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PITCHFORD INVESTMENTS (PVT) LTD v MUZARI 2005 (1) ZLR 1 (H)

Citation	2005 (1) ZLR 1 (H)
Case No	Judgment No. HH-193-04
Court	High Court, Harare
Judge	Makarau J
Heard	1 November 2004
Judgment	5 January 2005
Counsel	*H Simpson*, for the applicant *W Ncube*, for the respondent
Case Type	Application for summary judgment
Annotations	Link to case annotations

Flynote

C **Practice and procedure** — *summary judgment — when may be granted — need for plaintiff's claim to be unanswerable and based on clear cause of action — plaintiff having two possible causes of action and failing to elect which to rely on — summary judgment refused*

Headnote

D The applicant, a money-lender, had lent money to the defendant. The defendant signed an acknowledgment of debt, with a certain interest rate stipulated and a particular date from which the interest would run. He also executed a mortgage bond over his house. The mortgage bond specified a different, lower, interest rate and a different date from which the interest E would run. When the defendant failed to repay the loan, the plaintiff issued summons, claiming cancellation of the mortgage bond and repayment at the higher interest rate. It then applied for summary judgment on the basis that the defendant had no *bona fide* defence to the claim.

Held, that although the emphasis in the rules of court governing summary judgment is on the defences proffered by the defendant, the rules must be read as requiring the plaintiff's claim itself to be unanswerable and based on a clear cause of action. Where the plaintiff's claim on its own does not reveal a clear and competent cause of action, then even if no formal exception has been filed by the defendant to the claim, the court may not granted summary F judgment on such a claim, in the absence of G a suitable amendment to the claim. This would apply even in instances where the defendant has not proffered any *bona fide* defence.

Held, further, that *in casu* the relationship between the parties was governed by two separate documents with different provisions. The plaintiff did not make an election as to which document was binding between the two H parties, to the exclusion of the other. The plaintiff's cause of action,

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Makarau J

purporting to be based on both documents, was thus confusing and not A clear. No attempt had been made to reconcile the two agreements or to clearly abandon one in favour of the other. Even if the defendant has not excepted to the summons nor raised the above issues in his opposing affidavit, the inconsistencies in the plaintiff's claim were such that summary judgement should be denied even in the absence of a *bona fide* defence from the defendant. B

Cases cited

Chrismar (Pvt) Ltd v Stutchbury & Anor 1973 (1) RLR 277 (G); 1973 (4) SA 123 (R)

Davis v Terry 1957 R & N 392 (SR); 1957 (4) SA 98 (SR) C

R v Rhodian Investments Trust (Pvt) Ltd 1957 R & N 723 (SR); 1957 (4) SA 631 (SR)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 64(1) and 66(b) D

Case information

H Simpson, for the applicant

W Ncube, for the respondent

Judgment

MAKARAU J: This is an application for summary judgment. On 7 January 2004, the plaintiff issued summons out of this court, claiming E cancellation of a mortgage bond passed by the defendant in its favour, payment of the sum of $30 314 000 together with interest thereon at the rate of 243 per cent per annum, reckoned from 23 November 2003 to date of payment, an order that the property mortgaged be deemed specially executable and payment of the sum of $6 063 200 as a default penalty as stipulated in an F acknowledgement of debt by the defendant in favour of the plaintiff.

The facts of this matter may be summarised as follows. On 25 August 2003, the defendant borrowed a certain amount of money from the plaintiff, a registered moneylender. On the same date, he executed an acknowledgement of debt, acknowledging indebtedness to the plaintiff in the sum of $30 316 000 payable in full on 25 November 2003, failing which the debt would attract G interest at the rate of 243 per cent per annum. In addition, the defendant agreed to pay a default penalty of 20 per cent per annum of the outstanding balance.

On 2 September 2003, the defendant registered a mortgage bond in favour of the plaintiff over his property known as stand 292 Park Meadowlands H

Makarau J

A Township of Rocksands A of Subdivision B of Makabusi securing the sum of $30 316 000 at an interest rate of 98 per cent per annum to be reckoned from the day of the registration of the mortgage bond to date of payment in full. The debt secured by this mortgage bond is the same debt that the defendant had acknowledged in writing on 25 August 2003.

B Thus, the same debt allegedly owed to the plaintiff was secured by two separate liquid documents, each with different rates of interest and different dates when such interest would start to run.

When the defendant entered appearance to defend, the plaintiff filed this application for summary judgment, alleging that the defendant does not have a *bona fide* defence to the claim and was bent on delaying the inevitable. The C application for summary judgment was opposed primarily on the basis that the plaintiff did not allege in its papers that it is a registered moneylender. The plaintiff, not having anticipated that the defendant would raise this defence, sought leave of the court, which I granted, to file a supplementary affidavit, proving that it is a registered moneylender.

D The law on when a court will grant summary judgment is well settled. See *Davis* v *Terry* 1957 R & N 392 (SR); *R v Rhodian Investments Trust (Pvt) Ltd* 1957 R & N 723 (SR) and *Chrismar (Pvt) Ltd* v *Stutchbury & Anor* 1973 (1) RLR 277 (G), 1973 (4) SA 123 (R). It is only when all the defendant's proposed defences are clearly without substance both in law and in fact that summary judgment may be entered in favour of the plaintiff to save the plaintiff having to undergo E the drawn out proceedings of a trial before obtaining judgment.

Rule 64 (1) of the High Court Rules in terms of which the court grants summary judgment, reads:

> "Where the defendant has entered an appearance to a summons, the plaintiff may, at any time before a pre-trial conference is held, make a court F application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs."

Rule 66 (b) allows a defendant to satisfy the court by affidavit or oral evidence that he has a good *prima facie* defence to the action, to avoid summary judgment.

The unstated presumption in rr 64(1) and 66(b), cited above, is that the G plaintiff's claim on its own must be clear. It must not be susceptible to exceptions on the basis of vagueness and it must be such a claim as the court may grant judgment upon in the absence of a good and *bona fide* defence. It must reveal a clear and competent cause of action. Although the emphasis on the rule is on the defences proffered by the defendant, the rules must be read H as requiring the plaintiff's claim itself to be unanswerable and based on a clear

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Makarau J

cause of action. Where the plaintiff's claim on its own does not reveal a clear A and competent cause of action, then, in my view, even if no formal exception has been filed by the defendant to the claim, the court may not grant summary judgment on such a claim, in the absence of a suitable amendment to the claim. I would maintain my view even in instances where the defendant has not proffered any *bona fide* defence. B

In casu, as indicated above, the relationship between the parties is governed by two separate documents with different provisions. The plaintiff did not make an election as to which document is binding between the two to the exclusion of the other. Resultantly, the plaintiff's cause of action, purporting to be based on both documents, is, with respect, confusing and not clear. It however goes without saying that a cause of action founded on either of the C two documents would have been competent at law, as long as a basis was laid for holding the disregarded document as of no force and effect between the parties.

In its declaration, the plaintiff alleged that the defendant defaulted in his obligations in terms of the acknowledgement of debt dated 25 August 2003. D In an action based on the acknowledgment of debt, it then proceeded in the prayer to seek cancellation of the mortgage bond of 2 September 2003 without laying a basis for such relief. The plaintiff then further prayed for an order that the mortgaged property be declared specially executable to satisfy the plaintiff's claim, brought on the acknowledgment of debt and notwithstanding the cancellation of the bond. I am unaware of a procedure where the court will E cancel a mortgage bond in the event of the debtor defaulting in his or her repayments. My understanding was that a mortgage bond is upheld and enforced to protect the interests of the creditor in the event of the debtor defaulting.

As observed above, the plaintiff has two binding instruments in its favour. F It has not made its election clear as to which of the documents it seeks to rely on. The two documents provide for two different interest rates that accrue on the capital debt from different dates. No attempt has been made to reconcile the two agreements or to clearly abandon one in favour of the other. As such, even if the defendant has not excepted to the summons nor raised the above issues in his opposing affidavit, the inconsistencies in the plaintiff's claim are G such that summary judgment should be denied even in the absence of a *bona fide* defence from the defendant.

In the result, I make the following order:

1. The application is dismissed. H

Makarau J A

2. The plaintiff is to bear the costs of the application.
3. The defendant is granted leave to file his plea within ten days of this order.

Mushonga & Associates, plaintiff's legal practitioners

Mabuye & Company, defendant's legal practitioners

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Source:
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MUKUZE & ANOR v A-G 2005 (1) ZLR 6 (H)

Citation	2005 (1) ZLR 6 (H)
Case No	Judgment No HH-2-05
Court	High Court, Harare
Judge	Uchena J
Heard	20 December 2004
Judgment	5 January 2005
Counsel	*Dururu*, for the applicants *R Tokwe*, for the respondents
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Criminal procedure — *charge — dismissal of — failure to start trial within* C *six months of case being presented — when case is considered to be pending before the High Court*

Criminal procedure — *charge — dismissal of for failure to start trial within six months of committal for trial — meaning of "dismissal" — not tantamount to an acquittal* D

Criminal procedure — *trial — venue — change of — when High Court may order change of venue — High Court may not order trial to be transferred to magistrates court*

Headnote

The applicants were indicted for trial before the High Court. Some six months E after they were indicted, they appeared before the court but the trial did not get under way. Shortly after that the Attorney-General instructed that they be tried before the regional magistrates court. Section 160(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that if an accused person is not brought to trial after the expiry of six months from the date of his committal for trial, his case shall be "dismissed". F They applied for an order under that section dismissing the charges against them, as the trial had not started within six months of the indictments having been served on them. It was argued for the Attorney-General that as the applicants had not pleaded, the indictments had not been presented in terms of s 161 of the Act.

Held, that once the indictments had been served on the applicants and lodged G with the Registrar, the case was, in terms of s 137, pending before the High Court.

Held, further, that the provisions of s 161 authorising the High Court, upon application, to order that the trial be held at another place than that H

Uchena J

A specified in the indictment, did not mean that the Court could order the trial to be held in a court other than the High Court. It merely meant that the trial could take place in another venue of the High Court. It was not competent for the Attorney-General to change the venue.

Held, further, that the six-month period mentioned in s 160 could be interrupted (a) if the accused person is through circumstances beyond the control B of the Attorney-General not available to stand trial or (b) if the Attorney-General has in terms of s 108 ordered a further examination to be taken.

Held, further, that the "dismissal" referred to in s 160(2) does not amount to an acquittal, nor does it relate to prescription. It relates to the committal and the effects or consequences or implications thereof. The subsection C is meant to protect accused persons from being unreasonably kept under committal for trial for longer than six months when the trial has failed to take place during that period, as well as to ensure that the Attorney-General conducts expeditiously the trials of accused persons committed for trial.

Legislation considered D

Criminal Procedure & Evidence Act [*Chapter 9:07*], ss 137, 160(2) and (3), 161(1), (2) and (3), and 162

Case information

* *Dururu*, for the applicants

E *R Tokwe,* for the respondents

Judgment

UCHENA J: The applicants were arrested on 8 October 2002 on charges of armed robbery. They were remanded in custody by the magistrates court which periodically remanded them until 16 April 2004, when they were indicted to appear before the High Court for trial.

F On 13 September 2004, they appeared before the High Court but the trial did not take off. They again appeared before the High Court on 14 October 2004. Again their trial failed to take off, but one Fanuel Mkandla with whom they were jointly charged pleaded guilty and was convicted and sentenced.

The applicants were thereafter made to appear before the magistrates court G in court 19.

This application was triggered by their being been made to appear before court 19 of Harare Regional Court when the Attorney-General had not in terms of s 161(1) of the Criminal Procedure and Evidence Act applied for an order authorising the trial of the accused persons before the magistrates court.

2005 (1) ZLR p8

Uchena J

Mr *Dururu* for the applicants submitted that the change of venue from the A High Court to the regional magistrates court was unprocedural as it does not comply with s 161(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] hereinafter called the Act. He further submitted that it was prejudicial to the applicants' rights under s 160(2) of the Act in that their case cannot be dismissed after the expiring of six months from the date of their committal if B they are appearing before the magistrates court. He further submitted that the period of six months had lapsed and the applicants were now entitled to their dismissal in terms of s 160(2).

Mr *Tokwe* for the respondent submitted that the indictment was not presented to the applicants in the High Court, therefore s 161(1) of the Criminal Procedure and Evidence Act does not apply. C

The issues to be decided are:

1. Were the applicants correctly transferred from the High Court to the magistrates court?
2. Are the applicants entitled to the dismissal of their case due to the expiry of six months from the time of their committal for trial? D
3. If they are, can this be done through their application such as this one without a proper ventilation of the issues referred to in the provisos to s 160(2) and s 160(3) of the Criminal Procedure and Evidence Act.

I must first consider the interpretation of s 161(1) to determine the intention of the legislature. Section 161(1) of the Act provides as follows: E

> "161(1) When an indictment *has been presented against an accused person in the High Court*, any judge may, upon application by or on behalf of the Attorney-General or by or on behalf of the accused, order that the trial *shall be held at some place other than that specified in the notice of trial* and at a time to be named in the order."

In ascertaining the intention of the legislature, the court must consider the F literal meaning of the words used by the legislature. In s 161(1), the legislature did not use words which have the effect of the accused having been asked to plead to the indictment. In my view, the legislature deliberately did not use such words because it merely intended to provide for the situation where the accused's case is pending before the High Court as it had already provided under s 137 of the Criminal Procedure and Evidence Act. It was also aware of G the provisions it had made under s 160(2). The legislature is presumed to be aware of the existing laws of the country. It is therefore deemed to have been aware of the procedural laws on the taking of the accused's plea. In my view, that is why it deliberately used the words "has been presented against an accused person in the High Court". H

Uchena J

A In my view, the words "presented against" simply means the case is pending against the accused in the High Court. It cannot mean the accused has pleaded to the charge as has been argued by Mr *Tokwe*. Even if Mr *Tokwe*'s submissions were to be accepted as correct when confined to s 161(1), that interpretation would fail when one considers the provisions of sections 137; 160(2); 161(2) and 161(3). The provisions of these sections do not support the B interpretation put to s 161(1) by Mr *Tokwe*.

It is a well known rule of interpretation that words in a statute should be interpreted in conformity with the rest of the statute.

The interpretation advanced by Mr *Tokwe* is not in conformity with the sections mentioned above.

C Section 137 of the Act provides as follows:

> "137. As soon as the indictment in any criminal case brought in the High Court *has been duly lodged with the registrar* of that court, such case shall be deemed to be pending in that court."

This, in my view, agrees with the provisions in s 161(1) on the indictment being D "presented against an accused" not presented to the accused as suggested by Mr *Tokwe*. In my view, a reading of sections 137 and 161(1) together supports the interpretation advanced by Mr *Dururu* that s 161(1) simply means once the indictment is before the High Court the accused cannot be removed from that court to another court without an application being made and the High Court granting an order authorising the change of venue.

E Section 160(2) of the Criminal Procedure and Evidence Act provides as follows:

> "If a person referred to in subsection (1) is not brought to trial after the expiry of six months from the date of his committal for trial, his case shall be dismissed."

F Section 160(2) gives rights to an accused person whose trial does not take place within six months. If Mr *Tokwe*'s interpretation of s 161(1) were to be accepted an accused person indicted to the High Court could, before he pleads to the indictment in the High Court, be transferred to the magistrates court without an application being made. If that were to be accepted it would have the effect of avoiding the provisions of s 160(2) as the magistrates court's G procedure does not have a similar provision. In fact, a closer analysis of s 161(1) does not authorise transfer of accused persons back to the magistrates court. It merely authorises the holding of "*the trial at some place other than that specified in the notice of trial*." In my view, though this was not submitted on by counsel for either party, it means the case remains pending in the High H Court but could be transferred to another venue of the High Court.

Uchena J

Section161(1) does not say an application can be made and be granted for the A trial to be held before another court other than the High Court. It merely provides for the change of place of trial

and the time of trial.

When s 161(1) is read together with s 161(2) the meaning of s 161(1) becomes clearer. Section 161(2) provides as follows:

> "(2) When any order is made under subsection (1), the consequences *shall* B *be the same in all respects* and with regard to all persons *as if the Attorney-General had decided* to prosecute the accused at the place named in the order and the time specified therein" (my emphasis).

Section 161(2) confines the changes to the place and time of trial and does not extend to the court of trial. It is therefore, clear that s 161(1) was not intended to provide for change of venue to the extent of a case committed for trial in the C High Court being transferred to the magistrates court. In my view, even if such an application had been made by the respondent it would not have been granted as it would have fallen outside the provisions of s 161(1) of the Act.

An analysis of sections 161(3) and 162 of the Act also confines the change of venue to the place and time of trial and does not extend to the court. This D to me means the trial should be held in the High Court but the High Court can upon application change its venue of sitting.

I would therefore hold that the applicants were improperly transferred to the magistrates court after they had been indicted to the High Court. Their removal to court 19 of Harare Magistrates court was unlawful. E

I now turn to the issue of whether the applicants are entitled to the dismissal of their case in terms of s 160(2) of the Act.

The provisions of s 160(2) are clear and have already been commented on above. The lapse of six months determines whether or not an accused's case can be dismissed subject to the proviso to s 160(2) and s 160(3). The proviso provides as follows: F

> "160(2) Provided that any period during which *such person is through circumstances beyond the control of the Attorney-General not available* to stand trial shall not be included as part of the period of six months referred to in this subsection" (my emphasis).

Section 160(3) provides as follows: G

> "For the purposes of this section, a person *shall not be deemed to have* been committed for trial in any case in which the *Attorney-General has in terms of section* one hundred *and one ordered a further examination* to be taken, until such further examination has been completed" (my emphasis). H

Uchena J

A The provisos to s 160(2) and s 160(3) provide for circumstances which interrupt the lapse of the six months period. If the six months period lapses without interruption then, the accused is entitled to a dismissal of his case. It must however be noted that this can only be done when the court is satisfied there is no such interruption. This should be after hearing the reasons why the case did not get to trial within the stipulated period. In my view, dismissal B can not be ordered after a cursory inquiry based on the applicant's affidavits without affidavits from the investigating officer and the prosecutor who handled the case, or an admission by the State that there are no valid reasons why the accused's case should not be dismissed. In this case, the State did not submit opposing papers but Mr *Tokwe* appeared on short notice to defend C the State's position without any documents on whether or not the application should be dismissed.

Mr *Dururu* conceded that a proper inquiry, preferably before the High Court sitting as a criminal court, is necessary before the applicants' case can be dismissed.

In the circumstances, the applicants' case cannot be dismissed but their D transfer to the magistrates court is clearly unlawful as it was done without an application and in any event the granting of such an application by the High Court is not provided for under s 161(1) of the Act.

It is therefore, ordered that:

1. the applicants' criminal case No. HC 59-61/04 (Ref CRB 1276-7/04) is E before the wrong court, that is Harare Regional Court 19.
2. the applicants' case No. HC 59-61/04 be and is hereby reinstated before the High Court.
3. the respondent cause the applicants to appear before the High Court sitting as a criminal court by not later than 28 January 2005.

F *Machingambi legal practitioners*, applicant's legal practitioners

Attorney-General's Office, respondents legal practitioners

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S v SAMAKOMVA 2005 (1) ZLR 12 (H)

Citation	2005 (1) ZLR 12 (H)
Case No	Judgment No. HH-8-05
Court	High Court, Harare
Judge	Makarau J
Heard	7 January 2005
Judgment	14 January 2005
Counsel	*R K H Mapondera*, for the applicant *Godzi*, for the respondent
Case Type	Bail application
Annotations	No case annotations to date

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of* C *Rights — s 18(3)(e) — right to have court compel attendance of defence witnesses — extent of right — need for person asserting right to show materiality and probative value of evidence to be given by witnesses*

Headnote

The right under s 18(3)(e) of the Constitution, to have the court compel the D attendance of defence witnesses, cannot be had just for the asking. The applicant or accused must demonstrate that the testimony of the witnesses will be both material and will result in his acquittal. Whereas the right to present one's defence is absolute, the right to be assisted by the court to compel the attendance of witnesses is a qualified right, subject to the materiality and probative value of the testimony to be called. E

The applicant sought bail from the High Court pending appeal. One of his grounds of appeal was that the trial court had failed to subpoena two defence witnesses, thereby violating his right to a fair trial under s 18 of the Constitution. In considering whether or not to grant him bail, the High Court considered his prospects of success in the appeal. F

Held, that in such cases the applicant bears the heavy onus of proving that the testimony of the denied witnesses was both material and would have resulted in his acquittal. The onus is more burdensome on appeal than at trial as the applicant must show how the intended evidence would

have destroyed or significantly reduced the cogency of the evidence on record. Where the intended evidence is remote or peripheral to the G charge, or is merely cumulative of the evidence before the court, a failure by the court to compel the attendance of the witness does not violate his right to a fair trial.

Makarau J

Cases cited A

S v Beahan 1989 (2) ZLR 20 (S)

S v Manyange HH-1-03

S v Muleya 1992 (1) ZLR 68 (H)

S v Mushayandebvu 1992 (2) ZLR 62 (S)

S v Tengende & Ors 1981 ZLR 445 (S)

Legislation considered B

Constitution of Zimbabwe, s 18(3)(e)

Case information

R K H Mapondera, for the applicant

C *** *Godzi*, for the respondent

Judgment

MAKARAU J: The applicant appeared before a regional magistrate at Harare facing one count of extortion, alternatively one count of contravening s 3(1)(a)(i) of the Prevention of Corruption Act [*Chapter 9:16*]. After contest, he was convicted on the alternative charge and sentenced to five years' D imprisonment with one year suspended for five years on conditions of good behaviour. He thereafter noted an appeal to this court against both conviction and sentence. He now applies to be allowed out on bail pending the determination of the appeal.

In his grounds of appeal, he seeks to attack the decision of the trial magistrate E on the grounds that she erred in convicting him on the basis of accomplice evidence and, further, that the sentence she imposed is so severe as to induce a sense of shock. The applicant has since amended his grounds of appeal to include an averment that his constitutional right to a fair trial was violated in that the court did not subpoena, for his defence, two witnesses, namely Chivhinge and Kahuni who were both employed by the Reserve Bank of F Zimbabwe at the time of the offence.

The allegations giving rise to the conviction of the applicant are as follows. He was employed by the Reserve Bank of Zimbabwe as an investigator. As part of his duties, he was tasked to investigate the activities of the complainant, a local businessman who was suspected of illegally dealing in foreign G currency and of conducting an illegal money transfer business. In that capacity, he came across information tending to incriminate the complainant. Using that information, he demanded money amounting to $100 000 000 as consideration for the favour of destroying a certain document that allegedly incriminated the complainant. The complainant paid him a total of $32 000 000 H through one Luis Chabikira who was employed by the complainant as a Loss

Makarau J

Control Manager. When the applicant demanded more money, the complainant A made a report to the Governor of the Reserve Bank, leading to the arrest of the applicant.

At the trial of the matter, the State led evidence from the complainant and from Luis Chabikira, upon which testimony the trial court convicted the applicant. B The complainant and Luis Chabikira were clearly accomplices of the applicant. In convicting the applicant on the basis of testimony from these two, the trial magistrate did caution herself that she was dealing with accomplice evidence as follows:

"The court in analyzing the evidence could not overlook the fact that both witnesses were also involved in a criminal act in doing what they did. The issue for the court was on how much weight it should place on their C evidence."

She then proceeded to find the witnesses credible and their respective testimonies safe to rely on.

It is trite that an appeal court is always slow to upset the findings of a trial court on the credibility of the witnesses that appear before it unless there are glaring D inconsistencies and inadequacies in the testimony of such witnesses, which inconsistencies and inadequacies appear *ex facie* the record. In the application before me, the applicant highlighted no such. I did not find any from my perusal of the record.

It may have been in realisation of the absence of any inconsistencies and inadequacies in the testimony of the two State witnesses that Mr *Mapondera* E shifted his attention to the amended ground of appeal as raising a potentially stronger ground to rely on in support of the application for bail pending appeal. In the amended ground of appeal, the applicant submits that he was not afforded a fair hearing in that he requested the trial court to compel the attendance at court of his two witnesses. This the court declined to do. F

In my view, it is necessary to set out in detail the sequence of events giving rise to this assertion. The applicant appeared before the trial magistrate on 5 October 2004. G He was without legal representation. Trial commenced. On 4 November 2004, when he opened his case, he indicated to the court his intention to call two witnesses whose names I have given above. After the testimony of the applicant, the trial was adjourned to 22 November 2004, presumably for the attendance and examination of the defence witnesses. At the resumption of the hearing, the prosecutor informed the court that both of the witnesses had declined the request to attend court. One of the witnesses, Mr Kahuni, allegedly informed the prosecutor that he did not know anything about the case and was on his way to South Africa. The other witness, Mr H

Makarau J

A Chivhinge, declined the invitation to appear on behalf of the applicant on the basis that it was against the policy of the Reserve Bank of Zimbabwe, where he is employed, for him to testify on behalf of the defence. In view of the information supplied to the court by the prosecutor, the court asked the applicant what should be done in the circumstances whereupon the applicant requested that the court compel the two to attend court. When the court B suggested that the witnesses might turn out hostile to the defence if they were compelled to come to court, the applicant then suggested that the court conduct an inspection *in loco* at his house to establish whether his gate was black as alleged by one of the witnesses or was actually silver. The court then ruled that the applicant's request could not be granted and the reasons were C to follow in the main judgment. No such reasons followed in the main judgment.

On the basis of the above facts, the applicant alleges that the proceedings in the matter of his trial were so irregular as to violate his right to a fair trial and that there is a high chance of success on appeal on this basis. The respondent denies that the trial in the court *a quo* was an unfair trial and that it was attended D with irregularities.

In making their submissions, both counsel were agreed that in considering this application, I must be satisfied that the applicant's appeal enjoy prospects of success and that in addition there are other positive grounds upon which bail must be granted: see *S* v *Tengende & Ors* 1981 ZLR 445 (S) and *S* v *Manyange* E HH-1-03.

The issue that falls for my determination is whether the refusal by the court *a quo* to compel the attendance of the two defence witness violated the applicant's rights to a fair trial as alleged and/or was an such an irregularity as to warrant the setting aside of the appellant's conviction by a court of appeal.

F I now turn to consider the content of the right of the appellant to a fair trial in respect of the right to be assisted by the court to compel the attendance of witnesses.

Section 18(3)(e) of the Constitution of Zimbabwe provides as follows:

"(3) Every person who is charged with a criminal offence – G

(a) …

(b) …

(c) …

(d) …

2005 (1) ZLR p16

Makarau J

(e) shall be afforded facilities to examine in person or, save in proceedings A before a local court, by his legal representative the witnesses called by the prosecution before the court *and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and* …" (emphasis is mine).

The content of the right contained in the above section was examined and B debated in the case of *S* v *Beahan* 1989 (2) ZLR 20 (S).

Beahan, a British national resident in South Africa, was arrested in Botswana by Botswana police after fleeing this jurisdiction (by swimming across the Zambezi River), where he was being questioned by the local law enforcement agents. He was handed over to the local police who charged him under the then C Law and Order Maintenance Act [*Chapter 67*]. A statement was recorded from him and was taken before a magistrate for confirmation. At his trial in this court, the confirmed statement was adduced into evidence. He sought to challenge the admissibility of the confirmed statements on the basis that he had been ill-treated by the police in Botswana and thus his statement to the police in Zimbabwe was not made freely and voluntarily as he could not D separate his maltreatment in Botswana from his maltreatment at the hands of the local police. He requested that the police from Botswana be called to testify as defence witnesses to enable him to discharge the onus on him that he had not made the extra-curial statements tendered in evidence freely and voluntarily. He alleged that the absence of these witnesses would constitute a violation of his right to a fair trial. E

The argument by Beahan that the absence of the witness he wished to attend court impaired his right to a fair trial did not find favour with the trial court nor with the Supreme Court on appeal.

In dismissing the appeal, the Supreme Court held at p 29 that:

> "An accused person who claims that his fundamental right to a fair hearing F has been violated, in that he has not been afforded facilities to obtain the attendance of witnesses to testify on his behalf, guaranteed to him under s 18(3)(e) of the Constitution of Zimbabwe, must establish certain basic criteria. It is not sufficient for him merely to assert that he desires to call certain witnesses whose attendances at the trial is beyond the power of the Attorney-General and of the court to compel. *He must make some* G *plausible showing of how their testimony would have been both material and favourable to his defence. For this particular constitutional protection does not grant him the right to secure the attendances and testimony of any and all witnesses, only of those whom he seeks to testify on his behalf – that (is), witnesses in his fav*our" (emphasis mine). H

2005 (1) ZLR p17

Makarau J

A It is my view that while the witnesses that Beahan sought to have compelled to attend his trial were beyond the jurisdiction and their attendance could not be compelled by process of this court, the legal principle upon which the decision in his case turned remains unaffected by the lack of jurisdiction of the court over the witnesses. It appears to me that the principle is this: a request to have defence witnesses compelled by the court cannot be had just for the B asking. The applicant or accused must demonstrate that the testimony of such witnesses will be both material and will result in his acquittal.

The intimation of materiality of the witnesses is in my view, amply borne out by reference to the American cases that Gubbay JA (as he then was) cited with approval and relied upon in the *Beahan* case.

C It is my view that in an application for bail on an allegation that the applicant was denied the right to fair trial in that he was denied access to witnesses, the applicant bears the heavy onus of proving that the testimony of the denied witnesses is both material and would have resulted in his acquittal. The onus on the applicant is in my view, made more burdensome on appeal than at trial as the applicant has to show the materiality and probative value of the D intended testimony against the evidence used to convict him. In other words, he has to show how the intended evidence would have destroyed or significantly reduced the cogency of the evidence on record. Where the intended

testimony is remote or peripheral to the charge, or is merely cumulative of the evidence already before the court, a failure by the court to E compel the attendance of such witness does not appear to me to violate the right to a fair trial.

It further appears to me that the protection afforded an accused person by s 18(3)(e) of the Constitution of Zimbabwe is to be contrasted with the right of the accused to defend himself or herself. As was held by Cheda J (as he then was) in *S* v *Muleya* 1992 (1) ZLR 68 (H) at 69A, "the accused is entitled F to present his defence no matter how unreasonable it may appear." In that case, the trial magistrate had stopped the proceedings after the State closed its case and proceeded to convict the accused without allowing the accused to present his defence.

While the right to present one's defence is absolute, the right to be assisted G by the court to compel the attendance of witnesses has been interpreted by the Supreme Court and by the courts in America construing a similarly worded law, as being a qualified right, subject to the materiality and probative value of the testimony to be called.

Makarau J

It is my further view that the right to be assisted in compelling the attendance A of witnesses is to be contrasted with the right to legal representation. In *S* v *Mushayandebvu* 1992 (2) ZLR 62 (S), Manyarara JA held that a violation of an accused's right to legal representation as enshrined under s 18(2)(c) and (d) of the Constitution of Zimbabwe renders the trial incurably defective, for which there is no condonation. In that case, an unsophisticated woman had pleaded guilty to contravening the Firearms Act in the absence of her legal B practitioner, who was engaged elsewhere. The prosecutor, to who, the legal practitioner had spoken before trial, neglected to inform the court that the accused was legally represented.

By his ruling above, Manyarara JA was of the view that denial of legal representation on the facts of the matter before him constituted a violation of C one's right to a fair trial. The same Supreme Court has laid down certain criteria that must be satisfied before a denial by a trial court to compel the attendance of defence witnesses will amount to an unfair trial.

In casu, the applicant wished to call Mr Chivhinge as the custodian of the fax that the applicant allegedly destroyed after receiving a payment from the D complainant. He also wished to have Mr Kuhuni called as this witness was still with the Reserve Bank of Zimbabwe when the investigations into the affairs of the complainant were commenced.

I have considered the application before me anxiously. From it, I am unable to discern the materiality of the testimony that the applicant intended to lead from the two witnesses nor that such testimony would have advanced the defence E case. In arriving at this conclusion, I take into account the evidence that is on record against the applicant and the respective positions of the intended witnesses *vis--viz*., the allegations against applicant. Mr Kuhuni is alleged to have been with the Reserve Bank when the investigations into the affairs of the complainant commenced. His testimony would therefore be peripheral F to the charge. Mr Chivhinge is alleged to be the custodian of the fax that the applicant allegedly destroyed after being paid the sum of $10 million by the complainant. Again, I view the testimony of this witness as being remote from the charge and as not advancing the defence of the applicant. Evidence of the existence of the fax in the custody of the Reserve Bank of Zimbabwe does not destroy the cogency of the other evidence against the applicant. G

I am further keenly aware that at this stage of the proceedings, I am not determining the merits of the appeal but merely examining the cogency of the evidence on record to determine whether the applicant enjoys prospects of having his appeal upheld on the grounds that he has raised. It is my view that the applicant enjoys no such prospects. H

Makarau J

A In the result, I make the following order:

The application for bail pending appeal is dismissed.

Mapondera & Co, applicant's legal practitioners

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

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Source:
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NHETE & ORS v MUDZI RURAL DISTRICT COUNCIL 2005 (1) ZLR 20 (H)

Citation	2005 (1) ZLR 20 (H)
Case No	Judgment No. S-92-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	7 October 2004
Judgment	20 January 2005
Counsel	*L Uriri* for the appellants *C Warara* for the respondents
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

Employment — *suspension of employees pending application to terminate* C *contract of employment — whether on normal salary and benefits — employees notified that suspension was in terms of regulations — clear implication that suspension was without pay*

Headnote

The appellant employees, having engaged in unlawful industrial action, were D notified by their employers that they were being suspended in terms of the relevant labour regulations, pending an application to terminate their employment. Some months later, after they had not received their normal salary and benefits, they sought an order from the Labour Court that they should be paid their salaries and benefits pending determination of the E matter. That application was dismissed on the ground that their suspension was in terms of the relevant labour regulations (SI 371 of 1983), which provided for suspension without pay or benefits. They appealed on the ground that the suspension letters made no mention of loss of pay.

Held, that, even assuming the Labour Court had jurisdiction to make such an order (which was questionable) the letter of suspension clearly stated F that the appellants were being suspended in terms of the Regulations. The Regulations clearly provided that an employer may suspend an employee without salary and benefits. If the employer had intended to suspend the appellants on full pay and benefits in terms of the common law no reference would have been made to the Regulations. At common law, the appellants were entitled to their salaries and benefits upon G suspension. The reference to the Regulations clearly implied that the appellants were being suspended in terms of the Regulations and without pay. While it is desirable that an employer

should advise the suspended employee whether he is being suspended with or without pay and that such notification be in writing for easy proof, there is nothing H

2005 (1) ZLR p21

Chidyausiku CJ

A in the language of s 3 of the Regulations which prescribes the manner and the timing of communication of that term of the suspension to an employee. In any event, where an employee is suspended pending dismissal, there is hardly any basis for expecting such suspension to be on salary and benefits.

Case cited B

Makova v Urban Development Corporation 1992 (1) ZLR 326 (H)

Legislation considered

C Labour Relations Act (now Labour Act) [*Chapter 28:01*], s 97

Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations (SI 371 of 1985), s 3(c)

Case information

L Uriri for the appellants

C Warara for the respondents D

Judgment

CHIDYAUSIKU CJ: This is an appeal from a decision of the Labour Court. The appellants applied to the Labour Court for interim relief in the form of payment of their salaries and benefits pending the determination of a labour dispute between the parties. The labour dispute is pending before an arbitrator. In the E Labour Court the appellants sought the following relief:

"1. That the respondent is hereby ordered to pay the applicants $177 240 612 being salaries and benefits accrued with effect from January 2003 to date, with interest.

2. That the respondent be and is hereby ordered to continue paying the applicants their salaries and benefits until they are dismissed. F

3. That the respondent be and is hereby ordered to pay costs of suit."

The application was dismissed and the President of the Labour Court made the following order:

"1. That the suspension letter was in terms of SI 371/83. Section 3 provides for suspensions without pay or other benefits. G

2. The application for the payment of salaries and benefits pending the finalisation of the matter is therefore denied."

The appellants now appeal against the above determination upon the following grounds:

"1. The court *a quo* erred in denying appellants the right to salaries and H other benefits until their main matter is finalised.

2005 (1) ZLR p22

Chidyausiku CJ

2. The Labour Court misdirected itself on point of law by holding that A the suspensions were without pay, which assertion is not provided in the suspension letters."

The following relief is sought in this court:

"(a) That the order by the Labour Court be substituted;

(b) That the respondent be ordered to pay the appellants their salaries B and benefits until the finalisation of the matter;

(c) Costs of suit."

The facts of this case are as follows.

The appellants were employees of the respondent at the material time. In January 2003 they embarked on an industrial action which the respondent C alleges was illegal. A disposal order against

them was issued and they defied that disposal order. They are also alleged to have destroyed or damaged their employer's property in the course of the industrial action. Following these events the respondent suspended the appellants and sought permission to dismiss them from employment. In a letter dated 21 January 2003 the respondent advised the appellants as follows: D

> **"Re: SUSPENSION FROM DUTY PENDING DISMISSAL**
>
> In terms of Statutory Instrument 371/85, section 3(c), as read together with section 33(j) of the Mudzi Rural District Council (General Conditions of Service), please be advised that Council has suspended you from duty with effect from 21 January 2003. E
>
> The grounds upon which the suspension is based are that:
>
> - On 15 January 2003, at around 0900 hours, you deflated Council vehicle
>
> The effects of this suspension are that:
>
> - You shall not report to your work place with immediate effect
> - During the period of your suspension, you are not entitled to enter F Council premises
> - You will not be paid for the period you were on industrial action.
>
> During your period of suspension, you should inform Council of your change of address."

The respondents, as I have said, applied to the Labour Court for the payment G of their salaries and benefits pending the determination of the labour dispute between the parties. It is not clear from the application itself in terms of which provision of the law that application for interim relief was made. In terms of s 97 of the then Labour Relations Act [*Chapter 28:01*] ("the Act") an application for interim relief could be made to the Labour Court in respect of matters that H

A were pending before the Labour Court. The relevant section provided as follows:

> " 97 Appeals to the Labour Court
>
> (1) …
>
> (2) … B
>
> (3) …
>
> (4) Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires."

Thus the Labour Court only had jurisdiction to determine interim relief in respect of matters that were pending before it and not any other fora. This C matter is not pending before the Labour Court. The record shows that the matter is pending before an arbitrator.

I have serious doubts that the Labour Court had jurisdiction to entertain the application for interim relief in this matter that is not pending before it. On this basis alone this appeal cannot succeed.

D Apart from this, this case would not succeed on the merits.

It was argued for the appellants that they were not informed by the respondent that they were being suspended without salary and benefits. There is no substance in this contention. The letter of suspension clearly states that the appellants were being suspended in terms of SI 371/85 ("the Regulations") E which clearly provides that an employer may suspend an employee without salary and benefits.

If, indeed, the employer had intended to suspend the appellants on full pay and benefits in terms of the common law no reference would have been made to the Regulations. At common law, the appellants are entitled to their salaries and benefits upon suspension. The reference to the Regulations clearly F implies that the appellants were being suspended in terms of the Regulations and without pay. The appellants' conduct after suspension indicates that the appellants understood this to be the position. The appellants never asked for their salary at the end of January after their suspension in the course of that month. The appellants only asked for their salaries some nine-and-a-half G months after their suspension. The inescapable inference to be drawn from this conduct of the appellants is that they accepted that they had been suspended without pay. For how could all the twenty-one appellants fail to claim their pay at the end of the first month of suspension if they *bona fide* believed that they had been suspended on full pay and benefits?

Chidyausiku CJ

On this basis I am satisfied that the employer intended to suspend the A appellants without salary and benefits and the employees understood and accepted that to be the position. In my view this is the only reasonable inference to be drawn from the conduct of both parties.

It was argued on behalf of the appellants that because the letter of suspension did not specifically mention that the appellants were being suspended without B pay and benefits they were therefore suspended in terms of the common law which entitled them to their pay during the period of suspension. For this proposition the appellants' counsel relied on the case of *Makova* v *Urban Development Corporation* 1992 (1) ZLR 326 (H) wherein Gibson J said the following at 328G-330A:

> "As to the question whether the suspension was without pay, the C applicant's contention is that the respondent did not purport to suspend the applicant without pay, that the applicant is thus entitled to his remuneration until he is dismissed.
>
> It is useful to look at the position under the common law and to examine the reasons given for the approach of the courts before the statutory intervention to appreciate the extent of the changes. At common law the D employer enjoyed the power to dismiss an employee or to suspend him, but the right to suspend was only on full pay: see *Zimbabwe Sun Hotels (Pvt) Ltd* v *Lawn* 1988 (1) ZLR 143 (S) which refers with approval to the case of *Myers* v *SA Railways and Harbours* 1924 AD 85. At p 90 Solomon JA in the *Myers* case *supra* rationalises the common law position and the power to suspend a worker and says: E
>
> '… the general principle underlying a contract of service is that hire is to be paid in return for services rendered, so that, *prima facie*, if the services have not been rendered - the servant would not be entitled to be paid for that period. And accordingly … if an unforeseen misfortune, such as sickness, befalls the person who has left his services and renders him incapable of performing them for the whole of the period of his F engagement, he can only claim wages or salary for the time during which he has actually served. If, however, it was due to his employer that he had been unable to perform his work, then he would be entitled to be paid, notwithstanding that no service had been rendered by him.'
>
> Section 3 of the Regulations changed the common law. It gave the employer a right to choose whether or not the suspension is to be with G or without pay. That election, in my view, has to be made at the time of suspension so that the worker who has not yet been found guilty of misconduct and is available to carry on his duties knows what of his rights or other benefits are affected by the decision to suspend him from work. It would be unjust and contrary to the purposes of the statute and the H

Chidyausiku CJ

> A Regulations to expect an employee, suspended say at the end of the month, to wait until the end of the following month to find out the full terms of the suspension. The objectives of the statute (the Labour Relations Act 16 of 1985) which are defined in the preamble as 'to declare and define the rights of employees' among others, would be stultified, in my opinion, if the employer were to be allowed to leave the employee in the dark about B his changed status.
>
> It does seem unjust and unfair to leave it to the suspended worker to deduce his rights from his employer's future behaviour. Besides, there may be any number of reasons why a cheque duly posted may not reach its destination. Besides this, the Labour Relations Act and its Regulations sets out to prescribe a course of conduct to be followed by an employer C wishes (*sic*) to invoke his rights under the statute he is duty bound to follow the steps prescribed in the statute to give validity to his actions. In conclusion I hold that once the employer decides to suspend his employee he has to go further and consider whether such suspension is to be with or without pay, and having made the decision the employer must communicate his decision to the employee. The failure to communicate D the decision to withhold pay during suspension entitled the employee to expect that he will continue to receive his pay during that suspension."

Among other things the learned judge makes the following two points —

(1) that upon suspension the employer is required to advise the employee *in writing* that he or she is being suspended with or without pay; E

(2) that once the employer has made the election at the time of suspension he cannot resile from it.

I have no doubt in my mind that it is most desirable that an employer advises the suspended employee whether he is being suspended with or without pay and that such notification be in writing for easy proof. I, however, find nothing in the language of section 3 of the Regulations which prescribes the manner F and the timing of communication of that term of the suspension to an employee. To that extent *Makova's* case *supra* overstates what is required of an employer.

In any event, I am satisfied that the appellants were advised in writing at the time of suspension that the suspension was without pay and benefits by G reference to the Regulations.

The letter of suspension could have been more explicit than it was but I find it sufficiently clear, in that the employees were advised that their suspension was in terms of the Regulations, and not in terms of the common law. The employees understood the letter to mean that, hence their failure to demand their salaries at the end of the month of their suspension. H

Chidyausiku CJ

The probabilities in this case are against the appellants. Where an employee A is suspended pending investigations such an employee has a legitimate expectation to payment of salary and benefits pending finalisation of investigations. However, where an employee is suspended pending dismissal, as was the case *in casu*, there is hardly any basis for expecting such suspension to be on salary and benefits. B

It is for the foregoing reasons that this appeal has no merit. Accordingly, the appeal is hereby dismissed with costs.

Ziyambi JA & Malaba JA concurred C

Honey & Blanckenberg, appellants' legal practitioners

Warara & Associates, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/N & B VENTURES (PVT) LTD v MINISTER OF HOME AFFAIRS & ANOR 2005 (1) ZLR 27 (H)

N & B VENTURES (PVT) LTD v MINISTER OF HOME AFFAIRS & ANOR 2005 (1) ZLR 27 (H)

Citation	2005 (1) ZLR 27 (H)
Case No	Judgment No. HB-138-04
Court	High Court Bulawayo
Judge	Cheda J
Heard	20 January 2005
Judgment	20 January 2005
Counsel	*J Tshuma*, for the applicant *Nzarayapenga*, for the respondent
Case Type	Urgent application
Annotations	Link to case annotations

Flynote

C **Administrative law** — *administrative authority — duty to act reasonably and in reasonable time — effect of failure to do so — not entitled to penalise other party if it has not first done its own duty*

Headnote

The applicant operated a hotel and also sold liquor to its patrons. It had D applied for and been granted a liquor licence for 2002 by the Liquor Licensing Board. In spite of a timeous application in respect of the years 2003 and 2004. the Board failed to consider the application. On 17 September 2004, police officers, acting under authority of the second respondent, demanded to see a valid liquor licence. The applicant was unable to produce one as none had as yet provided by the Board. E Notwithstanding that the applicant's manager explained that the issuance of the liquor licence was still awaited, it was issued with a ticket in respect of a contravention of the Liquor Licensing Act [*Chapter 14:12*]. The applicant signed an admission of guilt and paid the fine in respect thereof. However, on the same day, the police thereafter applied to a magistrate F for an order to seize applicant's stock of liquor. Without affording the applicant an opportunity to explain its default, the provincial magistrate on granted a forfeiture order. The Board finally issued the applicant with its liquor licence few days later. The applicant applied for an order for the return of its liquor.

Held, that the Board could not merely rely on the fact that the applicant was G selling liquor without a licence when they knew full well that the applicant's failure to possess one was due to the Board's own administrative inaction. The Board was charged with handling matters relating to liquor licences. It was duty bound to either to refuse an application or to issue a liquor licence within a reasonable time. Its failure to do so was a clear dereliction of duty. Administrative authorities are

---

Cheda J

required to act reasonably and the failure to issue a liquor license under A such unexplained circumstances was unreasonable. Where in the absence of an adverse reason an administrative authority fails to act, the courts have a duty to interfere in order to safeguard the financial and social interests of the applicant and the public respectively. Where an administrative authority is seized with a duty to perform a certain act, B which act is a condition for another party to act, it can not be allowed to penalise the other party on the basis of non-performance when it has not itself performed its own part. It must first perform its part before it penalises the other party for non-performance.

Held, further, that the magistrate had erred in failing to afford the applicant an opportunity of explaining its default before taking the drastic step of C ordering forfeiture. The application seeking the return of the forfeited goods accordingly succeeded.

Case information

J Tshuma, for the applicant

***Nzarayapenga,* for the respondent D

Judgment

CHEDA J: The applicant filed an urgent application wherein it seeks the return of various goods seized by the second respondent. The applicant is a duly registered company in terms of the laws of Zimbabwe and trading as Nesbitt Castle Hotel. In addition to providing accommodation it also sells liquor. The first respondent is the Minister of Home Affairs, Harare. He is sued in his E official capacity as the Minister responsible for the second respondent.

The second respondent is the Officer-In-Charge, Zimbabwe Republic Police, Drill Hall, Bulawayo and is cited as the most senior person in charge of the station where the seized goods are kept.

The facts of this case which are largely common cause are that on 17 September F 2004, police officers from the second respondent's station arrived at the applicant's premises wherein they demanded to see a valid liquor licence authorising them to sell liquor. The applicant did not have one in their possession but proffered an explanation as to why they did not possess it. They explained to the police officers that they were waiting for its issuance by the Liquor Licensing Board

in Harare. Police Officers were shown copies G of letters sent to the Liquor Licensing Board, Harare to which they had not received a response.

On 13 March 2003, the applicant through its legal practitioners of record wrote a letter to the Liquor Licensing Board in which they attached an application H

Cheda J

A for renewal for the year 2003 and 2004 together with the expired licence for 2002. It appears no response was received from the Liquor Licensing Board until the applicant again wrote another letter on 3 September 2004 enquiring about the same licence.

It is also common cause that the Liquor Licensing Board was experiencing B problems in issuing liquor licences as evidenced by a letter by the applicant's erstwhile legal practitioners, Messrs Winterton, Holmes & Hill who had expressed concern in the delay in issuing the said licences way back in June 2002.

The applicant having experienced the delay in receiving the liquor licence continued to sell liquor without a licence and was therefore on two occasions C issued with tickets for contravening the Liquor Licensing Act [*Chapter 14:12*] and it paid admission of guilt fines. Subsequent to the seizure of the liquor in question the applicant has since been issued with a licence which it produced to the respondent on 24 September 2004 after the Magistrates' Court had authorised forfeiture of the said liquor.

D Mr *Nzarayapenga* for the respondents argued that the said goods should not be returned to the applicant as the applicant was engaged in an illegal sale of liquor i.e. without a valid liquor licence, more so, that it did so on two occasions.

Mr *Tshuma* for the applicant argued on the other hand that the offence of trading without a licence in the circumstances was technical, in that, it is the Liquor Licensing Board which is at fault by not issuing licences timeously. He E further argued that forfeiture of the goods should not have been ordered after the admission of guilt fine was paid on 17 September 2004.

It is pertinent to note that the application for forfeiture was made to the Provincial Magistrate on 17 September 2004 and was issued on 20 September 2004.

F There are basically two issues which arise as I see them in this matter. Firstly, it is that of trading without a liquor licence. The Liquor Licensing Board is the authority for issuing licences. In the event that an offence is committed, it is the second respondent who should arrest the offender. At that juncture, the second respondent indeed was the proper authority to issue tickets. However, the most important aspect is the manner the Liquor Licensing Board (issuing G authority) has been conducting itself. The applicant way back in March 2003 sent renewal applications for the years 2003 and 2004 but no response was received until 24 September 2004 when the licence was issued.

The fact that the applicant committed an offence by selling liquor without a licence is not in dispute. It is however, not enough to look at this offence and H

Cheda J

end there. It is necessary to look at the circumstances surrounding the A commission of this offence in order to arrive at a just and equitable decision. The Liquor Licensing Board is the issuing authority and is a creature of a statute which empowers it to establish administrative machinery in handling matters relating to liquor licences.

The law not only empowers administrative bodies to act but also places them B under a strict duty to act properly. It is that duty to act which should complete their own smooth running of those individuals or institutions which are affected by their administrative actions. The Liquor Licensing Board is duty bound to issue liquor licences within a reasonable time. If it fails to do so, it, literally means that those in the business of trading in liquor will either cease operations or risk operating without licences without an intention of doing so. C The applicant had been waiting for a licence for 2 years at no fault of its own. The Liquor Licensing Board had a duty to either decline the issuance of such a licence or issue one at a reasonable time. The response to an application must be done without a delay. A delay of 2 years without an explanation can certainly not be regarded as

reasonable. Their failure to do so was a clear dereliction of duty. The offence therefore, becomes purely a technical one. D

Administrative powers are always conferred for certain purposes. In the present case it is clear that powers conferred on the issuing authority are for the purpose of advancing public interest. For that reason they should be exercised reasonably. It can certainly not be said that such powers are used reasonably when the issuing authority neglects its duty of issuing licences E but at the same time turn a blind eye when the second respondent who are its agents enforce the law against the applicant in total disregard of the reason for the applicant's failure to possess a liquor licence.

It is a fact that the applicant applied for the renewal of its licence timeously and has a right to expect the issuing authority to issue them with one timeously F too. The consequences of the failure to do so has a devastating commercial effect on the applicant. It is therefore in the best interest of the applicant that his business be allowed to run efficiently and effectively without being frustrated by the issuing authority's inaction. Administrative authorities are required to act reasonably and in my view, the failure to issue a liquor license under such unexplained circumstances is unreasonable. Where in the absence G of an adverse reason the administrative authority fails to act, the courts have a duty to interfere with its administrative powers in order to safeguard the financial and social interests of the applicant and the public respectively.

The Liquor Licensing Board should timeously process liquor licences so that it can justifiably deal with those who offend against the act. They can not be H

Cheda J

A allowed to take a safe route purely on the basis of non-compliance by retailers while they have not performed their part in this exercise.

The principle of fair play is part of our legal system and it must be strictly adhered to. The Liquor Licensing Board cannot merely rely on the fact that the applicant was selling liquor without a licence when they know fully well B that its failure to possess one was due to their own administrative inaction. Where an administrative authority is seized with a duty to perform a certain act which act is a condition for another party to act, it can not be allowed to penalise the other party on the basis of non-performance when it has not itself performed its own part. It must first perform its part before it penalises the other party for non-performance. It can not sit back and do nothing on its part but C only to rush to penalise those who fall under its authority when it has not performed its part.

The second issue is the reason for the forfeiture. The forfeiture was authorised after an admission of guilty fine had been paid by the applicant. It was ordered on the basis of the admission of guilt by the applicant. The matter had been finalised and no other case was pending. The applicant was not informed of D the intended forfeiture by the second respondent. Failure to inform the applicant clearly offends against the principles of natural justice *audi alteram partem* (hear the other side). Baxter L, *Administrative Law* 1984 at 538 clearly states:

> "The principles of natural justice serve three purposes; firstly, they E facilitate accurate and informed decision making; secondly, they ensure that decisions are made in the public interest; and, thirdly, they cater for certain important process values."

There is, in any case a lot to be gained by hearing the other side while there is everything to lose by not hearing it. The learned magistrate should have afforded the applicant an opportunity to explain its default before it took such F a drastic step of forfeiting its goods.

The first and second respondent are administrative agents of the liquor licensing authority and as such are required to act in the public interest and not according to their own whims. As they were acting for and on behalf of the administrative authority they are therefore subject to the full rigour of the G requirements of public law. As they are a creature of a statute, they must therefore, act within the four corners of the said statute which in itself places a duty on the administrative authority to act in the public interest. This objective was clearly not carried out by both the Liquor Licensing Board and the first and second respondents. The notice of the forfeiture was in my view premature. H

Cheda J

In conclusion this application succeeds with costs. A

Webb, Low & Barry, the applicant's legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/TAVENGWA v TAVENGWA & ORS 2005 (1) ZLR 33 (H)

TAVENGWA v TAVENGWA & ORS 2005 (1) ZLR 33 (H)

Citation	2005 (1) ZLR 33 (H)
Case No	HB-173-04
Court	High Court, Bulawayo
Judge	Ndou J
Heard	10 February 2004
Judgment	20 January 2005
Counsel	*C Dube*, for the plaintiff Ms *C Nleya*, for the defendants
Case Type	Civil application
Annotations	No case annotations to date

Flynote

C **Succession** — *will — validity — person who signs as witness to the execution of a will not present when testator signs — will invalid*

Succession — *Wills Act [Chapter 6:04] — s 4 — capacity to make a will — requirement for testator to be capable of appreciating the nature and effect of making a will — section declaratory of the common law*

Headnote

D Where one of two signatories as a witness to a will is not present at the time it was signed by the testator, the will does not comply with s 8 (1) of the Wills Act [*Chapter 6:06*] and the will is, therefore, invalid.

Section 4 of the Wills Act, which provides that a person who " …at the time E of making [a] will is mentally incapable of appreciating the nature and effect of his act" lacks the capacity to make a will, is declaratory of the common law.

Cases cited

Battan Singh v Amirchand [1948] 1 All ER 152 (PC)

F *Kirsten v Bailey* 1976 (4) SA 108 (C)

Kunz v Swart 1924 AD 618

Lewin v Lewin 1949 (4) SA 241 (T)

Thomas v Jones [1928] P 162

Legislation considered G

Wills Act [*Chapter 6:06*], ss 4 & 8(1)

Case information

C Dube, for the plaintiff

Ms *C Nleya*, for the defendants

2005 (1) ZLR p34

Ndou J

Judgment

NDOU J: On 12 April 2002, the plaintiff issued summons against the A defendants in which she sought an order in the following terms:

> "(i) The plaintiff's claim is for an order declaring the will executed by Jephias Tavengwa in July 2001 null and void *ab initio*.
>
> (ii) That Jephias Tavengwa be declared to have died intestate; and
>
> (iii) The first and second defendants pay the costs of the suit on an B attorney-client scale, jointly and severally, each paying the other to be absolved."

The first six defendants filed a plea in which they contended that the will sought to be challenged by the plaintiff was valid. They alleged that at the time that the late Jephias Tavengwa is alleged to have signed the will he was in his sound and sober senses and had the necessary testamentary capacity. C

The plaintiff led evidence from a consultant physician, Dr D K Njau. Dr Njau is a specialist in internal medicine with twenty-five years experience. He testified that the late Tavengwa was discharged from hospital i.e. before he signed the will, after he was diagnosed to have been a victim of immuno suppression for home based care, as he was considered terminally ill. He made D such a decision because the hospital had nothing to offer the patient. He was re-admitted on 27 July 2001 and the doctors diagnosed that he was in a semi-comatose state. He died on 27 July 2001. The doctor pointed out that, it is highly unlikely that on 22 July 2001 he could have been able to execute a will. The plaintiff also gave evidence. Her version was corroborated in material respects by that of Irene Temberere. The total effect of their evidence was that E on 22 July 2001, the late Jephias Tavengwa was terribly ill and he could not have been able to execute a will. I find that the above evidence led in support of the plaintiff's case as credible and probable. The testimony clearly established that the deceased Jephias Tavengwa was so ill on 22 July 2001 that he was incapable of executing the disputed will. In addition, Dr Njau indicated F that the CPZ drug that the deceased Tavengwa was taking at the time could also lead to confusion.

Some of the defendants testified in support of their case. They also led evidence from their aunt Jane Chivasa. Their testimony was to the effect that on 22 July 2001 Jephias Tavengwa was in a sound and disposing mind to execute a will. According to Janet Tavengwa the will was executed on 22 July G 2001. According to Jane Chivasa the will was drafted in 1999. She kept the draft and it was only signed by the deceased on 22 July 2001. On being questioned by the court, Chivasa conceded that although she appears as one of the witnesses to the will, she was not present when the deceased signed it on 22 July 2001. The defendants concede that this evidence of Chivasa renders the H

2005 (1) ZLR p35

Ndou J

A will invalid on account of non-compliance with the provisions of s 8(1) of the Wills Act [*Chapter 6:06*] which provides –

> "(1) Subject to subsection (3), a will shall not be valid unless –

(a) it is in writing; and

(b) the testator or some other person in his presence and at his direction, B signs each page of the will as closely as may be to the end of the writing on the page concerned; and

(c) each signature referred to in paragraph (b) is made or acknowledged by the testator in the presence of two or more competent witnesses present at the time; and

(d) each competent witness either – C

(i) signs each page of the will; or

(ii) acknowledges his signature on each page of the will."

The evidence of the defendants clearly shows that the will *in casu* falls foul of the provisions of this section. One of the witnesses signed some time well before the late Tavengwa did so. The deceased did not sign in the presence D of witness Chivasa. The evidence generally shows that the will does not comply with the formalities provided for in s 8(1). It is therefore not a valid will.

Further, from the credible evidence adduced by the plaintiff, *supra*, the late Tavengwa clearly lacked the requisite capacity to make a will. From the defendants' version, they became desperate when they realised the fate of the deceased prior to his execution of the will. They picked him from the plaintiff's E custody and attention and drove him to sign and lodge the disputed will with the Master's office. This was an act of desperation as they feared that the deceased might die before he executed a will. They were doing the right thing very late as the deceased Tavengwa no longer enjoyed the capacity to execute a will in terms of the law. In particular, s 4 provides –

F "4. *Capacity to Make a Will*

(1) Subject to this Act, every person who is of or over the age of sixteen years may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act."

Section 4 is a declaratory of the common law – *Kunz* v *Swart* 1924 AD 618 and *Kirsten* v *Bailey* 1976 (4) SA 108(C). The evidence, medical and otherwise G shows that the extent of his terminal illness coupled with the taking of CPZ drugs affected the late Tavengwa's power of exercising judgment and discretion and discrimination. In *Lewin* v *Lewin* 1949 (4) SA 241 (T) at 279-280. Roper J observed:

"The analyses of the testimentary power which I have extracted from

---

Ndou J

Banks v *Goodfellow* LRS QB 349 and *Harwood* v *Baker* 3 Moo PC 282 A have been elaborated in such cases as *Smee* v *Smee* (5 PD 84); *Burdett* v *Thompson* LR 3P & D, 72 and *Birkin* v *Wing* 91 LT 80 but without adding materially to their effect. It is abundantly clear from the authorities that it is not sufficient that the testator understood and intended the disposition which he was making in his will (see on this point in our own courts Estate *Rehne & Ors* v *Rehne* 1930 OPD 80 at p 91; *Lange* v *Lange* 1945 AD 332 B at 342; it is necessary further that he shall have been able to comprehend and appreciate the claim of his various relations upon his bounty, without any poisoning of his affections, or pervesion of his sense of right, due to mental disorder; and generally, to use the language of the American case referred to by Cockburn CJ, that he shall have had the ability –

'clearly to discern and discretely to judge of all these things and all those C circumstances, which enter into the nature of a rational, fair and just testament'."

In other words, infirmity, or weakness caused by illness may be such as to affect a person's testamentary capacity. In these days of AIDS and HIV, where a legal practitioner is instructed to prepare a will, the validity of which may be impeached on the grounds of the testator's infirmity or weakness, the legal D practitioner would be well advised to call a disinterested medical practitioner to examine the testator and attest the will: See *Thomas* v *Jones* [1928] P 162 at 166 and *The Law of Succession* by Sir David H Parry 6ed at 10.

It is clear that on 22 July 2001, the late Tavengwa was so disoriented by disease and the intake of CPZ drugs to the extent that he lacked testamentary capacity. E This is a case of enfeeblement due to terminal illness: See *Battan Singh* v *Amirchand* [1948] 1 AER 152.

Whichever way one looks at the evidence, the will has to be impeached, by failing to comply with the provisions of either s 4(1) or s 8(1) of the Act. The plaintiff has made a good case for the order sought. F

Accordingly, the order is granted in terms of the aforesaid draft.

Dube and Associates, plaintiff's legal practitioners

Mabhikwa, Hikwa and Nyathi, defendants' legal practitioners

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Source:
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GANDA & ORS v FIRST MUTUAL LIFE ASSURANCE SOCIETY 2005 (1) ZLR 37 (H)

Citation	2005 (1) ZLR 37 (H)
Case No	Judgment No. S-1-05
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Malaba JA
Heard	10 January 2005
Judgment	24 January 2005
Counsel	*A M Gijima,* for the appellants No appearance for the respondent
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

C **Appeal** — *noting of — late noting of — need to give explanation for delay in seeking condonation as well as for delay in noting appeal — delay due to neglect of legal practitioner — relevance of*

Headnote

D A person seeking condonation of the late noting of an appeal should give a reasonable explanation, not only for the delay in noting the appeal, but also for the delay in seeking condonation. Even if it were accepted that the failure to note the appeal timeously and the delay in seeking condonation of the late noting of the appeal were due to the fault of his legal practitioner, that would not assist the appellant. The practitioner E is, after all, the representative whom the litigant has chosen himself. There is little reason why, in regard to condonation of failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.

Cases cited F

Barros & Anor v Chimphonda 1999 (1) ZLR 58 (S)

First Mutual Life Assurance v Muzivi 2004 (1) ZLR 287 (S)

Maswaure v Nyamunda 2001 (1) ZLR 405 (S)

P E Bosman Tpt Works Cttee & Ors v Piet Bosman Tpt (Pty) Ltd 1980 (4) SA 794 (A) G

Saloojee & Anor v Min of Community Development 1965 (2) SA 135 (A)

Case information

A M Gijima, for the appellants

No appearance for the respondent

Sandura JA

Judgment

SANDURA JA: This is an appeal against a judgment of the Labour Relations A Tribunal ("the Tribunal") (now the Labour Court) which dismissed with costs the appellants' application for the condonation of the late noting of their appeal to the Tribunal. The background facts are as follows. In July 1998, the appellants, who were employed by the respondent ("the Society"), resorted to collective job action in order to redress certain grievances. They were B subsequently charged with misconduct in terms of the Society's Code of Conduct ("the Code"). Thereafter, they appeared before a hearing officer, who found them guilty and recommended that they be dismissed. They then appealed to the Society's chief executive officer, but the appeal was not successful. The chief executive officer accepted the hearing officer's findings and recommendation, and terminated the appellants' employment. Some of C the appellants were dismissed on 31 August 1998 whilst the others were dismissed in the middle of September 1998. Subsequently, on 10 December 1998, the appellants, through their legal practitioner, filed a court application in the High Court seeking a review of the chief executive officer's decision and the setting aside of their dismissal. That application was heard and dismissed with costs on 9 February 2000 on the ground that the appellants should have D exhausted their domestic remedies before approaching the High Court. Thereafter, on 5 July 2001, the appellants filed an application in the Tribunal for the condonation of the late noting of their appeal against the termination of their employment. That application was heard by the Tribunal on 8 March 2002 and was dismissed with costs on 29 April 2002, on the ground that the E appellants had not given any reasonable explanation for their failure to note the appeal timeously. Aggrieved by that decision, the appellants appealed to this court.

The appellants' failure to note the appeal timeously was explained by one of the appellants in his affidavit, an affidavit with which the rest of the appellants associated themselves. The relevant part reads as follows: F

> "2. On or around 5 August 1998, I, together with the other applicants hereto, were (*sic*) dismissed by the respondent owing to allegations of misconduct. We challenged these dismissals by way of appeals and these appeals were thrown out on or around 31 August 1998.
>
> 3. We took the matter to the High Court by way of an application for review in February 1999 (December 1998). The High Court ruled that G we should first exhaust domestic remedies before approaching the High Court for the remedy we were seeking.
>
> We then instructed our then legal practitioners, Dube, Manikai & Hwacha, to note an application for condonation for late noting of appeal to the Labour Relations Tribunal. Affidavits in pursuance of H

Sandura JA

> A this application were duly drawn in our names and we duly instructed our legal practitioner, Mr *S.V. Hwacha*, to lodge the said application with this Honourable Court. I have attached hereto a copy of my own affidavit duly drawn and commissioned in May 2000 as Annexure 'B' hereto.
>
> 4. All along the applicants hereto and I as a representative of the B applicants was (*sic*) under the impression that the said application had been duly lodged with this court, having satisfied all the requirements for the lodging of the application. It was only on or around 21 May 2001 that (when?) I made an inquiry at the Labour Relations Tribunal that I was advised that there was no such application pending in this Honourable Court. Thereafter, I advised C my trade union as well as my colleagues of this position. The trade union then made a follow up with Mr *Hwacha* who advised that he had had problems with the payment of his statement of account, hence had not filed the papers."

The issue which arises for determination is whether the above averments constitute a reasonable explanation for the appellants' failure to note the D appeal timeously. In addition, it is pertinent to

note that it has been stated in a number of cases that a person seeking condonation of the late noting of an appeal should give a reasonable explanation, not only for the delay in noting the appeal, but also for the delay in seeking condonation. Thus, in *Saloojee & Anor* v *Minister of Community Development* 1965 (2) SA 135 (A) at 138H, Steyn CJ said:

> E "What calls for some acceptable explanation is not only the delay in noting an appeal and in lodging the record timeously, but also the delay in seeking condonation. As indicated, *inter alia*, in *Commissioner for Inland Revenue* v *Burger* 1956 (4) SA 446 (A) at 449, and in *Meintjies*' case *supra* [*Meintjies* v *H.D. Combrinck (Edms) Bpk* 1961 (1) SA 262 (A)] at 264, an appellant should, whenever he realises that he has not complied F with a Rule of Court, apply for condonation without delay."

Applying that test to the facts of the present case, there can be no doubt that the decision of the Tribunal was correct. As already stated, some of the appellants were dismissed on 31 August 1998 whilst the others were dismissed in the middle of September 1998. Thereafter, instead of noting an appeal to the G Tribunal in accordance with the provisions of the then Labour Relations Act [*Chapter 28:01*] (the Act) (now the Labour Act [*Chapter 28:01*]), they filed a court application in the High Court on 10 December 1998, i.e. about three months after they had been dismissed. They gave no explanation whatsoever for failing, during that period, to note an appeal to the Tribunal or to seek H condonation of the late noting of the appeal. The appellants averred that after

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Sandura JA

the dismissal of their High Court application on 9 February 2000, they A instructed their legal practitioner to file an application for condonation and signed affidavits in support of that application. However, the affidavits referred to were signed before a commissioner of oaths in May and June 2000, and not in February 2000 immediately after the dismissal of the High Court application. Once again, the appellants gave no explanation whatsoever for B the delay of about three months in finalising the affidavits. The appellants further averred that after instructing their legal practitioner to file an application for condonation, and signing affidavits in support of that application, they believed that the application had been filed with the Tribunal. They added that it was only on 21 May 2001, when one of them checked with the Tribunal, that they discovered that no application for condonation had been filed by their C legal practitioner. When they approached their lawyer, he said that no application had been filed because his fees had not been paid.

Before considering whether the appellants' averments constitute a reasonable explanation for the delay in seeking condonation, I would like to set out what one of the appellants said in his affidavit. When referring to what happened after the appellants had instructed their legal practitioner to file the application D for condonation, he said:

> "Contended (Content?) that we had signed the necessary papers we waited in vain for our legal counsel to advise us of the date when hearing of the application had been scheduled for. Numerous follow ups to his offices and offices of the Commercial Workers Union yielded no favourable E response. Fed up, we decided to check with the Tribunal what was causing the delay, and to our horror we discovered that the lawyers had not filed anything at the Tribunal."

It is pertinent to note that the appellants did not allege that their legal practitioner had been paid. In my view, he had not been paid, and that is why he did not file the application. If he had been paid, the appellants would have F said so and would have filed an affidavit from him explaining why he did not file the application in accordance with their instructions. Furthermore, if it is true that between May 2000 and May 2001 the appellants made "numerous follow ups to his offices", the legal practitioner would have told them that he would not file the application before his fees were paid. He could hardly be blamed for adopting such a stance. Having discovered, on 21 May 2001, that G no application for condonation had been filed by their legal practitioner, the appellants did not act without delay. Instead of filing the application urgently, they waited until 5 July 2001. Once again, they gave no explanation for the delay of about 44 days.

Sandura JA

A However, even if it were accepted that the failure to note the appeal to the Tribunal timeously and the delay in seeking condonation of the late noting of the appeal were due to the fault of their legal practitioner, that would not assist the appellants. As I stated in *Maswaure* v *Nyamunda* 2001 (1) ZLR 405 (S) at 409E-G:

B "Even if the delay in applying for condonation were due to the fault or negligence of the appellant's legal practitioners, the appellant would not escape the consequences of his lack of diligence. As Steyn CJ said in the *Saloojee* case *supra* at 141B-E:

'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape C the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise, might have a disastrous effect upon the observance of the Rules of this court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply D with the Rules of this court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are'."

E In the circumstances, I am satisfied that the appellants did not give any reasonable explanation for failing to note the appeal to the Tribunal timeously, for the long delay in seeking condonation of the late noting of the appeal. In any event, it must be borne in mind that in determining the application the Tribunal exercised a judicial discretion. Unless it is shown that the Tribunal F made an error in exercising that discretion, this court would not interfere with the Tribunal's decision: see *Barros & Anor* v *Chimphonda* 1999 (1) ZLR 58 (S) at 62G-63A. In my view, no such error has been established.

In the circumstances, I do not consider it necessary to deal with the prospects of success of the appeal on the merits. As Muller JA said in *P.E. Bosman Transport Works Committee & Ors* v *Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) G at 799D-E:

"In a case such as the present, where there has been a flagrant breach of the Rules of this court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application

Sandura JA

should, in my opinion, not be granted whatever the prospects of success A may be."

In my view, those comments apply to the present case with equal force.

Finally, I wish to comment very briefly on the case of *First Mutual Life Assurance* v *Muzivi* 2004 (1) ZLR 287 (S), which was referred to by Mr *Gijima*. Although it appears that Jackson Muzivi had participated in the collective job B action in which the appellants in the present case had participated, it is clear from the judgment in *Muzivi*'s case *supra,* that that case had nothing to do with condonation of the late noting of the appeal to the Tribunal. It is, therefore, of no assistance to the appellants.

As there was no appearance for the Society, I shall not make any order with regard to the costs of the appeal. C

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

ZIYAMBI JA & MALABA JA concurred.

Mbidzo, Muchadehama & Makoni, appellants' legal practitioners D

Atherstone & Cook, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/STANDARD CHARTERED BANK ZIMBABWE LTD v MUSANHU 2005 (1) ZLR 43 (S)

STANDARD CHARTERED BANK ZIMBABWE LTD v MUSANHU 2005 (1) ZLR 43 (S)

Citation	2005 (1) ZLR 43 (H)
Case No	Judgment No. S-122-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	1 November 1004
Judgment	27 January 2005
Counsel	*L Uriri*, for the appellant *D Mbidzo*, for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

C **Appeal** — *Labour Court — interim determination by Labour Court under s 97(4) of Labour Relations Act [Chapter 28:01] — purpose of — when should be granted — determination granted in circumstances where applicant could have enforced his rights through other methods — not appropriate*

Headnote

D The respondent was charged by the appellant bank with various serious acts of misconduct, mostly relating to the fraudulent or improper allocation to himself or relatives of foreign currency. The senior labour relations officer took a very superficial view of the evidence and concluded that E the bank had not established the offences charged. The bank was ordered to reinstate the respondent from the date of suspension, without loss of salary and benefits, failing which to pay him damages in lieu of reinstatement. The amount of damages to be awarded was not specified, nor was the method of their quantification stated. The bank appealed to the Labour Court against the determination. No application was made by F the bank for suspension of the execution of the judgment pending determination of the appeal, but the respondent was told that the bank would not reinstate him. The respondent made an application to the Labour Court in terms of s 97(4) of the Labour Act for an interim determination that he either be reinstated or paid his salary and benefits. That application was granted. On appeal by the bank:

G *Held*, that the object of an interim determination made under s 97(4) of the Act is to give a party in whose favour the determination appealed against was made an interim right which he would otherwise not have because of the noting of the appeal. It may also be to grant the party against whom the judgment was made temporary relief from the burden of the obligation

Malaba JA

imposed by the determination which he would otherwise not have A because of the appeal.

Held, further, that whilst the Labour Court has a discretion whether or not to make an interim determination in the matter, it is required by s 97(4) to have regard to the justice of the case. It instead made its interim order without having considered the prospects of success in the main appeal, B the purpose of the order, the practicability of forcing the employee on the employer and the possibility of giving the employee an unfair advantage.

Held, further, that there was no hindrance at all to the enforcement of the rights under the determination appealed against by the respondent. Although reinstatement was no longer a matter for which an interim C determination could provide, having been adjudicated upon by the senior labour relations officer and made the subject of a valid order, the respondent could have enforced the determination by the process of execution appropriate to it, regardless of the appeal. He was free to have had the damages quantified and the order registered with the magistrates court or the High Court for purposes of enforcement of payment. D

Held, further, that simply making yet another order on the same matter and in the same terms as those of the determination appealed against was not the appropriate remedy for the enforcement of the judgment appealed against. The Labour Court should not have made the order. E

Cases cited

Clouston & Co Ltd v Corry [1906] AC 122

Pearce v Foster (1886) 17 QBD 536

Legislation considered

Labour Act [*Chapter 28:01*], s 97(3) & (4) F

Case information

L Uriri, for the appellant

D Mbidzo, for the respondent

Judgment

MALABA JA: This is an appeal against the judgment of the Labour Court delivered on 19 July 2004, granting with costs an application by the respondent G ("Musanhu") against the appellant ("Standard Chartered") for an interim determination in terms of s 97(4) of the Labour Relations Act [*Chapter 28:01*] as amended ("the Act"), pending the final determination of the appeal from a judgment of the senior labour relations officer (now a "labour officer").

Malaba JA

A The background facts of the case are these. Musanhu was employed by Standard Chartered, a financial institution, as Head of Money Markets Division. He sometimes acted as Head of Treasury when the incumbent was on leave. On a date not disclosed in the record, but probably in 2002, Musanhu was suspended from work and an application made forthwith to a senior labour relations officer for an order terminating the contract of employment in terms B of s 3(a) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, SI 371 of 1985 (now repealed).

Standard Chartered believed that Musanhu had abused his authority as Head of Money Markets Division or as acting Head of Treasury to commit acts inconsistent with the fulfilment of the express or implied conditions of his C contract of employment, justifying his dismissal. The allegation made against him was that he had fraudulently withdrawn foreign currency from the bank for personal use or allocated foreign currency to his wife, relatives and a friend.

The evidence placed before the senior labour relations officer at the hearing of the application on 20 November 2002 was as follows.

D On 17 May 2001, the Head of Treasury approved payment of tuition fees in the sum of 2 080 and 12 500 for board, fares and stationery in terms of an invoice from Emile Woolf College for Musanhu's sister. On 8 June 2001, Musanhu accessed the sum of 12 500 from the Highlands Branch of Standard Chartered on the authority of the invoice granted on 17 May 2001. That left the sum of 2 080 unpaid. On 12 June 2001, Musanhu is said to have forged the invoice E by writing on it the words "approved 18 000". He presented the forged invoice at the Avondale Branch of Standard Chartered and withdrew the sum of 10 000 instead of 2 080. Standard Chartered was prejudiced in the sum of 7 920.

On 20 June 2001, Musanhu was alleged to have presented a DSTV invoice of US$209 for his subscription fees. He was paid the foreign currency in cash. F On 26 June 2001, he presented a duplicate of the invoice to Priority Banking and obtained US$209 in the form of a bank draft. The allegation was that he had misrepresented the fact that the invoice had not been paid when he presented it to Priority Banking for payment of the money to Multichoice by means of a bank draft.

On 30 July 2001, Musanhu is said to have authorised allocation and payment G of US$3 000 to his wife at the exchange rate of 55:1 instead of 56 962:1. The bank was prejudiced of $9 625. The authority was granted under reference No. 3945/01. He also used the same reference number to allocate and have paid to a friend of his US$150 000. This meant that there was in fact no authority for this allocation and payment, as each allocation and payment of foreign currency H had to have its own authority identified by a reference number. The amount

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allocated to Musanhu's friend was way above the maximum of US$5 000 an A individual could access.

Musanhu was given authority under reference No. 641/01 to access foreign currency for his holiday and official travel allowance. On 16 January 2001, he allocated US$5 000 to his sister and had it paid under reference No. 641/01. There was no proper authority for the allocation and payment of foreign currency B to his sister.

It was also alleged that whilst Musanhu was supposed to be attending a course in Nyanga he was arrested at Chirundu Border Post smuggling into Zambia about $1 200 000 concealed in a plastic fuel container. He was convicted of the crime. The criminal conduct was said to be unbecoming of a senior bank employee and an embarrassment to Standard Chartered. C

In his defence, Musanhu did not deny the acts of misconduct. He gave irrelevant explanations which unfortunately misled the senior relations officer into believing that they constituted defences to the charges of misconduct.

For example, he claimed that he could not get the 14 580 paid on 8 June 2001 because the Highlands Branch of Standard Chartered did not have enough D foreign currency. He said he had a right to approach the Avondale Branch of Standard Chartered for the payment of the balance on the invoice. But the gravamen of the allegation against him was that as a result of the forgery he committed, in endorsing on the invoice the words "approved 18 000", he fraudulently induced the Avondale Branch of Standard Chartered to pay him more than the 2 080 he was entitled to. E

On the allocation of foreign currency to his wife, his friend and his relatives, he said the fact that they were people related to him did not disentitle them to receive foreign currency from Standard Chartered. He did not address the gravamen of the allegation, which was that not only did he put himself in a position where there was a conflict of interest but also allocated foreign F currency higher than the official limits and without the authority of the Head of Treasury.

All Musanhu could say in respect of the criminal conduct committed at Chirundu Border Post was that it took place outside the performance of his duties. He forgot that for conduct to constitute misconduct inconsistent with G the fulfilment of the express or implied conditions of a contract of employment it is not necessary that it should have been committed during working hours or in the carrying on of the service or the business of the employer. In *Pearce* v *Foster* (1886) 17 QBD 536 at 539, Lord Esher MR said:

> "But if a servant is guilty of such a crime outside his service as to make it

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A unsafe for a master to keep him in his employ the servant may be dismissed by his master, and if the servant's conduct is so grossly immoral that all reasonable men would say that he cannot be trusted, the master may dismiss him."

The same view was taken by Lord James of Hereford in *Clouston & Co Ltd* v *Corry* [1906] AC 122, a case of dismissal of a manager who had been B convicted by a magistrate of drunkenness.

The senior labour relations officer took a shockingly superficial view of the evidence produced by Standard Chartered to prove the acts of misconduct alleged against Musanhu and concluded that it

had not established the offences charged. He said: C

"(1) It does appear that there is nothing wrong with or fraudulent in the respondent using two separate branches to withdraw his forex allocation. In any case it is common knowledge that there was a critical shortage of foreign currency in Zimbabwe during the period in question. If the respondent failed to get the full amount authorised at Avondale Branch, there is nothing fraudulent in proceeding to draw the balance at Highlands Branch. D

(2) …

(3) …

(4) The applicant seems to take great exception to the fact that some of the people issued forex were known to the respondent. But the totality of evidence led appears to show a farfetched attempt by the E applicant to desperately find fault on the respondent's part and impute evil into otherwise transparent transactions. The bottom line is that all these people were customers of the bank just like the hundreds (of) others the respondent transacted with as part of his duties during the course of his employ. F

(5) The Chirundu Border Post incident is yet another farfetched charge. The incident is divorced from the respondent's duties and, in any case, the matter is *sub judice*."

Absent from the judgment of the senior labour relations officer was a critical and objective analysis of the evidence to determine whether acts of misconduct inconsistent with the fulfilment of the express or implied conditions of G employment had been shown on a balance of probabilities to have been committed. Standard Chartered was ordered to reinstate Musanhu from the date of suspension, presumably (it was not specified in the order) without loss of salary and benefits, failing which to pay him damages in lieu of reinstatement. The amount of damages to be awarded was not specified, nor was the method of their quantification stated.

Malaba JA

On 28 March 2003, Standard Chartered appealed to the Labour Court on the A ground that the decision that the evidence produced did not establish acts of misconduct by Musanhu inconsistent with the fulfilment of the express or implied conditions of his contract of employment was so outrageous in its defiance of logic that no sensible person who had applied his mind to the evidence could have arrived at such a conclusion. B

Section 97(3) of the Act provides that an appeal against a determination such as the one made by the senior labour relations officer shall not have the effect of suspending the determination or decision appealed against. Although the Labour Court could, upon application being made to it under s 97(4) of the Act and in the exercise of its discretion, have ordered suspension of the execution of the judgment pending determination of the appeal, no such application was C made by Standard Chartered. The judgment remained enforceable by process of execution appropriate to its nature.

On 28 April 2003, Standard Chartered advised Musanhu by letter that it was not going to reinstate him in its employment, leaving the award of compensatable damages as the only remedy for the enforcement of the D judgment of the senior labour relations officer.

Notwithstanding this development, Musanhu made an application to the Labour Court on 12 July 2003 in terms of s 97(4) of the Act for an interim determination. In the founding affidavit he said:

> "… the appeal is being filed just for the purposes of delay. In the meantime, however, I have no source of livelihood and I pray to this honourable court E for an order compelling payment of salary and benefits per month pending finalisation of this case in terms of the law. This to be effected whether or not the appellant reinstates me to my previous job."

The draft order to be the interim relief was that:

"1. In the interim the respondent be and is hereby ordered to reinstate F the applicant without loss of pay or benefits.

Alternatively –

Pay the applicant from date of suspension to date of determination and thereafter the applicant is to be paid his salary per month and benefits until such time as the appeal has been finalised.

2. The respondent bears costs of this suit." G

In opposing the application, Standard Chartered denied that the appeal had been noted for purposes of delay as opposed to a genuine desire to reverse an outrageous decision. It averred that the prospects of success in the appeal were good. It denied that Musanhu was indigent. H

Malaba JA

A Upon the hearing of the application on 9 July 2004, it was argued on behalf of Standard Chartered that the cause of action had been misconceived because it was believed that the noting of the appeal had the effect of suspending the execution of the determination of the senior labour relations officer. As the effect of s 97(3) of the Act was that the determination was enforceable pending the determination of the appeal and there had been no B application for stay of execution in terms of s 97(4) of the Act, the making of the order sought was unnecessary. It was argued that the application for interim relief in terms of the draft order was ill-conceived. It was not in the interests of justice to make a second order in terms identical to the determination appealed against. No useful purpose would be served by duplicating orders.

C The argument did not find favour with the presiding President of the Labour Court, who said:

> "I am unpersuaded by these submissions. The effect of subs (3) is that the labour officer's determination is not suspended by the respondent's appeal to this court. Therefore the respondent is legally obliged to either reinstate the applicant or to pay him damages. The only way the respondent D could avoid complying with the determination was to file an urgent application under subs (4) for stay of execution pending the outcome of the appeal.
>
> The respondent has not done so. Therefore, the applicant is lawfully entitled to enforce his rights under the determination. Whether you call such enforcement a *mandamus* or interim relief is neither here nor there.
>
> E Accordingly I make the following order –
>
> 1. Pending the outcome of the respondent's appeal, pending in this court under reference No. LC/H222/03, the respondent shall reinstate the applicant without loss of pay or benefits, as from the date of suspension.
>
>   F Alternatively, the respondent shall pay the applicant his salary and benefits from the date of suspension until the date when the respondent's said appeal is finalised; and
>
> 2. The respondent shall pay the applicant's costs."

The contention on appeal was that the decision of the Labour Court to grant the order was clearly wrong. I agree. Section 97(4) of the Act, in terms of which G the application was made and on the authority of which the interim determination was made, provides that:

> "Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires."

Whilst the Labour Court has a discretion in the matter whether or not to make

Malaba JA

an interim determination in the matter, it has to have regard to the justice of A the case. Assuming for a moment that the interim determination could be made in the circumstances of this case to provide for the reinstatement of Musanhu without loss of salary and benefits failing which payment of damages, did the Labour Court properly exercise its discretion?

The Labour Court made the interim order without having considered the B prospects of success in the main appeal, the purpose of the order, the practicability of forcing the employee on the employer and the possibility of giving the employee an unfair advantage.

The Labour Court does not appear to have appreciated that it had a discretion in the matter, which was to be exercised after having regard to the requirements of justice. There was no consideration of what the justice of the case required. C The Labour Court believed that because the determination appealed against had not been suspended, it was bound to make the order by way of enforcement of that determination.

I accept the submission made by Mr *Uriri*, on behalf of Standard Chartered, that it was not open to the Labour Court in the circumstances of this case to D make the order it did. Reinstatement was no longer a matter for which an interim determination under s 97(4) of the Act could provide. It had been adjudicated upon by the senior labour relations officer and made the subject of a valid order. Reinstatement had been dispensed with as a subject of controversy to be determined in terms of s 97(4) of the Act when Standard Chartered indicated on 28 April 2003 that it was not going to reinstate Musanhu. E

The object of an interim determination made under s 97(4) of the Act is to give a party in whose favour the determination appealed against was made an interim right which he would otherwise not have because of the noting of the appeal. It may also be to grant the party against whom the judgment was made temporary relief from the burden of the obligation imposed by the determination F which he would otherwise not have because of the appeal.

In this case, there was no hindrance at all to the enforcement of the rights under the determination appealed against by Musanhu. He could have enforced the determination by the process of execution appropriate to it regardless of the appeal. As correctly pointed out, he was free to have had the damages quantified and the order registered with the magistrate's court or the High G Court for purposes of enforcement of payment.

It is not necessary to decide in this case whether an interim determination made under s 97(4) of the Act can take the place of the ordinary process of execution of a judgment appealed against. What is clear is that the effect of the provisions of s 97(3) and the absence of an application for an order of stay of H

Malaba JA

A execution were circumstances the Labour Court had to take into account in deciding whether a case had been made for an interim determination. It seems that, contrary to the view taken by the Labour Court that the effect of s 97(3) and the absence of an interim order of stay of execution obliged it to make an interim determination, these factors should have persuaded it against making the interim determination. It should have realised that simply making yet B another order on the same matter and in the same terms as those of the determination appealed against was not the appropriate remedy for the enforcement of the judgment appealed against.

The appeal is therefore allowed with costs. The order of the court *a quo* is set aside and substituted with the following:

> C "The application for an interim determination in terms of section 97(4) of the Labour Relations Act [*Chapter 28:01*] is dismissed with costs."

Chidyausiku CJ & Ziyambi JA concurred.

D *Honey & Blanckenberg*, appellant's legal practitioners

Mbidzo, Muchadehama & Makoni, respondent's legal practitioners

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STANDARD CHARTERED BANK ZIMBABWE LTD v CHAPUKA 2005 (1) ZLR 52 (S)

Citation	2005 (1) ZLR 52 (H)
Case No	Judgment No S-125-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	5 October 2004
Judgment	27 January 2005

Counsel *L T Biti,* for the appellant
R T Maganga, for the respondent

Case Type Civil appeal

Annotations Link to case annotations

Flynote

Employment — *contract — termination — grounds for — conduct inconsistent with the fulfilment of the express or implied conditions of the contract of employment — such conduct giving prima facie right to employer to dismiss employee — what employee must show to avoid dismissal — employee's intention — lack of intention to defraud — relevance of* D

Headnote

The respondent, a senior bank employee, acting under a scheme to assist employees to build their own homes, had obtained cheques from his bank to pay to building contractors or suppliers of building materials. Instead of paying the cheques to the payees, E he altered the names of the payees and paid the cheques into his wife's account, from which he drew the bulk of the proceeds. He was charged with conduct inconsistent with the fulfilment of the express or implied conditions of his contract of employment, was convicted and dismissed from his employment. Appeals to the grievance and disciplinary committee and the appeals board were unsuccessful, the board taking the view that the misconduct was not F trivial and inadvertent, but serious and deliberate.

On further appeal, the Labour Relations Tribunal confirmed the determination that the conduct was inconsistent with the fulfilment of the express or implied conditions of the respondent's contract of employment. However, without the question having been raised by the respondent, the Tribunal G proceeded to consider the correctness of the decision by the appeals board that the misconduct gave the bank the right to dismiss him from employment. It found the decision inappropriate since the conduct did not prejudice the bank, and reduced the penalty to a final warning. The bank then appealed the ruling to the Supreme Court. H

A *Held,* 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, giving the former a *prima facie* right to dismiss the latter. It is then up to the employee to show that his misconduct, though technically inconsistent with the fulfilment of the conditions of his B contract, was so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of dismissal was not warranted.

Held, further, that the fact that the respondent's intention was not to defraud the bank and that no prejudice was suffered by Standard Chartered as a result of his acts is of questionable relevance, because the alleged C 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 the employee in the position in which he considered the pursuit of personal interest more important than the honest discharge of his duties D to the employer.

Held, further, that the relationship between the bank and the respondent was one based upon trust and confidence. To make the dismissal justifiable, it was sufficient that the bank felt that as a result of his own acts of misconduct it could not continue in future to repose in him the trust and confidence that he would perform his duties as a senior member of staff E with a high degree of honesty.

Cases cited

Clouston & Co Ltd v Corry [1906] AC 122 (PC); [1904-1907] All ER 685 (PC)

F *Mine Workers' Union v Brodrick* 1948 (4) SA 959 (A)

Sinclair v Neighbour [1966] 3 All ER 988 (QB); [1967] 2 QB 279

Tobacco Sales Floors Ltd v Chimwala 1987 (2) ZLR 210 (S)

Legislation considered

G Employment Code of Conduct for the Banking Undertaking, 1995 (SI 201 of 1995)

Labour Relations Act [*Chapter 28:01*], s 91

Case information

L T Biti, for the appellant

R T Maganga, for the respondent

Malaba JA

Judgment

MALABA JA: This appeal is against part of the judgment of the then Labour A Relations Tribunal ("the Tribunal") setting aside the dismissal of the respondent ("Chapuka") from employment with the appellant ("Standard Chartered") and substituting the penalty of "Final Written Warning" on a conviction of misconduct inconsistent with the fulfilment of the express or implied conditions of his contract of employment in contravention of s 11(1) of Category "D" offences under the Employment Code of Conduct for the B Banking Undertaking, SI 201 of 1995 ("the Code").

The facts on which the appeal turns are these. Chapuka, who was employed by Standard Chartered, a financial institution, as a support service manager at its branch in Bindura, was in 1999 granted a loan under a scheme to assist employees to build their own dwelling houses. The loan was granted in terms C of a contract which required that payment of the money be made through "bank cheques" drawn by Standard Chartered on its branch at Africa Unity Square in Harare in favour of suppliers of building materials or contractors.

On 26 August 1999, Chapuka submitted a written request to the Credit Department at Standard Chartered's Africa Unity Square Branch, which had D the responsibility of administering the housing loan scheme, for two bank cheques in the amounts of $17 496.37 and $15 638.38 drawn in favour of Valley Farm Services and D.S.T. respectively, for the purchase of building materials.

The two cheques were drawn in favour of the named payees and given to Chapuka. They bore two signatures of officials authorised to issue the cheques on behalf of Standard Chartered. Each cheque was crossed and E endorsed "account payee only". Once the cheques were in his custody, it became Chapuka's duty to preserve them in their complete and regular form and deliver them to the intended payees in that state.

In breach of the obligation to preserve the instruments in their integrity, Chapuka altered them in material parts by deleting the names of the payees, F by putting lines across them and substituting his wife's name as payee. He did not deliver the cheques to the intended payees. He signed for the alterations and got a teller who was his subordinate to counter-sign so as to create the impression that the alterations had the authority of Standard Chartered. To induce the unsuspecting teller to put his signature on the altered cheques, Chapuka misrepresented to him that the cheques had been drawn G in favour of the original payees by mistake and the alterations had been authorised by the Credit Department at Africa Unity Square Branch of Standard Chartered.

The forged cheques were deposited by Chapuka into his wife's account. An amount of $32 000 was immediately withdrawn therefrom and deposited by H

Malaba JA

A Chapuka into his own personal account, leaving a balance of $2 099.75 in his wife's account. He deposited the $32 000 into his account without having sought and obtained authority from the branch manager.

To guard against its employees misappropriating depositors' funds and depositing them into their own accounts, the bank had a standing order B requiring that all deposits by employees into personal accounts should receive the authority of branch managers.

On discovering Chapuka's conduct, the branch manager charged him with conduct inconsistent with the fulfilment of the express or implied conditions of his contract of employment. On 21 September 1999, Chapuka appeared before a hearing officer to answer the charge, the particulars of which were that C Chapuka had:

"1. Altered bank cheques without authority/falsified bank records.

2. Instructed a subordinate to carry out an improper transaction.

3. Deposited cheques meant for the benefit of a bank employee into the wife's account. D

4. Deposited $32 000 into a personal account without authority.

5. Left a balance of $2 099.75 in the wife's account when she was not entitled to it."

Chapuka did not deny committing all these acts. He said he wanted to have access to the money so that he could buy the cheapest building materials in E the market. As the facts were not in dispute, the hearing officer had no difficulty in holding that the misconduct which Chapuka admittedly committed was inconsistent with the fulfilment of the express or implied conditions of his contract of employment. The hearing officer also held that the misconduct by Chapuka involved a breach of trust and its degree of seriousness justified dismissal from employment, as it struck at the root of the confidential F relationship between the parties. Chapuka was accordingly dismissed.

Chapuka appealed unsuccessfully to the grievance and disciplinary committee and then to the appeals board of the National Employment Council for the Banking Undertaking. In holding that the misconduct justified Chapuka's dismissal, the chairman of the appeals board, writing for all its members, on 17 December 1999, said:

> G "The facts of the case were clear and the Appeals Board were in complete consensus that the evidence clearly showed that Mr Chapuka was guilty of the charges laid against him. They agreed that he had abused his position in the bank to misdirect money that was to have paid for a house. The bank would never have lent him the money if they were not sure that the house itself would act as security. Mr Chapuka knew this and

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Malaba JA
deliberately flouted the regulations. They all felt that Mr Chapuka had A abused a position of trust."

So the appeals board's view of the facts constituting the misconduct committed by Chapuka was that it was not trivial and inadvertent but serious and deliberate.

The determination that the conviction gave Standard Chartered the power and B authority to dismiss Chapuka from employment, as it constituted a serious breach of trust and confidence on which the relationship of employer and employee was based, was not challenged on appeal to the Tribunal. Chapuka's ground of appeal was that he had been wrongly charged. His contention was that he should have been charged with "failure to comply with standing instructions" in contravention of s 8 of Category "B" offences under the Code. C

The Tribunal confirmed the determination by the appeals board that Chapuka had committed conduct which was inconsistent with the fulfilment of the express or implied conditions of his contract of employment, effectively holding against him on the ground on which the appeal turned.

Although it had not been raised by Chapuka as a question for determination, D the Tribunal nonetheless considered the correctness or otherwise of the decision by the appeals board that the misconduct Chapuka had been found to have committed gave Standard Chartered the right to dismiss him from employment. The inference it drew from some of the facts was that the dismissal was not justified. It said:

> "It is not disputed that the appellant's conduct was improper. However, E it must be borne in mind that the intention behind the (appellant's conduct) was not to defraud the respondent. When the respondent wrote a cheque (*sic*) in favour of the creditors it was effectively doing so on the appellant's behalf. Thus what money was being paid to the creditors effectively belonged to the appellant. What the appellant did, did not prejudice the bank." F

The dismissal was then set aside and substituted with the penalty of a "Final Written Warning". The Tribunal said that in substituting dismissal with the less severe penalty of a "Final Written Warning" it acted in terms of s 91 of the Labour Relations Act [*Chapter 28:01*] ("the Act").

The decision was attacked on appeal to this court on two grounds. The first G was that s 91 of the Act did not authorise the Tribunal to substitute its own determination for a determination on a matter not appealed against. The second was that as its decision could only be made upon consideration of the correctness of the dismissal of Chapuka as a question of fact, no such question had been raised in the grounds of appeal for the Tribunal to consider. Even H

2005 (1) ZLR p57

Malaba JA

A if the question had been raised, the determination would have been reached only if the Tribunal was satisfied that the decision of the appeals board was one no reasonable tribunal could have made.

I have found it unnecessary to consider the validity of the first ground of appeal because I am satisfied that the determination that the misconduct B committed by Chapuka did not give Standard Chartered the right to dismiss him from employment was clearly wrong. My reasons are the following:

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, giving the former a *prima facie* right to dismiss the latter. In *Clouston & Co Ltd* v *Corry* C [1904-1907] All ER 685 (PC); [1906] AC 122 (PC), Lord James of Hereford remarked by way of a *dictum* at p 129:

> "Now the sufficiency of justification depends 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 will not justify the determination of the contract of service D 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*" (my emphasis).

In *Sinclair* v *Neighbour* [1966] 3 All ER 988 (QB) at 989D; [1967] 2 QB 279 at 287, Sellers LJ held that to be conferred with the power and authority to E dismiss a manager found guilty of taking money out of the till and leaving an "I.O.U." note when he knew that if he had asked he would not have been given the money:

> "… it was sufficient for the employer if he could, in all the circumstances, regard what the manager did as being something seriously inconsistent – incompatible – with his duty as the manager in the business in which F he was engaged."

In *Tobacco Sales Floors Ltd* v *Chimwala* 1987 (2) ZLR 210 (S), McNally JA approved of the *dictum* by Lord James of Hereford in the case of *Clouston & Co Ltd* v *Corry supra* before going on at 218H-219A to say the following:

> "I consider that the seriousness of the misconduct is to be measured by whether it is 'inconsistent with the fulfilment of the express or implied G conditions of his contract'. If it is, then it is serious enough *prima facie* to warrant summary dismissal … Then it is up to the employee to show that his misconduct, though technically inconsistent with the fulfilment of the conditions of his contract, was so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted."

2005 (1) ZLR p58

Malaba JA

In this case, it was held on the facts by the Tribunal that the misconduct A Chapuka had been convicted of having committed was inconsistent with the fulfilment of the express or implied conditions of his contract. He did not show that the misconduct was "so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of" dismissal was not warranted.

In *Mine Workers' Union* v *Brodrick* 1948 (4) SA 959 (A), Greenberg JA held B at p 978 that a wrongful and unauthorised alteration by its Secretary General of a resolution made by the executive committee of the appellant amounted to misconduct which justified summary termination by the appellant of the relationship of employer and employee.

It is clear from the cases that, even if the question of the correctness of the decision by the appeals board that Standard Chartered was justified in C dismissing Chapuka from employment for the misconduct had been raised as a ground of appeal, the Tribunal would have had to be satisfied that the decision was on all the facts clearly wrong.

In my judgment, what was said by the Tribunal about the effect of the misconduct committed by Chapuka against Standard Chartered would not have been sufficient to justify interference with the judgment of the appeals board. The relevance of the statement by the Tribunal that the intention of Chapuka in committing the misconduct was not D 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 E 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 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. F

The relationship between Standard Chartered and Chapuka was one based upon trust and confidence. It is sufficient that in dismissing Chapuka from employment Standard Chartered felt that as a result of his own acts of misconduct it could not continue in future to repose in him the trust and confidence that he would perform his duties as a senior member of staff with a high degree of honesty. It was also sufficient that any reasonable employer G in the position of Standard Chartered could on the facts have dismissed Chapuka for what he did.

The appeal is allowed with costs. The decision of the Tribunal is set aside and substituted with the following: H

2005 (1) ZLR p59

Malaba JA

A "The appeal against the decision of the appeals board of the National Employment Council for the Banking Undertaking upholding the dismissal of the respondent from employment is dismissed with costs."

CHIDYAUSIKU CJ & ZIYAMBI JA concurred.

B *Honey & Blanckenberg*, appellant's legal practitioners

Muzenda & Maganga, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/PROTON BAKERY (PVT) LTD v TAKAENDESA 2005 (1) ZLR 60 (H)

PROTON BAKERY (PVT) LTD v TAKAENDESA 2005 (1) ZLR 60 (H)

2005 (1) ZLR p60

Citation	2005 (1) ZLR 60 (H)
Case No	Judgment No. S-126-04
Court	Supreme Court, Harare
Judge	Sandura JA, Malaba JA & Gwaunza JA
Heard	8 November 2004
Judgment	27 January 2005
Counsel	*T Biti*, for the appellant The respondent in person
Case Type	Civil appeal

Annotations No case annotations to date

Flynote

Employment — *Labour Court — determinations — Court deciding dispute on technical issue not raised by parties — whether permissible*

Employment — *labour disputes — determination of — need to avoid technicalities* D

Headnote

Labour disputes should not be determined on the basis of technical irregularities, particularly when the irregularities can be cured by the leading of evidence.

The appellant company had employed the respondent but dismissed him for E misconduct, acting in terms of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 (SI 371 of 1985). These regulations required an employer who wished to dismiss an employee to suspend him and then seek the Minister's approval for his dismissal. The respondent contested the merits of his dismissal at a hearing before a labour relations officer and then on appeal to a senior F labour relations officer and thence to the Labour Relations Tribunal (now the Labour Court). After five days of evidence in which the factual merits of the dismissal were canvassed extensively, the president of the Tribunal gave judgment for the respondent on the ground that there was no evidence that the respondent had been suspended before being G dismissed – an issue that had not been raised or touched on in any of the hearings. The appellant appealed against the judgment of the Tribunal to the Supreme Court.

Held, that it was a serious misdirection for the Tribunal to determine the matter in this way, picking on a procedural irregularity neither raised nor argued H

Gwaunza JA

A before it and basing its determination solely on that technicality. The Tribunal had had ample opportunity to solicit evidence on the specific issue of the respondent's suspension, if it considered such evidence to be decisive. The misdirection was so serious as to leave the Supreme Court with no option but to interfere with the Tribunal's determination.

Cases cited B

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

Mpumela v Berger Paints (Pvt) Ltd 1999 (2) ZLR 146 (S)

Muzuva v United Bottlers (Pvt) Ltd 1994 (1) ZLR 217 (S)

National Foods Ltd v Magadza S-105-95

Case information

C *TBiti*, for the appellant

The respondent in person

Judgment

GWAUNZA JA: This is an appeal against a judgment of the Labour Relations Tribunal, in terms of which the appellant was ordered to reinstate the D respondent to his former employment without loss of salary and benefits, or pay him damages in lieu of reinstatement.

The appellant gives as its main ground of appeal, the following:

"1.1 The learned Chairman erred as a question of law in finding as a fact that the Appellant never made an application for permission to terminate respondent's contract of employment, consistent with s 3 E of the Labour Relations Termination (General Conditions of Employment) Regulations SI 371/85, and that appellant never suspended the respondent.

1.2 The finding of fact that the application had (not)been made was grossly unreasonable as to constitute a question of law particularly F given (that);

(a) in all the proceedings in the court *a quo* it had always been common cause that in fact an application had been made consistent with SI 371/85;

(b) in any event during the hearing before it, the Tribunal itself did not raise the issue with the appellant to afford him the opportunity G to provide an explanation as to how the application was made, and to produce copies of same, if available."

In elaboration of this ground of appeal, the appellant asserts that the hearing in the court *a quo* lasted five days, during which evidence was heard from witnesses called by both parties; that pp 1 to 118 of the record of the H proceedings contain evidence on the merits of the case and that the parties

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Gwaunza JA

had been asked to, and did, file detailed closing submissions meant to assist A the court in making its determination. The appellant charges, however, that the court *a quo* disregarded all this evidence, which was essentially addressing the merits of the case, and instead made a factual finding on a matter that had not been argued before it. On the basis of that sole finding, it is further argued on behalf of the appellant, the court *a quo* had reached the determination now being appealed against. B

The evidence before this court shows there is substance in the appellant's assertions. As correctly pointed out by the appellant, the issue before the court *a quo* was whether or not the respondent had abandoned his work station and whether that abandonment amounted to a breach of the implied or express provisions of his contract of employment. C

Evidence on this issue was led before the labour relations officer who first heard the matter, then again before the senior labour relations officer who entertained the respondent's appeal. More detailed evidence on the very same issue was, as already indicated, heard before the court *a quo*. At no time during these various hearings of the matter was the question ever raised or D argued, whether or not the appellant had – verbally or in writing – suspended the respondent before seeking permission to dismiss him.

It is clear from the judgment of the learned chairman of the Labour Tribunal that his finding concerning the matter of the respondent's suspension was based on his own reading of the record. He noted as follows at p 2 of the judgment: E

> "My reading of the record (of appeal) does not reveal that the appellant was ever written a letter suspending him from employment. In stating this observation, I am not unaware that a suspension does not have to be in writing. The record does not even say that the appellant was verbally suspended." F

The appellant argues, in the light of all this, that the action of the court *a quo* in reaching a material decision on its own, amounted to gross irregularity justifying interference by this court on the principles that have now become trite.[1] I am, for the reasons outlined below, persuaded by this argument.

Firstly, the respondent himself never took issue with the way he was made to leave his employment. If anything, as several excerpts from correspondence G

Gwaunza JA

A emanating from him showed, the respondent considered himself as having been suspended before permission to dismiss him was sought. He must have had a basis for this attitude.

Secondly, it was never put to the appellant that it had not properly suspended the respondent before applying for leave to dismiss him. Had this been done, B the appellant would have been given an opportunity not only to explain the process it had gone through in seeking to terminate the respondent's employment but also, if necessary, to proffer documentary or other evidence to support its assertions.

Thirdly, the two labour relations officers who heard the matter both proceeded on the premise that the respondent had properly been suspended and that the C appellant was at the time of the hearings

seeking permission to dismiss him. It is in my view safe to assume that the two labour relations officers must have had a reason for proceeding on that premise.

Fourthly and most importantly, the court *a quo* had ample opportunity in the five days during which *viva voce* evidence was led on the merits of the case, D to solicit evidence on the specific issue of the respondent's suspension, if, as now appears, it considered such evidence decisive. The court, however, did not solicit this evidence. Instead, it went on *mero motu* and after the event, to pick on a procedural irregularity neither raised nor argued before it, and base its determination solely on that technicality. This it did to the exclusion of the not insubstantial evidence placed before it on the merits of the case.

E As correctly contended on behalf of the appellant, this court has in the past emphasised the need to avoid determining matters on the basis of technical irregularities in labour disputes, particularly where such irregularities can be cured by the leading of evidence: See *Dalny Mine* v *Banda* 1999 (1) ZLR 220 (S) at 221 Evidence *in casu* could easily have been led on the technicality in F question.

The misdirection on the part of the court *a quo* is left in no doubt. It is my view, so serious as to leave this court with no option but to interfere with the determination of the lower court.

Having said that, I still deem it pertinent and necessary to consider the merits of the case, as argued in the court *a quo*.

G The allegations levelled against the respondent were that on 9 January 1994, he had abandoned his place of work before a relief operator arrived and without obtaining the authority of his supervisor. As a result, when a bread making machine broke down there was no one in attendance, leading to an interference with the bread making process, and the loss of 105 dozen loaves of bread. This

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conduct was deemed to be inconsistent with the fulfilment of the express or A implied terms of the respondent's contract of employment. It is recorded that the respondent himself acknowledged it was company policy that an employee doing the type of work that he was doing, was never to leave his post until his relief operator arrived. He did not deny abandoning his post before a reliever arrived. B

It is also recorded that the worker's committee representing the respondent in proceedings before the labour relations officer conceded that the respondent had acted wrongly by abandoning his post. Both the labour relations officer and, on appeal, the senior labour relations officer, were satisfied on the evidence placed before them, that the respondent was guilty of the misconduct alleged, hence their decision to grant, and confirm the granting of, permission C to dismiss the respondent.

I am satisfied the decisions were correct.

The respondent, in his heads of argument, has quite properly not sought to persist with his original defence to the charge. He has, instead, seized on the lifeline extended to him by the court *a quo*, and restricted himself to the new D defence that he had not been properly suspended by the appellant before dismissal. For the reasons already stated this was, for him, not a competent defence.

When all is considered, therefore, I find the appeal has merit and must succeed.

In the premises, it is ordered as follows: E

1. The appeal be and is hereby allowed with costs.
2. The decision of the court *a quo* is set aside and substituted with the following:

   "The appeal be and is hereby dismissed with costs." F

SANDURA JA & MALABA JA concurred.

Honey and Blanckenberg, appellant's legal practitioners G

1 See in this respect *Muzuva* v *United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S); *National Foods Ltd* v *Magadza* S-105-95; and *Mpumela* v *Berger Paints (Pvt) Ltd* 1999 (2) ZLR 146 (S).

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/TOTAL ZIMBABWE (PVT) LTD v MOYANA 2005 (1) ZLR 65 (H)

TOTAL ZIMBABWE (PVT) LTD v MOYANA 2005 (1) ZLR 65 (H)

Citation	2005 (1) ZLR 65 (H)
Case No	Judgment No. S-127-04
Court	Supreme Court, Harare
Judge	Sandura JA, Malaba JA & Gwaunza JA
Heard	19 October 2004
Judgment	27 January 2005
Counsel	*A Gijima* for the appellant No appearance for the respondent
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

C **Employment** — *contract — termination — grounds for — worker employed on basis of his specialised skills — failure to perform work with reasonable skill and competence — such a ground for dismissal under his code of conduct*

Headnote

D The respondent was charged under a code of conduct with "unsatisfactory work performance related to lack of skill which the employee expressly or by implication holds himself out to possess". He was found guilty and dismissed. He appealed to the Labour Court and succeeded on the grounds that the offence charged also fell under another section of the code for which the punishment was a written warning. On appeal:

E *Held,* that the two offences penalised different breaches of duty. An employee who holds himself out as being skilled to do a certain type of work and is employed on that basis impliedly undertakes that he possesses and will exercise reasonable skill or competence in that work. Throughout the period of the employment he owes a duty to his employer to perform his work with reasonable skill or competence. "Skill" embraces F "care", such that facts which show lack of "due care" in the performance of work may be evidence of lack of skill which an employee charged with incapability or incompetence by implication held himself out to possess. There is no distinction in this situation between possessing skill and exercising it. When an employee signs a contract of employment which G has a specialised job description, which has been brought to his attention, the implication is that he has the requisite skill for the proper performance of the work that he was engaged. In signing the contract, he has by implication undertaken to exercise

reasonable skill in the performance of the work in its various facets. Failure to do so could render him liable to dismissal.

Malaba JA

Cases cited A

Lister v Romford Ice & Cold Storage Co [1957] AC 555

Case information

A Gijima for the appellant

No appearance for the respondent B

Judgment

MALABA JA: This is an appeal against the judgment of the Labour Court dated 27 May 2003, setting aside the dismissal of the respondent ("Moyana") from employment with the appellant ("Total") and ordering that he be reinstated in his original position without loss of salary and benefits failing which he be paid damages, the quantum of which was to be agreed upon by the parties or calculated by the Labour Court. C

The facts of the case are these. Moyana was employed by Total as a "lube despatch supervisor" from 8 April 1999 when he signed the contract of employment. It was a requirement that a person employed as a "lube dispatch supervisor" had to have accounting skills. The specialised job description signed by Moyana stated that a person could become a "lubes despatch supervisor" only if he had passed five subjects at "O Level", including Mathematics and Accounts or Science, and had at least one year's working experience in a similar environment. The duties to be performed by a "lubes despatch D supervisor" were described as including:

"1. Daily stock counts and updating stock ledgers.
2. Monitoring all receipts from OBEL and making purchase receipts. E
3. Supervising the loading and despatching of lubes to customers, depot transfers and export orders.
4. Supervising all decants and raising the necessary documents."

In carrying out the duty of supervising the loading and dispatching of lubes, the person was required to be present at the loading bay and personally count F the number of items loaded onto the truck to satisfy himself that the correct quantities were loaded and dispatched. He was also required to physically examine the products to satisfy himself that they were of good quality. When he had satisfied himself that the loaded products were what was ordered and tallied with what was recorded in the delivery note, the supervisor would sign G the delivery note certifying that the correct quantity of products had been loaded and authorising their dispatch.

In signing the contract of employment on 8 April 1999, Moyana had by implication held himself out to Total to be in possession of the skill it required in a person it intended to employ as a "lubes dispatch supervisor". He was H

Malaba JA

A employed on the basis that he was possessed of the requisite skill or competence in the work described.

On 21 July 1999 Moyana was on duty when he was called to the stores office to explain aspects of his functions to internal auditors for purposes of obtaining an I.S.O. 9002 certification. A truck which was already at the loading bay was loaded with products for dispatch in the absence of Moyana.

B A security guard then brought a delivery note to Moyana in the stores office. Moyana signed the delivery note certifying that the quantity of goods recorded therein tallied with that in the truck. In signing the delivery note he authorised the dispatch of the goods. Moyana had not physically examined the goods in the truck, nor had he counted them. The certification turned out C to be false, in that there were eight extra cartons of 4 x 5 litres of quartz 40 motor oil loaded onto the truck,

which were about to be unlawfully dispatched on the authority of the delivery note signed by Moyana.

On 3 August 1999 Moyana appeared before a designated officer charged with the contravention of s 3 of the Group IV offences under the Employment Code D of Conduct for the Commercial Sector ("the Code"), that is to say, "unsatisfactory work performance related to lack of skill which the employee expressly or by implication holds himself out to possess".

The allegation against Moyana was that in signing the delivery note without having personally counted the goods in the truck to satisfy himself that the correct number ordered was dispatched, he had breached the undertaking he E had by implication made to exercise the reasonable skill in the performance of his duties as a "lubes dispatch supervisor".

In his defence, Moyana said he signed the delivery note without verifying whether the goods recorded therein tallied with those loaded in the truck because of pressure of having to attend to the internal auditors. He, however, F conceded that he could have stopped what he was doing with the internal auditors and attended to his contractual obligations.

G On 13 August 1999 Moyana was found guilty as charged and dismissed from employment. He appealed unsuccessfully to the local joint committee and the negotiating committee of the National Employment Council for the Commercial Sector.

On 18 January 2001 Moyana appealed to the Labour Court on the ground that he had been wrongly charged with the offence of "unsatisfactory work performance" due to "lack of skill which the employee expressly or by implication holds himself out to possess", which was punishable by dismissal. He said his conduct was due to carelessness. It was contended that he should H have been charged with contravening s 3 of the Group I offences under the

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Code, that is to say, "unsatisfactory work performance" due to carelessness A particularised as "performance of duty without the exercise of due care and attention".

The Senior President of the Labour Court, in giving judgment, said that Moyana was dismissed from employment "on allegations of unsatisfactory work performance". He went on to state that: B

> "The offence is classified under Group One offences where it is punishable by a written warning.
>
> The same offence also falls under Part Four of the registered Code of Conduct where it is punishable by dismissal. … I am therefore persuaded that the appellant's act of misconduct was punishable by a written warning in terms of Group One offences." C

The contention on appeal was that the decision of the Labour Court that one offence of unsatisfactory work performance was classified under two categories of offences in the Code for purposes of punishment and that the question for determination was whether Moyana's act of misconduct was punishable with dismissal or by a written warning was clearly wrong. I agree. D

The ground on which the judgment of the negotiating committee was appealed against was that Moyana had been wrongly charged with and found guilty of the offence of contravening s 3 of the Group IV offences under the Code. The argument was that he ought to have been charged with and convicted of contravening s 3 of the Group I offences. It was accepted that these were two offences with different essential elements classified under two different categories of offences and attracting different E penalties.

Whilst both offences arose out of performance of work because of the nature of the relationship between the parties, they prohibited breaches of different legal duties in a contract of employment. The offence with which Moyana was charged prohibited breach of the undertaking by an employee upon engagement F that he would exercise the skill in the performance of the work which he expressly or by implication held himself out to the employer to possess and on the basis of which representation he would have been employed. The offence was thus described as "unsatisfactory work performance" due to "lack of skill which the employee expressly or by implication holds himself out to possess". In other words, unsatisfactory work performance was G evidence of a breach in the particular circumstances of the case of the contractual obligation assumed by the employee upon engagement to exercise reasonable skill in doing the type of work for which he was employed. He would by implication have held himself out in agreeing to do a job requiring a particular skill that he had the requisite skill. H

Malaba JA

A The basis of the offence is described in *Chitty on Contracts* 26 ed para 3899 as follows:

> "An employee who holds himself out as being skilled to do a certain type of work and is employed on that basis impliedly undertakes that he possesses and will exercise reasonable skill or competence in that work. Throughout the period of the employment he owes a duty to his employer B to perform his work with reasonable skill or competence."

An employee who professes a particular skill or competence requiring training or experience would be liable to be charged with contravening s 3 of the Group IV offences if he breached the legal duty he voluntarily assumed upon signing the contract of employment.

C On the other hand, an employee who did not profess a particular skill or competence and did not take up a job requiring a particular skill to do cannot be charged with the same offence because he would not have been in a position to breach the legal duty on which the offence is based. He would, like any other employee, have been under a legal duty to perform his work with due care. There would be an implied term in the contract of employment that D he would exercise reasonable care in the performance of his duties. Breach of that duty would make him liable to a charge of contravening s 3 of the Group I offences under the Code.

"Skill" embraces "care", such that facts which show lack of "due care" in the performance of work may be evidence of lack of skill which an employee E charged with incapability or incompetence by implication held himself out to possess. In *Lister* v *Romford Ice and Cold Storage Co* 1957 AC 555 Viscount Simonds said at pp 572-573:

> "It is, in my opinion, clear that it was an implied term of the contract that the appellant would perform his duties with proper care. The proposition of law stated by Willes J in *Harmer* v *Cornelius* (1858) 5 C.B.N.S. 236, 246, F has never been questioned: 'When a skilled labourer', he said, 'artisan, or artist is employed there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes – *spondes peritiam artis*. Thus, if an apothecary, a watch-maker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts. … An express promise or express G representation in the particular case is not necessary. I see no ground for excluding from, and every ground for including in, this category a servant who is employed to drive a lorry which, driven without care, may become an engine of destruction and involve his master in very grave liability. Nor can I see any valid reason for saying that a distinction is to be made between possessing skill and exercising it. No such distinction is made H in the cited case: on the contrary, 'possess' and 'exercise' are there

Malaba JA

> conjoined. Of what advantage to the employer is his servant's undertaking A that he possesses skill unless he undertakes also to use it? I have spoken of using skill rather than using care, for 'skill' is the word used in the cited case but this embraces care. For even in so-called unskilled operations an exercise of care is necessary to the proper performance of duty."

When Moyana signed the contract of employment he was aware from the specialised job description, which had been brought to his attention, that it B was on the basis that he had the requisite skill for the proper performance of the work that he was engaged. In signing the contract, he had by implication undertaken to exercise reasonable skill in the performance of the work in its various facets. The charge of misconduct alleging that he had failed to exercise reasonable skill in the performance of the work in breach of the undertaking C to do so was in the circumstances appropriate.

The question the Labour Court should have determined was whether the decision by the negotiating committee that the evidence adduced had on a balance of probabilities proved the act of misconduct charged against Moyana was certainly wrong or, to put it another way, so outrageous in its defiance of logic that no reasonable tribunal could have made it. That is clear D from the ground of appeal which was that:

> "The negotiating committee of the N.E.C.C.S. misdirected itself by finding the appellant guilty of unsatisfactory work performance as charged. There was no evidence to prove that the appellant had breached clause 3 of Part 4 offences as set out in the Code of Conduct." E

In light of the misdirection committed by the Labour Court in failing to address its mind to the question, this Court is at large. It is important to bear in mind that what was in issue in this case

was not the possession of the requisite skill for the particular job Moyana was engaged to do. What was in issue was whether or not he had *exercised* the skill. The evidence showed that he did not exercise his counting or enumerating skill, as he did not go to the loaded F truck to count the items that had been loaded before signing the delivery note authorising their dispatch.

That obligation was fundamental to the proper performance of Moyana's duties. He had held himself out to Total to possess the particular skill by producing evidence of passes he had at "O-Level" in Mathematics and Accounts. He had also acquired the necessary skill through experience. G

It seems to me that in signing such an important document as a delivery note without having seen the products it referred to as having been loaded onto the truck, Moyana denied himself the opportunity of exercising any of the skills he had undertaken to exercise in the performance of his duties. He was in fact committing a fraud on his employer, in that by his signature on the H

Malaba JA

A delivery note he misrepresented that he had exercised reasonable skill by physically checking and counting the contents of the truck. He certified everything as being in order when that was not the case.

Moyana argued that he was under pressure to assist internal auditors with information on his duties for purposes of getting the I.S.O. 9002 certification. B He was admitting that he did not exercise reasonable skill at the time he was under a legal duty to do so. To blame pressure of work is not a defence to the charge of incompetence in the circumstances because the job description in which the activities of the work he agreed to perform were set out made it clear that it was the type of work which had to be performed under pressure. He was expected to use his skills to manage the pressure and satisfactorily perform C his duties.

In my view, all these facts show lack of skill which Moyana by implication held himself out to possess. On the authority of *Lister's* case *supra* the word "possess" as used in the Code includes the word "exercise". The evidence shows lack of skill in Moyana at the time, in the sense that he failed to exercise reasonable skill which he had undertaken to exercise in the performance of his D duties. The decision of the negotiating committee finding Moyana guilty of the offence charged and dismissing him from employment was, in my view, correct.

The appeal is accordingly allowed with costs. The judgment of the Labour Court is set aside and substituted with the following —

E "The appeal against the decision of the negotiating committee is dismissed with costs."

Sandura JA & Gwaunza JA concurred

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

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Source:
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THOMAS v COMMISSIONER OF WAR VICTIMS PENSIONS & ANOR 2005 (1) ZLR 72 (S)

Citation 2005 (1) ZLR 72 (H)

Case No Judgment No. S-128-04

Court Supreme Court, Harare

Judge Chidyausiku CJ, Ziyambi JA & Malaba JA

Heard 23 September 2004

Judgment 27 January 2005

Counsel *Charles Thomas & Partners*, appellant's legal practitioners
Civil Division of the Attorney-General's Office, respondents' legal practitioners

Case Type Civil appeal

Annotations No case annotations to date

Flynote

Pensions — *disablement pension — disablement due to injury sustained during war in Zimbabwe — to whom such pension payable — need for person to have been engaged in an occupation and in receipt of earnings when injury sustained — unemployed minor sustaining injury — no pension payable* D

Statutes — *War Victims Compensation Act [Chapter 11:16] — disablement pension payable under Act — to whom such pension payable — need for claimant to have been engaged in an occupation and in receipt of earnings when injury sustained — unemployed minor sustaining injury — no pension payable — degree of disablement — claimant must show* E *that disablement had reached a final and stationary condition — must also show that he had not lost his employment as a result of his disablement or suffered similar loss*

Headnote

In 1979, when the appellant was aged ten years, he sustained an injury which resulted in a 50 per cent permanent disability in respect of a below the F knee amputation to the right leg. Subsequently, and after the coming into operation of the War Victims Compensation Act [*Chapter 11:16*], he applied to the first respondent for compensation. As the first respondent was satisfied that the appellant had sustained the injury during the war, and, was as provided for in the Act, he was awarded a "disfigurement G compensation". This was paid to him in addition to educational, clothing and medical allowances throughout the period of his education. On turning 19 years on 5 October 1989, he applied to the first respondent for "disablement pension" in terms of s 8(1) of the Act. Notwithstanding the fact that at the time of his injury, the appellant was an unemployed minor H

Malaba JA

A and had not been engaged in any form of employment, he was awarded a "disablement pension" with effect from that date. He later applied to the first respondent for his disablement pension to be paid to him with effect from 1 July 1980. In so doing, he relied upon the provisions of s 9(1) of the Act. This further application was refused by the first respondent and subsequently, on appeal, by the Minister responsible, who was the B second respondent. His application to the High Court upon review was similarly dismissed. On appeal to the Supreme Court:

Held, that the appellant should not have been awarded a "disablement pension" with effect from 5 October 1989 because he could not show, as required by s 8(1) of the Act, that he had been engaged in an occupation or employment immediately prior to the date of injury.

C *Held*, further, that the appellant also had to show, for the purposes of s 9(1) of the Act, that the degree of his disablement had reached a final and stationary condition and that he had not been discharged from employment or compelled, as a result of his disablement, to change his normal occupation or to follow a lower standard of education.

D *Held*, further, that it followed that the appellant was not entitled to a "disablement pension" from the earlier date of 1 July 1980 and that the appeal should be dismissed.

Judgment

MALABA JA: This is an appeal from a judgment of the High Court delivered on 5 October 2003, dismissing with costs an application for review of the E decision of the respondents refusing a claim by the appellant under the War Victims Compensation Act [*Chapter 11:16*] ("the Act") to be paid a "disablement pension" awarded on 5 October 1989 from 1 July 1980.

The Act came into operation on 14 November 1980. Its object was to make provision for the payment of compensation to persons who suffered F disablement from injuries sustained during the "war" of liberation. The "war", as defined in s 2, was the "armed conflict which occurred in Zimbabwe and neighbouring countries between the 1st January 1962 and the 29th February 1980, in connection with the bringing about of, or resistance to, political and social change in Zimbabwe". Disablement under the Act was "for employment or permanent injury or disfigurement".

G Compensatable disablement had to have been caused by an injury sustained before 1 March 1980. Compensation was payable after the first respondent ("the Commissioner") had satisfied himself that the claimant, who was required to make the application for compensation in terms of s 5 of the Act, sustained the injury during the "war" and before 1 March 1980.

Malaba JA

It is common cause that in 1979 the appellant, who was aged ten years, A sustained an injury which resulted in a 50% permanent degree of disability in respect of a below the knee amputation to the right leg. Upon an application for compensation, the Commissioner was satisfied that the appellant had sustained the injury during the war and before 1 March 1980. The appellant was awarded a "disfigurement compensation" in addition to educational, B clothing and medical allowances, which were paid to him throughout the period of his education until he qualified as a legal practitioner.

The disablement compensation and allowances were paid in terms of s 25 of the Act containing special provisions relating to the disablement of "minors", defined as persons who had not attained the age of nineteen years. Subsection (2) of s 25 provides that: C

> "(2) Notwithstanding anything contained in this Act –
>
> (a) there shall be paid in respect of the disablement of a minor such compensation as the Commissioner may consider D appropriate after taking into account –
>
> (i) such of the provisions of this Act as the Commission may consider relevant; and
>
> (ii) the circumstances of the minor and of the parents, if any, of the minor;
>
> (b) no pension shall be payable to any person in respect of the death of a minor".
>
> "Compensation" is defined in s 2 of the Act as "any compensation, pension, allowance or other benefit including medical aid, which is E payable or provided for under this Act".

The compensation paid to the appellant for his disablement was not a pension. The Commissioner had considered the fact that, having been a minor and unemployed at the time he sustained the injury which caused his disablement, the appellant had no earning capacity to be paid a pension. The compensation F was not for disablement for employment.

On turning nineteen on 5 October 1989 the appellant applied to the Commissioner for a "disablement pension", defined in s 2 of the Act as "a pension payable in terms of s 8". Subsection (1) of s 8 provides that a disabled person, whose degree of disability is one hundred percent, shall be entitled to a disablement pension calculated according to the prescribed formula. Subsection (2) of s 8 G also provides that a disabled person, whose degree of disability is not one hundred percent, shall be entitled to a disablement pension calculated in accordance with a prescribed formula. The entitlement is to a disablement pension as opposed to any of the other forms of compensation. The claimant H

Malaba JA

A would have to show to the satisfaction of the Commissioner that the circumstances of his disablement met all the requirements for calculation of the pension prescribed in s 8 of the Act.

Subsection (1) of s 8 requires that a disablement pension payable to a person, whose degree of disability is one hundred percent, should be an amount equal B to the aggregate of forty-five percent of *his earnings immediately prior to the date of his injury* if he continued to carry out his normal occupation with no reduction in earning capacity. It should be an amount equal to the aggregate of

ninety percent of his earning immediately prior to the date of his injury if as a result of the disablement he was discharged or compelled to follow a lower standard of occupation. The same formula has to be applied where the C disabled person has not changed his normal occupation, but has had *a reduced earning capacity as a result of his disablement.*

Subsection (2) of s 8 provides that a disablement pension to be payable to a disabled person, whose degree of disability is less than one hundred percent, shall bear the same proportion to the pension which would have been payable in terms of subs (1) of s 8 had his degree of disablement been one hundred D percent as his actual degree of disfigurement bears to one hundred percent.

It is clear from the provisions of s 8 of the Act, in terms of which a disablement pension is payable, that the fundamental requirement for entitlement is that the disabled person should have been engaged in an occupation or employment immediately prior to the date of his injury. The measure of the disablement E pension is not only the degree of the disability then suffered but its effect on his normal occupation, that is to say, whether he carries on without a reduction of earning capacity or is compelled as a result of the disablement to change his normal occupation or to follow a lower standard of occupation. The degree of disablement as assessed is compensated in money by a sum equal to the aggregate of amounts, being percentages of what the disabled person was F earning immediately prior to the date of his injury.

Although the Commissioner awarded the appellant a disablement pension on 5 October 1989, I am of the view that the decision was not in accordance with the provisions of s 8 of the Act. As the appellant was an unemployed minor at the time he sustained the injury which caused the disablement in respect G to which compensation was claimed, he could not show that he was engaged in an occupation or employment immediately prior to the date of his injury. It was not enough for purposes of entitlement to a disablement pension payable in terms of s 8 of the Act that he had suffered a disablement during the "war" and before 1 March 1980, because that would have entitled him to the other forms of compensation such as "disfigurement compensation" and allowances.

2005 (1) ZLR p76

Malaba JA

It is clear to me that a disablement pension payable in terms of s 8 of the Act A is based upon what the claimant was earning immediately prior to the date of his injury.

Having secured what, in my view, was a wrong award of a "disablement pension", the appellant sought to push his luck too far. He demanded that the disablement pension be paid to him with effect from 1 July 1980, citing the B provisions of subs (1) of s 9 of the Act to buttress his claim. When the Commissioner refused to accede to his demand, the appellant appealed to the second respondent ("the Minister") in terms of s 29 of the Act. The Minister dismissed the appeal. The appellant took the dismissal of the appeal to the High Court for review, on the ground that it was certainly wrong. The Minister had held that a disablement pension was not payable to the appellant with C effect from 1 July 1980 because he had no earnings immediately prior to the date of his injury. The High Court dismissed the application. It held that the decision of the respondents was correct because the appellant was not entitled to a disablement pension, let alone one payable with effect from 1 July 1980. D

Mr *Chikuku*, for the appellant, conceded on appeal that no right could have accrued to the appellant to payment of a disablement pension from 1 July 1980 in terms of subs (1) of s 9 of the Act because at that time the appellant could not have been awarded a disablement pension as he had not been engaged in any occupation immediately prior to the date of his injury. Leaving aside the correctness of the decision to award the appellant a "disablement E pension" on 5 October 1989, the concession was properly made.

Subsection (1) of s 9 of the Act does not detract from the force of the requirement that a claimant of a disablement pension must show to the satisfaction of the Commissioner that he was engaged in an occupation or employment immediately prior to the date of his injury sustained during the F war and before 1 March 1980. The purpose of s 9 of the Act was to fix the dates from which the disablement pension, calculated in accordance with the formula prescribed in s 8, was payable to disabled persons entitled to that particular form of compensation.

Section 9 provides as follows:

> "9. **Date of accrual of disablement pension** G

(1) Subject to subsection (2), where the degree of disablement of a disabled person has, in the opinion of the Commissioner, reached a final and stationary condition, the disablement pension shall be payable with effect from the 1st July 1980:

2005 (1) ZLR p77

Malaba JA

A Provided that where the disabled person has been discharged from his employment or is compelled as a result of his disablement to change his normal occupation or to follow a lower standard of occupation before the 1st January 1982, his disablement pension shall be payable in accordance with the degree of disablement as assessed on or after the date of that discharge or compulsion. B

(2) Where the degree of disablement of a disabled person has not, in the opinion of the Commissioner, reached a final and stationary condition before the 1st January 1982 the disablement pension –

(a) shall be payable in accordance with the degree of disablement as assessed on or after the 1st January 1982, with effect from the 1st July 1980, and C

(b) shall be subject to variation or withdrawal according to the degree of disablement as assessed from time to time with effect from the date referred to in subsection (4) of section eight."

What is of critical importance is that the right to have a disablement pension paid with effect from 1 July 1980 accrues to a disabled person who before D 1 January 1982 would have been suffering from a disablement whilst in employment and its degree had reached a final and stationary condition. The appellant had to show at the time the disablement pension was awarded on 5 October 1989 that on 1 January 1982 the degree of his disablement had reached a final and stationary condition and that he had not been discharged from employment or compelled as a result of his disablement to change his E normal occupation or to follow a lower standard of occupation.

The appellant could not satisfy these requirements. Although the degree of his disablement may have reached a final and stationary condition before 1 January 1982 he was not in employment at the time. Even where the degree of disability had not reached a final and stationary condition on 1 January 1982, necessitating its assessment from time to time after that date, the right F to payment of the disablement pension with effect from 1 July 1980 would have accrued to a disabled person only if he satisfied the Commissioner that he had been engaged in an occupation immediately prior to the date of his injury. The right could not accrue to the appellant by virtue of turning nineteen, because he still suffered the legal disadvantage that his disablement was not caused G by an injury sustained when he was engaged in an occupation immediately prior to the date of its occurrence.

The appeal has no merit. It is dismissed with costs.

2005 (1) ZLR p78

Malaba JA

Chidyausiku CJ, and Ziyambi JA concurred A

Charles Thomas & Partners, appellant's legal practitioners

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

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Source:
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S v MUKUZE & ANOR 2005 (1) ZLR 79 (H)

2005 (1) ZLR p79

Citation 2005 (1) ZLR 79 (H)

Case No Judgment No. HH-17-05

Court	High Court, Harare
Judge	Mavangira J
Heard	25 January 2005
Judgment	27 January 2005
Counsel	*Dururu*, for the applicants *Godzi*, for the respondent
Case Type	Application in terms of s 160(2) of the Criminal Procedure and Evidence Act [*Chapter* 9:07]
Annotations	Link to case annotations

Flynote

C **Criminal Procedure** — *charge —dismissal of for failure to start trial within 6 months of committal for trial — meaning of dismissal — not tantamount to an acquittal – Criminal Procedure and Evidence Act [Chapter 9:07] — s 160(2) — purpose of provision — meant to ensure that trials of persons committed for trial are expeditiously conducted — protects* D *accused persons from being unreasonably kept under committal for longer than six months when the trial does not take place during that period*

Headnote

Section 160(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] E provides that if an accused person is not brought to trial after the expiry of six months from the date of his committal for trial, his case shall be "dismissed". The section is meant to protect accused persons from being unreasonably kept under committed for trial for longer than six months when the trial has failed to take place during that period. It is also meant to ensure that the Attorney-General ensures that trials of accused F persons committed for trial are expeditiously conducted. In the event that the trial does not take place within the six-month period, the section does not entitle accused persons to a discharge or an acquittal, nor does it relate to the running of prescription.

Legislation considered G

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 23, 110(2) and 160(1), (2) and (3)

Case information

*** *Dururu,* for the applicants

H *** *Godzi,* for the respondent

2005 (1) ZLR p80

Mavangira J

Judgment

MAVANGIRA J: In early October 2002, the two applicants were arrested on A a charge of armed robbery of a motor vehicle. On 14 October 2002, they appeared before a magistrate and were remanded in custody. In mid-April 2002, the applicants were indicted for trial before the High Court. Their co-accused, one Fanuel Mkandla was similarly indicted.

Although the trial was set down for 31 May 2004, it did not commence. One B Runyararo Munhuweyi, a legal practitioner who was then representing the third accused person, that is, Alexio Katapa, in an affidavit filed in support of this application, states that the trial did not commence because the first accused, that is Garikai Mukuze had not yet been interviewed by his legal practitioner. On the

other hand, Benjamin Chidenga, a senior law officer in the Attorney-General's office who was tasked with prosecuting the matter, in his C affidavit filed in opposition to the application, states that the trial did not commence due to the non-availability of defence lawyers as well as state witnesses.

The matter was then set down again for 13 September 2004. Again, it failed to commence. Munhuweyi states in his affidavit that the first accused's legal D practitioner applied before the Judge, to be excused as he was already in the middle of another *pro deo* matter. Furthermore, Mr Chidenga, the State counsel, did not come to court and after waiting for close to two hours, Mr Phiri from the Attorney-General's office came and explained that the Public Prosecutor who was handling the matter was unavailable. Chidenga in his affidavit merely states that he was meant to prosecute the matter but Mr Phiri E attended at court and the matter could not proceed because the first accused's legal practitioner recused himself from the case.

The learned judge's notes in the file indicate that Mr R. Gumbo for the first accused indicated that he was not ready. Mr Munhuweyi and Miss Maunganidze for the third and second accuseds respectively, were ready. Mr F Gumbo indicated that sometime in April he got two *pro deo* matters. He had returned the instant one. On 8 September 2004, he got another notice to do the matter. He had thus come to apply to be excused. He had spoken to the Registrar. He had also only got the papers on the Friday at 2.00 p.m. He resided in Bindura. The notes also indicated that Mr Phiri advised the court that Mr Chidenga was not available. Mr Phiri said they had phoned Mr Chidenga but G his phone battery was low. Mr Chidenga had not turned up for work.

The learned Judge's notes further indicated as follows:

> "Witnesses available – all present except the complainant
>
> Everything was ready. H

> A At the request of Mr Phiri, postponed to 4/10/04."

On 4 October 2004, again the trial did not commence. However, the applicants co-accused, Fanuel Mkandla pleaded guilty, was convicted and sentenced on that day. Subsequently, the applicants were taken to the Magistrates court to appear before the magistrate in court 19 for trial on the same charge for which B they had been indicted. This triggered the filing of an urgent chamber application by the applicants which was heard on 20 December 2004 culminating in judgment No. HH-2-05. The learned Judge therein found that the transfer of the applicant's case to the magistrate was unlawful as it was done without an application and in any event the granting of such an application by the High Court is not provided for under s 161(1) of the Act. He then ordered as follows: C

> "1. The applicants' criminal case HC 59-61/04 (Ref CRB 1276-7/04 is before the wrong court that is Harare Regional Court 19.
>
> 2. That the applicant's case No. HC 59-61/04 be and is hereby reinstated before the High Court.
>
> 3. That the respondent cause the applicants to appear before the High Court sitting as a criminal court by not later than the 28 January 2005."

D Apparently, in a bid to comply with the above cited order the respondent caused the matter to be set down for the week commencing 24 January 2005.

It is pertinent to note that the learned judge at page 5 of the cyclostyled judgment referred to above said:

> "The proviso to section 160(2) and section 160(3) provide (sic) for E circumstances which interrupt the lapse of the six months period. If the six months period lapses without interruption then the accused is entitled to a dismissal of his case. It must however be noted that this can only be done when the court is satisfied there is no such interruption. This should be after hearing the reasons why the case did not get to trial within the stipulated period. In my view dismissal cannot be ordered after a cursory F inquiry based on the applicants' affidavits without affidavits from the investigating officer and the prosecutor who handled the case or an admission by the State that there are no valid reasons why the accused's case should not be dismissed. In this case the State did not submit opposing papers but Mr *Tokwe* appeared on short notice to defend the State's position without any documents on whether or not the application G should be dismissed.
>
> Mr *Dururu* conceded that a proper inquiry preferably before the High Court sitting as a criminal court is necessary before the applicant's case can be dismissed."

Mavangira J

On 19 January 2005, the applicants filed the instant application wherein they A seek an order in the following terms:

"1. The applicants' criminal case No. HC 59-61/04 be and is hereby dismissed.

2. The applicants be and are hereby discharged."

The applicants' affidavits in support of the application detail the history of B the matter from the time of their arrest. Also filed in support of the application is Runyararo Munhuweyi's affidavit reference to which has already been made above.

The respondent filed a notice of opposition to which was attached an affidavit by Benjamin Chidenga. I have also already made reference to its contents. C

It is the applicant's case that six months have elapsed since they were committed for trial before the High Court and as they have not been brought to trial yet, their case must, in terms of s 160(2) of the Criminal Procedure and Evidence act [*Chapter 9:07*], (the Act) be dismissed. It was submitted on their behalf that the State's failure to bring them to trial within the stipulated period was not occasioned by circumstances beyond the control of the Attorney- D General. It was argued that as the applicants have always been in custody, they have always been available to stand trial as they were, at all relevant times, at the disposal of the State, furthermore, that if any department of the State, was at fault, that would be tantamount to the Attorney-General's fault as all such departments are at the Attorney-General's "beck and call", he being the E representative of the State who is not merely a passive participant but the prime mover in any prosecution of any criminal matter. It was submitted in paragraph 9 of the court application that the trial having failed to take place as detailed above, the case against the applicants is prescribed and should be dismissed. Mr *Dururu*, in his oral submissions and in response to the State counsel's submissions, submitted that the proviso to s 160(2) falls within the F meaning of the phrase "… unless some other period is expressly provided by law …", in s 23(2) of the Criminal Procedure and Evidence Act (the Act).

Mr *Dururu* also submitted that by transferring the applicants' case to the Regional court, the Attorney-General abandoned his intention to proceed against the applicants in terms of the indictments that had been served by them for trial in the High Court and thereby abandoning the case. G

Section 160(2) and (3) of the Act provides:

"(2) If a person referred to in subsection (1) is not brought to trial after the expiry of six months from the date of his committal for trial, his case shall be dismissed: H

Mavangira J

A Provided that any period during which such person is, through circumstances beyond the control of the Attorney-General, not available to stand trial shall not be included as part of the period of six months referred to in this subsection.

(3) For the purpose of this section, a person shall not be deemed to have been committed for trial in any case in which the Attorney-General has in B terms of section one hundred and one ordered a further examination to be taken, until such further examination has been completed.

The Attorney-General's stance as submitted by Mr *Godzi*, is that whilst six months have elapsed since the applicants' indictment for trial, the accused persons were not available to stand trial due to no fault on the part of the Attorney-General. Mr *Godzi* submitted that if an accused is not able to C conduct his defence due to the non-availability of his legal practitioner he cannot argue that he was available to stand trial as it would not be possible for the trial to commence in the absence of his legal practitioner. The Registrar had dutifully arranged legal practitioners for the accused persons and had the legal practitioner for the first accused not recused himself as stated above, the D matter could have long been finalised.

The applicants were thus not available to stand trial through circumstances beyond the control of the Attorney-General and the proviso to subsection (2) of section 160 cannot therefore operate in favour of the applicants.

Mr *Godzi* also submitted that in terms of section 23 of the Act the case against the applicants can only prescribe after the lapse of twenty years from the time E when the offence was committed.

Further, that the dismissal provided for in s 160(2) is not equivalent or tantamount to an acquittal but is akin to a removal from remand. He further submitted that had that been the intention of the legislature it would have clearly stated so in specific terms. In any event a person is acquitted only if he has tendered a plea of not guilty to a charge. If F he tenders a plea of not guilty and thereafter further remand is refused, then he is entitled to a verdict but where he has not pleaded, he is not entitled to a verdict and cannot tender a plea of *autrefois acquit*. In any event, by virtue of s 23 of the Act, the offence prescribes after twenty years and the qualification in s 23(2) is not applicable *in casu*.

Mr *Godzi* also submitted that even if the Attorney-General should be found G to be partially to blame, the applicants are equally to blame because the first accused's legal practitioner was always not available on all the material occasions.

It is in my view, important to ascertain the meaning or effect of the dismissal provided for in s 160(2) of the Act. Is it tantamount or equivalent to an acquittal

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or is it merely akin to a refusal of further remand in a case where the accused A has not pleaded?

In terms of s 110(2) of the Act, on receipt of a written notice by the Attorney-General, the magistrate *shall* commit an accused person for trial before the High Court and grant a warrant to commit him to prison, there to be detained till brought to trial before the High Court for the offence specified in the warrant B or till admitted to bail or liberated in the course of law.

It is also in my view, important to read subsection (2) of s 160 in conjunction with s 160(1) of the Act, which provides:

> "Except as is otherwise expressly provided in this Act as to the postponement or adjournment of a trial, *every person committed for trial* or sentence whom the Attorney-General has decided to prosecute before C the High Court shall be brought to trial on such date as may be determined by the Attorney-General:
>
> Provided that the High Court may, on application by the accused and on good cause shown by him, order that the trial shall take place on an earlier date than that determined by the Attorney-General" (my emphasis). D

Clearly, s 160(2) is applicable in this matter because the applicants were committed for trial. The shorter *Oxford English Dictionary* gives the following meanings, amongst others, to the word "commit": "consign to custody" and "to consign officially to custody or confinement." This tallies with what actually happens in terms of section 110 of the Act, already referred to above.

In terms of subsection (1) of s160, the trial of a person committed for trial shall E be heard on the date determined by the Attorney-General. However, in terms of the proviso thereto, the trial may take place on an earlier date. In terms of subsection (2) of 160, if the trial of the person referred to in subsection (1) does not take place after the expiry of 6 months, the case shall be dismissed. In terms of the proviso thereto however, this is permissible only where the accused was F not available to stand trial at any stage during the six months period, due to circumstances within the control of the Attorney-General. In *casu,* the non-availability of the first accused's legal practitioner, cannot in my view be said to be a circumstance within the control of the Attorney-General. It is beyond the control of the Attorney-General. In my view, by ensuring that the accused was provided with *pro deo* counsel, the Attorney-General did all that was in G his power to do in respect thereof.

It is unfortunate that the respondent's papers do not give a full and clear explanation as to the non-availability of Mr Chidenga on 13 September 2004 as recorded in the learned Judge's notes made on that date. Without such explanation, the Attorney-General must, in my view, shoulder the blame for H

A the consequences thereof. But that is the date on which the first accused's legal practitioner asked to be excused by the court. I therefore agree with Mr Godzi that the applicants and the respondents were equally to blame for the failure of the trial to take place at least on 13 September 2004. But the fact remains, in my view, that the non-availability of the applicants to stand trial by reason of the first accused's legal practitioner's non-availability, cannot B be laid at the Attorney-General's door.

It seems to me however, that the fact cannot now be escaped that a period of six months has expired since the applicant's committal.

We still then come back to the question of what the effect of that dismissal is, as the applicants also seek an order for their discharge. The shorter *Oxford* C *English Dictionary* gives the meanings, amongst others, to the word "discharge", "to clear of a charge or accusation; to exculpate, acquit." It also gives the following meanings, "to dismiss (one charged with an offence); to release from custody, liberate, to send away, let go".

Mr *Dururu* submitted that the dismissal contemplated herein is in effect an D acquittal.

As stated above already, it is important to note that s 160 becomes relevant only because the applicants were on 14 April 2004 committed for trial. Furthermore, as Mr *Dururu* submitted committal has serious consequences on the life liberty and livelihood of an accused and on his family and dependants. It must therefore have been for that reason that the legislature E decided to enact the proviso in question. But the legislature also clearly spelt out, in clear and unambiguous language that the "right of prosecution for *any offence other than murder*", shall "be barred by the lapse of twenty years from the time when the offence was committed", unless some other period is *expressly provided* by law.

F In my view, s 160(2) does not expressly provide for the prescription of "any offence other than murder" if a person committed for trial before the High Court on that offence is not brought to trial after the expiry of six months. The dismissal relates, in my view, to the committal and the effects or consequences or implications thereof; such consequences or effects as appear, for example in s 110 already referred to above. In my view, the dismissal relates to a release G from committal and there can be no question of prescription having run by virtue of s 160(2). Section 160(2) does not qualify as and is not an express provision for the running of prescription as contemplated by s 23(2) when it states "unless some other period is expressly provided by law."

2005 (1) ZLR p86

Mavangira J

In my view, s 160(3) is clearly of no relevance in this application and merits no A further mention or discussion.

I thus find that s 160(2) is meant to protect accused persons from being unreasonably kept under committal for trial for longer than six months when the trial has failed to take place during that period. It is also, in my view, meant to ensure that the Attorney-General ensures that trials of accused persons B committed for trial are expeditiously conducted. There must be a balancing of the interests of society *vis-à-vis* the interests of the accused person. Indeed, our constitution recognises the right of an accused person to be afforded a fair hearing within a reasonable time. In my view, s 160(2) was enacted in that spirit and against such backdrop. But s 160(2) does not entitle the applicants to a discharge or acquittal nor does it relate to the running of prescription. It C merely relates to release from committal.

In the result and for the above reasons, it is ordered as follows:

IT IS ORDERED:

That in terms of s 160(2) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*], the applicants' case be and is hereby dismissed. D

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Source:
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MAZODZE v MANGWANDA 2005 (1) ZLR 87 (H)

2005 (1) ZLR p87

Citation	2005 (1) ZLR 87 (H)
Case No	Judgment No. S-100-04
Court	Supreme Court, Harare
Judge	Chidyausika CJ, Ziyambi JA & Gwaunza JA
Heard	15 July 2004
Judgment	31 January 2005
Counsel	*G Mandizha*, for the appellant *G Machingambi* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

C **Contract** — *performance — condition precedent — condition that purchaser of house obtains loan from specific bank — loan obtained from building society — equivalent performance entitling purchaser to take transfer*

Headnote

The appellant sold a house to the respondent. One of the conditions of the sale was that the respondent should obtain a loan from a specific bank. D Instead of obtaining a loan from that bank, the respondent obtained a mortgage bond from a building society. He tendered payment but the appellant sought to resile from the contract on the pretext that the transference was not strictly in accordance with the wording of the agreement. The High Court upheld E an application by the respondent for an order that the house be transferred to him. On appeal, the appellant sought to lead further evidence that he had, on purporting to cancel the agreement, sold the house to a third party. This fact had not been disclosed to the High Court.

Held, that even though there was a condition precedent, the respondent had satisfied it by tendering the purchase price within the stipulated period F even though the money was not from the specific bank.

Held, further, that, when the High Court issued the order for specific performance, the property was registered in the name of a third party, who was not a party to the proceedings. Had the court been aware that the property in question had already been transferred to a third party, it would have directed that the third party be joined to the proceedings and G given an opportunity to defend his rights in the property. Accordingly, the matter would be referred back to the High Court, so that the third party could be joined and a determination reached after that party had shown whether or not he was an innocent purchaser.

Chidyausiku CJ

Case information

G Mandizha, for the appellant A

G Machingambi for the respondent

Judgment

CHIDYAUSIKU CJ: The facts of this case are as follows. On 28 January 2003, the parties entered into a written agreement of sale of the appellant's house, Stand No. 1837 Kushinga Crescent, Ruwa, to the respondent for the sum of B $11 000 000. The $11 000 000, in terms of clause A of the agreement's special conditions, was to be raised by the respondent obtaining "a 100% bond from Kingdom Bank as referred (*sic*) in the purchase price and terms of payment above within 30 days of the date hereof which bond will be applied for by the purchaser on the signing hereof and will be applied for by the purchaser on the signing hereof and will be accepted by him when offered". C

Condition 2 of the general conditions provides for a bank guarantee or other guarantee acceptable to the seller for the payment of the purchase price. The agreement provides that in the case of conflict between general conditions and special conditions, special conditions shall prevail. Instead of applying for the 100% bond from Kingdom Bank, the respondent applied for and obtained a CABS D loan guaranteed by Kingdom Bank as surety to the CABS loan. The appellant's appointed conveyancers on 21 February 2003 wrote to the respondent tendering transfer of the property. The conveyancers attached the mortgage bond for the respondent to sign at the foot of the second page. This means that by 21 February 2003 CABS had advised the appellant's conveyancers of its willingness to loan to the respondent $11 000 000 for the E purchase of the appellant's property.

The respondent argued in the court *a quo* that even though there was a condition precedent, he had satisfied it by tendering the purchase price within the stipulated period even though the money was not from Kingdom Bank. He argued that all the parties wanted was securing of the purchase price, whether *in forma specifica* or by an equivalent act. He further argued that his F obtaining of a loan from CABS guaranteed by Kingdom Bank constituted a substantial performance of the obligation contained in the special condition, which entitled him to an order requiring the appellant to sign all the necessary papers for the transference of the property to his name and, in the alternative, that the Deputy Sheriff be authorised to sign the relevant papers on behalf of G the appellant. The appellant, on the other hand, argued that because the payment of the purchase price was not strictly in accordance with the wording of the agreement, he was entitled to resile from the agreement.

The learned judge in the court *a quo*, after a very careful analysis of the facts and the law applicable came to the conclusion that the respondent should H

Chidyausiku CJ

A succeed and ordered the appellant to sign all the necessary papers to transfer the property into the name of the respondent. The appellant was dissatisfied and noted an appeal to this court. Before the appeal was heard the appellant filed a Chamber Application in terms of r 39(4) of the Rules of the Supreme Court to lead further evidence. I ordered that the application to lead further evidence be heard at the same time as this appeal. Accordingly, that application was B heard together with this appeal.

The further evidence that the appellant seeks to place before this court is that on 28 January 2003 he had entered into an agreement of sale for immovable property in terms of which he sold Stand No. 1837 Kushinga Crescent, Ruwa, to the respondent. On 7 April 2003, he unilaterally cancelled that agreement C on the basis that the respondent had breached the agreement by changing the source of the purchase price without his consent and that, after he had received the court application on 24 May 2003 in the court *a quo,* he instructed his legal practitioners to defend the matter. The matter was set down on 21 October 2003 and a court order for specific performance was granted in favour of the respondent. By the time the order for specific performance was granted, D he had already sold and disposed of the immovable property to a third party, by the name of Gordon Chikumbu, and that since he had signed all the necessary papers for the registration and transfer of the property into the name of the third party the property is now registered in the name of the third party. Thus, on the date the court issued an order for specific performance, the E property in question was registered in the name of the third party and the third party was not a party to the proceedings.

The facts of this case therefore are somewhat unusual. I have no doubt in my mind that the judgment of the court *a quo* was correct, given the facts of the evidence before it. However, I also have no doubt in my mind that if the learned judge in the court *a quo* had been aware that the property in respect of which F he was about to issue an order had already been transferred to a third party, he would have directed that the third party be joined to the proceedings and given an

opportunity to defend his rights in the property in respect of which an order was sought. The court was not aware of the latest development, as no evidence thereof had been placed before it. The court made an order that I have no doubt it would not have made because it was not capable of G fulfilment.

Given these facts, this court has no option but to set aside the order given by the court *a quo* and to refer the matter back to the court *a quo*, so that the third party is joined to the proceedings and a fresh determination can be made after the third party has been given an opportunity to establish whether he was an H

Chidyausiku CJ

innocent purchaser or not, which determination might affect the outcome of A the proceedings. As this situation has been brought about by the deceitful conduct of the appellant and he should bear the costs of these proceedings on an attorney and client scale.

In the result, the appeal succeeds to the extent that the order made by the court *a quo* is set aside and the matter is remitted to the court *a quo* for the joinder B of the third party and the determination of the matter afresh. The appellant shall bear the costs of these proceedings on an attorney and client scale.

ZIYAMBI JA & GWAUNZA JA concurred.

Mhiribidi, Ngarava & Moyo, appellant's legal practitioners C

G Machingambi, respondent's legal practitioner

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/MAGUTA v CHIKUNICHAWA 2005 (1) ZLR 91 (H)

MAGUTA v CHIKUNICHAWA 2005 (1) ZLR 91 (H)

Citation	2005 (1) ZLR 91 (H)
Case No	Judgment No. S-102-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Malaba JA & Gwaunza JA
Heard	20 May 2004
Judgment	31 January 2005
Counsel	*G Chikumbirike*, for the appellant *V E Chinhema*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

C **Contract** — *condition precedent — what is — contract of sale — provision that purchase price payable upon receiving a mortgage and within stipulated period — not a condition precedent — party not in default not entitled to cancel contract*

Contract — *interpretation — contract of sale — provision that purchase* D *price payable upon receiving a mortgage and within stipulated period — not a condition precedent — party not in default not entitled to cancel contract*

Headnote

The parties entered into a contract for the sale of a house. The contract provided that the purchase price was payable in cash upon the purchaser E receiving a mortgage bond within a period of four weeks from the date of signature. It also provided that in the event of a breach not being remedied within 14 days of the posting of a written notice to the purchaser to do so, the seller was entitled to cancel the contract. The purchaser failed to obtain a bond within the stipulated period and the seller F cancelled the contract, without giving the purchaser notice. It was contended by the seller that the provision about the purchase price was a condition precedent that was unfulfilled and accordingly the contract had not come into operation.

Held, that where the language clearly indicates that the securing of the purchase price and its payment is a condition precedent of the agreement G of sale coming into force, failure to comply with such agreement means the agreement of sale never comes into operation until that condition is fulfilled. In this case, however, a proper interpretation of the contract clearly indicated that it was not the intention of the parties to make the failure of payment of the purchase price a condition precedent to the H coming into effect of the agreement of sale. The clear intention of the

Chidyausiku CJ

parties was that in the event of the other party breaching any condition A of the agreement, including the payment of the purchase price by the stipulated date, it would entitle the other party to give notice of fourteen days of such breach and demand compliance. In the event of the other party failing to comply within the stipulated fourteen days after being placed in *mora*, only then would cancellation of the agreement become B lawful. As the seller had not placed the purchaser in *mora*, he was not entitled to cancel the contract.

Cases cited

Meyer v Barnardo & Another 1984 (2) SA 580 (N)

Ncube & Anor v Wiley and Anor 1985 (2) ZLR 69 (H) C

Westmore v Crestanello & Ors 1995 (2) SA 733 (W)

Case information

G Chikumbirike, for the appellant

V E Chinhema, for the respondent D

Judgment

CHIDYAUSIKU CJ: The parties in this case entered into an agreement of sale of immovable property, Stand No. 322 New Tafara, Mabvuku Township, Harare. The appellant was the seller whilst the respondent was the purchaser. The parties signed an agreement of sale on 19 July 2002.

In terms of the agreement of sale the purchase price for the property was $2 E million payable in cash upon the purchaser receiving a mortgage bond from the First National Building Society within a period of four weeks from the date of the signatures to the sale agreement.

Payment was to be made at the offices of the authorised agents of the parties. Clauses 3.8 and 3.9 of the agreement of sale provides as follows:

> "3.8 Notwithstanding anything to the contrary hereinafter contained the F Seller shall, in the event of the Purchaser failing to pay any sum owing under this Agreement on the due date or in the event of

breach of any other conditions of this Agreement of Sale, not being remedied within 14 (fourteen) days of the posting of a written notice to the purchaser to do so, notwithstanding any previous indulgences or concessions given by the Seller to the Purchaser, be entitled to: G

3.9 Notwithstanding anything to the contrary hereinafter contained the Purchaser shall, in the event of the Seller failing to fulfill any term and condition of Agreement of Sale within 14 (fourteen) days of the posting of the written notice to the Seller requiring the Seller so to do, notwithstanding any previous indulgences or concessions given by H

2005 (1) ZLR p93

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A the Purchaser to the Seller, be entitled to:

(a) Cancel and terminate this Agreement of Sale in which event the Seller shall be responsible for payment of all costs incurred by the Purchaser, including costs of obtaining mortgage financing and interest charges, in lieu of damages; or B

(b) Institute legal proceedings against the Seller to effect transfer of the Property or to sue for damages whichever the Purchaser shall elect."

The learned judge in the court *a quo* observed that clause 3.8 on its own is incomplete and that the parties must have intended that sub-clauses 3.9 (a) and (b) should, *mutates mutandis*, apply to clause 3.8 making the options open C to the purchaser the same as those for the seller. A reading of the agreement as a whole makes that inference inescapable. I agree with the judge in the court *a quo*. I do not accept Mr *Chikumbirike's* submission that the above conclusion is speculative. The respondent was offered the loan to meet the purchase price on 9 August 2002. She signed the offer letter on 28 August 2002 accepting the loan and proceeded with efforts to effect the agreement of sale. The appellant refused to proceed with the sale, contending that the respondent had been in breach of clause 3.1 as she had not secured payment by 16 August 2002.

D The appellant contended in the court *a quo* and in this court that clause 3.1 was a condition precedent with the deadline of 16 August 2002 and that failure E by the respondent to make payment by that deadline meant that the condition was not met and the agreement of sale was not activated. The learned judge rejected this contention. He concluded, firstly, that the agreement did not provide for 16 August 2002 as a deadline date and, secondly, that clause 3.1 was not a special condition or a condition precedent. On that basis, he held that the respondent had offered payment on time and that, in any event, the F purchaser was entitled to fourteen days' notice in the event of her failure to pay the purchase price on time and such notice was not given. He further concluded that the appellant was not entitled to cancel the agreement of sale without first placing the respondent in *mora*.

The court ordered, as prayed for by the respondent, that the appellant be G ordered to sign all documents necessary to enable the registration of transfer of Stand 322 New Tafara, Mabvuku, into the respondent's name and that, in the event of the respondent failing to comply with the order, the Deputy Sheriff, Harare, be authorised to sign the relevant documents on behalf of the respondent in order to effect the transfer.

2005 (1) ZLR p94

Chidyausiku CJ

The appellant now appeals against the judgment of the court *a quo* upon the A following grounds:

"1. The court *a quo* erred in its finding that the agreement of sale was not subject to a condition precedent which rendered the said agreement null and void yet it was subject to such condition and it erred in its interpretation of the agreement, in making this finding, that because B it was not specifically labelled as a condition precedent then it was not.

2. The court *a quo* erred in its finding that the respondent had secured the loan to meet the purchase price within the period (which the court incorrectly held was not specific and was an approximation) of four weeks as she was obliged so to do in terms of the agreement of sale. C

3. The court *a quo* erred in its finding that the appellant was obliged to give notice that he intended to cancel the agreement when in actual fact the agreement was null and void from the date that the respondent failed to fulfil the condition precedent. The court *a quo* therefore erred in holding that the consequence of non-fulfilment of the said condition was not clear from the agreement and therefore did not have the effect of rendering the agreement as null and void. D

4. The court *a quo* erred generally in finding that the respondent had proved that she was entitled to the order she sought and that there was no dispute of fact incapable of resolution by it without the

matter being referred to trial or not warranting a dismissal of the respondent's application." E

Grounds 1 to 3 of the notice of appeal amount to one ground of appeal, namely that the court *a quo* should have held that clause 3.1 of the agreement of sale is a condition precedent and not a term of the agreement. I will deal with ground 2 first.

The agreement of sale specifically provides that payment of the purchase price F was to be made within four weeks from the date of the signing of the agreement of sale. In this regard Mr *Chikumbirike* argued that the date by which the purchase price was to be paid was determinable and therefore specific. He submitted that the date was four weeks from the date of the signing of the agreement of sale. He calculated that date to be 16 August 2002. I agree with Mr *Chikumbirike's* argument that the date by which the purchase price was G payable is 16 August 2002.

In this regard, the learned judge in the court *a quo* misdirected himself by stating that the date by which the purchase price was payable was not determinable. It is determinable. It is fourteen days from the date of the signing of the agreement. As the purchaser secured the funds on 21 August 2002, it H

Chidyausiku CJ

A follows that she failed to comply with clause 3.1, which required her to make payment by 16 August 2002. The consequence of the purchaser's failure to pay the purchase price by 16 August 2002 leads to the question raised in grounds 1 to 3 of the notice of appeal, namely, whether or not the agreement of sale becomes null and void by reason of the failure to meet the condition precedent. In other words, is the securing of the purchase price a condition B precedent of the agreement of sale or a term of the agreement of sale? This is a matter of interpretation of the agreement of sale.

In those agreements of sale where the language clearly indicates that the securing of the purchase price and its payment is a condition precedent of the agreement of sale coming into force failure to comply with such agreement C means the agreement of sale never comes into operation until that condition is fulfilled. In this regard the learned judge in the court *a quo* referred to a number of cases where it was held that the securing of the purchase price was a condition precedent. In particular he referred to the case of *Ncube & Anor* v *Wiley and Anor* 1985 (2) ZLR 69 (H). In that case there were two special conditions. The special condition clause stated that:

> D "The sale is conditional upon the purchaser being awarded a loan in principle or otherwise by a lending institution … by 10 June 1985."

In *Meyer* v *Barnardo & Another* 1984 (2) SA 580 (N) the special condition clause was worded as follows:

> "This agreement is conditional upon the second purchaser obtaining a E loan agreement against the registration of a first mortgage … within a period of 21 days from the date of this agreement'.

On the consequences of failure to meet the condition the clause provided that:

> '… should the loan not be granted within the aforesaid period then this agreement shall be null and void and of no force or effect without notice by either party to the other.'"

F In *Westmore* v *Crestanello & Ors* 1995 (2) SA 733 (W) the agreement of sale was subject to the purchaser obtaining a first mortgage bond over the property for the sum of R196 000, such bond to be granted by no later than 15 April 1994, failing which the sale would be automatically cancelled.

I agree with the learned judge's observation that in the above cases there can G be no doubt that the securing of the purchase price was a condition precedent of the agreement of sale coming into force. However, the wording in the agreements of sale between the parties in this case is very different from the wording of the agreement in the cited cases. Clause 3.1 of the agreement of sale in particular reads:

Chidyausiku CJ

> "The purchase price for the property is $2 000 000.00 (TWO MILLION A DOLLARS) payable in cash upon the purchaser receiving his mortgage bond from First National Building Society within a period of four weeks from the date of signature to this Agreement. Payments shall be made at the offices of their authorised agents."

Clause 3.1, as read with clauses 3.8 and 3.9, clearly indicates that it was not B the intention of the parties to make the failure of payment of the purchase price a condition precedent to the coming into effect of the agreement of sale. The clear intention of the parties, as gathered from the wording of clauses 3.1, 3.8 and 3.9, is that in the event of the other party breaching any condition of the agreement, including the payment of the purchase price by the stipulated date, it would entitle the other party to give notice of fourteen days of such breach C and demand compliance. In the event of the other party failing to comply within the stipulated fourteen days after being placed in *mora* only then would cancellation of the agreement become lawful.

This is the conclusion that the learned judge in the court *a quo* came to and I find myself in agreement with that conclusion. The appellant was not entitled to cancel the agreement of sale without placing the respondent in *mora* in D terms of the agreement. It is common cause that the appellant did not give notice to the respondent, as was required by the agreement of sale. Accordingly he could not lawfully cancel the agreement.

It is on this basis that the appeal cannot succeed.

In the result the appeal is dismissed with costs. E

MALABA JA and GWAUNZA JA concurred.

Chikumbirike Associates, appellant's legal practitioners

Mazondo Chinhema, respondent's legal practitioners F

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SIBANDA & ANOR v SIBANDA 2005 (1) ZLR 97 (H)

Citation	2005 (1) ZLR 97 (H)
Case No	Judgment No. S-117-04
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Gwaunza JA
Heard	25 October 2004
Judgment	31 January 2005
Counsel	*E T Matinenga*, for the first appellant No appearance for the second appellant *B Mtetwa*, for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

C **Family law** — *husband and wife — matrimonial property — division of property following decree of nullity — appropriate to apply Matrimonial Causes Act*

Family law — *husband and wife — matrimonial property — division of property following decree of nullity — what may be included —* D *matrimonial home owned by company which was wholly controlled by husband — part of matrimonial property*

Headnote

The parties were married under the Customary Marriages Act, having lived together for several years beforehand. Unbeknown to the wife, the husband's previous marriage to another woman still subsisted. When E the marriage failed, the wife obtained a decree of nullity. The parties were possessed of nine immovable properties, as well as numerous vehicles. Apart from one property and one car, all the property, movable and immovable, including the matrimonial home, was registered in the name of one or other company or nominees of the appellant. The directors of those companies were the appellant's parents and one of his girlfriends F – but the sole signatory on the various bank accounts was the appellant, who controlled all the companies. The trial judge awarded the wife a house which was registered in the name of one of the companies. That house had been the matrimonial home for 10 years before the marriage was annulled. The husband contended that as the house was owned by G a company wholly owned by the appellant, it did not constitute matrimonial property which fell to be divided in terms of the Matrimonial Causes Act.

Held, that section 7 of the Matrimonial Causes Act can be applied to the division of property when a marriage has been declared a nullity

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2005 (1) ZLR p98

Ziyambi JA

Held, further, that the veil of incorporation may be lifted where necessary in A order to prove who determines or who is responsible for the activities, decisions and control of a company. On the evidence, it was clear that the husband controlled the company and so the house could be considered part of the matrimonial property.

Cases cited B

Cattle Breeders Farm (Pvt) Ltd v Veldman 1974 (1) SA 169 (RA)

Gering v Gering & Anor 1974 (3) SA 358 (W)

Makovah v Makovah 1998 (2) ZLR 82 (S)

R P Crees (Pvt) Ltd v Woodpecker Industries (Pvt) Ltd 1975 (1) RLR 151 (G) C

Saloman v Saloman & Co Ltd [1897] AC 22 (HL)

Wallersteiner v Moir [1974] 3 All ER 217 (CA)

Legislation considered

Matrimonial Causes Act [*Chapter 5:13*] s 7 D

Case information

E T Matinenga, for the first appellant

No appearance for the second appellant

B Mtetwa, for the respondent

Judgment

ZIYAMBI JA: On 19 June 2002, the High Court granted to the respondent an E order of nullity of marriage and certain ancillary relief which included the following awards:

(a) house No. 14052 Chatsworth Road, Vainona, Harare;

(b) Lot 3 of Subdivision B of Lot 12 Block D of Avondale and Lot 13 Block D of Avondale, otherwise known as 5 Howden Close, Avondale, Harare; F

(c) a BMW motor vehicle; and

(d) damages for *injuria* in the sum of $50 000.

These awards are the subject of the present appeal.

JLF (Pvt) Ltd ("JLF") did not enter an appearance to defend in the High Court. G Accordingly, it was wrongly cited as an appellant in this matter. There is only one appellant.

The facts as found by the learned trial judge, who accepted the respondent's evidence, are that in 1986 the parties commenced to live together in a customary union. The respondent was then working at Air Zimbabwe. They H

Ziyambi JA

A purchased a house in Belvedere which was the parties' matrimonial home. Two children, twins, were born of this union on 5 October 1990.

One day, the respondent arrived home to find two children there, looking very miserable. Upon enquiring from the appellant, she was told that they were his from a previous marriage and that they had been abandoned. The two children became part of her household. One day, one of the children fell sick and B required surgery. She felt that their mother ought to be advised and the appellant called the mother, who came over to see the child. Together, they went to pay the medical bills and make bookings at the clinic. It was during this time that she learnt from the children's mother that the latter had been thrown out of the house in which she had lived with the appellant because she C failed to return to him money which he had given to her before he went to prison to serve a sentence of four years in 1981. She did not say whether their union had been registered.

The matrimonial home became too small, for the two children now formed part of their household, and it became necessary to move to more spacious premises. The Avondale house was purchased from JLF – they bought the D shares in JLF – for this purpose.

The appellant's many extra-marital relationships soon began to surface and these gave rise to problems in the marriage. As a result, in September 1993, the respondent moved out of the Avondale house, taking the four children, the furniture and a Nissan pick-up. The appellant pursued her and became so E violent that she was driven to obtain a peace order restraining him from entering the property where she now resided.

The appellant then changed his tactics. He promised to change. They resumed cohabitation. He suggested that they be married in terms of the African Marriages Act [*Chapter 238*] (now the Customary Marriages Act F [*Chapter 5:07*]). They did so on 3 March 1994. A marriage certificate was issued which described the respondent as a spinster and the appellant as a bachelor and stated that she was the appellant's first wife. The respondent was then invited by the appellant to be involved in his business. From that time she worked for him, running his office as manager. She closed her own electrical business (which was not doing too well) in order to be able to run G the appellant's business.

Then, in January 1999, the appellant began spending a lot of time in South Africa and the respondent discovered that he was having an affair with an eighteen year old girl and had installed her in the house in Greystone Park which he furnished for her. This angered the respondent because the H appellant had never purchased furniture for her. So the respondent hired a

Ziyambi JA

truck and took all of the furniture out of the Greystone Park house. A report A was made to the police and she was called to the police station. The appellant was also called and explained that this was a domestic squabble between his two wives.

The respondent felt embarrassed and degraded by this incident and decided to file for divorce. Upon seeing papers from her lawyer, the appellant moved B out of the matrimonial home but later returned and assaulted her so severely that she had to be taken to the Emergency Centre as she was badly hurt and bleeding through the ears.

Thereafter, not satisfied with that, the appellant continued to issue threats by telephone to assault and kill both the respondent and the children. The telephone calls would be made at all hours of the night. C

The respondent obtained another peace order, as well as an order for the eviction of the appellant from the matrimonial home, but despite that the appellant continued to harass her. She eventually moved to alternative accommodation, taking with her the Mercedes Benz motor vehicle, of which the appellant soon dispossessed her.

It was from the appellant's opposing papers filed in the proceedings commenced by her for his eviction from the matrimonial home and a peace order pending divorce that the respondent first learnt that the appellant was legally married to one Esnath at the time he "married" her.

The parties were possessed of nine immovable properties, as well as twenty-one vehicles inclusive of trucks and trailers. Apart from the Vainona property and the Mercedes Benz, all the property, movable and immovable, including the matrimonial home, was registered in the name of JLF and other companies or nominees of the appellant. The directors of those companies were the appellant's parents and one of his girlfriends – but the sole signatory on the various bank accounts was the appellant, who controlled all the companies.

The learned trial judge found the evidence of the respondent to be credible. With regard to the issue of her knowledge of his marriage to Esnath, he found that she had no knowledge that the appellant was a married man at the time he went through the ceremony of marriage with the respondent and that their marriage was a putative marriage to which the provisions of s 7(1) of the Matrimonial Causes Act [*Chapter 5:13*] ("the Act") are applicable.

Section 7 of the Act provides as follows:

> "(1) Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to –

> (a) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other;
>
> (b) the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage.
>
> (2) An order made in terms of subsection (1) may contain such consequential and supplementary provisions as the appropriate court thinks necessary or expedient for the purpose of giving effect to the order or for the purpose of securing that the order operates fairly as between the spouses and may in particular, but without prejudice to the generality of this subsection –
>
> (a) order any person who holds any property which forms part of the property of one or other of the spouses to make such payment or transfer of such property as may be specified in the order;
>
> (b) confer on any trustees of any property which is the subject of the order such powers as appear to the appropriate court to be necessary or expedient.
>
> (3) The power of an appropriate court to make an order in terms of paragraph (a) of subsection (1) shall not extend to any assets which are proved, to the satisfaction of the court, to have been acquired by a spouse, whether before or during the marriage –
>
> (a) by way of an inheritance; or
>
> (b) in terms of any custom and which, in accordance with such custom, are intended to be held by the spouse personally; or
>
> (c) in any manner and which have particular sentimental value to the spouse concerned.
>
> (4) In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances of the case, including the following –
>
> (a) the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
>
> (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
>
> (c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;
>
> (d) the age and physical and mental condition of each spouse and child;
>
> (e) the direct or indirect contribution made by each spouse to the family,

including contributions made by looking after the home and caring A for the family and any other domestic duties;

(f) the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as result of the dissolution of the marriage; B

(g) the duration of the marriage;

and in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses.

(5) In granting a decree of divorce, judicial separation or nullity of marriage an appropriate court may, in accordance with a written agreement C between the parties, make an order with regard to the matters referred to in paragraphs (a) and (b) of subsection (1)."

Compare *Makovah* v *Makovah* 1998 (2) ZLR 82 (S) where Muchechetere JA at 90A-D stated:

"In my view, the above provisions [of s 7(1) of the Act] cover a marriage, such as the present one, which is declared null and void. If it were not the D case, it would work an injustice and hardship on a party, such as the respondent in this case, who laboured and contributed towards the marriage and the accumulation of the matrimonial property under the impression that the marriage was valid. It would also unjustly enrich a dishonest party, such as the appellant in this case, simply because the property in question is either registered in his name or is under his control. E Such a position is unconscionable and the legislature by using the expression 'nullity of marriage' must have envisaged that a situation such as the present one would be covered. I should state that such situations are very common in African society because of the failure by many to realise that once they contract a 'church' marriage their marriage becomes monogamous. F

In the circumstances, the trial judge acted properly in applying the provision of s 7 of the said Act on the issue of the division of matrimonial property."

It was the appellant's contention that the learned judge in the court *a quo* had erred in awarding the immovable properties to the respondent. In respect of G house No. 14052, ("the Vainona property") it was alleged that the respondent had fraudulently obtained the transfer of the property into her name. The learned judge disbelieved the appellant on this issue. A reading of the record justifies his finding that the appellant was dishonest in the evidence he gave to the court. The Vainona property is the premises from which the respondent runs a nursery school and did so during the subsistence of the "marriage". H

Ziyambi JA

A With regard to the second property ("the Avondale house"), it was contended, on behalf of the appellant, that it was owned by JLF, a company wholly owned by the appellant and did not therefore constitute matrimonial property which fell to be divided in terms of the Act. Accordingly, it was alleged the learned judge misdirected himself in granting to the respondent a house belonging to a company in which she was not a shareholder.

B It was common cause that the Avondale house was the matrimonial home of the parties for the ten years preceding the divorce. The respondent spent much money redecorating the house, paving the driveway and setting up the garden. The learned trial judge found that, although it was registered in the name of JLF, it was clear that JLF was the appellant's company and that he C controlled it. The following question by counsel for the appellant to the respondent in cross-examination clearly confirmed this position:

"Q. Well JLF was virtually Mr Sibanda's company and he could do as he wanted with the property …?"

Indeed, the evidence of the respondent was that the appellant registered all D properties which he acquired in the name of companies to keep them from the reach of his many creditors! JLF was, as I have stated above, cited as a party in these proceedings but did not enter an appearance to defend. The conclusion is irresistible that the appellant controls JLF.

The respondent successfully prayed that the corporate veil be lifted to enable the court to obtain access to the properties held by the companies in order to E arrive at an equitable apportionment of the matrimonial property.

It is trite that a company duly incorporated is a distinct legal entity endowed with its own legal personality: see *Salomon* v *Salomon & Co Ltd* [1897] AC 22. However, the veil of incorporation may be lifted where necessary in order to prove who determines or who is responsible for the activities, decisions and F control of a company.

Thus, in *Wallersteiner* v *Moir* [1974] 3 All ER 217 at 238, Lord Denning Mr had this to say:

> "I am prepared to accept that the English concerns – those governed by English company law or its counterparts in Nassau or Nigeria – were distinct legal entities. I am not so sure about the Liechtenstein concerns G – such as the Rothschild Trust, the Cellpa Trust or Stawa AG. There was no evidence before us of Liechtenstein law. I will assume, too, that they were distinct legal entities, similar to an English limited company. Even so, I am quite clear that they were just the puppets of Dr Wallersteiner. He controlled their every movement. Each danced to his bidding. He pulled the strings. No-one else got within reach of them. Transformed into legal

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Ziyambi JA

> language, they were his agents to do as he commanded. He was the A principal behind them. I am of the opinion that the court should pull aside the corporate veil and treat these concerns as being his creatures – for whose doings he should be, and is, responsible."

And in *Gering* v *Gering & Anor* 1974 (3) SA 358 (W) at 361G-H, Margo J remarked: B

> "There are three companies, apart from Lauren Lyn (Pty) Ltd, in which the first defendant has a 100 percent interest in the shareholding. It is true that, in the case of these companies, their records are not *stricto sensu* in the possession, custody or control of the first defendant in his personal capacity. However, on the facts, those companies are his creatures and his instruments. He is conducting business through them, or holding C assets through them, and, though they are separate juristic personalities, they are in substance merely part of the machinery by which he alone conducts his business affairs."

See also Nkala & Nyapadi *Company Law in Zimbabwe* at p 106; *Cattle Breeders Farm (Pvt) Ltd* v *Veldman* 1974 (1) SA 169 RA; *R P Crees (Pvt) Ltd* v *Woodpecker Industries (Pvt) Ltd* 1975 (1) RLR 151 (GD). D

In view of the above, the learned judge was correct in regarding the Avondale house, though held in the name of JLF, as part of the matrimonial property which fell to be divided between the parties.

The learned judge considered a fair share for the respondent of the immovable property of the marriage to be the Avondale house and the Vainona property. E At p 14 of the cyclostyled judgment, he said:

> "Josephine is, in my opinion, entitled by virtue of s 7(1) of the Matrimonial Causes Act [*Chapter 5:13*] to a fair share of the matrimonial estate, but the question is, what is a fair share? She cannot have half of it, as she claims, because there is Joseph's true wife, Esnath, who deserves a share and there are his numerous other offspring who have to be supported. F Even if they are illegitimate, he still has a duty to support them.
>
> As regards the immovable property, I consider that a fair share for Josephine would be the Avondale home and the Vainona property. As regards the movable property, I consider that Josephine should be given the BMW that is registered in her name. The other vehicles should not, in my opinion, be taken into consideration." G

The evidence of the respondent was that the BMW was bought for her and registered in her name. The court believed her. I can find no fault with these awards.

Ziyambi JA

A The final ground of appeal was the award of damages for *injuria*. The learned trial judge dealt with this issue as follows:

> "The only other matter for consideration is Josephine's claim for damages for *injuria* in the sum of $200 000. In *Snyman* v *Snyman* 1984 SA 262 (W) at 264C-F, Goldstone J said:
>
> B 'In Hahlo *The South African Law of Husband and Wife* 4 ed at 59, the learned author says that:
>
> "… an action for damages on the ground of breach of promise or fraud may lie against a person who has induced another by fraudulent misrepresentations to enter into a void (e.g. bigamous) marriage with him."
>
> C See, too, at 490 note 45.
>
> In the present case, Mrs *Cosijn*, who appeared for the plaintiff, limited her submission to the *injuria* suffered by the plaintiff. That a claim lies under that cause of action I have no doubt. In *Viljoen* v *Viljoen* 1944 CPD 137, Sutton J awarded damages for the *injuria* suffered by a woman to whom a promise of marriage had been made by a man who, unbeknown D to her, was married. *A fortiori*, in the case where a person purports to implement his unlawful promise: see, too, *Bull* v *Taylor* 1965 (4) SA 29 (A) especially at

37-38; *S* v *Youngleson* 1948 (1) SA 819 (W) at 822. In the present case, there was both *injuria* and *contumelia* attendant upon the unlawful conduct of the defendant.

The plaintiff satisfied me that she was entitled to the amount claimed by E her as maintenance for the minor child. She also satisfied me that, having regard to the circumstances, and especially the hurt caused to her and the social standing of the parties, she is entitled to a substantial award of damages.'

The learned judge awarded the plaintiff damages in the sum of R5 000.

The views expressed by the learned judge were approved by Hodes AJ F in *Arendse* v *Roode* 1989 (1) SA 763 (C). At p 765D-J the learned judge said:

'The only reported judgment of which I am aware in which a claim for damages arising from bigamy has been considered is that of Goldstone J in *Snyman* v *Snyman* 1984 (4) SA 262 (W). I am, with due respect, in agreement with Goldstone J and with Hahlo *The South African Law of Husband and Wife* 5 ed at 107 that an action for damages under G the *actio injuriarum* lies against a defendant who by his deceit took advantage of a plaintiff's innocence and induced her to enter into a marriage which the defendant knew, but the plaintiff did not know, to be null and void because he was already married.

As in *Snyman*'s case *supra*, in the present case there was both *injuria* and *contumelia* attendant upon the unlawful conduct of the defendant.

Ziyambi JA

It was clear from her testimony in the witness-box and from what I saw A of her that the plaintiff is a sensitive woman and that she has been and remains affected deleteriously by the defendant's wrongful and unlawful conduct.

It does not, however, appear from the evidence before me that there has been any noteworthy impairment of the plaintiff's reputation. B

Taking into account all the relevant facts set forth above, including the extent to which the plaintiff has suffered anguish and humiliation as a result of the defendant's behaviour, the plaintiff's social standing and financial circumstances, the defendant's financial circumstances and the attitude of the defendant and whether he has shown any repentance or concern for the plaintiff, I am of the view that an amount of R5 000 would be an appropriate award of damages under the *actio injuriarum*. C

The plaintiff also claims damages for seduction. This claim does not fall within the ambit of the *action injuriarum*, but is an action *sui generis*. Van den Heever *Breach of Promise and Seduction in South African Law* at 42-3 and *Carelse* v *Estate De Vries* (1906) 23 SC 532 at 539.

That a plaintiff who has been seduced may recover compensation for the D loss of her virginity and the consequent impairment of her marriage prospects is clear: see *Bull* v *Taylor* 1965 (4) SA 29 (A) at 38-9.

In deciding what compensation should be awarded a seduced plaintiff for the loss of her virginity and for the diminished chances of her making a suitable marriage, a court should, in my view, take into account, *inter alia*, the plaintiff's social standing and financial position as well as that E of the defendant.'

He then awarded the plaintiff an additional R1 500 in respect of her claim for seduction."

I have found no cases in this country dealing with actions for *injuria* against a bigamist who induces a woman to enter into a marriage which he knew, but she did not know, to be null and void. I am satisfied, on the authorities quoted F above, that Josephine is entitled to damages, but I consider that the amount she is claiming is excessive. There is no evidence before me that she is a sensitive woman or that she has suffered anguish and humiliation as a result of Joseph's behaviour. Having regard to Joseph's financial circumstances and the fact that he has shown no repentance or concern for Josephine, I consider that an award of $50 000 would be appropriate. G

I agree with the reasoning of the learned Judge. The quantum of damages is not in issue and there has been no cross-appeal. H

Ziyambi JA

A The appeal is accordingly dismissed with costs.

SANDURA JA & GWAUNZA JA concurred.

Mutezo & Co, appellant's legal practitioners

B *Kantor & Immerman*, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/BEVERLEY BUILDING SOCIETY v RGWAFA 2005 (1) ZLR 108 (H)

BEVERLEY BUILDING SOCIETY v RGWAFA 2005 (1) ZLR 108 (H)

Citation	2005 (1) ZLR 108 (H)
Case No	Judgment No. S-7-05
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Gwaunza JA
Heard	7 February 2005
Judgment	7 February 2005
Counsel	*J C Andersen SC*, for the appellant *Ms F Chimbaru*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Practice and procedure — *application — chamber application — disclosure* C *— need for applicant to disclose all relevant information that might affect granting of order sought*

Practice and procedure — *heads of argument — filing of — effect of failure to file timeously*

Headnote

An applicant who brings an application *ex parte* seeking relief against D another person must make full disclosure of all relevant information which is within his knowledge and which may affect the granting of the order sought.

Legal practitioners who do not file heads of argument within the period laid down in the Rules of the Supreme Court should apply for condonation E without delay. The court will not always consider such applications indulgently, and will grant relief only when sufficient and satisfactory grounds have been advanced. In appropriate cases such applications will be refused.

The respondent, a police officer, applied *ex parte* to the High Court for an order under s 51(2) of the Serious Offences (Confiscation of Profits) Act F [*Chapter 9:17*] directing the appellant to produce certain documents which allegedly related to a fraud committed by the appellant. In his founding affidavit the respondent did not disclose the following facts, of which he must have been aware: that the appellant had previously produced the documents to the police; that two of the appellant's senior employees had been arrested in connection with the offence but were not G placed on remand because a magistrate found they had no case to answer; and that the two employees were later awarded damages for unlawful arrest and detention. The High Court granted the order sought and the appellant appealed.

Sandura JA

A *Held,* that the respondent's *ex parte* application was an abuse of the process of the High Court, and the order granted should be set aside with costs on the legal practitioner and client scale.

Cases cited

B *Le Mans Motors (Pvt) Ltd v Collins* 1986 (2) ZLR 253 (S)

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

Legislation considered

Rules of the Supreme Court, 1964 (SI 380 of 1964), r 43(3)

Case information

C *J C Andersen SC*, for the appellant

Ms F Chimbaru, for the respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court which granted an *ex parte* application, filed by the respondent ("Godfrey") in terms D of s 51(2) of the Serious Offences (Confiscation of Profits) Act [*Chapter 9:17*] ("the Act"), for an order directing the appellant's general manager to produce to Godfrey certain documents alleged to be in the appellant's possession or control. The documents were to be produced within forty-eight hours after service of the order on the general manager.

After counsel for the respondent conceded, quite properly in my view, that E the appeal ought to be allowed, the following order was made:

"1. The appeal is allowed with costs on the legal practitioner and client scale.

2. The order of the court *a quo* is set aside and the following is substituted –

F 'The application is dismissed with costs'."

Before setting out the reasons for granting that order, I would like to indicate that on 13 December 2004 a court application was filed in this court on behalf of the appellant ("Beverley") seeking leave to place additional evidence before this court. The evidence was in the form of an affidavit sworn to by Miccah Moyo ("Moyo"), Beverley's managing director. The application was G not opposed and, consequently, we granted it with costs, having been satisfied that the basic requirements which must be met by an applicant in such application were present. See *S* v *Kuiper* 2000 (1) ZLR 113 (S) at 115G-116D.

Having said that, I wish to set out the background facts in this matter. They H are as follows. A company called Bernwin Development Company (Pvt) Ltd

Sandura JA

("Bernwin"), whose principal shareholder was Bernard Mahara Mutanga A ("Mutanga"), owned immovable property in Harare ("the property") which it wished to develop. It approached Beverley for the required finance. In 1999, Beverley and Bernwin concluded two agreements, in terms of which Beverley advanced to Bernwin two loans on certain terms and conditions. As security for the said loans Bernwin registered two mortgage bonds over the property B in favour of Beverley. Subsequently, Beverley discovered that some of the funds advanced to Bernwin had been used for purposes other than the development of the property. In order to be sure that the funds would only be used for the agreed purpose, Beverley devised a very strict procedure for disbursing the funds which required proof of the progress completed on the ground as verified by Beverley's valuers. C

Thereafter, Mutanga, apparently annoyed by the new procedure for disbursing the funds, approached the Criminal Investigation Department of the Zimbabwe Republic Police and alleged that Beverley had failed to disburse all the money lent to Bernwin because some of the money had been fraudulently disbursed to third parties by Moyo, who was then Beverley's deputy general manager, D

and David Chinhara ("Chinhara"), who was then Beverley's mortgage operations manager. The allegation was investigated by Detective Inspector Charles Murehwa ("Murehwa") and his colleagues. In the course of that investigation, Murehwa and his team informed Beverley that they required from it all the documents relating to the two loans advanced by Beverley to Bernwin, and the documents were given to them. However, a few days later E Murehwa and his team arrested Moyo and Chinhara on a Friday, detained them over the weekend and took them to the magistrates court on Monday. The allegation was that they had committed fraud. The presiding magistrate subsequently refused to place them on remand on the ground that there was no reasonable suspicion that they had committed an offence.

As a consequence of their unlawful arrest and detention, Moyo and Chinhara F subsequently instituted a civil action for damages in the High Court against Murehwa and two other persons. Thereafter, on 14 January 2002 the High Court granted an order by consent directing the three defendants to pay to each plaintiff damages in the sum of $100 000, together with interest and costs of suit, jointly and severally, the one paying the others to be absolved. G

About two-and-a-half months later, on 28 March 2002, Godfrey filed an urgent *ex parte* application in the High Court against Beverley in terms of s 51(2) of the Act, seeking the order already referred to at the beginning of this judgment. The order was granted on 3 April 2002. Aggrieved by that decision, Beverley appealed to this court. H

Sandura JA

A Section 51(2) of the Act reads as follows:

> "Where a person has been convicted of, or is reasonably suspected of having committed, a serious offence and a police officer has reasonable grounds for suspecting that any person has possession or control of any property-tracking document in relation to that offence, he may apply to a judge for an order directing the person, subject to subsection (5), to B produce to a police officer any document described in the order which is in that person's possession or control."

The issue which arose for consideration was whether Godfrey had any basis for filing the *ex parte* application. I do not think that he had. I say so because in April 2000 Moyo and Chinhara were arrested and detained by Murehwa and C his team on the same allegations subsequently made against them by Godfrey in the *ex parte* application filed in the High Court on 28 March 2002. In the course of their investigation, Murehwa and his team required Beverley to produce, and Beverley did produce, all the documents which related to the two loans advanced by Beverley to Bernwin. Thereafter, when Murehwa and his team took Moyo and Chinhara to the magistrate's court for remand the D presiding magistrate refused to place them on remand on the ground that they had no case to answer. In addition, when Murehwa and the two other persons were sued by Moyo and Chinhara for damages for unlawful arrest and detention, they consented to an order directing them to pay damages in the sum of $100 000 to each plaintiff. If there had been any evidence which justified the arrest and detention, they would not have consented to the granting of E the order.

In my view, Godfrey must have been aware of all this background information when he filed the *ex parte* application in the High Court. I say so because both he and Murehwa were members of the Serious Offences Fraud Squad in the Criminal Investigation Department and were based in Harare. The unlawful F arrest and detention of Moyo and Chinhara by Murehwa and his team, as well as the order for the payment of damages, which was granted by consent, would not have escaped Godfrey's notice.

As the application was *ex parte*, Godfrey should have made a full disclosure of all the relevant information which was within his knowledge and which might have affected the granting of the order sought. In this regard, the learned G authors of *Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa* 4 ed state at follows at p 367:

> "Although, generally, an applicant is entitled to embody in his supporting affidavits only allegations relevant to the establishment of his right, when he is bringing an *ex parte* application in which relief is claimed against H another party he must make full disclosure of all the material facts that

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Sandura JA

> might affect the granting or otherwise of an order *ex parte*. The utmost A good faith must be observed by litigants making *ex parte* applications in placing material facts before the court, so much so that if an order

> has been made upon an *ex parte* application and it appears that material facts have been kept back, whether wilfully and *mala fide* or negligently, which *might* have influenced the decision of the court whether to make an order or not, the court has a discretion to set the order aside with costs on the ground B of non-disclosure."

In my view, it is clear from a perusal of Godfrey's founding affidavit that the most important part of the background facts already set out in this judgment was deliberately withheld from the court. Had Godfrey stated in his affidavit that the fraud allegations against Moyo and Chinhara had previously been C investigated by Murehwa and his team, and that the magistrate before whom the two men had been brought for remand had refused to place them on remand on the ground that they had no case to answer, it is unlikely that the learned judge in the court *a quo* would have granted the order which she granted.

In the circumstances, we were satisfied that the *ex parte* application filed by Godfrey was an abuse of the process of the High Court, and that the order D granted by the learned judge in the court *a quo* should be set aside with costs on the legal practitioner and client scale.

Finally, I would like to comment on the late filing of the respondent's heads of argument. The appellant's heads of argument were filed with this court on 25 November 2004 and thereafter served on the respondent, but the E respondent's heads of argument were not filed until Thursday 3 February 2005, in breach of the rules of this court ("the Rules).

Rule 43(3) of the Rules, which governs the filing of heads of argument by the respondent, in relevant part reads as follows:

> "Where the respondent will be represented by a legal practitioner at the hearing of the appeal, that legal practitioner shall, within ten days after F receiving the appellant's heads of argument in terms of subrule (2), file with a registrar a document setting out the main heads of his argument together with a list of authorities cited in support of each head, and immediately thereafter shall deliver a copy to the appellant …"

In view of the fact that the appeal was due to be heard on Monday 7 February 2005, the filing of the respondent's heads of argument on Thursday 3 February 2005 G was obviously not in compliance with the Rules, as no condonation of the late filing of the heads of argument had been granted.

Consequently, Mr *Andersen*, who appeared for the appellant, submitted, quite correctly in my view, that counsel for the respondent was not properly before this court. That submission prompted Ms *Chimbaru*, who appeared for the H

Sandura JA

A respondent, to make an application for condonation of the late filing of her heads of argument. Her explanation for the delay in filing the heads of argument was as follows. There had been some confusion in the Attorney-General's Office with regard to which Division of that Office was to handle the appeal. As a result, the relevant file had initially been sent to the Civil Division instead of the Criminal Division, to which it was eventually sent on 27 January B 2005. It was only after that date that the file was allocated to her and she was directed to prepare the respondent's heads of argument. By that time, the period within which the heads of argument ought to have been filed had already expired.

Whilst that explanation was not entirely satisfactory, we decided to give Ms C *Chimbaru* the benefit of the doubt, and accordingly condoned the late filing of her heads of argument.

However, legal practitioners should be aware that this court will not always consider applications for condonation indulgently. The relief sought will only be granted when sufficient and satisfactory grounds have been advanced. In appropriate cases, applications for the condonation of the late filing D of heads of argument may be refused. As Dumbutshena CJ stated in *Le Mans Motors (Pvt) Ltd* v *Collins* 1986 (2) ZLR 253 (S) at 253F-G:

> "Time and time again, we have warned legal practitioners of the need to file heads of argument in compliance with rule 43(2) of the Supreme Court Rules as amended. Insufficient heed has been paid to our warnings. The E time has come to indicate this court's disapproval by dismissing this appeal. In doing so we wish to stress that we would not have resorted to this somewhat drastic action but for the fact that it is our unanimous view that there is no reasonable prospect of this appeal succeeding."

It is, therefore, in the interests of the administration of justice that legal practitioners observe the rules of this court, and that whenever they realise F that they have not complied with the Rules, they

should, without delay, apply for condonation.

Ziyambi JA and Gwaunza JA concurred.

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

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/ZIMBANK v INTERFIN MERCHANT BANK OF ZIMBABWE LTD 2005 (1) ZLR 114 (H)

ZIMBANK v INTERFIN MERCHANT BANK OF ZIMBABWE LTD 2005 (1) ZLR 114 (H)

Citation	2005 (1) ZLR 114 (H)
Case No	Judgment No HH-13-05
Court	High Court, Harare
Judge	Makarau J
Heard	15 December 2004; 5 January 2005
Judgment	9 February 2005
Counsel	*M Mahlangu*, for the plaintiff/applicant Mrs *J Zindi*, for the defendant/respondent
Case Type	Provisional sentence application
Annotations	Link to case annotations

Flynote

Practice and procedure — *provisional sentence — purpose of procedure — procedure where application is opposed — defects in summons or application — effect of — onus on defendant where application opposed — what defendant must show* D

Headnote

The procedure of provisional sentence allows a creditor, armed with a liquid document, to obtain payment of the debt without having to wait for the final determination of the dispute between the parties. It is an extraordinary remedy based on the presumption of indebtedness created by the liquid document. It is a brisk and robust remedy granted by the court in E appropriate cases, on the date of the hearing endorsed on the face of the summons, after the court has satisfied itself that the defendant has no probability of success in the principal case. Even if the application is opposed, the matter cannot wait to be determined on the opposed roll in accordance with the provisions of Order 32 of the High Court Rules 1971. F Issues of convenience to the court, which is essentially sitting as an unopposed court, can effectively be overcome by the presiding judge standing the matter down to the end of the roll for counsel to make their submissions to court.

While, in provisional sentence proceedings, the plaintiff ought in principle to have his or her papers in order, the approach of the courts is not to G be deterred from granting provisional sentences by technical defects on the face of the summons that can be cured by suitable amendments. This accords with the general approach of this court to amendment of pleadings, which has always been to grant such where in doing so no injustice or prejudice that cannot be cured by an award of costs is H

Makarau J

A occasioned the other party. The onus rests on the defendant in provisional sentence matters to show that he has probabilities of success in the main action. Such probabilities must be substantial and should not be mere conjecture. They must be based on facts laid out in the affidavit and not upon inferences to be drawn from the facts.

Cases cited B

Barclays National Bank Ltd v Swartzberg & Ors 1974 (1) SA 133 (W)

Hicks v Dobriskey 1976 (1) RLR 218 (G)

Jammine & Anor v Emil 1951 (4) SA 460 (T)

Jenkins v de Jager 1993 (4) SA 534 (N)

C *Reynolds' Est v Dorasamy* 1950 (4) SA 33 (D)

Case information

M Mahlangu, for the plaintiff/applicant

Mrs *J Zindi,* for the defendant/respondent

Judgment

D **MAKARAU J:** This is a provisional sentence matter.

On 9 November 2004, the plaintiff issued provisional sentence summons against the defendant, claiming provisional sentence in an amount of $720 428 163.97 (Seven Hundred and Twenty Million Four Hundred and Twenty- Eight Thousand One Hundred and Sixty Three Dollars and Ninety Seven Cents), together with interest thereon at the prescribed rate from 5 April 2004, being E the date of demand to date of payment in full.

The plaintiff's claim is the cumulative maturity values of five bankers acceptances, issued by the defendant in favour of Trojan Nickel Mine and Human People to People and in respect of which the plaintiff is the holder in due course. Copies of the five bills of exchange were attached to the summons.

F Summons was duly served upon the defendant on 11 November 2004 and the matter was set down before me for 15 December 2004. Prior to the set down date, the defendant filed an appearance to defend on 15 November 2004 followed by a notice of opposition and an opposing affidavit on 24 November 2004. Such was the consternation generated by the service of provisional G sentence summons on the defendant that it filed an appearance to defend and a notice of opposition in the same suit.

In the opposing affidavit, the defendant denied being indebted to the plaintiff as alleged and averred that it had liquidated the indebtedness giving rise to the bills of exchange in the possession of the plaintiff.

Makarau J

When the matter was called in court, Mrs Zindi appeared for the defendant A and the matter became heavily contested hence the further postponement of the matter to 5 January 2005 to avoid delaying the remaining unopposed matters on that day's roll.

On 5 January 2005, Mr Mahlangu moved for the granting of provisional sentence in favour of the plaintiff. His argument was to the effect that the B procedure of obtaining provisional sentence is sui

generis and where the liquid document upon which the claim is based is not denied, provisional sentence must be granted.

In opposition, Mrs Zindi mounted a three pronged attack against the granting of provisional sentence in the matter. Firstly, she submitted that since provisional sentence is an extra-ordinary remedy that seeks to oblige the C defendant to pay off the debt in advance of the determination of the claim after a fully fledged trial, the onus on the plaintiff is great and he or she must strictly abide by the provisions of the rules of this court in terms of the particularity of the information to be pleaded. She then proceeded to allege what she conceived as irregularities appearing ex facie the provisional sentence D summons, which alleged irregularities I shall deal with in detail shortly. Secondly, she objected to my determining the matter outside the ambit of opposed applications and urged me to refer the matter to the opposed roll. Finally, she advanced the argument raised in the opposing affidavit that the debt secured by the bills of exchange had since been discharged and accordingly, the plaintiff was not entitled to provisional sentence on such E bills.

I now turn to deal with each of the arguments advanced by Mrs Zindi. Before I deal with the first argument, it is in my view necessary to recap on the essential elements of the procedure of provisional sentence. It has struck me that litigants before this court infrequently resort to the procedure of provisional F sentence presumably following the relaxation of the rules relating to when one may apply for summary judgement, which is a final judgement as opposed to provisional sentence. My further experience has been that where the procedure of provisional sentence is invoked, invariably, there is no opposition to the granting of the provisional sentence, which is then routinely done in terms of the summons. The position as to what happens when opposition to provisional G sentence is manifested in the form of opposing affidavits or the defendant appearing on the floor of the court has thus become blurred through the disuse of the procedure. It is therefore in my view necessary to recall that the procedure of provisional sentence allows a creditor armed with a liquid document, to obtain payment of the debt without having to wait for the final H

A determination of the dispute between the parties. Whilst a speedy remedy, provisional sentence is an extra-ordinary remedy based on the presumption of indebtedness created by the liquid document. It is a brisk and robust remedy granted by the court in appropriate cases, on the date of the hearing endorsed on the face of the summons, after the court has satisfied itself that the defendant has no probability of success in the principal case. Although B opposed, the matter cannot wait to be determined on the opposed roll in accordance with the provisions of Order 32 of the High Court rules 1971,although the filing of further affidavits in the matter after the opposing affidavit are to be in terms of the provisions of Order 32.

The above is my view in answer to the second argument raised by Mrs Zindi C that the matter be referred to the opposed roll. It has always been the practice of this court to determine provisional sentence matters on the date appearing on the face of the summons. Issues of convenience to the court, which is essentially sitting as an unopposed court, can effectively be overcome by the presiding judge standing the matter down to the end of the roll for counsel to make their submissions to court. I have not been able to conceive of any D interpretation of the rules of this court that would tend to suggest that this is not the proper way of proceeding. I have further failed to conceive of any possible reason why the practice of this court should be changed to refer contested provisional sentences to the opposed roll as that course will effectively rob the "quick" remedy of its efficacy and thereby weaken the E whole machinery of provisional sentence.

I now return to the first argument advanced by Mrs Zindi. In this regard, she raises defects allegedly appearing ex facie the provisional sentence summons. In detail, she argued that the plaintiff had neither alleged a cause of action in its summons nor that it had made demand when the bills matured and the amount of their value became due and payable. She further argued that the F plaintiff has not alleged on its summons when it became the holder in due course of the bills of exchange it seeks provisional sentence on. On the basis of these shortcomings, she urged me not to grant provisional sentence in the matter.

While it is true that in provisional sentence proceedings, the plaintiff ought G in principle to have his or her papers in order, it has been the approach of the courts in South Africa not to be deterred from granting provisional sentences by technical defects on the face of the summons that can be cured by suitable amendments.1see Estate Reynolds v Dorasamy 1950 (4) SA 33 (D); Jenkins v de

Jager 1993 (4) SA 534 (N) and Barclays National Bank v Swartzberg & Ors 1974 (1) SA (WLD) 133. In the Barclays National Bank case, Margo

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2005 (1) ZLR p118

Makarau J

J opines that "one incidental omission- even more than one incidental A omission- may perhaps, in a proper case, be fairly cured by amendment"(to the summons). In that case, he refused an amendment to the provisional sentence summons because the omissions were not only numerous but in his view, rendered the provisional sentence summons an abortive process.

I find merit in the approach by the South African courts in the cases cited B above. Although my limited research has not yielded a local case where this approach was specifically adopted, I do not doubt that our courts would follow the South African approach rather than putting the provisional sentence summons under a microscope before granting the relief sought. The general approach of this court to amendment of pleadings has always been to grant such where in doing so no injustice or prejudice that cannot be cured C by an award of costs is occasioned the other party. No reason suggests itself to me that this approach should not be followed in provisional sentence matters, notwithstanding that provisional sentence is an extraordinary remedy.

I have carefully considered the alleged defects pointed out by Mrs Zindi. Firstly, the plaintiff does allege a cause of action by alleging that it is the holder D in due course of certain described bills of exchange for which payment has been refused on demand. Secondly, demand is alleged to have been made on 5 April 2004. Even if such demand was not made, this is hardly a defect of such a nature as to vitiate the summons as it is not necessary that demand be made. The provisional summons acts as demand.2 see Jammine & Anor v Emil 1951 (4) SA 460 (TPD). E

It is my further view that failure to aver when the plaintiff took possession of the bills of exchange does not vitiate the provisional sentence summons. It appears trite to me that a bill remains negotiable until its discharge. The issue to determine is whether the defendant has raised a probability of success in the main action to prove that it is no longer liable on the bills for the reasons F it advances.

It is common cause that the bills became due for payment on 29 December 2003. Presentation for payment was allegedly made in April 2004 and no payment was effected. The defendant alleges that it had effected payment in December 2003 to First Mutual Asset Management Company, who had invested some money with the defendant and as security for which the bankers' acceptances G were issued. Defendant alleges that after paying off the amount of the debt, it did not retrieve the securities. I may mention in passing at his stage that the link between First Mutual Asset Management Company and the bills attached to the summons before me has not been explained. This link or lack of it, is however not of such relevancy as to deter me from determining this matter. H

2005 (1) ZLR p119

Makarau J

A It appears to me that the law is well settled that the onus rests with the defendant in provisional sentence matters to show that he or she has probabilities of success in the main action. Such probabilities must be substantial and should not be mere conjecture. The probabilities must be based on facts laid out in the affidavit and not upon inferences to be drawn from the facts. See Hicks v Dobriskey 1976 (1) ZLR 218.

B In casu, it is my view that the defendant has failed to raise such probabilities. Firstly, assuming that First Mutual Asset Management Company presented the bills for payment, they must have delivered the bills to the plaintiff upon receiving payment for such to constitute a discharge of the bill. Clearly this was not done and the alleged payment to First Mutual Asset Management C Company did not discharge the bill. Payment on a bill to constitute a discharge of the bill must be to the holder. The defendant has not raised any probability that the plaintiff was not the holder of the bills when it allegedly made payment to First Mutual Asset Management Company.

Secondly, and more importantly in my view, the plaintiff is a holder in due course of the bills and holds these free of equities. The defences that the D defendant may have against First Mutual Asset Management Company are not good against the plaintiff.4 see: Malan: Bills of Exchange, Cheques

and Promissory Notes 2 ed. p 11. It is my view that the alleged defence raised by the defendant that it made payment on the bills is not valid against the plaintiff as holder of the bills.

E In the result, it is ordered that provisional sentence be entered for the plaintiff in the sum of $720 428 163-97 together with interest thereon at the rate of 30 percent per annum from 5 April 2004 to date of payment in full.

Gill Godlonton & Gerrans, plaintiff's legal practitioners

F *Kantor & Immerman*, defendant's legal practitioners

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Source:
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ZIMBABWE ELECTRICITY SUPPLY AUTHORITY v SMITH & ORS 2005 (1) ZLR 120 (H)

Citation	2005 (1) ZLR 120 (H)
Case No	Judgment No. S-9-05
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Gwaunza JA
Heard	10 February 2005
Judgment	10 February 2005
Counsel	*L Mazonde*, for the appellant *J B Colegrave*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Contract — *formation — mistake — unilateral mistake — when may vitiate contract — what offeror must establish to vitiate contract — no fraud, nor knowledge of mistake on part of offeree — offer already accepted by buyer when alleged mistake discovered — contract upheld* D

Headnote

Where an offeror mistakenly makes an offer that is accepted by the offeree, the offeror will only be entitled to rescind the contract if (a) the offer was induced by fraudulent misrepresentation by the offeree; or (b) the mistake was a material one and the offeree knew or ought to have known that the offer had been made in error (*University of Zimbabwe* v *Gudza* E 1996 (1) ZLR 249 (S) followed).

In terms of an offer letter, the respondents were, in March 2001, offered the right to purchase from the appellant the houses which they were occupying. All respondents accepted the offer,

whereupon agreements of sale were drawn up and signed by each of them and by the appellant. F Upon payment of the respective purchase prices, the appellant wrote to its legal practitioners, instructing them to attend to the transfer of the houses. The legal practitioners called upon the respondents to pay the necessary transfer fees and stamp duties, which was done. It was only thereafter, and after the necessary ministerial consent had been given in terms of the Electricity Act [*Chapter 13:05*] that the appellant changed G its mind. It refused to sign a power of attorney, alleging that the houses in question were not supposed to be sold. In its affidavit, opposing an order from High Court that the houses be transferred to the respondents, the appellant had indicated that the only basis upon which it relied in purporting to cancel the agreement of sale was that its management had H

Sandura JA

A made a mistake in selling the houses. It claimed, therefore, that its mistake was unilateral, being a mistake which exists when one party to a contract is mistaken but the other is not. On appeal from an order of the High Court ordering the transfer of the stands:

Held, dismissing the appeal, that assuming that there was a unilateral mistake on the appellant's part, it could not justify the cancellation of the sale agreement. From a perusal of those B agreements, it was clear that the appellant had agreed to sell and did sell the houses in question to the respondent who paid the purchase prices in full. That is what the parties intended doing and that is what they did.

Cases cited C

George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A)

National and Overseas Distributors Corporation (Pty) Ltd v Potato Bd 1958 (2) SA 473 (A)

SAR&H v National Bank of SA Ltd 1924 AD 704

University of Zimbabwe v Gudza 1996 (1) ZLR 249 (S)

Case information D

L Mazonde, for the appellant

J B Colegrave, for the respondent

Judgment

SANDURA JA: This is an appeal against the judgment of the High Court which E granted the respondents' application for an order compelling the appellant to transfer to them certain houses purchased by the respondents from the appellant. After hearing both counsel, we dismissed the appeal with costs, and indicated that the reasons for that decision would be given in due course. I now set them out.

F The factual background in this matter is as follows –

At the relevant time the respondents were employees of the appellant ("ZESA") and were based at Kariba where they occupied houses belonging to ZESA.

In March 2001 the respondents were offered the right to purchase from ZESA G the houses which they were occupying. The offer letter reads as follows:

> "Dear Sir/Madam,
>
> Re: OFFER TO PURCHASE … (the house occupied)

Sandura JA

> This note serves to inform you that the Authority is offering you the 'right A of first refusal' to purchase the above-mentioned property at a selling price of $ …
>
> Please advise us whether you are interested in buying it or not. Your response should reach us no later than three weeks from the date indicated above. In your response, please indicate your method of payment and the source of finance to enable the Agreement of Sale to be signed. If your B response fails to

reach us within three weeks from the above date, it will be assumed that you are not interested and the offer will be extended to other members of staff.

Please note that apart from the purchase price, there are other costs involved in the transaction which include – C

Transfer and Conveyancer's fees – about 7 per cent of the purchase price.

If you feel that the selling price is higher than what you expect, you are free to advise the Chief Estates Officer who will then appoint an independent Estate Agent to value the property at your own cost.

If you are not interested in purchasing the house, the Authority will give you two months notice to vacate the premises." D

All the respondents informed ZESA timeously that they wished to purchase the houses they were occupying.

Thereafter, agreements of sale were prepared, and were duly completed and signed by ZESA and by the respondents. Some of the respondents had to sell their motor vehicles, cattle and other property at low prices to ensure that E sufficient funds were raised timeously to avoid losing the right to purchase the houses.

Once the purchase price had been paid, ZESA wrote to its legal practitioners instructing them to attend to the transfer of the houses on its behalf. The letter reads as follows: F

"Dear Sir,

Re: TRANSFER OF STAND … FROM ZESA TO … G

Could you please attend to the transfer of the above-mentioned property. Attached please find a copy of the Agreement of Sale, a receipt being proof of payment of the full purchase price, and the original title deed."

Thereafter, the legal practitioners wrote to all the respondents calling upon them to pay the transfer fees as well as the stamp duty that was payable. All H

Sandura JA

A the sums demanded by the legal practitioners were paid timeously by the respondents.

In addition, the consent of the responsible Minister, which was required in terms of the Electricity Act [*Chapter 13:05*], had already been obtained.

However, when all the necessary papers were ready for lodging with the B Registrar of Deeds, and the conveyancers asked ZESA to sign the Power of Attorney to pass transfer, ZESA declined to do so, alleging that the houses in question were not supposed to be sold.

A resolution was subsequently passed by the ZESA Board "to withdraw the sale of Authority houses in Kariba that should have been retained for operational purposes, and reimburse the affected employees accordingly".

C ZESA then purported to cancel the agreements of sale and refund the money which had been paid by the respondents, but the respondents refused to accept the refunds.

Thereafter, on 8 March 2002, the respondents filed a court application in the High Court seeking an order compelling ZESA to transfer to them the houses D which they had purchased from ZESA. That order was granted on 12 February 2003. Aggrieved by that result, ZESA appealed to this Court.

The main issue which arose for determination by this Court was whether there was any legal basis on which ZESA was entitled to cancel the agreements of sale. I do not think that there was.

E The basis on which ZESA purported to cancel the agreements of sale was set out in paras 2, 5, 6, 7 and 9 of its opposing affidavit. The relevant parts of those paragraphs read as follows:

"2. The chronology of events as narrated by Mr Smith is basically correct. It is also correct that the respondent (ZESA) has withdrawn instructions for the conveyance of the properties in question to the F applicants (now the respondents). This withdrawal is the correction of a very big mistake on the part of respondent's Management. …

5. In or about September 2000, the respondent's Management decided to sell certain immovable properties around the country, which properties were either not crucial to its operations and/or could not fit into the process of unbundling the respondent. Such properties G are commonly referred to as 'non-designated'…

6. The respondent's Board having resolved to sell non-designated houses, and having obtained the requisite Ministerial authority, the implementation was then left to the respondent's Management to identify the non-designated properties and offer same for sale in H accordance with specifications from the parent Ministry.

2005 (1) ZLR p124

Sandura JA

It was at this stage that a terrible mistake was made, that of offering A the houses at Kariba to sitting tenants …

7. The houses at Kariba are integral to the operations of the power station, and should never have been offered to the applicants or anyone for that matter …

9. The sale of the houses in question, as I stated before, was a terrible B mistake on the part of the respondent's Management. This mistake ought to be understood in (the) light of the fact of it happening at a time of relative confusion within the respondent's ranks, with people being moved from one office or department of the mother body to this or other division or department of one of the several business units …".

Before commenting on the above averments, I would like to indicate that on C 22 October 2004 a court application was filed in this court on behalf of the respondents, seeking leave to place additional evidence before this court. The evidence was in the form of five documents whose existence the respondents did not know of at the time the matter was heard in the court *a quo* on 27 September 2002, and for a considerable period thereafter. The application D was not opposed and, accordingly, at the hearing of the appeal it was granted with no order as to costs.

Having said that, I would like to comment on the averments made by ZESA in its opposing affidavit.

In my view, the allegation by ZESA that once Ministerial authority had been E obtained it was left to ZESA's management to identify the non-designated houses and offer them for sale cannot be true. I say so because when the Minister's consent to the sale was granted on 13 September 2000, the houses to be offered for sale (i.e. the non-designated houses) had already been identified.

Three of the documents placed before this court as part of the additional F evidence clearly indicated that before 13 September 2000, when the Minister's consent was granted, the question of which houses were to be retained (i.e. designated houses) and which houses were to be sold (i.e. non-designated houses) was canvassed. The most important of these documents was a memorandum, dated 21 June 2000, from Mr G T Woods, ZESA's station G manager at Kariba, to the acting corporate services director. The memorandum set out the precise location of each house which was to be retained as well as the occupant's post.

In my view, the averments in ZESA's opposing affidavit indicated that the only basis relied upon by ZESA in the purported cancellation of the agreements H

2005 (1) ZLR p125

Sandura JA

A of sale was that its management had made a mistake in selling the houses in question. What was relied upon was, therefore, a unilateral mistake, a mistake which exists when one party to the contract is mistaken but the other is not.

However, even if it were accepted that there was a unilateral mistake on the part of ZESA, I do not think that such a mistake would justify the cancellation of the sale agreements. I say so because it is clear from a perusal B of the sale agreements that ZESA agreed to sell and did sell the houses in question to the respondents who paid the purchase prices in full. That is what the parties intended doing and that is what they did.

As Wessels JA said in *South African Railways & Harbours* v *National Bank of South Africa Ltd* 1924 AD 704 at 715-716:

C "The law does not concern itself with *the* working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties D purport to accept as a record of their agreement."

The law relating to the effect of a unilateral mistake on a contract has been set out in a number of cases.

In *George* v *Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) Fagan CJ said the following at 471 A-D:

> E "When can an error be said to be *justus* for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party – the one who is trying to resile – been to blame in the sense that by his conduct he has led the other F party, as a reasonable man, to believe that he was binding himself? … If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound."

In *National & Overseas Distributors Corporation (Pty) Ltd* v *Potato Board* 1958 (2) SA 473 (A) Schreiner JA considered the effect of a unilateral mistake G on a contract and said the following at 479 E-H:

> "If the respondent had been a natural person who had accepted a tender according to its terms, there is no doubt that a contract would have been made when the acceptance was communicated to the tenderer, as by posting it. It would not be possible for such a natural person, if he H repudiated, to escape liability by proving that he had posted the wrong

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2005 (1) ZLR p126

Sandura JA

> letter or the like. That follows from the generally objective approach to A the creation of contracts which our law follows…
>
> No other approach would be consistent with fairness or practicality. Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted B under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (*error*) would have to be reasonable (*justus*) and it would have to be pleaded."

In our own jurisdiction, the same principles were stated by this court in *University of Zimbabwe* v *Gudza* 1996 (1) ZLR 249 (S). The headnote in that C case reads as follows:

> "… where an offeror mistakenly makes an offer that is accepted by the offeree, the offeror will only be able to rescind the contract if (a) the offer was induced by fraudulent misrepresentation by the offeree; or (b) the mistake was a material one and the offeree knew or ought to have known that the offer had been made in error." D

Finally, in *The Law of Contract in South Africa* 4 ed at 365, Professor Christie considered the effect of a unilateral mistake on a contract and stated as follows:

> "Unless the mistaken party can prove that the other party knew of his mistake, or that as a reasonable person he ought to have known of it, or that he caused it, the *onus* of showing that the mistake was a reasonable one justifying release from the contractual bond will not be easy to E discharge."

Applying the above principles to the facts of the present case, we were satisfied beyond doubt that ZESA had failed to discharge the *onus* of showing that the alleged mistake was a reasonable one justifying the cancellation of the sale agreements. F

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

Ziyambi JA and Gwaunza JA concurred. G

Muzangaza, Mandaza & Tomana, appellant's legal practitioners

Coghlan, Welsh & Guest, respondents' legal practitioners H

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Source:
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ZIMBABWE ELECTRICITY SUPPLY AUTHORITY v ZIMBABWE ELECTRICITY SUPPLY AUTHORITY EMPLOYEES 2005 (1) ZLR 127 (H)

Citation	2005 (1) ZLR 127 (H)
Case No	Judgment No. S-106-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA and Malaba JA
Heard	28 June 2004
Judgment	14 February 2005
Counsel	*F Nyakabawu*, for the appellant *T Chitapi*, for the respondent
Case Type	Civil Appeal
Annotations	No case annotations to date

Flynote

Employment — *labour dispute — disposal order by Labour Court — what may be contained in disposal order — no power to order employer to* D *lift suspension on striking employees — referral of matter to another authority — need to specify authority and set out terms of reference*

Headnote

Following industrial action by employees of the appellant, the matter was referred to the Labour Court which issued a disposal order in terms of s 107 of the Labour Act [*Chapter 28:01*]. The disposal order, among other E things, directed that the appellant should lift the suspension it had imposed on some employees and that the matter should be referred for conciliation.

Held, that while s 107(2)(b) of the Act empowers the Labour Court to suspend a collective job action pending the determination of the underlying cause of a job action, the section, however, cannot be construed as empowering F the Court to order the lifting of a suspension imposed by an employer on his employees.

Held, further, that s 98 of the Labour Act sets out very clearly what should be done in the event of the Labour Court referring a matter to compulsory arbitration. The parties thereto have to be given an opportunity to be G heard before such an order is made. The order should clearly setout the terms of reference and identify the authority to which it is referring the matter.

Chidyausiku CJ

Legislation considered A

Labour Relations Act [*Chapter 28:01*], ss 98, 107(2) and 107(3)

Case information

F Nyakabawu, for the appellant

T Chitapi, for the respondent B

Judgment

CHIDYAUSIKU CJ: The appellant in this case, is a parastatal which supplies electricity. It is engaged in providing an essential service in terms of the Labour Relations Act. Its employment relations disciplinary procedures are governed by a code of conduct registered in terms of the Labour Relations Act [*Chapter 28:01*] ("the Act"). C

It is common cause that the respondents, who are employees of the appellant, engaged in an unlawful collective job action in the form of sit-ins, strike action and general withdrawal of their labour.

A show cause order was issued by the Labour Court terminating the job action by the respondents. On the return day of the show cause order, although the legal practitioners of both parties suggested to the court that they were agreed D on the order to be issued by the court, differences emerged when they made submissions to the court. It became apparent that the parties were agreed only on certain aspects and disagreed on others. The parties were agreed that the collective job action was unlawful, and that it should be terminated with immediate effect. There was, however, some disagreement over the course of E action the appellant could take in regard to conduct prior to the issuance of the show cause order.

The appellant was of the view that it could lawfully discipline the employees for their conduct prior to the show cause order. The respondents took the view that the appellant could not do so. The respondents contended that the show cause order barred the appellant from taking any disciplinary action for F conduct committed prior to its issuance.

The disposal order, the meaning of which is in dispute, provides as follows:

"IT IS ORDERED THAT –

1. The illegal job action engaged on by the respondents as from 13 October 2003 be and is hereby terminated forthwith. G
2. (a) The applicant be and is hereby ordered to lift, with effect from today's date, the suspension it imposed on the striking employees.

   (b) The applicant be and is hereby authorized to withhold payment of salaries and benefits to those employees who were on suspension in respect of the period that they were on strike and on suspension. H

   (c) The applicant be and is hereby authorized to withhold salaries in respect of the rest of the striking employees for the duration of the Collective Job Action.

3. Applicant be and is hereby authorized to take disciplinary action in terms of its code of conduct against any employee who defies the provisions of this order. B
4. The dispute between the parties be and is hereby referred for conciliation in terms of the Labour Act [*Chapter 28:01*]."

The appellant was dissatisfied with paras 2 and 4 of the disposal order. It appeals to this court for an order striking out the two paragraphs. The main argument advanced by the appellant is that the Labour Court had no power C to issue the directive contained in those two paragraphs. The Labour Court did not state in terms of which section of the Act it had issued its order. I have assumed that the Labour Court must have been acting in terms of s 107 of the Act which provides as follows:

"**107 Disposal orders**

D (1) On the return day of a show cause order, the Labour Court shall, at the time and place specified in the order, inquire into the matter and shall afford the parties concerned an opportunity of making representations in the matter.

(2) After conducting an inquiry in terms of subsection (1), the Labour Court may issue a disposal order directing that – E

(a) the unlawful collective action be terminated, postponed or suspended; or

(b) the issue giving rise to the unlawful collective action concerned be referred to *another authority* to be dealt with in terms of Part XII and that, pending the determination of the issue in terms of that Part, the unlawful collective action concerned be terminated, postponed or F suspended.

(3) Without derogation from the generality of the powers conferred upon the Labour Court in terms of subsection (2) to make a disposal order, such order may provide for –

(a) in the case of an unlawful collective action other than a lock-out - G

(i) discharge or suspension of an employer's liability to pay all or part of the wages or benefits due to specified employees or categories of employees engaged in the unlawful collective action, in respect of the duration of such collective action or part thereof;

Chidyausiku CJ

(ii) the employer, in his discretion, to dismiss summarily, or lay off A or suspend with or without pay, specified employees or categories of employees engaged in the unlawful collective action;

(iii) the lay off or suspension, with or without pay, of specified employees or categories of employees not engaged in the unlawful collective action for such period as may be specified where such lay off or suspension is necessitated by the collective B action;

(iv) the dismissal of specified employees or categories of employees engaged in the unlawful collective action;

(v) the prohibition of the collection of union dues by any trade union concerned for such period as may be specified; C

(vi) the suspension or rescission of the registration of the trade union involved in the collective job action;

(b) …" (my emphasis).

In regard to the challenge to paragraph 2 of the disposal order, s 107(3)(a)(i)of the Act empowers the Labour Court to provide for, in a disposal order, the discharge or suspension of an employer's liability to pay wages of employees D engaged in an unlawful job action. Paragraph 2(b) and (c) of the disposal order authorises the appellant to withhold salaries of the striking employees. The legal basis for such a directive exists in the Act.

However, para 2(a) of the disposal order directed the appellant to lift the suspension it had imposed on some employees. There is no provision in s 107 E of the Act conferring power on the Labour Court to issue such a directive. Section 107(2)(b) empowers the Labour Court to suspend the collective job action pending the determination of the underlying cause of a job action. That section cannot be construed as empowering the Labour Court to order the lifting of a suspension imposed by the appellant on its employees. Accordingly the Labour Court had no power to issue the directive set out in para 2(a) of F the disposal order.

The Labour Court did not adjudicate on the underlying cause of the dispute between the parties. It, however, determined that the collective job action was unlawful and referred the determination of the underlying cause of the collective job action to another authority in terms of s 107(2)(b) of the Act. G

While I am satisfied that the Labour Court has the discretion to refer an unresolved dispute to another authority as it did in terms of para 4 of the disposal order, the order itself reveals serious flaws. The Labour Court referred the unresolved issues for conciliation in terms of the Act. The Act enjoins the Labour Court to refer the matter to a specific authority and to spell out, in its H

Chidyausiku CJ

A order, the specific terms of reference. In this regard, s 98 of the Act provides as follows:

"98 **Effect of reference to compulsory arbitration under Parts XI and XIII**

(1) In this section, 'reference to compulsory arbitration', in relation to a dispute, means a reference made in terms of paragraph (d) of B subsection (1) of section eighty-nine or section ninety-three.

(2) Subject to this section, the Arbitration Act [*Chapter 7:15*] shall apply to a dispute referred to compulsory arbitration.

(3) Before referring a dispute to compulsory arbitration, the Labour Court or the labour officer, as the case may be, shall afford the parties a reasonable opportunity of making representations on the matter.

C (4) In ordering a dispute to be referred to compulsory arbitration, the Labour Court or labour officer, as the case may be, shall determine the arbitrator's terms of reference after consultation with the parties to the dispute.

(5) In referring a dispute to compulsory arbitration –

(a) the Labour Court; or D

(b) the labour officer, after consulting any labour officer who is senior to him and to whom he is responsible in the area in which he attempted to conciliate the dispute;

as the case may be, shall appoint as an arbitrator a person whose name appears on a list referred to in subsection (6):

E Provided that the labour officer who attempted to conciliate the dispute which is referred to arbitration shall not be appointed as the arbitrator in that dispute …"

It is clear that paragraph 4 of the disposal order falls short of the requirements of s 98 of the Act. In particular, it does not identify the authority to which the matter is referred or set out the terms of reference as is required by the Act.

F Section 98 of the Act spells out very clearly what should be done in the event of the matter being referred to compulsory arbitration. The parties have to be given an opportunity to be heard before such an order is made. The order should clearly set out the terms of reference and identify the authority to which it is referring the matter. In the light of the above, para 4 of the disposal order G has to be struck out.

In the result, the appeal succeeds to the extent that paras 2(a) and 4 of the disposal order are deleted from the order issued and the matter is remitted to the Labour Court for the reformulation of para 4 of the order. Because of the partial success of the appeal the ordinary rule that costs follow the result does H not apply. Each party will bear its own costs.

2005 (1) ZLR p132

Chidyausiku CJ

ZIYAMBI JA & MALABA JA concurred. A

Gill Godlonton & Gerrans, appellant's legal practitioners

T H Chitapi & Associates, respondent's legal practitioners B

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Source:
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TEL-ONE (PVT) LTD v ZULU 2005 (1) ZLR 133 (H)

2005 (1) ZLR p133

Citation	2005 (1) ZLR 133 (H)
Case No	Judgment No. S-110-04
Court	Supreme Court, Harare
Judge	Chidyausika CJ, Cheda JA & Ziyambi JA
Heard	1 June 2004
Judgment	14 February 2005
Counsel	*H Zhou*, for the appellant *S Mabuye*, for the respondent
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

C **Employment** — *contract — termination — unlawful — damages for — when to be calculated from — employee under suspension securing another job before dismissal — effect — distinction between an employee under suspension and one who is dismissed*

Headnote

D The respondent was suspended from his employment without pay pending investigation into allegations of misconduct. Eighteen months later he secured a job with another employer. He remained there for six months, when he was dismissed, the appellant having told the new employer that the respondent was employed by them and under suspension. A labour relations officer approved the application to dismiss the respondent. E Sixteen months later that the respondent secured another job at a lower wage than what he got from the appellant. When the matter went before the Labour Tribunal, the appellant conceded that the dismissal was unlawful and that damages would have to be paid. The Tribunal ordered that the appellant pay wages and benefits from the date of suspension until the date the respondent secured the second job, less what he F received from the first job, plus damages equal to the difference between what he got from the second job and what he would have got had he stayed with the appellant, up to the date the appellant agreed the dismissal was unlawful.

Held, that an employee who is on suspension is under a legal obligation to G avail himself for duty to his employer during the period of suspension. If he takes employment during the period of suspension, he repudiates his contract of employment. It makes no difference whether the suspension is with or without pay. By taking up the first job, the respondent repudiated his contract of employment with the appellant on that day. The repudiation terminated the contract of employment between the H appellant and the respondent.

2005 (1) ZLR p134

Chidyausiku CJ

Held, further, that an employee who has been dismissed, whether lawfully or A unlawfully, is under an obligation to mitigate his damages as quickly as possible and failure to do so might cause him to be denied damages.

Held, further, that damages would thus be paid from the date of suspension until the date the respondent started the first job.

Cases cited B

Ambali v Bata Shoe Co Ltd 1999 (1) ZLR 417 (S)

Leopard Rock Hotel Co (Pvt) Ltd v van Beek 2000 (1) ZLR 251 (S)

Zimbabwe Sun Hotels (Pvt) Ltd v Lawn 1988 (1) ZLR 143 (S)

Case information

H Zhou, for the appellant C

S Mabuye, for the respondent

Judgment

CHIDYAUSIKU CJ: The respondent was an employee of the appellant. The appellant suspended the respondent on allegations of misconduct on 21 February 1996. The letter of suspension reads as follows:

> "A cheque book went missing from Security Stores when you were in D charge and responsible for the Security Stores at the material time. Three cheques from the cheque book totaling $44 289.03 were cashed with your assistance.
>
> The Corporation is suspecting you of misconduct in terms of the PTC Code of Conduct Part III section 7(2), (3), (9)(a), (10) and (11), as read with the Conditions of Service (Employee) Rules section 15(b), (c), (h), (i) and E (j). You are hereby suspended from duty with effect from 21 February 1996.
>
> Please note that the period of suspension is without pay or all other benefits. The *onus* is on you to meet your financial obligations such as medical aid and pension contributions normally covered by deductions

from your salary." F

On 1 September 1997, the respondent found a job at ZIMNAT and was employed there until he was dismissed on 12 February 1998. Thus, he worked at ZIMNAT for a period of approximately four and a half months. A determination by the labour relations officer was made on 19 March 1998. In terms of that determination, the appellant was authorised to dismiss the respondent with effect from the date of suspension. The respondent appealed against the G determination of the labour relations officer authorising his dismissal. The appeal was heard by a senior labour relations officer, who confirmed the determination of the labour relations officer. The respondent then appealed to the Labour Relations Tribunal ("the Tribunal") (now the Labour Court) against that determination. At the Tribunal the appellant conceded that the H

2005 (1) ZLR p135

Chidyausiku CJ

A dismissal of the respondent was unlawful and that it was willing to pay damages because reinstatement was not possible at that point in time. It is also apparent from the record that at the time the matter came before the Tribunal the appellant was employed by BIMCO. After making a concession that the respondent had been unlawfully dismissed, the parties requested the Tribunal to assess the damages payable to the respondent. The Tribunal ordered that:

> B "The respondent (the appellant in this case) pays the applicant his salary and benefits from 21 February 1996 to 14 June 1999 less the earnings from ZIMNAT.
>
> The respondent pays applicant damages calculated from 14 June 1999 to 31 May 2002 plus interest at the prescribed rate."

C The appellant was dissatisfied with this assessment of damages and now appeals to this Court. The question of damages is an issue on fact: see *Leopard Rock Hotel Co (Pvt) Ltd* v *van Beek* 2000 (1) ZLR 251 (S). In that case, McNally JA had this to say:

> "The ruling by the Tribunal on damages is a ruling on fact and thus is not appealable unless it can be categorised as wholly unreasonable. This may D (but not must) be the situation where the Tribunal has misdirected itself on the law as to the criteria to be taken into account in assessing damages."

The appellant, in its notice of appeal, contends that the Tribunal misdirected itself in making a distinction between back-pay and damages and computing E the respondent's entitlement on that basis. It was argued for the appellant that the concept of damages necessarily includes back-pay, and that the Tribunal should not have differentiated between the two as it did, and that as a result of the failure to properly treat back-pay as damages the Tribunal erred in law. It was also argued that the Tribunal erred in not applying the rule requiring an aggrieved party to mitigate his damages. The appellant further argued that F the Tribunal erred in holding that the respondent's contract of employment with the appellant subsisted until 14 June 1999 when he took up employment with BIMCO. The appellant contended that the respondent repudiated his contract of employment with the appellant when he took up employment with ZIMNAT on 1 September 1997.

I am satisfied that the Tribunal did misdirect itself in calculating the period G forming the basis of damages and, also, in failing to appreciate that back-pay is part of damages and treating the two separately. This misdirection relates to principles applicable in the calculation of damages. Consequently, it is a misdirection on a point of law, and this court can entertain this appeal.

2005 (1) ZLR p136

Chidyausiku CJ

The Tribunal, in arriving at the period it used to calculate damages for the A respondent, reasoned as follows:

> "The appellant is claiming back-pay and benefits from the date of dismissal (21.2.96) to the date when he was permanently employed by a company known as BIMCO i.e. on 14 June 1999. He is claiming a further 36 months as damages calculated from 14 June 1999. It is common cause that the applicant did not just sit back but tried to mitigate his loss by looking for B alternative employment. He managed to secure alternative employment with ZIMNAT on 1 September 1997. This employment was short-lived as ZIMNAT terminated it on 12 February 1998 on the ground that the respondent had advised ZIMNAT that the applicant was still their employee. The letter of termination by ZIMNAT dated 12 February 1998 reads in part: C
>
> 'Please be advised that your contract of employment as a Stationery Controller has been terminated with immediate effect. This has been necessitated by the advice we received from PTC Human Resources

Department that you are still employed by them. They also advised that you are on an indefinite suspension.'

In view of the above, even if it was to be accepted that the applicant by D joining ZIMNAT had the intention to repudiate his contract with the respondent, I find that this was frustrated by the respondent. Therefore, his employment with ZIMNAT was on a temporary basis.

On 17 June 2002, before this court the respondent made the concession that the dismissal cannot be sustained due to the non-availability of expert E evidence, and the election to pay damages as reinstatement was no longer possible.

Under the circumstances, I find that the applicant is entitled to back pay calculated from the date of dismissal (21 February 1996) to the date of repudiation of his contract of employment with the respondent. He repudiated his contract with the respondent by getting permanent F employment with BIMCO on 14 June 1999, less what he earned at ZIMNAT: see *Madyara* v *Globe and Phoenix Industries* 2002 (2) ZLR (S)."

The learned member of the Tribunal further stated:

"In 1999, the applicant effectively repudiated his contract with the respondent. He argues that had it not been for the premature and unlawful termination of his contract with the respondent, he would have been G earning $72 000. He submitted that he is currently earning $23 000 with BIMCO.

He is therefore, entitled to damages from 14 June 1999 up to the date the respondent made the election not to reinstate him i.e. 31 May 2002. The damages will be the difference between what he was getting at BIMCO and what he could have been earning at PTC during that period." H

2005 (1) ZLR p137

Chidyausiku CJ

A The Tribunal thereafter issued the order set out above.

It is clear from the reasoning of the learned member of the Tribunal that she misdirected herself in several respects in determining the quantum of damages payable to the respondent. Firstly, the Tribunal failed to appreciate the distinction between an employee who is on suspension and an employee who B has been dismissed, whether unlawfully or lawfully, and the different legal obligations pertaining to the different employees. An employee who is on suspension is under a legal obligation to avail himself for duty to his employer during the period of suspension and that if such employee takes employment during the period of suspension he repudiates his contract of employment: see *Zimbabwe Sun Hotels (Pvt) Ltd* v *Lawn* 1988 (1) ZLR 143 (S). In that case, C Gubbay JA (as he then was) said at 150:

"The effect of informing an employee that he is suspended was considered by Feetham J in *Gladstone* v *Thornton's Garage supra* at 119. This is what was said:

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

See also *van der Merwe* v *Colonial Government* (1904) 14 CTR 732 at 737; E *Boston Deep Sea Fishing and Ice Co* v *Ansell* (1888) 39 ChD 339 at 352.

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

But does the fact that the employee is suspended without pay in fundamental breach of both the common law and s 5 of the Employment (Conditions of Service) Regulations, rid him of the obligation to hold himself at the disposal of his employer? I think not. Such a breach by the employer will not automatically end the contract. It will serve only to vest G the employee with an election either to stand by the contract and enforce his rights to the payment of his salary, or to accept the repudiation, terminate the contract and sue for damage. See (1888) 39 ChD 339 at 352."

An employee who has been dismissed, whether lawfully or unlawfully, is under a different legal obligation from an employee who has been suspended.

2005 (1) ZLR p138

Chidyausiku CJ

A dismissed employee is under an obligation to mitigate his damages as A quickly as possible and failure to do so might cause him to be denied damages: see *Ambali* v *Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S). In this regard, McNally JA had this to say at 419:

> "There are also those, and Ambali is one of them, who seem to believe that they must on no account look for alternative employment; that so long B as their case is pending they must preserve their unemployed status; that if they look for and find a job in the meanwhile they will destroy their claim.
>
> It cannot be emphasised too strongly that this is wrong. There may be some confusion arising out of cases which deal with wrongful suspension rather than wrongful dismissal."

The learned judge went on further to state: C

> "But if an employee is wrongfully dismissed his duty to mitigate his loss arises immediately. If he is offered a good job the day after he is dismissed he must take it or forfeit any claim for damages. If he is offered a good job only after he has been unemployed for six months, he must take it. If in the meantime he has instituted proceedings for reinstatement, he may continue them, but his claim for damages will usually then be limited to D his loss over the six month period."

The principle that emerges from the above authorities is that an employee who is on suspension has a legal obligation to be available for employment by his employer. He cannot take up employment while on suspension, as that has the effect of terminating his previous employment. On the other hand, an E employee who has been dismissed is under an obligation to look for alternative employment almost immediately upon dismissal in order to mitigate his damages.

The respondent in this case, as I have stated, was placed on suspension on 21 February 1996. As the respondent was on suspension he could not, unlike a dismissed employee, take up employment during the suspension without F terminating his former employment. He obtained employment with ZIMNAT on 1 September 1997. The determination, in terms of which he was dismissed, was on 19 March 1998. At the time, the respondent took up new employment on 1 September 1997, he was on suspension. In my view, the fact that the dismissal was back-dated to the date of the suspension does not in any way affect the conduct of the respondent in accepting employment with ZIMNAT G on 1 September 1997. By taking up employment with ZIMNAT, the respondent repudiated his contract of employment with the appellant on that day. That repudiation terminated the contract of employment between the appellant and the respondent. The suggestion that the repudiation was frustrated by the respondent is illogical. The respondent took up employment with ZIMNAT H

Chidyausiku CJ

A and worked for six months before his employment was terminated. The act of accepting employment with ZIMNAT is what terminated the respondent's previous employment.

The Tribunal concluded that the employment with ZIMNAT was on a temporary basis. There is nothing on the record to indicate that the respondent B took employment with ZIMNAT on a temporary basis. If anything, the indications are that he took on the job on a permanent basis and lost it through the interference of the appellant. It may well be that the respondent has a cause of action against ZIMNAT for unlawful termination of employment or against the appellant for inducing the breach of contract of employment. I leave that matter entirely open. I am satisfied, however, that the respondent's acceptance C of employment with ZIMNAT was a repudiation of the employment contract with the appellant.

The appellant conceded that the dismissal of the respondent from employment was unlawful. How then should damages be assessed for that unlawful dismissal from employment? I have concluded that the respondent repudiated his contract of employment with the appellant on 1 September 1997, the date D he accepted employment with ZIMNAT. The respondent therefore can only claim arrears of salary and benefits up to that date. It is on this basis that the appeal should succeed.

In the result, the appeal succeeds and the order of the Tribunal is set aside and substituted by the following order:

> E "It is ordered that the respondent be paid his salary and benefits from the date of dismissal, which is 21 February 1996, to the date he took up employment with ZIMNAT, which is 1 September 1997."

CHEDA JA & ZIYAMBI JA concurred.

F *Coghlan, Welsh & Guest*, appellant's legal practitioners

Mabuye & Co, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/MATANHIRE v B P SHELL MARKETING SERVICES (PVT) LTD 2005 (1) ZLR 140 (H)

MATANHIRE v B P SHELL MARKETING SERVICES (PVT) LTD 2005 (1) ZLR 140 (H)

Citation	2005 (1) ZLR 140 (H)
Case No	Judgment No. S-5-05
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	31 January 2005
Judgment	15 February 2005
Counsel	*T Muskwe*, for the appellant *W Ncube*. For the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Practice and procedure — *directions — application for — matter pending in Labour Relations Tribunal — not competent for High Court to give directions in respect of matter pending in another forum*

Practice and procedure — *judgment — finality of — limited extent to which court may alter judgment once given* D

Headnote

The appellant was suspended from duty, then dismissed, on various grounds of misconduct. He noted an appeal to the then Labour Relations Tribunal. Some six months later, the respondent issued summons against the appellant in the High Court for the repayment of various sums loaned to him while he was employed. At the pre-trial conference, the judge issued E an order by consent. The order depended on whether the Tribunal found the appellant's dismissal to be lawful or otherwise. If it was unlawful, the agreement was the appellant would not be liable to repay the loans that were due and owing to the respondent while the respondent would not be liable to pay damages for the unlawful dismissal. If the Tribunal found F that the appellant was lawfully dismissed, he would be liable to pay the respondent the sums loaned with interest to the date of payment and costs of suit. When the matter was first heard by the Labour Relations Tribunal, it was postponed to enable the appellant to seek directions from the High Court. A different judge heard the application for directions, and ordered that Labour Relations Tribunal should determine the lawfulness G or otherwise of the appellant's dismissal and the substantive issues relating to dismissal, reinstatement or package in lieu of reinstatement. The Labour Relations Tribunal determined that the dismissal was unlawful and that it was bound by the terms of the consent order. The appellant argued that the later order of the High Court should have been followed. H

Chidyausiku CJ

A *Held*, that once a matter has been finalised by a court, that court becomes *functus officio*. It has no authority to adjudicate on the matter again. The only jurisdiction that a court has is to make incidental or consequential corrections. It may also correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention, provided that the substance of the judgment is not affected thereby.

B *Held*, further, that an order giving directions is not an incidental order and a judge of the High Court cannot vary or alter an order of a judge of parallel jurisdiction, short of expanding on it.

Held, further, that the order giving directions was patently irregular in that it was purportedly made in terms of r 151, which does not authorise the C High Court to grant such an order. In terms of that Order the High Court can only give directions in respect of matters pending in the High Court and not in other *fora*.

Cases cited

Brightside Entprs (Pvt) Ltd v Zimnat Ins Co 1998 (2) ZLR 229 (H)

D *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A)

Kassim v Kassim 1989 (3) ZLR 234 (H)

Parker v Parker & Ors 1985 (2) ZLR 79 (H)

S v Wells 1990 (1) SA 816 (A)

Thompson v SA Broadcasting Corp 2001 (3) SA 746 (SCA)

West Rand Estates Ltd v New Zealand Insurance Co Ltd 1926 AD 173

Legislation considered E

High Court Rules 1971 (RGN 1047 of 1971), r 151

Case information

T Muskwe, for the appellant

F *W Ncube*. For the respondent

Judgment

CHIDYAUSIKU CJ: This is an appeal against a determination of the Senior President, C Bhunu, (as he then was) of the Labour Court. The facts of this case are common cause and are ably set out in the heads of argument of the respondent's counsel. They are as follows.

G On 4 September 1998, the respondent suspended the appellant from employment without pay on allegations of smuggling of rhino horns and dealing in precious metals or, alternatively, fraud or forgery or theft, bribery or corruption.

On 22 September 1998, the appellant appeared before a disciplinary committee. He was found guilty of non-disclosure of owning a company and of trading H in precious stones on the black market in violation of the company's code of

Chidyausiku CJ

conduct. His contract of employment was terminated with effect from the date A of his suspension.

On 23 October 1998, the appellant appealed to the Labour Relations Tribunal, now the Labour Court.

On 6 April 1999, the respondent issued summons in the High Court against the appellant claiming payment of the sum of $290 914.70, being the amount B of loans advanced by the respondent to the appellant during the course of his employment. The appellant defended the claim. By April 2000, the High Court matter reached the pre-trial conference stage and came before Smith J.

On 11 April, Smith J issued a consent judgment on the basis of a settlement reached by the parties. Both legal practitioners representing the parties signed C the consent order on behalf of their clients. The consent order provides as follows:

> "Smith J: The defendant was employed by the plaintiff. In September 1998, the plaintiff suspended the defendant and applied to a labour relations officer for approval to dismiss him. The matter has now been referred to the Labour Relations Tribunal which has a tremendous back-log. The D plaintiff issued summons claiming from the defendant repayment of a vehicle loan ($197 760), an essential services loan ($357.87) and an educational loan ($92 795.83) – a total of $290 914.70. *The parties have agreed that the plaintiff will withdraw its claim on the following basis* –
>
> (a) if the Labour Relations Tribunal determines that the dismissal of the E defendant was not lawful, the defendant shall not be liable to repay the loans and the plaintiff shall pay the defendant's costs of suit but shall not be liable to pay damages for the unlawful dismissal;
>
> (b) if the Labour Relations Tribunal determines that the dismissal of the defendant was lawful, the defendant shall be liable to pay the plaintiff $290 914.70 with interest thereon at 25 per cent *per annum* from 19 F March 1999 to date of payment and costs of suit" (emphasis is mine).

This court order is very clear and admits no ambiguity. It simply means that the respondent was withdrawing its case against the appellant on the two conditions set out in the order, namely, that, in the event of the Labour Relations Tribunal concluding that the appellant was unlawfully dismissed, the appellant would not be liable to repay the loans that were due and owing G to the respondent while the respondent would not be liable to pay damages for the unlawful dismissal. It is clear that the parties agreed that the damages for unlawful dismissal would be set off against what the appellant owed the respondent by way of loans. H

Chidyausiku CJ

A It is also clear from the consent order that, in the event of the Labour Relations Tribunal coming to the conclusion that the appellant was lawfully dismissed, the appellant would be liable to pay the respondent the amount of $290 914.70 with interest at the rate of 25 per cent *per annum* from 19 March 1999 to date of payment and costs of suit.

B The Labour Court matter was set down for hearing on 7 March 2002. At the hearing of the matter, the following order was issued by the Presiding Officer:

> "It is ordered that the matter be and is hereby postponed *sine die* to enable the appellant to seek directions from the High Court."

It was contended, and not disputed, that the postponement was at the instance of the appellant who wished to apply to the High Court for directions.

C The appellant thereafter filed a chamber application to the High Court in terms of r 151 of the High Court Rules 1971. That rule provides as follows:

> "151. **Application for directions after pleadings closed: notice to opposite party**
>
> (1) In any action after pleadings are closed, or by leave of a judge D after appearance has been entered, either party may make a chamber application for directions in respect of any interlocutory matter on which a decision may be required."

The application for directions was opposed. However, Mavangira J granted the chamber application and issued the following order:

> E "IT IS ORDERED
>
> 1. That the matter be and is hereby referred to the Labour Relations Tribunal on the substantive issues on lawfulness or unlawfulness of the dismissal of the Applicant or his reinstatement.
> 2. That the Labour Relations Tribunal be and is hereby ordered to determine on the substantive issues relating to dismissal, F reinstatement or package in lieu of reinstatement.
> 3. That costs be reserved."

It is quite clear that r 151 provides for an application for directions in respect of matters pending before the High Court and not pending in the Labour Court or other fora. It is, therefore, surprising that the appellant should have made such an application and a judge of the High Court should have granted such G an order when clearly she had no authority to grant such an order. Rule 151 is clearly intended to enable the High Court to control and regulate its own process and not the process of other courts. I shall revert to this.

The Labour Court matter then resumed on 15 September 2003. The matter was H duly completed and judgment was delivered. In his judgment, the learned

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Chidyausiku CJ

Senior President concluded that the dismissal of the appellant was unlawful A and that he was bound by the order of Smith J, cited above. In that order, it was directed that in the event of the Labour Court concluding that the appellant's dismissal was unlawful the appellant would not repay the loans advanced to him and the respondent would thereby be released from the obligation to pay the appellant damages for wrongful dismissal. The Labour B Court accordingly issued the following order:

> "In the result, the appeal can only succeed. In view of the appellant's success this court is bound by the consent order made by Smith J in High Court case No. HC-4735-99 which ordered that:
>
> '(a) If the Labour Relations Tribunal (Court) finds that the dismissal of the defendant (appellant) was not lawful the defendant shall not be C liable to repay loans (specified in that order) and the plaintiff (respondent) shall pay the defendant's costs of suit but shall not be liable to pay damages for the unlawful dismissal'."

The appellant was aggrieved by this determination and appeals to this court on the following grounds set out in the notice of appeal:

> "1. It is respectfully submitted that the court *a quo* erred in holding that D the appellant was bound by a consent order made before Smith J under case No. HC-4735-99 contrary to the directions of the High Court under case No HC-3000-02 directing the court *a quo* to deal with all substantive issues including matters relating to reinstatement or payment of a package in lieu of reinstatement.
>
> 2. The court *a quo* erred in making a finding, that the consent order was E binding when in actuality the court *a quo* previously requested appellant to seek directions from the High Court in his order of 7 March 2002, which directions were duly issued by the High Court under case No HC-3000-02, by flouting the terms of that order.
>
> 3. The court *a quo* totally misinterpreted the order made before Smith F under case No. HC-4735-99 in circumstances where it only related to the loans agreement and not substantive issues of the labour.
>
> 4. The court *a quo* erred in failing to make a finding that this was an appropriate case of an award of costs on a punitive scale on a legal practitioner and client scale given the unwholesome conduct of the respondent." G

Dealing with the first ground of appeal, the issue that arises from this ground is whether or not the Labour Court committed an error of law by applying Smith J's order which recorded the settlement of the parties of their dispute in case No. HC-4735-99. In order to succeed on this ground, the appellant has to show or establish that there is a rule or principle of law which required or H

Chidyausiku CJ

A bound the Labour Court to apply or follow the order of Mavangira J as against that of Smith J.

In his heads of argument, counsel for the appellant made the following submissions:

> "1. The appellant in this appeal is seeking the setting aside of the B judgment of the court *a quo* and his immediate reinstatement to his original position at the time of suspension without any loss of benefits on the basis that the court *a quo* made a fundamental error in failing to implement the High Court Order of 3 June 2003 under case No. HC-4735-99 (p 49 of the record) which gave it directions as to how the matter was to proceed and be determined. C
>
> 2. The appellant is further seeking an appropriate order of costs as against the respondent on a punitive scale as between legal practitioner and client scale given the reckless attitude of the respondent in pursuing an inane argument in the light of the 'glaring error' by the court *a quo* and having been informed by the appellant's legal practitioners of that error.
>
> D A. **MAIN SUBMISSIONS**
>
> 1. It is a fundamental rule of law that where the court *a quo* refers a matter for directions to a superior court, as in the matter *in casu* to the High Court and such directions given and issued by that superior court, then the court *a quo* has no discretion put to implement them. E
>
> 1.1 Thus the court *a quo* having referred the matter to the High Court in terms of its order of 7 March 2002 (p 50 of the record refers) after the parties had given conflicting interpretations to the order of the then Judge of the High Court, Smith J, dated 10 April

2000, which essentially dealt with the question of company motor vehicle loans F and not labour issues; the High Court of Zimbabwe having given such directions (p 50 of the record refers), the court *a quo* had an obligation to implement the directions of the High Court as directed and had no discretion in the matter: see *Standard Chartered Bank of Zimbabwe* v *Matsika* S-23-96. G

1.2 The court *a quo*, having made a finding that the respondent had failed to prove the appellant's guilt on a balance of probabilities must have gone further to order reinstatement of the appellant to his original position as at the time of suspension without any loss of benefits as per the High Court order of 3 June 2002 (p 49 refers). It is further

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Chidyausiku CJ

respectfully submitted that the court *a quo* had no discretion A at all, to hold otherwise but to implement the High Court Order."

Counsel for the respondent did not refer us to any authority for the proposition that where there are two orders from the same court it is wrong for a lower court to comply with one order as opposed to the other. In the present case, there B are two judgments of two different judges of the same court with the same parallel jurisdiction which are at variance with each other. This situation is largely of the appellant's own creation, in that he firstly signed a consent order which is very clear, and thereafter, he applied for another order from the same court, the High Court, which sought to alter the judgment previously obtained from that court. C

The basis upon which Mavangira J's order was sought, according to the appellant's counsel, was that the High Court has jurisdiction to interpret its judgment. It is a submission, as Prof *Ncube* correctly submitted, which finds no support in law. The law on this point is very clear, in that once a matter has been finalised by a court, that court becomes *functus officio*. It has no authority to adjudicate on the matter again. The only jurisdiction that a court D has is to make incidental or consequential corrections. The position was stated as follows in the case of *Kassim* v *Kassim* 1989 (3) ZLR 234 (H) at p 242C-D where it was stated that:

> "In general, the court will not recall, vary or add to its own judgment once it has made a final adjudication on the merits. The principle is stated in E *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306, where Trollip JA stated:
>
> 'The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally F exercised, its authority over the subject matter has ceased'."

In *Firestone supra*, at p 306 the court further stated that:

> "The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt which the court overlooked or inadvertently omitted to grant." G

Further on at 307C-G, the court went on to say:

> "The court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention … The exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance." H

Chidyausiku CJ

A In *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 it was stated that:

> "The court can, however, declare and interpret its own order or sentence, and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the sentence are in no way affected by such correction; for to interpret or correct is held B not to be equivalent to altering or amending a definitive sentence once pronounced."

The above principles were fully reaffirmed in *Thompson* v *South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) at 748-749: see also generally *Brightside Enterprises (Pvt) Ltd* v *Zimnat Insurance Co* 1998 (2) ZLR 229 (H) at 231-232. C

In *S* v *Wells* 1990 (1) SA 816, the principles were stated as follows:

> "According to the strict approach a judicial official is *functus officio* upon having pronounced his judgment which is a *sententia stricti juris* and as such incapable of alternation, correction, amendment or addition by him in any manner at all … A variant of this strict approach permits a judicial D officer to effect linguistic or other minor corrections to his pronounced judgment without changing the substance thereof …
>
> The more enlightened approach, however, permits a judicial officer to change, amend or supplement his pronounced judgment, provided that the substance of his judgment is not affected thereby" (at 819-820).

E In *Parker* v *Parker & Ors* 1985 (2) ZLR 79 (H), it was held that an order giving directions is not an incidental order and that a judge of the High Court cannot vary or alter an order of a judge of parallel jurisdiction, short of expanding on it (see at pp 84-85).

The effect of Mavangira J's order was to do precisely what was said to be incompetent in *Parker* v *Parker supra*.

F Whilst it is true that there was no appeal against the judgment of Mavangira J and this court is not seized in this appeal with the correctness or otherwise of that judgment, the fact of the matter is that Mavangira J's judgment is not only patently wrong, it is also patently irregular in that it was purportedly made in terms of Order 23 which does not authorise her to grant such order. I have G already stated that in terms of Order 23 she could only have given directions in respect of matters pending in the High Court and not in other fora.

The first ground of appeal cannot succeed as it is predicated on a court order that is patently incompetent and irregular.

The Labour Court cannot be faulted for complying with the order of Smith H J which cannot and has not been impugned. Apart from this, the order of

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Chidyausiku CJ

Smith J was given by consent and its terms were very clear, contrary to the A submissions by the appellant's counsel. The order states in no uncertain terms that in the event of the appellant's dismissal being found to be unlawful by the Labour Court, his damages for such unlawful dismissal would be the equivalent of the amount the appellant owed the respondent in respect of the loans. The appellant's counsel, who represented him at the pre-trial conference, B signed that agreement and he should have known and understood its meaning.

Turning to the second ground of appeal, that ground clearly misrepresents what is on record. What is on record is that the appellant requested for a postponement of the matter while it was pending at the Labour Court in order to enable the appellant to apply for directions from the High Court. The Labour C Court granted the postponement. The Labour Court never requested for directions. Even if it had requested for such directions it would have acted *ultra vires* the Labour Act which does not provide for such a procedure. Accordingly, the second ground of appeal must also fail.

In the third ground of appeal, the appellant contends that the court D misinterpreted the order of Smith J in HC-4735-99 in circumstances where it only related to the loan agreement and not substantive issues of labour. With the greatest respect, it is the appellant who has misinterpreted the order of Smith J whose language very clearly provides for what should happen in the event of the Tribunal finding that the dismissal of the appellant was unlawful. Again, there is no substance in this ground of appeal. E

The appellant's counsel seeks damages on a punitive scale given what he contends to be the unwholesome conduct of the respondent. If anybody was guilty of unwholesome conduct it is the appellant's legal practitioner who played a leading role in the litany of errors which is the hallmark in this case.

The respondent has not asked for punitive costs therefore no such costs will F be awarded. The costs will follow the result.

In the result, the appeal is dismissed with costs.

Ziyambi JA & Malaba JA concurred. G

Muskwe & Associates, appellant's legal practitioners

Coghlan Welsh & Guest, respondent's legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/ZHOU v GLOBAL MOTORS & ANOR 2005 (1) ZLR 149 (H)

ZHOU v GLOBAL MOTORS & ANOR 2005 (1) ZLR 149 (H)

Citation	2005 (1) ZLR 149 (H)
Case No	Judgment No. HH-11-2005
Court	High Court, Harare
Judge	Makarau J
Heard	18 January
Judgment	16 February 2005
Counsel	Details not supplied
Case Type	Civil review
Annotations	No case annotations to date

Flynote

C **Court** — *small claims court — review of decision of — procedure — normal review procedure to be followed — grounds for review — limited to method by which court's decision arrived at*

Review — *small claims court — how proceedings from small claims court may be brought on review — normal review procedure to be followed*

Headnote

D The Small Claims Court was set up in 1993 for the adjudication of small civil claims in an inexpensive fashion. It is not a court of record and procedure therein is largely informal. No appeal lies from its decisions. It is not permissible to bring an appeal under the guise of a review. An application for review must be limited to attacking the manner in which the decision E of the small claims court was arrived at rather than the merits of the decision. The review must be brought by way of court application on notice to the other side and to the small claims court whose decision is to be reviewed.

Cases cited

F *Charumbira v C of T & Ors* 1998 (1) ZLR 584 (S)

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

Kariwo & Anor v Takawira & Anor HH-113-98

Min of Labour & Ors v Pen Transport (Pvt) Ltd 1989 (1) ZLR 293 (S)

Mundoma v BICC CAFCA (Pvt) Ltd S-133-98

Muringi v Air Zimbabwe Corp & Anor 1997 (2) ZLR 488 (S)

G *National Foods Ltd v Kare & Ors* 1990 (1) ZLR 223 (H)

Legislation cited

High Court Act [*Chapter 7:06*], ss 26 and 27

High Court (General) Rules 1971 [RGN 1047 of 1971], r 256

Small Claims Court Act [*Chapter 7:12*], ss 30 and 33

Makarau J

Judgment

MAKARAU J: This matter was placed before me in chambers as a review of A the proceedings of the small claims court.

The background facts to this matter may briefly be stated as follows:

The plaintiff issued process out of the Small Claims Court claiming the sum of $12 800 000 for services rendered at the defendant's special instance in supplying and fitting car shades at the defendant's premises. The claim was B resisted. After the hearing, which was held on 28 September 2004, the presiding officer entered judgment for the plaintiff in the sum of $11 800 000 together with costs. Dissatisfied with the judgment, the defendant filed a document styled "Application for Review" with the clerk of court. This he did on 24 November 2004. The document, together with the record of proceedings before the Small Claims Court, were placed before me in chambers with a C request that I review the proceedings.

In the purported application for review, the defendant avers that:

"1. The Presiding Officer erred in awarding judgment in favour of the plaintiff in the sum of $11 800 000 when the right to that amount had not been properly established. D

2. The Presiding Officer erred in not finding that the work done was so defective that it did not serve the purpose for which it was intended.

3. The Presiding Officer erred in not taking into consideration the fact that the shades have to be removed and altered at an estimated cost of $6 000 000 for the nets alone.

4. The plaintiff as an expert was expected to advise us (*sic*) on the state E of the structure before putting up the tents.

5. We are not refusing in totality the plaintiff's claim but we are prepared to pay the reasonable value for work done, which we value at $5 500 000."

The Small Claims Court was set up by Parliament in 1993 for the adjudication F of small civil claims in an inexpensive fashion. It is not a court of record and procedure therein is largely informal. No appeal lies from its decision as s30 of the Small Claims Court Act [*Chapter 7:12*] provides:

"**30 Finality of judgment**

A judgment of a small claims court shall be final and no appeal shall G lie from it, but any party may bring the proceedings on review before the High Court on any grounds on which the High Court may review proceedings of judicial tribunals."

It is under the provisions of this section that the purported review was brought before me. H

Makarau J

A Two issues arise from the papers before me.

Firstly, assuming that the papers were properly before me, which they are not, as I shall detail hereunder, the issues raised in the application for review are not review matters but are an attack on the merits of the judgment of the presiding officer. It is a settled position at law that an attack on the merits of B the decision is an appeal while a review seeks to attack the manner in which the decision was arrived at. The difference between an appeal and a review was highlighted in *Muringi* v *Air Zimbabwe Corporation & Anor* 1997 (2) ZLR 488 (S) at 490F-G, where Gubbay CJ (as he then was), had this to say:

"Judicial review, as the phrase implies, is concerned not with the correctness of the decision but with the decision making process."

The statement by the then Chief Justice above, was cited with approval by McNally JA in *Charumbira* v *Comm of Taxes & Ors* 1998 (1) ZLR 584 (S), which in turn was cited with approval in *Mundoma* v *BICC CAFCA (Pvt) Ltd* S-133-98.

While not referring to any of the above Supreme Court decisions, Devittie J made the same distinction between an appeal and a review in *Kariwo & Anor* v *Takawira & Anor* HH-113-98. In that case, he reminded himself of the distinction between an appeal and a review by citing the following passage from *Herbstein and van Winsen* 4 ed p 932:

> "The reason for bringing proceedings under review or appeal is usually the same, to have judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however the real grievance is against the *method* of the trial, it is proper to bring the case upon review. The first distinction, depends therefore on whether it is the result only or it is the method of the trial that is to be attacked. And naturally, the method of trial will be attacked on review only when the result of the trial is regarded as being unsatisfactory as well. The giving of a judgment not justified by the evidence would be a matter of appeal and not of review upon this test. The essential question in review proceedings is not the correctness (of the decision) under review but its validity."

This court does not exercise an appellate jurisdiction under its review jurisdiction of inferior tribunals: see *National Foods Ltd* v *Kare & Ors* 1990 (1) ZLR 223, 232 (H); *Minister of Labour Manpower & Social Welfare & Ors* v *Pen Transport (Pvt.) Ltd* 1989 (1) ZLR 293 (S) *and Fikilini* v *Attorney-General* 1990 (1) ZLR 105 (S).

In the papers before me, no allegation tending to attack the manner in which the judgment was arrived at has been raised. No allegation has been made that

the proceedings were irregular or that the decision is invalid for want of procedure. The attack on the decision is that it was incorrect.

On the basis of the foregoing, even assuming that I could review the matter on the basis of the papers before me, the review would not have succeeded. It is essentially an appeal brought under the guise of a review and will have the effect of bypassing the provisions of s 30 cited above.

Secondly and more importantly in my view, the purported review brought by the defendant is improperly before this court.

It is specifically provided in the rules of this court that save where any other law provides otherwise, reviews to this court are to be brought by way of court application on notice to the other side and to the authority or body whose decision is to be reviewed.[1]

The Small Claims Court Act does not provide for the procedure to be adopted when an aggrieved party wishes to bring on review the decision of a presiding officer in favour of any of the parties appearing before that court. Instead, it specifically provides in s33 for the reviews of a decision of a presiding officer imposing a penalty on any person for contempt of the Small Claims Court. These are to be on statement from the presiding officer. In my view, it is worth noting that the legislature specifically provided for an informal procedure for the review of the decision of a presiding officer imposing a penalty for contempt of court. In making this special provision which imports the informality of the procedures before the small claims court into the High Court procedures, the legislature must be presumed to have been aware of the provisions of the High Court Rules I have referred to above. In my view, one can easily understand the jurisprudential basis for making this special provision, as contempt proceedings have the effect of depriving the convicted party of his or her liberty and the power of the presiding officer to do so has to be checked to avoid abuse.

Further, it is my view that by making specific provision for the informal review of the decision of a presiding officer imposing a penalty for contempt of court and not making similar provisions for the review of any other decision of the presiding officer, the legislator must be taken to have intended to exclude general reviews from the informal procedure. In arriving at this finding, I am relying on the *expressio unius est exclusio alterius* maxim. It is part of this court's approach in construing statutes to be guided by this maxim whose meaning is effectively that the mention of one or more things of a particular

Makarau J

A class may be regarded as by implication, excluding all other members of the class.[2]

While it is part of this court's approach to make the *expressio unius est exclusio alterius* maxim yield if its invocation will lead to an absurdity, it is my view, that that no absurdity will result in the matter before me by invoking the B maxim. To the contrary, the invoking of the maxim appears to me to fulfil the purpose of the Small Claims Court Act. As indicated above, it was the intention of the legislature to set up an inexpensive and expeditious vehicle for the settlement of small claims. It further appears to me that it was not the intention of the legislature that the resolution of such claims, be prolonged by the noting of appeals to the formal courts, hence, the provisions of s 30 of the Act. The C spirit behind s30 of the Act was, in my view, to contain the duration of litigation over small claims. Limiting the matters that filter to the High Court to reviews only is in keeping with the spirit of the Act and this spirit is further kept by subjecting such reviews to the formality normally associated with the High Court. It is my view that any informality on the part of the High Court may open floodgates of appeals labeled "reviews", a mischief that the legislature D intended to curb.

I have considered and rejected the possible argument that since small claims are informally dealt with at first instance, it is not in the interests of justice to subject litigants over such claims to the formal procedures of the High Court. This may even entail having to engage counsel at the prevailing high costs. E I have rejected this possible argument on the basis that this court does not proceed on the basis of the rules of the tribunal whose decision is under review save where this has been specifically provided for in the legislation setting up the tribunal. It is trite that reviews of the decisions of most inferior tribunals of whatever nature, be they lower courts, quasi-judicial bodies, military or labour related tribunals, are dealt with in terms of the standard review F procedures of this court as laid out in Order 33 of the High Court Rules. This court enjoys its review powers by virtue of sections 26 and 27 of the High Court Act [*Chapter 7:06*]. As stated above, unless any other law provides to the contrary, civil reviews to this court are to be brought in terms of the provisions of Order 33 of the Rules.

G On the basis of the foregoing, it is my view, that reviews to this court seeking to set aside the decisions of the Small Claims Court are to be filed in accordance with the provisions of Order 33 of the High Court Rules 1971 and are not to be entertained on statement from the aggrieved party.

2005 (1) ZLR p154

Makarau J

As indicated above, in the matter before me, a single document purporting to A be an application for review has been placed before me in chambers. The grounds upon which the defendant seeks to have the decision of the Small Claims Court set aside go to the merits of the decision and are not the grounds upon which this court reviews the decisions of inferior tribunals. The application was not served on the plaintiff. Due to these unsatisfactory B features, the application by the defendant does not comply with the rules of this court and is therefore improperly before me.

As this is a matter involving the procedure of this court, I have discussed this judgment with the Judge President who shares my views.

In the result, the application is dismissed. C

1 Order 33 r 256 of the High Court Rules, 1971.
2 See: Cross *Statutory Interpretation* 2 ed p 138.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/BENNETT v PARLIAMENT OF ZIMBABWE 2005 (1) ZLR 155 (H)

BENNETT v PARLIAMENT OF ZIMBABWE 2005 (1) ZLR 155 (H)

Citation	2005 (1) ZLR 155 (H)
Case No	Judgment No. HH-18-05
Court	High Court, Harare
Judge	Hungwe J
Heard	9 November 2004
Judgment	18 February 2005
Counsel	*E T Matinenga*, for the applicant *S J R Chihambakwe*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

C **Constitutional law** — *Parliament — privilege — contempt of Parliament — nature of parliamentary proceedings for punishment of contempt — effect of certificate issued by Speaker of Parliament in terms of s 6(1) of Privileges, Immunities and Powers of Parliament Act [Chapter 2:08]* *

Headnote

D A court of law has no power to consider an application for the release, pending appeal, of a person who has been sentenced to imprisonment by Parliament for contempt, once the Speaker of Parliament has issued a certificate in terms of s 6(1) of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*] stating that the matter concerns the privilege of Parliament.

E Following a fracas in the House, Parliament found the applicant guilty of contempt of Parliament and sentenced him to an effective 12 months' imprisonment. He instituted appeal and review proceedings in the Supreme Court and the High Court, contending that Parliament had reached its verdict in an unfair manner and that the sentence imposed on him was excessive. Pending the determination of those proceedings, he F applied to the High Court for an order directing his release from prison. The Speaker of Parliament, however, issued a certificate stating that the application concerned the privilege of Parliament; the certificate was issued in terms of s 6(1) of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*], which provides that when such a G certificate is produced to a court, the court concerned is obliged to stay the proceedings immediately.

Held, that if the court were to issue an order for the applicant's release, following the proper issue of a certificate by the Speaker, it would interfere with an order of Parliament when there was no proper basis to do so. The court had to give effect to the certificate.

Hungwe J

Held, further, that the answer to the applicant's contention that the sentencing A process was flawed was that Parliament is not a court of law properly so called. Although Parliament sits as a court when imposing punishment on its members, it is not bound by the public sentencing principles as they are known to courts of law. It is exercising a special power vested in it as Parliament, which is one of the facets of its sovereignty. B

Cases cited

British Railways Board v Pickin [1974] 2 WLR 208 (HL); [1974] 1 All ER 609 (HL)

De Lille & Anor v Speaker of the National Assembly 1998 (3) SA 430 (C)

Speaker of the National Assembly v De Lille & Anor 1999 (4) SA 863 (SCA) C

Mutasa v Makombe NO 1997 (1) ZLR 330 (S)

Legislation considered

Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*], s 6(1) D

Case information

E T Matinenga, for the applicant

S J R Chihambakwe, for the respondent

Judgment

HUNGWE J: The applicant is a Member of Parliament for the Chimanimani E constituency. He is currently serving a sentence of 15 months' imprisonment with labour, of which three months were suspended for a period, following his being found guilty of contempt of Parliament on 28 October 2004.

Upon his committal to prison, his legal practitioners filed this application on an urgent basis seeking the following relief:

"1. The applicant be released from prison pending the determination of F the Appeal in S-332-04, the review proceedings and constitutional challenges to be instituted by 5 November 2004.

2. The applicant's committal to prison be stayed pending the determination of all proceedings referred to in para 1 hereabove.

3. The applicant reports to the Speaker of Parliament, Clerk of Parliament G or any other official they may designate between the hours of 0600 hours and 1600 hours every Tuesday and Thursday.

4. The respondent pay the costs of this application."

Briefly, the events leading to this application may be summarised as follows. On 18 May 2004, during the course of a debate of the Stock Theft Amendment H

Hungwe J

A Bill in Parliament, a fracas occurred in the august house. A Parliamentary Select Committee on Privileges was established two days later and tasked to enquire into the conduct of the applicant and to report its findings to Parliament. The said Committee duly proceeded with the inquiry and produced a report as mandated.

B Before the committee could present its report before Parliament, the applicant on 26 October 2004 filed an urgent application in which he sought an interdict preventing the Select Committee from tabling its report before the Parliament pending the determination of the effect of the prorogation of Parliament and a constitutional challenge he intended to mount. At the hearing of that application in HC-11689-04, the Speaker of Parliament, who was cited as the C first respondent, invoked the provisions of s 16(1) of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*].*

After argument was presented, the court did not find in favour of the applicant. It stayed these proceedings, thereby giving effect to the Speaker's certificate. In the result, the Select Committee tabled its report to Parliament. Following upon a debate of the report, the applicant was found guilty of contempt of D Parliament and sentenced as aforesaid.

In his submissions on applicant's behalf, Mr *Matinenga* urged this court to take judicial notice of the extremely harsh sentence imposed on the applicant for common asssault and by inference to find that his prospect of success on review or appeal were eminently bright. We were urged to give regard to the E unconstitutionality of the provisions of the Privileges, Immunities and Powers of Parliament Act aforesaid. Mr *Matinenga*'s argument, as I understood it, was this. Section 13 of the Constitution guarantees protection of the right to personal liberty. It specifically forbids the deprivation of personal liberty unless such deprivation is authorised by law. One such exception is where such deprivation of liberty is in execution of the order of a court punishing him F for contempt

of that court or of another court or tribunal or in execution of an order of Parliament punishing him for contempt. But as the Committee which inquired into the allegations had a majority of ruling party members who were biased against him, his rights to a fair trial as enshrined in s 18(2) of the Constitution were infringed. Resultantly, the whole process was unlawful and G infringed upon his constitutional rights so patently that on appeal he will easily overturn the findings and sentence.

2005 (1) ZLR p158

Hungwe J

As to the certificate issued by the Speaker of Parliament, I understand A applicant's argument to be that once the proceedings of the Parliament were terminated with applicant's committal, this court cannot be prevented from reviewing the whole process by the mere production of the certificate. This court has original jurisdiction to review all proceedings of inferior tribunals and courts. Any citizen aggrieved by the determination of an inferior court, B tribunal or quasi judicial body has the right to approach this court for relief.

This argument raises an important issue, the all-important questions of whether the courts could lift the veil of privilege where Parliament merely claims privilege without stating anything further. Put differently, in my view, the issue is whether on the say-so of the Speaker of Parliament, the court must accept that a matter is one of the privileges recognised at law before the C exclusive jurisdiction of Parliament.

As the issue of parliamentary privilege has its roots in the Westminster parliamentary system, it is helpful to trace its development in that jurisdiction and its subsequent adoption in our jurisdiction. Erskine May in his book *Parliamentary Practice* 21ed points out that Coke CJ in the early seventeenth D century regarded the law of Parliament as a particular law, distinct from the common law. For that reason, Coke CJ held that:

> "Judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common laws but *secundum legem et consuetudinem parliamenti*."

Over the years, there has been a discernible shift from this purist position, with E the courts in England having recognised the need for an exclusive parliamentary jurisdiction as a necessary bulwark of the dignity and efficiency of Parliament.

Thus, in general the English courts accepted that when a matter is a proceeding of the House beginning and terminating within its own walls, it is obviously outside the jurisdiction of the courts; though there may be an exception for F criminal acts so far as they may be understood within the term of proceedings of Parliament.

With the passage of time the English courts came to realise that there may be instances where the courts cannot avoid going behind an Act of Parliament and investigate whether it had been properly obtained.

The case of *British Railways Board* v *Pickin* [1974] 2 WLR 208 (HL); [1974] G 1 All ER 609 (HL) demonstrated that although the British courts have been careful not to act so as to cause conflict with parliament there were two views in the judiciary about where the boundary between the concerns of each should be drawn. On the one hand, Lord Denning MR held that: H

2005 (1) ZLR p159

Hungwe J

> A "... it is the function of the court to see that the procedure of Parliament itself is not abused and that undue advantage is not taken of it. In so doing, the court is not trespassing on the jurisdiction of Parliament itself. It is acting in aid of Parliament and, I might add, in aid of justice."

On the other hand, the House of Lords held an entirely opposite view. It held that the function of the court was to consider and apply enactments of B Parliament. Accordingly, it was not lawful to impugn the validity of the statute by seeking to establish that Parliament, in passing it, was misled by fraud or otherwise. Any investigation into the manner in which Parliament had exercised its function would or might result in a conflict: see Erskine May at pp 158-9).

C In our jurisdiction, the position as applied has been heavily influenced by the contemporary changes in the jurisprudence of the region. To begin with, the South African courts have steered away from the neo-conservatism of the pre-1994 era. The development of the South African constitutional law has been heavily influenced by their new constitution which, in a way, permitted for judicial review of parliamentary proceedings (Constitution of the Republic of D South Africa Act

108 of 1996): see *De Lille & Anor* v *Speaker of the National Assembly* 1998 (3) SA 430 (C) and also *Speaker of the National Assembly* v *De Lille & Anor* 1999 (4) SA 863 (SCA): see also *Mutasa* v *Makombe NO* 1997 (1) ZLR 330 (S).

In Zimbabwe, the Privileges, Immunities and Powers of Parliament Act E [*Chapter 2:08*] regulates the position.

Section 6 of that Act, which corresponds with the South African s 5 of the Powers and Privileges of Parliament Act 91 of 1963, requires the officer presiding over any case in which proceedings have been instituted for or on account of any matter of privilege to stay the proceedings on production of the Speaker's certificate. It states:

> F "(1) Upon production, at any stage of proceedings instituted for or on account of or in respect of any matter of privilege, to the presiding officer by the person against whom the proceedings are instituted of a certificate by the Speaker or, in his absence or incapacity, by the Secretary, stating that the matter in question is one concerning the privilege of Parliament the presiding officer shall immediately stay the proceedings G which shall thereupon be deemed to be finally determined."

In the present case, the Speaker again issued his certificate Exhibit 1 of the papers in terms of s 6(1) of the Privileges Immunities and Powers of Parliament Act [*Chapter 2:08*].

2005 (1) ZLR p160

Hungwe J

The certificate issued in terms of s 6(1) mentions in its body two parliamentary A privileges known to the law. These are:

(a) The privilege of absolute control over the internal proceedings of the House; and

(b) The parliamentary privilege of exclusive jurisdiction over a committal for contempt of the House. B

It seems to me there are sufficient jurisdictional grounds upon which to uphold the effect of the certificate. I did not hear counsel to argue against the merits of the finding of contempt by Parliament. It is the manner by which the finding was arrived at that is put in issue. It is the process by which the finding was arrived at which will be urged in the Supreme Court to have offended the rule C against bias. Thus the finding of guilty of contempt is not itself challenged. If that is the case, as I understand it to be, then there are very little prospects of the appeal succeeding. I say this because the procedure adopted to challenge the applicant's incarceration is based on the assumption that because Parliament sat in a judicial capacity, therefore its order should be subjected to the rigours of a normal review or appeal process. That argument D is misplaced. It has been held that a finding of guilt by Parliament on a contempt charge is not a crime in the conventional sense. In *Mutasa* v *Makombe NO supra*, Gubbay CJ at 337C-338B stated:

> "A finding of guilt by Parliament on a contempt-offence is not a crime in the conventional sense. When dealing with these contempt-offences Parliament, though sitting as a court, does not sit as a court of law. Its E proceedings are not in the nature of a public criminal trial as envisaged in s 18(2) of the Constitution; for Parliament is not 'an independent and impartial court established by law'. It exercises its own jurisdiction and powers conferred upon it by the Privileges, Immunities and Powers of Parliament Act. That it does so is recognised in the Constitution. Section 13(2)(b) thereof provides that no person shall be deprived of his F personal liberty save, *inter alia*, as may be authorised by law:
>
> 'in execution of the order of a court punishing him for contempt of that court or of another court or tribunal or *in the execution of the order of Parliament punishing him for a contempt*' (emphasis added).
>
> And s 16(7)(b) of the Constitution prohibits the compulsory acquisition of property of any description or interest or right therein, but provides that G it shall be lawful where such deprivation occurs:
>
> 'by way of penalty for breach of any law whether under civil process or after conviction of an offence, or forfeiture in consequence of a breach of the law or in *pursuance of any order referred to in s 13(2)(b)*' H

2005 (1) ZLR p161

Hungwe J

> A The line drawn in the Constitution between punishment for contempt under an order of court or tribunal, and that imposed by Parliament, is significant and important. It indicates plainly, to my mind, that, in utilising its powers under the Privileges, Immunities and Powers of Parliament Act in dealing with contempt-offences, Parliament is not exercising a criminal or civil jurisdiction. Rather one *sui generis*, being the jurisdiction expressly B authorised by law.

> Thus, in respect of contempt-offences s 18(2) of the Constitution, which stipulates that every person charged with a criminal offence is to be afforded a fair hearing by an independent and impartial court, is of no application. Nor is s 18(9). It concerns the determination of the existence of civil rights and obligations and provides that in respect thereto every C person is entitled to be afforded a fair hearing by an independent and impartial court or other adjudicating authority. Parliament is not such a court or authority."

If the certificate was properly issued, I have no doubt that to issue an order for release of the applicant would interfere with an order of Parliament when there was no proper basis to do so.

D In argument, it was suggested that the sentencing process for the applicant was flawed for reason that party political considerations were at play rather that the strict principles of sentencing as are applied in the courts of law. The simple answer to that argument is to be found in Gubbay CJ's summation quoted in extenso above.

E Parliament is not a court of law property so called. Although it sits as such when imposing punishment on its members, it is not bound by the public sentencing principles as they are known to courts of law. It is exercising special power vested in it as Parliament. It is the "High Court of Parliament," as the old authorities would say. It is one of those facets of its sovereignty. It may sound abbrassive for this court to so state, but to those schooled in F constitutional law I am stating the obvious.

What may well be at issue when the matter is placed before the Constitutional Court is whether Parliament should continue to enjoy such wide *quasi* judicial powers, which may be exercised in such a manner as to deprive a private citizen of his liberty without due process. Whilst applicant had his rights infringed G upon, his victim in turn had his rights withheld as he cannot sue for the assault. Contemporary parliamentary practice shows a dearth of similar cases elsewhere in the region or overseas. Yet as long as the law is in the statute books it is not for the court to change it but to interpret it. The Law Development Commission and human rights groups might find this to be fertile ground for H activism, but for the purposes of the application before me I am of the firm view

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Hungwe J

that the Speaker's certificate is properly relied upon. I am enjoined to give it A effect.

In the result, I dismiss the application with costs.

Kantor & Immerman, applicant's legal practitioners B

Chihambakwe & Mutizwa, respondent's legal practitioners

* Section 6(1) of the Act provides that if the Speaker issues a certificate stating that any issue before a court is a matter of parliamentary privilege, the judicial officer presiding over the court must immediately stay the proceedings – *Editor*.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/S v CHIYANGWA 2005 (1) ZLR 163 (H)

S v CHIYANGWA 2005 (1) ZLR 163 (H)

Citation 2005 (1) ZLR 163 (H)

Case No Judgment No HH-21-05

Court	High Court, Harare
Judge	Hungwe J
Heard	13 January 2005
Judgment	18 February 2005
Counsel	*J C Andersen SC,* for the applicant *M Nemadire,* with him *B Vito,* for the respondent
Case Type	Bail Appeal
Annotations	Link to case annotations

Flynote

C **Criminal law (statutory offences)** — *Official Secrets Act, [Chapter 11:09] — s4 (2) — having possession of information and publishing such information — nature of information that must be published — must relate to military and related matters*

Criminal procedure — *remand — degree of proof required at remand stage* D *— reasonable suspicion — criterion for*

Headnote

The applicant, a member of Parliament and prominent businessman, was arrested on allegations of contravening s 4(2)(b) as read with s 4(2)(a) and s 9 of the Official Secrets Act [*Chapter 11:09*]. It was alleged that he had E passed information to an agent in South Africa concerning the issues of who was going succeed the President and corruption investigations against senior member of the Politburo of ZANU(PF), the governing party. He was taken to court and placed on remand. He was refused bail. He challenged the State's right to place him on remand and to deny him bail.

F *Held* , that an offence under the section is committed by a person who (a) has possession of information relating to military matters or the preservation of the security of Zimbabwe or the maintenance of law and order by the police force or any other body so lawfully established for the purposes of assisting in the preservation of the security of Zimbabwe and (b) publishes or communicates such information to any person in any G manner for purposes prejudicial to the safety or interests of Zimbabwe. Where one of these elements is lacking and is not alleged either in the request for remand form or verbally by the prosecutor, it could not be objectively said that a *prima facie* case for reasonable suspicion has been made out, justifying placing a person on remand.

2005 (1) ZLR p164

Hungwe J

Held, further, that s 13(2)(e) of the Constitution of Zimbabwe, dealing with A the standard for the deprivation of personal liberty, requires the production of evidence of facts and circumstances sufficient to warrant a prudent man in suspecting that the accused person had committed, or was about to commit, a criminal offence. A reasonable suspicion is required. On the facts not one iota of evidence had been adduced. Accordingly, the B applicant was entitled to his immediate release.

Cases cited

A-G v Blumears & Anor 1991 (1) ZLR 118 (S)

McNabb v US 318 US 332 (1943)

S v Niesewand (3) 1973 (1) RLR 216 (A) C

Case information

J C Andersen SC, for the applicant

M Nemadire, with him *B Vito,* for the respondent

Judgment

HUNGWE J: The applicant is a member of Parliament for Chinhoyi D Constituency. He is a prominent businessman as well as a commercial farmer. He was arrested on 28 December 2004 on allegations of contravention of s 4(2)(b) as read with s 4(2)(a) and s 9 of the Official Secrets Act [*Chapter 11:09*]. The Request for Remand Form 242 recites the basis of these allegations as follows: E

> "Between June and December 2004, the applicant was recruited by one Jack, a member of the South Africa Secret Service, to supply to him information on the economic and political developments in Zimbabwe. The applicant supplied such information to Jack, Felix Mbatho and one Madikiza, the Director General of the South African Secret Service.
>
> That information was prejudicial to the security and interests of Zimbabwe. F In turn the applicant was paid US$4 000 monthly on a regular basis and US$10 000 for further information to be supplied."

On 29 December 2004, he was taken to court and placed on remand. He challenged the State's right to have him placed on remand. His challenge did not find favour with the magistrate who proceeded to place him on remand and deny him bail. G

The applicant now seeks a review of those proceedings on an urgent basis. At the same time the applicant has appealled against the order of the magistrate denying him bail.

With the consent of the parties the two matters were consolidated and argued in the same sitting (see HC 104/05 and HC B29/05). H

Hungwe J

A The applicant now seeks an order setting aside his placement on remand and subsequent refusal of bail. He attacks the process leading to the order placing him on remand and denying him bail on several grounds. The applicant challenged the proceedings and the decision following there from on the grounds of it being so grossly unreasonable and irrational that no fair minded court applying its mind to the issues to be decided would have come to the B conclusion that it did.

The citizen's right to liberty is guaranteed by s 13(1) of the Constitution. There are however recognized, in the same section, exceptions to this guarantee. Gubbay CJ discussing the degree of proof required at remand stage in *Attorney-General* v *Blumears & Anor* 1991 (1) ZLR 118 (S) put it this way at C p122A-C.

> "The standard for the deprivation of personal liberty under s 13(2)(e) of the Constitution are facts and circumstances sufficient to warrant a prudent man in suspecting that the accused person had committed, or was about to commit, a criminal offence. This standard represents a necessary accommodation between the individual's fundamental right to the D protection of his personal liberty and the State's duty to control crime. It seeks on the one hand, to safeguard the individual from rash and unreasonable interference with liberty and privacy, and from unfounded charges of crime, yet on the other, to give fair leeway for enforcing the law in the community's protection. The criterion of reasonable suspicion is a practical, non-technical concept which affords the best compromise for E reconciling these often opposing interests. Requiring more would unduly hamper the legitimate enforcement of the law. To allow less would be to leave law-abiding persons at the mercy or the whim or caprice of the authorities."

Mr *Andersen*, who appeared for the applicant, urged us to find that in the absence of evidence of the nature of the information passed on to the alleged F principals by applicant, there could be no basis for reasonable suspicion that a crime was committed or about to be committed. He pointed out to the brevity of the information contained in form 242 the Request for Remand Form. In order for the court *a quo* to have been in a position to determine the issue whether a reasonable suspicion that the applicant committed or was about to commit an offence it was necessary for the State to have disclosed more.

G Surprisingly Mr *Nemadire* who appeared for the respondent indicated that the State had not prepared argument in opposition of the application for review but only in respect of the appeal against refusal of bail. The reason for this, according to Mr *Nemadire*, was that the presiding

magistrate had not filed an affidavit required of him in order for the State to mount its opposition. What

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Hungwe J

that affidavit would have added remains a mystery to this court. Legal A argument could still be advanced in the absence of the affidavit. The papers indicate that the urgent application was duly served on the respondent's representatives as was the notice of set down. Mrs *Chimbaru* who appeared earlier in the morning requested for a postponement to later that morning assuring the court that the State would be ready for the hearing. As is the B practice in all urgent matters, the respondent argues his/her case orally or from prepared papers. Having granted the respondent an earlier application for postponement, the court ordered the respondent to proceed to present its case in the manner it deemed appropriate.

Mr *Vito* then urged the court to dismiss the appeal against the refusal of bail relying on the well known grounds of likelihood of abscondment, ability to C evade trial and so forth. He urged the court not to place too much weight on the presumption of innocence in favour of the applicant. I will consider the application for review.

It seems to me that even without submissions from the State in respect of the review application, I am in as good a position to apply the principles set out D in *Blumears case (supra)* and come to the appropriate conclusion. As was pointed out by Gubbay CJ, the test whether a reasonable suspicion existed upon which to deprive a citizen his liberty is a question of fact to be judged objectively. One must use the reasonable man test and ask the question, on the facts presented to it, would a reasonable court have placed the applicant on remand on the charges as reflected in the Form 242. In order for one to do E so one has to be satisfied that *prima facie*, on the facts presented, all the essential elements appear to have been satisfied, always being careful not to require proof beyond reasonable doubt. See *S* v *Niesewand* (3) 1973 (1) RLR 216.

In my view the starting point is to establish what offence is created by s 4(2)(b) F or 4(2)(a) and s 3 of the Act. (I say s 3 because the Attorney-General in his Certificate issued in terms of s 11 of the Official Secrets Act charges it in the main and the s 4(2) in the alternative. This reference to s 3 is not made elsewhere in the proceedings so will not be considered).

Section 4 reads:

> "(2) Any person who — G
>
> (a) has in his possession or under his control any model, article, document or information, which relates to —
>
> (i) munitions of war or any military matter; or
>
> (ii) The preservation of the security of Zimbabwe or the maintenance H

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Hungwe J

> A of law and order by the police force or any other body or organization appointed or established by the government for the purpose of assisting in the preservation of the security of Zimbabwe, and
>
> (b) publishes or communicates such model, article, document or information to any person in any manner or for any purpose prejudicial B to the safety or interests of Zimbabwe;
>
> shall be guilty of an offence and liable to an offence and liable to a fine not exceeding level 14 or to imprisonment for a period not exceeding twenty years or to both such fine and such imprisonment."

An offence in terms of this section is committed when a person who has C possession of information relating to military matters (S(2)(a)(i)) or to the preservation of the security of Zimbabwe or to the maintenance of law and order by the police force or any other body so lawfully established for the purposes of assisting in the preservation of the security of Zimbabwe (Section 2(a)ii) *and* publishes or communicates such information to any person in any manner for purposes prejudicial to the safety or interests of Zimbabwe D [Section 2(6)]. The use of the conjunctive *and* rather than the disjunctive *or* indicates the linkage between these two paragraphs.

The information must concern or be on the subject of either military or security or intelligence matters or the preservation of the national security by the regular forces or an organization established by statute for security purposes.

E The person must then pass on the information to another person for any purpose prejudicial to the safety or interests of Zimbabwe.

Where therefore one of these elements is lacking it could not be objectively said that a *prima facie* case for reasonable suspicion has been made out. There must be: F

(a) possession of information

(b) of a military or security nature;

(c) passed on to another

(d) for any purpose prejudicial to the security or interests of Zimbabwe.

The facts allege in the intended trial, which are part of the record reads:

G "*Outline of the State case*

1. ……
2. ……
3. ……
4. He was subsequently recruited by Jack to supply intelligence

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Hungwe J

information centred on the following topics A

— the succession issue

— corruption investigations against senior member of the Politburo of ZANU (PF)

5. Round Tree is the code name of the accused.
6. ……. B
7. …….
8. …….
9. …….
10. …….”

No disclosure was made by the State as to the nature of the information passed C on by the applicant either in the hearing a *quo* or the hearing of the appeal, despite the invitation by the court in terms of the law and the indication that court could move into camera to accept that evidence.

In spite of my urging Mr *Vito* to furnish me with such information, he could only say he was prepared to call witnesses. Clearly the State was either not D prepared to confide with the court which in terms of the law it should, as to the exact nature of the information involved or it did not have the information fitting the description of that required in order for a contravention of the Act to occur. It must clearly be in respect of military matters or security matters and must have been handed over for purposes prejudicial to the security or interests of Zimbabwe. E

In order for one to determine this, the need for access to the nature, of the information, is highly relevant. Without it, how can a reasonable court come to the conclusion that a reasonable suspicion existed that an accused committed or was about to commit an offence?

I must comment on the highly emotive language and the highly presumptuous F statements used by the court *a quo*.

Initial remand is an important step in a citizen's loss of his liberty. After arrest without warrant, it is the first time that his case is presented to a neutral body for arbitration of the issue whether or not on the basis of mere suspicion, the citizen must lose his freedom. If he loses his freedom at that stage, before his guilt is proved, he may face total ruin. He may lose his job, or other means of G his livelihood. He could lose his home too if he is a lodger or a mortgagee as he falls into arrears. This could drive his family into destitution and he is forced to rely on State support for livelihood whilst in custody. The consequences are just too ghastly to contemplate for both the rich and the poor. Magistrates H

2005 (1) ZLR p169

Hungwe J

A are therefore to take the greatest care when approaching the question of whether to deny or grant bail. The language used here is totally injudicious and untoward coming from a judicial officer to an unconvicted suspect. He is only a suspect. He has not put forward his side of the case. He expects the courts to fairly listen to his plea for justice.

B To simply rely on the information on the form 242 or that on para 4 of the State Outline as the State did and then oppose bail, demonstrates the need to guard against the dangers of the overzealous as well as the despotic.

As was pointed out by Frankfurter J in *McNabb* v *United States* (1943) 318 US 332(a) 343 —

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

Had the court *a quo* listened to Mr *Dube's* submission, it would not have missed the very obvious point he was at pains to make. It is this, that no *iota* E of evidence has been adduced to trigger the reasonable man's suspicion that applicant has committed or was about to commit the offence charged. What transpired in this case is unfortunately becoming a trend in the so called high profile matters. A suspect is virtually charged, tried and convicted by the media. By the time his matter is placed before a court of law the media has F already convicted the suspect. Apparently some judicial officers have fallen into this trap. Judicial officers, I accept, are also members of the public when they interact with media. They read newspapers, listen to the radio and watch television. Whatever may have swayed their views in the paper must be abandoned at the door to court when they deal with matters of the law. It is their sworn duty to adjudicate freely fairly and without fear or favour. It seems G to me that the officer in the court *a quo* carried the media's views into his court room and failed to exercise his judicial mind properly on the issues before him.

As I have pointed out, I am in no doubt that had the court *a quo* applied its mind to the matters to be decided, it would not have come to the conclusion that it did.

2005 (1) ZLR p170

Hungwe J

As there has not been a proper application of the principles to be applied, I A am enjoined to set aside the proceedings in the court *a quo*.

In the result I grant the following relief.

1. The proceedings in the court *a quo* a (CRB 14773/04) are hereby set aside.
2. The applicant is entitled to his immediate release. B

Dube, Manikai & Hwacha, the plaintiff's legal practitioners

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

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MADZINGO & ORS v MINISTER OF JUSTICE & ORS 2005 (1) ZLR 171 (H)

2005 (1) ZLR p171

Citation 2005 (1) ZLR 171 (H)

Case No	Judgment No. S-100-05
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Ziyambi JA, Malaba JA and Gwaunza JA
Heard	23 February 2005
Judgment	23 February 2005
Counsel	*H Zhou,* for the applicants *E Jena,* for the respondents
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 24 — application under — s 24(6) — right of Attorney-General to be cited and heard — such right exists if a question arises as to whether any law is in contravention of the Declaration of Rights*

D **Constitutional law** — *Constitution of Zimbabwe 1980 — s 20(1) — freedom of expression — does not include right to cast of ballot at an election*

Election — *voters — absentee voters — voters required to attend polling stations personally in order to vote — save in respect of a few specified persons absentee voting is not catered for in the Act*

E **Election** — *voters — right to vote — elections — voters not resident in their constituencies on polling day — failure by authorities to make arrangements for absentee voters to cast their votes — such failure not unconstitutional*

Statutes — *Electoral Act [Chapter 2:13] — overriding object of electoral law* F — *voters required to attend polling stations personally in order to vote — save in respect of a few specified persons absentee voting is not catered for in the Act*

Headnote

Section 24 (6) of the Constitution gives the Attorney-General the right to be heard by the court and therefore be cited if, in any proceedings, it falls G to be determined whether any law is in contravention of the Declaration of Rights.

Failure to make adequate and reasonable arrangements for all voters registered on the common roll who would not be in their constituencies on polling days is not unconstitutional. The voter does not lose his right to vote.

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Malaba JA

He is disabled from exercising that right by being in a wrong constituency A at the time he is expected to vote. Such disability does not result from any action by the Registrar-General (*dicta per* Chidyausiku CJ in *Registrar-General & Ors* v *Tsvangirai* 2002 (1) ZLR 204 (S) followed).

The applicants were all voters, duly registered as such in the constituencies in which they had formally resided. All of them were presently resident B and employed in the United Kingdom and were unable to cast their votes personally in their respective constituencies in respect of the parliamentary election to be held on 31 March 2005. They were concerned that no mechanism had been established in the United Kingdom for the taking of their votes at the election. Relying on s 20(1) of the Constitution, which guarantees freedom of expression the applicants, they applied for C redress to the Supreme Court in terms of s 24(1) of the Constitution.

Held, that the Electoral Act [*Chapter 2:13*] makes it clear that absentee voting is available only to a few specific categories of registered voters living in foreign countries. Those are persons who

are absent from Zimbabwe in the service of the Government or members of the disciplined who are on duty, and their spouses. There is no provision in the Act, or D the Constitution, to the effect that a registered voter, in the position of applicants, who is unable because of the nature of his occupation, service or employment, to attend personally on the polling day to cast the ballot at a polling station in his constituency, can vote through some mechanism of absentee voting.

Held, further that the overriding object of the law of elections was to make E the ballot available to registered voters who attended personally at polling stations to cast their votes.

Held, further, that the applicants' claim, relying on s 20(1) of the Constitution, was ill-founded. Freedom of expression, which is guaranteed by that provision, does not include the casting of a ballot at an election. F

Held, further, that the applicants could not seek to invoke a guarantee, under s 20(1) of the Constitution, to enforce a right not constitutionally protected as a basic human right.

Held, further, that there was no provision in either the Constitution or the Electoral Act [*Chapter 2:13*] on the basis of which the application could be granted. Accordingly the application was dismissed with no order as G to costs.

Cases cited

Allman v Northwest Territory 144 DLR (3d) 467 (SC)

Carter v Saskatchewan (A-G) (1992) 5 CRR 1 H

2005 (1) ZLR p173

Malaba JA

A *Haig v Canada* 16 CRR 193

Hipperson v Electoral Officer [1985] 2 All ER 456 (CA)

Irwin Toy Ltd v Quebec (Attorney General) (1989) 39 CRR 193 (SCC)

Jyoti Basu v Bebi Ghosa [1982] 3 SCR 318

McDonald v Bd of Election Commissioners of Chicago 394 US 802

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

B *R v Zundel* (1987) 29 CRR 349 (SC)

Registrar-General and Ors v Tsvangirai 2002 (1) ZLR 204 (S)

US v Classic 313 US 299

Legislation considered

C Constitution of Zimbabwe 1980, ss 20(1), 24(6) and 58; para 53 of Schedule 3

Electoral Act [*Chapter 2:13*], ss 56(1), 71 and 73

Case information

H Zhou, for the applicants

D *E Jena,* for the respondents

Judgment

MALABA JA: At the conclusion of hearing full argument in this case from counsel for the applicants and counsel for the respondents, we dismissed the application with no order as to costs and indicated that reasons for the decision would follow in due course. These are they –

E The application for redress was made by the applicants in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution") which gives any person who alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to himself the right to apply to the Supreme Court for redress. The proceedings arose out of concern by the applicants that no F mechanism had

been established in the United Kingdom where they resided for taking their votes in the forthcoming election of Members of Parliament ("the election") fixed for 31 March 2005.

The applicants are citizens of Zimbabwe living in the United Kingdom where they are employed. They left the country of their own accord. They have not stated in their affidavits for how long they have been living in the United G Kingdom. It is not in dispute that before leaving Zimbabwe each applicant had registered on the voters' roll for the constituency in which he or she resided. The names of the respective constituencies for which the applicants were enrolled are not given. On the basis of the fact that their names were on the voters roll for their respective constituencies, the applicants alleged that they H were entitled to cast their ballots in the election whilst in the United Kingdom.

Malaba JA

They alleged that they will be unable to attend personally on polling day at A polling stations in the constituencies for which they enrolled to cast their votes.

It is common cause that no machinery has been established in the United Kingdom to take votes of persons in the applicants' position. Assuming that the respondents are responsible for the conduct of the election, the applicants B alleged that failure by the respondents to put up facilities in the United Kingdom or provide some mechanism to take their votes in the election constitutes a hindrance to them from participating in the election and is likely to violate freedom of expression, guaranteed to them under s 20(1) of the Constitution. They also alleged that failure by the respondents to put up mechanisms to record their votes in the foreign country is likely to violate their C right to freedom of assembly and association (s 21) and the right to freedom of movement (s 22). They therefore claim an order directing the respondents to make the ballot in the election available to them in the foreign country where they reside. This they call the "diaspora vote".

The relief sought by the applicants is in the form of an order to the effect that– D

1. The hindrance of the applicants from participating in Parliamentary and Presidential elections is inconsistent with the provisions of ss 20, 21 and 22 of the Constitution of Zimbabwe and is accordingly declared null, void and of no effect.
2. The respondents be and are hereby directed to set up all the necessary E structures to allow and enable the applicants to vote in the forthcoming Parliamentary elections and all future general elections thereafter in the United Kingdom.
3. The respondents pay the costs of this application.

Mr *Zhou*, for the applicants, did not advance in court the contention that the alleged conduct of the respondents in failing to establish mechanisms to take F the applicants' votes in the United Kingdom is likely to violate their rights guaranteed under ss 21 and 22 of the Constitution. He nonetheless pressed on with the argument that the alleged conduct of the respondents is likely to violate the applicants' freedom of expression. The basis of the contention is that freedom of expression includes the right to vote. It is said that the casting G of a ballot is an expression of a preference of a candidate by a voter.

The respondents opposed the application. The first respondent is responsible for the administration of the Electoral Act [*Chapter 2:13*] ("the Act") in terms of which the election is to be conducted. His position is that the Government is not under any legal duty to establish mechanisms in foreign countries to H

Malaba JA

A take votes of its citizens who left Zimbabwe of their own accord and are unable on the polling day to attend personally to cast their ballots at polling stations in the constituencies for which they are enrolled.

The second respondent is the Registrar General of Voters. His stance is that he has no power under the Act to do what the applicants ask the court to order B him to do. The Act entrusted the Zimbabwe Electoral Commission with the responsibility for the conduct of the election. He said that body is not a party to the proceedings.

The third respondent's position is also that it has no power under the Act to do what the applicants want the court to order it to do. It said that its duties in an election are under the Act limited to the accreditation of election monitors C and observers, the making of a report after every election on the conduct of that election stating whether or not the result of the election represented the will of the electorate and giving advice upon request to the Electoral Commission on any matters relating to the registration of voters and the conduct of elections.

D The third respondent was cited as an intervenor in terms of s 24(6) of the Constitution. It appears to me that the Attorney-General should not have been cited as a party to these proceedings. The question raised by the applicants for determination is not whether any law is in contravention of the Declaration of Rights. Section 24(6) of the Constitution gives the Attorney- General the right to be heard by the Court and therefore be cited if in any proceedings it E falls to be determined whether any law is in contravention of the Declaration of Rights. The question arising for determination in these proceedings is whether the alleged failure by the respondents to set up mechanisms to take the applicants' votes in the election in the United Kingdom where they reside is likely to violate their freedom of expression enshrined in F s 20(1) of the Constitution. The allegation is not that any provision of the statute contravenes s 20(1) of the Constitution. The application proceeds on the assumption that there is a constitutionally valid law requiring the respondents to do what the applicants claim as relief in terms of s 24(1) of the Constitution.

The Attorney-General, nonetheless, went into the merits of the application. He denies that the applicants have been excluded from participating in the G election. He said they are free to come back to Zimbabwe on polling day and cast their ballots at the polling stations in the constituencies for which they enrolled. The Attorney-General cited the case of *Registrar General of Elections & Ors* v *Morgan Tsvangirai* S-12-02 as authority for the proposition that the electoral authorities are not under a legal duty to provide machinery H in foreign countries to record votes of Zimbabwean citizens registered as

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voters who live there and are unable to attend personally at polling stations A in their constituencies on polling day to cast their ballots except in respect of the category of persons specified under s 71 of the Act.

The question for determination is whether the applicants have established the allegation that the respondents are under a legal duty to establish machinery in the United Kingdom to take their ballots in the election. In other words does B freedom of expression entrenched under s 20(1) of the Constitution impose a positive duty on the State to take measures to ensure that a registered voter casts his or her vote in a foreign country where he or she is resident on the polling day if he or she is unable to attend personally at a polling station in the constituency for which he or she is enrolled? It is necessary to set out the provisions of the Constitution and the Act which are relevant to the C determination of the question.

Section 20(1) of the Constitution guarantees freedom of expression in these words:

> "(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, D that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence."

Section 58 of the Constitution provides that:

> "(1) …
>
> (2) … E
>
> (3) The qualifications and disqualification for registration, as a voter and for *voting at elections shall be as prescribed in Schedule 3 and subject thereto, by the Electoral Law.*
>
> (4) An Act of Parliament shall make provision for the election of members of Parliament, including elections for the purpose of filling casual vacancies" F (my emphasis).

Section 3 of Schedule 3 of the Constitution provides that:

> "(1) Subject to the provisions of this paragraph and to such residence qualifications as may be prescribed in the Electoral Law for inclusion on the electoral roll of a particular Constituency, any person who has attained the age of eighteen years and who – G
>
> (a) is a citizen of Zimbabwe; or

(b) since 31 December 1985, has been regarded by virtue of a written law as permanently resident in Zimbabwe; shall be qualified for registration as a voter on the common roll. H

2005 (1) ZLR p177

Malaba JA

A (2) …

(3) *Any person who is registered on the electoral roll of a Constituency shall be entitled to vote at an election which is held for the Constituency"* (my emphasis).

Section 60(2) of the Constitution provides that Zimbabwe shall be divided into B one hundred and twenty common roll constituencies. Under s 113(1) of the Constitution, the "Electoral Law" is defined to mean the Act of Parliament having effect for the purposes of s 58(4) which is for the time being in force. It is common cause that the Act of Parliament in force for the purposes of making provision for the election is the Electoral Act [*Chapter 2:13*] which came into force on 1 February 2005. An examination of the law shows that C whilst the applicants have a genuine complaint as registered voters there is no provision in the Constitution and the Act on the basis of which their application can be granted.

The effect of subs (3) and (4) of s 58 of the Constitution is that what is prescribed in Schedule 3 of the Constitution and the provisions of the Act constitutes a self-contained code on the rights and duties arising from the D election. One does not have to look outside these provisions for law governing matters relating to elections in Zimbabwe.

Section 56(1) of the Act also provides that at an election for a member of Parliament every voter registered on the voters roll for the constituency concerned shall be entitled to vote. Does this provision mean that every E registered voter has a right to cast his or her ballot wherever he or she is on the polling day and that the State is obliged to provide mechanisms to take the ballot?

It is important to appreciate the fact that there is no express provision in the Constitution and the Act requiring electoral authorities to establish machinery F in foreign countries to record votes of Zimbabwean citizens registered as voters on voters rolls for constituencies who live in those countries. The provisions that are there require a registered voter to attend personally on polling day to cast his or her ballot at a polling station in the constituency for which he or she is enrolled. The requirement applies to every registered voter and its object is to give effect to the entitlement to vote provided under s 3 G of Schedule 3 of the Constitution. The only exception to this general rule is created in s 71 of the Act.

For the purposes of enabling registered voters to cast their ballots, s 51 of the Act requires the constituency elections officer to establish the polling stations at places convenient to the voters but within the boundaries of the H constituencies. Section 56(3) of the Act requires that a ballot paper be handed

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to a person who has proved to the satisfaction of the presiding officer at a A polling station that he or she is registered as a voter on the voters roll for the constituency concerned by producing a voter's certificate. The presiding officer is required under s 56(2) of the Act to put such questions to an applicant for a ballot paper as he considers necessary to ascertain whether or not the applicant is registered as a voter on the voter's roll for the constituency B concerned. It is clear from the provisions of the Act that the overriding object of the law of elections was to make the ballot available to registered voters who attended personally at polling stations to cast their votes.

Under s 71 of the Act, a person who on application to the Chief Elections Officer can show that he or she has good reason to believe that he or she will be absent from the constituency or unable to attend at the polling station C personally by reason of being –

(a) on duty as a member of a disciplined force or as an electoral officer or monitor;

(b) absent from Zimbabwe in the service of the Government of Zimbabwe; or D

(c) a spouse of a person referred to in para (a) or (b), may vote by post.

A person entitled to postal voting is deemed to be resident in the constituency for which he or she enrolled as a voter. If the Chief Elections Officer is not satisfied that the applicant is entitled to receive a postal ballot paper he is required under s 73 of the Act to send the person a notice to the

effect that E he is not so satisfied and that the applicant must attend personally at a polling station on the polling day to cast the ballot. The statute makes it clear that absentee voting is available to the few specific categories of registered voters living in foreign countries. These are of persons who are absent from Zimbabwe in the service of the Government of Zimbabwe or members of the disciplined forces who are on duty and their spouses. F

There is no provision in the Constitution and the Act to the effect that a registered voter in the applicants' position who is unable because of the nature of his or her occupation, service or employment to attend personally on the polling day to cast the ballot at a polling station in the constituency for which he or she is enrolled can vote through some mechanism of absentee G voting.

Parliament has power under s 58(3) of the Constitution to prescribe conditions for the exercise of the right to vote. The right to vote includes the right to cast the ballot and have it counted at the election. Parliament has power under s 58(4) of the Constitution to enact a law governing the election of members H

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Malaba JA

A of Parliament.It has a duty therefore to ensure that the law it enacts is operative and effective. The assumption is that in creating absentee voting by post as an exception to the general rule for the categories of the registered voters specified under s 71, the legislature was aware of the classes of registered voters in the applicants' position but decided that extending the exception to them would not be for the common good. Parliament did not find it necessary B in the exercise of its powers to treat the applicants as a special class of persons for the purposes of the exercise of the right to vote.

The applicants did not challenge the constitutional validity of the provisions of the Act requiring registered voters to attend personally at polling stations in their constituencies to cast their ballots. That attitude is not surprising in C the light of the power given to Parliament in s 58(4) of the Constitution. They also did not allege that failure by the legislature to create an exception in their case in the form of absentee voting was unconstitutional. It is not the applicants' case that failure by the respondents to establish a mechanism to take their votes in the United Kingdom deprives them of the right to vote as prescribed under s 3 of Schedule 3 of the Constitution.

D In *McDonald* v *Board of Election Commissioners of Chicago* 394 US 802, plaintiffs who were awaiting trial as inmates of the jail of Cook County Illinois and were unable to attend personally at the polls to cast their ballots challenged the constitutionality of a statute which made absentee balloting available to certain persons absent from their county of residence for any E reason but did not make the same mechanism available to take their votes. They alleged that the statutory scheme violated the equal protection clause of the Fourteenth Amendment of the Constitution of the United States of America.

The Supreme Court of the United States held that the statute did not disenfranchise the plaintiffs. It said that what was at stake was a claimed right F to receive absentee ballots rather than the right to vote. The court noted the fact that the absentee voting provisions of the statute were designed to make voting more available to some groups who could not get to the polls but did not in themselves deny the appellants the exercise of the franchise.

Chief Justice Warren, delivering the opinion of the court, said at pp 807, G 809, 810, …

> "States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised …
>
> Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are H otherwise silent …

2005 (1) ZLR p180

Malaba JA

> With this much discretion, a legislature traditionally has been allowed to A take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind'; and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.
>
> Illinois could, of course, make voting easier for all concerned by extending B absentee voting privileges to those in appellants' class. Its failure to do so, however, hardly seems arbitrary, particularly in view of the

> many other classes of Illinois citizens not covered by the absentee provisions, for whom voting may be extremely difficult, if not practically impossible."

In *Registrar General of Elections* case *supra*, the respondent sought to have C the Registrar General compelled to set up all the necessary mechanisms to enable registered voters who would be outside their constituencies on the polling day in the Presidential election to vote. Although the correct interpretation of s 28(2) of the Constitution was at issue in that case the substance of the relief sought was the same as the one sought by the applicants. D

The court held that the failure by the Registrar General of Elections to put up mechanisms to take votes of registered voters who would not be in their constituencies on the polling day did not constitute a denial to those voters of their right to vote nor was it unconstitutional.

Chidyausiku CJ said: E

> "It is common cause that the first appellant, in his capacity as Registrar General of Elections, has directed that each voter on the common roll shall vote in his or her constituency in the forthcoming Presidential election. The respondent is not in any way challenging this decision. It is the failure of the first appellant to make adequate and reasonable arrangements for all voters registered on the common roll who would not be in their F constituencies on the polling days which he alleges is unconstitutional. Providing for as many people to vote as possible is highly commendable. Failure to provide in the manner alleged is, however, not unconstitutional. The contention that the failure to provide the above facility amounts to the disenfranchisement of a voter is simply untenable. The voter does not lose his right to vote. He is disabled from exercising the right by being in a wrong constituency at the time he is expected to vote. The disability G would not, in the circumstances, have resulted from any action by the Registrar General."

I note the fact that the applicants have alleged that failure by the respondents to put up mechanisms to record their votes was likely to contravene their freedom of expression guaranteed under s 20(1) of the Constitution. The H

Malaba JA

A contention is that freedom of expression includes the right to vote. Underlying the applicants' argument is the assertion that the casting of a ballot is an expressive activity, the content of which conveys a meaning to the effect that the candidate chosen is the suitable person to represent the voter in Government.

B The first step to be taken is to determine whether the casting of a ballot may properly be characterised as conduct falling within "freedom of expression". In *Irwin Toy Ltd v Quebec (Attorney General)* (1989) 39 CRR 193 (SCC), McIntyre JA writing for the majority in the Supreme Court of Canada at p 228 said that:

> "'Expression' has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That C meaning is its content."

It is not in dispute that the casting of a ballot is an expressive activity. The ballot forms the content of that activity and conveys a meaning. By a ballot a voter makes an expression of his or her preference among the candidates. In *United States* v *Classic* 313 US 299, Mr Justice Stone at p 318 said that:

> D "From time immemorial, an election to public office has been in point of substance no more and no less than the expression by qualified electors of their choice of candidates."

The question is whether the casting of a ballot is part of the conduct falling within the sphere of activities intended by the framers of the Constitution to be constitutionally guaranteed and entrenched against infringement by the E State under the "freedom of expression".

In my view, the contention that freedom of expression as guaranteed under s 20(1) of the Constitution includes the casting of a ballot is an ill- conceived attempt to elevate an unentrenched right to the status of a fundamental human right. That misconception is due to lack of appreciation of the meaning of F freedom of expression and the structure of the Constitution. It is clear for the reasons that follow that there is no legal basis on which the applicants' claim as pleaded can be granted.

Freedom of expression denotes the freedom to communicate orally, in writing, print, by broadcasting or otherwise, statements or views on any matter. In *R* v *Zundel* (1987) 29 CRR 349, the court in dealing with the Canadian jurisprudence G on the subject of freedom of expression, concluded thus at p 365:

"When determining the limits of freedom of expression, a distinction must be drawn at the outset between 'rights' and 'freedoms'. A 'right' is defined positively as what one can do. A 'freedom', on the other hand, is defined by determining first the area which is regulated. The freedom

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2005 (1) ZLR p182

Malaba JA

is then what exists in the unregulated area – a sphere of activity within A which all acts are permissible. It is a residual area in which all acts are free of specific legal regulation and the individual is free to choose."

Rights are said to impose a corresponding duty or obligation on another party to ensure the protection of the right in question, whereas "freedoms" involve an absence of interference. Freedom of expression as guaranteed under s 20(1) B of the Constitution recognises a claim by any individual against the State to non- interference with the enjoyment of the activities stated therein.

In *Allman* v *Northwest Territory* 144 DLR (3d) 467 (S), the appellant challenged the constitutionality of a three year residency requirement contained in a Territorial Plebiscite Ordinance that prevented him from voting in an upcoming referendum. The trial judge stated that the basic difference between a "right" C and a "freedom" consisted in the nature of the claims which each of these terms describes in relation to the "State". He observed at p 479 that:

"The 'freedom of thought, belief, opinion and expression' referred to in para 2(b) of the charter on which the applicants rely is therefore to be understood as recognition of a claim which anyone may make against the State … to non-interference in matters of thought, belief, opinion and D expression.

The applicants' complaint in these proceedings … falls instead into the class of a 'demand for State intervention' to provide access to the means of expression available to those designated as voters by the Ordinance. That sort of demand … is to be classed as a claim of 'right', such as the right to vote in s 3." E

The right to vote as prescribed under s 3 of Schedule 3 of the Constitution was created and conferred upon the citizens and permanent residents who had attained the age of eighteen and were registered on the common voters roll by positive law. The right came into existence at the time the Constitution was enacted. It was prescribed as a distinct or free standing right from freedom of F expression which was at the same time protected under s 20(1) of the Constitution as a fundamental human freedom recognised as having been in existence at the time the Constitution was enacted.

As a matter of law, the right to vote was provided as a distinct right different from freedom of expression. The framers of the Constitution clearly placed the G casting of a ballot within the regulated sphere of activities, thereby removing it from the sphere of unregulated conduct guaranteed as freedom of expression. The right to vote having been expressly provided for under the Constitution, cannot be sought to be established by implication from freedom of expression.

The right to vote is a creature of legislation and the conditions for its exercise H

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Malaba JA

A are a result of a State intervention. The casting of a ballot is clearly a regulated activity. The applicants are making claim to a mechanism that would make the casting of the ballot easier and convenient to them. Theirs is not a claim of non-interference by the State but a demand for State assistance to make the exercise of the right to vote easier. The claim has nothing to do with the freedom of expression, the enforcement of which is protected against infringement by the B State under s 20(1) of the Constitution.

Even under international human rights instruments the "right to vote" is proclaimed as a distinct and separate right from freedom of expression. In the Universal Declaration of Human Rights (1948), the right to freedom of opinion and expression is recognised under Article 19 whilst the right to vote is C proclaimed in Article 21. The International Covenant on Civil and Political Rights (1966) recognises the right to freedom of expression under Article 19, whilst the right to vote is under Article 25. Constitutions of other countries adopt the same framework. The Constitution of the Republic of South Africa (1996), for example, provides for the right to freedom of expression in s 16(1), whilst the right to vote in elections for any legislative body established in D terms of the Constitution is proclaimed under s 19(3)(a).

The clear distinction between the right to vote as prescribed under s 3 of Schedule 3 of the Constitution and freedom of expression as guaranteed under s 20(1) of the Constitution should not be blurred, as the two values serve different purposes. The primary purpose of the right to vote is

to secure for E a voter effective representation in government. The purposes of freedom of expression on the other hand have been stated as being –

1. seeking and attaining the truth;
2. participation in social and political decision-making; and
3. cultivation of diversity in forms of individual self-fulfilment and human F flourishing in an essentially tolerant environment not only for the sake of those who convey a meaning but also for the sake of those to whom it is conveyed.

See *Carter* v *Saskatchewan* (AG) (1992) 5 CRR 1 at p 9; *Irwin Toy supra* at p. 234; In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S) p 57 A.

G As already pointed out, in claiming the right to cast a ballot in the election as freedom of expression the applicants sought to elevate the right to vote to a constitutionally guaranteed and entrenched right. The right to vote is not one of the fundamental human rights in our Constitution. It is true that Zimbabwe is a constitutional democracy and that the right to vote is of the essence of a democratic system of Government. In *Haig* v *Canada* 16 CRR 193, Cory J

Malaba JA

was of the view that the right to vote was synonymous with democracy. He A said at p 227:

> "All forms of democratic government are founded upon the right to vote. Without the right, democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is a proud badge of freedom." B

Notwithstanding its importance to democracy the right to vote is, anomalously, not guaranteed as a fundamental human right. The framers of the Constitution were influenced at the time by legal thinking on the nature of voting rights. In *Hipperson* v *Electoral Officer* [1985] 2 All ER 456, Sir John Donaldson Mr remarked on the nature of the right to vote at p 458C:

> "Voting rights lie at the root of Parliamentary democracy. Indeed, many C would regard them as a basic human right. Nevertheless they are not like the air we breathe. They do not just happen. They have to be conferred or at least defined and the categories of citizens who enjoy them have also to be defined. Thus no one would expect a new-born baby to have voting rights or that citizens could vote in all constituencies or in that of their unfettered choice." D

In 1982, Reddy J made the observation in the case of *Jyoti Basu* v *Bebi Ghosa* [1982] 3 SCR 318 that under the Indian Constitution:

> "A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right."

On the other hand, freedom of expression has been recognised and guaranteed E as one of the fundamental human rights to which every human being is by nature entitled wherever and whenever born. It is a guaranteed birthright. Many countries have since guaranteed the right to vote as a fundamental human right. Examples of such countries are Namibia, South Africa, Canada and the United States, to name but a few.

It was improper for the applicants to seek to invoke a guarantee under s 20(1) F of the Constitution to enforce a right not constitutionally protected as a fundamental human right. Theirs was not a claim for freedom or liberty.

The last reason why this application must fail is that the respondents are not under any legal duty to conduct the election. They are not responsible for the conduct of the election. If they were responsible for the conduct of the election G they would still be acting lawfully in not providing the applicants with the machinery to record their ballot. This is because there is no law imposing such a duty on any authority responsible for the conduct of elections. In the circumstances, the court would not have power to order the respondents to act unlawfully. The provisions of the law properly construed do not bear out the relief claimed by the applicants. H

Malaba JA

A The application was accordingly dismissed with no order as to costs.

Chidyausiku CJ, Sandura JA, Ziyambi JA & Gwaunza JA concurred.

Kantor & Immerman, applicants' legal practitioners

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

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Source:
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FRENKEN v CONTROLLER OF CUSTOMS 2005 (1) ZLR 186 (H)

Citation	2005 (1) ZLR 186 (H)
Case No	Judgment No. HH-27-05
Court	High Court, Harare
Judge	Hlatshwayo J
Heard	23 February 2003
Judgment	23 February 2003
Counsel	Mrs *J B Wood,* for the applicant *A B Chinake,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Criminal law — *statutory offences — Customs and Excise Act [Chapter 23:02]* C *— forfeiture— considerations to be taken into account —s 188(3) — vehicle with a false roof — no evidence that an accused was an inveterate smuggler — unsafe to order forfeiture of the vehicle*

Customs and excise — *smuggled goods — forfeiture of — when forfeiture should be ordered — special circumstances for not ordering forfeiture — goods and vehicle in transit to another country — vehicle with hidden* D *compartment — owner of vehicle unaware of modification*

Headnote

The applicant, a German national working for a mission in Mozambique, arrived at a border post in Zimbabwe in a vehicle belonging to the mission though registered for convenience in the applicant's name. He was in E transit to Mozambique. He did not declare the various goods which were stored in a hidden compartment in the vehicle. The applicant admitted that he personally had the compartment designed in order to create additional storage space and occasionally to conceal goods from thieves and not from customs officials. The vehicle, goods and certain sums of money were confiscated by customs. He applied for the return of the F confiscated items.

Held, that under s 182 of the Customs and Excise Act [*Chapter23:02*], any person who smuggles goods is guilty of an offence. Failure to declare goods on one's person or in one's custody amounts to smuggling. Even in non-commercial cases of smuggling it is now the rule rather than

the exception for the courts to order forfeiture of the goods, the only G exceptions being where the offender can show that "special circumstances" exist.

A *Held*, further, that in considering forfeiture for the purposes of the Act, the following aspects, while not exhaustive, are important:

1. the real value of the goods;
2. the purpose for which the goods were being imported;
3. the importance to the accused of being allowed to retain B them;
4. whether it will benefit or harm the community if he is allowed to retain them;
5. whether the accused will be able to pay an adequate monetary penalty for his offence, if imprisonment is not regarded as a suitable punishment.

Held, further, that there were special circumstances in this case. The only purpose for which the applicant imported the goods was to export them C immediately, which rendered them exempt from duty. The community would not be harmed in any way by releasing them to the mission in Mozambique.

Held, further, that as for the forfeiture, s 188(3) of the Act subjects to forfeiture any vehicle which, *inter alia*, "has false bulkheads, false bows, double sides or bottoms or any secret or disguised place whatsoever adapted D for the purpose of concealing goods". There being no evidence that the applicant was an inveterate smuggler, it was difficult to conclude that the modification was designed to smuggle goods and thus justify forfeiture in terms of s 188(3). At any rate, the true owners of the vehicle, the Mission, were unaware that it had been so modified. Under s 209(3)(b)(ii), forfeiture may not be ordered where the owner is unaware of the E adaptation.

Cases cited

S v Bennett-Cohen 1985 (1) ZLR 46 (S)

S v Coetzee A-185-76

F *S v Elmes* GS-66-76

S v Kokani 1989 (2) ZLR 34 (H)

S v Kurimwi 1985 (2) ZLR 63 (S)

S v Lennon 1972 (2) RLR 259 (A)

S v Mohamed 1977 (2) RLR 208 (G)

S v Smith 1973 RLR 293 (G); 1974 (1) SA 607 (R)

Legislation considered G

Customs and Excise Act [*Chapter 23:02*], ss 73, 188(3) & 209(3)(b)(ii)

Case information

Mrs *J B Wood,* for the applicant

H *A B Chinake,* for the respondent

Hlatshwayo J

Judgment

HLATSHWAYO J: On 17 October 2002, at about 1800 hours, and driving a A Mozambican registered vehicle, Mr Achim Frenken, the applicant, presented himself for outward clearance at the Zimbabwean Forbes Border Post. He tendered a declaration form, bearing a Beitbridge date stamp impression and indicated that he had the same and only goods, being an Isuzu differential and personal luggage only. The declaration was accepted and Mr Frenken was B allowed to proceed. At the exit barrier, Mr Frenken was stopped by a customs officer. On being quizzed as to why his vehicle canopy had an unusual shape, Mr Frenken was not open and forthcoming. The customs

officer had to climb on top of the canopy to discover that the canopy had been especially designed to conceal goods. The concealed goods included an assortment of motor vehicle spares, computer accessories, video tapes and groceries. The vehicle C and all the goods contained therein were seized. After allowing the traveller his $15 000 allowance, the excess local currency, being Z$29 980 was seized, as was the excess foreign currency of SAR2 830 and US$ 1 665. An appeal to the Regional Controller against the forfeiture of the vehicle and the goods was dismissed.

In his application to this court, the applicant pointed out that he was a German D citizen missionary worker with the Assemblies of God Mission at Vila Moyo Mucuru in Chimoio, Mozambique. The Mission provides shelter and support to the poor, especially children and persons suffering from HIV-AIDS. The Mission, which is funded by the Christian community in Germany, is the owner of the vehicle, a Toyota Hilux 2 800 double cab. Although the vehicle is the E property of the Mission, it is registered in the applicant's name to enable him to travel easily within the sub-region to purchase necessary supplies for the Mission. The goods were intended for the benefit of the Mission.

I shall first examine the forfeiture of the goods, including local and foreign currency, and later, that of the motor vehicle.

Section 173(1) of the Customs and Excise Act provides that: F

> "any person who, on or after arriving in Zimbabwe… is questioned by an officer as to whether he has upon his person or in his possession any goods, whether dutiable or otherwise, or goods, the importation or exportation of which is prohibited, restricted or controlled, and who denies that he has any such goods upon his person or in his possession G or fails to mention any dutiable, prohibited or restricted goods which he has upon his person or in his possession shall be guilty of an offence if such goods are discovered to be or, at the time of the denial or the statement, to have been upon his person or in his possession."

Hlatshwayo J

A Section 173(2) provides that "goods" includes "Zimbabwean and foreign currency". Section 182 of the Act stipulates that any person who smuggles goods shall be guilty of an offence. Failure to declare goods on one's person or in one's custody amounts to smuggling: s*ee S* v *Bennett-Cohen* 1985 (1) ZLR 46 (S). Even in non-commercial cases of smuggling it is now the rule rather than the exception for the courts to order forfeiture of the goods. The only B instances where forfeiture should not be ordered are those where the offender can show that "special circumstances" exist: see *S* v *Mohamed* 1977 (2) RLR 207, *S* v *Kokani* 1989 (2) ZLR 34 (H).

In *S* v *Kurimwi* 1985 (2) ZLR 63 (SC), the Supreme Court, in line with Pittman J's opinion in *S* v *Mohamed (supra)* reiterated the following but by no means C exhaustive considerations to be taken into account before any decision on forfeiture of goods is made:

1 The real value of the goods to the accused (*S* v *Elmes* (GS-66-76)) and *S* v *Smith,* 1974 (1) SA 607 (R));

2 The purpose for which they were being imported (*S* v *Lennon* 1972 (2) RLR 259 (AD)); D

3 The importance to the accused of being allowed to retain them;

4 Whether it will benefit or harm the community if he is allowed to retain them (*Coetzee* v *S* AD-185-76), and

5 Whether the accused will be able to pay an adequate monetary penalty E for his offence, if imprisonment is not regarded as a suitable punishment.

In my view there are special circumstances in this case. The only purpose for which the applicant imported the goods was to export them immediately, which renders them exempt from duty. The community would not be harmed in any way by releasing them to the mission in Mozambique. The applicant has offered to pay a fine. The most fitting punishment in this regard would have F been a fine, assessed and exacted in terms of s 200.

As far as the forfeiture of the vehicle is concerned, s 188(3) subjects to forfeiture any ship, aircraft or vehicle which, *inter alia*, "has false bulkheads, false bows, double sides or bottoms or any secret or disguised place whatsoever adapted for the purpose of concealing goods". The applicant G admitted that he personally had the canopy with the upper storage compartment or "false roof" designed in order to create additional storage space and occasionally to conceal goods from thieves and not from customs officials. There being no evidence that the applicant is an inveterate smuggler, it is difficult to conclude that the modification was designed to smuggle goods and thus justify forfeiture in terms of s 188(3). At any rate, the true owners of the

Hlatshwayo J

vehicle, the Mission, were unaware that it had been so modified. According A to s 209(3)(b)(ii) forfeiture may not be ordered where the owner was unaware of the adaptation.

Amazingly, the respondent has not suggested that the vehicle should be forfeited by virtue of any other provision of the Act. It could have been argued, but probably without success, that the vehicle was liable for seizure because B it had been used for smuggling. In *S* v *Kurimwi (supra)*, the forfeiture of a BMW 2500 motor vehicle used to smuggle goods for personal family use was struck down by the Supreme Court as excessively harsh and inequitable because the value of the motor vehicle greatly exceeded the value of the goods smuggled.

Two years have elapsed since the fateful day that the applicant presented C himself at the Forbes Border Post. He has endured many anxious moments and the Mission has had to do without the goods in question due to the inordinate delay in the finalization of this matter. Therefore, it would be inequitable to require the applicant at this stage to pay a fine. Accordingly, the applicant is entitled to the immediate release of his goods. As far as costs are concerned, D it is fair that each party should bear its own costs especially given that, the applicant, though successful in this instance, was largely the maker of his own misfortune.

In the premises, the following order is made:

1) The Controller of Customs shall forthwith deliver to the applicant:
   a) A Toyota Hilux 2800D registration number MMF 48-85 E
   b) All goods listed on Notices of Seizure Numbers 126746 D and 126 747 D dated 18th October 2002
   c) The sum of US$1 665
   d) The sum of SAR2 830 F
   e) The sum of Z$14 980
2) Each party shall bear its own costs.

Henning, Lock, Donagher and Winter, the applicant's legal practitioners

Kantor & Immerman, the respondent's legal practitioners G

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Source:
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MALABA v MALABA 2005 (1) ZLR 191 (H)

Citation	2005 (1) ZLR 191
Case No	HB-14-05
Court	High Court, Bulawayo
Judge	Ndou J
Heard	8 March 2004; 16 March 2004
Judgment	3 March 2005
Counsel	*A J Sibanda*, for the plaintiff

R Moyo-Majwabu, for the defendant

Case Type Matrimonial action

Annotations No case annotations to date

Flynote

C **Contract** — *donation — from one spouse to another — when proper — revocation of donation — when donation may be revoked*

Headnote

A donation, or *schenking,* is a contract whereby one person, who is not under D an obligation to do so but out of sheer liberality, promises to give another person something without receiving anything in return. The motive should be disinterested benevolence and for moral purposes. The motive of liberality, *animus donandi,* is the distinguishing feature of a donation. A donation from a husband to his wife which took place against the background of serious illness of the donor, who was at the E time wholly dependent on the donee, and in the middle of gross matrimonial discord would not be a proper one. A donation may be revoked in exceptional circumstances. These include gross ingratitude on the part of the donee, or ill-treatment of the donor by the donee and malicious desertion of her husband by a woman.

Cases cited F

Ahrend v Winter 1950 (2) SA 682 (T)

Avis v Verseput 1943 AD 331

Benoni Town Council v Min of Agricultural Credit and Land Tenure 1978 (1) SA 978 (T)

Chikumba v Nkomo S-62-91

G*Dlamini v Dlamini* HB-27-00

Dube NO & Anor v Logan & Ors 2002 (2) ZLR 81 (H)

Est Jager v Whittaker 1944 AD 246

Ex parte Boyd et Uxor 1938 CPD 197

Ndou J

H *Kay v Kay* 1961 (4) SA 257 (A)

Masveto v Masveto HB-51-04 A

Mathews v Mathews 1936 TPD 124

Mulligan v Mulligan 1925 WLD 178

Mvududu v Mvududu 1981 ZLR 397 (H)

Ncube v Ncube 1993 (1) ZLR 39 (S)

Takafuma v Takafuma 1994 (2) ZLR 103 (S)

The Master v Thompson's Est 1961 (2) SA 20 (FS) B

Legislation considered

General Law Amendment Act [*Chapter 8:07*], ss 10 & 11 C

Case information

A J Sibanda, for the plaintiff

R Moyo-Majwabu, for the defendant

Judgment

NDOU J: This matter has a chequered background. I propose to give a summary of the material facts and events for the purposes of determining the D issues before me. The parties were married to each other in terms of the Marriages Act, 1964 (as it was then) on 9 June 1978. There are two children of the marriage who had attained the legal age of majority as at the date of issue of summons. Prior to solemnising the marriage in 1978, the plaintiff had, in 1964, purchased in his own name and right, immovable property known as stand No. 49753, Bulawayo Township. E

In 1997, when he was critically ill, the plaintiff registered this property in the name of the defendant. On 17 May 2001, the plaintiff issued summons with this court claiming a decree of divorce with ancillary relief. After the pre-trial conference, the matter was referred for trial. For one reason or another, the matter could not take off on the original trial date. The matter was eventually F allocated 23 October 2003 as the date of trial. On that date, the plaintiff and his legal practitioner did not turn up. The defendant turned up with her legal practitioner. The defendant successfully applied for the dismissal of the plaintiff's claim and the granting of her counter-claim. The defendant testified in this regard. On 4 November 2003, the plaintiff became aware of the judgment granted in his absence. He launched an application for rescission of the G judgment in HC 2581/03. He, however, did not challenge the dissolution of the marriage but focussed his application for rescission on the ancillary relief. The defendant consented to the granting of the rescission. In other words, the decree of divorce stands and this application is only in respect of the distribution of the matrimonial assets and the question of costs. The parties H

Ndou J

A adduced evidence on the acquisition and division of the assets. They led evidence on the circumstances surrounding the registration of the matrimonial home in the sole name of the defendant in 1997.

[*The judge then assessed the testimony of the plaintiff as to the allocation of the movable property and continued.*]

B He testified that the above division reflects generosity on his part. He gave details of the improvements he carried out on the matrimonial house. From his testimony, the greater part of such improvements were carried out prior his marriage to the defendant. He also gave evidence of the improvements made by the defendant. Suffice to say that these were said to be negligible compared to his own. He also gave details on the acquisition of the other assets. He then C justified the above distribution of the assets. He said a lot. He is generally a man of many words. He also testified that the parties jointly owned the dressmaking business. He outlined his contribution towards the setting up and subsequent life of the business. On his illness, he said that he started having health problems in 1988. He suffered from osteomyelitis of the right tibia in 1991. He had high blood pressure and was diabetic. According to D medical evidence of the orthopaedic surgeon, Mr B A V Ncube, in 1991, the plaintiff developed osteomyelitis of the right tibia which could not be controlled because of his diabetes. He had multiple operations culminating in a more extensive operation in 1995 in which a lot of necrotic bone was removed. At the time of the treatment in 1995, the plaintiff's leg was so bad that his E decision was initially to amputate the leg. However, after a last attempt extensive operation his leg was salvaged. At this time, his blood sugar was uncontrollable. He was grossly affected mentally and he kept lapsing into a state of confusion and a semi-comatose state. His whole life was actually in danger. After the 1995 operation he then started recovering slowly and he has not had problems with his leg since then. His sugar has also remained relatively F well controlled and so has his blood pressure. He is now very stable and mentally strong. This was opined by Mr Ncube in March 2000.

He testified that it was on account of the above illness that he registered the immovable property in the name of the defendant, solely out of reasonable apprehension of impending death, and in order to secure her future in the event of his death. At the time, he loved and trusted her. He said he did so because G he feared that in the event of his death his relatives may give the defendant problems. He testified that at the time of the donation, their marriage was estranged. She, the defendant, had through her erstwhile legal practitioners managed to stop the parties from sharing the bedroom

around April 1997, i.e. H a few months prior to donation. At the time of the donation, their relationship

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2005 (1) ZLR p194

Ndou J

had not normalised. In fact, it never did again. He said he made the donation A for the sake of the children of the marriage and not as a token of love to the defendant. He said this was a way of securing the future of his children with the defendant. In June 2001, the defendant moved out of the matrimonial home. By arrangement of the parties, she went back in the company of the police officers and removed some movable assets. He stated that he wished the B donation of the matrimonial home to be revoked so that he could use it himself, as he is no longer in a position to acquire a house on account of his state of health and age, i.e. 63 years. He has no other house in his name. He is surviving on medication. The witness was subjected to some detailed and tactful cross-examination. I find his testimony satisfactory in material respects.

[*The learned judge then assessed the testimony of the defendant and* C *continued.*]

She says the plaintiff got sick in1995. He was hospitalised and when he was discharged their problems started. The plaintiff started accusing her of infidelity. She says that out of love she spent sleepless nights attending to him. She said that the plaintiff was fine health wise when he donated the D matrimonial home to her. She said that he is now trying to revoke the donation for selfish reasons. Under cross-examination, she stated that the cause of divorce was that the plaintiff was using African herbs (commonly known as "muti") and he was also impotent and accused her of infidelity. She conceded that she is the one who took the initial steps to bring the parties to a separation after approaching her erstwhile legal practitioners. She also gave a detailed E account of the acquisition of the matrimonial assets. She also conceded that the matrimonial home was acquired by the plaintiff many years prior the parties' marriage (… "I was a baby then" to use her statement). She agreed with the findings of Dr B AV Ncube on the state of the plaintiff as a result of his illness. She agreed that the plaintiff was grossly affected mentally and kept F lapsing into coma and his life was in danger prior to the surgery. She agreed that during his illness the plaintiff totally depended upon her and she wielded a lot of influence on him. At that stage, the plaintiff had virtually no source of income. She conceded that it came as a surprise when he decided to donate the matrimonial home to her. She said she found it strange that he was making such a donation out of nowhere. The plaintiff had no other house at the time. G She, however, disputed that the plaintiff was in a "fragile" state and had just survived death. She opined that he had recovered from his illness. She stated that she wants to keep the house for sentimental reasons. She denied that she took advantage of the plaintiff's illness and dependence on her to unduly influence him to make the donation. She opposes any attempts by the plaintiff H

2005 (1) ZLR p195

Ndou J

A to revoke the donation. She, however, could not explain the plaintiff's apparently strange and irrational behaviour of donating the house at the time when they were fighting and involving legal practitioners in their fight, as evinced by the letter from the erstwhile legal practitioners. More or less the same time that he had health problems and matrimonial problems with the defendant is the same that he makes this unusual but extremely generous B donation. I hold the view that the defendant has not given a credible explanation of the circumstances surrounding the donation. She took advantage of an ailing and wholly dependent partner. It is trite that the common law rule relating to the prohibition of donations between the spouses *stante matrimonio* has been repealed by s 11 of General Law Amendment Act [*Chapter 8:07*]. C Section 11 provides:

> "The rule of the common law relating to the prohibition of contracts of donation between spouses is declared to be no longer of any force."

I have cited the current statutory provision because Mr *Sibanda*, for the plaintiff, relied heavily on *The South African Law of Property, Family Relations and Succession* by R W Lee, A M Honore and T W Price (1954) and D cases cited therein. One has to bear in mind that the law on this issue has undergone tremendous transformation since 1954.

From the facts of this matter, the plaintiff made a donation *inter vivos* to the defendant. In law, there is nothing wrong with such a donation *per se*. Such a donation *inter vivos* may be made by a simple document signed by the donor E –s 10 of the General Law Amendment Act *supra* – and Wille's

Principles of South African Law 8ed by D Hatchison, B van Heerden, DP Visser and C G van Der Merwe at p 626. Such a donation *inter vivos* is not revocable by the donor save in exceptional circumstances. The donation, therefore, can be revoked for reasons justifiable in the circumstances: see *Ahrend* v *Winter* 1950 (2) SA 682 (T). A glance at the common law and case law shows that the F following have been held to be exceptional circumstances and justifiable reasons:

(a) gross ingratitude on the part of the donee or ill-treatment by him/her of the donor: see Grotius 3.2.17 and Voet 39.5.22

(b) malicious desertion of her husband by a woman: see *Mulligan* v *Mulligan* G 1925 WLD 178

(c) on account of a breach of a condition (*modus*) attached to it, but not on the ground that the donor has subsequently been reduced to dire financial straits: see *Mathews* v *Mathews* 1936 TPD 124; *Benoni Town Council* v H *Minister of Agricultural Credit and Land Tenure* 1978 (1) SA 978 (T) and

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Ndou J

ex parte Boyd et Uxor 1938 CPD 197: see also *Principles of South African* A *Law supra*). Only (a) and (b) are relevant to the facts of this case.

It seems to me that the first determination that I have to make is whether there was a lawful contract of donation in light of the dubious circumstances at the time of the donation as alluded to above. It is trite that a donation, *schenking*, is a contract whereby one person, who is not under obligation to do so, but B out of sheer liberality, promises to give another person something without receiving anything in return: see *Avis* v *Verseput* 1943 AD; *Estate Jager* v *Whittake* 1944 AD 246 at 250; *The Master* v *Thompson's Estate* 1961 (2) SA 20 (FC) and *Dube NO* v *Logan & Ors* 2002 (2) ZLR (81) (H). The motive should be a disinterested benevolence and for moral purposes. This motive of liberality, the *animus donandi* is the distinguishing feature of a donation. Is C the donation by the plaintiff to the defendant a genuine one in the strict sense? *i.e. a donatio propria* or *mera.* From the evidence alluded to above, this donation lacked the *animus donandi*. The donation took place against the background of serious illness of the donor who was wholly dependent on the *donee*. The parties were in the middle of gross matrimonial discord. This is not D a *donatio propria*: see *Kay* v *Kay* 1961 (4) SA 257 and *Mvududu* v *Mvududu* 1981 ZLR 397 (H).

If I erred in this finding, there is the issue of revocation. I have already highlighted the legal principles applicable to revocation in such a matter. It is apparent from the evidence that there was gross ingratitutde on the part of the donee. She ill-treated the donor after the donation. She sought to remove him E from the house in question when he was ailing and to some extent destitute. She herself had another home and the donor was desperate and had no other home. She did not require the house for occupation but for sentimental reasons. The house was purchased by the plaintiff long before their marriage and, as such, would not normally be part of the matrimonial circumstances F justifying revocation of the donation. In a nutshell, whichever way one looks at the above, the donation cannot stand. Once the donation is revoked the defendant's claim thereto falls away on account of the house having been purchased well before the parties contracted the marriage. It is not in dispute that she did contribute to the improvements effected on the property. These improvements were on the peripheries and not on the main house. G

The rest of the matrimonial assets have to be shared in terms of a formula set out in s 7 of the Matrimonial Causes Act [*Chapter 5:13*]. In matters of this type, it is seldom possible for the court to ascertain with total accuracy the incomes and contribution of the parties to the joint estate. Our case law provides guidelines: see *Dlamini* v *Dlamini* HB-27-00; *Takafuma* v *Takafuma* 1994 (2) H

Ndou J

A ZLR 103 (S); *Ncube* v *Ncube* 1993 (1) ZLR 39 (S); *Chikomba* v *Nkomo* S-62-91 and *Masveto* v *Masveto* HB-51-04. The defendant, in her claim in reconvention, accepts the division suggested by the plaintiff in his declaration. Notwithstanding the subsequent disputes during the trial on some of these issues, after carefully examining the evidence, I find that such division meets the statutory objective of s 7 *supra*.

B Accordingly, it is ordered as follows:

1. that the donation of stand No. 49753 Bulawayo Township by the plaintiff to the defendant be and is hereby set aside.
2. that stand No. 49753 Bulawayo Township be and is hereby declared to be the sole absolute property of the plaintiff.

C [3 and 4 listed the movable property awarded to the plaintiff and defendant, respectively.]

5. that the defendant's claim in reconvention be and is hereby dismissed.
6. that each party bears its own costs.

D *Joel Pincus, Konson & Wolhuter,* applicant's legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/TRUST HOLDINGS LTD v TRUST BANK CORPORATION LTD & ORS 2005 (1) ZLR 198 (H)

TRUST HOLDINGS LTD v TRUST BANK CORPORATION LTD & ORS 2005 (1) ZLR 198 (H)

Citation	2005 (1) ZLR 198 (H)
Case No	Judgment No. HH-23-05
Court	High Court, Harare
Judge	Kamocha J
Heard	3 February 2005; 8 February 2005; 10 February 2005
Judgment	9 March 2005
Counsel	*M P Mahlangu*, for the applicant *L H Cook*, for the respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Banking — *bank — bank being placed under curatorship — power of curator to dispose of assets of bank — curator not obliged to proceed in terms of Troubled Financial Institutions (Resolution) Act [Chapter 24:28]* D

Headnote

The Governor of the Reserve Bank placed six troubled banking institutions under curatorship in terms of s 53(1) of the Banking Act [*Chapter 24:20*] for a period of six months. One of the banks, the Trust Bank, was wholly owned by the applicant. The second respondent was appointed curator of Trust Bank. When he took over the curatorship of Trust Bank, he discovered that the applicant owed it a large sum of money, which had E been granted as an interest-free loan. He tried to collect that debt for Trust Bank, but succeeded only in collecting a portion, resulting in

considerable prejudice to the depositors. The applicant had, in effect, used depositors' funds for the personal benefit of its shareholders. In view of the sums owed and the lack of serious effort to rehabilitate the bank, the curator F decided that it would be in the best interests of the bank and its creditors and depositors to sell the assets in accordance with the offer that was made by the third respondent, a banking group. He considered that this was a preferable course to liquidating the bank. In so doing, he purported to act in terms of s 55(2)(h) of the Act.

The applicant contended that the sale of the assets of the bank to the third G respondent was unlawful. It argued that the Troubled Financial Institutions (Resolution) Act [*Chapter 24:28*] required that before the various provisions of that Act can be implemented in respect of a financial institution deemed to be troubled, there ought to be a declaration issued in terms of s 6 of the Act, confirmed by a judge in chambers in terms H

2005 (1) ZLR p199

Kamocha J

A of s 9(1) of that Act, following notice to the shareholders, creditors and former members of the Board of the troubled financial institution. It also argued that s 28 also required that the scheme of resolution be approved by shareholders and creditors and that had not been done. It sought an order restraining the respondents from taking over the assets and business of the bank in the manner that they had done, pending full B compliance with the law.

Held, that the promulgation of the Troubled Financial Institutions (Resolution) Act did not preclude the curator from proceeding in terms of the Banking Act. He was not obliged to proceed in terms of the new Act and do not purport to do so.

Held, further, that the curator was specifically empowered by s 55(2)(h) of the C Banking Act to sell any assets of the banking institution concerned. The respondents therefore acted lawfully in doing what they did.

Held, further, that in terms of s 55(4) a person who is aggrieved by any decision or action taken by a curator may appeal to the Reserve Bank. No acceptable explanation was proffered as to why the applicant chose to D ignore the provisions of the section. The applicant should have exhausted the domestic remedies before bringing the case to court unless there were special circumstances why that could not be done.

Legislation considered

Banking Act [*Chapter 24:20*], ss 54 & 55

E Troubled Financial Institutions (Resolution) Act [*Chapter 24:28*], ss 6, 9 & 28

Case information

M P Mahlangu, for the applicant

L H Cook, for the respondents

Judgment

F **KAMOCHA J:** This is an urgent chamber application wherein the applicant sought relief in these terms:

> "**Interim Relief Granted**
>
> The first, second and third respondents are:
>
> (i) restrained and interdicted from seeking to transfer the assets and/or G business of Trust Bank Corporation Ltd;
>
> (ii) ordered to vacate all the premises of Trust Bank Corporation Ltd occupied by the third respondent and to restore the Bank's signage H which they have caused to be removed."

2005 (1) ZLR p200

Kamocha J

In its final relief the order sought was as follows: A

> "**Terms of final order**

1. It is declared that the purported acquisition by the first and third respondents of the assets and banking business of Trust Bank Corporation Ltd is unlawful.
2. The first, second and third respondents are restrained from seeking B to transfer the assets and business of Trust Bank Corporation Ltd to the third respondent or to occupy any of the premises of Trust C Bank Corporation Ltd.
3. The second and third respondents are ordered to forthwith restore the signage of Trust Bank Corporation Ltd wheresoever such has been removed and to forthwith vacate any of the premises of Trust Bank Corporation Ltd they presently occupy.
4. The first, second and third respondents, jointly and severally, the one paying the others to be absolved shall pay the costs of this application."

On 23 September 2004, the Governor of the Reserve Bank of Zimbabwe placed Trust Bank Corporation Ltd ("Trust Bank") under curatorship in terms of s D 53(1) of the Banking Act [*Chapter 24:20*] ("the Act") for a period of six months. Mr Peter Bailey, the second respondent, was appointed a curator of Trust Bank, which was one of the six troubled banking institutions.

Section 54(1) of the Act provides for the effect of placing a banking institution under curatorship as follows: E

> "The issue of a direction in terms of section *fifty-three* shall have the effect of suspending the powers of every director, officer and shareholder of the banking institution concerned, except to the extent that the curator may permit them to exercise their powers."

Section 55 of the Act endows a curator with very wide ranging duties and powers. In terms of s 55(1), a curator has a duty and power to take over and F assume the management of the banking institution concerned. It is also his duty and he has the power to manage the banking institution concerned in such manner as he considers prudent and most likely to promote the interests of the institution and creditors of the institution. This is provided for in s 55(1)(a) and (b). Section 55(2)(h) enjoins him with the following powers:

> "A curator shall have the following powers to the extent that he is G authorized to exercise them in terms of the direction under which he was appointed –
>
> (a) to (g)
>
> (h) to dispose, by public auction, tender or individual negotiation, of any asset of the banking institution concerned …" H

Kamocha J

A The curator alleged that when he took over the curatorship of Trust Bank he discovered that the applicant, which is the sole shareholder of Trust Bank, owed it in excess of $23 billion and that that loan had been interest free for a considerable period. As part of his duties as a curator, he tried to collect that debt for Trust Bank. He claimed that it had been extremely difficult and he allegedly had to accept assets from the applicant as part settlement of the debt. B The debt was then reduced down to some $8 billion. It seemed to him doubtful if any more money would be collected. That, in his view, would cause considerable prejudice to the depositors of the bank. The amount of $8 billion was an agreed liability by the applicant and it would have made a considerable difference to the depositors if it had been paid.

C Instead, his investigations appeared to reveal that the applicant had, in effect, used depositors' funds for the personal benefit of its shareholders.

In January 2004, the Reserve Bank sent a corrective order to the chairman of the bank, yet its liquidity was certainly not improved to any extent at all thereafter.

In fact, the curator's investigation revealed that, though the directors of the applicant and the Trust Bank were quite aware of the illiquidity of the bank and the problems that it faced, they seemed to do nothing about reducing the spending of the bank. Instead, spending increased and loans to the holding and associated companies continued, when normally reasonable and responsible management in the situation of illiquidity would cut spending and E do everything to increase the cash flow.

The curator held a view that the applicant could not have genuinely understood or believed that the bank could be rehabilitated. The assets only covered 25 per cent of the liabilities and the applicant had not paid $8 billion of its debt. It was therefore unrealistic to consider a possible capitalisation of the bank by the applicant since it could not even repay its debt of $8 billion.

F The curator averred that he and the Reserve Bank of Zimbabwe endeavoured as far as possible to take into account the interest of creditors and depositors. He concluded that the alternative of a liquidation of the bank would have been considerably worse for the creditors and depositors, given the extent to which the liabilities exceeded the assets. Consequently, he held the view that the G applicant had disregarded the interests of the creditors and depositors of the bank by remaining indebted to it in the sum of $8 billion which it had allegedly failed to pay despite demand.

He discovered that the mismanagement of the bank had caused it to be hopelessly insolvent to the extent that it could not be rehabilitated. In the H result, he accepted a proposition that it would be in the best interest of the bank

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and its creditors and depositors to sell the assets in accordance with the offer A that was made by the Zimbabwe Allied Banking Group (ZABG), the third respondent. Accordingly, the assets were purchased and taken over by the third respondent.

The curator averred that he acted in terms of the provisions of s 55(2)(h) which specifically empowers him to sell assets and he was satisfied that he acted B lawfully.

The applicant vehemently disputed the allegations and conclusions drawn by the curator. It asserted that the curator proceeded in terms of the Troubled Financial Institutions Act [*Chapter 24:28*], which came into effect on 14 January 2005, to sell the bank's assets. The applicant based its assertions C on a letter dated 19 January 2005 written to the Acting Board Chairman of the applicant by the curator, which reads in part:

> "In terms of the Troubled Financial Institutions (Resolution) Act, Zimbabwe Allied Banking Group Ltd (ZABG) will purchase all assets by Trust Bank Corporation (TBC) as at 1 January 2005 at full market value as already assessed by professional valuers. The liability to depositor customers D will be settled as follows:
>
> (1) Up to the first $5 million will be paid next week in cash.
>
> (2) Any balance above $5 million will be pro-rated downwards in the ratio of assets to liabilities and ZABG shares issued in exchange.
>
> (3) Other creditors will be pro-rated as above and issued shares in ZABG. E
>
> You will be aware that, even after the revaluation of assets and the modest profits generated during curatorship that the assets in Trust Bank Corporation Ltd (TBC) are less than 25 per cent of liabilities.
>
> In the circumstances, whether Trust Bank Corporation Ltd (TBC) went into liquidation or went the troubled bank resolution route as above, there will be zero recovery for shareholders and the Holding Company should F write off its investment in Trust Bank Corporation Ltd.
>
> What will be left in the old Trust Bank Corporation Ltd will be an adverse balance on equity and a debt to the RBZ and nothing else and it will have to be liquidated …"

The applicant alleged that the curatoxr failed to represent the interests of the shareholders, creditors and depositors of the bank. But the curator explained G that he had taken the interests of the depositors through the payment of $5 million and below to depositors. They could have realised less if the liquidation route had been taken. Further, the depositors and creditors had the option to convert their claims to equity and that would have had the potential for them to realise more value than they would have received had the institution been H liquidated.

A The applicant contended that the sale of the assets of the bank to ZABG did not comply with the laws of this country. In the first instance, the Troubled Financial Institutions (Resolution) Act [*Chapter 24:28*] required that, before the various provisions of that Act can be implemented in respect of a financial institution deemed to be troubled, there ought to be a declaration issued in terms of s 6 of the Act. The declaration must be confirmed by a judge in B chambers in terms of s 9(1) of that Act. The procedure was that the Reserve Bank of Zimbabwe would apply to a judge in chambers for an order confirming the declaration, giving not less than 14 days' written notice to the shareholders, creditors and former members of the Board of the troubled financial institution. The applicant went on to say that there were other publication requirements set out in s 9. Further, s 28 also required that the scheme of resolution be C approved by shareholders and creditors and that

had not been done *in casu.* In the result, the applicant averred that the actions of the RBZ, the curator and ZABG violated the provisions of the Troubled Financial Institutions (Resolution) Act.

The view of the applicant was that the curator had failed to exercise the powers D conferred upon him by s 55 of the Banking Act [*Chapter 24:20*] by, *inter alia*, failing to convene meetings of creditors of the bank and consulting with them on decision by him which affected their interests. It seemed to the applicant that the RBZ, the curator and ZABG had acted with undue haste and with perhaps very little regard for the interest of shareholders, creditors and depositors of the bank.

E The applicant consequently felt that the acquisition of the assets of the bank by the RBZ and the curator in that fashion was grossly unfair and improper. The applicant claimed to be aware of the fact that the RBZ had grossly overstated the liability of the bank to itself and had proceeded to make a determination that the bank was hopelessly insolvent and could not be F rehabilitated.

In conclusion, the applicant submitted that the respondents should be restrained from taking over the assets and business of the bank in the manner that they had done pending full compliance with the law and prayed for an interim order in terms of the draft.

G At the hearing, the applicant moved that a final order be granted since all the necessary documents had been filed by the time of the hearing.

The curator explained that he proceeded in terms of s 55 of the Banking Act to purchase the assets of the bank and its business. He said that, when the letter of 19 January 2005 was written, it had been contemplated that the sale H would be done in terms of the provisions of the Troubled Financial Institutions

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Kamocha J

(Resolution) but for various reasons that was amended so as to proceed in A terms of s 55 of the Banking Act. The curator submitted that the promulgation of the Troubled Financial Institutions (Resolution Act did not preclude him from proceeding in terms of the Banking Act. It was not obligatory to proceed in terms of the new Act. There is merit in that submission. It is quite clear that he proceeded in terms of the provisions of the Banking Act. B

That is so, because if he had proceeded in terms of the new Act, he would have had to follow the procedure laid down in that Act. The procedure in the new Act is that the Reserve Bank would, after affording the financial institution an adequate opportunity to make representation in the matter, declare the financial institution to be a troubled institution and place it under the administration of an administrator named in the declaration in terms of s 6(1) C of that Act. In the present matter, no such declaration was made and no administrator was named. That is why the provisions of s 9 of the new Act were not applicable *in casu*.

In the light of the foregoing, the court finds that the respondents proceeded in terms of the Banking Act to sell the assets and business of the bank. There D is, therefore, no question of what the respondents did offending any law. The curator is specifically empowered by s 55(2)(h) to sell any assets of the banking institution concerned. I therefore, find that the respondents acted lawfully in doing what they did. The suggestion that the acquisition of assets and banking business of Trust Bank Corporation Ltd by the first and third respondents be declared unlawful is without merit and cannot be acceded to. E

The applicant sought to restrain the respondents from seeking to transfer the assets and business the bank to ZABG or to occupy any of the premises of the bank. What was established from the documents filed of record was that the transfer of the assets had already taken place by the time the matter was heard. F

The applicant claimed to be the sole shareholder of the bank. Be that as it may, it remains a separate entity. There can be no doubt that the assets of the bank cannot belong to the applicant at the same time unless they are jointly owned. There was no suggestion that that was the case. It seems to me that the applicant does not have a direct and personal interest in the remedy being sought. If it is so advised, the applicant can claim damages, since it cannot G claim that it has a right which is being infringed. As stated *supra*, the applicant and the bank are two different entities.

I have already mentioned that the correct remedy in this matter was a claim for damages. There is nothing to stop the applicant from claiming for such H

Kamocha J

A damages even if the assets and premises of the bank have been sold. That remedy is available to the applicant.

Another valid point raised by the respondents is that the bank is not before the court and cannot claim an interdict. Nor can the shareholder. In any event, no irreparable harm has been established.

B The respondents contended that the balance of convenience favoured them. They argued that if ZABG were to be interdicted from trading, harm and chaos would ensue because staff have been taken on; depositors were anticipating that their interests are about to be served by ZABG; premises had already been occupied and refurbished; new signage is up and the national interest is being served by ZABG in taking over a hopelessly insolvent bank.

C In terms of s 55(4), any person who is aggrieved by any decision or action taken by a curator may appeal against it to the Reserve Bank. The applicant should have appealed to the Reserve Bank before filing this application. No acceptable explanation was proffered as to why the applicant chose to ignore the provisions of s 55(4) of the Banking Act. The applicant should have exhausted the domestic remedies before bringing this case to this court, unless there were D special circumstances why that could not be done.

The respondents moved that the court should not exercise its discretion in favour of the applicant because the shareholders of the applicant, through their alleged misbehaviour and negligence, landed the bank in the position it finds itself. They allegedly took personal benefits to the prejudice of the E depositors and creditors.

They also alleged that the applicant was responsible for the insolvency of the Bank and the severe prejudice suffered by the bank's depositors. I am inclined to agree with the above submissions.

In the light of the findings that I have made in this judgment, I would dismiss F this application with costs.

Gill, Godlonton and Gerrans, applicant's legal practitioners

Atherstone & Cook, respondents' legal practitioners

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Source:
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S v MANGENA & ORS 2005 (1) ZLR 206 (H)

Citation	2005 (1) ZLR 206 (H)
Case No	Judgment No HB-22-05
Court	High Court, Harare
Judge	Chiweshe J & Ndou J
Heard	17 January 2005
Judgment	10 March 2005
Counsel	*Siziba,* for the appellants *A V Mabhande,* for the respondent

Case Type Criminal appeal

Annotations No case annotations to date

Flynote

Criminal procedure (sentence) — *common law offences — public violence — serious nature of offence — factors which should be considered*

Headnote

Public violence, *vis publica*, is generally a serious offence striking at the roots of orderly and peaceful co-existence. It is aimed at a vital and main objective of criminal law itself. Public violence usually calls for exemplary D sentences. Aggravating factors would include the fact that a large number of persons were involved; that other persons were assaulted; that property was damaged; that weapons were used; that the accused played a pivotal role in the offence; and that the authority of public officials was challenged. Against all these factors the ages and personal E circumstances of the accused must be considered. The sentencing court has a duty to enquire into the subjective elements in order to individualise the punishment

Cases cited

S v Abrahams 1990 (1) SACR 172 (C) F

S v Beman & Ors HB-71-03

R v Cele & Ors 1958 (1) SA 144 (N)

S v Chaka en Andere 1978 (2) SA 65 (O)

S v CM; S v ZD HB-67-03

R v Kashion 1963 (1) SA 723 (SR)

S v Katsande; S v Mahlangu; S v Mutisi & Ors 1974 (1) SA 355 (RA) G

S v Khumalo en andere 1991 (4) SA 310 (A)

S v Malinga 1986 (4) SA 296 (E)

S v Mangcola 1987 (3) SA 791 (C)

S v Maseko 1988 (4) SA 1 (A)

S v Matanhire & Ors 2002 (1) ZLR 598 (H) H

Chiweshe J

A *R v Mathlala* 1951 (1) SA 49 (T)

S v Maxaku; S *v* Williams 1973 (4) SA 248 (C)

S v Msindo & Ors HH-25-02

S v Mundowa 1998 (2) ZLR 392 (H)

S v Mushonga 1975 (1) SA 247 (RA)

S v Muyambo 1981 (1) SA 385 (ZA)

B *R v Mzwakala* 1957 (4) SA 273 (A)

S v Quandu en Andere 1989 (1) SA 517 (A)

R v Salot 1955 (1) PH H35 (N)

S v Simbi & Ors 1996 (1) ZLR 167 (H)

S v Thonga 1933 (1) SACR 365 (V)

C *S v Usayi & Ors* 1981 ZLR 61 (A)

S v Zinn 1969 (2) SA 537 (A)

S v Zulu HB-52-03

Case information

*** *Siziba,* for the appellants

D *A V Mabhande,* for the respondent

Judgment

NDOU J: The appellants were jointly arraigned before a Provincial Magistrate sitting at the Gwanda Magistrates Court on 22 October 2003 facing a charge of public violence. They pleaded guilty to the charge and were each accordingly sentenced to 48 months imprisonment of which three months' imprisonment E was suspended for five years on the usual conditions of good behaviour. They are not satisfied with the propriety of the sentence and have appealed against sentence only. The background facts are that on 15 October 2003, and at Boulder Creek Ranch, West Nicholson, the appellants and 14 other persons thereabout, armed themselves with axes, knob-kerries, sticks, whips and F knives and disturbed public peace or security or invaded the rights of others. In short, they disarmed a National Parks and Wild Life officer of his official AK 47 rifle with a magazine of 26 rounds. They fired at him and his fellow game scouts. They shot and damaged the tyre and rim of vehicle registration No. 735-785Q, a Mazda B2500, the property of Drummond Ranch. They confiscated two Motorolla radios and car keys and an AK rifle from the scouts. G They further assaulted the game scouts. The motive of the public violence was to "rescue" the wives, relatives and fellow villagers who had been lawfully arrested for poaching offences committed at the ranch. The complainants were carrying out their lawful duties of preserving and managing wild life and game H at the time of the attack by the appellants.

Chiweshe J

At the conclusion of submissions we indicated that the appeal was partly A successful. We set aside the original sentence and substituted it with one of 48 months' imprisonment of which 24 months is suspended for three years on condition that the accused does not within that period commit an offence involving public violence and for which he or she is convicted and sentenced to imprisonment without the option of a fine. We indicated that our reasons B will follow. This judgment provides the said reasons. Public violence, *vis publica*, is generally a serious offence striking at the roots of orderly and peaceful co-existence. It is aimed at a vital and main objective of criminal law itself.

> "In an atmosphere and under circumstances of disorderly mob rule, of a serious breach of public peace and orderly co-existence, the law itself may C become endangered. Orderly administration may become difficult, if not impossible and the interests of law abiding members of society may be seriously and irreparably prejudiced …": see *South African Criminal Law and Procedure* Vol II, *Common Law Crimes* 3 ed, P M A Hunt and J R L Milton at pp 95-6.

Public violence usually calls for exemplary sentences – see D *S* v *Thonga* 1993 (1) SACR 365 (V) at 372; *S* v *Mushonga* 1975 (1) SA 247 (RA); *S* v *Muyambo* 1981 (1) SA 385 (ZA); *S* v *Maseko* 1988 (4) SA 1 (A) at 3I-4A; *S* v *Khumalo en andere* 1991 (4) SA 310 (A) at 365; *S* v *Simbi & Ors* 1996 (1) ZLR 167 (H) and *S* v *Quandu en andere* 1989 (1) SA 517 (A).

In this case, a large number of persons was involved i.e. the six appellants plus E fourteen others. This is a relevant factor in the assessment of sentence. The appellants used an assortment of weapons as alluded to above. They assaulted the complainant – Richard Moyo, until he was "powerless" and disarmed him of the AK 47 rifle. Such a severe assault is an aggravating factor: see *R* v *Cele & Ors* 1958 (1) SA 144 (N) and *R* v *Salot* 1955 (1) PH H35 (N). The appellants damaged a motor vehicle as indicated above. This is also aggravating: F see *S* v *Mangcola* 1987 (3) SA 791 (C). From the facts all the appellants participated actively and played pivotal roles in the violence. This is an aggravating factor: see *R* v *Mushonga supra*; *S* v *Katsande*,

S v *Mahlangu*, *S* v *Mutisi & Ors* 1974 (1) SA 355 (RA) and *S* v *Chaka en andere* 1978 (2) SA 65 (O). Another aggravating factor is that the appellants were challenging the G authority of public officials i.e. National Parks and Wild Life game scouts and officials: see *R* v *Mathlala* 1951 (1) SA 49 (T) and *S* v *Usayi & Ors* 1981 ZLR 61 (A). Against all this, the ages and personal circumstances of the appellants have to be considered: see *S* v *Abrahams* 1990 (1) SACR 172 (C) and *S* v *Malinga* 1986 (4) SA 296 (E). The appellants are first offenders. According to his reasons for sentence, the trial magistrate attempted to balance the H

Chiweshe J

A mitigatory personal circumstances against the seriousness of the offence. Generally, sentence is the province of the trial court which enjoys discretionary powers. This court of appeal is enjoined to be careful not to erode such discretion: see *S* v *Ramushu & Ors* S-25-93; *S* v *Mundowa* 1998 (2) ZLR 392 (H); *S* v *Matanhire & Ors* HH-18-02; *S* v *Mavhundura* 2002 (1) ZLR 598 (H); *S* v *Msindo & Ors* HH-25-02 and *S* v *Zulu* HB-52-03.

B I propose to deal with the issues raised by the appellants in turn. Firstly, the appellants argue that there is a need to individualise the punishment. I agree that the sentencing court has a duty to enquire into the subjective elements in order to individualise the punishment: see *S* v *Maxaku, S* v *Williams* 1973 (4) SA 248 (C); *S* v *Zinn* 1969 (2) SA 537 (A); *S* v *Beman & Ors* HB-71-03 and C *S* v *CM; S* v *ZD* HB-67-03. There is evidence that the trial magistrate was alive to this need as he sentenced the appellants' accomplice who fired the AK 47 rifle more severely than the appellants. He individualised the offenders' cases as best as he could. In view of the elastic nature of the public violence, he cannot be faulted for the extent of the individualisation: see *R* v *Kashion* 1963 (1) SA 723 (SR) and *R* v *Mzwakala* 1957 (4) SA 273 (A) at 277.

D Secondly, as for the period of the suspended sentence, Mr *Mabhande,* for the respondent conceded that a longer period of suspension was called for. I agree that this concession is proper bearing in mind the sentences in the cases that he referred to in his heads of argument. It is only to that extent that we felt that the trial court misdirected itself. We, accordingly, altered the E sentence as reflected above.

Chiweshe J concurred.

Cheda & Partners, appellants' legal F practitioners

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

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BENNETT v PARLIAMENT OF ZIMBABWE & ORS 2005 (1) ZLR 210 (H)

Citation	2005 (1) ZLR 210 (H)
Case No	Judgment No. HH-24-05
Court	High Court, Harare
Judge	Patel J
Heard	28 February 2005
Judgment	10 March 2005

Counsel *E T Matinenga,* for the applicant
S Chihambakwe, for the first respondent
Ruzive, for the second and third respondents

Case Type Civil application

Annotations No case annotations to date

Flynote

Administrative law — *discretion — exercise of — prison authorities — discretion to grant remission of sentence — discretion must be exercised fairly and reasonably*

Constitution — *Constitution of Zimbabwe 1980 — s 63(8) — committal to prison of a member of parliament by Parliament sitting as a court — upon committal the matter is duly concluded — matter does not lapse upon the dissolution of Parliament*

Criminal procedure (sentence) — *general principles — imprisonment — remission of sentence — discretion vested in prison authorities — prisoner not entitled to remission as a matter of course*

Prisons — *sentence — remission of — grant of remission of sentence — discretion vested in prison authorities — discretion must be exercised fairly and reasonably*

Statutes — *Prison Acts [Chapter 7:11] — s 109(1) — member of Parliament entitled to be considered for remission of sentence in terms thereof*

Statutes — *Privileges, Immunities and Powers of Parliament Act [Chapter 2:08] — Parliament sitting as a court — Part V of the Act — sentence of member to a term of imprisonment beyond current session of Parliament — special provision of Part V of the Act override s 32(2) thereof*

Headnote

The grant of remission to a convicted prisoner, in terms of s 109 (1) of the Prisons Act [*Chapter 7:11*] involves the exercise of a discretionary power, which is, however, subject to the usual fetters governing the use of an administrative discretion. It follows that a convicted prisoner is not entitled as matter of legal right to a one third remission of his sentence. This does not mean that he is without a remedy in the event that, when the time for remission on purely arbitrary or discriminatory grounds. An

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2005 (1) ZLR p211

Patel J

administrative discretion must be excised fairly and reasonably and any exercise of an administrative power is subject to review by the courts on the well-established grounds of illegality, impropriety or gross irrationality.

Consequent upon a disturbance within the precincts of Parliament, the applicant, a member of Parliament, was charged with a contempt involving an offence in terms of the special provisions of Part V of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*] and committed to prison for an effective term of 12 months, by Parliament, sitting as a court, with effect from 28 October 2004. In seeking his release from prison, the applicant submitted that the general provision of s 32(2) of the Act operated to expunge his term of imprisonment upon the dissolution of Parliament which was due on 30 March 2005. He further argued that, having regard to what he claimed was his entitlement to a one third remission of his sentence, in terms of s 109 of the Prisons Act [*Chapter 7:11*], he was entitled to his immediate release. He also placed reliance on s 63(8) of the Constitution, which provides that "On the dissolution of Parliament all proceedings pending at the time shall be terminated and accordingly every Bill, motion, petition or other business shall lapse."

He argued, in the alternative, that his committal to prison by Parliament was a matter which fell within the ambit of this provision and as a result his term of imprisonment due to lapse on 30 March 2005.

Held, that although Parliament is not a court of law in the conventional sense., it is nevertheless a court of competent jurisdiction when exercising its powers under Part V of the Privileges,

Immunities and Powers of Parliament Act [*Chapter 2:08*] and, therefore, the applicant did fall within ambit of s 109 of the Prisons Act [*Chapter 7:11*]. Notwithstanding this, however, the powers granted to prison authorities to grant a remission of sentences were discretionary and conferred no entitlement, as of right, to the F applicant to a one third remission of his sentence.

Held, further, that in finding the applicant guilty of a contempt in the form of offences covered by the special provisions of Part V of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*] and thereafter sentencing him to a term of imprisonment, Parliament had sat as a court G of record and empowered not only to impose a fine but also to commit applicant to a fixed term of imprisonment beyond the current session of Parliament. The general provisions of s 32(2) of the Act had, therefore, no application to the matter

Held, further that s 63(3) of the Constitution did not assist the applicant. H Having committed him to prison on 28 October 2004, the matter had been

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Patel J

duly concluded by Parliament. It thereupon become a completed matter A requiring no further inquiry or determination.

Held, that, in the result, the application should be as dismissed with costs.

Cases cited

Kuvarega v Registrar-General & Anor 1998 (1) ZLR 188 (H) B

Mutasa v Makombe NO 1997 (1) ZLR 330 (S)

Legislation considered

Constitution of Zimbabwe 1980, s 63(8)

Administrative Justice Act [*Chapter 10:28*], s 3 C

Interpretation Act [*Chapter 1:01*], s 3(3)

Prisons Act [*Chapter 7:11*], s 109

Prisons (General) Regulations, 1996 (SI 1 of 1996), s 113

Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*], ss 3, 16(4), 21 & 32; Parts V and VIII

Case information

E T Matinenga, for the applicant D

S Chihambakwe, for the first respondent

** *Ruzive,* for the second and third respondents

Judgment

PATEL J: The applicant is Roy Leslie Bennett, a Member of Parliament, who is presently incarcerated at Mutoko Prison, pursuant to his committal to E imprisonment by Parliament, for an effective term of 12 months beginning on 28 October 2004.

The first respondent is the Parliament of Zimbabwe. The second and third respondents are the Commissioner of Prisons and the Minister of Justice, respectively, who are cited in this matter in their official capacities. F

RELIEF SOUGHT

The applicant contends that the 12-month term of imprisonment imposed upon him will expire simultaneously with the dissolution of Parliament at the end of March 2005. If this is correct, it means that the validity of his prison term is truncated to a total period of 153 days. Accordingly, with due remission of his sentence by one-third, he ought to have been released from prison on 7 G February 2005.

The applicant therefore seeks an urgent order directing his release from prison forthwith and, in any event, within 12 hours of the granting of the order. H

Patel J

A In the alternative, the applicant seeks an order for his release on 30 March 2005, being the date when the present Parliament will be dissolved – by virtue of Proclamation 2 of 2005 (SI 15 of 2005).

THE ISSUES

The issues for determination by the court are as follows: B

1. Whether or not the application satisfies the requirement of urgency.
2. Whether the applicant is precluded from bringing this application on the grounds of *lis pendens* and/or *res judicata*.
3. Whether or not the applicant is entitled to one-third remission of his sentence in terms of s 109 of the Prisons Act [*Chapter 7:11*]. C
4. The effect of s 63(8) of the Constitution of Zimbabwe on the applicant's prison term.
5. Whether s 32(2) of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*] operates to expunge the applicant's prison term upon the dissolution of Parliament.

D **URGENCY**

The applicant contends that his right to liberty is at stake and that this factor in itself warrants the determination of his application as a matter of urgency. Moreover, if his averments are correct and his claim that he ought to have been released on 7 February is upheld, he will suffer irreparable harm if his E incarceration is allowed to continue.

As against this, it is contended on behalf of the respondents that the applicant's imprisonment, *per se*, does not necessarily give rise to any urgency. Moreover, the applicant has not satisfactorily explained why he waited for over two weeks before initiating this application. The failure to explain this delay in the founding papers, so the respondents contend, F effectively vitiates the applicant's claim of urgency: see *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H) at 193.

I accept the respondents' argument that the applicant could have lodged this application soon after the critical date of 7 February, despite the distance between Harare and Mutoko Prison and the need to consult with his legal G practitioners. The fact that he was able to file his detailed answering affidavit within 24 hours clearly belies any contention to the contrary.

Nevertheless, I am of the view that the facts of this case are distinguishable from those in *Kuvarega*'s case *supra*. The latter case involved an applicant who waited for a given deadline to materialise before taking the requisite H action. In the present matter, we are not concerned with any deadline that the

Patel J

applicant ought to have met. He is in the position of being continuously A incarcerated as opposed to being at liberty on the legal grounds that he avers.

I am also satisfied that the delay in bringing this application to the court is not inordinate in the circumstances of this case. If there has been some delay, it is such as to warrant condonation by this court in the interests of justice, in terms of R 4C of the High Court Rules, 1971. B

LIS PENDENS **AND/OR** *RES JUDICATA*

Mr *Chihambakwe*, on behalf of the first respondent, submits that the parties and the issues *in casu* are identical to the parties involved and the issues that were determined by this court in case Nos. HC 11689/04 and HC 11808/04.* Again, it is averred that the same issues are the subject-matter of an appeal C pending before the Supreme Court. On this basis, it is contended that the application should be dismissed on the grounds of *res judicata* and *lis pendens*.

While I accept that the parties in the three cases cited may be similar to those involved in this matter, I am of the view that the issues canvassed in those cases are very different from those before this court. In the present matter, the D applicant is not seeking a stay of current proceedings in Parliament nor is he challenging the validity of the sentence imposed upon him by Parliament. Instead, what he claims is that the term of imprisonment that he is currently serving has or will come to an earlier end by operation of law. His cause of action *in casu* is patently new and untested. Accordingly, I hold that the E defences of *lis pendens* and *res judicata* do not inure to the benefit of the respondents in this matter.

THE PRISONS ACT [*Chapter 7:11***]**

Section 109(1) of the Prisons Act, in its relevant portions, provides as follows:

> "A convicted prisoner under sentence of imprisonment for a period of more F than one month ... may, subject to such conditions as may be prescribed, earn by satisfactory industry and good conduct remission of one-third of his sentence …"

In the present case, three distinct questions arise for consideration. Firstly, does s 109 apply to the applicant? Secondly, what are the conditions prescribed for remission in terms of this section? And thirdly, is a prisoner G *entitled* to remission for good conduct?

Patel J

A **APPLICATION OF SECTION 109**

Section 2 of the Act defines a "convicted prisoner" as "any prisoner under sentence of a court or court martial". The word "court" is defined in s 3(3) of the Interpretation Act [*Chapter 1:01*] as being "any court in Zimbabwe of competent jurisdiction".

B The respondents contend that the applicant is not a "convicted prisoner" as defined and that, therefore, the benefit of remission in terms of s 109 of the Act cannot be extended to him. On behalf of the applicant, Mr *Matinenga* concedes that he is not a convicted prisoner and that the Act contains a glaring *lacuna* in that regard. Notwithstanding this, he submits that the applicant, whilst in prison, is subject to the same disabilities that apply to a convicted C prisoner and should, therefore, enjoy the same benefits as apply to the latter. On that basis, he urges the Court to adopt a teleological approach in interpreting the Act (*per* Devenish *Interpretation of Statutes*, 1992, at 39-48) and to fill an inequitable gap in the law in order to serve the ends of justice.

Whatever the merits of the teleological or purposive approach to statutory D interpretation, I do not think it necessary to legislate for Parliament in the instant case. Section 16 of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*] spells out the jurisdiction of Parliament in the exercise of its powers to deal with contempts and other offences. Section 16(4) is of specific relevance to the matter at hand. It provides that –

> "Parliament sitting as a court shall have all such rights and privileges of a court of record as may be necessary for the purpose of summarily inquiring into and punishing the commission of any act, matter or thing which in this Part is declared to be an offence."

As I read it, this provision makes it abundantly clear that, in the exercise of its penal powers, Parliament sits as a court with full jurisdictional competence to inquire into and punish the commission of offences pertaining to Parliamentary F affairs. For that purpose, at any rate, it is "a court of competent jurisdiction" as envisaged in the Interpretation Act. Although Parliament is not a court of law endowed with criminal or civil jurisdiction in the conventional sense (*per* Gubbay CJ in *Mutasa* v *Makombe NO* 1997 (1) ZLR 330 (S) at 337), it is nevertheless a court of competent jurisdiction when exercising its penal G powers under Part V of *Chapter 2:08*. Accordingly, I am of the view that the applicant is a "convicted prisoner" within the meaning of the Prisons Act and is, therefore, properly covered by the provisions of s 109 of that Act.

CONDITIONS FOR REMISSION

In answer to the question as to what conditions have been prescribed for H remission under s 109, counsel for the respondents were unable to enlighten

Patel J

the court in that regard. Their difficulty is quite comprehensible in view of the A rather sparse treatment of this subject in the Prisons (General) Regulations, 1996 (S.I. 1/1996). Section 113 of the Regulations curtly provides that –

> "Remission of sentence in accordance with Part XVIII [now Part XIX] of the Act shall be calculated by means of a Remission Table drawn up and issued by the Commissioner." B

The contents of the Remission Table referred to were not divulged to the Court. In any event, the table is presumably no more than a mathematical index computing the period of remission applicable to specified prison terms.

The real difficulty, it seems to me, is that no conditions appear to have been prescribed pertaining to, *inter alia*, the procedure to be followed and the C criteria to be applied in granting remission under section 109 of the Act. This, as I see it, is a real *lacuna* in the law which the second and third respondents may well wish to rectify at the earliest opportunity.

ENTITLEMENT TO REMISSION

It was submitted on behalf of the applicant that he has behaved in an exemplary D fashion during the course of his incarceration and that he is, therefore, entitled to one-third remission of his sentence in accordance with the practice hitherto followed by the Prisons authorities. As against this, the respondents emphasise the wording employed in s 109(1), *viz.,* a convicted prisoner *may* earn remission of his sentence.

It seems to me that the respondents' submission in this regard is unassailable. E There is nothing in the terminology or context of s 109 to suggest that its resort to the word "may" is intended to mean "shall" or to bear any similar peremptory connotation.

Consequently, I hold that the grant of remission to a convicted prisoner, in terms of s 109(1) of the Act, involves the exercise of a discretionary power – F subject to the usual fetters governing the use of administrative discretion.

It follows that the applicant is not entitled, as a matter of legal right, to one-third remission of his sentence. This does not mean that he is without remedy in the event that, when the time for remission is due, he is denied the benefit of remission on purely arbitrary or discriminatory grounds. It is trite that administrative discretion must be exercised fairly and reasonably and that any G irregular exercise of an administrative power is subject to review by the courts on the well-established grounds of illegality, impropriety or gross irrationality. (See s 3 of the Administrative Justice Act [*Chapter 10:28*], which now encapsulates the common law position in this respect). H

Patel J

A **SECTION 63(8) OF THE CONSTITUTION OF ZIMBABWE**

Section 63(8) of the Constitution provides as follows:

> "On the dissolution of Parliament all proceedings pending at the time shall be terminated and accordingly every Bill, motion, petition or other business shall lapse."

B It is contended for the applicant that his committal to prison by Parliament is a matter that falls within the ambit of this provision and that his term of imprisonment will immediately lapse as at the date of the dissolution of Parliament on 30 March 2005.

As I read it, s 63(8) simply declares that all parliamentary business *pending* in Parliament at the time of its dissolution must lapse at that time. Any such C inchoate business is terminated and cannot be automatically revived in the new Parliament at its inception.

In the present case, the applicant's conduct and subsequent committal to prison were inquired into and duly concluded by Parliament in October 2004. It is a completed matter requiring no further inquiry or determination by D Parliament. Nor does it leave any room for the applicant to approach Parliament with a view to seeking the review or reconsideration of his case. In a sense, Parliament is effectively *functus officio* in the matter and is under no duty or obligation to revisit it.

In this respect, I find no merit whatsoever in the applicant's contention and entertain no difficulty at all in dismissing it.

E PRIVILEGES, IMMUNITIES & POWERS OF PARLIAMENT ACT [*Chapter 2:08*]

For present purposes, the relevant provisions of *Chapter 2:08* are sections 3, 16, 21 and 32. These provisions are as follows:

F "3. Parliament and members and officers of Parliament shall hold, exercise and enjoy —

(a) the privileges, immunities and powers conferred upon Parliament, respectively, by this Act or any other law; and

(b) all such other privileges, immunities and powers, not inconsistent G with the privileges, immunities and powers referred to in paragraph (a), as were applicable in the case of the House of Commons of the Parliament of the United Kingdom, its members and officers, respectively, on 18 April 1980."

"16(1) It is declared for the avoidance of doubt that Parliament H has all such powers and jurisdiction as may be necessary for inquiring

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2005 (1) ZLR p218

Patel J

into, judging and pronouncing upon the commission of any act, matter A or thing in this Part declared to be an offence without derogation from the powers and jurisdiction exercisable by Parliament by virtue of paragraph (b) of section *three* with respect to the commission of any act, matter or thing, whether or not in this Part declared to be an offence, which is or may be adjudged by Parliament to be a contempt. B

(2) Parliament shall have power to award and execute the punishments provided by this Part for the commission of any act, matter or thing which in this Part is declared to be an offence.

(3) Subsection (2) shall not be construed as precluding Parliament from awarding and executing any punishment for the commission of any act, matter or thing referred to in that subsection which Parliament has power C and jurisdiction to award and execute by virtue of paragraph (b) of section *three* in addition to or instead of any punishment provided by this Part for the commission of that act, matter or thing.

(4) Parliament sitting as a court shall have all such rights and privileges of a E court of record as may be necessary for the purpose of summarily inquiring into and punishing the commission of any act, matter or thing D which in this Part is declared to be an offence."

" 21. Any person who commits any act, matter or thing specified in the Schedule shall be guilty of an offence and liable to a fine not exceeding level seven dollars or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment."

" 32(1) It is declared for the avoidance of doubt that any person adjudged E by Parliament to be guilty of a contempt which is not an act, matter or thing declared in Part V to be an offence may, in addition to any other penalty to which he is liable by virtue of this Act or any other law, be committed to prison for such period during the current session of Parliament as Parliament may determine.

(2) Any person referred to in subsection (1) who, because of a prorogation F or dissolution of Parliament, has not served a period of imprisonment deemed sufficient by Parliament may be committed to prison in the next session until Parliament is satisfied.

(3) Parliament shall not have power to impose —

(a) any fee for any contempt; or G

(b) any fine for any contempt which is not an act, matter or thing declared G in Part V to be an offence.

(4) The provisions of sections *twenty-three* and *twenty-four* shall apply, *mutatis mutandis*, to a warrant of committal to prison issued in pursuance of subsection (1) or (2)." H

2005 (1) ZLR p219

Patel J

A Also pertinent is para 16 of the Schedule which penalises "Assaulting, insulting, interfering with or wilfully obstructing a member coming to or going from Parliament or whilst within the precincts of Parliament …"

The applicant's argument for early release is predicated on s 32 of the Act. It is that s 32(1) permits Parliament to commit any person to prison *only during the current session of Parliament.* Where any such person is to be committed B to prison for a further period, s 32(2) allows such re-committal in the next session of Parliament. The combined effect of these provisions, so it is argued, is that every person committed to prison by Parliament must be released from prison when Parliament is prorogued or dissolved.

The obvious flaw in this argument is the clear confinement of s 32(1) to "a C contempt which is *not* an act, matter or thing declared in Part V to be an offence". For present purposes, the salient provisions of Part V are contained in sections 16(2) and 21 as read with para 16 of the Schedule. The overall effect of these provisions is that any person who assaults a member within the precincts of Parliament is guilty of an offence and may be committed to imprisonment for a period not exceeding two years. The period of imprisonment D so fixed constitutes a definite term that is not subject to restriction or truncation by dint of s 32.

It seems apposite at this juncture to explore the reasons for this divide between the provisions of Part V and s 32. As is evident from s 3(b) of the Act, Parliament is vested with all the privileges, immunities and powers as were held by the E House of Commons in the United Kingdom as at 18 April 1980. For the avoidance of doubt, s 16(1) declares that the additional penal powers and jurisdiction conferred by Part V of the Act are without derogation from the inherent penal powers and jurisdiction exercisable by virtue of s 3(b). Again, for the avoidance of doubt, s 32(1) declares that a person adjudged by Parliament to be guilty of a contempt falling outside the purview of Part V may F be committed to prison – but only for a period during the current session of Parliament.

The reason for confining imprisonment under s 32 to the current session of Parliament is not immediately discernible from the Act itself. In order to understand the peculiarity of this provision, it is necessary to examine the G corresponding position in England as at April 1980.

In Erskine May's *Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 21ed. 1989, pp 03-114, the learned authors expound the penal jurisdiction of both Houses of Parliament. At pp 103-104, they observe –

> "The Lords have a court of record, and as such have power not only to H imprison but to impose fines. They also imprison for a fixed time … The Commons' claim to be a court of record has been virtually abandoned A though the consequences have not included surrender of all the concomitant powers. … on the other hand, though the

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Patel J

> Commons formerly imprisoned offenders for a time certain, it has subsequently been considered as wanting the power to commit for a period beyond the end of the session; and unlike the Lords, which enjoys an undisputed status as a court of record, the Commons has not levied fines in the modern period." B

As regards the period of committal and discharge, they state further, at pp 108-109:

> "The Lords has power to commit offenders to prison for a specified term, even beyond the duration of the session …
>
> The Commons abandoned its former practice of imprisoning for a time C certain, and is now considered as without power to imprison beyond the session. The more recent practice of the Commons has been not to commit offenders for any specified time, but generally or during pleasure …
>
> Persons committed by the Commons, if not sooner discharged by the House, are immediately released from their confinement on a prorogation. If they were held longer in custody, they would be discharged by the courts upon a writ of *habeas corpus*.
>
> Where, however, the House considers that an offender who has thus regained his liberty has not been sufficiently punished, he may be again committed in the next session and detained until the House is satisfied."

What is evident from the passages quoted is that the House of Lords is a court E of record and has the power not only to imprison for a fixed duration but also to impose fines. In contrast, the House of Commons is no longer a court of record. More significantly, it cannot impose fines nor can it imprison beyond the current session.

Reverting to our own situation, the above distinctions and variations are clearly recognised and specifically addressed in our Act. As already indicated, E Parliament is inherently endowed with the penal powers and jurisdiction vested in the House of Commons (sections 3(b) and 16(1)). As such, it may commit any offender to prison during the current session (section 32(1)) and may re-commit that offender in the next session (section 32(2)). However, it may not impose any fine for any contempt which is not declared to be an offence under Part V of the Act (section 32(3)). G

In my view, Part V of the Act is deliberately designed to override these limitations on the powers of the House of Commons and to invest our Parliament with the plenary penal powers enjoyed by the

House of Lords. Thus, in relation to those acts and contempts which are declared to be offences under Part V, Parliament sits as a court of record and is empowered not only H

Patel J

A to impose fines but also to commit offenders to imprisonment for a fixed term, even beyond the duration of the current session.

To conclude this aspect of this case, it is clear that the special provisions of Part V of the Act stand apart from the general provisions of Part VII and s 32 of the Act. The applicant *in casu* was found guilty of contempt in the form of B offences specified in the Schedule and covered by Part V of the Act. He was then committed to a fixed term of imprisonment in accordance with sections 16(2) and 21 of the Act. The offences encompassed by these provisions and the consequences thereof fall outside the remit of s 32. It follows that the applicant cannot invoke that section in order to claim his early release from prison upon the dissolution of Parliament.

C **SUMMATION**

To sum up, the application fails on all of the three grounds proffered by the applicant as warranting his early release from imprisonment.

Firstly, he may be granted but is not entitled as of right to one-third remission of his sentence under s 109 of the Prisons Act. Secondly, his term of D imprisonment is not curtailed or in any other way affected by s 63(8) of the Constitution. And thirdly, his term of imprisonment is not governed by the provisions of s 32 of the Privileges, Immunities and Powers of Parliament Act and, as such, it will not automatically terminate upon the dissolution of Parliament on 30 March 2005.

E In the result, the application is dismissed with costs.

Kantor & Immerman, applicant's F legal practitioners

Chihambakwe, Mutizwa & Partners, first respondent's legal practitioners

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

* The judgment in this case is reported at p 155 of this volume — *Editor*.

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ASSOCIATED NEWSPAPERS OF ZIMBABWE (PVT) LTD v MINISTER OF STATE FOR INFORMATION AND PUBLICITY & ORS 2005 (1) ZLR 222 (S)

Citation	2005 (1) ZLR 222 (S)
Case No	Judgment No S-111-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA, Ziyambi JA, Malaba JA & Gwaunza JA

Heard 3 March 2004

Judgment 14 March 2005

Counsel *J C Andersen SC,* with him *E T Matinenga,* for the applicant
J Tomana, for the respondents

Case Type Constitutional application & civil appeal

Annotations Link to case annotations

Flynote

Appeal — *Administrative Court — noting of appeal against order of — no power in court to order execution pending appeal*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of* D *Rights — s 20 — protection of freedom of speech — whether infringed by SI 169C of 2002 — matter left open*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 24 — challenge to constitutionality of statutory provision — need for applicant to show how his rights would be affected – not usually enough to make a bare allegation* E

Court — *Administrative Court — powers of — appeal from — court has no inherent or statutory jurisdiction to order execution of its judgment despite the noting of an appeal*

Court — *contempt of court — requirement that applicant* G *purge its contempt before approaching court for relief — whether contempt at relevant time proved*

Court — *judicial officer — impartiality — bias — likelihood of — vitiates requirement of maxim audi alteram partem — violation of rule a gross irregularity*

Practice and procedure — *contempt of court — requirement that applicant purge its contempt before approaching court for relief — whether contempt at relevant time* F *proved*

Statutes — *Access to Information and Protection of Privacy Act [Chapter 10:27] — ss 39(1)(g), (i), (j), (n) & (p), 40, 41, 65, 66, 69, 70, 71, 72 , 76, 79, 80(1)(d)(2), 83, 89 & para 4 of Fourth Schedule — constitutionality of*

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Headnote

A This matter combined, by consent, a constitutional application and an appeal from the Administrative Court. The applicant contended that certain sections of the Access to Information & Protection of Privacy Act [*Chapter 10:27*], were unconstitutional. It had therefore declined to register in terms of s 66 of the Act, as it was required to do. The respondents contended that it was in contempt of court, and therefore B should not be heard. The provisions of the Act being challenged included: (1) s 39, which deals with accreditation of journalists; (2) s 40, which dealt with the appointment of the Media and Information Commission. The applicant argued that the section failed to provide for a Board that is independent of the Minister and was therefore C unconstitutional; (3) s 65, which seeks to control the ownership of the mass media services and limits the ownership of the media by non-citizens of Zimbabwe; (4) s 66, which provides for the registration of providers of mass media services; (5) s 70, which provides for the payment of fees; (6) s 71, which provides for the circumstances under which a registration certificate can be suspended or cancelled by the D Commission. These include fraud or misrepresentation and failure by a mass media provider to exercise its rights within 12 months; and (7) s 89, which confers on a person or organisation in respect of whom incorrect information has been published or whose rights or lawful interests have been infringed in a publication, the right to reply at no cost to him and for the reply to be published within a certain period of time. The applicant E also challenged the constitutionality of the Access to Information and Protection of Privacy (Registration, Accreditation and Levy) Regulations 2002 (SI 169C of 2002).

The appeal against the judgment of the Administrative Court was an appeal by the second respondent, the Media & Information Commission set up F by the Act, against a judgment in favour of the applicant. The Commission had turned down an application for registration by the

applicant. The Administrative Court had allowed the appeal on three grounds, namely (1) the Board of the Commission had been improperly constituted; (2) the Commission had acted *ultra vires;* and (3) bias. It ordered that the Commission be re-constituted and that it should register the applicant G by 30 November, failing which the applicant would be deemed to be registered. The Commission further appealed against a subsequent order by the Administrative Court that its order should be brought into effect pending the hearing of the appeal.

H *Held,* that the applicant was not in contempt at the relevant time

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Held, further, that in relation to the attack on s 39 of the Act, s 24 of the A Constitution entitles a litigant to approach the Supreme Court on the allegation that its fundamental right has been violated. When such a litigant seeks to impugn a statutory provision the nature of the challenge should be set out in some detail. In particular, the application should set out the manner in which it is alleged that the offending provisions violate B the applicant's constitutional rights. If this is not done respondents will have difficulty in understanding what case they have to meet. It will equally be difficult for the court to appreciate fully the issues which it is required to determine. It is not enough to make a bare allegation unless the violation is obvious. The factual basis for the allegation has to be set out in a manner that enables the court to understand the nature of the C allegation. In the premises, it was not established that the impugned provisions of s 39 were unconstitutional.

Held, further, that accreditation of journalists and the licensing of electronic media is constitutional as long as the requirements for such accreditation and licensing are not onerous.

Held, further, that the security for the independence of the Commission does D not depend upon the nature of the appointing authority but on the existence of qualification requirements, the consideration of which induces a sense of duty in the appointing authority and eliminates the exercise of discretionary power thereby ensuring that merit alone is the basis for selection. The constitutionality of s 40 could not be successfully impeached on the mere ground that the executive has the power to E appoint the members of the Commission.

Held, further, with regard to s 65, that the applicant had to show that it was affected by the section, by alleging that it was a body corporate in which the controlling interest was not held directly or indirectly whether through any individual company or association by one or more individuals F who are not citizens of Zimbabwe or permanently resident in Zimbabwe. It did not show that the section affected its rights.

Held, further, that for the same reasons that a requirement for accreditation of journalists was constitutional, the requirement for providers of mass media services to be registered was constitutional. It could not be said that a requirement that a mass media service provider should register G itself with the Commission in order to exercise the right of freedom of expression is not justifiable in a democratic society when its object is to ensure that citizens of the country have effective ownership and control of the mass media for the exercise of their right to freedom of expression. H

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A *Held,* further, that the requirement to pay fees was not in itself unconstitutional; it might so be if the fees were excessive.

Held, further, that the meaning of misrepresentation is justiciable and capable of determination, as is what constitutes a material non-disclosure. What is fraudulent is much easier to determine than non-disclosure of a material fact and misrepresentation. The Constitution confers no right on an B individual to misrepresent, either directly or through non-disclosure of a material fact or to commit fraud.

Held, further, that freedom of expression carries with it certain responsibilities, one of which is not to infringe on the rights of others, and a law that offers a remedy for the wronged party is constitutional.

C *Held*, further, that s 80(1)(a), (b) and (c) (which have since been repealed) should be struck down as unconstitutional.

Held, further, that the allegation that the Regulations contained in S1 169C of 2002 infringed the right of freedom of speech, as protected by s 29 of the Constitution, was not adequately supported by factual averments, and the issue should be left open.

D In respect of the appeal against the order of the Administrative Court:

Held, that the Commission had seriously violated the *audi alteram partem* rule, which was a gross irregularity justifying the setting aside of its determination.

Held, further, that the Administrative Court had failed to determine the alleged basis of the alleged contravention of the Act by the applicant. E This was a very serious misdirection.

Held, further, that the Administrative Court had misdirected itself by ordering that the Board of the Commission reconstitute itself, without first ordering the joinder of the Minister, the first respondent.

Held, further, that it had also misdirected itself by ordering the reconstitution F of the Board, and then usurping the function of the Board by ordering it to register the applicant.

Held, further, that it had further misdirected itself in finding that the Commission had acted *ultra vires.*

Held, further, that although actual bias had not been shown, the Administrative Court's finding in this regard would be supported on the basis of a G reasonable apprehension of bias.

Held, further, that the Administrative Court had no inherent jurisdiction to order the execution of its own judgment despite the noting of an appeal. Nor did its parent Act give it such jurisdiction. At common law the noting of an appeal suspends the operation of a judgment. However, a court of H inherent jurisdiction has jurisdiction to order the execution of its own

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judgments despite the noting of an appeal. It is trite that only superior A courts enjoy inherent jurisdiction, these being the High Court and the Supreme Court. Courts created by statute do not have inherent jurisdiction and consequently do not have power to order execution of their judgments unless such jurisdiction is conferred on them by the statute. Section 19 of the Administrative Court Act creates a right of appeal to the Supreme B Court, to be exercised within twenty-one days of the handing down of a judgment. The section does not expressly or by implication confer on the Administrative Court either the power or the jurisdiction to order execution of its own judgments despite the noting of an appeal.

Held, therefore, that the appeal against the decision of the Administrative Court should be allowed, and the orders of the Administrative Court set C aside; the determination of the Commission to refuse the applicant registration as a mass media service should be set aside; and the issue should be remitted to the Commission for consideration *de novo.*

Cases cited

ANZ (Pvt) Ltd v Min of State for Information & Ors 2004 (1) ZLR 538 (S) D

Assn of Independent Journalists & Ors v Min of State for Information & Ors 2004 (1) ZLR 94 (S)

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

Copthall Stores Ltd v Willoughby's Consolidated Co Ltd 1913 AD 305 E

Fismer v Thornton 1929 AD 17

Liebenberg & Ors v Brakpan Liquor Licencing Bd & Anor 1944 WLD 52

Metropolitan Properties (FCG) Ltd v Lannon [1969] 1 QB 577

South Cape Corp (Pvt) Ltd v Engineering Mgmt Svcs (Pty) Ltd 1977 (3) SA 534 (A) F

Legislation considered

Constitution of Zimbabwe, ss 20 & 24

Access to Information and Protection of Privacy Act [*Chapter 10:27*], ss 39(1)(g), (i), (j), (n) & (p), 40, 41, 65, 66, 69, 70, 71, 72, 76, 79, 80(1)(d), 80(2), G 83, 89 & para 4 of Fourth Schedule

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

Administrative Court Act [*Chapter 7:01*] H

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Case information

A *J C Andersen SC,* with him *E T Matinenga,* for the applicant

J Tomana, for the respondents

Judgment

CHIDYAUSIKU CJ: This judgment determines the constitutional court application launched by the applicant in case number S-7-03 as well as the B appeal by the second respondent against the judgment of the Administrative Court in case number S-359-03. As will appear from the facts, the two cases involve the same parties, except for the first and third respondents who were not parties to the proceedings in the Administrative Court, and the facts are very closely related. It is convenient to deal with the two matters in one judgment. I shall refer to *Associated Newspapers of Zimbabwe (Pvt) Ltd* as C the applicant throughout the judgment and the other parties as the respondents. The second respondent is, however, the appellant in the appeal from the Administrative Court.

The applicant is an incorporated company with limited liability and registered in terms of the laws of Zimbabwe.

D The first respondent is the Minister of State for Information and Publicity (hereinafter referred to as "the Minister") in the Office of the President responsible for the administration of the Access to Information and Protection of Privacy Act [*Chapter 10:27*] (hereinafter referred to as "the Act").

The second respondent is the Media and Information Commission ("the Commission"), a body corporate capable of suing and being sued, established E in terms of s 38 of the Act. The functions and powers of the Commission include the power to register the mass media service providers in Zimbabwe.

The third respondent is the Attorney-General who has been cited in terms of s 24(6) of the Constitution of Zimbabwe.

The applicant is the owner and publisher of *The Daily News*, a daily newspaper F published and distributed physically, throughout Zimbabwe and worldwide, on the Internet. It is common cause that the applicant is a provider of a mass media service.

In terms of s 66 of the Act a provider of a mass media service is required to register before it can provide such service. Upon the coming into operation G of the Act, the existing mass media service providers, including the applicant, were given a grace period of three months within which to register. The Regulations necessary to facilitate the registration of mass media service providers were not promulgated in time and the registration date was extended. Further extensions for registration were granted, with 31 December 2002 as the new deadline date. It is common cause that the applicant did not apply for H registration by the deadline date of 31 December 2002. Despite not being

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registered, the applicant continued to publish *The Daily News* and its sister **A** newspaper, *The Daily News on Sunday*. The applicant's failure to register was a deliberate contravention of s 66 of the Act.

The applicant's stance was that it could not, in good conscience, obey a law that required it to register as such a law, in its view, was unconstitutional. In pursuance of this stance the applicant challenged the constitutional validity B of several sections of the Act, including s 66.

At the hearing of the constitutional challenge the respondents raised the point *in limine* that the applicant had approached the court with dirty hands because the applicant was operating as a mass media service provider without being registered in terms of s 66 of the Act. On this basis, it was argued that C the court should refuse to entertain the court application until such time as the applicant had submitted itself to the law. This court determined the preliminary point in favour of the respondents. In this regard the court had this to say:

> "This court is a court of law and, as such, cannot connive at or condone the applicant's open defiance of the law. Citizens are obliged to obey the D law of the land and argue afterwards. It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and thus avoid compliance with the law it objects to pending a determination by this court. In the absence of an explanation as to why this course was not followed, the inference of a disdain for the law becomes inescapable. For the avoidance of doubt the applicant is not E being barred from approaching this court. All that the applicant is required to do is to submit itself to the law and approach this court with clean hands on the same papers.
>
> Compliance with the law does not necessarily mean submission of an application for registration to carry on the activities of a mass media service. It certainly means desisting from carrying on the activities of a F mass media service illegally."

See *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *Minister of State for Information and Publicity & Ors* S-20-2003.

The above citation has been the subject of varied interpretation by the parties. The citation simply means that a number of options were open to the applicant to bring itself within the law. In particular, the applicant could have challenged G s 66 of the Act, before the Act came into operation, and sought the court's indulgence to continue publishing pending the determination of its constitutional challenge. The applicant could have stopped providing a mass media service pending the determination of its constitutional challenge. The applicant could have applied for registration and upon being registered H

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A continued providing a mass media service while at the same time challenging the constitutionality of s 66. Other mass media service providers exercised one or more of the above options enabling them to operate within the law.

The applicant chose to operate outside the law pending the determination of the constitutional challenge. In adopting this course, the applicant created B problems for itself. The issue is not the contents or slant of the applicant's newspapers. There are several mass media service providers that are as critical of the Government and the establishment as the applicant's newspapers. They registered and are operational. The issue, as far as this court is concerned, is one of compliance with the law. Nothing more and nothing less. Nobody is above the law and that includes the applicant. The applicant's C contention that it is being victimised because of its editorial inclination is totally without foundation. Once the applicant complies with the law this court will accord it the same protection that it accords all citizens who are law-abiding.

The judgment on the point *in limine* in this case, No. S-20-03, was handed down on 11 September 2003. Despite the court's ruling that the applicant was D operating illegally, it continued providing mass media services. The applicant was eventually stopped by the police from its continued breach of the law. On 15 September 2003, the applicant applied to the Commission for registration as a mass media service provider. The Commission turned down the application on 19 September 2003. The reasons for the refusal to register the applicant are E contained in a determination of the Commission, to which I shall refer later.

The applicant was aggrieved by the refusal of registration and appealed to the Administrative Court in terms of s 60 of the Act. The notice of appeal sets out ten grounds of appeal. The Administrative Court dealt with only three of the ten grounds of appeal, namely, improper constitution of the second respondent; the allegation that the Commission acted *ultra vires*; and bias on the part of F the Chairman of the Commission. It is not clear from the record why the other grounds of appeal were not dealt with.

The Administrative Court allowed the appeal. It ordered that the Commission be re-constituted and register the applicant by 30 November 2003, failing which the applicant would be deemed to be registered. The order reads as G follows:

"Accordingly it is ordered that —

(a) there be appointed by the appointing authority a validly constituted board as envisaged in section 40 by the 30 November 2003;

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(b) the board is to issue the appellant with a certificate of registration on A or before that date, failing which the appellant shall be deemed to be registered as from that date."

The Commission, dissatisfied with the determination by the Administrative Court, appealed to this court. That appeal was noted on 31 October 2003, under case No. SC-320-03. B

The noting of the appeal suspended the order of the Administrative Court. The applicant was desirous of commencing the publication of its newspapers immediately, without having to await the outcome of the appeal. The applicant, by way of an urgent chamber application, applied to the Administrative Court for an order authorising the execution of its judgment despite the noting of an appeal. C

The Administrative Court granted the application and ordered the execution of its judgment despite the noting of the appeal. The respondents again appealed against that judgment.

Various exchanges between the parties occurred, culminating with an application to this court by the respondents to stay execution of the D Administrative Court's judgments pending the determination of the appeal by this court.

After a hearing in Chambers, I issued, by consent, the following order on 28 January 2004:

"IT IS ORDERED BY CONSENT – E

1. THAT Supreme Court Civil Appeals Numbers 320/03 and 359/03 be and are hereby consolidated;
2. THAT the registrar of the Administrative Court is hereby directed to prepare the records in the above cases as a matter of urgency;
3. THAT the consolidated appeals and the constitutional case No. SC-323-03 are set down for argument on 18 February 2004; F
4. THAT the applicant's (the Media and Information Commission) prayer in paragraph 4 of the draft order is held over and the parties are granted leave to file further papers; and
5. THAT the costs of this application are reserved."

On 9 February 2004 the following additional order was issued by me: G

"IT IS ORDERED THAT:

The relief sought in paragraph 4 of the applicant's (the Media and Information Commission) draft order be referred to the court sitting on 18 February 2004 to hear the consolidated cases between the parties and that costs be costs in the cause." H

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A The relief sought in para 4 of the applicant's (the Media and Information Commission) draft order reads as follows:

"The respondent (Associated Newspapers of Zimbabwe) be and is hereby ordered to refrain from publishing pending the finalisation of the consolidated appeals."

B The constitutional application and the consolidated appeals were then duly set down for hearing. At the hearing the following issues fell for determination:

1. Whether or not the applicant had now brought itself within the law to enable this court to hear the constitutional challenge on the merits;
2. In the event of the applicant satisfying the court that it was now operating within the law, the merits of the constitutional challenge; and C
3. The merits of the appeal against the judgment of the Administrative Court, including the issue of whether or not the Administrative Court had jurisdiction to order execution of its judgment despite the noting of an appeal.

I will deal with these issues *seriatim*.

HAS THE APPLICANT BROUGHT ITSELF WITHIN THE LAW TO ENABLE THIS COURT TO HEAR THE CONSTITUTIONAL CHALLENGE ON THE MERITS?

The respondents contend that the applicant is still in contempt of both the law and this court and its court application challenging the constitutionality of several sections of the Act should not be heard on the merits until the applicant has purged itself of the contempt. In particular, it was submitted that:

(a) The day after the judgment of this court, namely on 12 September 2003, the applicant continued publishing its newspapers. It was averred, and not seriously disputed, that had the police not stopped the applicant from publishing its newspapers it would have continued doing so despite this court's ruling that in doing so the applicant was acting illegally. It was also averred, and not disputed, that the applicant made disparaging remarks about the judgment of this court. This, it was argued, demonstrated the applicant's persistent contempt of the law and this court; and

(b) On 25 September 2003 the applicant again published its newspapers, despite the explicit language of the judgment of the Administrative Court that the applicant was to submit its application for registration in terms of s 66 of the Act and that that application was to be considered by a newly re-constituted Commission as soon as possible and that, in the event of the newly constituted Commission failing to register the applicant by 30 November 2003, the applicant was to be deemed registered.

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It was also argued for the respondents that the publication of the applicant's newspaper on 25 September 2003 was unlawful and constituted contempt of the law and the Administrative Court.

The reasons advanced by the applicant for this unlawful conduct were firstly, that it did not understand the full import of the two judgments, namely that of this court and the Administrative Court, and secondly, that the violation was not intentional. With respect to the applicant, I find this explanation spurious and without substance.

It was also submitted by the respondents, and not seriously disputed by the applicant, that it was finally stopped from publishing its newspapers illegally only when the journalists working for the applicant refused to continue working for it until their accreditation in terms of s 79 of the Act had been finalised.

Whilst the conduct of the applicant is not condoned the fact that it was not in contempt of court at the time the application was brought before the court entitled it to be heard on the merits especially when regard is had to the fact that the cessation of the illegal publication of newspapers was as a result of the refusal by journalists to continue acting without accreditation, that is to say, outside the law.

The first issue is therefore resolved in favour of the applicant.

THECONSTITUTIONALITYOFTHEIMPUGNEDSECTIONSOFTHEACT

The applicant has challenged the constitutionality of a number of sections of the Act. These are set out in the draft order. The impugned sections are – 39(1) (g), (i), (j), (n) and (p), 40, 41, 65, 66, 69, 70, 71, 72, 79, 80, 83 and 89, and para (4) of the Fourth Schedule of the Act.In addition, the applicant seeks the following declaratory orders, namely: (i) that the Access to Information and Protection of Privacy (Registration, Accreditation and Levy) Regulations, 2002, published in Statutory Instrument 169C of 2002, infringe the right of the freedom of expression set out in s 20 of the Constitution of Zimbabwe ("the Constitution") and are therefore invalid and of no force and effect in respect of the registration of newspapers and the accreditation of journalists; (ii) that s 65 of the Act infringes the right of the freedom of association set out in s 21 of the Constitution and is, therefore, invalid and of no legal effect;and(iii)that s 76, insofar as it refers to the second respondent, infringes the applicant's right against the compulsory acquisition of property set out in s 16 of the Constitution and is therefore invalid and of no legal effect. An order of costs is also sought against the respondents. I will now deal with the particular sections under challenge.

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A *Section 39*

Section 39 of the Act provides as follows:

"39. **Functions and powers of Commission**

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

(a) to ensure that Zimbabweans have access to information and 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) to comment on the implications of proposed legislation or programmes C of public bodies on access to information and protection of privacy; and

(d) to comment on the implications of automated systems for collection, storage, analysis or transfer of information or for access to information or protection of privacy; and

(e) to inform the public about this Act; and D

(f) to engage in or commission research into anything affecting the achievement of the purposes of this Act; and

(g) to conduct investigations in terms of Part IX to ensure compliance with the provisions of this Act; and

(h) to advise the Minister on the adoption and establishment of standards and codes relating to the operation of mass media; and E

(i) to receive, evaluate for accreditation and consider applications for accreditation as a journalist; and

(j) to enforce professional and ethical standards in the mass media; and

(k) to review the decisions of public bodies in terms of Part X; and

(l) to bring to the attention of the head of a public body any failure to F meet the prescribed standards for fulfilling the duty to assist applicants; and

(m) to authorise a public body, at the request of its head, to disregard requests that would unreasonably interfere with the operations of the public body; and G

(n) to accredit journalists; and

(o) to monitor the mass media and raise user awareness of the mass media; and

(p) to register mass media in Zimbabwe; and

(q) to investigate and resolve complaints against any mass media service H in terms of the provisions of this Act.

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(2) In the exercise of its functions, the Commission shall have regard to A 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; B

(d) the development of mass media that uphold professional and ethical codes of conduct;

(e) to promote the preservation of the national security and integrity of Zimbabwe;

(f) to foster a Zimbabwean national identity and integrity;

(3) Subject to this Act, for the better exercise of its functions, the C Commission shall have power to do or cause to be done, either by itself or through its agents, all or any of the things specified in the Third Schedule, either absolutely or conditionally and either solely or jointly with others."

The applicant's founding affidavit sets out no details as to how the impugned D provisions of s 39 of the Act are unconstitutional or in what manner s 39 abridges the applicant's constitutional rights. In para 13 of the founding affidavit there is a broad reference to s 39 of the Act. It is as follows:

"13.It is the view of the applicant therefore that the provisions of the Act concerning the second respondent and its functions and also the provisions of the Act relating to the registration of mass media owners E and related provisions set out in sections 39(1) (g), (i), (j), (n) and (p),40, 41, 65, 66, 69, 70, 71, 72, 76, 79, 83 and 89 are unconstitutional and should be declared to be so."

Also in para 37 of the applicant's heads of argument there is an oblique reference to s 39 of the Act which does not in any way take the averments any F further. The remaining subsections of s 39 (1) of the Act are not, in any way, impugned by the applicant. In particular, the applicant does not impugn the functions of the Commission but does impugn the Commission's powers to investigate issues of compliance with the Act; powers of accreditation of journalists (paragraphs (g) and (n)); powers to enforce professional and ethical standards (j); to monitor the mass media and raise user awareness of G the mass media (o); and the registration of the providers of mass media services in Zimbabwe.

As I have already stated, the applicant does not state in what manner these provisions are unconstitutional. This Court has already held that accreditation of journalists and the licensing of electronic media is constitutional as long H

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A as the requirements for such accreditation and licensing are not onerous. See *Capital Radio (Pvt) Ltd* v *Broadcasting Authority of Zimbabwe & Ors* S-128-02 and *Association of Independent Journalists & Ors* v *The Minister of State for Information & Publicity in the President's Office & Ors* S-136-02.

Section 39 deals not with the qualifications for accreditation but with the requirements for accreditation, which this court has declared to be constitutional.

When an applicant seeks to impugn a statutory provision the nature of the challenge should be set out in some detail. In particular, the application should set out the manner in which it is alleged that the offending provisions violate C the applicant's constitutional rights. If this is not done respondents will have difficulty in understanding what case they have to meet. It will equally be difficult for this court to fully appreciate the issues which it is required to determine. Section 24 of the Constitution entitles a litigant to approach this court on the allegation that the litigant's fundamental right has been violated. It is not enough to make a bare allegation unless such violation is obvious. The factual basis for such an allegation has to be set out in a manner that enables the court to understand the nature of the D allegation.

I am satisfied, therefore, that there is nothing on the papers that establishes that the impugned provisions of s 39 of the Act are unconstitutional.

E **Section 40**

Section 40 of the Act provides as follows:

> "40.**Appointment and composition of Media and Information Commission**
>
> (1) The operations of the Commission shall, subject to this Act, be controlled and managed by a Board.
>
> (2) Subject to subsection (3), the Board shall consist of no fewer than five F members and not more than seven members (at least three of whom shall be nominated by an association of journalists and an association of media houses) appointed by the Minister after consultation with the President and in accordance with any directions that the President may give him.
>
> (3) The Fourth Schedule shall apply to the qualifications of members of the Board and the Commission, their terms and conditions of office, G vacation of office, suspension and dismissal, and the procedure to be followed by the Commission at meetings."

Section 4 of the Zimbabwe Broadcasting Services Act [*Chapter 12:06*] is similar to s 40 of the Act. It provides as follows:

> "4.**Establishment and composition of Broadcasting Authority of Zimbabwe Board**

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> (1) The operations of the Authority shall, subject to this Act, be A controlled and managed by a board to be known as the Broadcasting Authority of Zimbabwe Board.
>
> (2) Subject to subsection (3), the Board shall consist of not fewer than seven members and not more than nine members appointed by the Minister after consultation with the President and in accordance with any directions the President may give him. B
>
> (3) Of the members appointed in terms of subsection (2) —

(a) two shall be persons chosen for their experience or professional qualifications in the field of broadcasting technology and broadcasting content respectively; and

(b) one shall be a chief as defined in the Traditional Leaders Act [*Chapter* C *29:17*] and nominated by the Council of Chiefs referred to in that Act; and

(c) one shall be a legal practitioner of not less than five years' standing D registered in terms of the law in force relating to the registration of legal practitioners; and

(d) one shall be a public accountant of not less than five years' standing registered in terms of the law in force relating to the registration of public accountants; and

(e) one shall be a representative of churches or other religious bodies chosen from a list of nominees submitted by groups representative of churches or other religious bodies.

(4) At least three of the members referred to in subsection (3) shall be E women.

(5) The Third Schedule shall apply to the qualifications of members of the Board, their terms and conditions of office, vacation of office, suspension and dismissal, and the procedure to be followed by the Board at its meetings. F

(6) If any council or group referred to in subsection (3), or the Board or portfolio committee referred to in subsection (1) of section *four* A, fails or refuses to submit any nomination within thirty days of being requested to do so by the Minister in writing, the Minister may, subject to subsection (4), appoint any person to represent that council or group or the Board or portfolio committee, and the person so appointed shall hold office as a member of the Board or of the Independent Disciplinary Committee in G all respects as if he or she had been duly nominated and appointed in terms of subsection (3) or subsection (1) of section *four* A."

Again, the manner in which s 40 is alleged to violate the applicant's fundamental right is not clearly spelt out. It would appear, however, that the basis of the H

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A challenge to s 40 of the Act is that it fails to provide for a Board that is independent of the Minister and is therefore unconstitutional. Similar submissions were made in respect of s 4 of the Zimbabwe Broadcasting Services Act ("the Broadcasting Act") in the case of *Capital Radio* case, *supra*. The court came to the conclusion that s 4 of the Broadcasting Services B Act was constitutional and that the method of appointment did not make a Board subservient to the Minister.

The factors relied upon by the court in upholding the constitutionality of s 4 of the Broadcasting Act, which are equally valid in the determination of the constitutionality of s 40 of the Act, were that it merely created the regulating authority and identified the Minister as the person to appoint its C members. Someone had to make the appointments to the Board. The persons to be appointed were not identified in such a manner as to leave the Minister with no choice but to appoint people dependent on government. The security for the independence of the Commission does D not depend upon the nature of the appointing authority but on the existence of qualification requirements the consideration of which induces a sense of duty in the appointing authority D and eliminates the exercise of discretionary power thereby ensuring that merit alone is the basis for selection. The constitutionality of s 40 could not be successfully E impeached on the mere ground that the executive has the power to appoint the members of the Commission.

On the authority of the *Capital Radio* case, *supra,* and for the same reasons, E I hold that s 40 of the Act is constitutional.

Section 41

Section 41 of the Act provides as follows:

"41.**Financial and miscellaneous provisions relating to Commission**

The Fifth Schedule shall govern the financial and certain other aspects F of the operations of the Commission".

The Fifth Schedule referred to in this section provides for regulation of the financial management of the Commission funds and how those funds are to be acquired. It also provides for the appointment of auditors of the Commission and the powers of those auditors.

G Again no attempt has been made, either in the founding affidavit or in the heads of argument to establish how the provision for the management of the Commission's finances, as set out in s 41 of the Act, violates the applicant's constitutional rights. There is nothing in s 41 which is blatantly unconstitutional.

H In the result I am satisfied that s 41 of the Act is constitutional.

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Section 65 A

Section 65 of the Act provides as follows:

"*65.Restriction of ownership of mass media services*

(1) The following persons and bodies may not be mass media owners -

(a) any individual who is not a citizen of Zimbabwe or any body corporate in which a controlling interest is not held, directly or indirectly, B whether through any individual, company or association or otherwise, by one or more individuals who are citizens of Zimbabwe;

(b) an association of persons or an organisation whose activity is banned or prohibited by law; or

(c) any person who is insolvent or bankrupt under a law in force in Zimbabwe or any other country, and has not been rehabilitated or C discharged.

(2) No person other than –

(a) a citizen of Zimbabwe or person who is regarded as permanently resident in Zimbabwe by virtue of the Immigration Act [*Chapter 4:02*]; or D

(b) a body corporate in which a controlling interest is not held, directly or indirectly, whether through any individual, company or association or otherwise, by one or more individuals who are citizens of Zimbabwe or are regarded as permanently resident in Zimbabwe by virtue of the Immigration Act [*Chapter 4:02*]; may hold or acquire any shares in a mass media service. E

(3) Nothing contained in this section shall prevent any person who was an existing mass media owner as at 31 January 2002, from continuing to be a mass media owner after that date to the extent of his ownership on that date."

The above section seeks to control the ownership of the mass media services and limits the ownership of the media by non-citizens of Zimbabwe. Section 8 of the Broadcasting Act imposes similar restrictions on non-citizens in respect of licensing of broadcasters.

Section 65 of the Act and s 8 of the Broadcasting Act deal with the same principle, namely, restrictions on foreign ownership of the Zimbabwean media. In the *Capital Radio* case *supra* this court concluded that s 8 of the G Broadcasting Act was constitutional.

The decision in that case, as it should be in this case, was that the applicant had to show that it was a body corporate in which the controlling interest was not held directly or indirectly whether through any individual company or association by one or more individuals who are not citizens of Zimbabwe or H

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A are not regarded as permanently resident in Zimbabwe by virtue of the Immigration Act [*Chapter 4:02*]. Similarly s 65 of the Act specifies who may and who may not own a mass media or hold or acquire shares therein. If the applicant fell into the prohibited class it was expected to make those allegations in its affidavit in order to lay the basis for impugning the constitutionality of B s 65. It is to be inferred from the applicant's silence that there was no contravention of its right to freedom of expression arising from those provisions.

I am, therefore, satisfied that s 65 of the Act is constitutional.

Section 66

Section 66 of the Act provided, before it's amendment by s10 0f Act 5/2003 C as follows:

"66.**Registration of mass media services**

(1) A mass media owner shall carry on the activities of a mass media service only after registering and receiving a certificate of registration in terms of this Act:

Provided that this section shall not apply to — D

(a) the activities of a person holding a licence issued in terms of the Broadcasting Services Act [*Chapter 12:06*] to the extent that such activities are permitted by such licence; or

(b) a representative office of a foreign mass media service permitted to operate in Zimbabwe in terms of section *ninety*; or E

(c) in-house publications of an organisation which is not mass media service.

(2) An application for the registration of a mass media service whose products are intended for dissemination in Zimbabwe shall be submitted by its owner to the Commission in the form and manner prescribed and accompanied by the prescribed fee.

F (3) The Commission shall, upon receiving an application for registration send a notification of receipt of the application to the owner or person authorised by him indicating the date when the application was received, and the Commission shall consider such application within a month of receiving it.

(4) A mass media service shall be registered when it is issued with a G certificate of registration by the Commission.

(5) A certificate issued in terms of subsection (4) shall be valid for a period of two years and may be renewed thereafter.

(6) The registered owner shall start circulating his mass media's products six months from the date of issue of the registration certificate, failing H which the registration certificate shall be deemed to be cancelled."

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Section 66 is very similar to s 79 of the Act. Section 79 of the Act provides for A accreditation of journalists, whilst s 66 provides for the registration of providers of mass media services.

The mandatory registration by the Commission to which the owner of a mass media service has to submit himself in order to exercise the right to freedom of expression as a mass media service provider is a means rationally connected B to the objects of the Act the achievement of which it is the duty of the Commission to oversee. One of the objects of the Act is the achievement of effective ownership and control of mass media services by citizens of Zimbabwe. For historical reasons this source of economic and political power was owned and controlled by foreigners. It cannot be said that a requirement that a mass media service provider should register itself with the Commission C in order to exercise the right of freedom of expression is not justifiable in a democratic society when its object is to ensure that citizens of the country have effective ownership and control of the mass media for the exercise of their right to freedom of expression.

This court considered s 79 of the Act in the case of *Association of Independent* D *Journalists supra* and concluded that the principle of accreditation was constitutional. The court also expressed the view that the conditions for such accreditation would be held to be unconstitutional if they are onerous.

Again, for the same reasons given by this court when it considered s 79 of the Act in the *Association of Independent Journalists* case *supra*, I am satisfied that s 66 is constitutional. This section merely sets out the requirement for registration and not the conditions for such registration.

Section 69

Section 69 of the Act provides as follows:

"69. **Refusal of registration of mass media service** F

(1) The Commission *may* not refuse to register a mass media service unless —

(a) it fails to comply with the provisions of this Act; or

(b) the information indicated in an application for registration is false, misleading or contains any misrepresentation; or

(c) that mass media service seeks to be registered in the name of an G existing registered mass media service;

and the Commission shall forward a written notification of the refusal of registration, stating the grounds upon which such refusal is based.

(2) An application for the registration of a mass media service shall not be considered — H

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(a) if it contravenes any provision of this Act;

(b) if the application has been filed by a person who has no authority to do so;

(c) if the application fee has not been paid.

(3) An application for registration may be re-submitted for consideration B after the removal of any contraventions or when there is a change of circumstances." (The underlining is mine)

Subsections (2) and (3) have since been repealed. Section 69 of the Act sets out the powers of the Commission in regard to an application for registration of a mass media service provider.

The first point I wish to make in regard to this section relates to the use of the word "may" in subsection (1). It is quite clear from the context in which that word is used that it should be taken to mean "shall". The word "may" generally confers discretion, but when followed by the negative word "not", i.e. "may not", as is the case here, it means absence of discretion as in "shall". When this court dealt with the word "may" in s 79 in the *Association of Independent* D *Journalists* case *supra* the court made the following observation:

> "It is quite clear from the context that the word 'may' means 'shall' in this subsection.
>
> In ordinary usage, 'may' is a permissive and 'must' is imperative, and, in accordance with the usage, the word 'may' in a statute will not generally be held to be mandatory. In some cases, however, it has been held that E expressions such as 'may' or 'shall have power' or 'shall be lawful' have – to say the least – a compulsory force and so their meaning has been modified by judicial exposition.
>
> See Maxwell on *The Interpretation of Statutes* 12 ed by P St. J Lagan at pp 234-235 and the cases there mentioned."

I am satisfied that the word "may" in subs (1) of s 69 of the Act means "shall". F It follows therefore that s 69(1) of the Act confers no discretion on the Commission and consequently an applicant who has complied with the Act is entitled to registration as a matter of law.

Subsection 69(1)(b) provides that registration could be refused if the information indicated in an application for registration is false, misleading or contains any G misrepresentation. This provision confers on the Commission the power to determine whether the information indicated in an application for registration is false, misleading or contains a misrepresentation. While the use of the words, false, misleading and misrepresentation may, on the face of it, appear vague and uncertain such words are commonly found in legal instruments and courts have been called upon, in numerous cases, to determine what, in legal

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terms, constitutes what is false, misleading or what constitutes a A misrepresentation. In the event of a dispute between an applicant and the Commission over the meaning of the above words, such a dispute is justiciable and thus eliminates the possibility of abuse.

In the result I am satisfied that s 69(1)(b) is constitutional.

Section 69(1)(c) of the Act prohibits the registration of a mass media service B provider in the name of an already existing registered mass media service provider. It prohibits passing off. The Constitution of Zimbabwe does not confer on anyone the right to pass off. The applicant does not have a constitutional right to register itself in the name of an already existing mass media service provider. The applicant has not even alleged on the papers that C that is what it intends to do. I am satisfied that s 69(1)(c) of the Act is constitutional.

Section 69(2) of the Act, which has since been repealed, provided that an application for registration shall not be *considered* if it contravenes any of the provisions of the Act. The contraventions referred to in this section must be those that are apparent on the face of the application, such as those that D are referred to in s 66(2) of the Act, which provides that an application shall be made in the form and manner prescribed and accompanied by the prescribed fee. Thus for an application to be considered at all, it must be in a prescribed form and accompanied by the prescribed fee. Where an application is not in the prescribed form and is not accompanied by the prescribed fee the Commission is barred from considering the application. Contraventions of the E Act such as those envisaged in s 69(1) can only emerge after the commencement of consideration of an application by the Commission.

It is on this basis that I am satisfied that the Administrative Court's decision that the Commission acted *ultra vires* s 69(2) is wrong. In this case the *Associated Newspapers of Zimbabwe (Pvt) Ltd* application complied with the F formal requirements as set out in s 66(2) of the Act and the Commission, quite correctly in my view, considered the application. During the consideration of the application, or the meeting to adjudicate upon the application, alleged violations of the Act were brought to the attention of the Commission. On the basis of these alleged violations the registration of the applicant was refused. On these facts, to conclude that the Commission acted *ultra vires* does not G make sense.

The same section also bars the Commission from considering an application submitted by an H unauthorised person or if the prescribed application fee has not been paid. I am satisfied that the Constitution does not confer on the applicant the constitutional right to have its application submitted by an

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A unauthorised person. The applicant has not alleged on the papers that it wishes to have its application submitted by an authorised person and that that right has been violated. The applicant has not alleged on the papers that the prescribed fees are onerous and there is nothing on the papers to suggest that they are.

B In any event s 69(2) has been repealed and the question of its constitutionality is now academic.

I am satisfied that s 69(2) of the Act was constitutional.

I accordingly hold that s 69 of the Act is constitutional.

Section 70

C Section 70 of the Act reads as follows:

> "70 **Registration fee**
>
> The registration fee shall be as prescribed by the Minister:
>
> Provided that the Minister may prescribe a higher fee for established mass media services specialising in commercial mass media services and advertising and a lower fee for a mass media service specialising in D producing materials intended for children, adolescents and disabled persons and used for educational, philanthropic and social purposes."

This section merely provides that the Minister can prescribe the registration fee. The payment of the registration fee in itself cannot, in my view, be unconstitutional although the amount of the prescribed fee could, in certain E circumstances, be unconstitutional, for example, if the prescribed fees are excessive. In that case, a constitutional challenge against the level of fees is sustainable. Indeed the applicant, in its heads of argument, argues that it is the potential for charging exorbitant fees that could be unconstitutional. In the light of that, one has to look at the Statutory Instrument setting out the prescribed fees to see whether it is constitutional or not. Section 70 merely F establishes the principle of the payment of a fee and that, in my view, cannot be unconstitutional.

Section 71

Section 71 is a fairly lengthy provision but it essentially provides for the circumstances under which a registration certificate can be suspended or G cancelled by the Commission. This is provided for in subs (1), which reads as follows:

> "(1)Subject to this section, the Commission may, whether on its own initiative or upon the investigation of a complaint made by any interested person against the mass media service, suspend or cancel the registration H certificate of a mass media service if it has reasonable grounds for

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> believing that: A

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> (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 the mass media owner concerned; or
>
> (b) the mass media service concerned does not publish or go on air within twelve months from the date of registration; or B
>
> (c) the mass media service concerned has contravened sections sixty-five, seventy-five, seventy-six, seventy-seven or eighty-nine of this Act."

The rest of the provisions deal with the consequences and the procedures to be followed in establishing the basis for the Commission to act in terms of subs (1). It is clear from subs (1) that the Commission is empowered to suspend or C cancel a registration certificate for the three reasons set out in paras (a), (b) and (c) thereof.

In terms of para (b), the mass media service provider that does not publish or go on air within twelve months from the date of registration is liable to have its registration cancelled. I have no difficulty in upholding this ground of D cancellation as constitutional. The mass media service

provider that obtains registration but does not seek to exercise its right under that registration for a period of twelve months really has no basis for complaining that its registration has been cancelled.

I am also unable to see on what basis the applicant contends that its right is about to be violated by this provision. The applicant was an existing media E service provider at the time that the Act came into operation. It was already publishing its papers and was unlikely to be affected by this provision. In any case, it does not state on the papers how it is being adversely affected by this provision.

Paragraph (c) of subs (1) provides that a mass media service provider that has F contravened s 65, s 75 and s 89 of the Act can have its certificate of registration cancelled. Again, I have no problem in finding that this provision is *intra vires* the Constitution. The provision provides for the cancellation of a certificate for contravening the law. It is difficult to see the basis of the applicant's complaint in that if it abides by the law its rights will not be affected but if it breaks the law, the consequence of such breach of the law is the cancellation G of the registration. If the applicant is law-abiding then it has nothing to fear. It certainly has no basis to fear that its registration will be cancelled.

In considering s 69(1)(b) I expressed some misgivings regarding the use of the word "misrepresentation" but concluded that the meaning of misrepresentation is justiciable and capable of determination. I am also satisfied that what H

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A constitutes a material non-disclosure is justiciable and capable of determination. What is fraudulent is much easier to determine than non-disclosure of a material fact and misrepresentation. In my view, the Constitution confers no right on an individual to misrepresent, either directly or through non-disclosure of a material fact or to commit fraud. Accordingly, none can be violated. B Section 71(1) is, therefore, constitutional.

Section 72

Section 72 of the Act provides as follows:

> "72 **Penalties for operating mass media service without registration certificate**
>
> (1) No person shall carry on or operate a mass media service without a C valid registration certificate, license or permit issued in terms of this Act or any other law.
>
> (2) A person who contravenes subsection (1) shall be guilty of an offence and liable, upon conviction, to a fine not exceeding level two or to imprisonment for a period not exceeding two years or to both such fine D and such imprisonment.
>
> (3) In addition to any fine imposed in terms of subsection (2) and without derogation from any of its powers granted under any enactment a court convicting a person of contravening subsection (1) may declare forfeited to the State any produce, equipment or apparatus used for the purpose of or in connection with the offence.
>
> (4) The proviso to subsection (1) and subsections (3), (4), (5) and (6) of section 62 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] shall apply *mutatis mutandis*, in relation to a declaration made in terms of subsection (3)."

This section is a penalty clause and the type of clause found in most acts of Parliament providing for a penalty for contravening a statute. Subsection (1) F merely prohibits the operation of a mass media service without a registration certificate. In view of the fact that I have concluded that s 66 is constitutional, there is no basis for holding that s 72(1) is unconstitutional.

Subsection (2) of s 72 provides that a person who operates without a registration certificate commits an offence and is liable, upon conviction, to G a fine not exceeding level two or imprisonment not exceeding two years or to both such fine and imprisonment.

This section provides guidelines to the court on the level of the seriousness with which the legislature regards a contravention of subs (1) of s 72 of the Act. The fine and the period indicated cannot be described as totally disproportionate to the offence created under subs (1).

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Subsection (3) confers on the court, upon conviction of a person for A contravening subs (1), the power to declare forfeited the equipment or apparatus used for the purpose of or in connection with

the offence. Again, this is a standard clause found in most Acts of Parliament conferring on the court the power to declare a weapon used in the commission of the offence to be declared forfeited. That power is exercised by a court of law and there B is no risk of that power being exercised in a capricious manner.

I also see no possible constitutional impediment to subs E (4), which simply incorporates the provisions of the Criminal Procedure and Evidence Act.

Accordingly I hold that s 72 of the Act is constitutional.

Section 76 C

Section 76 of the Act provides as follows:

> "76 **Deposit copies**
>
> The mass media service shall send free deposit copies of a periodical to the Commission and the National Archives."

The applicant, in its heads of argument, has no objection to providing the D National Archives with a copy of its publication, but objects to provide a free copy to the Commission. The applicant is here indulging in triviality and I have no hesitation in dismissing this challenge on the *de minimis* principle.

Sections 79, 80 and 83

The constitutionality of the above sections was challenged in the case of E *Association of Independent Journalists, supra.* In respect of s 79 the Court concluded as follows:

> "It is common cause that s 79 is at the centre of the licensing system. Licensing of the media, as I have already stated, is sufficiently important to have been recognised as a constitutional exception. Accordingly I am satisfied that the object of s 79 is sufficiently important for the purpose set out in (1) above. F
>
> Section 79 is rationally connected to the above objective because as was submitted by the applicant's counsel, it is at the centre of the licensing process. On this basis s 79 is, therefore, rationally connected to the objective of the legislation, The second requirement is therefore met.
>
> The third requirement cannot be conveniently applied to s 79. Section 79 G is essentially an enabling provision. The requirement that the means used be no more than is necessary to accomplish the objective can only be applied to the regulations that prescribe formalities and qualifications for accreditation. As I have said, none of the provisions of SI 169C have been challenged. Section 79 merely confers the powers to make regulations H

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> A that prescribe the formalities and qualifications for accreditation. The test will have to be applied to the regulation that prescribes the formalities and the qualifications and not s 79 which only confers the powers to make such regulations.
>
> In the result I come to the conclusion that the challenge to s 79 cannot succeed."

B The submissions made in the present case have not persuaded me to depart from that conclusion. For the reasons set out in the *Association of Independent Journalists, supra*, s 79 is constitutional.

In respect of s 80 this court concluded that s 80(1)(a)(b) and (c) were unconstitutional and struck them down while the rest of s 80 was held C constitutional. There is nothing, on these papers, that persuades me to depart from that conclusion. However s 80 has since been repealed and substituted by a new s 80 which provides as follows:

> "80. **Abuse of journalistic privilege**
>
> A journalist who abuses his or her journalistic privilege by publishing – D
>
> (a) information which he or she intentionally or recklessly falsified in a manner which —
>
> (i) threatens the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;or
>
> (ii) is injurious to the reputation, rights and freedoms of other persons; or E
>
> (b) information which he or she maliciously or fraudulently fabricated; or
>
> (c) any statement —
>
> (i) threatening the interests of defence, public safety, public order, the economic interests of the State, public morality or public F health; or

(ii) injurious to the reputation, rights and freedoms of other persons;in the following circumstances —

A. knowing the statement to be false or without having reasonable grounds for believing it to be true; and

B. recklessly, or with malicious or fraudulent intent, representing G the statement as a true statement;

shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years."

It will be seen that the offending paragraphs have been repealed. The issue, H therefore, has become academic.

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In respect of s 83 the court concluded: A

"Section 83 prohibits an individual from practicing as a journalist unless he or she is accredited as a journalist. The issues raised here are identical to those raised in respect of the challenge to s 79. What I said in regard to s 79 applies with equal force to s 83. In my view, s 83 is constitutional."

Again, I am not persuaded by any submission in this case that the above B conclusion is erroneous.

Section 89

Section 89 provides as follows:

"89 **Right of reply**

(1) A person or organisation in respect of whom a mass media service C has published information that is not truthful or impinges on his rights or lawful interests shall have a right of reply in the same mass media service at no cost to him, and the reply shall be given the same prominence as that accorded to the offending.

(2) The reply shall be published in the earliest possible issue of the publication in which the offending information appeared after the request D for the reply is received"

Section 89 confers on the person or organisation in respect of whom incorrect information has been published or whose rights or lawful interests have been infringed in a publication, the right to reply at no cost to him and that reply should be published within a certain period of time. In my view, freedom of expression carries with it certain responsibilities, one of which is not to infringe E on the rights of others, and a law that offers a remedy for the wronged party is constitutional.

Therefore I find that s 89 is constitutional.

The applicant, in paragraph 3 of the draft order, seeks the following relief:

"Instrument 169C of 2002, infringes the right of the freedom of expression F set out in s 20 of the Constitution and is therefore invalid and of no legal effect in respect of the registration of newspapers and the accreditation of journalists."

No factual basis for this relief is set out in the affidavits and, accordingly, no proper determination of this issue can be made on these papers. The issue is G left open.

THE APPEAL AGAINST THE JUDGMENT OF THE ADMINISTRATIVE COURT

The facts leading to the appeal against the determination of the Commission to the Administrative Court have already been set out in some detail. As I have H

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A already stated, the Commission turned down the application for registration by the applicant on the grounds set out in its determination.

The Commission in its determination concluded that the applicant had contravened ss 29, 39, 65, 72 and 79 of the Act. It would appear from the record that the applicant was denied an opportunity to be heard before the Commission B concluded that it had contravened the above sections of the Act. This is a serious violation of the *audi alteram partem* principle and a gross irregularity justifying the setting aside of that determination.

The applicant was dissatisfied with the Commission's determination and appealed to the Administrative Court. The grounds of appeal advanced before the Administrative Court are set out in the notice of appeal, to that court, which C reads as follows:

"1. The respondent is improperly constituted in terms of law, and was accordingly unable to lawfully make the decision that it made.

2. The chairman of the respondent was and is hostile and biased towards the appellant and ought not to have participated in any decision relating to the application made by the appellant. His failure D to do so deprived the appellant of a fair and proper hearing.

3. The respondent failed to apply the rules of natural justice, and failed to afford the appellant an opportunity to deal with the factual basis upon which the application for registration was refused.

4. The provisions of the Access to Information and Protection of E Privacy Act [*Chapter 10:27*] and the Regulations made thereunder, dealing with the requirement to register and the requirements of registration are unconstitutional, and therefore unlawful.

5. The provision of the Act relied upon by the respondent, namely section 76, as one of the grounds for refusing registration is unconstitutional and in breach of section 16 of the Constitution. F

6. The Commission erred in finding that the appellant had failed to comply with the provisions of the Act in a (*sic*) sense that requirement is set out in section 69(1)(a) of the Act.

7. Even if it is correct as found by the respondent that Chengetai Zvauya has a previous conviction, the respondent erred in failing to consider the nature of that conviction, the relevance of it to the application of G the appellant, and the provisions of s 69 of the Act, and failed to give the appellant an opportunity to be heard on the allegation.

8. The respondent erred in considering that the appellant was a news agency, and accordingly erred in applying section 79(6) of the Act H to the appellant.

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9. The respondent erred in finding that any person or body who owned A the appellant was an association of persons or an organisation whose activities were banned or prohibited by law, and accordingly erred in applying section 65(1)(b) of the Act to the appellant.

10. The decision of the respondent was motivated by political considerations, was made and considered in a *mala fide* manner, and accordingly did not comply with the law." B

As I have already stated, the determination of the Commission was based on the alleged contravention by the applicant of ss 29, 39, 65, 72 and 79 of the Act. It was, therefore, necessary for the Administrative Court to determine the factual basis of the alleged contraventions of the Act. The factual determination was critical because the applicant's entitlement to registration depended on C it. In terms of s 66 of the Act, as I have already stated, the applicant cannot, as a matter of law, be registered unless it has complied with the provisions of the Act. Equally an applicant who has complied with the Act becomes, as a matter of law, entitled to registration and the Commission has no discretion in the matter. Thus, whether or not the applicant had contravened the Act, as alleged, was a critical issue that the Administrative Court ought to have D determined before granting the order it issued.

The Administrative Court's failure to determine this issue as well as its order directing that the applicant be deemed to be registered without first satisfying itself that the applicant had complied with the Act, constitutes a very serious misdirection. This is particularly so because an applicant's entitlement to E registration, or refusal of such registration, is dependent upon its compliance, or non-compliance, with the provisions of the Act.

It must also be stated that the Administrative Court ordered the reconstitution of the board not for purposes of exercising its powers, that is, considering afresh the application on the merits and determining whether it should register the applicant but in order to grant to the applicant a certificate of registration F regardless of the merits of the application. The board was relieved of its duty to determine the question of entitlement to registration because the court had done that for it and concluded that the applicant was entitled to be registered but for a badly or invalidly constituted board. But the fallacy of this approach by the court is that once the board was found to have been invalidly G constituted its decision or determination of the proceedings was a nullity.

Given this misdirection, and the failure to determine the factual basis of the allegations of non-compliance with the provisions of the Act, the Administrative Court had no legal basis to issue the order that it did and that order is hereby set aside. H

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A According to the notice of appeal the applicant requested an B opportunity to be heard on the issue of non-compliance with the Act and the request was refused. This, as I said, constitutes a serious breach of the *audi alteram partem* rule. Because of this irregularity the Commission's decision refusing to register the applicant cannot stand and should also be set aside. The application should be reconsidered and the applicant should be given an opportunity to be heard on the allegations of non-compliance with the Act.

Finally, I wish to make the following observations regarding the three grounds upon which the Administrative Court sought to set aside the determination of the Commission, namely, improper constitution of the Commission, *ultra vires* and bias.

C **Improper constitution**

It was argued in the Administrative Court and in this court that the Commission was not properly constituted in terms of s 40 of the Act. Upon the raising of the issue of the constitution of the Commission, the Administrative Court should have ordered the joinder of the first respondent because in terms of D the Act the first respondent is responsible for the appointment of the members of the Commission. The first respondent, as the appointing authority, had a substantial interest in a case in which the issue of whether or not the Commission was properly constituted in terms of s 40 of the Act had to be determined. The learned President of the Administrative Court therefore misdirected himself in determining this issue without the first respondent E being a party to the proceedings. It is also apparent from the record that the applicant conceded this point in the Chamber application to the Administrative Court in which it sought an order for the execution of its judgment despite the noting of an appeal. That issue is resolved in favour of the respondent.
Ultra vires

F The Administrative Court concluded that the Commission had acted *ultra vires* s 69(2) of the Act, in that it had considered an application by the applicant when it had not complied with the Act.

I am satisfied that, on a proper reading of s 69(2), the legislature intended s 69(2) of the Act to refer to compliance with the formal requirements of the Act which appear *ex facie* the application itself and not contraventions that G emerge during the consideration of the application. The Commission did not err in this case because the application itself complied with the procedural requirement of the Act, s 66(2), in particular. The alleged contravention of ss 29, 39, 65, 72 and 79 by the applicant can only have emerged during the consideration of the application. These contraventions would not have been H apparent on the face of the application.

Chidyausiku CJ

In the result, the conclusion of the Administrative Court that the Commission A acted *ultra vires* the Act has no legal basis.

Bias

The applicant placed before the Administrative Court a number of articles authored by the chairman of the Commission, in which he made certain remarks about the applicant. In particular, he referred to the applicant as an outlaw and B indicated that its application would not be considered on the turn and that generally the applicant was conducting itself in an inappropriate manner.

In my view, the chairman of the Commission should have appreciated that he would chair the Commission that would determine the application for registration by the applicant. Accordingly, he should have refrained from making comments that were likely to make the applicant apprehensive of not C getting a fair hearing from the Commission chaired by him.

The actual bias in the mind of the Chairman of the Commission against the applicant was not established on the evidence. But it was not necessary for the applicant to prove actual bias in one member of the Commission in order to get the decision of all the members vitiated. It was enough that there was D a likelihood of bias in the evidence of the utterances made by the member who then took part in the deliberations of the Commission. It was shown that the utterances could have

created an apprehension in the minds of reasonable men that justice would not be done:see *Liebenberg & Ors* v *Brakpan Liquor Licensing Board & Anor* 1944 WLD 52 at 54 – 55; *Metropolitan Properties (FCG) Ltd* v *Lannon* [1969] 1 QB 577. E

Accordingly, while I agree with the conclusion of the Administrative Court that the proceedings of the Commission are voidable on the grounds of bias, I, however, do not accept the Administrative Court's conclusion that actual bias on the part of the chairman of the Commission was proved on the evidence placed before it.

JURISDICTION OF THE ADMINISTRATIVE COURT TO ORDER THE EXECUTION OF ITS OWN JUDGMENT DESPITE THE NOTING OF AN APPEAL

I turn now to the issue of whether or not the Administrative Court had jurisdiction to order the execution of its judgment despite the noting of an G appeal.

The President of the Administrative Court concluded that he had jurisdiction to determine the issue of whether the Administrative Court has jurisdiction to order execution of its own judgments despite the noting of an appeal. He H

A concluded that s 19(2)(b) of the Administrative Court Act conferred on him such jurisdiction.

He clearly erred in this regard. The Administrative Court does not have jurisdiction to order the execution of its judgment when an appeal is noted.

At common law the noting of an appeal suspends the operation of a judgment. B This point is well settled.

However, a court of inherent jurisdiction has jurisdiction to order the execution of its own judgments despite the noting of an appeal. In other words, a court of inherent jurisdiction can alter the common law position.

In the case of *Copthall Stores Ltd* v *Willoughby's Consolidated Co, Ltd* 1913 AD 305 Buchanan J had this to say at p 308: C

> "I am of opinion that *the Appellate Division has an inherent right* to control its own judgments, and, in the light of the circumstances of each case, to say whether or not execution should be suspended pending such an application to (the) Privy Council." (The emphasis is mine)

D The *Copthall* case *supra* was cited with approval by De Villiers ACJ in *Fismer* v *Thornton* 1929 AD 17 at 19, where the learned Acting Chief Justice had this to say:

> "Now, although there is no right of appeal to the Privy Council and no provision in our rules for staying execution, this court in *Copthall's Stores, Ltd* v *Willoughby's Consolidated Company, Ltd* (1913 AD 305) laid it down E that *it has an inherent right to control its own judgments, and in the light of the circumstances of each case to say whether or not execution should be suspended pending an application to (the) Privy Council for special leave to appeal.* Since then the court has on several occasions granted a temporary stay, but this has been done only on an order for specific performance or for F a declaration of rights." (The emphasis is mine)

The same view was echoed by Corbett JA (as he then was) in the case of *South Cape Corporation (Pvt) Ltd* v *Engineering Management Services (Pvt) Ltd* 1977 (3) SA 534 (AD) at pp 544H-545D, where the learned Judge of Appeal concluded:

> "Whatever the true position may have been in the Dutch Court, and more G particularly the Court of Holland (as to which see *Ruby's Cash Store (Pvt) Ltd* v *Estate Marks & Anor* 1961 (2) SA 118 (T) at pp 120-3), it is today the accepted common law rule of practice in our courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot H be carried out and no effect can be given thereto, except with the leave

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> of the court which granted the judgment. To obtain such leave the party A in whose favour the judgment was given must make special application. (See generally *Olifants Tin 'B' Syndicate* v *De Jager* 1912 AD 377 at p 481; *Reid & Anor* v *Godart & Anor* 1938 AD 511 at p 513; *Gentiruco A.G* v *Firestone SA (Pvt) Ltd* 1972 (1) SA 589 (AD) at p 667; *Standard Bank of SA Ltd* v *Stama (Pvt) Ltd* 1975 (1) SA 730 (AD) at p

746). The purpose of this rule as to the suspension of a judgment on the noting of an appeal B is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from (*Reid's* case *supra* at p 513). The court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the C right to execute shall be exercised (see *Voet* 49.7.3; *Ruby's Cash Store (Pvt) Ltd* v *Estate Marks & Anor supra* at p 127). This discretion is part and parcel of the inherent jurisdiction which the court has to control its own judgments (cf *Fismer* v *Thornton* 1929 AD 17 at p 19). In exercising this discretion the court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors …". (The underlining is mine) D

It is quite clear from the above authorities that the power of a court to order execution of its own judgments despite the noting of an appeal is founded in the common law doctrine of inherent jurisdiction. It is trite that only superior courts enjoy inherent jurisdiction. In this country these are the High Court and the Supreme Court. Courts created by statute do not have inherent jurisdiction E and consequently do not have power to order execution of their judgments unless such jurisdiction is conferred on them by the statute.

The jurisdiction of the Administrative Court is to be found within the four corners of the Administrative Court Act and any other enactment that confers upon it jurisdiction. It does not have inherent jurisdiction. Accordingly, it has F no power to order execution of its own judgments despite the noting of an appeal.

As I have said earlier, the learned President of the Administrative Court concluded that s 19(2)(b) of the Administrative Court Act conferred on him such jurisdiction. He reasoned thus:

"In the case of *South Cape Corporation (Pvt) Ltd* v *Engineering* G *Management Services (Pvt) Ltd* 1977 (3) SA 534 at p 549 Corbett JA had this to say:

'In a wide and general sense the term "interlocutory" refers to all orders pronounced by the court, upon matters incidental to the main dispute, H

2005 (1) ZLR p255

Chidyausiku CJ

A preparatory to, or during the process of the litigation." (my underlining)

I accept Advocate *Matinenga's* submissions, that litigation is still in progress until the appeal court has pronounced (on) that appeal.

In the same case of *South Cape Corporation (Pvt) Ltd supra* Corbett JA had this to say (at) p 551A:

B 'It remains to apply these principles to the case of an application for leave to execute a judgment pending an appeal. It seems clear that the litigation which resulted in the judgment being given against the applicant on 1 October 1976 (i.e. for the sum of R111 700.50, interest and costs) is still in progress. The appeal noted in this court is a step in that litigation and the case will not be concluded until this court has pronounced finally C upon that appeal.'

The law, therefore, is clear as to when an interlocutory order can be applied for. The present application was made within the legal time frame.

Having addressed myself to the provisions of section 19(2)(b) of the Administrative Court Act and the law, I am quite satisfied that this court has the jurisdiction to hear this urgent chamber application before it.

D In the result —

'The point relating to the jurisdiction of this court, raised *in limine* in this very court, is dismissed.'"

Section 19 of the Administrative Court Act, in terms of which the President of the Administrative Court purported to assume jurisdiction, provides as E follows:

"**19 Appeal from decision of Court**

(1) Subject to subsection (2) and except as otherwise provided in any other enactment, any person who is dissatisfied with any decision of the court may lodge an appeal with the Supreme Court within the period of twenty-one days immediately following the announcement by the court F of such decision.

(2) Except as otherwise provided in any other enactment, no appeal shall lie from —

(a) any order of the court or the President of the court made with the consent of the parties;

(b) an order as to costs only or an interlocutory order or an interlocutory G judgment without the leave of the court or the President of the court or, if such leave has been refused, without the leave of a judge of the Supreme Court.

H (3)…"

Chidyausiku CJ

The learned President of the Administrative Court clearly erred in interpreting A the above section as conferring on him the jurisdiction to order execution of a judgment despite the noting of an appeal. A proper interpretation of s 19 of the Administrative Court Act reveals that it creates a right of appeal to the Supreme Court, to be exercised within twenty-one days of the handing down of a judgment. The right of appeal conferred on the litigant by s 19 is automatic B if exercised within the prescribed period. Subsection (1) of s 19 is explicit in this regard. Subsection (2) of s 19 is a derogation of the right conferred in subs (1). It is a derogation in that —

(a) there is no appeal against an order by consent of the Administrative Court; and

(b) an appeal against an order as to costs or against an interlocutory C order or an interlocutory judgment can only be exercised with the leave of the court or the President of the court or, if such leave has been refused, with the leave of a judge of the Supreme Court.

Section 19 does not expressly or by implication confer on the Administrative Court either the power or the jurisdiction to order execution of its own judgments despite the noting of an appeal. Section 19 merely defines the D litigant's right of appeal from the Administrative Court to the Supreme Court.

If the Administrative Court had the jurisdiction to order execution of its judgment pending appeal, derived from the Act, then any litigant who wished to appeal against such a judgment or order would fall within the ambit of s 19(2)(b) and would need the leave of the Administrative Court to appeal, as E it would be an interlocutory order or judgment.

That, in my view, is the effect of the case of *South Cape Corporation Ltd supra*, which the learned President sought to rely on. The *South Cape Corporation Ltd* case *supra* is authority for the proposition that an order for execution of a judgment pending appeal is an interlocutory order in the broader or wider sense and requires leave to appeal against it. The *South Cape* F *Corporation Ltd* case *supra* is no authority for the proposition that a statutory court like the Administrative Court has inherent jurisdiction which confers on it jurisdiction to order the execution of its own judgment despite the noting of an appeal.

Having concluded that the Administrative Court has no jurisdiction to order G the execution of its own judgment despite the noting of an appeal, the issue of whether this was a proper case for the issuance of such an order falls away.

It is on this basis that the appeal against the order of the Administrative Court ordering the execution of its judgment succeeds. H

Chidyausiku CJ

A The inordinate delay in the handing down of this judgment was largely due to the unavailability, through illness, of one of the judges who sat in this case.

CONCLUSION

In the result the Court issues the following order — B

1. The application to declare ss 39(1)(g)(i)(j)(n) and (p) 40,41,65,66,69,70,71,76,79,80(1)(d)(2), 83 and 89 and para 4 of the Fourth Schedule of the Act, null and void is dismissed.
2. Section 80(1)(a)(b) and (c) (which have since been repealed) are struck down as unconstitutional.
3. The appeal against the decision of the Administrative Court is allowed C and the orders of the Administrative Court are hereby set aside.
4. The determination of the Commission in which it refused the applicant registration as a mass media service provider is set aside.
5. The issue of the registration of the applicant as a mass media provider is remitted to the Commission for consideration *de novo*. D
6. There will be no order as to costs.

CHEDA JA, Ziyambi JA, Malaba JA & Gwaunza JA concurred.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Muzangaza, Mandaza & Tomana, respondents' legal practitioners

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BENNETT v CONSTITUENCY ELECTIONS OFFICER, CHIMANIMANI CONSTITUENCY & ORS 2005 (1) ZLR 258 (E)

Citation	2005 (1) ZLR 258 (E)
Case No	Judgment No. EP-1-05
Court	Electoral Court, Harare
Judge	Uchena J
Heard	8 March 2005
Judgment	15 March 2005
Counsel	*A P de Bourbon SC,* for the appellant *G Chikumbirike*, for the first and second respondents No appearance for the third and fourth respondents
Case Type	Appeal from the Nomination Court
Annotations	No case annotations to date

Flynote

Constitutional law — *Constitution of Zimbabwe — Parliament — proceedings of* B *Parliament sitting as a court — not a court of law as envisaged by s 18(2) of the Constitution*

Election — *candidate — eligibility — must be eligible for registration as* D *voter — person sentenced to imprisonment for six months or more — person sentenced by Parliament for disciplinary reasons — not sentenced by a court of law — eligible for registration as voter and thus eligible as candidate for Parliament*

Statutes — *Privileges, Immunities and Powers of Parliament Act [Chapter 2:08] — contempt of Parliament — fracas in the House — power of* E *Parliament to decide whether to deal with such a disturbance itself or to refer it to the Attorney-General as an offence — power of Parliament to regulate its internal affairs*

Headnote

A finding of guilty by Parliament on a contempt offence is not a crime in the F conventional sense. When dealing with these contempt offences Parliament, though sitting as a court, does not sit as a court of law. Its proceedings are not in the nature of a public criminal trial as envisaged in s 18 (2) of the Constitution, for Parliament is not an independent and impartial court established by law (*dicta per* Gubbay CJ in *Mutasa* v *Makombe NO* 1997 (1) ZLR 330 (S) at 337 followed). G

The appellant was serving a term of twelve months' imprisonment for contravening Item 16 of the Schedule to the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*]. The

sentence had been imposed by Parliament when he was a sitting member, following a fracas H

Uchena J

A in the House. His nomination as a candidate in the 2005 general election was rejected by the first respondent on the grounds that he was serving a sentence of more than six months and thus, in terms of para 2(1) of Schedule 3 of the Constitution, was not eligible for nomination, being disqualified as a voter in terms of para 3(2)(c) of the Schedule. This B provides that a person who has been convicted of a criminal offence and sentenced by a court to imprisonment for a term of six months or more is disqualified as voter for the period of his imprisonment. The appellant appealed to the electoral court, seeking the reversal of the first respondent's decision. He sought an order entitling him to submit his papers before the nomination court. It was argued, on his behalf, that C Parliament is not a court of law and therefore imprisonment by it does not disqualify one from registration as a voter and therefore for standing for election to the office of Member of Parliament.

Held, that if the appellant had been convicted by a court of law such as the magistrates court or the High Court there was no doubt that he would be disqualified.

D *Held,* further, that what the appellant did constituted a criminal offence under the Privileges, Immunities and Powers of Parliament Act [*Chapter 2: 08*].

Held, further, that Parliament can choose how it wants to deal with anyone alleged to have committed a contempt offence, the nature of which is coloured by how Parliament decides to deal with it. If it decides to deal with it itself, the contempt becomes a contempt against the authority and E integrity of Parliament. If it resolves in terms of section 22 of the Act that the Attorney-General should prosecute, then the offence becomes a public crime*. In casu*, it chose to deal with and punish the appellant itself.

Held, further, allowing the appeal, that, in sitting to regulate its internal affairs, Parliament's finding the appellant guilty of a contempt offence did not F constitute a criminal conviction in the conventional sense. The sentence imposed on him did not, therefore, disqualify him from registration as a voter nor from standing as a candidate for election to the office of Member of Parliament.

Case cited

G *Mutasa v Makombe NO* 1997 (1) ZLR 330 (S)

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Legislation considered A

Constitution of Zimbabwe 1980, s 18(2); Schedule 3, paras 1(3), 2(1) and 3(2)(c)

Electoral Act [*Chapter 2:13*], s 46(10)

Interpretation Act [*Chapter 1:01*], s 3

Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*], ss B 21& 22 (1); Schedule, item 16

Case information

A P de Bourbon SC, for the appellant

G Chikumbirike, for the first and second respondents

No appearance for the third and fourth respondents C

Judgment

UCHENA J: On 18 February 2005, a Nomination Court sat at Mutare Magistrates Court for the purpose of accepting nomination papers for candidates aspiring to contest in elections to be held on 31 March 2005. All candidates for constituencies falling under Manicaland Province submitted their

nomination papers at Mutare Magistrates Court. It is common cause that the first respondent was the Constituency Elections Officer who received and D processed nomination papers for all constituencies under Manicaland Province. I am aware that in the applicant's papers her appointment as a Constituency Elections Officer is challenged. However, in the appeal she is cited under that title.

The appellant who is the current Member of Parliament for Chimanimani E submitted his nomination papers through his Chief Elections Agent. The first respondent rejected the appellant's nomination on the ground that he is currently serving a 12 months term of imprisonment imposed on him by Parliament for contravening Item 16 of the Schedule (s 21) of the Privileges, Immunities and Powers of Parliament Act [*Chapter2:08*] hereinafter called the Act. F

The appellant.was found to have been in contempt of Parliament for assaulting two members of Parliament while the house was debating the Stock Theft Bill. The members he assaulted are the Hon Patrick Chinamasa who is the leader of the House and Minister of Justice, Legal and Parliamentary Affairs and the Hon Dydimus Mutasa, a Member of Parliament for Makoni. G

The first respondent rejected the appellant's nomination on the ground that he was serving a term of imprisonment of more than 6 months. She relied on the provisions of para 2(1) of Schedule 3 of the Constitution of Zimbabwe which provides as follows: H

Uchena J A

"(1) A person shall be disqualified for election or appointment as a Member of Parliament if he –

(a) is disqualified under paragraph 3 for registration as a voter."

Paragraph 3(2)(c) which is relevant to these proceedings provides as follows:

"(2) The following shall be disqualified for registration as a voter for the B periods stated hereunder –

(c) any person who has been convicted –

(i) within Zimbabwe of a criminal offence; or

(ii) outside Zimbabwe of an offence by whatever name called which if committed within Zimbabwe, would have been a criminal offence;

C and sentenced by a court to imprisonment, by whatever name called, for a term of six months or more for the period of his imprisonment."

The first respondent believed the appellant was disqualified even though his name was on the voters roll. The issue before her was whether or not appellant's papers were in order. It is not in dispute that appellant is serving D a prison term. According to law, she was entitled to deem the appellant's name to be not on the voters' roll on account of his imprisonment. Therefore if the appellant is disqualified in terms of s 3(2)(c) of Schedule 3 of the Constitution the first respondent was correct when she, in terms of s 46(10)(d) of the Electoral Act [*Chapter 2:13*], found the appellant's papers not to be in order. One's nomination papers cannot be said to be in order if his name does not E appear on the voters' roll or when it is deemed not to be on the voters' roll. Section 1(3)(a) of Schedule 3 of the Constitution requires one to be a registered voter to qualify as a Member of Parliament. She, for that reason, rejected his nomination papers. The appellant was aggrieved and has appealed to this court seeking the reversal of the first respondent's decision and orders F entitling him to submit his papers before the Nomination Court and be considered in light of this court's findings on his status as regards paras 2 and 3 of Schedule 3 of the Constitution.

The second respondent was cited in its capacity as the independent public body which is in terms of section 4 of the Zimbabwe Electoral Commission Act [*Chapter 2:18*], charged with the responsibility of preparing for and conducting G elections and ensuring that those elections and referendums are conducted efficiently, freely, fairly, transparently, and in accordance with the law. The appellant alleges that the preparations and conducting of the nomination court for the Chimanimani Constituency were flawed.

The third respondent like the appellant is an aspirant to the office of Member H of Parliament for Chimanimani. He was nominated by ZANU (PF) and his

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nomination papers were accepted. He was thus authorised to contest in the A March 31 elections. He has an interest in this case as the setting aside of the nomination process for the Chimanimani Constituency will temporary put on hold his ambitions.

The fourth respondent is the appellant's wife. She was nominated by the MDC as its second choice candidate when her husband who was its first choice's B nomination was rejected by the first respondent. She like the third respondent is aspiring for the post of Member of Parliament for Chimanimani. She however has indicated appreciation of her being her party's second choice and submitted an affidavit in which she indicated willingness to step down if her husband's appeal succeeds.

The appellant attacked the first respondent's decision under three headings. C

1. That her decision that he was not qualified to stand for election as a candidate for the office of Member of Parliament due to his being a serving prisoner serving a sentence of six months or more was legally wrong.

2 (a) That she was not properly appointed to the office of constituency elections officer and was therefore not entitled to preside at the nomination D court.

2 (b) That section 46(10) of the Act does not authorise her to consider issues of disqualification but should have confined herself to issues covered by section 46(10) of the Act, an issue which has already been resolved above.

3. That the process leading to the sitting of the nomination court was flawed E due to –

   (a) the appointment of one Constituency Elections Officer for the whole province;

   (b) the late appointment of the Constituency Elections Officer by the second respondent. F

I will now consider the crucial issue which is the eligibility of the appellant for nomination as a candidate for the office of Member of Parliament for Chimanimani. It is common cause that the appellant who is already a Member of Parliament qualifies in all other respects except for his having been imprisoned by Parliament for 15 months with 3 months suspended. He is currently serving a sentence of 12 months. Paragraph 3(2)(c) of the Third F Schedule of the Constitutiondisqualifies a person from registering as a voter and therefore standing as a candidate during the period of such imprisonment.

The issue to be decided is whether the appellant's imprisonment by Parliament falls within the provisions of para 3(2)(c) of the Third Schedule of the Constitution. H

Uchena J

A Mr *de Bourbon* for the appellant submitted that the imprisonment which disqualifies one from registration as a voter is one which follows conviction and sentence by a court of law. He submitted that Parliament is not a court of law and therefore imprisonment by it does not disqualify one from registration as a voter and therefore from standing for election to the office of Member of Parliament. He referred this court to the case of *Mutasa* v *Makombe NO* 1997 B (1) ZLR 330 (S) at 337C, where Gubbay CJ with the concurrence of all judges of the Supreme Court held that a finding of guilty by Parliament on a contempt offence is not a crime in the conventional sense as Parliament when dealing with such contempt offences though sitting as a court, "does not sit as a court of law". He urged this court to find that what Parliament did when it convicted C and sentenced the appellant was an exercise of its disciplinary powers.

On the other hand, Mr *Chikuinbirike* for the first and second respondents submitted that Parliament sat as a court and convicted the appellant of an offence which is a crime. He urged this court to distinguish this case from the *Mutasa* case and find that the appellant's imprisonment by Parliament disqualifies him from registration as a voter and consequently from standing D for election to the office of Member of Parliament. He referred this court to the dictionary meaning of the word "offence" which includes misdemeanours and criminal offences.

It is common cause that the appellant was convicted by Parliament and sentenced to a term of imprisonment exceeding six months. It is common cause E that he is still serving that sentence. If he had been convicted by a court of law *i.e.* the Magistrates Court or the High Court he would have without doubt fallen within the provisions of s 3(2)(c) of the Third Schedule of the Constitution.

Issue couldhave arisen as to the meaning of the word "offence" as the dictionary meaning referred to by Mr *Chikumbirike* includes "misdemeanours" which clearly do not have criminal connotations. However that would not F have caused me any difficulties, as the Interpretation Act [*Chapter 1:01*] in s 3 gives a definitive definition of the word "offence". It provides that "offence" in every enactment means "a criminal offence". I would therefore not have had any difficulties in finding that

the word offence as used in the Privileges Immunities and Powers of Parliament Act means a criminal offence G and therefore that the appellant was convicted of and sentenced to 12 months' imprisonment for a criminal offence. I have no doubt in my mind that what the appellant did constituted a criminal offence.

The issue however is, was he convicted and sentence for that offence? Mr *de Bourbon* submitted that he was disciplined for that offence by Parliament H which is not a court of law.Mr *Chikumbirike* submitted that he was convicted

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2005 (1) ZLR p264

Uchena J

by Parliament sitting as a court of a criminal offence and sentenced to an A effective 12 months' imprisonment. My task is to determine whose submission is the correct interpretation of the law.

In my view, the Supreme Court in *Mutasa* v *Makombe supra* has already made a finding on this issue. Its decision was a unanimous one involving the full Supreme Court bench. This court is bound by decisions of the Supreme Court. B It can only depart from that decision if this case can be distinguished from the *Mutasa* case *supra.*

In the *Mutasa* case *supra,* Gubbay CJ at p 337C-D said:

> "A finding of guilty by Parliament on a contempt offence is not a crime in the conventional sense. When dealing with these contempt offences Parliament though sitting as a court does not sit as a court of law. Its C proceedings are not in the nature of a public criminal trial as envisaged in *s 18(2) of the Constitution, for Parliament is not 'an independent and impartial court established by law'*. It exercises its own jurisdiction and powers conferred upon it by the Privileges, Immunities and Powers of Parliament Act … " (my emphasis).

At p 337G-H, he went on to say: D

> "The line drawn in the Constitution between punishment for contempt under an order of court or tribunal and that imposed by Parliament, is significant and important. *It indicates plainly, to my mind, that in utilising its powers under the Privileges, Immunities and Powers of Parliament Act in dealing with contempt offences, Parliament is not* E *exercising a criminal, or civil jurisdiction: rather one sui generis, being the jurisdiction expressly authorised by law*" (my emphasis).

It is clear from the Supreme Court's decision that when Parliament sits as a court to decide on contempt offences it does not sit as a court of law. Its proceedings do not resemble a criminal trial. It does not sit as an independent and impartial court. It sits to regulate its internal affairs. F

Earlier on at p 337A-B, Gubbay CJ clearly explained the dual nature of contempt offences when he said:

> "In conferring upon Parliament, the power to institute disciplinary proceedings s 21 of the Privileges, Immunities and Powers of Parliament Act adopts the expedient of declaring those acts or conduct specified in the schedule to be "contempts" which are offences. Such offences, being punishable by *fairly severe penalties, have a dual nature. In one respect, they are regarded as contempts against the authority and integrity of Parliament, in another, as 'public crimes' since if requested by resolution of Parliament, the Attorney-General* may prosecute them before a court of competent jurisdiction" (my emphasis).

2005 (1) ZLR p265

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A The issue in this case is which nature does the appellant's conviction and sentence take.

It is clear from the above that the nature of a contempt offence is coloured by how Parliament decides to deal with it. If it decides to deal with it itself the contempt offence becomes a contempt against the authority and integrity of B Parliament. If it resolves that the Attorney-General prosecute it then it becomes a public crime.

This position is clarified by the provisions of s 22(1) of the Act which provides as follows:

> "(1) The Attorney-General may, *if requested to do so by resolution of Parliament but not otherwise, take steps as are necessary to bring to* C *trial before a court of contempt jurisdiction* any person who is alleged to have committed –
>
> (a) any act, matter or thing which in this Part is declared to be an offence; or
>
> (b) . . ." (my emphasis).

D This means Parliament can choose how it wants to deal with any one alleged to have committed a contempt offence. In this case, it chose to deal with and punish the appellant itself. This case therefore falls under what the Supreme Court said in *Mutasa*'s case *supra,* subject to its being distinguished from it as was suggested by Mr *Chikumbirike.*

E Mr Chikumbirike seems to have been relying on the nature of the offence in E seeking to distinguish this case from Mutasa's case. Mr de Bourbon pointed out that Mutasa was disciplined by Parliament for contravening item 16 of the Schedule, the item under which the appellant was charged.

A reading of Mutasa's case supra supports Mr de Bourbon's contention. At p 333D after referring to the offending words, the court said –

> F "Two days later, a motion was presented to Parliament that the appellant's utterances, which attracted prominence in the media were *prima facie* in breach of Parliamentary privilege. It was said that the remarks constituted a contempt of Parliament in contravention of item 16 of the Schedule to the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*]*."*

G At p 339G-H, Gubbay CJ said:

> "I entertain no doubt that the appellant's words fell within the offence prescribed in item 16 of the Schedule. To say publicly that the overall caliber of Members of Parliament is such as to render the body of Parliament meaningless; that some members are 'unwitty' in the sense of lacking intelligence; that they make no effort to inform themselves of

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Uchena J

> current affairs before attending sessions of the House, and that they A diminish respect for the institution of Parliament, was certainly contemptuous."

It is clear in *Mutasa's* case, the contempt was through verbal utterances. In the appellant's case, it was through violence towards other members of Parliament. One therefore, has to examine item 16 of the Schedule to determine B how these two seemingly different offences can fall under the same item. Item 16 provides as follows:

> "16 Assaulting, insulting, interfering with or willfully obstructing a member coming to or going from Parliament or whilst within the precincts of Parliament or on account of his conduct in Parliament or a committee or endeavouring to compel a member by force, insult or menace to declare C himself in favour or against any proposition or matter pending or expected to be brought before Parliament or a committee."

Item 16 of the Schedule therefore, makes various acts contempts which are also offences. It includes assaults, insults, interference, obstructing and compelling by force insult or menace a member to declare himself for or against a proposition pending or to become pending in Parliament or a committee. In D short it provides for a variety of acts which constitutes contempts which are also offences.

Mr *Chikumbirike* had, in trying to distinguish this case from the *Mutasa* case *supra*, said in *Mutasa's* case the court was dealing with a contempt which is not an offence while in this case we are dealing with a contempt which is also E an offence. That argument cannot stand in view of both contempts falling under the same Schedule which provides for contempts which are also offences. Both fall under item 16 and are provided for one after the other. They obviously fall under the same class, that of contempts which are also offences. It is therefore not possible to distinguish one from the other as they fall under the same section, schedule and item. F

I therefore, find that the appellant was found guilty by Parliament while exercising its powers as a court in a *sui generis* sense. Therefore its finding the appellant guilty of a contempt offence does not constitute a criminal conviction in the conventional sense. The sentence imposed on the appellant does not therefore disqualify the appellant from registration as a voter nor standing as a candidate for election to the office of Member of Parliament. The G first respondent's rejection of the appellant's nomination papers was therefore not legally correct. It should be set aside.

In view of my finding being capable of resolving the issues touching on the appellant's disqualification by the first respondent, it is not necessary to H

Uchena J

A determine the remaining issues whose determination might, if the appellant's submissions on law are correct, affect persons who were not cited as parties in this case.

I am aware that appellant also raised issues on the appointment of the first respondent and the second respondent's failure to timeously appoint B Constituency Elections Officers. He sought to invalidate the nomination process by the first respondent. This in my view, should have been preceded by the citing of all candidates whose papers were accepted by the first respondent. It would not be just to decide a matter of such serious magnitude to the candidates without affording them an opportunity to be heard.

In the circumstances, I will confine myself to granting orders which affect the C Chimanimani Constituency whose candidates were afforded an opportunity to be heard.

The finding that the appellant is qualified to stand as a candidate means the nomination process for Chimanimani has to be redone to give the appellant an opportunity to file his nomination papers.

D On the issue of costs, I am satisfied that they should follow the result. The successful party is entitled to costs.

In the circumstances, it is ordered that:

1. The appeal is allowed with costs, such costs to be paid jointly and severally by the first and second respondents, the one paying the other E to be absolved.
2. It is declared that the appellant is qualified in terms of para 1(3) of Schedule 3 of the Constitution of Zimbabwe to stand as a candidate for election to the Parliament of Zimbabwe.
3. It is declared that the applicant is entitled in law to stand as a candidate F seeking election for the Constituency of Chimanimani, subject only to the proper completion of the prescribed nomination form, the payment of the prescribed deposit, and satisfying the Constituency Elections Officer of matters set out in s 46(1) of the Electoral Act [*Chapter 2:13*].
4. The decision of the Nomination Court in respect of Chimanimani Constituency is set aside and the first respondent is directed to hold a G nomination court in terms of s 46 of the Electoral Act [*Chapter 2:13*] for candidates wishing to seek election as the Member of Parliament for the Chimanimani Constituency on 4 April 2005 at a venue to be advised by the first respondent by notice in *The Herald* or *The Manica Post* on or H before 18 March 2005 and in the Government *Gazette* of 18 March 2005.

Uchena J

5. Any poll in terms of Part XII and Part XIII of the Electoral Act [*Chapter 2:13*] A for the Constituency of Chimanimani shall he held on Saturday, 30 April 2005.

Henning Lock Donagher & Winter, appellant's legal practitioners

Chikumbirike & Associates, first and second respondents' legal practitioner B

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/ATTORNEY-GENERAL v STEYL & ORS 2005 (1) ZLR 269 (S)

ATTORNEY-GENERAL v STEYL & ORS 2005 (1) ZLR 269 (S)

Citation	2005 (1) ZLR 269 (S)
Case No	Judgment No. S-11-05
Court	Supreme Court, Harare
Judge	Chidyausiku CJ

Heard 16 March 2005

Judgment 16 March 2005

Counsel *F Chimbaru,* for the applicant
Mrs *J B Wood,* for the respondents

Case Type Chamber application

Annotations No case annotations to date

Flynote

C **Appeal** — *criminal case — application by Attorney-General for leave to appeal against sentence — judicial authority on the point at issue divided — desirability of full court rather than single judge in chambers resolving conflict — application granted*

Criminal procedure (sentence) — *principles — suspension of portion of sentence — magistrate declining to suspend portion of sentence on* D *grounds that accused were foreigners — whether a misdirection*

Headnote

The respondents had been sentenced by a magistrate to a term of imprisonment on a charge of contravening the Immigration Act. The magistrate had refused to suspend portion of the sentence on the grounds that the E respondents were foreigners. They appealed to the High Court, alleging that the sentence was manifestly excessive. No misdirection was alleged. At the hearing, the Attorney-General's representative conceded that part of the sentence should have been suspended. The High Court altered the sentence accordingly, holding that the magistrate had misdirected himself in ruling that it was not competent to suspend a F sentence or portion of a sentence imposed on a convicted foreigner. The Attorney-General applied in terms of s 44(7) of the High Court Act [*Chapter 7:06*] for leave to appeal against the High Court's decision. Judicial authority on the point was divided.

Held, granting the application that, an appellate court can only interfere with G a sentence imposed by a lower court on two grounds. Firstly, when the sentence imposed is manifestly excessive and, secondly, when the lower court misdirects itself leaving the appellate court at large to consider an appropriate sentence. The probabilities were that an appeal court would conclude that the court *a quo* misdirected itself by holding itself at large on the question of sentence. Further, with regard to the conflicting H decisions of the Supreme Court on whether it was competent to suspend

---

Chidyausiku CJ

a sentence imposed on a foreigner, the apparent conflict was best A resolved by the full court and not by a single judge in a chamber application.

Cases cited

S v Avari S-4-86 B

S v Cassim 1976 RLR 323 (A); 1976 (4) SA 29 (RA)

S v Kanyamula 1983 (2) ZLR 222 (S)

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

Case information

F Chimbaru, for the applicant C

Mrs *J B Wood,* for the respondents

Judgment

Before: Chidyausiku CJ, in Chambers.

The applicant in this case is the Attorney-General who makes an application for leave to appeal against a judgment of the High Court in which D Omerjee J, with the concurrence of Mavangira J, altered a sentence that had been imposed on the respondents by the Provincial Magistrate's Court.

He makes this application in terms of s 44(7) of the High Court Act [*Chapter 7:06*] which provides as follows:

> "44. (7)If the Attorney-General considers that the sentence imposed by the High Court in any case, whether in the exercise of its original or appellate E jurisdiction or on review, including a review pursuant to section 57 of the Magistrates Court Act [*Chapter 7:10*], is –
>
> (a) incompetent in law, he may appeal to the Supreme Court against that sentence; or
>
> (b) inadequate – F
>
> (i) in the light of the findings of fact relied on by the High Court and the nature of the charge; or
>
> (ii) because it was based on findings of fact for which there was no evidence or 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 to the Supreme Court against the sentence."

The respondents contend that the Attorney-General has no right to make this G application. I am satisfied that s 44(7) confers on the Attorney-General, such a right. The language of s 44(7) is very explicit in this regard.

The facts of the case are briefly as follows: The respondents were charged with contravening s 36(1)(a) of the Immigration Act [*Chapter 4:02*]. They pleaded H

Chidyausiku CJ

A guilty and were found guilty. The pilot and co-pilot of the aircraft that brought the respondents into Zimbabwe were sentenced to 16 months' imprisonment and the passengers to 12 months' imprisonment. The respondents were dissatisfied with the sentence imposed on them and appealed to the High Court.

B The grounds of appeal are set out in the Notice of Appeal filed of record. The following are the grounds of appeal set out therein:

> "1.The sentence was excessive in the circumstances and induced a sense of shock. The sentence was totally disproportionate to the nature of the offence especially when it is taken into account that all the appellants were arrested whilst sitting in the plane and that the plane had C been directed by Aviation officials to the Manyame Airbase which is adjacent to the international airport and that the boundaries are not clearly visible especially at night.
>
> 2. The court erred in not taking into account that:
>
> (i) The appellants pleaded guilty and were first offenders.
>
> (ii) That the contravention was technical in that they had been given D permission to land and purchase fuel and had been authorised to taxi to Manyame Airbase which is part of the international airport and that the appellants had remained on board and sat in the plane they were only arrested in the plane and were removed from the plane by force.
>
> (3) The magistrate found as mitigation that they were in transit to another E country that they had landed at an international airport with authority from the Civil Aviation officials, in other words the landing and taxiing was lawful and that the State was only relying on the issue of boundary. It was purely technical demarcating Manyame Airbase and Harare International Airport the appellants had not wasted the court's time by arguing this point of the demarcation of the boundary between Manyame Airbase and the International Airport by pleading guilty, thereby saving the court from F time and money which would have cost the State if it would have gone into full trial as they would have needed to engage at least nine (9) interpreters.
>
> (4) The court did not take into account the concession made by the State that the appellants were merely employees who were simply following G their employer's orders.
>
> (5) The court did not take into account that the appellants had been in custody for over six (6) months and that they had waited for a month for sentence after pleading guilty. The delay had not been occasioned by the appellants but by H the State. The court did not give reasons for imposing the maximum custodial penalty in the absence of aggravating features from the State and it did not take into account the concessions made by the State.

Chidyausiku CJ

(6) The court erred in not considering the penalty section, which calls A for a fine or in the alternative, a period of imprisonment not exceeding two (2) years and since the contravention was purely technical there was no justification for imposing a custodial sentence especially when the appellants had spent six (6) months in maximum prison where they were being treated worse than convicted criminals facing a death penalty. B

(7) The appellants pray that the appeal be allowed and the sentence imposed by the magistrate on the 10th of September 2004 be set aside and that each be sentenced to one month imprisonment which they have already served and that they be released from custody."

The above grounds of appeal boil down to one ground of appeal, namely, that the sentence imposed on each of the respondents is manifestly excessive. The C enumerated grounds of appeal are mitigating factors that, according to the respondents, make the sentence manifestly excessive. There is no suggestion in the grounds of appeal that the learned trial magistrate had misdirected himself, either by taking into account for the purposes of sentence factors he should not have taken into account, or, failing to take into account factors that he should have taken into account. The court *a quo* however altered the D sentence of the respondents on the basis that the trial magistrate had misdirected himself. There is no allegation of misdirection in the Notice of Appeal. It is not clear from the judgment why the court *a quo* set aside the sentence on a ground not set out in the Notice of Appeal.

When the matter was heard on appeal the Attorney-General submitted that part of the sentence should have been suspended. The court *a quo* accepted E that, that concession was properly made. The court *a quo* thereafter altered the sentence on the respondents by suspending a portion of the period of imprisonment. The Attorney-General now contends that the concession he made in the court *a* quo was improperly made because it is not competent for a court to suspend a sentence or portion of a sentence imposed on a convicted F foreigner. In altering the sentence of the trial court the court *a quo* reasoned as follows:

"The Attorney-General's Office is therefore conceding that a portion of the sentence imposed upon the appellants ought to be suspended. In amplification of this stance, Mr *Phiri*, in his verbal submissions stated that in regard to all the appellants it was not in issue that it was not G envisaged that any of them would disembark from the aircraft for the duration of its stay on Zimbabwean territory. Steyl and Hamman, apart (from) the remaining appellants were not in control of the aircraft and did not determine what was to happen when the aircraft landed in Zimbabwe. For those reasons, it was submitted that, the offence committed by the H

Chidyausiku CJ

A appellants excluding Steyl and Hamman, was of a technical nature. In the considered view of this court, this concession by the State is a fair and proper concession. It is also important to bear in mind that the offence with which these appellants were charged was that of contravening section 36(1)(e) of the Immigration Act. *It is that offence with which these proceedings are concerned. We consider that the omission by the trial* B *magistrate to suspend a portion of the sentence imposed upon the appellants, on the basis that they were foreigners, was a misdirection on his part*. This view is fortified by the concession made by the State that a portion of the sentences imposed upon the appellants ought to be suspended. *This court is therefore at large to consider an appropriate punishment in view of the misdirection*." (my emphasis)

C Thus the court *a quo* concluded that the learned trial magistrate had misdirected himself and consequently it was at large on the question of sentence.

The learned trial magistrate, in sentencing the respondents, had approached the issue thus:

"In my view there is no point suspending any portion of the sentence since all the accused persons are foreigners and this is the sentence imposed."

D The approach of the magistrate has support from decisions of this court. In the case of *S* v *Kanyamula* 1983 (2) ZLR 222, a Malawian national was convicted of possession of dagga in Zimbabwe whilst in transit at the Harare International Airport. He was sentenced to a custodial sentence, a portion of which was suspended on condition of good behaviour. This court altered the E sentence by deleting the suspended term of imprisonment. Georges CJ, at p 222, had this to say:

"The appellant is neither a citizen nor a resident of Zimbabwe and I see no reason for imposing a suspended sentence of imprisonment as well. The appellant will undoubtedly be returned to Malawi at the

end of his sentence. Thereafter, if need be, he can be denied entry into Zimbabwe. F Accordingly, I would vary the sentence by quashing the suspended sentence of 2 years' imprisonment with labour."

The learned Chief Justice's view that it is inappropriate to suspend a sentence of a foreigner finds support in the case of *Avari* v *S,* S-4-86. Counsel for the respondent cited the cases of *S* v *Ponder* 1989 (1) ZLR 235; *S* v *Cassim* 1976 (4) SA 29 (RA) G as authorities for the proposition that a suspended sentence of imprisonment on a foreigner can be appropriate in certain circumstances. This apparent conflict of authorities can best be resolved by the court and not by a judge in a Chamber Application. For the purpose of granting leave to appeal to the applicant I only need to be satisfied that the applicant has H prospects of success on appeal.

Chidyausiku CJ

For the foregoing reasons the applicant does have prospects of success on A appeal. The probabilities are that an appeal court will conclude that the court *a* quo misdirected itself by holding itself at large on the question of sentence. It is trite that an appellate court can only interfere with a sentence imposed by a lower court on two grounds. Firstly, when the sentence imposed is manifestly excessive and, secondly, when the lower court misdirects itself leaving the B appellate court at large to consider an appropriate sentence.

As I have already stated, the court *a quo* did not interfere with the sentence of the magistrate on the basis that the sentence was manifestly excessive but on the basis that there had been a misdirection the existence of which I have grave doubts.

It is on this basis that I am satisfied that the applicant has prospects of success C and leave to appeal should be granted.

I, accordingly, grant the application and the applicant is hereby granted leave to appeal against the judgment of the court *a quo* in terms of s 44(7) of the High Court Act [*Chapter 7:06*]. The Attorney-General contributed to his own predicament by making a concession which he now contends he should not D have made. This should disentitle him to costs. There will be no order as to costs.

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

Byron Venturas & Travlos, respondents' legal practitioners E

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/NET ONE CELLULAR (PVT) LTD v NET ONE EMPLOYEES & ANOR 2005 (1) ZLR 275 (S)

NET ONE CELLULAR (PVT) LTD v NET ONE EMPLOYEES & ANOR 2005 (1) ZLR 275 (S)

Citation	2005 (1) ZLR 275 (S)
Case No	Judgment No. S-40-05
Court	Supreme Court, Harare
Judge	Chidyausiku CJ
Heard	21 March 2005
Judgment	21 March 2005
Counsel	*E T Matinenga*, for the applicant

L T Biti, for the first respondent
No appearance for the second respondent

Case Type Chamber application

Annotations Link to case annotations

Flynote

C **Court** — *Supreme Court — jurisdiction — application for stay of execution pending appeal — application ancillary to appeal already noted — court having jurisdiction to deal with application*

Court — *Supreme Court — jurisdiction — inherent jurisdiction to control its judgment — this includes the jurisdiction to control its process —* D *Supreme Court has jurisdiction to determine whether or not execution of a judgment pending an appeal should be permitted*

Court — *Supreme Court — jurisdiction — review — rectification of irregularity — Deputy Sheriff issuing warrant of execution despite noting of appeal — an irregularity that may be corrected on review*

E **Employment** — *appeal — under Labour Relations Act — appeal from Labour Court upholding a decision of an arbitrator — noting of an appeal also suspends the arbitrator's determination*

Practice and procedure — *execution — pending appeal — need for respondent to apply for execution despite noting of appeal*

Headnote

F Once the Supreme Court is seized with a matter, it has inherent jurisdiction to control its judgment. The inherent jurisdiction to control its judgment includes jurisdiction to control its process; that is jurisdiction to determine whether or not execution of a judgment should be permitted pending the hearing of an appeal.

G At common law, a party cannot execute a judgment appealed against. A party wishing to execute despite an appeal can, however, approach the court a *quo,* if it has such jurisdiction, for leave to execute despite the noting of an appeal (*South Cape Corporation* v *Engineering Management* H *services (Pty) Ltd* 1977 (3) SA 534 (A) followed).

2005 (1) ZLR p276

Chidyausiku CJ

The 56 respondents, who were employed by the applicant went on strike, as A a result of which the applicant conducted disciplinary proceedings, resulting in their dismissal from employment. Thereupon the respondents filed a complaint with the labour officer. However, he failed to resolve the matter, which was then referred to arbitration in terms of s 98 of the Labour Relations Act [*Chapter 28:01*]. The arbitrator ruled in favor of the B respondents and ordered their re-instatement without loss of benefits.

The applicant was dissatisfied with this order and appealed to the Labour Court in terms of s 98(10) of the Act. The Labour Court dismissed the appeal and the applicant thereupon noted an appeal to the Supreme Court.

Upon dismissal of the appeal by the Labour Court, the respondents, in terms C of s 98(14) of the Act, registered the arbitrator's determination with the High Court, the effect of which registration was to make it a judgment of that court, in terms of s 98(15). A warrant of execution was thereupon issued by the Deputy Sheriff, the second respondent, and the applicant's goods were seized. The applicant forthwith sought an order from High Court staying execution pending the appeal. This application was D dismissed by the High Court and the applicant thereupon noted a second appeal in the matter. Pending this appeal, the applicant sought an order staying the execution of its property.

Held, that the noting of an appeal against the judgment of the Labour Court had the effect of suspending the judgment thereof and also the arbitrator's determination. Once the appeal was noted, by operation of law, the E applicant was entitled to a stay of execution.

Held, further, that, in any event, the Supreme Court was entitled to exercise its powers of review in terms of s 25 of the Supreme Court Act [*Chapter 7:13*]. The second respondent had issued a warrant of attachment and intended to remove and sell the applicant's property. This was an F irregularity because the judgment of the High Court had been appealed against and was not therefore executable.

Held, further, that the application granting a stay of execution, pending the appeal, should be granted with costs.

Case cited G

South Cape Corp v *Engineering Mgmt Svcs (Pty) Ltd* 1977 (3) SA 534 (A)

Chidyausiku CJ

Legislation considered A

Labour Relations Act [*Chapter 28:01*], ss 97, 98(10), 98(14) and 98(15)

Case information

E T Matinenga, for the applicant

L T Biti, for the first respondent

B No appearance for the second respondent

Judgment

Before**: CHIDYAUSIKU CJ**, in Chambers

The first respondents in this case are employees of the applicant. I shall refer C to the applicant as the employer and the first respondents as the employees. On 20 May 2004, the employees gave the employer notice of their intention to go on strike following a failure to negotiate a satisfactory salary increase.

On 15 June 2004, the employees went on strike. Thereafter the employer conducted disciplinary proceedings in respect of each of the employees. As a result of the hearing the employees were dismissed from their employment. D The employees then filed a complaint of unfair dismissal with a Labour Officer. The Officer met both parties but failed to settle the matter through conciliation. The matter was thereafter referred to compulsory arbitration in terms of s 98 of the Labour Relations Act [*Chapter 28:01*] (hereinafter referred to as the Act).

E The arbitrator ruled in favour of the employees and ordered the employer to reinstate the employees without loss of benefits. The employer was dissatisfied with the arbitrator's determination and appealed to the Labour Court in terms of s 98(10) of the Act. Section 98(10) reads:

> "98(10) An appeal on a question of law shall lie to the Labour Court from any decision of an arbitrator appointed in terms of this section."

F The Labour Court upheld the determination of the arbitrator and dismissed the appeal.

The employer appealed to the Supreme Court against the decision of the Labour Court in terms of s 92D of the Act which provides that:

> "An appeal on a question of law shall lie to the Supreme Court from any G decision of the Labour Court."

That appeal is yet to be heard by the Supreme Court.

Upon the dismissal of the employer's appeal by the Labour Court, the employees registered the determination of the arbitrator with the High Court H in terms of s 98(14) and (15) of the Act which provides:

Chidyausiku CJ

> "(14) Any party to whom an arbitral award relates may submit for A registration the copy of it furnished to him in terms of subsection (13) to the court of any magistrate which would have had jurisdiction to make

an order corresponding to the award had the matter been determined by it, or, if the arbitral award exceeds the jurisdiction of any magistrates court, the High Court.

(15) Where arbitral award has been registered in terms of subsection (14) B it shall have the effect for purposes of enforcement, of a civil judgment of the appropriate court."

Following the registration with the High Court, a warrant of execution was issued by the Deputy Sheriff and the employer's goods have been attached. At the hearing of this matter the employees undertook not to sell in execution C the attached property pending this judgment.

Before launching the present Chamber application, a similar application had been made to the High Court for the stay of execution pending the determination of the appeal by the employer against the decision of the Labour Court to the Supreme Court. The application for the stay of execution was dismissed by Omerjee J. In dismissing the application, the learned judge reasoned as D follows:

"As a matter of law the grounds on which an arbitral award may be set aside were the subject of determination in the case of *Catering Employers Assoc. of Zimbabwe* v *Zim Hotel and Catering Workers Union & Anor* 2001 (2) ZLR 388 (S). At p 391, the Supreme Court stated as follows: E

'An arbitral award may be set aside by the High Court only if –

(a) the party making the application furnishes 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 on that question, under the law of Zimbabwe; or F

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of 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 submission to arbitration, or contains G decisions on matters beyond the scope of the submission or arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or H

2005 (1) ZLR p279

Chidyausiku CJ A

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Model Law.

B (b) The High Court finds, that –

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe; or

(ii) the award is in conflict with the public policy of Zimbabwe.'

Those are the only grounds on which an arbitral award may be set aside by the High Court.'

I also had regard to the contents of the judgment of the Labour Court dated 10 February 2005. Sight must not be lost of the fact that the essence of the matter with which this application is concerned arises from an arbitral award. As such the only basis upon which a superior court may interfere with an arbitral award is on the grounds set out in Article 34(2) outlined D above. The grounds upon which the decision of an arbitrator may be set aside are very limited. Furthermore, the applicants did not establish any grounds upon which a superior court may interfere with the decision made. On this basis alone, I was not persuaded in the grant of a stay of execution. The issue of the correctness or otherwise of the *quantum* is not before me.

That dispute could be referred back to the Labour Court for clarification."

E The employer noted an appeal against the judgment of Omerjee J. That appeal is pending before this court. In an effort to prevent the sale in execution of its attached property before the determination of its appeal against the judgment of Omerjee J and the appeal against the judgment of the Labour Court the applicant filed the present Chamber application. The relief sought F is essentially that there should be no sale in execution until the two appeals noted to this court have been determined. The application is opposed by the employees. Mr *Biti,* for the first respondents, took the preliminary point that this court has no jurisdiction to hear the matter. He argued that the Chamber application can only be made to a court with original jurisdiction. This court only enjoys original jurisdiction in respect of applications made in terms of s G 24 of the Constitution. On that basis alone, this application should be dismissed.

The Chamber application before me is, in effect, an application to stay the sale in execution of the employer's property pending the hearing by this court of an appeal against the judgment of Omerjee J and the judgment of the Labour H Court.

2005 (1) ZLR p280

Chidyausiku CJ

The first issue to be resolved is whether I have jurisdiction to entertain this A Chamber application. This application is not one that involves original jurisdiction. It is ancillary to two appeals this court is already seized with. Once this court is seized with a matter, it has inherent jurisdiction to control its judgment. See *South Cape Corporation* v *Engineering Management Services* 1977 (3) SA 534 and the cases referred to in that case. The inherent jurisdiction to control the court's judgment includes, in my view, jurisdiction to control B the court's process, that is, jurisdiction to determine whether or not execution of a judgment should be permitted pending the hearing of an appeal. I will assume jurisdiction in this case on that basis. I can also assume jurisdiction in terms of s 25 of the Supreme Court Act [*Chapter 7:13*]. I shall revert to this proposition later. It is trite that at common law a party cannot execute a C judgment appealed against: see *South Cape Corporation supra*. The party wishing to execute despite the appeal can, however, approach the court *a quo,* if it has such jurisdiction, for leave to execute despite the noting of an appeal. In the present case, the employees simply sought execution after registering the award without first seeking leave of the court to do so. The employer sought, unsuccessfully, an order from the High Court to stop the execution. D The employees, after registering the arbitrator's award with the High Court, should have applied for leave to execute after the noting of an appeal. In this regard, Corbett JA, in *South Cape Corporation supra* at pp 544H-545H had this to say:

> "Whatever the true position may have been in the Dutch Courts, and more E particularly the Court of Holland (as to which see *Ruby's Cash Store (Pty) Ltd* v *Estate Marks & Anor* 1961 (2) SA 118 (T) at pp 120-3), it is today the accepted common law rule of practice in our courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. To obtain such leave the party F in whose favour the judgment was given must make special application. See generally *Olifants Tin 'B' Syndicate* v *De Jager* 1912 AD 377 at p 481; *Reid & Anor* v *Godart & Anor* 1938 AD 511 at 513; *Gentiruco AG* v *Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) At 667; *Standard Bank of SA Ltd* v *Stama (Pty) Ltd* 1975 (1) SA 730 (A) at p 746. The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to G prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from (*Reid's* case *supra* a p 513). The court to which application for leave to execute is made has a wide general discretion to grant or refuse leave H

2005 (1) ZLR p281

Chidyausiku CJ

> A and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised. See *Voet*, 49.7.3; *Ruby's Cash Store (Pty) Ltd* v *Estate Marks & Anor supra* at p 127. This discretion is part and parcel of the inherent jurisdiction which the court has to control its own judgments (cf. *Fismer* v *Thornton*, 1929 AD 17 at p 19). In exercising this discretion, the court should, in my view, determine what is just and B equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors:
>
> (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
>
> (2) the potentiality of irreparable harm or prejudice being sustained by C the respondent on appeal (applicant in the application) if leave to execute were to be refused;
>
> (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g. to gain time to harass D the other party; and
>
> (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent the balance of hardship or convenience, as the case may be.
>
> See in this connection *Ruby's* case *supra* a pp 127-8; also *Rood* v *Wallach* 1904 TS 257 at p 259; *Weber* v *Spira* 1912 TPD 331 at pp 333-4; *Rand Daily* E *Mails Ltd* v *Johnston* 1928 WLD 85; *Frankel* v *Pirie* 1936 EDL 106 at pp 114-6; *Leask* v *French & Ors* 1949 (4) SA 887 (C) at pp 892-4; *Ismail* v *Keshavjee* 1957 (1) SA 684 (T) at pp 688-9; *Du Plessis* v *van der Merwe* 1960 (2) SA 319 (O). Although

most of the cases just cited dealt with the exercise of the court's discretion under a statutory provision or Rule of Court, the statute or Rule concerned did not prescribe the nature of the F discretion except in broad general terms (eg secs 36 and 39 of Proc. 14 of 1902 (T) empower the court to give directions as

'may in each case appear to be most consistent with real and substantial justice'

and the same general approach would be appropriate to the exercise of a G discretion under the aforementioned rule of practice."

Authorities clearly establish that at common law a decision of a lower court in respect of which an appeal has been noted cannot be executed upon. It can only be executed upon after leave to execute has been granted. No such leave was applied for nor granted *in casu*.

2005 (1) ZLR p282

Chidyausiku CJ

On the facts of the present case, as I have already stated, there was no A application to execute the arbitrator's determination despite the noting of an appeal. It is the employer who sought to stay the execution on the grounds that an appeal had been noted. In my view the employer was entitled to a stay of execution by operation of the law once the employer noted an appeal.

The arbitrator made a determination. The employer appealed against that B determination in terms of s 98(10) of the Act. The effect of the noting of that appeal was to suspend execution of the arbitrator's determination pending a decision of the Labour Court. When the Labour Court dismissed the appeal the employer appealed to the Supreme Court in terms of s 92D of the Act. The noting of that appeal had the effect of suspending the judgment of the Labour Court and the arbitrator's determination. The only circumstances, in terms of C the Act, where the noting of an appeal does not suspend a determination in a labour dispute are set out in s 97 of the Act which provides as follows:

"**97 Appeals to Labour Court**

(1) Any person who is aggrieved by –

(a) any determination or direction of the Minister in terms of section D *twenty five, forty, fifty-one, seventy-nine* or *eighty-two*, or in terms of any regulations made pursuant to section *seventeen*;

(b) a determination made under an employment code in terms of section *one hundred and one*; or

(c) the conduct of the investigation of a dispute or unfair labour practice by a labour officer; or E

(d) the conduct of any proceedings in terms of an employment code;

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; F

(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 its review on a ground referred to in paragraph (b).

(3) *An appeal in terms of subsection (1) shall not have the effect of* G *suspending the determination or decision appealed against.*

(4) Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires" (my emphasis). H

2005 (1) ZLR p283

Chidyausiku CJ

A None of the appeals in this case were made in terms of s 97(1) of the Act and thus protected from suspension upon the noting of an appeal.

The determination of the arbitrator was registered with the High Court in terms of s 98(14) and (15) of the Act.

In terms of the Act, when the employees registered the arbitrator's award it B acquired the same status as a High Court judgment. A High Court judgment in respect of which an appeal has been noted is not executable until the appeal is determined. Execution before an appeal is determined is only permissible upon the leave of the court *a quo*. The record clearly shows that no such leave was granted. Consequently, the arbitrator's determination, by operation of law, is not executable. What the High Court considered and adjudicated upon C was an application to stay execution which stay of

execution was, in my view, already in existence by operation of law, having been triggered by the noting of an appeal. I have serious doubts about the correctness of the judgment of Omerjee J in refusing to grant the stay of execution which was already in existence by operation of law. I would have no difficulty if he had come to the D same conclusion in an application for leave to execute pending appeal and upon consideration of the relevant factors in such an application. I leave these issues open as they have to be determined by this court when it determines the appeal against the judgment of Omerjee J.

Section 25 of the Supreme Court Act provides as follows:

> "**25 Review powers**
>
> E (1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings and decisions of inferior courts of justice tribunals and administrative authorities.
>
> F (2) The power, jurisdiction and authority conferred by subsection (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court.
>
> G (3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court of a judge of the Supreme Court, and provision may be made in rules of court, and a judge of the Supreme Court may give directions specifying that any class of review or any particular review shall be instituted before or shall be referred or remitted to the High Court H of determination."

Chidyausiku CJ

The Deputy Sheriff has issued a warrant of attachment and intends to remove A and sell in execution the employer's property on the basis of a judgment that has been appealed against therefore not executable. This is an irregularity that calls for rectification in terms of s 25 of the Act.

For the avoidance of doubt, I do not wish to be understood to be expressing the view that the employer's appeal has merit. I am simply making the point B that a judgment appealed against is not executable without the leave of the court.

In the result, the warrant of the Deputy Sheriff to attach the applicant's property which appears on page 84 of the record is set aside. To that extent the application succeeds. Costs follow the result and the employees are C ordered to pay the costs.

Gula-Ndebele and Partners, applicant's legal practitioners

Honey & Blanckenberg, first respondent's legal practitioners D

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/POSB v CHIMANIKIRE & ORS 2005 (1) ZLR 285 (H)

POSB v CHIMANIKIRE & ORS 2005 (1) ZLR 285 (H)

Citation 2005 (1) ZLR 285 (H)

Case No HH-30-05

Court High Court, Harare

Judge Makarau J

Heard 19 January 2005

Judgment 23 March 2005

Counsel *W Ncube,* for the applicant
L T Biti, for the respondents

Case Type Opposed application

Annotations No case annotations to date

Flynote

C **Employment** — *trade union — membership of— employee's right to join trade union of his choice — employer having no right to terminate employee's membership in such union*

Practice and procedure — *res judicata — principles — issues necessarily* D *decided in another forum — matter res judicata*

Headnote

The applicant was part of the Posts and Telecommunications Corporation before the Corporation was broken up into smaller units. The applicant's employees had been represented in labour matters by the third respondent, a trade union representing the workers of the PTC as a whole. The E applicant considered that as it was now part of the banking industry, the workers should not be represented by a trade union representing telecommunications workers. It sought permission from the Minister of Labour to withhold the deductions paid on behalf of the workers to the trade union and invited its workers to attend collective bargaining F discussions, by-passing the trade union. The Minister refused permission, on the grounds that an employer cannot decide which trade union its employees should belong to.

On appeal to the Labour Court, the Minister's decision was upheld. The Labour Court's decision was made after the filing of, but before the hearing of, an application for an order restraining the respondents from G interfering in the applicant's relationship with its staff and specifically barring the respondents from representing the interests of its staff in matters affecting conditions of service of its staff.

Held, that the issue in the Labour Court was whether the third respondent would effectively represent the interests of the applicant's staff after the H applicant moved to the banking industry. The Minister, and then the

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Makarau J

Labour Court, ruled that it was not for the applicant to choose who would A best serve the interests of its staff, as such staff have a constitutional right to belong to a trade union of their choice. The same issue was being raised in the present application. Both proceedings revolved around the right of the applicant, as an employer, to choose which trade union its staff should belong to. In deciding that the applicant had no right to hold back the workers' dues to the trade union, the Minister necessarily B decided that the applicant had no right to interfere in the contractual relationship between the third respondent and its members. In so deciding, the Minister necessarily decided that the third respondent could represent the interests of the applicant's staff. There was thus no issue before the court which had not been necessarily decided by the C Minister and in turn by the Labour Court. The matter was thus *res judicata*.

Held, further, that membership of a trade union of one's choice, while entrenched by the provisions of the Constitution of Zimbabwe and the Labour Act, is essentially a matter of contract. The member and the trade union enter into a contract where the member is obliged to pay his dues D in return for representation in certain specified matters by the trade union. The employer is not privy to this contract and has no *locus standi* to terminate the membership of its staff in terms of

the contract between the two. Although the Labour Act gives the employer *locus standi* to make representations when seeking the variation of the registration of the trade union in a particular industry, this does not amend the common E law of contract generally.

Cases cited

Munemo v Muswera 1987 (1) ZLR 20 (S)

Wolfenden v Jackson 1985 (2) ZLR 313 (S) F

Case information

W Ncube, for the applicant

L T Biti, for the respondents

Judgment

MAKARAU J: The applicant filed the above application on 9 October 2002, G seeking an order restraining the respondents from interfering in the applicant's relationship with its staff and specifically barring the respondents from representing the interests of its staff in matters affecting conditions of service of its staff. The application was opposed. H

Makarau J

A In turn, the third respondent filed a counter- application in which it sought an order compelling the applicant to deduct and forward to the third respondent dues deducted from its staff and for an order registering the determination by the Minister of Labour on 2 July 2002 in this regard. This counter-application was in turn opposed.

B The applicant is a statutory corporation that came into being by Act of Parliament in 2001. Prior to that, it was one of the units within the larger Posts and Telecommunications Corporation ("PTC"), also a statutory corporation during its lifetime. At that time, during the lifetime of the PTC, the respondents were the president, secretary and registered trade union respectively of the workers of PTC as a whole, including the workers of the business unit that gave C birth to the applicant.

As a result of its new personality, the applicant regards itself as falling into the Banking Industry, with no ties to the Telecommunications Industry, save in history.

In June 2001, the applicant invited its staff to a Collective Bargaining D Agreement meeting, clearly bypassing and ignoring the respondents. This provoked the ire of the respondents, who wrote to the applicant alleging that it was engaging in unfair labour practices in violation of the national labour laws by seeking to enter into a collective bargaining agreement for its staff in the absence of the third respondent. Correspondence was exchanged between the parties and their legal representatives without the parties agreeing on the E correct legal position. This application was then filed.

Parallel to the events leading to the filing of this application, the applicant had sought the authority of the Minister of Public Service, Labour and Social Welfare to uphold its decision to stop deducting the dues to the third respondent from its staff, in what is commonly referred to as the check off F system. The Minister refused to grant his authority and his decision was taken before the Labour Court on appeal. On 3 May 2004, before the application before me was set down, the Labour Court upheld the decision of the Minister. In its judgment, which I find well reasoned, the Labour Court had this to say on page 5 of the cyclostyled judgment:

> "The Minister refused to ratify the position taken by the applicant on the G basis that the appellant, as the employer, cannot decide which trade union the employees should belong to. The Minister noted that the employees still wanted H to belong to the Respondent in line with their freedom of association.
>
> The appellant did not challenge the fact that its employees still wanted to belong to the respondent. Its main argument being that the respondent

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Makarau J

> no longer represents its employees' interests who are now in the banking A industry.

'*That may well be so, but that in itself does not give the applicant the right to dictate which union its employees should belong to. That was the basis of the Minister's decision which we agree with*'" (emphasis is mine).

Prior to hearing argument on the merits of the matter, I requested counsel to B address me on whether this court still enjoyed jurisdiction over the application in view of the amendment to the Labour Act [*Chapter 18.01*] that came into force on 30 December 2002. Both counsel were unanimous in their view that the amendment to the Labour Act giving exclusive jurisdiction in the first instance to the Labour Court in certain specified matters did not have any C application to the above application as it was filed on 9 October 2002, two months prior to the gazetting of the amendment.

In coming to this conclusion, both counsel relied on the two principles in the construction of statutes against retrospectivity and ouster of jurisdiction. I find myself in agreement with the views of counsel that this court still enjoys jurisdiction in this application where *litis contestatio* occurred prior to the D promulgation of the amendment to the Act. Since the issue of jurisdiction is not disputed, it is not necessary that I detail the arguments advanced in support of the position that this court enjoys jurisdiction in this matter.

In view of the fact that the Labour Court handed down its decision prior to the hearing of this application, an issue *in limine* was taken at the resumed hearing E of the matter. This was whether the merits of the application were *res judicata*, having been determined by the Labour Court.

The essential elements of the *exceptio rei judicata* are settled in our law. A comprehensive discussion of these is to be found in *Wolfenden* v *Jackson* 1985 (2) ZLR 313 (S) where Gubbay JA (as he then was) reviewed some old authorities before holding that the requirements of the *exceptio* are that the F previous proceedings must have been between the same parties or their privies and that the same question must arise. In addition, the parties must be estopped from disputing any issue necessarily decided by the court in reaching its decision. This formulation of the essential requirements of the *exceptio* has been followed in this jurisdiction in other cases: see *Munemo* v G *Muswera* 1987 (1) ZLR 20 (S).

In addressing the issue of whether or not the matter before me had been decided by the Labour Court, Mr *Ncube* for the applicant sought to argue that the Labour Court had left the matter between the parties open by suggesting that the applicant could have applied for variation of the registration of the H

2005 (1) ZLR p289

Makarau J

A third respondent. He relies on the following passage that appears at page 8 of the judgment of the Labour Court:

"Given the appellant's position it should have made an application in terms of s39 of the Act to the Registrar for the variation of the registration of the union in so far as it applied to the union's representation of its workers. The variation so sought would have enabled the appellant to argue its B case that adequate representation of its workers could not be catered for under this union since they were now in the Banking Industry."

As detailed above, the applicant is of the view that the third respondent, registered initially in the Communications Industry, cannot effectively represent its workers who are now in the Banking Industry.

C I do not read the above suggestion by the Labour Court as an indication that its determination in upholding the decision of the Minister was an interlocutory ruling, pending the application for the variation of the registration of the third respondent. It was a definitive judgment that put an end to the proceedings between the parties. It ended the litigation between them. As observed by Gubbay JA in the *Wolfenden* case *supra*, at 316B-C, the *exceptio rei judicatae* D is based principally upon the public interest that there must be an end to litigation and litigants should not be allowed to plough the same field twice or to forum shop, hoping for a different result.

It is my view that the applicant is hoping that this court will come to a different position from that adopted by the Labour Court. If that is correct, then it erred, E for the *exceptio* will hold in favour of the respondents. The issue before the parties in the Labour Court, albeit on appeal from the decision of the Minister, was whether the third respondent would effectively represent the interests of the applicant's staff after the applicant moved to the Banking Industry. The Labour Court ruled that it

was not for the applicant to choose who would best serve the interests of its staff as such staff has a constitutional right to belong F to a trade union of its choice. The same issue is raised in the application before me, where the applicant seeks an order restraining the respondents from representing its staff. The applicant still seeks to choose a trade union for its staff by refusing to deal with the trade union that its staff is happy to belong to. Both proceedings revolve around the right of the applicant, as an employer, to choose which trade union its staff should belong to. Thus, in the proceedings G before the Minister, the applicant sought to hold back the dues that its staff is obliged to pay to the third respondent. In deciding that the applicant had no such right, the Minister necessarily decided that the applicant had no right to interfere in the contractual relationship between the third respondent and its members, part of whom constitute the staff of applicant. In deciding that H the applicant could not stop deducting the dues due to the third respondent,

the Minister necessarily decided that the third respondent could represent the A interests of the applicant's staff. I do not find any issue before me that was not necessarily decided by the Minister and the Labour Court in turn when it upheld the decision of the Minister.

In the result, and on the basis of the foregoing, the applicant is estopped from disputing any of the issues necessarily determined by the Minister in the first B instance and by the Labour Court on appeal. The *exceptio* raised by the respondents is valid and disposes of the matter before me.

Assuming that I am wrong in holding that the matter before me is disposed of by the *exceptio*, I would still have dismissed the application on the merits.

It is trite that membership to a trade union of one's choice, while entrenched by the provisions of the Constitution of Zimbabwe and the Labour Act, is C essentially a matter of contract. The member and the trade union enter into a contract where the member is obliged to pay his or her dues in return for representation in certain specified matters by the union. The applicant, as employer, is not privy to this contract and has no *locus standi* to terminate the membership of its staff in terms of the contract between the two. As pointed D out by the Labour Court in its judgment referred to above, the Labour Act gives the employer *locus standi* to make representations when seeking the variation of the registration of the trade union in a particular industry. Thus, to illustrate the point by using the absurd example given in the applicant's affidavit, if a brick-layer exercises the freedom of choice guaranteed him in the Constitution to join a teachers' trade union, and the teachers trade union seeks to be E registered in the construction industry to protect the interests of its bricklayer member, then at the hearing of that application for the registration of the trade union in respect of the Construction Industry, that Industry can make representations in terms of the Act against the registration of the union and give reasons why it objects to the teachers' union representing the interests F of the bricklayer. Once the teachers' trade union is registered in terms of the Act, the bricklayer's employers are obliged to sit down with that teachers' trade union to negotiate the conditions of service of the bricklayer. This is trite and it reflects the extent to which the labour law protects the rights of workers to belong to trade unions of their choices. The right given by the Act to employers to make representations during the registration of a trade union is, G in my view, in recognition of the lack of *locus standi* on the part of the employer at common law to interfere in the contractual relationship between a trade union and its members. The right as given by the Act cannot be read to amend the common law of contract generally. In the absence of variation of registration proceedings relating to the third respondent brought in terms of the provisions H

A of the Labour Act, the applicant has no *locus standi* at common law to interfere in the contractual relationship between a trade union and its members.

In view of the conclusion, I have arrived at in this matter, it appears unnecessary to me that I deal with the procedural issues raised in the matter by the respondents. These relate to the authority of the deponent to the applicant's B affidavit to bring the application on behalf of the applicant and the alleged failure by the applicant to cite the individual employees who are members of the third respondent.

In the result, I make the following order:

1. the application is dismissed. C
2. the determination by the Minister of Labour made on 2 July 2002 is hereby made an order of this court.
3. the applicant is to pay the respondents' costs.

Coghlan Welsh& Guest, the applicant's legal practitioners

D *Honey & Blankenberg*, the respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/S v KAJOKOTO 2005 (1) ZLR 292 (H)

S v KAJOKOTO 2005 (1) ZLR 292 (H)

Citation	2005 (1) ZLR 292 (H)
Case No	Judgment No. HH-32-05
Court	High Court, Harare
Judge	Gowora J
Heard	12 April 2005
Judgment	12 April 2005
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure — *admissions — procedure to be followed where prosecutor seeks admissions from accused — prosecutor not entitled to* C *interrogate accused to obtain admissions*

Headnote

The accused in a criminal trial pleaded not guilty and outlined the basis for his defence. The prosecutor applied for admissions of fact from the accused. When the application was granted, the prosecutor proceeded D to interrogate the accused, as a result of which the accused made various admissions. At the end of the interrogation, the accused was found guilty.

Held, that the magistrate did not comply with the requirements of s 314(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The magistrate should have ascertained from the prosecutor what facts it was intended E to be sought as admissions. It was the duty of the magistrate, not the prosecutor, to ask the accused person if he was willing to admit the facts concerned in order to obviate the need to adduce evidence. It was also the magistrate's duty under s 314(3) to warn the accused that he was not obliged to make any admissions. The

magistrate did not so warn the accused. The admissions envisaged by the section are for purposes of F clarifying the facts in issue or those facts which do not appear to be in dispute. It is not intended under this section to give the prosecutor an opportunity to cross-examine the accused and force him to make admissions in the absence of any evidence from the State.

Legislation considered G

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 314(2) & (3)

Judgment

GOWORA J: The accused was convicted of one count of contravening s 52(2) of the Road Traffic Act [*Chapter 13:11*] H .

2005 (1) ZLR p293

Gowora J

A The allegations against the accused were that the accused was travelling north along Second Street. A cyclist then entered the road and attempted to cross in front of the accused. He was struck by the accused before he could cross the road. He fell down on the tarmac sustaining injuries from which he died on arrival at the hospital.

B The motor vehicle being driven by the accused did not stop after the impact. Instead, it veered to the right in the path of oncoming traffic and collided with the cyclist who sustained serious injuries as a result.

It was alleged against the accused that he had driven at an excessive speed in the circumstances and had failed to stop or act reasonably when a collision seemed imminent. He had also allegedly failed to keep a proper lookout, sound C a horn, keep the vehicle under proper control and keep in the correct lane after an impact. He was also alleged to have turned across the path of an oncoming vehicle.

When the charge was put to the accused, he tendered a plea of not guilty. He was then requested to outline the basis of his defence and he duly complied. D Thereafter the prosecution made an application for admissions and the application was granted. The prosecutor then proceeded to cross-examine the accused. In his response to the prosecutor, the accused made certain admissions. At the end of the cross-examination, the accused was found guilty of the offence.

Although the prosecutor did not make reference to a particular section of the E Criminal Procedure and Evidence Act [*Chapter 9:07*], the section relating to admissions is s 314, subs (2) of which provides:

> "If he considers it desirable for the purposes of clarifying the facts in issue or for obviating the adduction of evidence on facts which do not appear to be in dispute, the judge or magistrate may, during the course of a trial F or a preparatory examination and on application by the prosecutor, the accused or his legal representative, ask the accused or his legal representative or the prosecutor as the case may be, whether any fact relevant to the issue is admitted in terms of this section."

The trial court did not comply with the provisions of the section. The magistrate should have ascertained from the prosecutor what facts it was G intended to be sought as admissions. It was the duty of the magistrate, not the prosecutor, to ask the accused person if he was willing to admit the facts concerned in order to obviate the need to adduce evidence. The admissions envisaged by the section are for purposes of clarifying the facts in issue or those facts which do not appear to be in dispute. It is not intended under this H section to give the prosecutor an opportunity to cross-examine the accused and force him to make admissions in the absence of any evidence from the A State.

2005 (1) ZLR p294

Gowora J

Once the accused had tendered a plea of not guilty to the charge, the State should have adduced evidence to establish the guilt of the accused beyond a reasonable doubt. The admissions wrung from the accused person as a result of the questions put to him by the prosecutor cannot and do not constitute B an unequivocal admission of the offence and all the essential elements.

In his defence outline, the accused had put across a defence and it was incumbent upon the State, in order to establish the guilt of the accused, to call evidence in support of the charge.

Subsection (3) of s 314 obliges the judicial officer conducting the trial to warn C an unrepresented accused that he was not obliged to make any admissions. In this case no such warning was given to the accused person.

The conviction, in any view, is unsafe and should be quashed.

The scrutinising regional magistrate, in his comments, stated that the accused has been tried separately for the death of the cyclist. I agree that this would cause extreme prejudice to the accused, especially as regards the issue of D sentence. The charges arose out of the alleged negligent driving on the part of the accused. Two people were injured, one fatally, with the other sustaining serious injuries. In his reasons for sentence, the magistrate stated that the accused had admitted causing the death of the cyclist. Although the accused had not been tried for culpable homicide, the death of the cyclist was a factor E taken into account in deciding on the sentence. The prejudice to the accused is clearly obvious.

In the result, I make the following order:

It is ordered that the conviction of the accused is hereby quashed and the sentence is set aside. F

Kamocha J concurs. G

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/SHUMBA v SHUMBA 2005 (1) ZLR 295 (H)

SHUMBA v SHUMBA 2005 (1) ZLR 295 (H)

Citation	2005 (1) ZLR 295 (H)
Case No	Judgment No. HB-25-05
Court	High Court, Bulawayo
Judge	Cheda J & Ndou J
Heard	7 June 2004
Judgment	21 April 2005
Counsel	Appellant in person *R Nyathi,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Customary law — *child — legitimacy — child born during subsistence of* C *customary law marriage — presumption of legitimacy*

Family law — *child — legitimacy — child born during subsistence of customary law marriage — presumption of legitimacy*

Headnote

By African law, the custody and guardianship of children born in wedlock D rests on the father. There is a presumption of legitimacy and that the husband is the father of the children. There is a presumption against bastardising a child. Generally, children born of, or conceived by, a wife during the course of her customary marriage, whether legitimate or adulterine, belong to her house, and so to her husband. Under Shona law, any children born in wedlock are automatically affiliated to the husband's E family. This rule is ascribed to the payment of "roora" bride wealth, which operates to transfer the woman's child bearing powers to her husband.

Cases cited

Cruth v Manuel 1999 (1) ZLR 7 (S)

Elizabeth & Mzeze v Gwandibva 1941 SRN 121

Hlale v Dziyake 1938 SRN 34

Kulumo v Diyana & Ors 1944 SRN 35

Ndoro v Mapfumo 1942 SRN 166

Tiwandire v Chipanda HB-12-04

Case information

Appellant in person

R Nyathi, for the respondent

Judgment

NDOU J: The appellant, a major in the Zimbabwe National Army, based at the Zimbabwe Staff College, filed an application for custody on 23 January 2003. The matter was heard by the Provincial Magistrate on 7 July 2003 and he

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Cheda J

dismissed the application. The appellant then raised the same application, on A a photocopy of an affidavit of the matter previously dismissed on 7 July 2003. This matter was set down for 14 March 2003 before a different Provincial Magistrate. The latter magistrate dismissed the application by reason of the fact that the matter was *res judicata*. The appellant now appeals against the decision of the first Provincial Magistrate. The judgment appealed against B was handed down on 7 July 2003. This matter was initially set down for 24 May 2004. The respondent's heads of argument were filed on that day. The appellant did not have his heads of argument ready. We indulged him and postponed the matter to 7 June 2004. On the later date, the appellant filed his heads of argument. Generally the appellant did not conduct his case with efficiency and reasonable promptness. As he is a self-actor, we allowed him C to be heard on the merits.

The background facts of the dispute are the following. The parties have been married to each other for a period in the region of 15 years. There are children born out of their union. Of their children, only two, *viz.* S and K are in the centre of the dispute. The appellant protests that they are not his children. These children were born *stante matrimonio*. By African Law on which the appellant D placed reliance the custody and guardianship of such children born in wedlock rests on the father, i.e. the appellant. There is a presumption of legitimacy. There is therefore a presumption that the husband is the father of the children. There is a presumption against bastardising the child: see *Kulumo* v *Diyana & Ors* 1944 SRN 35*; Hlale* v *Dziyake* 1938 SRN 34; *Ndoro* E v *Mapfumo* 1942 SRN 166 and *Elizabeth & Mzeze* v *Gwandibva* 1941 512 N 121. In other words, generally children born of, or conceived by a wife during the course of her customary marriage, whether legitimate or aldutrine, belong to her house, and so to her husband. I think it is high time that we acknowledge the futility and cruelty of penalising children for their parents' sexual misdemeanours. We should regard equality of status as a basic human right: F see *A Sourcebook of African Customary Law for Southern Africa* by T W Bennett (1995) pp 359-360; United Nations Declaration (1989) 28 ILM 1448;

Article 25(2) of Universal Declaration of Human Rights 1948; Article 10(3) of the International Convention on Economic, Social and Cultural Rights 1966 and Article 2 of the Convention on the Rights of the Child 1989. In *casu*, the G appellant is heavily focused on the Shona customary rules of affiliation with a corresponding disregard of the welfare and interests of two children, S and K, born *stante matrimonio*. But even under Shona law, because the respondent was married to the appellant, any children she bore in wedlock are automatically affiliated to the appellant's family. This rule is ascribed to the payment of "roora" bride wealth, which operates to transfer the woman's child bearing H

2005 (1) ZLR p297

Cheda J

A powers to her husband: see *Shona Customary Law, with reference to Kinship, Marriage, the Family and the Estate* by J F Holleman, 1952 OUP (Cape Town) at 242-259 and *A Sourcebook of African Customary Law For Southern Africa supra* at 365.

Notwithstanding his strong belief in customary law, supernatural and black B magic, the appellant surprisingly contracted a civil marriage. This fact impacts on the legal consequences of their marriage inclusive of the question under consideration. The drama that is discernible from the appellant's case has, unfortunately, grave consequences for the children concerned. The appellant, in the court *a quo*, disputed paternity. He also alleged that one of the children, with downs syndrome, thus requiring specialised care, is a goblin. The C challenge resulted in paternity tests being carried out in respect of child S. The blood samples were extracted by the Medical Director of the National Blood Transfusion Services of Zimbabwe. They were sent to the Laboratory for Tissue Immunology at the University of Cape Town in South Africa. The blood samples were tested and analysed at the said institution by Professor E D du Toit. The institution is European Federation accredited. The result of D DNA tests according to Professor du Toit, provide evidence that the appellant cannot be excluded as possibly being the biological father of child S. The essence of the appeal is that the appellant wants the DNA tests to be carried out afresh. He however does not challenge the findings of Professor du Toit. His case is that there was magical tampering with the blood samples before E they got to Professor du Toit's laboratory. He submits that such tampering was carried out by goblins or other manifestations of the supernatural.

His case is that he was denied an opportunity by the trial court of calling a witness to such tampering by goblins with the blood samples between Harare and Cape Town.

Ill-equipped with the capacity to call and hear evidence from goblins or some F other supernatural manifestations the court *a quo*, correctly in my view, dismissed the application. This appeal is, therefore, also based on the appellant's obsessive, and possibly hopelessly distorted belief in the supernatural, goblins and other such manifestations, an area any court of law is ill-equipped to determine. The appellant is entitled to believe what he wants G to, but that does not translate to anything useful in a court of law. He cannot use such beliefs in seeking legal remedy. There was overwhelming scientific evidence of paternity at the disposal of the court *a quo.* The trial court arrived at a decision based on all the evidence before it, inclusive of the scientific medical evidence. Parents of children cannot shun their responsibilities on the H basis of evidence which taps into the spiritual, the magical or the supernatural.

2005 (1) ZLR p298

Cheda J

The courts of law are constrained by principles of practice and good logic A developed over centuries to deal only with evidence that can allow for objective assessment. In any event, what the appellant is alleging borders on a contravention of the provisions of the Witchcraft Suppression Act [*Chapter 9:19*] whose general objective is to prevent the imputation of witchcraft and the activities in general of the diviner. The Act may have its own B shortcomings but it is the law: see *Traditional Healers and the Shona Patient* – by G L Chavunduka at p 97. The bottom line is that it is the law of land and must be obeyed. The criticisms that the appellant levelled against the Act are purely academic and have no bearing or relevance in court. If the law is bad, it is the legislature that should intervene and not the court: see *Cruth* v *Manuel* 1999 (1) ZLR 7 (S) at 16B-C and *Tiwandire* v *Chipanda* HB-12-04. C

Accordingly, there is no legal basis for reversal of the decision of the court *a quo*. It is therefore, ordered that the appeal is dismissed with costs on a legal practitioner and client scale.

Cheda J concurred. D

Appellant in person

Marondedze, Nyathi, Majome and Partners, respondent's legal practitioners

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Source:
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CHAFADA v EDGARS STORES LTD & ANOR 2005 (1) ZLR 299 (H)

Citation	2005 (1) ZLR 299 (H)
Case No	Judgment No. HB-27-05
Court	High Court, Bulawayo
Judge	Cheda J
Heard	18 March 2005
Judgment	28 April 2005
Counsel	*C P Moyo*, for the applicant
Case Type	Urgent application
Annotations	Link to case annotations

Flynote

C**Legal practitioner** — *conflict of interest — attesting affidavit or signing certificate of urgency for client of practitioner's own firm — whether improper*

Practice and procedure — *affidavit — attestation — whether legal practitioner may attest affidavit sworn by own firm's client*

D**Practice and procedure** — *application — urgent application — certificate of urgency — signing — whether legal practitioner may sign certificate for application brought by own firm's client*

Headnote

It is improper for a legal practitioner to act in a matter in which he has an interest, so it is totally undesirable for a practitioner to attest an affidavit, E or to sign a certificate of urgency in terms of r 242 of the High Court Rules, 1971, for or on behalf of a client who is being represented by his firm.

Cases cited

Pretoria Bill Posting Co. v Hess 1911 TPD 360

S *v* Rolomane 1971 (4) SA 100 (E)

F Smith *v* Hancock [1894] 2 Ch D 377 (CA)

Legislation considered

High Court Rules, 1971 (RGN 1047 of 1971), O 32 r 242(2)(b)

Case information

G *C P Moyo*, for the applicant

Judgment

CHEDA J: This is an urgent chamber application filed on 8 March 2005, seeking to suspend a judgement obtained by the first respondent against the applicant. H It was, however, granted on 14 March 2003.

2005 (1) ZLR p300

Cheda J

Nothing turns on this application *per se* except for the certificate of urgency A signed by the legal practitioner in terms of r 242(2)(b) which states that:

> "242 **Service of Chamber Applications**
>
> (2) Where an applicant has not served a chamber application on another party because he reasonably believes one or more of the matters referred to in paragraphs (a) to (e) of subrule (1) – B
>
> (a) ...
>
> (b) unless the applicant is not legally represented, the application shall be accompanied by a certificate from a legal practitioner setting out, with reasons, his belief that the matter is uncontentious, likely to attract perverse conduct or urgent for one or more of the reasons set out in paragraphs (a), (b), (c), (d) or (e) of subrule (1)." C

The issue is whether or not it is proper for a legal practitioner from the same firm as that of the applicant to certify the said certificates. The determinant factor in my view is that of interest in the matter at hand. Of late, this court has been inundated with urgent chamber applications accompanied by certificates signed by legal practitioners and affidavits deposed to by litigants and D attested to by legal practitioners in their capacities as commissioners of oaths from the same legal firms.

In my view, it is improper for a legal practitioner to act in that matter as he has an interest in the matter at hand. The interest in the matter is grounded on two factors. Firstly, that he has a pecuniary interest in the earning of fees from the said client. Secondly, that he is interested in promoting the goodwill of his firm E by bringing his client's affairs to a successful conclusion. In other words, it means a financial and not a mere social or ethical interest or view. This principle was clearly laid down in *Smith* v *Hancock* [1894] 2 ChD 377 (CA). The same principle was also adopted in the case of *Pretoria Bill Posting Co* v *Hess* 1911 TPD 360.

In *S* v *Rolomane* 1971 (4) SA 100 (E) at 101-102, Jennett JP remarked: F

> "no doubt the courts require for the admissibility of affidavits tendered in evidence that they be attested by a commissioner of oaths who is impartial, unbiased and independent in relation to the subject-matter of those affidavits."

To my mind, it is totally undesirable for a legal practitioner to either attest to G an affidavit or sign an urgent certificate for and on behalf of a client who is being represented at his firm as such lawyer clearly has an interest in the matter at hand. H

2005 (1) ZLR p301

Cheda J

A Legal Practitioners are therefore guided accordingly.

Ndou J concurred.

B *Majoko & Majoko,* applicant's legal practitioners

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FUYANA v MOYO & ORS 2005 (1) ZLR 302 (H)

Citation	2005 (1) ZLR 302 (H)
Case No	Judgment No HB-39-05
Court	High Court, Bulawayo
Judge	Cheda J
Heard	8 April 2005; 12 April 2005
Judgment	28 April 2005
Counsel	*S Sibanda,* for the applicant *T Moyo,* for the respondent
Case Type	Civil Application
Annotations	No case annotations to date

Flynote

Costs — *legal practitioner and client scale — lack of bona fides and* C *deplorable conduct*

Court — *contempt of court — disobedience to court order — imprisonment for — release from imprisonment — need for contemnor to purge contempt by obeying order* D

Headnote

The applicant was imprisoned for contempt of court. In earlier litigation he had been ordered to surrended the title deeds to a property, failing which he would be imprisoned for three months. He refused, and was imprisoned. The order also stated that duplicate deeds could be issued for the purpose of transferring the property. This was done and the property E was transferred. The applicant then sought his release from prison, arguing that the contempt had been cured by the transfer of the property and that imprisonment served no further purpose.

Held, the applicant had missed the point. The issue was that he had disobeyed a court order, the sanction for which was a period of imprisonment. To avoid further incarceration he should obey the court F order and surrender the title deeds.

Cases cited

Clement v Clement 1961 (3) SA 861 (T)

Consolidated Fish Distributors P/L v Zive & Ors 1968 (2) SA 517 (C) G at 522

Case information

S Sibanda, for the applicant

T Moyo, for the respondent H

Cheda J

Judgment

A **CHEDA J**: On 8 April 2005 the applicant filed an urgent application seeking the following relief:

"**Interim Relief Granted**

That this order shall operate as an interim interdict until the order is confirmed and/or pending the finalisation of the Supreme Court Appeal B under case number SC-236-00

1. That the applicant's obligations, in the main action, be and are hereby declared discharged.
2. That the writ of civil imprisonment be and is hereby suspended.
3. That the second and third respondents be and are hereby ordered to release the applicant from Bulawayo Prison. C
4. That this order shall be served upon the first respondent by the Deputy Sheriff and upon the second and third respondents by the applicant's legal practitioners."

The historical background of this matter is that the applicant and the respondent have had a long dispute regarding ownership of a certain house D in Bulawayo. On 12 July 2002 in case HC 3385/01 this honourable court made the following order against the applicant:

"It is ordered that:

(a) The first respondent be and is hereby ordered to surrender the title deeds, in respect of stand number 11747 Nkulumane suburb, Bulawayo held under deed of transfer registration 4631/98 to the Deputy Sheriff E within 6 days of service of this order upon him failing which the first respondent be and is hereby deemed to be in contempt of court and is hereby committed to Bulawayo Prison to serve a prison term of 3 months provided that at any time during his imprisonment, the first respondent shall be entitled to his release if he complies with the High Court order in the main action. F

(b) Should the first respondent for any reason, finally fail to comply with the court order in the main action, the second respondent be and is hereby directed to issue out to the Deputy Sheriff, a duplicate copy of deed of transfer registration number 4631/98 held under the name of the first respondent, only for the purposes of transfer of the same property into the name of the applicant."

G The applicant did not obey that order. The first respondent subsequently took transfer of the said property by virtue of para (b) of the said order. As the applicant did not comply with that order, he was subsequently arrested for contempt of court and was lodged in prison which then culminated into this H urgent application.

2005 (1) ZLR p304

Cheda J

Mr *S Sibanda* for the applicant has argued that the applicant should be A released from prison on the basis that:

1. the contempt which he had committed by refusing to transfer the Title Deed had been cured by the transfer of the property by the Deputy Sheriff; and
2. that the imprisonment does not serve any purpose at this stage as the first B respondent has now obtained her order.

Mr *Moyo* for the first respondent has argued that the applicant is in contempt and should not be heard. He further argued that the applicant has sought to mislead the court in this application, firstly, by alleging that it was the first respondent who filed the application in case number 4295/98 yet he is the one C who had done so and secondly that he had appealed against the judgment of Cheda J (as he then was) in case number 3385/01 which in fact was not true.

There is a valid order in operation but the applicant has refused to comply with it. In fact in his own words he said "I refused to surrender my Title Deeds". It is trite law that disobedience of an order by a competent court results in contempt. In para (a) of the order by Cheda J (as he then was) it is clear that D he ordered the applicant to surrender the Title Deeds failing which the applicant should be held in contempt. There are three requirements for contempt procedure:

1. that an order was granted by a competent court.
2. that the respondent was indeed served with the said order or that it was E brought to his attention; and
3. that the respondent has either disobeyed it or has neglected to comply with it: see *Consolidated Fish Distributors P/L* v *Zive & Ors* 1968 (2) SA 517 (C) at 522.

I agree with Mr *Moyo* that a party who is in contempt should not be heard, in F fact this is the law. The person remains in contempt until he purges his contempt. The court will however, follow this course in the absence of urgency: see *Clement* v *Clement* 1961(3) SA 861. The applicant has been arrested and is in prison. This dispute has been going on since 1998. There have been applications and counter applications. Litigations must come to finality. It is for the above reasons that I allowed the applicant to be heard, G thereby departing from the usual procedure.

On the merits, I find that the applicant flagrantly disobeyed the order and in his own words states in his affidavit " I refused to surrender my Title Deeds". This is an open defiance of a court order. He obviously holds this court in contempt. He can not therefore seek a redress from the same court which he H holds in contempt.

2005 (1) ZLR p305

Cheda J

A His argument that the first respondent should not bother with the insistence on his incarceration because he is now in possession of the said Title Deeds is to me to miss the fundamental point in this matter. He has not obeyed the order, that is all. The alternative order was to serve a situation where the applicant refuses to sign the transfer papers. This in my view, was to avoid the unnecessary delay on the first respondent's part in executing her order. B However, the matter does not end there, the court saw it fit to impose a sanction on the applicant in the event of his failure for whatever reason to surrender Title Deeds. He has refused to do so, therefore, it logically follows that he should be arrested for contempt and sent to prison. For him to avoid the incarceration he should therefore surrender the Title Deeds and thereafter his C cherished liberty will be restored without further ado. Mr *Sibanda*'s argument, therefore, that his imprisonment is nothing but harassment is misplaced. I should add that in addition to the applicant's attitude it appears that he found solace from his legal advisers who were all the time advising him that he was correct in his defiance of a court order. I say so in reference to a letter of 30 March 2005, by Mr *Moyo,* addressed to both Messrs *S K M* and *S Sibanda* D where he said:

> "For that reason, the writer completely disagrees with Adv. S K M Sibanda *where he says a delict is being committed by Fuyana's incarceration*." (my emphasis)

It is therefore clear to me that Mr *Moyo* went to pains to explain to the E applicant's legal practitioners the correct legal position with regards to a contempt of court order.

This is borne out by Mr *Moyo*'s informative paragraph in the same letter where he further stated:

> "Our major concern is that from our conversation it seems your client is not prepared to release the Title Deeds in spite of the fact that we have advised F you that he is continuing to sell the house to various people … We further confirm that in our conversation with Mr *Sibanda* yesterday, we had agreed that once the Title Deeds were surrendered there was no need to keep Mr Fuyana in goal."

It is therefore clear to me that while the applicant is a stubborn man, his attitude was exacerbated by wrong legal advice. The correct legal position with regards G to disobedience of a court order is well known by every legal practitioner. It is certainly improper for a legal practitioner to urge a litigant to defy a court order on the basis of some unfounded delictual claim. The applicant is in contempt of court and remains in that position until he purges that contempt. In as much as the respondent is now in possession of the new Title Deeds H in her name, the applicant has a duty to obey that order. In fact I do not see

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2005 (1) ZLR p306

Cheda J

any reason for his refusal to do so if he is not harbouring an ulterior motive A and it is those motives the court would like to curb. The said court order is absolute and it must be obeyed as it is. Defiance of that order on the basis of some misconception of the law can not be tolerated.

The applicant has applied for costs at a higher scale. The general rule is that the courts are averse in making an order for attorney and client costs. The B courts have, however, departed from this general rule if there is dishonesty on the part of the losing litigant. *In casu*, the applicant has been untruthful in his averments namely that it was the first respondent who had instituted proceedings in case number 4295/98 and that he had appealed against the judgment in case number 3385/01. There is therefore an absence of *bona fides* on his part. The second justification for such departure is where the losing C party has shown a deplorable attitude towards the court: see *Caluza* v *Min of Justice & Anor* 1969 (1) SA 251 (N). *In casu*, the applicant having disobeyed the court order,

proceeded to institute these proceedings when he knew that he had not purged his contempt. In my view, the circumstances are ripe for the award of costs on the punitive scale.

In conclusion, this application is accordingly dismissed with costs on the D attorney and client scale.

Advocate S K M Sibanda & Partners, applicant's legal practitioners E

Hwalima, Moyo and Associates, respondent's legal practitioners

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CHICHERA v ATTORNEY-GENERAL 2005 (1) ZLR 307 (S)

Citation	2005 (1) ZLR 307 (S)
Case No	Judgment No. S-98-04
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA, Ziyambi JA, Malaba JA & Gwaunza JA
Heard	15 March 2004
Judgment	5 May 2005
Counsel	Mrs *J B Wood,* for the applicant *N Mutsonziwa*, for the respondent
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

C **Constitutional law** — *Constitution of Zimbabwe 1980 — Declaration of Right — s15(1) — prohibition against torture or inhuman or degrading punishment — includes punishments which are grossly disproportionate to the seriousness of the offence — mandatory minimum sentence irrespective of seriousness of offence — test of proportionality — must be applied generally and not on an individual basis — punishment must* D *be so excessive as to shock or outrage contemporary standards of decency — special circumstances — provision whereby mandatory minimum sentence not applicable where special circumstances found — sufficient safeguard against the imposition of a sentence which might otherwise have been considered grossly disproportionate*

E **Criminal procedure (sentence)** — *statutory offences — Drugs and Allied Substances Control Act [Chapter 320 of 1974] — possession of dangerous drugs — mandatory minimum sentence of 20 years imposed in 1995 — s 44(2) of the Act subsequently repealed so as to remove the mandatory minimum provision — in 1995 society would not have been outraged by the sentence*

F **Criminal procedure (sentence)** — *statutory offences — Drugs and Allied Substances Control Act [Chapter 320 of 1974] — s 44(2) — special circumstances — mandatory minimum sentence — such sentence not mandatory if special circumstances found — sufficient safeguard against the imposition of a sentence which might otherwise have been* G *considered grossly disproportionate*

Headnote

Section 15(1) of the Constitution, which provides that no " …person shall be subjected to torture or to inhuman or degrading punishment or other such treatment", applies not only to punishment which are in their nature H inhuman of degrading, it also extends to punishments which are grossly

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2005 (1) ZLR p308

Cheda J

disproportionate to the seriousness of the offence (*dicta per* Gubbay A JA in *S* v *Ncube and Ors* 1987 (2) ZLR 246 (S) at 265; 1988 (2) SA 702 (ZS) at 715 followed)

The test of proportionality must be applied generally and not on an individual basis. The question is not whether the sentence is too severe having regard to the particular circumstances of an offender, but whether it is B cruel and unusual outrage to standards of decency, having regard to the nature and quality of the offence committed, and therefore too severe for any person committing the same offence (*dicta per* McIntyre J in *Smith* v *R* [1988] LRC (Const) 361 at 391 followed)

The question is whether a sentence can be regarded as so inhuman or degrading in its disproportionality to the seriousness of the offence C in that no — one could possibly have thought that the particular offence would have attracted such a penalty, the punishment being so excessive as to shock or outrage contemporary standards of decency. This question must be determined having regard to current norms and expectations of the society in which the D sentence is imposed and at the time it was imposed.

On 30 June 1995, the applicant was convicted in the magistrates court of contravening s 44(1) of the then Drugs and Allied Substances Control Act [*Chapter 320 of 1974*]. She had been found in possession of over 1 000 mandrax tablets. Acting in terms of s 44 (2) of the Act, the court E sentenced her to 20 years in prison, this being, in the absence of a finding of special circumstances, the mandatory minimum sentence in respect of those unable to pay additional fine prescribed by the subsection. In 2001, s 44(2) of the Act was repealed and substituted by a provision which abolished the former mandatory minimum sentence. The name of the Act itself was changed, so as to become the Medicines and Allied Substances F Control Act [*Chapter 15:03*]. In seeking to set aside the sentence of 20 years' imprisonment, it was argued on her behalf that her constitutional rights had been infringed because such a sentence constituted a cruel and unusual punishment as contemplated by s 15(1) of the Constitution. It was further argued that the fact that the mandatory minimum sentence did not have to be imposed where special circumstances are found to G exist, did not detract from the fact that applicants rights had been violated. In dismissing the application, it was:

Held, that in 1995 Zimbabwean society would not have considered the mandatory sentence so excessive as to shock or outrage contemporary standards of decency. Parliament is in a better position than the courts H

2005 (1) ZLR p309

Cheda J

A to determine the class of crimes which endanger the economic and moral fabric of the nation and the extent of the damage caused by that particular offence. The legislature, being representative of the people, is in a better position to determine both the attitude of society to specific crimes and the type of sentence which would be acceptable by society for certain types of criminal conduct. The minimum sentence prescribed in this case B was then regarded by the legislature as the appropriate sentence for this kind of offence.

Held, further, that having regard to the possible deleterious effect of mandrax, the mandatory sentence could not be described as grossly disproportionate.

C *Held,* further, that the decision as to whether special circumstances existed so as to justify a departure from the prescribed sentence is left within province of the courts. It is a sufficient safeguard against the imposition of a sentence which is otherwise so unfit having regard to the offence and the offender, as to be grossly disproportionate. The interpretation placed by the courts on the term "special circumstances" is not a matter D which can be taken into account in deciding whether the provision infringes s 15(1) of the Constitution.

Held, further, that had the applicant been sentenced after the repeal of the mandatory provisions it may have been that a sentence of less than 20 years would have been considered by a court to be appropriate. This does not mean, however, that the fact of the repeal renders the provisions E unconstitutional. At the time the applicant was sentenced, a very serious view was taken of the offence of which she had been convicted.

Cases cited

S v Arab 1990 (1) ZLR 253 (S)

S v Malgas 2001 (2) SA 1222 (SCA)

S v Ncube &Ors 1987 (2) ZLR 246 (S); 1988 (2) SA 702 (ZS)

Smith v R [1988] LRC (Const) 361

Legislation considered

Constitution of Zimbabwe 1980, ss 15(1) & 24(1)

G Drugs and Allied Substances Control Act [*Chapter 320 of 1974*], s 44

Medicines and Allied Substances Control Act [*Chapter 15:03*], s 4

Precious Stones Act [*Chapter 21:06*], s 3(2)

Case information

Mrs *J B Wood,* for the applicant

H *N Mutsonziwa*, for the respondent

Cheda J

Judgment

ZIYAMBI JA: This application is brought in terms of s 24(1) of the Constitution A of Zimbabwe ("the Constitution"), which provides that:

> "If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other B action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress".

The applicant, who is thirty-two years old and currently serving a mandatory sentence of a term of twenty years' imprisonment at Chikurubi Female Prison, alleged that her constitutional rights were infringed by the mandatory C provisions of the Drugs and Allied Substances Control Act [*Chapter 320*], under which she was sentenced. By virtue of various amendments, the citation of this Act was changed and it came to be known as the Medicines and Allied Substances Control Act [*Chapter 15:03*] ("the Act"), while the impugned section became s 44.

The applicant further alleged that the provisions of the Act, insofar as they D impose mandatory minimum sentences for contraventions of the Act, are unconstitutional because they infringe upon the provisions of s 15(1) of the Constitution, constituting cruel and unusual punishment in that —

(a) they take no account of the level of culpability of any particular offender;

(b) they take no account of the personal circumstances of each offender; E

(c) they give rise to hugely disproportionate sentences in relation to the level of the crime and the ultimate intent of the accused to such an extent that the punishment meted out does not fit the crime;

(d) the provision for a finding of special circumstances so as to avoid the imposition of a mandatory minimum term does not constitute a sufficient F safeguard to avoid the evils set out in (a), (b) and (c) above.

In addition, she alleged that the imposition of an additional minimum fine, or in default of payment, the minimum period of imprisonment, imposed under s 44(2)(b) of the Act places an accused person

in the position whereby it is impossible to pay the fine prescribed in the former section whilst serving the G minimum period of fifteen years under s 44(2)(a). The accused is therefore obliged, in the vast majority of cases, to serve a mandatory minimum period of twenty years in all. This, she averred, also constitutes cruel and unusual punishment in terms of s 15(1) of the Constitution. She therefore seeks an order that the provisions of the Act so prescribing be declared invalid. H

2005 (1) ZLR p311

Cheda J

A Section 44 of the Act reads as follows:

> "**44 Prohibition of dealing in prohibited drugs**
>
> (1) No person shall deal in any prohibited drug.
>
> (2) Any person who contravenes subsection (1) shall be guilty of an offence and liable to —
>
> (a) imprisonment for a period of not less than fifteen years or more than twenty years; and B
>
> (b) a fine of not less than fifteen thousand dollars or, in default of payment, imprisonment for an additional period of not less than five years or more than ten years;
>
> and, notwithstanding anything to the contrary contained in any other C enactment, the court shall not order that the operation of the whole or any part of the sentence be suspended:
>
> Provided that where upon conviction the convicted person satisfies the court that there are special circumstances in the particular case, which circumstances shall be recorded by the court, why such a sentence should not be imposed, the convicted person shall be liable to imprisonment for D a period not exceeding fifteen years or to a fine not exceeding fifteen thousand dollars or to both such imprisonment and such fine".

By virtue of s 4 of Act 22/2001, s 44(2) was repealed and a new section substituted, the effect of which was to abolish the mandatory provisions set out above.

E The facts forming the background of this application are that on 20 July 1993 the applicant was apprehended at Chirundu Border Post whilst in possession of over 1 000 mandrax tablets. The street value of the mandrax was approximately $26 150,00. The applicant was convicted by the magistrate on 30 June 1995 and sentenced for contravening what is now s 44(2) of the Act. Because of the quantity of mandrax found in her possession she was presumed by the court F to be dealing, or to have intended to deal, in the mandrax. The court found there were no special circumstances justifying a lesser sentence and accordingly imposed, as it was obliged to, the mandatory sentence prescribed by the Act.

Section 15(1) of the Constitution provides as follows:

> "**15Protection from inhuman treatment**
>
> G (1) No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment".

In *S* v *Ncube; S* v *Tshuma; S* v *Ndhlovu* 1988 (2) SA 702 (ZSC) at p 715 G-H Gubbay JA (as he then was) said:

> H "On its face s 15(1) is aimed primarily at the quality or nature of punishment.

2005 (1) ZLR p312

Cheda J

> Certain types of punishment are acknowledged to be inherently inhuman A and degrading. Those involving the rack, the thumb screw, the pillory, burning alive or at the stake, prolonged periods of solitary confinement and starvation, fall unquestionably into this category. But s 15(1) is not confined to punishments which are in their *nature* inhuman or degrading. It also extends to punishments which are 'grossly disproportionate'; those which are inhuman or degrading in their disproportionality to the B seriousness of the offence, in that no one could possibly have thought that the particular offence would have attracted such a penalty - the punishment being so excessive as to shock or outrage contemporary standards of decency".

Can it be said then that the mandatory sentence prescribed in s 44(2) of the Act is grossly disproportionate in the sense set out above? G

The applicant brings this challenge "in the knowledge of the decision of this Court in *S* v *Arab* 1990 (1) ZLR 253 (SC). In that case it was held that the Court can interfere if Parliament imposes a mandatory sentence that is considered to be cruel and unusual punishment, and thus in conflict with s 15(1) of the Constitution. However, the mandatory minimum sentence imposed in

terms D of the Precious Stones Trade Act [*Chapter 21:06*] did not meet that test, because the mandatory sentence of three years could only be imposed if no special reasons existed.

It was submitted that in this case the situation was different, in that although there is a provision for special circumstances to be found, the consequence of an absence of special circumstances is not only imprisonment for fifteen E years, but in addition a fine which will inevitably be beyond the means of the offender, thereby leading to a further sentence of five years' imprisonment. The submission is that the current mandatory sentence, in the absence of special circumstances, is so outrageous that it constitutes cruel and unusual punishment because of the very nature of its minimum requirements. It was F submitted, in addition, that this Court should reconsider its previous finding that a provision of a finding of special circumstances affords proper constitutional protection to an offender against capricious minimum sentences.

In *S* v *Arab supra* this court endorsed the following approach by Mcintyre J in his dissent in *Smith* v *R* [1988] LRC (Const) 361, at p 391 of its judgment:

> "The test of proportionality must be applied generally and not on an G individual basis. The question is not whether the sentence is too severe, having regard to the particular circumstances of offender 'A', but whether it is cruel and unusual, an outrage to standards of decency, having regard to the nature and quality of the offence committed, and therefore too severe for any person committing the same offence. This approach is H

Cheda J

> A necessary, in my view, if we are to recognize and give effect to the very special nature of the prohibition contained in s 12 of the Charter. Constitutional effect to the prohibition in s 12 cannot be given if its application is to vary from case to case and person to person. What is unconstitutional for one must be unconstitutional for all when charged with the same offence. The constitutional question posed in this case, in B the absence of a uniform application of the prohibition, could only be answered: 'sometimes yes, and sometimes no'. This would not provide an acceptable basis for constitutional determination. Section 12 establishes an outer limit to the range of permissible sentences in our society; it was not intended – and should not be used – as a device by which every sentence will be screened and reviewed on appeal and fitted to the peculiar C circumstances of individual offenders. This desirable purpose may be served in the actual sentencing process by the exercise of judicial discretion within the wide range of sentencing options not coming within the s 12 prohibition. As I have tried to show, s 12 was not designed or intended to fit the individual sentencing requirement for each individual; it was intended as an absolute right to all to be protected from the degree of excessive punishment and treatment which would outrage standards D of decency".

It was held that it would be wrong to decide the constitutionality of s 3(2) of the Precious Stones Trade Act 1978 on an individual basis, that is, as it applied to each case and each offender. The same approach is to be applied in the present case.

E The question whether a sentence can be regarded as so "inhuman or degrading in (its) disproportionality to the seriousness of the offence, in that no one could possibly have thought that the particular offence would have attracted such a penalty - the punishment being so excessive as to shock or outrage contemporary standards of decency" is to be determined having F regard to the current norms and expectations of the society in which the sentence is imposed and at the time it was imposed.

In casu, would the Zimbabwean society in 1995 have considered the mandatory sentence so excessive as to shock or outrage contemporary standards of decency? I think not.

The legislature, in prescribing the minimum sentence which can be imposed G in the cases set out above, has taken a strong view of the dangers caused to society by the use of certain drugs. When one has regard to the possible deleterious effect of these drugs, the mandatory sentence cannot be described as grossly disproportionate. In this connection, regard must be had to the fact that Parliament is in a better position to determine the class of crimes which H endanger the economic and moral fabric of the nation and the extent of the

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Cheda J

damage caused by that particular offence. (See *S* v *Arab supra*). Because the A legislature, being representative of the people, has its ear to the ground, it is also fair to say that it is in a better

position to determine both the attitude of society to specific crimes and the type of sentence which would be acceptable by society for certain types of criminal conduct. The minimum sentence prescribed in this case was then regarded by the legislature as the appropriate B sentence for this kind of offence.

In prescribing the minimum sentence, the legislature ensured that the seriousness with which it viewed offences of this nature would be reflected in the sentences passed by the courts. A mandatory sentence would ensure that uniform sentences were passed by the courts for this offence. The intention was that in such cases the personal circumstances of the offender C would have no bearing on the sentence imposed.

In order to cater for the cases where offenders did not merit a sentence as severe as the minimum sentence prescribed, the element of special circumstances was introduced in s 44(2). The introduction of the element of special circumstances was intended to mitigate the harshness of the minimum D sentence. It was meant to provide an avenue for the exercise of the trial court's discretion where special circumstances were found to exist. Thus where special circumstances were found to exist, a court had the discretion to impose a sentence less severe than the mandatory minimum sentence if the justice of the case so required. The fact that the legislature did not ascribe a meaning to the term "special circumstances" is significant. E

In *S* v *Malgas* 2001 (2) SA 1222 (SCA) Marais JA, in dealing with s 51 of the Criminal Law Amendment Act 105 of 1997, which prescribes a mandatory sentence of life imprisonment for certain offences, remarked upon the significance of the fact that the legislature, in that enactment, gave no guidance as to the meaning to be attributed to the term "substantial and F compelling circumstances", a finding of which entitles a court to impose a sentence less than that prescribed, as follows at 1233H-1234A:

> "It signals that it [the legislature] has deliberately and advisedly left it to the courts to decide in the final analysis whether the circumstances of any particular case call for a departure from the prescribed sentence. In doing so, they are required to regard the prescribed sentences as being *generally* G *appropriate* for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so. A departure must be justified by reference to circumstances which can be seen to be substantial and compelling as contrasted with circumstances of little significance or of debatable validity or which reflect a purely personal preference unlikely to be shared by many". H

2005 (1) ZLR p315

Cheda J

A The decision as to whether special circumstances exist justifying a departure from the prescribed sentence is left within the province of the courts. That, in my view, is a sufficient safeguard against the imposition of a sentence which is "so unfit having regard to the offence and the offender as to be grossly disproportionate".

B I do not agree with the submission that the interpretation placed by the courts on the term "special circumstances" is a matter that can be taken into account in deciding whether the provision infringes s 15(1) of the Constitution. It is for a court to interpret the term in such a way that it accords with the intention of the legislature and, where special circumstances are found to exist, to impose what it considers to be an appropriate sentence.

C With regard to the additional punishment imposed by s 44(2)b), the situation envisaged by the applicant could only occur where no special circumstances are found to exist. The severity of the minimum sentence in this case is an indication of the serious view which the legislature then took of offences of this nature and of the intention of the legislature to stamp out this offence. It bears repeating that the legislature is well placed to know the aspirations of D the society which it represents as well as its attitude to certain types of crime and the appropriate punishment for those crimes.

For the above reasons I am of the view that the application must fail.

As I have already indicated, the provisions of the Act, in terms of which the applicant was sentenced to a mandatory term of imprisonment, have now been E repealed. The new s 44(2) provides:

> "(2)Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding level fourteen or to imprisonment for a period not exceeding twenty years or to both such fine and such imprisonment".

F This is an indication that the reasons justifying the requirement of the mandatory minimum sentence for contraventions of certain provisions of the Act no longer exist. Had the applicant been sentenced after the repeal of the mandatory provisions, it may be that a sentence less than twenty years could have been considered by a court to be appropriate. But this is not to say that the fact of the repeal would render the provisions unconstitutional. The G applicant was sentenced at a time when a very serious view was taken of the offence of which she was convicted. The mandatory sentence was imposed for such offences by the legislature in the exercise of its duty to protect the citizens of Zimbabwe from the dangers attendant on the use of the prohibited drugs specified in the Act at a time when the illegal use of the said drugs was H rampant.

2005 (1) ZLR p316

Cheda J

Now that the mandatory provisions have been repealed, it may be that an A application by the applicant for the exercise of the presidential prerogative of mercy in terms of s 31I(1) of the Constitution might be regarded with favour, but this is not the province of this Court.

For the above reasons the application is dismissed. B

Sandura JA, Cheda JA, Malaba JA and Gwaunza JA concurred.

Byron Venturas & Partners, applicant's legal practitioners

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

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MAWERE v MINISTER OF JUSTICE 2005 (1) ZLR 317 (H)

2005 (1) ZLR p317

Citation	2005 (1) ZLR 317 (H)
Case No	Judgment No. HH-1-05
Court	High Court, Harare
Judge	Uchena J
Heard	15 February 2004
Judgment	11 May 2005
Counsel	*A P de Bourbon SC*, for the applicant Mrs *** *Mudenda*, for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

C **Administrative law** — *natural justice — observance of rules of — whether such principles must be observed by Minister of Justice before "specifying" a person in terms of s 6 of Prevention of Corruption Act [Chapter 9:16]*

Company law — *corporate veil — lifting of — when justifiable — investigation of corruption allegations*

D **Criminal procedure** — *specification of person suspected of corruption offences — requirement for Minister to have reasonable suspicion that offence committed — how such requirement may be satisfied — applicability of procedure to non — citizens*

E **Review** — *proceedings brought on review — court confined to matters of procedure and the rules of natural justice*

Statutes — *Prevention of Corruption Act [Chapter 9:16] — s 6 (1) — specification — procedure to be adopted — does not include a hearing before specification — Act designed to combat corruption — provisions reasonable in a democratic society — reasonable suspicion — test to* F *be applied — the same as that for an arrest without a warrant — applicant not a citizen of Zimbabwe — citizenship not necessary for the specification of a person*

Headnote

An application for a declaratory order cannot provide relief in a case where review proceedings cannot, due to an applicant's failure satisfactorily G to explain his delay in instituting such proceedings.

A company should be seen as a separate entity from its shareholders. However, there are exceptions to this principle. Where the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud and defend crime, the law will regard it as an association H (*Van Niekerk v Van Niekerk & Ors* 1999 (1) ZLR 421 (S) at 427 followed).

2005 (1) ZLR p318

Uchena J

The applicant, a businessman with interests in business in Zimbabwe and A South Africa, was declared by the respondent Minister to be a specified person in terms of s 6(1) of the Prevention of Corruption Act [*Chapter 9:16*]. He took his specification on review and sought an order setting it aside. In argument, a number of points were raised on his behalf. *Inter alia,* he complained that he was not heard before he was declared a B specified person and that, in terms of s 18 of the Constitution, he had a right to be so heard. He also complained that the respondent did not have facts or information upon which his jurisdiction in terms of s 6 (1) of the Act was based. He argued that the respondent did not have the information upon which he could reasonably suspect that he had done something for which he could be specified. The applicant also took the C point that, as a South African citizen, he was not subject to specification in terms of that provision. The Act did not have extra- territorial application and created no crime or conduct that has extra-territorial effect.

Held, that, in the review, the court was confirmed to the procedure provided for in s 69(1) of the Act as well as the rules of natural justice. This procedure did not provide for a hearing before specification. As far as D the rules of natural justice were concerned, the Act, which was designed to contact corruption, was reasonably necessary in a democratic society.

Held, further, that in regard to the question of reasonable suspicion, the test to be applied is the same as that for arrest without a warrant. It does not require the firm resolution of conflicting evidence that guilt beyond E reasonable doubt demands, nor even a preponderance of probability. The Minister is not required to possess anything more than information that would lead a reasonable person to suspect that any of the stated offences may have been committed. He is allowed a wide and unfettered discretion, only qualified by the requirement of reasonableness. That requirement is met if in fact there was in existence an objective foundation F of fact or evidence on which the suspicion could be justified. Suspicion, by definition, is a state of conjecture or surmise whereof proof is lacking (*dicta per* Gubbay CJ in *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S) at 159 followed).

Held, further, that the fact that the applicant was no longer a citizen of Zimbabwe could not assist him. The crucial issue was the allegation that G the applicant and another person were externalizing foreign currency earned through the sale of products from a Zimbabwean company the applicant has interests in. If the applicant were a foreigner who had no property or business in Zimbabwe and could not contravene ss 6(1)(a) H

2005 (1) ZLR p319

Uchena J

A to (e) of the Act then the Act would certainly have been inapplicable to him.

Application dismissed with costs.

Cases cited

B *Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S)

A-G v Blumears & Anor 1991 (1) ZLR 118 (S)

Holland & Ors v Minister of the Public Service, Labour and Social Welfare 1997 (1) ZLR 186 (S)

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

Kwete v Africa Community & Publishing Trust & Ors HH-216-98

Lategan & Anor NNO v Boyes & Anor 1980 (4) SA 191 (T)

C *Marasha v Old Mutual Life Assurance Co Ltd* 2000 (2) ZLR 197 (H)

Martin v Attorney-General & Anor 1993 (1) ZLR 153 (S)

Min of Home Affairs v Austin & Anor 1986 (1) ZLR 240 (S)

Motsi v A-G & Ors 1995 (2) ZLR 278 (H)

Mutare City Council v Madzime 1999 (2) ZLR 140 (S)

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

US v Milwaukee Refrigerator Tpt Co 42 Fed 247 (1905)

Van Niekerk v Van Niekerk & Ors 1999 (1) ZLR 421 (S)

Vrystaat Estates (Pvt) Ltd v President, Administration Court of Zimbabwe & Ors 1991 (1) ZLR 323 (S)

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

Legislation considered

Constitution of Zimbabwe 1980, s 18(9)

High Court Rules 1971 (RGN 1047 of 1971), r 269

Prevention of Corruption Act [*Chapter 9:16*], s 6(1)

Case information

A P de Bourbon SC, for the applicant

Mrs *** *Mudenda*, for the respondent

Judgment

G **UCHENA J**: The applicant is a businessman with interests in businesses in Zimbabwe and South Africa. The respondent is the Minister of Justice, Legal and Parliamentary Affairs. He is the Minister responsible for the Administration of the Prevention of Corruption Act [*Chapter 9:16*] (hereinafter called the H Act). On 9 July 2004, he specified the applicant in terms of s 6(1) of the Act.

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The specification was in terms of s 6(1) gazetted in the Government Gazette A of 9 July 2004. The applicant was therefore declared a specified person from that date.

The applicant has now applied for the condonation of his late noting of review proceedings and the review of his specification. He seeks the following orders:

1. That condonation be and is hereby granted for the late filing of the B application for judicial review;
2. The decision of the respondent declaring the applicant to be a specified person in terms of section 6 of the Prevention of Corruption Act [*Chapter 9:16*] published in General Notice 345A of 2004 in the Government Gazette Extraordinary of 9 July 2004 be reviewed and is hereby set aside; C

3. The respondent shall pay the costs of this application;

alternatively;

4. It is declared that the respondent exceeded his powers in terms of section 6 of the Prevention of Corruption Act [*Chapter 9:16*] when he issued a notice published in General Notice 345A of 2004 in the Government Gazette Extraordinary of 9 July 2004 declaring the applicant to be a D specified person for the purposes of the Prevention of Corruption Act [*Chapter 9:16*];
5. It is declared that the applicant is under no lawful impediment in respect of his property in Zimbabwe;
6. The respondent shall pay the costs of this application.

The applicant seeks the alternative of a declaratory order in the event of E condonation not being granted. The applicant's counsel relied on the case of *Kadir & Sons (Pvt) Ltd* v *Panganai & Anor* 1996 (1) ZLR 598 (S) at p 600 for that submission.

In terms of s 6(1), the respondent should give the specified person notice by publishing the specification in the Government Gazette. The applicant in his F application for condonation states that because he lives in South Africa which he left after 29 June 2004 for the United States of America on business he did not learn of his specification until mid-September. He argues that his application was made within 8 weeks of mid-September 2004 therefore there is no need for condonation.

In terms of Order 33 r 259 of the 1971 High Court Rules: G

> "Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action, or proceedings in which the irregularity or illegality complained of is alleged to have occurred.
>
> Provided that the court may for good cause shown extend the time." H

Uchena J

A In the present case, the Minister's action of specifying the applicant was terminated on 9 July 2004. The eight weeks period therefore started ticking on that date. The applicant can however show good cause for his delay enabling this court to extend the time limit of eight weeks.

THE DECLARATORY ORDER

I will first consider whether the alternative of a declaratory order is applicable in the event of condonation not being granted. In my view, this is not possible in view of this court's decision in the case of *Marasha* v *Old Mutual Life Assurance Co. Ltd* 2000 (2) ZLR 197 (H) at p 199 were Adam J said:

> "In the heads of argument filed on behalf of the applicant, reference was made to the judgment of this court in the case of *Musara* v *Zimbabwe National Traditional Healers Association (ZINATHA*) 1992 (1) ZLR 9 (H). But since that judgment a number of judgments have been given by this court as well as by the Supreme Court. This court has held that a declaratory order is merely one of a species of relief available and that a party should not be able to get around the time limits for review proceedings by instituting for a declaratory order: see *Kwete* v *Africa Community* D *Publishing and Development Trust* HH-216-98. This was approved by the Supreme Court in *Mutare City Council* v *Mudzime* 1999 (2) ZLR 140 (S). In my view, even if this were an application for a declaratory order the applicant would be required to provide an explanation as to why such an application for a declaratory order has not been brought within a reasonable period of time i.e. two months or eight weeks, otherwise applications for E declaratory orders can be made many months or years after the offending proceedings had been finished."

An application for a declaratory order can therefore not provide relief where review proceedings cannot due to applicant's failure to satisfactorily explain his delay. The application for a declaratory order would in the circumstances meet the same fate.

F In the case of *Mutare City Council* v *Mudzime* 1999 (2) ZLR 140 (S) at p 43D, Muchechetere JA after quoting the case of *Kwete* v *Africa Community & Publishing Trust & Ors* HH-216-98 agreed with the sentiments expressed by Smith J in that judgment.

In the *Kwete* case *supra*, Smith J had at p 3 said:

> G "It seems to me anomalous that one should be permitted to file an application for review well out of time, without seeking condonation as long as a declaratory order is sought. A declaratory order is after all merely one species of relief available on review, one can imagine the case of a litigant who institutes an application

for review and reinstatement well out H of time. He applies for condonation which is refused. All then he has to

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do is to institute a fresh application for review but instead of seeking A reinstatement, he wants a declaratory order. Should he be able to get round the provisions of order 33 of the High Court Rules 1971 that easily? I think not."

I entirely agree with Smith J's sentiments. In the present case, the applicant is not even seeking to re-apply. He is saying if I fail to get condonation for the B late noting of my review application then grant me a declaratory order in spite of that failure.

If the applicant fails to get condonation he should not by-pass this court's rules by seeking a declaratory order. I will therefore proceed on the basis that the consideration of the applicant's explanation for the delay will affect both the review and declaratory orders sought. C

EXPLANATION OF THE DELAY

The applicant's explanation for the delay is based on:

1. His not being a resident of Zimbabwe and therefore his not being able to learn of his specification through his being gazetted in terms of s 6(1) of the Act. D
2. He also said soon after the Zimbabwean Government's attempt to extradite him from South Africa to Zimbabwe failed on 29 June 2004 he was released from bail and he traveled to the United States of America on business.

He only learnt of his specification in mid-September 2004 as he was away from F South Africa on business for two months.

He came back to South Africa at the end of September. A friend then told him of his specification and he then sought legal advice on the issue and instituted these proceedings when the specification started affecting him and his businesses in Zimbabwe. F

The respondent pointed out that the applicant contradicted himself in explaining the delay. He urged the court to draw an adverse inference from that contradiction.

In para 6 of his founding affidavit, the applicant contradicted himself on his explanation of the delay. He first said he did not learn of his specification until G mid September as he was overseas on business for two months. I understand that to mean his absence from South Africa prevented him from hearing of his specification. He later in the same paragraph said he returned to South Africa in late September when a friend told him of his specification. This means he did not learn of the specification until a friend told him about it in South Africa at the end of September. There is a difference between mid September and late H

Uchena J

A September. Why is the applicant tripping over his own evidence. Did he learn of the specification in mid September or late September. If this was the only explanation given I would have drawn an adverse inference against the applicant.

The applicant also said when he was specified he was not in Zimbabwe B therefore he could not have learnt of it through the Government Gazette. This is common cause. The applicant was known to be in South Africa before he was specified. That is why attempts had to be made to extradite him from there. His explanation that he does not receive the Government Gazette could be true. The respondent did not say he does. The possibility of his not having been informed of the specification by the Government Gazette is probably true.

C The applicant also says he after the 29 June 2004 left South Africa for the United States of America. The respondent did not dispute this. In fact, the supporting affidavit by Assistant Commissioner Samson Mangoma confirms that the applicant was at some stage in America. He in para 9, said:

"The specified person was to be interviewed in Zimbabwe had the extradition been successful. At one time he was said to be in the United D State of America and it still became even more difficult to interview him."

This supports the applicant's assertion that he was not in Zimbabwe nor South Africa at the time of his specification making it impossible for him to timeously learn of his specification.

The respondent's response to this was applicant should have been advised E of his specification by his Zimbabwean companies. This was a possible means through which applicant could have learnt of his specification. However there is no conclusive evidence that this happened. It remains speculative and cannot be used to diminish the applicant's explanation of his delay.

The applicant's explanation for the delay remains unchallenged and is F supported by common cause evidence.

In the case of *Vrystaat Estates (Pvt) Ltd v President, Administration Court of Zimbabwe & Ors* 1991 (1) ZLR 323 (S) at 330B, McNally JA said:

> "No authority is necessary for the proposition that eight weeks cannot possibly apply to an applicant who does not even know of the decision for far longer than eight weeks after it was made, *precisely because he was* G *not informed of the proceedings as he should have been*. Indeed, it seems to me to be artificial to seek to apply the eight weeks rule as from the date the appellant became aware of the proceedings …
>
> I do not think the rule applies at all. *In my view, the case should have been* H *decided on the simple test – has the appellant shown a reasonable*

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> *explanation for his delay, bearing in mind the strength of his case and* A *the question of prejudice to others*" (my emphasis).

In this case, I appreciate the respondent did what the law requires him to do that is giving notice of the specification through the Government Gazette. The applicant has however demonstrated his absence from Zimbabwe where notice in the Government Gazette is deemed to be notice of what is contained B therein. The applicant cannot therefore be blamed for the delay which took place while he was ignorant of his specification. This to me is an appropriate case for extending the time limit imposed by r 259 subject to the strength of the applicant's case.

I now proceed to consider the appellant's grounds for review.

Mr *De Bourbon* the appellant's counsel based the review on the following C grounds:

1. the respondent breached the rules of natural justice in failing to afford the applicant a hearing prior to declaring him to be a specified person.
2. the respondent had ulterior motives for the declaration.
3. the respondent did not have the jurisdictional facts to entitle him to D exercise his discretionary power to declare the applicant to be a specified person.
4. the Prevention of Corruption Act does not have extra-territorial application and creates no crime or conduct that has extra-territorial effect.

HEARING BEFORE SPECIFICATION E

The applicant's complaint is that he was not heard before he was specified. He says in terms of s 18 of the Constitution he had a right to be heard before his rights were interfered with by his specification.

On the other hand, the respondent says the Prevention of Corruption Act does not require him to hear a person before he specifies him. F

The applicant's counsel relied on the case of *Holland & Ors v Minister of the Public Service, Labour and Social Welfare* 1997 (1) ZLR 186 (S). In that case, the Supreme Court struck down s 21(1) of the Private Voluntary Organisations Act [*Chapter 17:05*] for being *ultra vires* s 18(9) of the Constitution as it provided for the suspension of the national council without a hearing. G

The issue in the present case is whether this court can review the respondent's decision in spite of his complying with the provisions of s 6(1) of the Act which do not provide for a hearing. In my view a review court's powers are limited to checking the procedural proprieties of the proceedings. In the case of *Holland supra*, Gubbay CJ at p 194D said: H

Uchena J

A "A review court is concerned to set aright procedural improprieties committed by the decision maker. *It cannot order a hearing where, under the particular legislation, the public official or body is not required to hold one*" (my emphasis).

In the present case, s 6(1) of the Act does not provide for a hearing before specification. If that is believed to be in contravention of s 18(9) of the B constitution it is not for this court to determine. In a review, I am confined to the procedure provided in s 6(1) of the Act and the rules of natural justice. In my view, the procedure provided by s 6(1) of the Act was correctly followed. The respondent's decision cannot be reviewed for not doing what the Act does not require him to do.

C The respondent relied on the case of *Motsi* v *Attorney-General & Ors* 1995 (2) ZLR 278 (H) where specification was held not to offend against the right to be heard. In that case, Mubako J at p 292E commenting on the Act said:

"The principal objective of the Act is stated in its preamble as 'to provide for the prevention of corruption and the investigation of claims arising from dishonesty and corruption …' The intention of the legislature was D to provide powers which enable society to combat corruption more effectively than before. *Corruption is perceived as a pressing social need which called for extraordinary powers to meet the tasks of combating crime. The measures adopted are appropriate and safeguards are provided. I conclude therefore, that the Act is reasonably justifiable in a democratic society*" (my emphasis).

E I agree with the learned Judge's conclusion. I am satisfied that the powers exercised by the Minister though extraordinary when viewed from the natural justice angle are permitted by the Act and were found by this court to be reasonably justifiable in a democratic society. The review can therefore not succeed on this ground.

G **ULTERIOR MOTIVES**

The applicant alleges the respondent had ulterior motives which motivated the specification. He based his view on the fact that the specification followed the failure to extradite him from South Africa. He also alleges that the respondent intended to facilitate the taking over of his companies by Government without paying appropriate compensation.

The respondent denies any ulterior motive. He says he specified the applicant on the basis of information he had received.

In para 16 of his opposing affidavit, the respondent said:

"Whilst it is true in principle that companies in Zimbabwe should ideally H be run by a board of directors appointed in terms of their respective

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Articles of Association. It has become reasonable for me to believe that A the applicant as the sponsor of a chain of companies including those born in Zimbabwe, has had an influence in the operations of the said companies which is why I specified applicant."

In para 16.2, the respondent said:

"The applicant's South African Company S A S failed for a long time to remit B to AA Mines a division of SMM Holdings its export proceeds thereby prejudicing the mines of the necessary working capital and in addition failing to meet its obligations."

In para 20, the respondent went on to say:

"The applicant is alleged to have externalized foreign currency from Zimbabwe using SMM (Pvt) Ltd. It is on this basis that the specification C came about."

In para 27, the respondent also said:

"The applicant is required by the police on charges of foreign currency externalisation. See supporting affidavit by Assistant Commissioner Mangoma." D

It is clear from the above that the respondent explained why he specified the applicant. The applicant agrees the police wanted him and attempted to extradite him. Though the extradition failed this court was not told why it failed. It could have failed on a technicality which does not prevent specification or impute ulterior motives to it.

Assistant Commissioner Mangoma in his supporting affidavit at paras 3-4 E said:

"(3) I am the leader of a team investigating a case of externalization of foreign currency in which the specified person and his former chairman of S.M.M. Holdings Mr William Hamadziripi Mudekunye are being jointly charged.

(4) Allegations are that the accused persons acted in connivance and F externalised US $18.5 million, Canadian $628 071.84 and South African Rand $4 515 367.48, the money realised through the export of proceeds of asbestos fibre from Shabani Gathsemine. The money was supposed to have been remitted to the Reserve Bank of Zimbabwe."

These details fully explain the basis for the specification. This cannot be said G to be a specification for ulterior motives. The details given in the respondent's opposing affidavit and Mangomas supporting affidavit clearly explain that the specification was based on information which gave the respondent reasonable suspicion that the applicant had committed offences which warranted specification. The applicant in para 35.5 of his founding affidavit H

2005 (1) ZLR p327

Uchena J

A says authorities in Zimbabwe attempted to get evidence against him in South Africa before his specification. This means the specification was based on information received and not for ulterior motives.

The applicant also complained that the alleged offences were committed by companies and that he should not have been specified for company offences. B The respondent said he pierced the corporate veil because of the alleged criminal offences as he believed applicant was interfering with the operations of his Zimbabwean companies.

In general, a company is a separate persona from its sponsors or shareholders and it should be personally held accountable for its actions. However, in the case of *Van Niekerk v Van Niekerk & Ors* 1999 (1) ZLR 421 (S) at p 427D-E, C Sandura JA said:

"Whilst it is true that if Homefield should have been registered in the name of Franklin Trading, as alleged by Iona, Franklin Trading would be the 'person aggrieved' for the purposes of s 52(9)(1) of the Act, in reality the 'person aggrieved' is Iona. In saying this, I am mindful to the fact that it is of cardinal importance, that the property of a company be kept separate D and distinct from those of its shareholders. However there are exceptions to the principle, enunciated in *Solomon* v *Solomon & Co* (1897) AC 22 (H), that a company is a separate entity from its members.

In *US* v *Milirankee Refrigerator Transit Co* 42Fed 247 (1905), Sanborn J after stating that a company should be seen as a separate entity from its E shareholders, said the following at 255:

'*… but when the notion of a legal entity is used to defeat public convenience justify wrong, protect fraud and defend crime, the law will regard it as an association*.'

That approach was mentioned with approval in *Lategan & Anor NNO* v *Boyes & Anor* 1980 (4) SA 191 (J) at 200H-201B. In my view, it is appropriate F to adopt that approach in the present case" (my emphasis).

In the present case, Mangoma said the applicant and Mudekunye connived to defraud SSM Holdings (Pvt) Ltd. The figures involved were mentioned. The applicant's relationship with SSM was explained in his founding affidavit. He is the sole proprietor of ARL which is through other companies the holding company of applicant's companies in Zimbabwe. See paras 19-20 of his G founding affidavit. The circumstances therefore warranted his direct specification as he and Mudekunye were alleged to have defrauded SMM This is a proper case for the piercing of the corporate veil. Otherwise, the legal status of the companies could be used to protect fraud and defend crime. The H review can also not succeed on this ground.

2005 (1) ZLR p328

Uchena J

JURISIDICATIONAL FACTS A

Mr *De Bourbon* for the applicant submitted that the respondent did not have facts or information on which his jurisdiction in terms of s 6(1) of the Act was exercised. He submitted that there is a vast difference between the respondent's allegations that the applicant has had an influence in the operation of the companies and that he externalised foreign currency from Zimbabwe using B SMM Holdings (Pvt) Ltd and the facts upon which that allegation is based. He said the respondent did not set out those facts. He urged the court to find that those facts do not exist.

He referred this court to the case of Martin v Attorney-General & Anor 1993 (1) ZLR 153 (S) for the test to be applied in forming the suspicion leading to specification. He also referred to the cases of *Attorney-General v Blumears & Anor* 1991 (1) ZLR 118 (S) where the SC said:

> "With this approach in mind it is to be decided whether the State has offered facts upon which objectively it can be held that reasonable suspicion existed that the applicant committed the offence for which he was placed on remand." D

In response, Miss *Mudenda* for the respondent submitted that the Prevention of Corruption Act does not compel the Minister to supply the applicant with the facts that the Minister relies on for specification. She further said this case is distinguishable from that of the *Minister of Home Affairs & Anor* v *Austin & Anor* 1986 (1) ZLR 240 (S) where the Minister was obliged to give reasons for the basis of the ground for detention therein. E

She also referred to the cases of *PF ZAPU* v *Minister of Justice, Legal & Parliamentary Affairs* 1985 (1) ZLR 305 (S), *Zambezi Proteins (Pvt) Ltd & Ors* v *Minister of Environment & Tourism & Anor* 1996 (1) ZLR 378 (H), *Affretair (Pvt) Ltd & Anor* v *MK (Pvt) Ltd* 1996 (2) ZLR 15 (S).

She concluded by saying the respondent acted in terms of the enabling F statute.

The important issue to be decided is whether or not the respondent had information on which he would reasonably suspect that the applicant had done something for which he could be specified.

I have already discussed the circumstances under which the respondent G specified the applicant under the heading "Ulterior Motives" and found that the applicant had sound basis upon which the specification was founded. He mentioned interference with the companies, conniving with Mudekunye to defraud S M M and externalization of foreign currency with the details of the amounts involved being given in the supporting affidavit of Assistant Commissioner Mangoma. H

Uchena J

A It must be borne in mind that the Minister is expected to act on reasonable suspicion. Suspicion is not certainty as to the truth. It is a state of conjecture or surmise without proof of what is suspected.

In the case of *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S) at 159B-D, Gubbay CJ dealing with the suspicion required for a court to put an B accused on remand said:

> "The test to be applied is the same as that for arrest without a warrant. *It does not require the firm resolution of conflicting evidence that guilt beyond reasonable doubt demands, nor even a preponderancy of probability. Certainty as to the truth is not involved, for otherwise it ceases to become suspicion and becomes fact. Suspicion by definition* C *is a state of conjecture or surmise whereof proof is lacking* – see *Attorney-General* v *Blumers & Anor* 1991 (1) ZLR 118 (S) at 122B-C, *S* v *Ganyu* 1977 (2) ZLR 97 AD at 104F" (my emphasis).

It must also be remembered that the Minister is not in the position of a magistrate who has to balance between two competing stories. The Minister Acts on the reasonable suspicion triggered by the information he has received D which will at that stage be unchallenged. What I should determine is whether the information the Minister had could trigger a reasonable suspicion.

In the case of *Motsi supra*, Mubako J at p 295C-E said:

> "The Act requires that specification must be based on the Minister's suspicion on reasonable grounds that the property in question has been E stolen or misappropriated. *The Minister is not required to possess anything more than information that would lead a reasonable person to suspect that any of the stated offences may have been committed*. In this case, the Minister had information from the Police that $1 916 385,72 was in one applicant's Standard Bank accounts and that large sums of money had been misappropriated from Zimpapers. I am satisfied that such information was sufficient to enable the Minister to form a reasonable F suspicion. *The Minister on the face of it is allowed a wide and unfettered discretion, only qualified by the requirement of reasonableness. That requirement is met if in fact there was in existence an objective foundation of fact or evidence on which the suspicion could be justified*" (my emphasis).

In the present case, the respondent faced with the information in paras 16, 16.2, G 20 and 27 of his opposing affidavit and that in Assistant commissioner Mangoma's supporting affidavit all detailed above had enough information justifying his reasonable suspicion subject to that information revealing a contravention of s 6(1)(a)-(e) of the Act.

Mr *De Bourbon* for the applicant further submitted that even if the respondent H had reasonable suspicion he should show why he considered it necessary to

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Uchena J

exercise his powers having regard to the facts upon which reasonable A suspicion was based. The respondent has given such an explanation under para 16.2 he said the mines were being prejudiced of the necessary working capital and were failing to meet their obligations. It is indicated in Mangoma's supporting affidavit that applicant was conniving with Mudekunye who was heading SMM Holdings in the externalization of foreign currency. In para 34, B he speaks of the national interest and the need to save the companies there mentioned from collapsing. In my view, the necessity for specification has been explained.

Mr *De Bourbon* for the applicant also submitted that the facts alleged do not establish the jurisdictional facts necessary for a specification in terms of s 6(1) of the Act. He submitted that an exchange control contravention is not an C offence which can result in specification. In para 27 of his Heads of Argument he said:

> "Thus, the Minister even on the limited allegations put forward by him – could not have suspected the applicant of having done any thing set out in the various paragraphs of s 6(1) of the Act. Thus the respondent's D decision to issue a specification order was not an act done by the Minister in the proper exercise of the powers under s 6 of the Prevention of Corruption Act; and must accordingly be set aside."

Miss *Mudenda* for the respondent's response was simply that the respondent exercised his powers in terms of the Act and that the applicant's conduct falls under s 6(1)(a)-(e) of the Act. E

A reading of s 6(1) provides as follows:

> "Where the Minister, on reasonable grounds suspects that any person:
>
> (a) by theft, *fraud or other unlawful means has caused the misappropriation* or loss of property of the State a statutory body, a local authority or any other person: F
>
> (b) …
>
> (c) …
>
> (d) …
>
> (e) …
>
> and is satisfied that it is in the national interest to do so, he may, by notice G published in the Gazette declare such person to be a specified person" (my emphasis).

It is not in dispute that the jurisdictional facts are:

1. The Minister's suspicion
2. On reasonable grounds H

Uchena J

A 3. The doing by the applicant of what is provided in s 6(1)(a)-(e)

4. The Minister's satisfaction that specification is in the national interest.

I have already dealt with jurisdictional factors 1, 2 and 4 and found that they were properly established.

My understanding of s 6(1)(a) is that theft, fraud or other unlawful means B establishes the third jurisdictional fact.

In my view, the alleged connivance by the applicant and Mudekunye amounts to a fraud against SMM Holdings (Pvt) Ltd and would establish the third jurisdictional fact. If I am wrong in so holding the "any other unlawful means" provided for in s 6(1)(a) certainly includes the applicant and Mudekunye's C connivance to externalise foreign currency to the prejudice of SMM Holdings.

I am therefore satisfied that all the jurisdictional facts were established in this case. The respondent's decision can therefore not be reviewed on the basis of absence of the jurisdictional facts on which the respondent should have acted.

D **THE APPLICANT'S SOUTH AFRICAN CITIZENSHIP**

The last ground of review was that the applicant was not a Zimbabwean and is therefore not subject to the provisions of s 6(1) of the Act.

Section 6(1) provides as follows:

> E "Where the Minister, on reasonable grounds, suspects that *any person:*
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) … F
>
> (e) …
>
> and is satisfied that it is in the national interest to do so, he may by notice published in the Gazette declare such person to be a specified person" (my emphasis).

My understanding is that the provisions of s 6(1) apply to any person who the Minister suspects on reasonable grounds to have done any of the things G mentioned in paragraphs (a) to (e). The words "any person" are wide enough to include a person who is not a citizen but has done or is doing any of the things mentioned in s 6(1)(a)-(e). In this case, the crucial issue is the allegation that the applicant and one Mudekunye were through connivance externalising foreign currency earned through the sale of products from a company the H applicant has interests in. If the applicant was a foreigner who had no property

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or business in Zimbabwe and could not contravene s 6(1)(a)-(e) of the Act then A the Act would certainly have been inapplicable to him.

The purpose of specification is to facilitate the investigation of the specified person and to stop the harmful conduct of the specified person. This is demonstrated by the provisions of s 8(1) & (2) and s 10 of the Act. If the applicant's submissions were to be accepted foreigners with local interests B would be able to continue to do things mentioned in s 6(1)(a)-(e) with impunity and the nation would continue to suffer helplessly from the effects of such conduct.

The applicant from the papers and documents produced acquired South African Citizenship in 2002. In terms of s 9(2) of the Citizenship of Zimbabwe Act [*Chapter 4:01*], the applicant ceased to be a citizen of Zimbabwe upon his acquisition of South African citizenship.

Section 9(2) provides as follows:

> " (2) A citizen of Zimbabwe of full age who by voluntary act other than marriage acquires the citizenship of a foreign country shall immediately cease to be a citizen of Zimbabwe."

There is no doubt that the applicant is an adult and has voluntarily acquired South African citizenship other than through marriage. He has therefore lost his Zimbabwean citizenship.

He however remains within the provisions of s 6(1) of the Act as he has interests in Zimbabwean companies as already explained above. Assistant E Commissioner Mangoma has clearly stated that he has in connivance with Mudekunye externalized foreign currency from SMM Holdings. I have already said this conduct justifies the piercing of the cooperate veil.

In the circumstances, I find that though the applicant is no longer a Zimbabwean Citizen his alleged conduct brings him within the provisions of s 6(1) of the F Act.

The applicant's application is therefore dismissed with costs.

Costa & Madzonga, applicant's legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/TFS MANAGEMENT CO (PVT) LTD v GRASPEAK INVESTMENTS (PVT) LTD & ANOR 2005 (1) ZLR 333 (H)

TFS MANAGEMENT CO (PVT) LTD v GRASPEAK INVESTMENTS (PVT) LTD & ANOR 2005 (1) ZLR 333 (H)

Citation	2005 (1) ZLR 333 (H)
Case No	Judgment No. HH-49-05
Court	High Court, Harare
Judge	Gowora J
Heard	11 May 2005
Judgment	11 May 2005
Counsel	*Gill Godlonton & Gerrans*, the applicant's legal practitioners *Dube Manikai & Hwacha*, the respondents' legal practitioners
Case Type	Application for further particulars
Annotations	No case annotations to date

Flynote

C **Practice and procedure** — *application — affidavit in support of application — who may depose to such affidavit — applicant's legal practitioner deposing to facts within his knowledge — no specific mandate required to authorise practitioner to depose to affidavit*

Headnote

D The applicant sued the respondents for monies due and payable in terms of a loan agreement. The respondents denied owing the sum claimed and alluded to a loan in a different amount. The applicant sought further particulars. In support of the application, an affidavit was filed by the applicant's legal practitioner. The respondents challenged the authority of the legal practitioner to depose to the affidavit, on the grounds that E the affidavit did not state that the legal practitioner was authorized to depose to the affidavit. They contended that authority to represent the applicant was not synonymous with authority to swear to an affidavit and that the company should have passed a resolution authorizing its legal practitioner to depose to the affidavit.

Held, that where a company commences proceedings by way of petition, it F must appear that the person who makes the petition on behalf of the company is duly authorized to do so. However, the respondents had not impugned the legal practitioner's authority to act for the applicant in the main action, and that the present application was a procedural step in the mandate given by the applicant to its legal practitioners. It would be G absurd for the practitioner to be given the mandate to sue for the claim and not have authority to depose to an affidavit in the name of the applicant, where such affidavit would be in relation to matters particularly within his knowledge and necessary for purposes of the successful performance of his mandate on behalf of the applicant. He thus did not require special authority to depose to the affidavit. Rule 227(4) of the H High Court Rules provide that an affidavit filed with a written application

Gowora J

shall be made by the applicant or respondent, as the case may be, or by A a person who can swear to the facts or averments set out therein. The legal practitioner had full knowledge of the facts pertaining to the application and his authority to depose to the affidavit could not be disputed.

Cases cited B

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

Tahan v Griffiths 1950 (3) SA 988 (O)

United Associates (Pvt) Ltd v Est Late L D Ncube & Ors HB-29-03

Wildner v Compressed Yeast Ltd 1929 TPD 166 C

Legislation considered

High Court Rules, 1971 (RGN 1047 of 1971), r 227(4)

Judgment

GOWORA J: The applicant seeks an order requiring that the respondents furnish further particulars in respect of their plea and exception. The respondents oppose the request for further particulars. D

The applicant has sued the respondents jointly and severally for the repayment of an amount of $471 133 770.82, allegedly arising out of a loan facility granted to the first respondent as principal debtor. The second respondent is alleged to have bound himself as a surety and co-principal debtor in respect of first respondent's indebtedness to the applicant. The allegation by the applicant E is that the amount of $419 406 161.83 was lent and advanced to the first respondent on 21 April 2004. The applicant further alleges that the respondent failed to repay the loan on 21 May 2004, on which date the said amount was due for payment, together with accumulated interest of $51 707 608.99.

The respondents deny owing the sum of $471 113 770.82. They state in para 2 F of their plea and in their exception that a written loan agreement was entered between the parties on 27 November 2003 and that the second respondent executed a guarantee agreement. The amount of the loan was $173 600 000 and it was to attract interest at market related rates to be agreed between the parties. An amount of $50 million has been paid to the applicant by the first respondent.

In response, the applicant then filed a request for further particulars as follows: G

1. **Ad para 2**

The defendants are required to state when, in terms of the loan agreement referred to in the paragraph, the sum of $173 600 000 was repayable by the first defendant to the plaintiff: H

Gowora J A

1.2. each defendant is required to state with clarity whether an indebtedness of $123 600 000 to the plaintiff is admitted and further, whether it is admitted.

1.3. that such sum was due and payable as at the date of institution of these proceedings.

B As a point *in limine*, the respondents have challenged the authority of Mr *Lloyd*, the legal practitioner for the applicant, to depose to the affidavit in support of the application. In an opposing affidavit sworn to by Mr *Dube*, the legal practitioner for the respondents, the respondents aver that the founding affidavit does not state that Mr *Lloyd* is authorized to depose to the affidavit. They contend that authority to represent the applicant is not synonymous C with authority to swear to an affidavit.

On the merits, the respondents have refused to furnish the further particulars on the basis that as a matter of law, the applicant is not entitled to the information requested in order to replicate. In a document filed of record on 17 August 2004, the respondents averred that, in view of the fact that the D applicant's claim was based on an alleged oral loan agreement and that the sum of $419 406 161.83 was alleged to be the capital amount due and not $173 600 000, the applicant did not need the further particulars requested to enable it to replicate.

The submissions on behalf of the applicant were in the following vein. The fact that a party can make a bare denial of an allegation does not preclude that E party from seeking further particulars.

The respondents had, for the first time in their plea, raised the allegation of a new agreement and further particulars on the plea would allow the applicant to replicate thereto. The agreement attached to the plea related to a 62-day facility agreement which was repayable in thirty days. Whilst the agreement itself had a repayment date, it did not F necessarily follow that the amount of the loan was due for payment by due date and that nothing was obvious from merely looking at it. The respondents were therefore required to furnish particulars as it when payment on the admitted loan was due. The applicant would also wish to know if both respondents admit indebtedness for the residual amount of $126 000 000. The respondents had issued a bare denial and alleged the existence of some other G agreement. If the written agreement was not part of their defence, they ought not to have included it. They were therefore obliged to answer on substantive issues.

Regarding the challenge to the authority of Mr *Lloyd* to depose to the founding affidavit, it was contended that the respondents had not impugned H his authority to act for the applicant in the main action, and the present

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Gowora J

application was a procedural step in the mandate given by the client to his legal A practitioners. It was submitted further that the legal practitioner did not require special authority to depose to the affidavit.

According to the respondents, the applicant is a registered company which had given its legal practitioners authority to prosecute its claim. However, that authority was not synonymous with authority to depose to an affidavit on its B behalf. The deponent should have clearly stated that he had such authority and exhibited the resolution from the company according him such authority, as this was essential to bind the company that he represents. Despite the fact that his authority to depose to the affidavit had been challenged, counsel for the applicant had not seen fit to file an answering affidavit attaching the company resolution giving him the authority to depose to the affidavit in C question.

The respondents contend that the particulars are not necessary for the purpose of a replication on the part of the applicant. It is common cause that the applicant had filed a declaration in which the cause of action is an alleged oral, alternatively implied, agreement from previous dealings between the D parties, supposedly entered into on 21 April 2004. In their plea, however, the respondents had stated that the loan agreement had been entered into on 27 November 2003 and was for $173 600 000, out of which an amount of $50 000 000 had been repaid. The respondents did not consider the further particulars to be necessary for the applicant to replicate, and that if the respondents furnished the further particulars the applicant would find a new E cause of action. In any event, the particulars sought were already within the knowledge of the applicant as they were in the agreement. The application was therefore an abuse of court process, The respondents counsel submitted that the respondents admitted receiving the amount of $173 600 000 and that $50 000 000 had been paid meaning that the balance was yet to be paid. F

In seeking to challenge the authority of Mr *Lloyd* to depose to the founding affidavit in respect of the application, the respondents contend that as the applicant is a company it acts through agents and the authority of Mr *Lloyd* to depose to the affidavit should have been granted by the company passing a resolution to that effect. It is trite that the position of an artificial person like G a company or co-operative differs from that of a natural person. The learned authors van Winsen, Cilliers and Loots make the following comment at p 363 of their book:

> "There is a considerable amount of authority for the proposition that where a company commenced proceedings by way of petition it was necessary H

Gowora J

> A to show that the person who brought the petition on behalf of the company had been fully authorized by the company to do so. It is submitted that this salutary rule applies also to proceedings on notice of motion brought on behalf of an artificial person."

In *Mall (Cape) (Pty) Ltd* v *Merino Ko-operasie Bkp*m ` 1957 (2) SA 347 at 351-352, Watermeyer J had this to say:

> B "There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the

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

F In the case of *United Associates (Pvt) Ltd* v *Estate Late Ncube & Ors* HB-29-03, Cheda J had to consider an objection *in limine* in which the capacity of the authority of the deponent to a founding affidavit in an application for an order to compel transfer of a certain immovable property from the respondents to the applicant. The applicant was a company and the founding affidavit was deposed to by its managing director. The learned judge G held that a representative for a company should state in his affidavit that he is authorized to act for and on behalf of the company and attach clear proof of such authority by attaching a resolution to that effect.

I consider that the case before me is distinguishable from the ones referred to H above. In the instant case, the proceedings were not instituted by way of a

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court application supported by an affidavit. The applicant issued summons A against the respondents through the agency of Mr *Lloyd*, who clearly had been given the mandate to prosecute the claim. The authority of Mr *Lloyd* to represent the applicants in these proceedings has not been impugned by the respondents. They have therefore accepted that he has the mandate to prosecute the claim of the applicants in full and it is a given that he has the B Bx authority of the applicant to do the same. The matter before me is an interlocutory application which is part of the legal process in the prosecution of the claim instituted by the applicants. It would be an absurdity for Mr *Lloyd* to be given the mandate to sue for the claim and not to have authority to depose to an affidavit in the name of the applicants where such affidavit would be in relation to matters particularly within his knowledge and necessary for C purposes of the successful performance of his mandate on behalf of the applicants. The affidavit was deposed to by him in his capacity as legal practitioner for the applicants, in circumstances that are related to the due performance of that mandate. It cannot be the suggestion on the part of the respondents that a legal practitioner instructed to represent a litigant is obliged, each time it becomes necessary to issue process pertaining to the D matter at hand, to obtain and exhibit, for the information of the protagonist to that dispute, authority to institute proceedings of an interlocutory nature.

In terms of r 226 of the High Court Rules, all applications for whatever purpose in terms of the rules or any other law, other than an application made orally during the course of a hearing, shall be by court application or a chamber E application. Rule 227(4) thereof provides that an affidavit filed with a written application shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein. Mr *Lloyd* has full knowledge of the facts pertaining to the application and, in my view, his authority to depose to the affidavit cannot be disputed.

I turn now to the merits of the application before me. The function of particulars F is not that they are to be used to fill in material gaps in a pleading. The use of particulars is to meet a further separate requirement of pleading imposed in fairness and justice upon the parties. The function of further particulars has been stated to be the following: (a) to limit the generality of allegations in pleadings; (b) to define the issues with greater precision; and (c) to prevent G the party asking for particulars from being taken by surprise at the trial: see *Tahan* v *Griffiths* 1950 (3) SA 988. Their function is to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and enable him to prepare for trial. Likewise, in the case of a plea, the purpose of further particulars is to H

Gowora J

A fill in the picture of the defence of the defendants so that the plaintiff is able to replicate thereto.

A plea ought to set out clearly the defence upon which a defendant relies and must set out each element constituting an allegation which it makes, in sufficient detail to enable the other party both to understand it and to place B on record a specific answer. When a defendant makes a positive allegation in denying the plaintiff's claim, then the defendant is required to state the material facts upon which he seeks to rely in his defence. The following remarks by Tindall J in *Wildar* v *Compressed Yeast Ltd* 1929 TPD 166 at 170-171 put into perspective the obligations that a defendant has in filing a plea:

> A "A plea ought to state expressly the defences which the defendant relies on, but it may happen to be so drafted that it indicates impliedly that the defendant intends to rely upon a certain defence. And if the terms of the plea do indicate, by implication, that the defendant intends to rely upon a certain defence, then I think it is the duty of the defendant to state clearly and concisely the material facts upon which the defence is based …"

D The respondents have not done so. They have, in denying the claim by the applicant, alluded to a loan agreement allegedly concluded between the parties which is materially and substantially different to the one that the applicant is suing under. The respondents have mentioned the loan amount and interest rate applicable. They have not mentioned the date of repayment E which, in the circumstances, is pertinent to the applicant's claim as the applicant is suing for due performance on a loan agreement. They have also refused, having admitted to the loan, to admit or deny liability in respect of a residual amount, which in terms of the plea filed by them is still outstanding. The lack of particularity in their plea is, in my view, bound to embarrass the applicant in the prosecution of its claim. In short, they have not given the F material facts upon which they seek to rely in their defence.

As the applicant states, the loan agreement being referred to by the respondents may be a totally different transaction altogether and the applicant should be put in possession of sufficient facts to enable it to replicate or make other answer. It is also necessary that the respondents state whether or not the indebtedness is admitted so that issues may be clarified between the parties.

G The applicant is, in my view, entitled to the further particulars requested.

In the result, I will issue an order in the following terms:

IT IS ORDERED AS FOLLOWS:

1. the defendants in case number HC 6822/04 be and are hereby ordered to H file their further particulars in compliance with the Rules of Court within

Gowora J

ten (10) days of the date of service of this order. A

2. the respondents are ordered to pay the costs of this application.

Gill Godlonton & Gerrans, the applicant's legal practitioners

Dube Manikai & Hwacha, the respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/NATIONAL RAILWAYS OF ZIMBABWE v ZIMBABWE RAILWAY ARTISANS' UNION & ORS 2005 (1) ZLR 341 (S)

NATIONAL RAILWAYS OF ZIMBABWE v ZIMBABWE RAILWAY ARTISANS' UNION & ORS 2005 (1) ZLR 341 (S)

Citation	2005 (1) ZLR 341 (S)
Case No	Judgment No. S-8-05
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Gwaunza JA
Heard	17 January 2005
Judgment	16 May 2005
Counsel	*E T Matinenga*, for the appellant *L T Biti*, for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

C **Employment** — *employee — strike action by — not entitled to wages during period where labour withheld — no change to common law position*

Employment — *Labour Court — jurisdiction of — application for interdict — only entitled to hear applications or appeal brought in terms of* D *Labour Act or other enactment — not thereby entitled to entertain application for interdict*

Practice and procedure — *judgment — finality of — extent to which court is entitled to interpret its previous judgment*

Headnote

E Members of the respondent unions, employees of the appellant, embarked upon a collective job action. A few days later the Labour Court issued a disposal order by consent, to the effect that if the employees continued with their job action after the date of the order, the appellant could proceed in terms of s 107(3)(a) of the Labour Act [*Chapter 28:01*]. In terms of this provision, the employer is discharged from any liability to F pay wages for the duration of the collective job action. There was nothing in the Labour Court's order requiring the appellant to pay the employees during the time they were on strike. The appellant accordingly withheld wages from the employees for that period. The respondents applied to the Labour Court for an interdict preventing the appellant from withholding the wages. The Labour Court took the view that it was G interpreting its previous order and granted the application. On appeal to the Supreme Court:

Held, that at common law the obligation of an employer to pay wages is dependent upon performance by the servant of the work that he contracted to do. The common law position is restated in s 108(4) of the Act. An H employee who participates in a lawful collective job action is not entitled

Chidyausiku CJ

to his salary unless that remuneration was being paid in the form of A services, in which case the remuneration must be paid but may be recovered by the employer by action instituted by him in the Labour Court for this purpose. A striking employee is not entitled to remuneration even where the strike is lawful. *In casu* the strike was illegal. If a participant in a lawful collective job action is not entitled to his salary, B then even more so should a participant in an unlawful collective job action have no entitlement to his salary.

Held, further, that under s 89(1)(a) of the Act, the Labour Court is entitled to hear and determine applications and appeals in terms of the Act or any other enactment. This means that the Act or other enactment must specifically provide for applications to the Labour Court of the type that C the applicant seeks to bring. Nowhere in the Act is the power granted to the Labour Court to grant an order of the nature sought by the respondents.

Held, further, that even if the application was one in which the court was being asked to interpret its order, the court was obliged to apply the basic principles of interpretation and could not ascribe to the order a meaning beyond its plain and ordinary meaning. The Labour Court did not merely D interpret its order; it ascribed an interpretation to the order that not only altered the sense and substance thereof but contradicted the plain meaning of the order.

Cases cited E

PTC v Chizema S-108-04

Legislation considered

Labour Act [*Chapter 28:01*], ss 89(1)(a), 89(2)(d), 107(3) and 108(4)

Case information

E T Matinenga, for the appellant F

L T Biti, for the respondent

Judgment

ZIYAMBI JA: This is an appeal from a judgment of the Labour Court. It raises three points of law, namely –

(a) Whether the participants in an unlawful job action are entitled to receive G payment of their salaries for the period during which their labour was withheld from their employer;

(b) The jurisdiction of the Labour Court to entertain an application for an interdict; and

(c) The interpretation of court orders. H

Chidyausiku CJ

A It is common cause that members of the respondents embarked upon a collective job action towards the end of August 2003. On 4 September 2003, the Labour Court issued a disposal order by consent of the appellant and the respondents. The order was issued in the following terms:

> "(i) That in the event that any employees persist with the Collective Job Action in defiance of the Collective Bargaining Agreement the B applicant [i.e. the National Railways of Zimbabwe] reserves the right to deal with them in terms of s 107(3)(a) of the Labour Act [*Chapter 28:01*];
>
> (ii) That each party is to bear its own costs."

WITHHOLDING OF SALARIES AND WAGES

C At the end of October 2003, the appellant did not pay the employees for the period during which they participated in the collective job action. As a result, the respondents brought an urgent application in the Labour Court seeking the following order:

> "1. The respondent [i.e. the National Railways of Zimbabwe] be and is D hereby interdicted forthwith from making any deductions or set offs against the salaries and wages of its employees consequent to the collective job action of 25 (*sic*) 28 August 2003 until a competent court has ruled otherwise.
>
> 2. In the event that the respondent has already done its payroll, the respondent be and is hereby ordered to reverse any and all such E deductions or set offs either electronically or manually to enable its employees to receive their full entitlements on their salaries and wages on 28 October 2003 …"

The Labour Court gave its judgment on 13 February 2004. It took the view that it was being required to interpret its order – the disposal order. It did so and concluded:

> F "I agree with the applicants' (now the respondents) interpretation of the first term of the disposal order. The term is quite clear and unambiguous.

For the respondent (now the appellant) to invoke the provisions of s 107(3)(a) in general and in particular subpara (i) there must have been persistence on the part of the applicants' members with the collective job action after its termination on 29 August 2003. In the absence of any G persistence, the respondent did not have a right to make any deductions from the applicants' members' salaries."

It ruled:

"In the result, the application is granted with costs. The respondent is hereby ordered to reinstate the salaries and wages it deducted from the H applicants' members' October salaries."

2005 (1) ZLR p344

Chidyausiku CJ

The appellant contended before us, as in the court below, that the salaries were A withheld on account of no work having been done and that this had nothing to do with the disposal order, which was a separate matter altogether.

A close look at the wording of para (i) of the disposal order reveals that it authorises the employer to take certain action against the employees should they persist in the collective job action, that is, should they continue with the B job action after the date of the order. In the event that such collective job action was not continued after the date of the order, the right conferred on the employer to take action in terms of s 107(3)(a) of the Labour Act [*Chapter 28:01*] ("the Act") fell away. The order dealt with the future action of the employees.

The disposal order did not, however, deal with the actions of the employees prior to the date of its issue, namely their actions in engaging in an unlawful collective job action. In connection with the latter, the finding by the Labour Court that:

"By agreeing to invoke s 107(3) it can correctly be concluded, though there was no declaration to that effect, that the parties were agreeing that the D collective job action was illegal",

has not been challenged.

With regard to illegal collective job actions, s 107(3) of the Act provides as follows:

"(3) Without derogation from the generality of the powers conferred upon E the Labour Court in terms of subsection (2) to make a disposal order, such order may provide for –

(a) in the case of an unlawful collective job action other than a lock-out –

(i) discharge or suspension of an employer's liability to pay all or part of the wages or benefits due to specified employees or F categories of employees engaged in the unlawful collective job action, in respect of the duration of such collective job action or part thereof;

(ii) the employer, in his discretion, to dismiss summarily, or lay off or suspend with or without pay, specified employees or categories of employees engaged in the unlawful collective job action; G

(iii) the lay off or suspension, with or without pay, of specified employees or categories of employees not engaged in the unlawful collective job action for such period as may be specified where such lay off or suspension is necessitated by the collective action;

2005 (1) ZLR p345

Chidyausiku CJ A

(iv) the dismissal of specified employees or categories of employees engaged in the unlawful collective job action;

(v) the prohibition of the collection of union dues by any trade union concerned for such period as may be specified;

(vi) the suspension or rescission of the registration of the trade union involved in the collective job action; B

(b) in the case of an unlawful collective job action consisting of a lock-out –

(i) where wages or benefits due to employees have been withheld or suspended, the payment of such wages or benefits;

(ii) the resumption of the normal operations of the undertaking C concerned;

(iii) where any employees have been laid off, suspended or dismissed, the reinstatement of such employees with all necessary wages, compensation and other related benefits;

(iv) the suspension or dismissal of specified managerial employees who are responsible for or have provoked, or contributed to, the D lock-out."

At common law, the obligation of an employer to pay wages is dependent upon performance by the servant of the work that he contracted to do. Thus, in *The Law of Master and Servant in South Africa* by Norman Scoble at p 203, the author states:

> E "The legal obligation of an employer to pay wages is dependent entirely on the servant having performed his part of the contract in rendering the services stipulated for by the parties. The basis is 'no work no pay' (unless the master is to blame for failing to provide any work for the servant to perform) (*Vadasz* v *Cohen* 1993 TPD 100)."

See also Christie *Business Law in Zimbabwe* pp 310-311.

F The common law position as set out above is restated in s 108(4) of the Act, which provides as follows:

> "An employer is not obliged to remunerate an employee for services that the employee does not render during the lawful collective job action except where the employee's remuneration includes payment in kind by G way of accommodation, the provision of food and other basic amenities of life, in which event the employer shall not discontinue such payment in kind unless the employee declines such remuneration:
>
> Provided that, at the conclusion of the collective action, the employer may recover the monetary value of such remuneration by action instituted in H the Labour Court."

Chidyausiku CJ

Thus, an employee who participates in a lawful collective job action is not A entitled to his salary unless that remuneration was being paid in the form of services, in which case the remuneration must be paid but may be recovered by the employer by action instituted by him in the Labour Court for this purpose. The point being made here is that the striking employee is not entitled to remuneration even where the "strike" is lawful. B

What the appellant did in this case was to withhold salaries from the respondents who had engaged in an unlawful collective job action. The principle is the same – no work, no pay. If a participant in a lawful collective job action is not entitled to his salary, then even more so should a participant in an unlawful collective job action have no entitlement to salary. There is a presumption that the legislature does not intend a departure from the common C law: see Devenish *Interpretation of Statutes* 1 ed at pp 159-160.

The interpretation sought to be placed on s 107 of the Act by the respondent would, apart from giving rise to an absurdity when regard is had to the provisions of s 108(4) *supra*, amount to a departure from the time-honoured legal principle that the legislature is presumed not to depart from the common D law unless it expressly legislates against it.

Accordingly, the appellant was well within its rights when it withheld payment from the respondents' members for the period during which they had not worked.

On this basis alone, the appeal can be upheld. E

THE APPLICATION FOR AN INTERDICT

It was contended by the appellant that the Labour Court erred in dismissing the point *in limine* raised by the appellant, namely, that the Labour Court had no jurisdiction to entertain an application of this nature, which was for an interdict. The Labour Court dismissed the point *in limine* on the basis that in F terms of s 89(1)(a), as read with s 89(2)(d), of the Act, it was empowered to hear the application.

There is, I think, judging from the cases which have come before us, a misconception generally held by the Labour Court, namely, that it is, in terms of s 89 of the Act, endowed with jurisdiction to entertain all applications brought before it. F

Section 89(1)(a) of the Act provides:

> "(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*" (emphasis mine). H

Chidyausiku CJ

A Thus, before an application can be entertained by the Labour Court, it must be satisfied that such an application is an application "in terms of this Act or any other enactment". This necessarily means that the Act or other enactment must specifically provide for applications to the Labour Court, of the type that the applicant seeks to bring: see *PTC* v *Chizema* S-108-04. In that case, it was B pointed out that an application brought in terms of s 93(7) of the Act would correctly be termed an application "in terms of this Act".

Section 92C of the Act (which provides for applications for rescission or alteration by the Labour Court of its own decisions) is a further example of an application that can be brought in terms of the Act.

Section 89(2)(d) of the Act, in my view, emphasises the point sought to be C made. It provides that the Labour Court may –

> "(d) in the case of an application other than one referred to in para (b) or (c), or a reference, *make such determination or order or exercise such powers as may be provided for in the appropriate provision of this Act*" (emphasis mine).

Thus, the application and the remedies obtainable thereby must be authorised D in the Act or the enactment authorising the application to the Labour Court.

Nowhere in the Act is the power granted to the Labour Court to grant an order of the nature sought by the respondents in the court *a quo,* nor have I been referred to any enactment authorising the Labour Court to grant such an order.

Accordingly, the court *a quo* was wrong in dismissing the point raised *in* E *limine*.

INTERPRETATION OF THE DISPOSAL ORDER

The third ground of appeal raised by the appellant was that the court erred in entertaining the application on the basis that it was an application to interpret its order.

F This was not an application for an interpretation by the Labour Court of its order. It was an application for an interdict based on the respondents' interpretation of the disposal order granted by the Labour Court.

Even assuming, however, that the application was one in which the court was being asked to interpret its order, the court was obliged to apply the basic G principles of interpretation and could not ascribe to the order a meaning beyond its plain and ordinary meaning.

What the Labour Court ordered by consent was a termination of the collective job action and, in doing so, gave guidelines to the appellant (the employer) as to its future conduct in response to members of the respondents who H flouted the consent order.

2005 (1) ZLR p348

Chidyausiku CJ

No mention was made in the order of the appellant's right (or lack of it) to A withhold payment from those respondents who had participated in the collective job action. When the appellant did withhold payment from the striking respondents, it was within its rights, as I have demonstrated above, to do so. It was not acting in defiance or contempt of the Labour Court's order, because there was no order directing it to pay salaries to the participants in B the collective job action for the period during which they participated therein.

The Labour Court, in ordering as it did, *supra,* did not merely interpret its order. It ascribed an interpretation to the order that not only altered "the sense and substance" thereof but contradicted the plain meaning of the order. This it cannot do: see Herbstein & van Winsen *The Civil Practice of the Supreme Court of South Africa* 4ed at p 686 where the authors state as follows: C

> "The general principle, now well established in our law, is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that the court thereupon becomes *functus officio:* its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter ceases."

In the result, the appeal is allowed with costs. The order of the court *a quo* is D altered to read:

> "The application is dismissed with costs."

Chidyausiku CJ & Gwaunza JA concurred. E

Mbidzo, Muchadehama & Makoni, appellant's legal practitioners

Honey & Blanckenberg, respondents' legal practitioners F

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S v NDLOVU & ORS 2005 (1) ZLR 349 (S)

Citation	2005 (1) ZLR 349 (S)
Case No	Judgment No. S-136-04
Court	Supreme Court, Bulawayo
Judge	Chidyausiku CJ, Ziyambi JA & Gwaunza JA
Heard	30 November 2004
Judgment	19 May 2005
Counsel	*Z Moyo,* for the first appellant *C Nleya,* for the second appellant *T Mtetwa,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

C **Evidence** — *confession — genuineness — confession denied in trial — can be accepted as genuine if it makes mention of facts accused could only have known if he was connected to the crime*

Headnote

The appellants were appealing against a death sentence for murder. The D second appellant had admitted to the charge in a confession which described his role in the murder, and mentioned the share of the deceased's property he received. At the trial, he alleged that the statement was obtained by coercion. However, the evidence in his confession was corroborated by evidence of other witnesses as well as the *post mortem* report.

E *Held,* that the warned and cautioned statement contained details of the crime which only the accused would have known. If an accused mentions in his confession facts, the knowledge of which could only have come to him by being connected to the crime, the mentioning of such facts would be regarded as strong evidence of the genuineness of the confession. In *casu,* the facts were also corroborated by other evidence.

Cases cited F

S v Nkomo 1989 (3) ZLR 117 (S)

R v Sambo 1964 RLR 565 (A)

S v Tsorayi 1985 (1) ZLR 138 (H)

Case information

G *Z Moyo,* for the first appellant

C Nleya, for the second appellant

H *T Mtetwa,* for the respondent

Chidyausiku CJ

Judgment

GWAUNZA JA: The appellants were convicted by the High Court of murder A with actual intent, and sentenced to death. They have now appealed to this court against both their conviction and sentence.

The facts of the matter are as follows:

On the night of 26 November 1999, the deceased, a twenty three year old student at the National University of Science and Technology, was drinking B beer at Flamingo Nightclub in Bulawayo. He was in the company of Brenda Ncube, who worked as a cleaner at the nightclub. Having agreed to spend the night together, the deceased and Brenda left the night club around 2.00 a.m. While walking along a footpath, the two were confronted by two people – assailants – who pounced on the deceased. In the attack that ensued, the deceased was overpowered and fell to the ground. He was robbed of the belt C he was wearing, and some $150 in cash. He was also struck on the head with a blunt instrument and suffered fatal injuries described in the post mortem report as brain damage, skull fracture and head injury.

Brenda fled the scene of the attack as soon as the assailants appeared. She went back to the nightclub and reported what had happened. This led to the D arrest of the appellants and the late Roy Mguni on suspicion of murder of the deceased. It was alleged the three had been at the Flamingo Nightclub at the same time as the deceased and Brenda. It was alleged further that they had not only observed the deceased buying Brenda some beer, but also that they, together with other patrons, had overheard Brenda mentioning that she was going to spend the night with the deceased. E

The learned trial judge noted in his judgment that the appellants had not disputed the evidence of one Busiwork Tawanda that he had been in the company of the two appellants at the nightclub earlier on the night the deceased was killed. Nor had they disputed the evidence that the two appellants had left the nightclub soon after the deceased and Brenda. F

After their arrests, the appellants recorded warned and cautioned statements which were confirmed by a magistrate the following day. Neither of them indicated the statements had not been made freely and voluntarily. In his warned and cautioned statement, the second appellant stated as follows:

> "I admit the charge of killing Louis Chomuseke. I left Flamingo Night Club G in the company of Freddy and Roy to follow behind the deceased, after we had gathered from Brenda that he had money on him. We were following after him with the intention of robbing him of the money. Freddy picked up two stones with which he hit the deceased... He hit him on the head and the person fell down. Freddy immediately searched him and at the same time Roy stabbed him and removed a black belt from him and H

Chidyausiku CJ

> A handed it to me as well as some money and I took possession of them. While all this was taking place I was watching that there were no people approaching. We left there and ran into town. When we later checked we discovered that we had taken $150 from him."

The first appellant, Freddy Ndlovu, effectively abandoned his appeal. It was submitted on his behalf, by his counsel, that he had no meaningful submissions B to make, since there seemed to be strong evidence linking him to the offence. It was also submitted in relation to the sentence passed against

him that it was appropriate, given the fact that the murder in question was committed in the course of a robbery.

This confession in my view is properly made. Even though the first appellant C denied in his oral evidence that he was at Flamingo Nightclub on the night in question, there was strong evidence linking him to the offence.

Firstly the State's only witness, Brenda (who as a suspected unconvicted accomplice, was properly cautioned) averred that she had seen the first appellant twice that night, firstly at the nightclub while in the company of Busiwork Tawanda, and later at the scene of the murder. It was her evidence D that just before she fled the scene, the first appellant had just picked up two stones and was threatening to hit both her and the deceased with them. He had also shouted a warning to her not to report what she had seen. The court *a quo* found Brenda to be a fair witness who did not exaggerate facts. The learned judge pointed out, as evidence of this, that if Brenda had been E dishonest and determined to incriminate the first appellant at all costs, she would have informed the court that she had seen him not only pick up the stones, but hit the deceased as well.

Secondly the second appellant as the court *a quo* correctly found, filled the gaps in Brenda's evidence. In his warned and cautioned statement, the second appellant asserted that the first appellant had hit the deceased on the head with F two stones that he had picked up, resulting in his (deceased) falling to the ground. According to the statement, the first appellant had then proceeded to search the deceased and remove the belt he was wearing, which he had handed to the second appellant as his share of the loot.

Thirdly and most importantly, Busiwork Tawanda corroborated Brenda's G evidence that it was in his company that the two appellants were drinking before the latter two left to follow Brenda and the deceased upon their departure from the nightclub. As already pointed out the first appellant did not dispute Busiwork's evidence.

The court *a quo* also properly dealt with the question of Brenda's positive H identification of the first appellant both at the scene of the murder and at an

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identification parade. At the scene of the crime, it was her evidence that she A recognised the first appellant by his clothes and his voice when he shouted a warning to her as she fled the scene, not to report the matter to the police. At the identification parade, Brenda's evidence was that she was able to identify him since she had known him for about a year. For the first nine or so months of that year, she averred, she had observed but not spoken to him. She B had, however, in the last three months, occasionally spoken to him.

Concerning identification, counsel for the State properly cited *S* v *Nkomo* 1989 (3) ZLR 117 (S) as an appropriate authority. It is noted in the headnote of that case that:

Broadly speaking, good identification does not need corroboration or support, but bad identification does. Examples of good identification include cases C where the witness has observed the accused over a lengthy period or many times or where the accused was well-known to the witness.

In *casu*, Brenda's identification, though good in itself, was corroborated by the evidence of Busiwork and that of the second appellant. Thus the first appellant's active participation in the crime was left in no doubt. In addition D to this, the first appellant did not help his case when he failed to produce evidence supporting the *alibi* that he came up with for the first time at the trial. His one witness failed to confirm that the first appellant had been at his rural home in Filabusi, on the day the crime was committed.

Taking all this into account, I am satisfied the State proved beyond reasonable E doubt that the first appellant hit the deceased on the head with stones, resulting in his death. The State also proved the fatal attack was perpetrated in the course of a robbery.

In the result, I find that the first appellant was properly convicted of, and sentenced for, murder with actual intent.

The second appellant Nelson Ndlovu, sought at the trial to dissociate himself F from his confirmed warned and cautioned statement. It is pertinent to note that in that statement, the second appellant not only placed himself at the scene of the crime, he also attributed to himself a participating role in

its perpetration. His evidence on the first appellant's role in the murder of the deceased smartly complemented that of Brenda. That he mentioned the deceased co-accused, G Roy Mguni, as having stabbed the deceased when no evidence of such stabbing was observed on the body, could, as found by the court *a quo*, have resulted from a mistaken belief as to the exact role played by Roy Mguni. It could also be evidence of the collusion by the three, to murder the deceased by whatever violent means possible, in order to facilitate the robbery. H

2005 (1) ZLR p353

Chidyausiku CJ

A The court *a quo* in my view correctly rejected the second appellant's evidence that he had not made the statement freely and voluntarily. He was questioned closely by the court on why he had not told the magistrate who confirmed the statement, that he had been induced through violence by the police, to make the statement. This was particularly so since, on his evidence, he had appeared before the confirming magistrate visibly in great pain from the supposed B assault by the police. The second appellant's response to the questioning was muddled, confused and bereft of credibility, a circumstance that cast serious doubt on the veracity of his evidence.

Despite it being a confirmed warned and cautioned statement, the court *a quo* nevertheless took the precaution of calling the police detail who was alleged C to have assaulted the second appellant. The police officer, Inspector Tsunda, denied that the second appellant had been assaulted as a way of forcing him to make the statement in question. Counsel for the respondent cited a number of authorities concerning the approach to adopt when dealing with confessions. In *S* v *Tsorayi* 1985 (1) ZLR 138 (H) at p 142 the learned judge quoted with approval a passage from *R* v *Sykes* (1913) 8 Cr App R 233 at 236 as follows:

> D "… the first question you ask when examining the confession of a man is, is there anything outside it to show it was true? Is it corroborated? Are the statements made in it of fact so far as we can test them true? … Is his confession possible? Is it consistent with other facts which have been ascertained and which have been, as in this case, proved before us?"

E In my view, there is substance in the submission made for the respondent that ample corroboration of the second appellant's confession was to be found in the evidence of Brenda and Busiwork, as well as the postmortem report. The second appellant confirmed Brenda's evidence that she and the deceased left the nightclub first, leaving Busiwork in the company of his drinking companions, the appellants. Busiwork averred his companions had followed soon afterwards. F The postmortem report gave the cause of death as skull fracture caused by a blunt instrument, something that is consistent with the second appellant's assertion that stones had been used to hit the deceased on the head. Other corroboration is to be found in Brenda's evidence, completed by the second appellant's, that the first appellant had picked up stones and hit the deceased with them on the head.

G In addition to this, was the evidence concerning the belt that the deceased was wearing on the day he was killed. The deceased's body was found with no belt on. Ackim Garikayi told the court *a quo* that the second appellant had given him a black male belt to sell on his behalf. He had duly done so. In his H confession the second appellant said he had been handed the deceased's belt

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2005 (1) ZLR p354

Chidyausiku CJ

as part of his share of the loot. Clearly, therefore the second appellant's A confession was corroborated in material respects by other evidence.

The court *a quo* in my view, correctly, also considered the fact that the second appellant's confession was consistent with other facts, which had been ascertained. He was at the nightclub and in the company of his two co-accused and Busiwork. Together with the former he had followed the deceased and B Brenda and was at the scene of the crime.

The court *a quo* was also correct in its finding that the second appellant's warned and cautioned statement contained details that only he would have known. It is an established principle of law[1] that if an accused mentions in his confession facts the knowledge of which could only have come to him by being connected to the crime, the mentioning of such facts would be regarded C as strong evidence of the genuiness of the confession. In *casu*, the deceased's body was found with no belt on it. The second appellant stated in his warned and cautioned statement that the belt had been removed from the deceased's body and given to him. He could not have known of the missing belt

unless he had been at the scene of the murder and had personal knowledge of the D circumstances surrounding its loss. The second appellant's warned and cautioned statement was coherent, properly sequenced, and filled gaps in Brenda's evidence. There is merit in the respondent's submission that he had been able to relate the true events because he had participated in them by occupying the strategic position of sentinel while his colleagues committed the offence. He clearly acted in common purpose with them. E

All in all, I am satisfied the court *a quo* properly accepted the second appellant's confession as a true version of what happened on that day.

The second appellant sought to raise what the court *a quo* correctly found to be a false *alibi*. For the first time, in court, he mentioned having had a tooth extracted on the day before the murder, and spending the whole of the following day at home. He failed to explain why he had not informed the police, and his lawyer, of what would have been a very strong defence. This evidence in addition to having clearly been an after-thought, was effectively discredited by the evidence of Brenda and Busiwork, which he did not dispute. He was at the nightclub on the night in question, he followed Brenda and the deceased and he stood guard while his co-accused, with whom he was acting in common G purpose, killed the deceased in order to rob him. He was given a share of the loot. His conviction in my view was properly arrived at. H

2005 (1) ZLR p355

Chidyausiku CJ

A The court *a quo* found no extenuating circumstances in the case. I am satisfied this finding is sound.

The appellants set out to rob the deceased, because they believed he had money. Robbery by its nature entails the use of violence on the victim. The use of stones in hitting the deceased on a vulnerable part of his body, and with B such force as to cause almost instant death, is suggestive of a clear intention to kill. As correctly argued for the State, had death not been intended, the appellants, who could easily have overpowered the deceased, since they outnumbered him, could have robbed him without assaulting him. The inference is also inescapable, that the appellants murdered the deceased in the manner they did, in order to eliminate the possibility of identification.

C That they killed in order to rob suggests a total disregard of and lack of respect for, human life.

I am satisfied the court *a quo* properly convicted them of murder with actual intent and sentenced them accordingly. The appeal is without merit and is accordingly dismissed.

D Chidyausiku CJ & Ziyambi JA concurred.

Bulawayo Legal Projects Centre, first appellant's legal practitioners

Sansole & Senda, second appellant's legal practitioners

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

1 See *R v Sambo* 1964 RLR 565

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OLIVINE INDUSTRIES (PVT) LTD v JACK & ORS 2005 (1) ZLR 356 (S)

2005 (1) ZLR p356

Citation 2005 (1) ZLR 356 (S)

Case No	Judgment No. S-138-04
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Ziyambi JA
Heard	20 July 2004
Judgment	19 May 2005
Counsel	*E T Matinenga*, for the appellants Respondents in person
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — *appeal — under Labour Act — Labour Court — appeal* C *against determination made under registered employment code of conduct — when appeal lies to Labour Court*

Headnote

The respondents were aggrieved when their employer, the appellant, regraded them, so they sought redress in accordance with grievance procedures D laid down in their employer's code of conduct, which was registered in terms of the Labour Act [*Chapter 28:01*]. They remained dissatisfied after the procedures under the code had been finalised, so they appealed to the Labour Relations Tribunal (now the Labour Court). The code did not provide for such an appeal. The Tribunal upheld their appeal and the employer appealed to the Supreme Court. E

Held, that the respondents were bound by the code of conduct and by decisions made under it. The Tribunal could interfere with a determination made under the code only if there were special reasons, for example that the person making the determination acted on a wrong principle or took into account extraneous or irrelevant matters, or did not take into account F relevant considerations, or was mistaken about the facts.

Cases cited

Charuma Blasting & Earthmoving Services (Pvt) Ltd v Njainjai 2000 (1) ZLR 85 (S)

Farmers Co-op Society (Reg) v Berry 1912 AD 343 G

Case information

E T Matinenga, for the appellants

Respondents in person H

2005 (1) ZLR p357

Sandura JA

Judgment

A **CHEDA JA**: The respondents were employed by the appellant and were referred to as dispatch clerks.

A job evaluation exercise was carried out by the appellant and the respondents were advanced from grade 6 to grade 8 employees. Other clerks employed by the appellant were placed in grades 9 and 10.

B The respondents complained that their grading was wrong and said that they should have been placed in grade 9 like the other clerks.

The appellant has a code of conduct ("the code"), which binds both the appellant and its employees. The code was registered with the labour relations registrar in March 1993. It regulates both the disciplinary and grievance procedures. The grievance raised against the appellant by the respondents C was dealt with at different levels up to the level of the officer referred to in the code as the Head of Business.

While the disciplinary structure states that the levels of authority have to follow the various steps up to the Head of Business and then provides that an employee who is dissatisfied with the final decision of the Head of Business D can appeal to the labour relations tribunal ("the Tribunal"), the grievance procedures end at the level of the Head of Business. He makes the final decision and there is no provision for any further appeal thereafter.

Step 4 of the grievance procedure in the code provides for the referral of a grievance to the Head of Business (or his representative) by the personnel F manager if all the steps already taken have failed to resolve the grievance. Step 5 of the code provides that the Head of Business (or his representative) shall make the final decision to resolve the matter if all the other steps have failed. Section 6:3 provides for an appeal if the employee is not satisfied with the resolution of the grievance in steps 1 to 3.

The respondents were aware of these provisions. They said in their heads of F argument that if there is a clause which states that an affected worker cannot appeal to a higher court, that clause is by mutual mistake of both parties. I do not agree because in the provisions for the disciplinary procedures the lodging of an appeal to a higher court was specifically provided for, while in the grievance procedures it was specifically provided that the decision of the Head of Business was final.

G In the circumstances, the Tribunal should not have interfered with the resolution of the matter by the Head of Business, as this was in accordance with the agreement entered into by the parties. The Tribunal could only interfere if there were special reasons similar to those referred to in the case H of *Farmers' Co-operative Society (Reg)* v *Berry* 1912 AD 343 at 350 and

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Sandura JA

Charuma Blasting & Earthmoving Services (Pvt) Ltd v *Njainjai* 2000 (1) ZLR 85 (S). A

The respondents argued that:

> "The right of every citizen to be heard in a court of law in Zimbabwe cannot be overtaken by a mere provision of a code."

It would be difficult to deal with complaints if parties who enter into a binding B agreement to regulate their industrial relations were to be readily allowed to turn against their agreement when they so wished.

A further observation is that the respondents were upgraded to a higher grade than that provided in the Collective Bargaining Agreement for the Detergents, Edible Oils and Fats Industry (SI No. 89 of 1997) and the standards set by the C National Employment Council.

The respondents also alleged that their employer had committed an unfair labour practice. Acts of unfair labour practice are defined in s 8 in Part III of the Labour Act [*Chapter 28:01*].

There is nothing in what the appellant did that has been shown to amount to D an unfair labour practice. The different grades given to the other clerks are explained by the difference in their duties and qualifications.

In view of the above reasons, I find that the Tribunal should not have interfered with the decision of the Head of Business, as it was made in accordance with the grievance procedure provided for in the registered code of the appellant.

The appeal succeeds. The decision of the Tribunal is therefore set aside. The E respondents are to bear the costs.

Sandura JA & Ziyambi JA concurred.

Coghlan, Welsh & Guest, appellant's legal practitioners F

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/S v SAFICO 2005 (1) ZLR 359 (S)

S v SAFICO 2005 (1) ZLR 359 (S)

Citation	2005 (1) ZLR 359 (S)
Case No	Judgment No HH-31-05
Court	High Court, Harare
Judge	Makoni J, Mavangira J concurring
Heard	19 May 2005
Judgment	19 May 2005
Counsel	Details not supplied
Case Type	Criminal Review
Annotations	No case annotations to date

Flynote

C **Criminal procedure (sentence)** — *mandatory minimum stentence — a sentence 'for a period not exceeding 20 years' is not a mandatory minimum sentence*

Criminal procedure (sentence) — *statutory offence — Sexual Offenders Act, [Chapter 9:12], s16 — sentence applicable when it is proved that convicted person was infected with HIV at time of offence — test carried* D *out after offence committed — need for test to be carried out within 30 days after the offence — test carried out later not raising presumption that accused infected at time of offence*

Headnote

The accused was convicted, under s16 of the Sexual Offenders Act, E [*Chapter 9:12*] of having sexual intercourse with a young person. He was tested for HIV some months after the offence. The test was positive. He was sentenced, by a junior magistrate, to 20 years imprisonment, the magistrate believing that to be a mandatory minimum sentence for someone proved to have been infected with HIV.

Held, (1) s 16 provides that an offender 'shall be sentenced to imprisonment for a period not exceeding 20 years'. This is not a mandatory minimum sentence.

(2) Under s 18(2) if it is proved that he was infected with HIV within 30 days after committing the offence, it is presumed, unless the contrary is shown, that he was infected with HIV when he committed the offence. For the presumption to operate, the test must have been done within 30 G days after the commission of the offence. A positive test, carried out some months after the commission of the offence, does not cause the presumption to operate.

(3) The magistrate, in any event, did not have jurisdiction to impose such H a sentence.

Makoni J

Held, accordingly, that the sentence be set aside and the matter remitted for A sentencing afresh.

Legislation considered

Sexual Offenders Act, [*Chapter 9:12*]

Judgment

MAKONI J: The accused was convicted, after a full trial, of contravening B Section 3(1) of the Sexual Offences Act [*Chapter 9:12*], (the Act). He was sentenced to 20 years imprisonment.

The facts are that the accused, who is aged 37 years, was in love with the complainant who is aged 15 years. On 9th March 2003 and at House number C 4463 Bindura, the accused had sexual intercourse with the complainant.

After conviction and on 22 August 2003 the court directed that the accused be tested to ascertain whether or not he was infected with HIV. The results, dated 16 September 2003, revealed that he was infected with HIV.

The conviction is proper and I hereby confirm it but the sentence is disturbingly excessive and the magistrate misdirected himself on a number of aspects. D

In sentencing the accused, the magistrate stated the following:-

> "In terms of the Sexual Offences Amendment (*sic*) Act in such a situation a minimum mandatory sentence is called for. The court's hands are therefore tied. There is no discretion but to pass the required minimum mandatory sentence." D

He then proceeded to sentence the accused to 20 years. This was a misdirection on the part of the magistrate.

The Act, in Section 16, provides that:

> "Where a person is convicted of
>
> (a) … F
>
> (b) Having sexual intercourse with a young person in contravention of section three or
>
> (c) …
>
> (d) …
>
> *and it is proved that, at the time of the offence,* the convicted person was G infected with HIV, whether or not he was aware of his infection, he shall be sentenced to imprisonment for a *period not exceeding 20 years."* (my own emphasis)

The phrases that I have underlined reflect two significant aspects, which in my view, magistrates should consider before proceeding to sentence an offender in terms of Section 16. H

Makoni J

A As regards the first phrase there must be evidence before the magistrate that the accused was infected with H.I.V. at the time he committed the offence. In this case, no such evidence was placed before the magistrate. The second phrase gives the maximum period that can be imposed in such a case. In other words the court can sentence anyone convicted of the said offence to any term of imprisonment but not exceeding twenty (20) years. The magistrate B misdirected himself when he considered the 20 years as the minimum mandatory sentence.

Having said the above, the next issue would be whether the magistrate, in this matter, had jurisdiction to impose the sentence in terms of s 16 of the Act. Section 19 of Act stipulates:

> C "A court of a regional magistrate shall have jurisdiction to impose the penalty presented in s 15 or 16 on a person convicted of contravening that section."

The magistrate who dealt with this matter is a junior magistrate. In terms of section 19 he had no jurisdiction to impose sentence on the accused in terms of s 16. Only a regional magistrate has jurisdiction. If the magistrate was aware D of section 19, he could have invoked the provisions of section 54(2) of the Magistrates Court Act [*Chapter 7:10*].

Further s 18(2) provides as follows:-

> "For purposes of section 15 and section 16, if it is proved that a person was infected with HIV, within 30 days after committing an offence, referred to E in those sections, it shall be presumed, unless the contrary is shown, that he was infected with HIV when he committed the offence."

For the presumption to operate, the test must have been done within 30 days after the commission of the offence. The offence in this case was committed on the 9th day of March 2003. I am not aware of the exact date when the test F was done but the results are stamped the 16th of September 2003. In any case the order for the test to be done was made on the 22nd of August 2002, well after the offence had been committed. The presumption did not operate in this matter.

In view of the above, it is quite clear that the magistrate misdirected himself on a number of aspects. I will therefore confirm the conviction and set aside G the sentence.

I would have sentenced the accused, but there is not enough information on the record to enable me to do so. This is mainly due to the fact that both the defence counsel and the magistrate were under the mistaken belief that the magistrate had no discretion in passing sentence. I will remit the matter to the H magistrate for him to recall the accused, take mitigation and proceed to

sentence him. The magistrate must take into account the period that the A accused has already served. B

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/OMAR & ANOR v BLUE GUM TRANSPORT (PVT) LTD & ANOR 2005 (1) ZLR 363 (H)

OMAR & ANOR v BLUE GUM TRANSPORT (PVT) LTD & ANOR 2005 (1) ZLR 363 (H)

Citation	2005 (1) ZLR 363 (H)
Case No	Judgment No. HB-44-05
Court	High Court, Bulawayo
Judge	Ndou J
Heard	27 April 2005
Judgment	18 May 2005
Counsel	*C Dube,* for the applicant *T Ndlovu,* for the respondents
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Practice and procedure — *execution — stay of — no automatic stay when proceedings brought on review — court's discretion to grant stay of execution — review brought as delaying tactic — stay refused*

Practice and procedure — *review — application for — does not automatically* D *cause stay of execution*

Headnote

The applicants had been the unsuccessful party in litigation and costs had been awarded against them on the higher scale. The bill of costs had been submitted by the first respondent to the taxing master for taxation. The E applicants contested the bill and the taxing master made his decision. The applicants brought the decision on review but a few days later the respondent served a notice of execution on the applicants for recovery of the taxed costs. The applicants argued that the execution was automatically stayed pending the court's decision on review.

Held, that while the noting of an appeal suspends execution of the judgment F appealed against unless the court otherwise directs, there is no similar common law rule applicable to staying of execution pending review. The institution of review proceedings does not automatically suspend the execution of a taxed bill of costs.

Held, further, that it would have been open to the applicants to have G requested the taxing master to refer the matter to a judge in terms of r 313 of the High Court Rules, rather than resort to the cumbersome review proceedings under r 314.

Held, further, that the court has a wide general discretion to allow stay of execution pending a review of taxation. It is only where the court is H satisfied that the review is not brought genuinely with the *bona fide*

2005 (1) ZLR p364

Makoni J

intention of testing the correctness of the determination of the taxing A officer, but is only brought as a delaying tactic and as a means of staving off the evil day that a court may order execution of the taxed costs to proceed. Here, the applicants did not contest all the costs but had not tendered even that which they accepted as being payable. It was clear that the proceedings were a delaying tactic. B

Cases cited

Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd 1989 (1) ZLR 152 (H)

Bredenkamp v Connax Wholesalers (Pty) Ltd & Ors 1965 (2) SA 876 (C)

Dabengwa & Anor v Min of Home Affairs & Ors 1982 (1) ZLR 223 (H)

E P du Toit Tpt (Pty) Ltd v Windhoek Municipality 1976 (3) SA 818 (SWA) C

Geffen v Strand Motors (Pvt) Ltd 1962 R & N 259 (SR); 1962 (3) SA 62 (SR)

Mahlangu v Ndhlovu & Ors HB-7-04

Ormonde v Buirski, Herbstein & Jacobson 1933 CPD 413

Patel v Ismail Mia & Co 1912 TPD 650

Policansky Bros v Hermann & Anor 1911 TPD 319

Reid & Anor v Godart & Anor 1938 AD 511 D

South Cape Corp (Pty) Ltd v Eng Mgmt Svcs (Pty) Ltd 1977 (3) SA 534 (A)

Super Sales & Upholsterers (Pvt) Ltd v Lawton 1974 (1) RLR 68 (G); 1974 (3) SA 264 (R)

Tselentis v Salisbury City Council 1965 RLR 282 (A); 1965 (4) SA 61 (RA) E

van Dyk v du Toit en 'n ander 1993 (2) SA 781 (O)

Case information

C Dube, for the applicant

T Ndlovu, for the respondents

Judgment

NDOU J: The applicants seek a provisional order in the following terms: F

"Terms of Final Order sought

1. The respondents to show cause to this a honourable court why a final order should not be made in the following terms:

   (i) That execution proceedings against the applicants based on the writ issued under cover of case number HC 3774/04 (X-Ref 3841/04) recovering taxed costs be and is hereby stayed pending the finalisation of this matter.

   (ii) That the first respondent pays costs of this application on an attorney-client scale. H

2005 (1) ZLR p365

Makoni J

A **Interim Relief granted**

2. Pending determination of this matter, the applicant is granted the following relief:

   (i) That the second respondent be and is hereby interdicted upon service of this order, from removing the applicant's property and if already removed, unconditionally release the same with the B first respondent meeting costs, if any, of returning same to the applicant's premises pending the finalisation of this matter."

This matter has a history which I do not wish to go into in detail. If suffices to say that the parties have been to this court on at least three instances. Those matters have been finalised with the applicants ordered to pay costs on a legal C practitioners and client enhanced scale. On 5 April 2005, the first respondent caused a bill of costs to be taxed by the Taxing Officer of this court. Having gone through the bill of costs, which the applicants, through their legal practitioners heavily contested, the Taxing Officer came up to a conclusion and awarded a total of $47 943 933,98 to the first respondent. According to the applicants the various items on the taxed bill were exaggerated. It is the D applicants' case that the Taxing Officer erred in allowing these items even on the level to which he reduced some of them. The applicants indeed filed an application for review of the Taxing Officer's decision under case number HC 642/05. The Taxing officer's decision is indeed reviewable. The said application for review was served upon the first respondent on 13 April 2005. On 15 April 2005 the second respondent served the applicants with a warrant E of execution against property for recovery of the taxed costs. The second respondent announced to the applicants that she/he is under specific instructions from the first respondent's legal practitioners to "attach and remove without giving any notice" of at least forty-eight (48) hours as is provided in the rules of this court. It is trite that having obtained an order of F costs (which costs were taxed by a Taxing Officer) in their favour, the first respondent, as a judgment creditor, is entitled to obtain satisfaction of it from the applicants, the debtors – *Bredenkamp* v *Connax Wholesalers (Pty) & Ors* 1965 (2) SA 876 (C); *Van Dyke* v *Du Toit en'n ander* 1993 (2) SA 781(O) and *Mahlangu* v *Ndlovu & Ors* HB-7-04. There are, however, exceptions to this general rule where the judgment creditor's right to execute may be stayed G pending the happening of some event. The court has a discretion, in a proper case, to suspend execution. But the discretion must be judicially exercised – *E P du Toit Transport (Pty) Ltd* v *Windhoek Municipality* 1976 (3) SA 818 (SWA); *Super Sales & Upholsterers (Pty) Ltd* v *Lawton* 1974 (3) SA 264 (R) and *Mahlangu* v *Ndlovu, supra*. Have the applicants made out a case for me H to exercise this discretion in their favour? This is what I have to determine.

2005 (1) ZLR p366

Makoni J

Mr *Dube*, for the applicants, equates the applicants' application for review A with an appeal which automatically suspends the execution of the judgment being appealed against. It is trite that at common law, the noting of an appeal suspends execution of the judgment appealed against unless the court otherwise directs – *Reid & Anor* v *Godart & Anor* 1938 AD 511; *Geffen* v *Strand Motors (Pvt) Ltd* 1962 (3) SA 62 (SR); *South Cape Corporation (Pty)* B *Ltd* v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A); *Arches (Pvt) Ltd* v *Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 and *Dabengwa & Anor* v *Minister of Home Affairs* 1982 (1) ZLR 223 (H). Pending appeal the order could not be carried out except with the leave of this court and in order to obtain such leave a special application has to be made by the applicant. I am not aware of similar common law rule applicable to staying of execution C pending review. Neither has Mr *Dube* referred me to any such authority. I am not convinced that this rule should be extended to review proceedings. I say so because there are material differences between review and appeal. My understanding is that in an

appeal what is in question is the substantive correctness of the original decision whereas on review the court is not delving into the substantive correctness of the decision, but is only determining D whether there were any reviewable procedural irregularities or any action which was reviewable because it was *ultra vires* the powers allocated to the tribunal or authority – *Tselentis* v *Salisbury City Council* 1965 RLR 282 (A); 1965 (4) SA 61 (SRA) and *A Guide to Zimbabwean Administrative Law* (3 ed 1998) by G Feltoe at 14. Therefore, the issuance of the review proceedings does E not automatically suspend the execution of the taxed bill of costs.

Mr *Ndlovu*, for the first respondent, took issue with the use of the cumbersome review proceedings under Order 33 instead of requesting the taxing officer to refer the issue to a judge in chambers in terms of Order 38 r 313. The latter route is faster and cheaper. Rule 313 provides:

> "313.**Taxing Officer may refer point to judge in chambers:** F
>
> The Taxing Officer may, without filing any formal documents, submit any point arising at a taxation for decision by a judge in chambers, and it shall be competent for the taxing officer and for legal practitioners who appeared at the taxation to appear before the judge respecting such point." G

Further taxed costs and expenses of execution "shall be a first charge" – Order 40 r 330. This is all consistent with case law that review in relation to the taxation of a bill of costs by a taxing officer as is the case here, should, in the absence of exceptional circumstances be concluded with undue delay – *Ormonde* v *Buirski, Herbstein and Jasobson* 1933 CPD 413; *Policansky Bros* v *Hermann* H

Makoni J

A *& Anor* 1911 TPD 319 and *Patel* v *Ismail Mia & Co* 1912 TPD 650. The possibility of using the r 313 route was brought to the attention of the applicants' counsel but this counsel was rejected. The way I understand it, the applicants' review is made pursuant to the provisions of Order 38 r 314 which states:

> B "(1) Any party aggrieved by the decision of a taxing officer may apply to court within four weeks after the taxation to review such taxation. The application shall be by court application to the taxing officer and to the opposite party, if such opposite party was present at the taxation or if the court decides that such opposite party should be represented.
>
> (2) The court application shall specify the items forming the subject of C the grievance."

From the papers before me over $16 million is not being contested by the applicants. The applicants have not tendered this uncontested amount. They have not averred any prejudice they could suffer by making the part payment. This court has a wide general discretion to allow the stay of execution pending review. It is only where the court is satisfied that the review of the taxation is D not brought genuinely with the bona fide intention of testing the correctness of the determination of the Taxing officer, but is only brought as a delaying tactic and as a means of staving off the evil day that this court may order execution of the taxed costs to proceed. I am satisfied that the balance of convenience favour the execution of the taxed costs pending review. The applicants did not tender payment of the uncontested taxed costs, which, as E already indicated above, are substantial. They opted to use a longer route instead of utilising r 313. The actions of the applicants are therefore designed to stave off the day of reckoning.

Accordingly, I dismiss the application with costs.

F *Dube and Partners,* applicants' legal practitioners

Cheda & Partners the respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/APOSTOLIC FAITH MISSION OF PORTLAND, OREGON & ANOR v BALTZELL & ORS 2005 (1) ZLR 368 (H)

APOSTOLIC FAITH MISSION OF PORTLAND, OREGON & ANOR v BALTZELL & ORS 2005 (1) ZLR 368 (H)

Citation	2005 (1) ZLR 368 (H)
Case No	Judgment No. HB-48-05
Court	High Court, Bulawayo
Judge	Ndou J
Heard	6 May 2005
Judgment	19 May 2005
Counsel	*S S Mazibisa*, for the applicants *O C Gutu*, for the respondents
Case Type	Urgent chamber application
Annotations	Link to case annotations

Flynote

Church — *dispute — between church and official — power of church to dismiss official — hierarchical nature of church — failure of church to follow correct procedures — effect*

Headnote

The second applicant was the Southern African Overseer in charge of all the D church branches of the first applicant church in seven Southern African states in terms of the church's Constitution, as well as being pastor for the Bulawayo Southern African Headquarters of the church. In terms of its Constitution, the church was a branch of the parent church in America. Its doctrines and rules were identical with those of and could not be changed without the recommendation and approval of the parent church. E The second applicant, as Overseer, was appointed by the parent church. An emissary from the parent church told him that the parent church wished him to resign on the grounds of his age. This was confirmed by a meeting of the local board, which nominated a successor. The second applicant refused to resign and sought a court order setting aside the board's actions. F

Held, that there was nothing in the church's Constitution to suggest that any of the posts in the church were to be for life, so some provision of the dismissal of the overseer ought to be implied in the Constitution. The basis for saying so was that he who has the power of appointment must as a necessary corollary have the authority to dismiss, because the lack G of the latter power derogates from the former. The intention, here, was to leave the question of the overseer ultimately in the hands of the parent church.

Held, further, that the applicants essentially were seeking judicial review of the proceedings that resulted in the second applicant being told to H

Ndou J

A resign. This was because the application was premised on absence of jurisdiction on the part of the authority concerned and failure to adhere to the principles of natural justice.

Held, further, that the respondents had not complied with the laid down procedures for the board meeting. This would entitle the applicants to a provisional order setting aside the dismissal, pending the hearing of B the review.

Cases cited

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

Kwete v African Community Publishing & Development Trust HH-216-98

Marasha v Old Mutual Life Assurance Co Ltd 2000 (2) ZLR 197 (H)

C *Musara v Zinatha* 1992 (1) ZLR 9 (H)

Mutare City Council v Mudzime & Ors 1999 (2) ZLR 140 (S)

Sec for Transport & Anor v Makwavarara 1991 (1) ZLR 18 (S)

Sibanda NO v Sibanda HB-100-85

Case information

S S Mazibisa, for the applicants

D *O C Gutu*, for the respondents

Judgment

NDOU J: The applicants seek a provisional order in the following terms:

"**Terms of the Final Order sought**

That the provisional order granted by this honourable court be confirmed E in the following manner:

1. That paragraphs 1, 2, 3, 4 and 5 of the interim relief granted be confirmed to be final and forming part of this final order.
2. That the respondents jointly and severally one paying the others to be absolved be and are hereby ordered to pay costs of suit on an attorney-client scale.

F **Interim Relief granted**

Pending the finalisation of the matter the applicant be granted the following relief:

1. that the first, second and third respondents' board meetings of 19 and 20 April 2005 be held to be unConstitutional and all decisions and G determinations arrived at be and are hereby declared to be null and void.
2. the applicant's forced resignation as the Southern African Observer for the first applicant church be and is hereby declared to be unConstitutional for lack of compliance with the spirit and letter of the Constitution more particularly Article 7, article 8 and article 9 of H the Constitution.

---

3. the first respondent's actions to dismiss the second applicant from A office be and is hereby declared to be unlawful and unConstitutional.
4. the first respondent's actions to dismiss the second applicant from office be and is hereby declared to be unlawful and unConstitutional for lack of authority from the Superintendent General in the United States of America.
5. the respondents jointly and severally be and are hereby interdicted B from interfering in any manner whatsoever whether directly or indirectly with the first applicant's operations in the Southern African Region and also the second applicant's discharge of his duties in terms of the Constitution in the office of the Overseer for the Southern Region.
6. the fourth respondent be and is hereby interdicted from acting as or C purporting to be the overseer for the Southern African Region pursuant to the appointment and actions by the first, second and third respondents or any other party without compliance with the Constitution of the first applicant."

The background facts of this matter are the following. The first applicant is D a *universitas* with a legal *persona* and capacity to sue and be sued. The second applicant is (or was, depending on whose side you view this matter) the Southern African Overseer, being in charge of all the church branched in seven Southern African states in terms of the Constitution and being pastor for the Bulawayo Southern African Headquarters church.

On 19 April 2005, the first respondent, who is the Director of Foreign Works E for Africa, came to Zimbabwe and held a meeting with the second applicant and instructed him to retire on the grounds of old age. The second applicant refused to retire and refused to sign any documents to that effect. On 20 April 2005, a second meeting, also attended by the second and third respondents instructed

the second applicant to retire. This application is essentially born F out of the outcome of these two meetings. The second applicant also opposes the appointment of the fourth respondent as his possible successor. The application is for an order to declare as null and void *ab initio* all the actions of the respondents. Alternatively, the matter is launched as an application for review in terms of s 14 of the High Court Act [*Chapter 7:06*] and Order 33 of the Rules of this court. G

The church is established in Southern Africa by a Constitution which was attached to the application and has its main body in Zimbabwe where registration took place in accordance which the laws of Zimbabwe. In terms of Article 1 and V of its Constitution, the church is a branch of, and its doctrines and rules will be identical with those of, and cannot be changed without the H

Ndou J

A recommendation and approval of the Apostolic Faith Mission of Portland, Oregon, USA ("the parent church"). The government and administration of the church was placed in the hands of a Board of Directors presided over by an Overseer (Article VII). The Overseer is appointed by the parent church, while Board Members are nominated by the Overseer but must also be approved by the church's members and the parent church (Article VII) – see B *Sibanda NO* v *Sibanda* HB-100-85 at p 4. As in this case, the Overseer refused to resign as overseer of the church despite efforts by the parent church to persuade him to do so. The church's Constitution is silent on the question whether the parent church had the power to dismiss the overseer or not. I agree with Muchechetere J (as he then was) in *Sibanda NO* v *Sibanda supra* that C there is nothing in the Constitution to suggest that any of the posts in the church were to be for life, and therefore some provision of the dismissal of the overseer ought to be implied in the Constitution. The basis is that he who has the power of appointment must as a necessary corollary have the authority to dismiss because the lack of the latter power derogates from the former. The intention, here, was to leave the question of the overseer ultimately in the D hands of the parent church. That being the case, all that has to be considered is whether the parent church exercised powers vested in it by the Constitution. Being a spiritual organisation, the church does not appoint people to positions through majority or popular vote. It has a structure and proper chain of command which is followed. The first respondent avers that his April 2005 visit to Zimbabwe was done in his capacity as a representative of the parent church. E In a letter dated 20 April 2005, the parent church and the board members of the first applicant decided and reduced their decision in writing in the following terms:

> "As of the date listed above [i.e. 20 April 2005] we hereby state that Richard J Sibanda is no longer Chairman of the Board and Southern African F Overseer of the Apostolic Faith Mission of Portland, Oregon (Southern African Headquarters) or pastor of the Apostolic Faith Church in Bulawayo.
>
> This decision has been made according to the procedures outline in the Constitution and by-laws of the Apostolic Faith Mission of Portland, Oregon (Southern African Headquarters) Inc. The Constitution is registered with the Zimbabwe Government.
>
> G Dated April 20, 2005 by
>
> (Signed)
>
> Darrel D Lee, President and Superintendent
>
> H General, International Headquarters

Ndou J

> (Signed) A
>
> Dwight L Batzell, Director of Africa Work, International Headquarters,
>
> Portland, Oregon
>
> (Signed)
>
> Jonah Munondo, Board Member B
>
> Southern African Headquarters
>
> (Signed)
>
> Ashworth Mahachi, Board Member
>
> Southern African Headquarters C
>
> (Signed)
>
> Onius Gumbo, Board Member

Southern African Headquarters

(Not signed) D

Lot D Mateza, Board member

Southern African Headquarters"

Having surfed through numerous documents filed of record I hold the view that it is this decision that resulted in the application. All other issues raised E are allied to this main issue. The nature of the application is that the applicants seek a declaratory order declaring as null and void the forced retirement taken at the meetings on 19 and 20 April 2005, alternatively, on ground of irregularity and arbitrariness, to subject the decision to retire second applicant to review on the ground that the Constitution and the *audi alteram* rule were not F adhered to. In the heads of argument filed on behalf of the applicants, heavy reliance is placed on the decision in *Musara* v *ZINATHA* 1992 (1) ZLR 9 (H). But since that judgment a number of judgments have been given by this court as well as the Supreme Court. It was held that a declaratory order is merely one species of relief available and that a party should be able to get around the requirements for review proceedings by instituting proceedings for a G declaratory order: see *Kwete* v *African Community Publishing & Development Trust* HH-216-98; *Mutare City Council* v *Mudzime & Ors* 1999 (2) ZLR 140 (S) and *Marasha* v *Old Mutual Life Assurance Co Ltd* 2000 (2) ZLR 197 (H) at 198H.

2005 (1) ZLR p373

Ndou J

A In my view, the papers reveal that the applicants essentially seek judicial review of the proceedings that resulted in the second applicant being told to resign. I say so because the application is premised on the absence of jurisdiction on the part of the authority concerned – s 27(1)(a) of the High Court Act [*Chapter 7:06*]. Further, it is based on the failure to adhere to principle of natural justice i.e. gross irregularity – s 27(1)(c) of the High Court Act *supra*: B see *Fikilini* v *Attorney-General* 1990 (1) ZLR 105 (S) and *Secretary for Transport & Anor* v *Makwavarara* 1991 (1) ZLR 18 (S). That being the case, the application should have been brought under Order 33 of the High Court Rules 1971 as a court application. According to the applicants, the parent church, i.e through the first respondent and the Superintendent General "can C only negotiate with the second applicant for his retirement and not force him. There is no Constitutional provision for forced retirement".

I have already ruled above that the parent church can appoint or dismiss. The applicants also rely on Article VIII, *supra,* which provides that the government of the church is with the Board of Directors composed of not less that three and not more than seven members. The meeting of 20 April 2005 had four D members of the Board so the requisite quorum was present to take the decision. The only issue is that second applicant did not chair and preside over the meeting as required by Article VII, *supra*. Article VIII(4) partially addresses the question in that "No official shall have the power of representation when matters regarding his personal interests are involved with those of the church E …" In the circumstances, the second applicant did not have the power of representation at the meeting of 20 April 2005 as his retirement was being discussed. He was an interested party in the issue. But, in that event, "a deputy will be appointed by the Southern African Overseer". This was not done *in casu*. That being the case, the applicants have a *prima facie* case for one, but not all, of the prayers in the interim order. Other prayers can really be dealt with F on review.

Accordingly, I grant the following provisional order:

"Interim Relief granted

Pending the finalisation of the matter the second applicant shall remain the Southern African Overseer and pastor for the Bulawayo church.

G **Terms of Final Order granted**

That the provisional order granted by this honourable court be confirmed in the following manner:

1. that the first, second and third respondents' Board meetings of 19 and 20 April 2005 be held to be unConstitutional and all decisions and H determinations arrived at be and are hereby null and void.

2005 (1) ZLR p374

Ndou J

2. that the respondents jointly and severally, one paying the other to A be absolved, be and are hereby ordered to pay costs of suit on an attorney-client scale."

Cheda & Partners, applicants' legal practitioners

Gutu & Chikowero, respondents' legal practitioners B

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/DAIRIBOARD ZIMBABWE (PVT) LTD v LIGHTON TRADING (PVT) LTD 2005 (1) ZLR 375 (S)

DAIRIBOARD ZIMBABWE (PVT) LTD v LIGHTON TRADING (PVT) LTD 2005 (1) ZLR 375 (S)

Citation	2005 (1) ZLR 375 (S)
Case No	Judgment No. S-97-05
Court	Supreme Court, Harare
Judge	Malaba JA, Chidyausiku CJ & Ziyambi JA
Heard	23 May 2005
Judgment	23 May 2005
Counsel	*J C Andersen SC,* for the appellant No appearance for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Contract — *termination — fixed term contract — when may be terminated before end of contract period — early termination lawful if provided for in the contract*

Headnote

The appellant and the respondent entered into a franchise agreement, in D terms of which the latter was appointed the sole franchisee of the appellant to sell and distribute its milk and other dairy products in the district of Kwekwe for a five year period from the date of signature of the agreement. To facilitate the operation of the franchise the respondent was allowed to occupy the appellant's business premises in the town and E to lease a house at a fixed monthly rental. The contract provided that either party could terminate the agreement at any time after the expiration of one year from the date of the agreement by giving to the other party two months' notice in writing. It also provided that, on termination of the agreement for any cause, the respondent had to deliver up the premises from which it operated the franchise and all the appellant's equipment. F If for any reason the respondent contested the termination, it was still obliged to deliver up the premises from which it operated and all the appellant's equipment contained therein, pending the outcome of the dispute. When the appellant gave the requisite

notice and demanded the return of its premises, the respondent argued that it was not entitled to do so.

G *Held,* that there is no law to the effect that once parties have entered into a franchise agreement and fixed the period of its termination they cannot provide, in the same contract, for its termination by either of them on notice to the other. In the absence of such a law, it would not be unlawful H for the parties to have, as a term of the franchise agreement, the

stipulation that it may be terminated by either party on notice at any time A before the expiration of the fixed period.

Case information

J C Andersen SC, for the appellant

No appearance for the respondent

Judgment

MALABA JA: At the conclusion of submissions made on behalf of the B appellant, we allowed the appeal with costs, set aside the order of the court *a quo* and substituted it with the following order –

"1. that the franchise agreement entered into between the appellant and the respondent in or around December 1999 be and is hereby declared lawfully cancelled. C

2. that the respondent and all those claiming through it be and are hereby ordered to vacate forthwith –

(a) the depot premises at number 9 Wilcania Street, Kwekwe;

(b) the depot premises at number 11 Wilcania Street, Kwekwe; and

(c) the house at number 9 Norfolk Drive, Fitchlea, Kwekwe. D

3. in the event of the respondent failing to comply with para 2 above, it is ordered that the Deputy Sheriff be and is hereby authorised to evict the respondent from the said premises mentioned in para 2 above.

4. the respondent pays the costs of suit."

We indicated that our reasons for our decision would follow in due course. E These are they.

The appellant and the respondent entered into a franchise agreement on 1 December 1999, in terms of which the latter was appointed the sole franchisee of the appellant to sell and distribute its milk and other dairy products in the district of Kwekwe from the date of signature of the agreement to 30 November F 2004. To facilitate the operation of the franchise the respondent was allowed to occupy the appellant's business premises at numbers 9 and 11 Wilcania Street, Kwekwe. It was also allowed to lease the house at number 9 Norfolk Drive, Fitchlea, Kwekwe, at a fixed monthly rental. The franchise was one of a fixed duration. In terms of clause 1 of the franchise agreement the parties G agreed that the duration of the franchise was to run from December 1999 to 30 November 2004. In clause 8(3), the parties agreed that:

> "Either party may terminate the agreement at any time after the expiration of one year from the date of this agreement by giving to the other party two months' notice in writing sent by registered post to the address of the other party as given in this agreement." H

A The effect of the termination of the franchise agreement was to be what was agreed upon by the parties in clause 9. It was stated that:

> "Upon termination of this agreement for any cause the franchisee shall forthwith deliver up the premises from which it operates the franchise and all equipment of Dairibord contained therein, described in the schedule. If for any reason the franchisee contests the termination of this agreement, B the franchisee shall still forthwith deliver up the premises which it operates from and all the equipment of Dairibord contained therein pending the outcome of their contention."

On 26 February 2002, the appellant, through its legal practitioners, gave the respondent notice in terms of clause 8(3) of the franchise agreement of its C intention to terminate the franchise at the

expiration of two months, on 30 April 2002. At the expiration of the notice period, the respondent did not deliver up the business premises and the house, arguing that the termination was unlawful. A court application for an order confirming the lawfulness of the termination of the franchise agreement and directing the respondent to vacate the two properties was made by the appellant to the High Court. The D respondent opposed the application, contending that clause 8(3) of the franchise agreement was an unlawful term, because it could not exist in the same contract with clause 1 fixing the duration of the franchise at five years. The respondent also argued that it had purchased the cold-rooms which were fixed to the building and, as such, it had become the co-owner of the buildings from which the appellant claimed its eviction. It also said it had bought the E house from the appellant.

The appellant pointed out that the respondent had purchased equipment and not the cold-rooms. It said that although the respondent had been offered the house at a purchase price of $180 000 in 1996 and had, in October 1997, indicated that it accepted the offer, no agreement of sale had been reached, F as the respondent had not paid the purchase price. The respondent had instead made a counter-offer to pay the purchase price in instalments. The counter-offer had not been accepted. Hence the respondent was still paying monthly rentals for its occupancy of the house in December 1999. The appellant contended that the respondent was obliged under clause 9 of the franchise agreement to vacate the premises, notwithstanding the fact that it G was contesting the termination.

The court *a quo* held that the termination of the franchise agreement by the appellant was null and void. It reasoned that clause 8(3) was unlawful and unenforceable because the agreement was for a fixed period of five years. The H learned judge said:

2005 (1) ZLR p378

Malaba JA

> "In my view, clause 8(3) of the agreement runs against the grain of the A relationship between the parties. The gist of the agreement is that the parties intended a five year agreement, renewable if both parties agree. Premature termination of the agreement is contemplated in the main under well defined and momentous circumstances such as breach, insolvency, liquidation, prejudicial conduct and prevention of performance of duties. Clause 8(3) seeks to empower either party to cancel the agreement at any B time after its first anniversary for no reason. I agree with the respondent in the argument that the effect of clause 8(3) is to provide for wrongful breach of the contract. To the extent that clause 8(3) provides for unlawful termination of the agreement the applicant should not expect this court to hold that provision binding on the parties. Accordingly, the applicant has not, in my view, established the grounds upon which the agreement C may be cancelled."

The learned judge proceeded on an assumption of the existence of a law prohibiting parties to a franchise agreement from providing in its terms for its termination at the expiration of a fixed period of time and also giving either party the right to terminate upon giving notice of a specified time to the other party without giving reasons for the termination. I agree with Mr *Andersen* that the D learned Judge misdirected himself in proceeding on the basis that there was such a law and therefore that what the parties did in enacting clauses 1 and 8(3) in the franchise agreement was unlawful. A franchise agreement is, of course, one of the types of contracts for which a fixed duration of operation is usually a material term. The law recognises the freedom in parties to an agreement to determine the substance of the terms of their contract, as long as they do not contravene any common law or statutory law or public policy. There is no law to the effect that once parties have entered into a franchise agreement and fixed the period of its termination they cannot provide in the same contract for its termination by either of them on notice to the other. In the absence of such a law, it would not be unlawful for the parties to have, as F a term of the franchise agreement, the stipulation that it may be terminated by either party on notice at any time before the expiration of the fixed period.

In Halsbury's *Laws of England* Vol 9 4ed para 529, it is stated as follows:

> **"Contracts for Fixed Term**
>
> Where the parties to a contract stipulate that the contract is to continue G for a definite period, the contract cannot be terminated before the expiration of that period, *unless the parties are empowered to do so by the terms of the contract*" (emphasis is mine).

The termination of the franchise agreement by the appellant was clearly in terms of the contract. It was lawful. In any case, the respondent bound itself H

2005 (1) ZLR p379

Malaba JA

A under clause 9 of the franchise agreement to deliver up to the appellant the business premises and equipment therein, even if it was contesting the termination. It is also clear from the facts that the respondent could not sustain the contention that it had purchased the house. It produced no evidence of payment of the purchase price, particularly in light of the allegation by the appellant that it made a counter-offer to pay the purchase price in instalments, B which was not accepted. It was common cause that the respondent was paying monthly rentals for the occupancy of the house at the time it claimed it had purchased it.

Chidyausiku CJ & Ziyambi JA concurred.

C *Webb, Low & Barry*, appellant's legal practitioners

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Source:
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NCUBE v NTOMBI 2005 (1) ZLR 380 (S)

Citation	2005 (1) ZLR 380 (S)
Case No	Judgment No. HB-49-05
Court	High Court, Bulawayo
Judge	Cheda J & Ndou J
Heard	17 May 2005
Judgment	26 May 2005
Counsel	Appellant in person Respondent in person
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Appeal — *record — what record of proceedings of lower court must contain* C *— effect of lack of proper record*

Headnote

A record of proceedings must at least contain the following:

- the date of the proceedings
- a judgment or ruling given by the court D
- any evidence given in court
- any objection made to any evidence received and tendered

- the proceedings of the court in general.

In other words, all material evidence, including demonstrations, must be properly and intelligibly incorporated in the record. When this is not done it become very difficult, if not impossible, for an appeal court to E determine the merits of the appeal. The appeal court is obliged to refer the matter back to the court *a quo* for trial *de novo,* at great expense and inconvenience to the parties.

Cases cited

Arthur v Bezuidenhout and Mieny 1962 (2) SA 566 (A) F

Goronga v Nezungai HH-120-03

Hayes v Bar Council 1981 ZLR 183 (A); 1981 (3) SA 1070 (ZA)

Msorwa v Munyuki 1994 (2) ZLR 261 (S)

Case information

Appellant in person

Respondent in person G

Judgment

NDOU J: There is an existing maintenance order in favour of the respondent against the appellant at Bulawayo magistrates court. What can be discerned from the extremely scant record of proceedings is that the respondent prayed for upward variation of the existing order of $10 000 to one of $250 000. There H

Cheda J

A is absolutely no record at all on what transpired on the day of the hearing save that the court *a quo* ultimately granted a variation up to $200 000. In his reply to the notice of appeal, the provincial magistrate stated:

> "The parties are customarily married. In this case, the applicant [appellant] is being difficult and yet he has been paying maintenance. He never mentioned all what is contained in his appeal papers."

B In fact, according to the record, the parties said nothing on the date of the hearing, which date is in any event not recorded. Most civil records from the magistrates courts, especially Bulawayo, are characterised by the absence of detail on what transpired. We highlighted this disturbing problem in *Masveto* v *Masveto* HB-51-04. We believe that a record of proceedings must at least C contain the following:

- date of the proceedings;
- a judgment or ruling given by the court;
- any evidence given in court;
- any objection made to any evidence received and tendered; D
- the proceedings of the court in general.

In other words, all material evidence, including demonstrations, must be properly and intelligibly incorporated in the record: see *Arthur* v *Bezuidenhout and Mieny* 1962 (2) SA 566 (A); *Msorwa* v *Munyuki* 1994 (2) ZLR 261 (S) at 264 H-265A; *Goronga* v *Nezungai* HH-120-03 at 9 and *Hayes* v *Bar Council* 1981 ZLR 183 (A); E 1981 (3) SA 1070 (ZA) at 1085.

When this is not done, it become very difficult, if not impossible, to determine the merits of the appeal. The appeal court is obliged to refer the matter back to the magistrate for trial *de novo* at great expense and inconvenience to the parties. The parties in this matter confirmed that the appellant was indeed F given an opportunity to make submissions in support of his opposition to the upward variation. He in fact made such submission but was told by the provincial magistrate words to the effect that, "since he authored the book he must read it." As already indicated there is nothing that the magistrate recorded except attesting his signature to the ultimate order.

Accordingly, in the interests of justice the appeal succeeds and the matter be G and is hereby referred back to the Bulawayo magistrates court for a fresh hearing of the application for variation

before a different magistrate within 30 days of this order as per our order pronounced in court on 16 May 2005.

H CHEDA J concurred.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/TSVANGIRAI v REGISTRAR-GENERAL & ANOR 2005 (1) ZLR 382 (H)

TSVANGIRAI v REGISTRAR-GENERAL & ANOR 2005 (1) ZLR 382 (H)

Citation	2005 (1) ZLR 382 (H)
Case No	Judgment No. HH-46-05
Court	High Court, Harare
Judge	Omerjee J
Heard	19 May 2005
Judgment	27 May 2005
Counsel	*A P de Bourbon SC*, for the applicant *Mutsonziwa*, for the respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Court — *contempt of — public servant — failure to comply with statutory* C *duty —relevance of lack of resources — contempt proceedings — citation of public servant in personal capacity — propriety of*

Headnote

The respondent was cited in both his official and his personal capacities in an application citing him for contempt of court. He had been ordered by the High Court to comply with his statutory duties under the Electoral D Act [*Chapter 2:01*], the legislation applicable at the time of the court order. The High Court had, in a succession of cases, ordered him to ensure that ballot papers from the Presidential election held in 2002 be sent to him by the constituency registrars, in order that the applicant might pursue an election petition in respect of that election. The respondent E had claimed that he had no physical space or financial resources to carry out the court's order, an argument that the court had rejected (see *Registrar-General* v *Tsvangirai* 2003 (2) ZLR 110 (H)). The respondent nevertheless failed to comply with the court's orders. He argued that the failure to comply with the terms of order was not wilful and thus the respondents were not in contempt of court. It was again contended on F behalf of the first respondent that he lacked adequate resources, *inter alia*, in terms of storage space and finances to comply with the terms of the court order. It was also submitted on behalf of the second respondent that citing him in his personal capacity not competent or proper.

Held, that although under the Electoral Act [*Chapter 2:13*],which came into effect on 1 February 2005, the first respondent was no longer in charge G of the responsibility for the safe custody of ballot papers and other election material (that function having been placed on the Chief Elections Officer), legal proceedings commenced under the old Act remained legally valid. H

2005 (1) ZLR p383

Omerjee J

A *Held*, further, that where a court order has not been complied with there arises an inference of both wilfulness and *mala fides* on the part of the contemnor. The onus then shifts to him to rebut that inference on a balance of probabilities. The submission by the first respondent based on the lack of resources could not avail him. By late 2002 he was aware of the need to comply with the mandatory provisions of s 78 of the B previous Act. The court's previous orders were forcing the first respondent to comply with his statutory duty. The transmission of the ballot papers to Harare was not a function outside the ambit of his functions, such that a specific request for funds should be made to Treasury. It was an administrative function which was part and parcel of and ancillary to the C election process for which he should have provided at the time of holding elections. Apart from that, the first respondent had two additional opportunities to specifically bid for such resources in the 2004 and 2005 annual budget estimates, respectively. He failed to place before the court any evidence suggesting that he had made any attempts to bid for such additional funds. The absence of any such evidence must necessarily D lead to the inference that he was unconcerned with obtaining funds to give effect to court orders. He had manifestly failed to discharge the onus cast upon him to show that his conduct was not wilful and *mala fide.*

Held, further, that the first respondent held a senior and important position in the employ of government. He had ignored several court orders issued in this matter arising from the statutory duties imposed upon him in his E official capacity. He had acted with impunity and disdain. It is unbecoming of any public official or anybody else for that matter, to ignore court orders. To condone such conduct would be to undermine public confidence in the overall administration of justice and in particular, in the integrity and dignity of our courts.

F *Held*, further, that a public servant may be held personally liable where a statute casts a duty on him, personally, to do something. In this situation, he is liable, not because he is an employee of the State, but because the statute has set him up as an agent of the legislature. So long as the party in his official capacity was served with an order of court, where he has failed to comply with such order he can be cited personally in subsequent G contempt proceedings arising from non-compliance with that court H order.

2005 (1) ZLR p384

Omerjee J

Cases referred to A

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

Mhora & Anor v Min of Home Affairs & Anor 1990 (2) ZLR 236 (H)

Wilson v Minister of Defence & Ors 1999 (1) ZLR 144 (H)

Legislation considered B

Electoral Act [*Chapter 2:13*], s 193

Case information

A P de Bourbon SC, for the applicant

** *Mutsonziwa*, for the respondents C

Judgment

OMERJEE J: Two applications were filed separately with the Registrar of the High Court. The first matter, Case No. HC 10321/03, is an application by the applicant for contempt of court against the Registrar-General in his official and personal capacities. The second matter is an application in terms of s 78(5) of the Electoral Act [*Chapter 2:01*] for an order compelling the Registrar-General of

Elections to allow the applicant to inspect the ballot papers and other D election material used in the 2002 Presidential election.

As both matters are linked to each other the applicant formally requested that they be administered in one hearing. The request was not opposed by both counsel for the respondents.

1. The Contempt Application (10321/03) E

The applicant is Morgan Tsvangirai, the leader of a political party in Zimbabwe called the Movement for Democratic Change (hereinafter referred to as the "MDC").

The Registrar-General of Elections is cited, in terms of the Electoral Act [*Chapter 2:01*] in his official capacity, as the first respondent. The Registrar-General F, Tobaiwa Mudede, is cited in his personal capacity as the second respondent. This application was lodged on 20 November 2003 when the said Electoral Act was still in force. That Act ("the previous Act") was repealed and substituted by the Electoral Act [*Chapter 2:13*] which came into effect on 1February 2005. (hereinafter referred to as "the present Act"). The first respondent, as at the date this application was lodged, was responsible *inter* G *alia* for the safe custody of ballot papers and other election material pursuant to the provisions of s 78 of the previous Act. It is on the basis of the duties and obligations imposed upon the first respondent in terms of s 78, that these proceedings were instituted by the applicant. The present Act, by virtue of s 70, reposes responsibility for the execution of that function upon the Chief H

Omerjee J

A Elections Officer, appointed in terms of s 11 of the Zimbabwe Electoral Commission Act [*Chapter 2:12*]. On account of changes to the law regarding the holding of elections in Zimbabwe, the responsibility for the safe custody of ballot paper and other election material is now a function no longer carried out by the first respondent.

B For the purposes of the clarity and to the extent that the first respondent is no longer in charge of the responsibility for the safe custody of ballot papers and other election material, it is necessary at the outset, to determine whether or not as a result of change to the law, the first respondent can be cited for contempt in these circumstances. The present Act, in s 193 contains savings provisions. Section 193 provides in subs (2) thereof that the previous Act is C repealed. Section 193(3)(d) provides as follows:

> "(3) Despite subsection (2) —
>
> (a) ……;
>
> (b) ……;
>
> (c) ……; D
>
> (d) every claim, application or objection made, notice issued, proclamation, rule, regulation or other statutory instrument published or other matter or thing whatsoever made, done or commenced in terms of the repealed Act which, immediately before the fixed date, had or was capable of acquiring legal effect *shall continue to have or to be capable of acquiring legal effect in terms of this Act in all respects* E *as if it had been made, issued, published, done or commenced, as the case may be, in terms of the appropriate provision of this Act."* (emphasis supplied)

A clear interpretation of this provision is that any legal proceedings or claim, initiated under the previous Act, remains legally valid in all respects. Therefore these proceedings initiated by the applicant before the present Act came into F effect cannot be impugned in view of the clear wording of the aforementioned provision.

The Background

The applicant was the MDC candidate in the Presidential Elections held during the period 9 to 11 March 2002. Following the announcement of the results of G that election, the applicant instituted legal proceedings by way of an election petition challenging the outcome of that election. (Refer *Tsvangirai* v *Registrar General of Elections & Ors* HC 3616/2002). That petition is still pending determination before the High Court. In pursuance of that petition, the H applicant sought compliance on the part of the first respondent with his

Omerjee J

statutory obligation in terms of s 78(3) of the previous Act which provides as A follows:

> "(3) As soon as may be after polling day, the constituency registrar shall transmit to the Registrar General in separate packets —
>
> (a) all the packets referred to in subsection (2); and
>
> (b) the statement in terms of subsection (3) of section *sixty* and the B report of the result of the verification thereof;
>
> and shall endorse on each packet a description of its contents and the date of the election to which it relates.

The obligation in terms of the law is spelt out in clear and unambiguous terms. The legislature has clearly stipulated that the obligation rests on the C constituency registrar to transmit all the sealed packets to the respondent at his offices. The applicant obtained several orders from the High Court with a view to giving effect to the statutory obligations imposed upon the first respondent to transmit *or cause to be transmitted to Harare all the ballot boxes and other election material used in the Presidential elections of 2002.* The details relating to the various court orders obtained by the applicant are D adequately dealt with by Chinhengo J in HC 879/2003 and may be summarised as follows:

> "(a) The order by Guvava J in *Tsvangirai* v *The Registrar of Elections* case No. HC 8225/2002 dated 12 September 2002 that —
>
> '1. The respondent shall not destroy *and instead shall keep in his safe custody* and not alter or amend in anyway all the documents referred E in s 78 of the Electoral Act [*Chapter 2:01*], pending the outcome of the Election petition — instituted by the applicant in case No. HC 3616/2002 against the respondent and three others.
>
> 2. *It is recorded that to avoid any logistical issues, the legal representatives and a representative of the applicant, together with a representative of the Attorney-General shall meet with the* F *respondent and/or officials of his office to agree the place andmanner in which the documents referred to in paragraph 1 shall be stored* pending the resolution of the election petition in case No. HC 3616/2002. Any dispute in regard to such arrangements may be referred to a judge of this Honourable Court on the present papers, supplemented as necessary by the parties. G
>
> 3. The costs of this application shall be determined by this Honourable Court when it adjudicates upon the election petition in case HC 3616/2002.'
>
> (b) The order by Matika J in *Registrar-General of Elections* v *Tsvangirai* HC 8657/2002 dated 26 September 2002 that — H

Omerjee J A

> '1. The applicant be and is hereby authorised the use of ballot boxes and seals in the March 2002 Presidential election.
>
> 2. The applicant be and is hereby refused to deal with the ballot papers as per section 78(4) of the Electoral Act [*Chapter 2:01*]
>
> 3. Costs of this application shall be determined by this Honourable Court when it adjudicates upon the Election Petition in case B No. HC 3616/2002.'
>
> If the respondent (applicant in HC 8657/2002) had been permitted to deal with the ballot papers in terms of s 78(4) of the Act he would have been entitled in terms of that section to cause them to be destroyed after a period of six months from the date of polling. The refusal by the learned judge that the ballot papers C be dealt with in terms of s 78(4) meant that the respondent had to deal with them in terms of s 78(3) of the Act which, among other things, requires the ballot papers to be transmitted to him. As to the meaning of 'transmit' see my judgment in H-142-2003 *supra* at p 13-14.
>
> (c) The interim order by Makoni J in *Tsvangirai* v *Registrar-General of Elections* HC 9021/2002 dated 16 October 2002 that —
>
> D 'Pending the determination of this chamber application, the respondent shall preserve, and shall ensure that all constituency registrars in Zimbabwe (who are under his direction and control) shall preserve in sealed packets all counted and rejected ballot papers together with counterfoils and used voters' rolls used in all polling stations in all constituencies in Zimbabwe during the said Presidential election held on E 9-11 March 2002 *and shall ensure that the said constituency registrars shall transmit the same to him forthwith for him to hold in his safe custody.'*

(d) The order by Omerjee J on 13 November 2002 confirming the provisional order granted by Makoni J — F

'1. That in relation to the Presidential election held on 9-11 March 2002, in order to prove all the constituency registrars in Zimbabwe (who act under the direction and control of the respondent), have complied with subsections (1) - (3) of section 78 of the Electoral Act and that the respondent has himself complied with subsection (3) of section 78 of the said Act, *the respondent be and is hereby order to produce to this Honourable Court within three (3) days of the date of this* G *order at some suitable venue in Harare nominated by this Honourable Court, all separate sealed packets referred to in subsection (1) of section 78 of the said Act in compliance with subsections (2) and (3) of the Act in respect of all counted and rejected ballot papers together with counterfoils and usedvoters'* H *rolls used in all polling stations in all constituencies in Zimbabwe*

Omerjee J

during the said Presidential election held on 9-11 March 2002. A

2. That the costs of the application shall be determined by this Honourable Court when it adjudicates upon the Election petition in case No. HC 3616/2002."

All the orders referred to concerned themselves with ensuring compliance by the first respondent with his obligations under section 78 of the previous Act. B What then followed were proceedings instituted by the applicant for the nomination by this court of the place where the election material was to be lodged pursuant to a formal order issued by Hlatshwayo J. Following a hearing, Chinhengo J issued an order in terms of a draft order as amended as follows:

"IT IS ORDERED: C

1. THAT in relation to the Presidential Election held on 9-11 March 2002, in order to prove that all the Constituency Registrars in Zimbabwe (who are under the direction and control of the respondent), have complied with subsections (1) - (3) of section 78 of the Electoral Act and that the respondent has himself complied with subsection (3) of section 78 of the said Act, the respondent be and is hereby ordered D to produce to this honourable court by no later than three (3) days of the date of service of this order, at the offices of the registrar of this honourable court at Harare all the separate sealed packets referred to in subsection (1) of section 78 of the said Act in compliance with subsections (2) and (3) of section 78 of the said Act in respect of all counted and rejected ballot papers together with counterfoils and E used voters' rolls used in all polling stations in all constituencies in Zimbabwe during the said presidential Election held on 9 - 11 March 2002.
2. For the avoidance of doubt the separate sealed packets referred to in paragraph 1 shall be retained by the respondent in terms of s 78(4) of the Electoral Act [*Chapter 2:01*]. F
3. That the respondent pays the applicant's costs of suit."

The sole issue for determination by this court is whether or not the respondents are in contempt of court for failing to comply with the aforementioned order of this honourable court in HC 879/2003 issued by Chinhengo J on 15 October 2003. This application is opposed by the respondents on the basis that the G failure to comply with the terms of the said order is not wilful and thus the respondents are not in contempt of court. It is contended on behalf of the first respondent that he lacks adequate resources, *inter alia* in terms of storage space and finances, to comply with the terms of the court order. This submission by the respondents is not a new submission. It was first raised and H

Omerjee J

A adjudicated upon by Gowora J in HC 10273/02 at p 4 of the cyclostyled judgment where the learned judge stated as follows:

"The order by Makoni J is forcing the applicant to comply with what is a statutory duty. The election materials should have been sealed in packets and sent to the applicant by the constituency registrar shortly after the last polling day. The respondent should not have been put to the B expense of applying to court for the applicant to be compelled to comply with the provisions of the Act. In compliance with the Act, the applicant should have made provision for the storage space of the materials from the constituency registrars. As far back as 12 September 2002, the applicant has had knowledge of the respondent's interest in the ballot papers and should have made adequate arrangements for the transmission C and storage in Harare in compliance with the provisions of s 78(3) of the Act. The transmission of the papers to Harare is not, in my view, a function outside the ambit of the applicant's functions, such that a specific

request for funds should be made to Treasury. It is an administrative function which is part and parcel of and ancillary to the election process for which the applicant should have provided for at the time of holding elections."

D The same argument was also advanced by the first respondent in proceedings before Chinhengo J in Case No. HC 879/2003. At pp 6-9 of the cyclostyled judgement Chinhengo J stated as follows:

"1. The response by the Treasury was dated 3 February 2003 and it reads:

'Request for Funding to Transport Presidential Election Residue

E Please refer to your minute reference E2/1/1/2003 dated 3 February 2003.

Whilst noting your request for additional funds, I regret to inform you that I am unable to provide the resources you require due to financial constraints. *Youare therefore urged to reprioritize from within your* F *budget in order to accommodate this new requirement."* (emphasis added)

The application for directions was made in terms of Order 23 of the High Court Rules. This was incorrect. Order 23 of the High Court Rules permits only for applications for directions of a procedural nature. In terms of Order 23 r 151 it is provided that —

G The 'Treasury' properly and even cleverly worded its response to the respondent's application for funds. It realised, as did the respondent (see *Registrar General of Elections* v *Tsvangirai* HH-142-03 at p 6) that this was a matter of national importance. It directed the respondent to 'reprioritize from within your budget'. The 'Treasury' surely must have known that there were funds within the respondent's budget which could H be used to fund the transportation and storage of the ballot papers. The

respondent has not shown on the papers before me either that the A 'Treasury' was wrong in its view regarding the availability of funds from within the respondent's existing budget or that he has no such funds in his budget and is unable to proceed in the manner as mandated. A bald statement to the effect that the respondent has no funds cannot be sufficient. The application for directions in terms of Order 23 of the High Court Rules must therefore be dismissed. B

The third ground of opposing the relief sought by the applicant was the same as that raised in the application for directions, namely, that the respondent has no money to meet the cost of transporting to, and storing the ballot papers in Harare. He specifically stated in paragraphs 7 and 8 of the opposing affidavit the following:

'7. I have approached Treasury to try and bring the material to C Harare but Treasury indicated they had no funds for transport and storage.

8. I am thus unable to bring the election material to Harare due to lack of funds and I stand guided by this honourable court on the next step to take.'

Two points arise from these averments. The 'Treasury' did not only say D that it was not providing the funds but it also said that the respondent could utilise the funds in its budget by virement. The second point is that the applicant confesses his full appreciation that he had been ordered by this court to cause the ballot papers to be transmitted to Harare and stored there. Thus, as I have already stated, the order to bring the ballot papers E to Harare has already been made. What has not happened from December 2002 to date is compliance by the respondent with that order. It must be clear therefore that the request that the ballot papers not be brought to Harare because of the alleged lack of funds is an attempt by the respondent not only to disregard the order of this court but, more importantly it is an attempt by him to have this court revisit its earlier decision. That cannot be done as this court is *functus officio* in respect of the issue as to whether F or not the ballot papers should be transmitted to and stored by the respondent in Harare. See *Firestone South Africa (Pty) Ltd* v *Genticuro AG* 1977 (4) SA 298 (A) 306G, *Stambolie* v *Commissioner of Police* 1989 (3) ZLR 287 (S) at 299 and *Kassim* v *Kassim* 1989 (3) ZLR 234 (H) at 242.

The issue of lack of funds was raised by the respondent in its application for stay of execution of the order requiring him to transport and store the G ballot papers in Harare. GOWORA J in her judgment in Case No. HC 10273/2002 dealt with that issue and at p 4 of her judgment, she said:

'The transportation of papers to Harare, is not, in my view, a function outside the ambit of the applicant's functions, such that a specific H

A request for funds should be made to Treasury. It is an administrative function which is part and parcel of and ancillary to the election process for which the applicant should have provided for at the time of holding elections.'

The same point had been made by Matika J in his judgement in Case No. HC 8657/2002.

B It is necessary, I think, that the respondent should bear in mind that in terms of s 15 of the Electoral Act his office is a public office and forms part of the Public Service. He is required to exercise such functions as are imposed or conferred upon him by the Electoral Act and that although in the exercise of his functions he is not subject to the direction or control of any person or authority other than the Electoral Directorate, he can best C carry out his function by meticulous planning and compliance with the provisions of the Electoral Act. Where the Electoral Act imposes on him the duty to do anything, as does s 78 as read with s 15(3)(a) of the Act in relation to the transmission of ballot papers after a poll, he must comply with the law. Where he faces difficulties in giving effect to the provisions of the Electoral Act or an order of this court, he should explain his D predicament, if such it is, to the responsible executive authorities. Where the requirements of the Electoral Act are clear as to his duties, it would not be proper for him to approach the courts for directions on a matter which lies exclusively within the province of the executive. The court cannot amend the provisions of an Act so that, as in this case, the respondent may not carry out a duty imposed on him by statute. See the E remarks of Chidyausiku CJ in *Registrar-General of Elections* v *Combined Harare Residents Association & Anor* 2002 (1) ZLR 83 (S) at 105-106.

In casu there is no dispute that the first respondent has not complied with the court order issued by this court in Case No. HC 879/03. The issue for determination is whether or not the failure to comply with the court order is wilful and *mala fides*. It is a trite proposition that where a court order has not F been complied with there arises an inference of both wilfulness and *mala fides* on the part of the contemnor. The onus then shifts to the first respondent to rebut that inference on a balance of probabilities. See *Lindsay* v *Lindsay* 1995 (1) ZLR 296 (S) at 299 B-C. The submission by the first respondent based on the lack of resources cannot avail him in this matter. By late 2002 the first G respondent was aware of the need to comply with the mandatory provisions of section 78 of the previous Act. Apart from the reasoning relied upon both by Gowora J and Chinhengo J on the issue of lack of resources (which I respectfully agree with), the first respondent has had two additional opportunities to specifically bid for such resources in the 2004 and 2005 annual budget estimates, respectively. The first respondent failed to place before this H court any evidence suggesting that he had made any attempts to bid for such

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additional funds. The absence of any such evidence must necessarily lead this A court to draw the inference that the first respondent was unconcerned with obtaining funds to give effect to court orders.

The first respondent was content with suggesting a form of inspection not sanctioned by the law or by any order of court, as a way of circumventing compliance with the court order of Chinhengo J of 15 October 2003. To date B there has simply been no compliance by the first respondent with that order of court. In the premise the first respondent has manifestly failed to discharge the onus cast upon him to show that his conduct was not wilful and *mala fides.*

The first respondent also contended that he ought not be cited for contempt of court as he was removed as a party to the main petition in proceedings C brought under HC 8225/2002. That submission does not assist the first respondent. He is cited for contempt on the basis that the previous Act imposed upon him the statutory duty to deal with ballot papers and other election materials in the manner laid down in s 78 of that Act. His citation for purposes of contempt arises primarily from the statutory duty imposed him in terms of s 78 of the previous Act and not necessarily on whether or not he D was cited as a party in the main presidential petition. As such, the court holds that the first respondent is properly cited for purposes of in these contempt proceedings.

In the result, the first respondent is found to be in contempt of court. The first respondent holds a senior and important position in the employ of government. He has ignored several court orders issued in this matter arising from the E statutory duties imposed upon him in his official capacity. He has acted with impunity and disdain. It is unbecoming of any public official or anybody else for that matter, to ignore court orders. To condone such conduct would be to undermine public confidence in the overall administration of justice and in particular, in the integrity and dignity of our courts.

The courts are duty bound to deal with such conduct suitably appropriately, F regard being had to all relevant circumstances.

It was further submitted on behalf of the second respondent that citing him in his personal capacity not competent. is improper. The law in this regard was dealt with in *Mhora & Anor* v *Minister of*

Home Affairs & Anor 1990 (2) ZLR 236 (H) where the learned judge stated as follows at p 241 F-H: G

> "Another area where the public servant may be held personally liable is where a statute casts a duty on him, personally to do something. In this case, Miss *Waddell,* for the State, rightly pointed out that the public servant is liable, not because he is an employee of the State, but because the statute has set him up as an agent of the legislature." H

2005 (1) ZLR p393

Omerjee J

A So long as the party in his official capacity was served with an order of court, where he has failed to comply with such order he can be cited personally in subsequent contempt proceedings arising from non-compliance with that court order. See *Wilson v Minister of Defence & Ors* 1999 (1) ZLR 144 (H) at 158 F-G.

B The second respondent is therefore properly cited as a party to the contempt proceedings in his personal capacity.

Accordingly it is ordered as follows:

1. The first and second respondents jointly and severally the one paying the others to be absolved to pay a fine of five million dollars within a period of seven days of service of this order upon him. C
2. The second respondent is hereby sentenced to undergo 60 days' imprisonment, the whole of which is suspended for 10 days from the date of service of this order upon him, on condition that he fully complies with the order of this Honourable Court issued in case No. HC 879/2003 dated 15th October 2003 by Chinhengo J. D
3. Should the second respondent fail to comply with the terms of paragraph two above, he shall immediately be committed to prison to serve the sentence imposed upon him in paragraph two.
4. The respondents shall jointly and severally, the one paying the other to be absolved, pay the applicant's costs of suit on a legal practitioner and E client scale.

2. THE INSPECTION APPLICATION (H 10237/04)

The second matter concerns an application in terms of s 78(5) of the Electoral Act [*Chapter 2:01*] (hereinafter referred to as "the previous Act") for an order compelling the Registrar General of Elections to allow the applicant to inspect ballot papers and other election materials used in the Presidential elections of March 2002. This application is premised on the basis that the applicant, as party to the pending presidential petition, has a legal entitlement to have access to and inspect fully all such material.

In the heads of argument filed on behalf of the third respondent, the relief sought by the applicant was initially opposed. The grounds for such opposition G were premised principally on the submission, that by virtue of the coming into force of the Electoral Act 25 of 2004 on 1 February 2005 (hereinafter referred to as "the present Act") the third respondent no longer has any legal control over ballot papers and other election material. As such, the submission goes, that any order granted against the third respondent in this regard would be H unenforceable and would be a *brutum fulmen*.

2005 (1) ZLR p394

Omerjee J

In the course of submissions during the hearing, the attention of counsel A representing the third respondent was drawn by counsel for the applicant to the provisions of s 193(3)(d) of the present Act, quoted hereinbefore.

Counsel for the third respondent B then requested the opportunity to consider the legal import of that provision. That opportunity was duly granted by the court. Upon resumption of the hearing, counsel for the third respondent formally abandoned her opposition to this application on the basis that the grounds for such opposition, in view of the provisions of s 193(3)(d) could not be sustained as a matter of law.

This attitude by counsel is correct. Section 193(3)(d) is a savings provision and does not absolve the third respondent from complying with any obligations imposed upon him by law under the previous Act. Counsel for the third C respondent is to be commended for the stance taken in this matter as it is consistent with the law and is in keeping with counsel's duty to the court.

The first and second respondents in this matter were served with the court application and the applicant's heads of argument respectively, in the latter part of 2004. They are cited for formal purposes and no specific relief was D sought against either of them. Neither the first nor second respondents have filed any opposition nor any opposing affidavits. They were accordingly barred from being heard in terms of r 233(3) of the High Court Rules. The effect of this is that the first and second respondents are deemed not to be opposed to the relief sought by the applicant.

Counsel for the third respondent, having formally made the concession E outlined above, agreed to an order in terms of the draft order filed of record as amended in the penultimate sentence of para 2 thereof, by the deletion of reference to "three days" and the substitution of "thirty days."

In the result an order by consent in terms of the Draft Order as amended was granted as follows: F

"1. IT IS ORDERED in terms of s 78(5) of the Electoral Act [*Chapter 2:01*] that the third respondent shall open and allow the applicant and/or his duly appointed representatives to inspect all the sealed packets containing all counted and rejected ballot papers together with counterfoils and voters' rolls, used in all polling stations in all constituencies in Zimbabwe during the Presidential Election held on G 9-11 March 2002.

2. IT IS ORDERED that the third respondent shall permit the applicant and/or his duly appointed representatives:

(a) to examine the seals on the packets referred to in para (1) above H

Omerjee J

A and make a record of any seal which appears to any of them to have been tempered with; and

(b) to open all the Presidential elections documents referred to in para (1) above;

at the offices of the Registrar of this Honourable Court at Harare by no later than thirty days days of the date of service of this order on him and B shall be entitled to examine, count and make notes or other records of and concerning the contents thereof and make a copy, by photocopy, scanning or otherwise, of any voters' rolls including any supplementary voters' rolls therein, for the purpose of the election petition

3. The applicant and/or his duly appointed representatives shall undertake such inspection and examination in the presence of C officers employed in the office of the third respondent and during normal office hours, unless other times are agreed between the applicant and/or his representatives and the third respondent and/or his officers.

4. IT IS ORDERED that the third respondent shall pay the costs of suit D of the applicant and of the first and second respondents."

Coghlan Welsh & Guest, applicant's legal practitioners

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

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JONASI-OGUNDIPE v CHIEF IMMIGRATION OFFICER & ORS 2005 (1) ZLR 396 (S)

Citation 2005 (1) ZLR 396 (S)

Case No	Judgment No. S-13-05
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Gwaunza JA
Heard	8 February 2005
Judgment	2 June 2005
Counsel	*S Machiridza,* for the applicant *C R Mudenda,* for the respondents
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of* C *Rights — s 22(1) — right to reside in Zimbabwe — right of citizen to have alien spouse reside in Zimbabwe with her — interference with such right — removal of prohibited persons — husband a prohibited person at time of marriage due to expiry of visitor's permit — parties not attempting to regularise his position and attempting to deceive* D *authorities — State's interests outweighing those of citizen*

Headnote

The applicant, a Zimbabwean citizen, married a Nigerian man in Zimbabwe. He was in the country on a temporary visitor's permit which had expired by the time the marriage took place. For some five years after the marriage, he remained in Zimbabwe without the parties attempting to regularise his E position with the immigration authorities. When his presence was fortuitously discovered by them he was deported. The applicant contended that the deportation of her husband constituted a contravention of her right to freedom of movement as enshrined in s 22(1) of the Constitution. She sought an order permitting him to return to F Zimbabwe and reside with her.

Held, that the husband was at the time of the marriage an illegal immigrant. In terms of s 14(1)(i) of the Immigration Act [*Chapter4:02*] that fact alone rendered him a prohibited person. It was not necessary for him to be formally declared a prohibited person. His marriage to the applicant did not convert his status from prohibited to non-prohibited person. To G attain the latter status, he still needed the requisite permit.

Held, further, that it was necessary to determine how the State's interests, in deciding who does or does not stay within its borders, were to be balanced against a Zimbabwean citizen's constitutional right to freedom of movement, in particular the right to have her spouse reside with her in Zimbabwe. The applicant's husband was declared a prohibited H

2005 (1) ZLR p397

Gwaunza JA

A immigrant and deported because he had defied the laws of the country by staying for a period in excess of five years without a valid residence permit. He thus breached the duty imposed on an alien to observe the laws of his host country and conduct himself in a manner compatible with the good order of the State. Even though the applicant's husband did not commit a serious crime – indeed, he was not even prosecuted – his B conduct was aggravated by the actions of his wife, the applicant. She also jeopardised her chances of succeeding in the application, because instead of encouraging her husband to go back to Nigeria and submit his application for a residence permit from there (thereby submitting himself to the law), the applicant actively and knowingly aided and abetted him C in his continued defiance of the law. When discovery was imminent, she

sought to mislead the authorities. The scales thus tilted in favour of considerations of public interest, and the application must fail.

Cases cited

Bhatti & Anor v Chief Immigration Officer & Anor 2001 (2) ZLR 114 (H)

D *Edwards v Chief Immigration Officer* 2000 (1) ZLR 485 (S)

Hambly v Chief Immigration Officer (3) 1998 (2) ZLR 285 (S)

Kenderjian v Chief Immigration Officer 2000 (1) ZLR 697 (S)

Rattigan & Ors v Chief Immigration Officer & Ors 1994 (2) ZLR 54 (S)

Salem v Chief Immigration Officer & Anor 1994 (2) ZLR 287 (S)

Legislation considered E

Constitution of Zimbabwe 1980, s 22(3)(a)

Immigration Act [*Chapter 4:02*], ss 14(1)(i), 15(2) and 29(1)

Case information

S Machiridza, for the applicant

F *C R Mudenda,* for the respondents

Judgment

GWAUNZA JA: The applicant is a Zimbabwean citizen, married to one Samson Olugbenga Ogundipe, ("Samson") who is a Nigerian national. Samson was declared a prohibited immigrant and deported from Zimbabwe on 9 May 2001. The applicant contends that the deportation of her husband constitutes G a contravention of her right to freedom of movement as enshrined in s 22(1) of the Constitution of Zimbabwe. This right has been interpreted in a long line of cases to include the right of a Zimbabwean spouse to reside in Zimbabwe with her alien husband: see *Rattigan & Ors* v *Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S), *Hambly* v *Chief Immigration Officer (3)* 1998 (2) ZLR 285 (S) and *Salem* v *Chief Immigration Officer & Anor* 1994 (2) ZLR 287 (S). H

Gwaunza JA

The applicant accordingly seeks an order in these terms: A

"1. That applicant's right under s 22(1) of the Constitution of Zimbabwe to freedom of movement that is to say the right to reside in any part of Zimbabwe has been contravened by the actions of the first and second respondents.

2. That by virtue of the Applicant's right under s 22(1) of the Constitution of Zimbabwe to have her husband residing with her in any part of B Zimbabwe:

2.1 first respondent issue to Samson Ogundipe within 30 days hereof such written authority as is necessary to enable him to travel back to Zimbabwe and to stay in Zimbabwe on the same standing as any alien who is a permanent resident. C

2.2 first respondent consider Samson Ogundipe's application for permanent residence status.

3. That the costs of this application are to be borne by the first respondent."

The background to the matter is as follows:

The applicant met Samson in 1994. He had entered Zimbabwe on a visitor's D permit the same year. The two got married in 1996. The applicant asserts but has tendered no proof thereof, that at the time of their marriage, Samson was lawfully in Zimbabwe. In other words, it is the applicant's submission that his visitor's permit had been extended or renewed after the lapse of its initial period of validity. Since temporary visitors' permits are endorsed on the visitor's E passport, all it would have taken would have been for the applicant to submit the relevant pages of Samson's passport to prove her assertions. She has not done so and implores the court to accept this fact on the strength of her word.

Be that as it may, the applicant now concedes that after their marriage in 1996, Samson had stayed in Zimbabwe with her, without a valid permit as required F by the Immigration Act [*Chapter 4:02*]. It is submitted on her behalf that she and her husband had assumed, erroneously, that their marriage had regularised Samson's stay in the country.

It is not in dispute that immigration officials came across documents pertaining to Samson's application for a residence permit, at the office or home of a fellow Nigerian who was subsequently deported. The discovery of these papers G resulted in Samson being tracked down and deported for being in the country illegally. The appellant has, it seems, decided to abandon the fiction that Samson had at some point after the marriage, gone back to Nigeria, and attempted to apply for a residence permit from there. H

2005 (1) ZLR p399

Gwaunza JA

A This, however, does not protect the applicant from the adverse inferences that the respondent urges this court to draw from her and Samson's deceitful conduct. The conduct translated to a letter written by the applicant to the Chief Immigration Officer, in April, 2001 and an application for a visitor's permit signed by Samson on 9 April 2001. In both these documents, the applicant and Samson deliberately misrepresented facts – in effect lied – that Samson B had gone back to Nigeria at some ungiven date, and was applying, with the support of the applicant, for a residence permit.

The true position as revealed in the papers before this court is that Samson continued to stay in Zimbabwe despite the expiry of his visitor's permit issued in 1994, before his marriage to the applicant. He was an illegal immigrant at the C time of the marriage, and he remained in Zimbabwe illegally for five years after the marriage. Whether or not the parties truthfully laboured under the misconception that their marriage had "naturalised" Samson, the fact remained that until his deportation, no serious effort had been made by him or the applicant to obtain a residence permit for him.

Five months after his deportation, the applicant launched these proceedings. D In paragraph 2.2 of her heads of argument, it is argued thus:

> "The applicant submits that the deportation and endorsement of her husband's passport infringes on her constitutional rights and negates the purpose of having a marriage …"

The applicant argues in addition that her husband "became 'eligible' for E consideration as a prohibited person in any event after the marriage date and thus the status of a prohibited person could not attach (to him)".

I am not persuaded by these contentions.

In the absence of any proof that Samson was in Zimbabwe lawfully at the time of the marriage, I find that he was at that time an illegal immigrant. In terms of F s 14(1)(i)of the Immigration Act [*Chapter 4:02*] that fact, *per se*, rendered him a prohibited person. The section reads as follows:

> "(1) Subject to this Act, the following persons are prohibited persons –
>
> (a) -(h) …
>
> (i) any person who has entered or remained in Zimbabwe in G contravention of this Act or a repealed Act, whether or not he has been prosecuted for such contravention."

The relevant part of the Act is s 29(1), which provides that no alien shall enter, be or remain in Zimbabwe unless he is in possession of a valid permit or visitors H entry certificate.

2005 (1) ZLR p400

Gwaunza JA

My interpretation of Subsection (1)(i) above is that one does not need to be A formally declared a prohibited person, for him to be one. He becomes one by the mere fact of being in Zimbabwe in contravention of the Act. *In casu*, the applicant's husband was a prohibited person from before his marriage to the applicant. He remained a prohibited immigrant until the day he was deported. The endorsement of his passport merely confirmed this reality. His marriage B to the applicant did not convert his status from prohibited to non-prohibited person. To attain the latter status, he would still need the requisite permit. This point was stressed by this court in *Edwards* v *Chief Immigration Officer* 2000 (1) ZLR 485 (S) at 487E-F where Gubbay CJ quoted, with approval, the following passage in the High Court case involving the same parties (HB-107-96): C

> "In the absence of authority to the contrary, I find that marriage, *per se*, does not entitle an alien wife of a Zimbabwe citizen to reside in the country without the relevant permit issued in terms of the provisions of the Immigration Act and Regulations."

The alien wife in the Edwards case was, like the applicant's husband *in casu*, a prohibited person in terms of s 14 of the Act. D

In the same judgment, the learned Chief Justice addressed the same argument being advanced by the applicant, that is, that as a spouse, her husband was protected from being declared a prohibited person by virtue of s 15(2) of the Immigration Act. The learned Chief Justice stated as follows at p 489E-F:

> "It is implicit that s 15(2) classifies persons or classes of persons who are E not regarded as prohibited persons under s 14. Thus, the actuality of being a prohibited person at the date of her marriage to a citizen of Zimbabwe effectively disqualified the appellant from becoming a non-prohibited person under para (d) to s 15(2) of the Act. A contrary interpretation would give rise to the ability of a prohibited person to evade the restriction against entry or removal from Zimbabwe by marriage to a Zimbabwean F citizen."

It is contended for the applicant that the case at hand is distinguishable from *Edwards*' case. I do not agree. As long as it is accepted that in *casu* the applicant's husband was a prohibited person at the time of his marriage to her, the case is not distinguishable from *Edwards*' case *supra*.

What has to be determined now is whether the fact of her husband being a G prohibited immigrant has the effect of negating the applicant's entitlement to have him reside with her in Zimbabwe. In other words how are the State's interests in deciding who does or does not stay within its borders, to be balanced against the constitutional right of a Zimbabwean citizen's right to H

Gwaunza JA

A freedom of movement, in particular the right to have her spouse reside with her in Zimbabwe.

This is a matter that this court has already had occasion to address – see *Kenderjian* v *Chief Immigration Officer* 2000 (1) ZLR 697 (S), *Edwards* v *Chief Immigration Officer supra* and *Bhatti & Anor* v *Chief Immigration Officer &* B *Anor* 2001 (2) ZLR 114 (H).

The following passage in *Bhatti*'s case *supra* at p 123F is in my view, particularly instructive:

> "To hold that aliens absolutely cannot be deported from Zimbabwe if they are married to, or are children of, citizens is to completely ignore the complex relationships and responsibilities that both national and C international law impose on the aliens themselves, the States of origin and residence and the citizens of the State of residence, which one learned author has expressed thus:
>
> 'The admission of aliens into a State immediately calls into existence certain correlative rights and duties. The alien has rights to the protection of the local law. He owes a duty to observe that law and assumes a D relationship towards the State of his residence sometimes referred to as 'temporary allegiance.'
>
> The State has the right to expect that the alien shall observe its laws and that his conduct shall not be incompatible with the good order of the State and of the community in which he resides or sojourns. It has the obligation to give him that degree of protection for his person and property, which E he and his State have the right to expect under local law, under international law, and under treaties and conventions between his State and the State of residence. Failure of the alien or of the State to observe these requirements may give rise to responsibility in varying degrees, the alien being amenable to the local law or subject to expulsion from the State, or both, and the State being responsible to the alien or to the State of which F he is a national": *Hackworth, Digest of International Law* (1943), vol 5 pp 471-472 quoted in Dixon & McCorquodale *Cases and Material on International Law*, Blackstone Press Ltd, London, 1991 p 428."

It is submitted for the respondent that the applicant's husband was declared a prohibited immigrant and deported because he had defied the laws of the country by staying for a period in excess of five years without a valid residence G permit. He, in other words, breached the duty imposed on an alien to observe the laws of his host country and conduct himself in a manner compatible with the good order of the State. I am satisfied his conduct constituted a threat to public order.

As indicated, it is the State's interests in the light of such conduct that must H now be balanced against the applicant's entitlement to have her husband stay

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Gwaunza JA

with her in Zimbabwe. In arguing against the applicant's entitlement, it is A contended for the respondent, correctly, that the right to freedom of movement is not absolute, since it is subject to the public interest limitations stipulated in para (a) of s 22(3) of the Constitution, so long as these restrictions are reasonably justifiable in democratic society: see*Bhatti & Anor* v *Chief Immigration Officer & Anor* 2001 (2) ZLR 114 (H). Specifically, the applicant's B right to reside with her foreign spouse must be balanced against the public interest considerations that dictated the deportation of her husband: see *Bhatti*'s case *supra*.

This principle was re-stated in more categoric terms in *Kenderjian*'s case *supra* where it was stated as follows at p 701E-F:

> "The removal of prohibited persons – which one can understand as being C considered necessary in a situation as serious as this one – is a prerogative of the State. It is my belief that the restriction upon the use of such prerogative by the rights safeguarded under s 22 of the Constitution, should only be sanctioned in well defined cases. This is not one of them. A contrary decision by this court would set a dangerous precedent in which the existence of a genuine marriage to a citizen of Zimbabwe could D be relied upon to place an alien guilty of committing the most serious of crimes beyond the reach of the immigration authorities."

Even though the applicant's husband did not commit a 'most serious' crime – indeed he was not even prosecuted – I am satisfied the principle applies with equal force *in casu*. I say so because, in my view, his conduct was aggravated E by the actions of his wife, who is the applicant. By the same actions, which, I find, invite some censure, the applicant also jeopardized her chances of succeeding in this application. Instead of encouraging her husband to go back to Nigeria and submit his application for a residence permit from there (thereby submitting himself to the law), the applicant actively and knowingly aided and abbetted him in his continued defiance of the law. When discovery was F imminent, she sought to mislead the authorities by creating, through the letter already referred to, the fiction that Samson was properly applying for a residence permit from outside Zimbabwe. Her actions were therefore no different from those of one who seeks to defeat the ends of justice.

Having realised the futility of trying to circumvent the law, the applicant now turns to the same law for relief that in effect would restore to her husband the G same privilege – that is, residency in Zimbabwe - that he had with her help, illicitly enjoyed before he was deported. It does not in my opinion, augur well for the maintenance of law and public order that citizens feel they can on one hand exhibit disdain for the law and on the other and when it suits them, turn back to the same law to seek protection of their rights. In the case at hand, I H

Gwaunza JA

A have no doubt that but for her dishonest conduct, and barring any other undesirable circumstances, the applicant's efforts to secure her husband's lawful residence in Zimbabwe would have stood a better chance of success.

When the law as outlined above is applied to the circumstances of this case, I find that the scales tilt in favour of considerations of public interest. Like in B the *Kenderjian*'s case, the State *in casu* exercised its prerogative to remove a prohibited immigrant from the country. On the basis of that authority, I am not persuaded this case is one that is so "well defined" as to justify restriction on the use of such prerogative, by the rights safeguarded under s 22 of the Constitution.

The application must therefore, on that ground, fail.

C The respondents made a half hearted attempt to oppose the application on the ground that the marriage of the applicant and her husband was one of convenience. However the evidence used to support this allegation is the same evidence that the respondents knew, and the court has accepted, to be false. The applicant has admitted she and her husband stayed together as man D and wife for five years after their marriage under the supposed mistaken belief that the marriage had legalised his stay in Zimbabwe. This effectively removes the basis of the respondents' assertion that by her admission, the applicant and her husband had never stayed together as husband and wife, and had therefore, contracted a marriage of convenience. Thus, the respondents, had they been inclined to pursue this ground of objection, would not have been E able to prove it.

In the final analysis, I find that the applicant has failed to prove her case.

Accordingly, the application is dismissed with costs.

F Sandura JA & Ziyambi JA concurred.

Muzangaza Mandaza & Tomana, applicant's legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/UNION METALLURGICAL AND TECHNICAL SERVICES v SITHOLE & ANOR 2005 (1) ZLR 404 (H)

UNION METALLURGICAL AND TECHNICAL SERVICES v SITHOLE & ANOR 2005 (1) ZLR 404 (H)

2005 (1) ZLR p404

Citation	2005 (1) ZLR 404 (H)
Case No	Judgment No. HB-52-05
Court	High Court, Bulawayo
Judge	Ndou J
Heard	17 February 2005
Judgment	2 June 2005
Counsel	*R Moyo-Majwabu*, for the applicant *K I Phulu*, for the first respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure — *barring — opposed application set down as unopposed — whether respondent may be barred for failing to file heads of argument within period prescribed in r 238(2a) of High Court Rules, 1971*

Practice and procedure — *heads of argument — filing — effect of failure to* D *file timeously — opposed matter set down as unopposed — whether respondent may be barred for failing to file heads of argument timeously*

Headnote

Where an application has been set down incorrectly on the unopposed roll, the respondent is not barred if he does not file his heads of argument E within the time prescribed in O 32 R 238(2a) of the High Court Rules, 1971, since that rule limits barring to applications that have been set down as opposed under r 223(2).

Case cited

Muzerengi v Muchekwa 1992 (1) ZLR 58 (H) F

Legislation considered

High Court Rules, 1971 (RGN 1047 of 1971), O 31 r 223 & O 32 r 238

Case information

R Moyo-Majwabu, for the applicant

K I Phulu, for the first respondent G

Judgment

NDOU J: The issue here is whether the first respondent is barred in terms of r 238 of the rules of this court; and if indeed the first respondent is barred, whether I should grant condonation in terms of r 4(C). H

Ndou J

A Briefly, the applicant served its heads of argument on the first respondent on 26 January 2005. The applicant set down the matter for 17 February 2005 on the unopposed roll. On 16 February 2005, i.e. a day before the hearing, the first respondent filed his heads of argument. On 17 February 2005, when the matter was called, Mr *Phulu* sought indulgence of the court to be heard. Mr *Moyo-Majwabu* insisted that the first respondent was barred. I allowed Mr *Phulu* B to address on the question of the bar. He raised two points. Firstly, he submitted that the matter was improperly set down as unopposed. He relied on Order 31 r 223(2): see also *Muzerengi* v *Muchekwa* 1992 (1) ZLR 58 (H). It seems to me that there is confusion on the setting down of a matter in which the respondent is barred for failing to file heads of argument as required by C r 238. Rule 238 states:

> "(1) …
>
> (2) *Where an application*, exception or application to strike out *has been set down for hearing in terms of subrule (2) of rule 223* and any respondent is to be represented at the hearing by a legal practitioner, the legal practitioner shall file with the registrar in accordance with D subrule (2a), heads of argument clearly outlining the submissions relied upon by him and setting the authorities, if any, which he intends to cite, and immediately thereafter he shall deliver a copy of the heads of argument to every other party." [It is common cause that the first respondent complied with this subrule.]
>
> (2a) Heads of argument referred to in subrule (2) shall be filed by the E respondent's legal practitioner not more than ten days after heads of argument of the applicant … were delivered to the respondent in terms of subrule (1):
>
> Provided that –
>
> (i) … F
>
> (ii) the respondent's heads of argument shall be filed at least five days before the hearing.
>
> (2b) Where heads of argument that are required to be filed in terms of subrule (2) are not filed within the period specified in subrule (2a), the respondent concerned shall be barred …" (emphasis added)

G The highlighted words i.e. "where an application has been set down for hearing in terms of subrule (2) of r 223 …" limit the barring to opposed applications that have been set down in terms of subrule (2) of r 223. Rule 223(2) deals specifically with set down of opposed applications. The applicant sought to set the matter down as unopposed in the motion court in H terms of subrule (1) of Rule 223. The latter lists the classes of cases that may

---

Ndou J

be enrolled in motion court as unopposed *viz*; A

> "(1) Subject to subrule (5) –
>
> (a) uncontested cases for provisional sentence;
>
> (b) summons for civil imprisonment;
>
> (c) uncontested actions for restitution of conjugal rights, divorce, judicial separation or nullity of marriage; B
>
> (d) cases set down for judgment in terms of subrule (2) of Rule 58 or subrule (1) of r 59;

(e) *application in which a notice of opposition and opposing affidavits have not been filed*;

may be set down for hearing …" (my emphasis). C

Rule 236 confirms that applications are set down in terms of r 223. This matter was supposed to set down as an opposed application in terms of subrule (2) of r 223. The applicant should have applied to the Registrar for the allocation of a trial date. On the date of the hearing, the question of the bar (if any) would be considered.

Accordingly, from the foregoing I hold the view that the respondent's heads D of argument were not filed out of time. The respondent, was, therefore, not barred. The question of condonation does not arise.

It is ordered that the matter be set down in terms of r 223 with costs being costs in the cause. E

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

Wilmott & Bennet c/o Coghlan & Welsh, first respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/DULY HOLDINGS LTD v SPANERA 2005 (1) ZLR 407 (S)

DULY HOLDINGS LTD v SPANERA 2005 (1) ZLR 407 (S)

2005 (1) ZLR p407

Citation	2005 (1) ZLR 407 (S)
Case No	Judgment No. S-140-04
Court	Supreme Court
Judge	Chidyausiku CJ, Sandura JA & Ziyambi JA
Heard	23 November 2004
Judgment	13 June 2005
Counsel	*R Y Phillips* for the appellant No appearance for the respondent
Case Type	Labour Appeal
Annotations	No case annotations to date

Flynote

C **Employment** — *contract — termination — wrongful dismissal — damages for — how to be calculated – entitled only to compensation for period between date of dismissal and date when could be reasonably expected to have found alternative employment*

D The respondent was dismissed from his employment. Some five months later he found another job, at a lower salary. He left that job voluntarily about a year later. Subsequently the Labour Relations Tribunal found the dismissal to be unlawful, and ordered the respondent's reinstatement, or, failing reinstatement, damages. Ultimately the Labour Court (which had

replaced the Tribunal) awarded damages calculated on his full pay, E allowances and benefits from date of dismissal to date of judgment less what he earned in the other job between February 2000 and March 2001. The employer appealed.

Held, *he was entitled only to damages, calculated on the basis of his income, from the date of his dismissal to the date when he found employment.*

Cases cited F

Ambali v Bata Shoe Co Ltd 1999 (1) ZLR 417 (S) at 419

Case information

R Y Phillips for the appellant

No appearance for the respondent

Judgment

G **CHIDYAUSIKU CJ**: This is an appeal from the Labour Court. The facts of this matter are fairly simple and straight-forward.

The respondent is a former employee of the appellant. The appellant dismissed the respondent on 3 September 1999. The dismissal was disputed by the H respondent. After his dismissal, the respondent was employed by KB

Chidyausiku CJ

Locksmith with effect from 1 February 2000. He remained in the employment A of KB Locksmith from February 2000 to March 2001. The respondent resigned from his job with KB Locksmith on 8 March 2001.

He persisted in his action for wrongful dismissal by the appellant. On 11 June 2002, the Tribunal held that the respondent had been wrongfully dismissed on 3 September 1999. The Tribunal ordered reinstatement of the respondent B to his original position without loss of salary and benefits from the date of dismissal, namely, 3 September 1999. In the event of the appellant not being able to reinstate, the respondent it was ordered to pay damages. The damages were not quantified and the parties were given leave to approach the Tribunal for quantification of damages in the event of failure to agree on the *quantum.*

The parties failed to agree on the *quantum* of damages and approached the C Labour Court (the successor of the Tribunal) for the determination of the *quantum* of damages.

At the hearing to determine the amount of damages, the respondent, (who was then the applicant) claimed:

(a) back pay; D

(b) benefits i,e, annual bonus and annual wage increases as awarded by the industry;

(c) compensation for premature termination of contract;

(d) accumulated leave days.

The respondent in the court *a quo*, on the other hand, offered the equivalent E of one year's wages plus benefits calculated with effect from the date of dismissal. The Labour Court issued the following order:

> "He (applicant) is thus entitled to his back pay for the period September 1999 to January 2000 (5 months). He stated that he was earning less than what the respondent used to pay him. Thus for the period February 2000 F to date of judgment he is entitled to his damages less what he earned between February 2000 and March 2001. If he was entitled to any allowances in terms of the contract he should be paid them. He should also be paid all the benefits to which he is statutorily entitled.
>
> The above is granted with costs and interest at the prescribed rate.
>
> In the circumstances, the damages should be computed in terms of the G above. Accordingly it is so ordered."

The appellant now appeals against that order. It appeals against the above order on two grounds set out in the Notice of Appeal:

"1. The Labour Court erred in law, alternatively its judgment erred so H

Chidyausiku CJ

A seriously in respect of the facts as to amount to a misdirection of law in:

1.1 failing to give proper weight to the fact that respondent secured alternative employment five months after his dismissal;

1.2 in finding that, in computing damages respondent's entitlement accrued up to the date of the court's judgment; and B

1.3 in any event, in failing to make any computation as to damages.

2. In the circumstances, the appellant prays that the order of the Labour Court be set aside and substituted with the following:

'That the appellant be awarded damages equivalent to the salary and allowances which he would have earned from respondent had he C remained in its employment up to 31 January 2000'."

Mr *Phillips*, for the appellant, argued that the Labour Court misdirected itself in calculating the damages to which the respondent is entitled. He submitted that the respondent was entitled, by way of damages, to his salary and benefits for the period between his dismissal by the appellant and his employment by KB Locksmith. For this submission he relied on the case of *Ambali* v *Bata Shoe* D *Co Ltd* 1999 (1) ZLR 417 (S). In the *Ambali* case, *supra*, *Ambali* was wrongfully dismissed and the Tribunal calculated his damages on the basis submitted by Mr *Phillips*. In so doing McNally JA at p 419A had this to say:

"He (the employee) will be compensated only for the period between his wrongful dismissal and the date when he could reasonably have expected E to find alternative employment."

The learned judge further remarked at p 419D:

"But if an employee is wrongfully dismissed his duty to mitigate his loss arises immediately. If he is offered a good job the day after he is dismissed he must take it, or forfeit any claim for damages. If he is offered a good job only after he has been unemployed for six months, he must take it. If, in F the meantime, he has instituted proceedings for reinstatement he may continue these, but his claim for damages will usually then be limited to his loss over the six month period."

Mr *Phillips* argued that on the approach adopted in the *Ambali* case, *supra*, the respondent was entitled to his back pay and allowances from the date of his dismissal by the appellant to the date he found employment with KB G Locksmith and no more as his resignation from KB Locksmith on 8 March 2001 was his own decision.

I find myself in agreement with the submission by Mr *Phillips* that on the authority of *Ambali*'s case, *supra*, the respondent is entitled to damages calculated on the basis of his income from the date of his dismissal to the date H when he found employment.

Chidyausiku CJ

On this basis, it is quite clear that the learned President of the Labour Court A misdirected herself in regard to the assessment of the *quantum* of damages to which the respondent was entitled.

In the result, the appeal is allowed with no order as to costs. The order of the Labour Court is hereby set aside and substituted with the following order:

"That the applicant be awarded damages equivalent to the salary and B allowances which he would have earned from the respondent had he remained in its employment up to 31 January 2000."

Sandura JA & Ziyambi JA concurred. C

Gill Godlonton & Gerrans, appellant's legal practitioners D

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/REDSTAR WHOLESALERS v MUTOMBA 2005 (1) ZLR 411 (S)

REDSTAR WHOLESALERS v MUTOMBA 2005 (1) ZLR 411 (S)

Citation	2005 (1) ZLR 411 (S)
Case No	Judgment No. S-142-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA and Ziyambi JA
Heard	16 November 2004
Judgment	13 June 2005
Counsel	*A Moyo,* for the appellant No appearance for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

C **Appeal** — *Labour Court — appeal heard and determination made in absence of affected party — application by such party for* D *rescission — court obliged to consider merits of application for rescission*

Employment — *Labour Court — appeal to — appeal heard and determination made in absence of affected party — application by such party for rescission — court obliged to consider whether good cause for a rescission has been made out — factors to be considered*

Headnote

Consequent upon his dismissal from his employment with the appellant, the respondent appealed to the Labour Court. At the hearing of the appeal the appellant was absent. The court allowed the respondent's appeal on E the basis of the facts alleged by him not being challenged. The appellant then sought rescission of the judgment of the court in terms of s 92C(1) of the Labour Relations Act [*Chapter 28:01*]. This section allows the court to rescind or vary a determination or order made in the absence of the party against whom the order is made. The court refused the F application, on the grounds that its decision had been made on the merits. On appeal to the Supreme Court:

Held, that in determining whether or not the default judgment should be rescinded or varied, the Labour Court should have considered whether good cause for the rescission held been shown. The Labour Court was required, in terms of s 92C(1) of the Act, to consider the merits of an G application for rescission whenever such an application is made by the party that was in default. In so doing, it should have considered such factors as the length of the delay in applying for the rescission, the reason for the default, the prospects of success and the balance of convenience.

Held, further, that in simply dismissing the application on the basis that on H the merits, the Labour Court had failed to consider whether good cause

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Chidyausiku CJ

had for rescission had been shown. Accordingly, the Labour Court A should reconsider the application for rescission.

Cases cited

du Preez v Hughes NO 1957 R&N 706 (SR)

Roland & Anor v McDonnell 1986 (2) ZLR 216 (S) B

Simbi v Simbi S-164- 90

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

Legislation considered

Labour Relations Act [*Chapter 28:01*], s 92C(1) C

Case information

A Moyo, for the appellant

No appearance for the respondent

Judgment

CHIDYAUSIKU CJ: The respondent was employed by the appellant as a driver. He was charged with misconduct and suspended from duty with effect from 27 August 1999. An enquiry into the respondent's conduct was instituted in due course and the respondent was dismissed from employment. He appealed against his dismissal to the Local Joint Committee which also dismissed his appeal. The respondent thereafter appealed to the Negotiating Committee of the National Employment Council for the Commercial Sectors E which also dismissed his appeal and confirmed his dismissal. He then appealed to the Labour Court.

The Labour Court heard the respondent's appeal on 18 March 2003. At the hearing of the appeal the appellant was absent. Section 17 of SI 30 of 1993 provides that if a party or a witness fails to appear at its hearing the Tribunal may nevertheless proceed with the hearing in his absence. The Labour Court F therefore proceeded in the absence of the appellant in terms of s 17 of SI 30 of 1993.

The Labour Court having heard submissions from the respondent's legal practitioner allowed the appeal in its judgment of 12 June 2003. In allowing the appeal the President of the Labour Court reasoned as follows: G

> "Mr *Gumbo* who appeared on behalf of the appellant submitted that the reports against the appellant were false and that the authors of those reports had been coerced into making such false reports against the appellant by the supervisor, one Warama. Mr *Gumbo* submitted that there was no independent evidence to corroborate the reports by the assistants. Mr *Gumbo* further pointed out that a person who allegedly telephoned H

Chidyausiku CJ

> A the respondent corroborating the assistants' false reports was working in collusion with the said assistants. Mr *Gumbo* submitted that both the authors of the reports in question are prepared to give evidence in support of the appellant. Mr *Gumbo* also submitted that the hearing committee was improperly constituted and therefore the proceedings were a nullity.
>
> The appellant has always denied the allegations. He is still denying them.
>
> B The court took note of the fact that the respondent was duly served with the notice to appear in court but was in default. The court considered the appellant's position. *The facts which have been placed before the court, if unchallenged, which they are not, mean there was no wrongdoing on the part of the appellant.* In view of the above the appeal must succeed."(my emphasis)

C It is clear from the judgment of the Labour Court that the appeal was allowed on the basis that the facts alleged by the respondent were not challenged. The probabilities are that the reason why the facts upon which the court *a quo* relied in its judgment were not challenged is because the D appellant was not present at that hearing. The record and judgment clearly show that the appellant was not present at the hearing.

The appellant then applied on 1 July 2003 to have the determination of the Labour Court granted in his absence rescinded. The application for rescission was made in terms of s 92C (1) of the Labour Relations Act [*Chapter 28:01*] ("the Act"). Section 92C(1) of the Act provides that the Labour Court may, on application, rescind or vary any determination or order which it made in the E absence of

the party against whom it was made. Thus the Labour Court is required, in terms of s 92C(1) of the Act, to consider the merits of an application for rescission whenever such an application is made by the party that was in default.

The respondent was not present at the hearing of the application for rescission. F The Labour Court, after considering the written submissions and hearing the appellant's counsel, issued the following order:

> "IT IS ORDERED
>
> That the application be and is hereby denied on the grounds that the judgment entered was on the merits. The matter proceeded in the absence of the other side. It was not a default judgment, an appeal lies to the G Supreme Court."

It is not clear from the judgment of the President of the Labour Court why she concluded that the judgment of the Labour Court of 12 June 2003 was not a default judgment. The proceedings were conducted in the absence of the appellant and the judgment itself is very clear on that point. It certainly is a H judgment given in proceedings conducted in the absence of one of the parties

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and in respect of which the absent party can apply for rescission in terms of A s 92C (1) of the Act. I am satisfied that the Labour Court was required, in this case, to consider the merits of the application for rescission of the default judgment. In determining whether or not the default judgment should be rescinded or varied the Labour Court should have considered whether good cause had been shown. This is the test generally applied in applications for B rescissions of judgment. See *Du Preez* v *Hughes NO* 1957 R & N 706 (SR); *Roland & Anor* v *McDonnell* 1986 (2) ZLR 216 (S); *Songore* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S); *Simbi* v *Simbi* SC164-90.

Thus the President of the Labour Court, in order to determine whether the judgment of 12 June 2003 should be rescinded, should have considered whether the application for rescission had established a good and sufficient C cause. In doing so the court should have considered such factors as: the length of the delay in applying for the rescission, the reason for the default, the prospects of success and the balance of convenience. The Labour Court did not do so but simply dismissed the application on the basis that the judgment in respect of which rescission was sought was on the merits.

The Labour Court clearly misdirected itself on a point of law and on that basis D the Labour Court's determination should be set aside and the matter remitted to the Labour Court for the determination of the application for rescission on the merits, that is, whether or not the default judgment of 12 June 2003 should be rescinded.

In the result the appeal is allowed and the matter is referred to the Labour Court E for determination of the application for rescission on the merits. The order of the Labour Court is set aside and the following order is made:

> "(a) That the determination granted by the Labour Court on 27 March 2004 be and is hereby set aside.
>
> (b) That the Registrar of the Labour Court is hereby directed to reset the F matter down for determination of the application for rescission on the merits."

SANDURA JA and ZIYAMBI JA concurred G

Coghlan Welsh & Guest, appellant's legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/WANG & ORS v RANCHOD NO & ANOR 2005 (1) ZLR 415 (H)

WANG & ORS v RANCHOD NO & ANOR 2005 (1) ZLR 415 (H)

Citation	2005 (1) ZLR 415 (H)
Case No	Judgment No. HH-50-05
Court	High Court, Harare
Judge	Bhunu J
Heard	24 May 2005
Judgment	15 June 2005
Counsel	*A Gijima,* for the applicants *A Kara,* for the first and third respondents
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Administration of estates — *executor dative — appointment of — attorney* C *for person accused of having murdered deceased — such person an agent of the alleged killer — contrary to public policy for such person to be appointed executor dative*

Costs — *de bonis propriis — legal practitioner — legal practitioner accepting appointment as executor dative — client accused of having murdered deceased — reprehensibility of such conduct — conduct* D *incapable of condonation –award of costs de bonis propriis appropriate*

Practice and procedure — *parties — locus standi — applicants for appointment as executor of deceased estate — close relatives of deceased qualified to complete for appointment as preferred executors — such persons having an interest in the administration of the deceased* E *estate and thus having locus standi*

Headnote

It is against public policy for a person who is guilty of wrongfully killing another to take any benefit from that other's estate.

The first respondent had been appointed executor dative in the estate of the late H by the Master. He was also the legal practitioner and agent of the F third respondent, who had been married to H. It was common cause between the parties that on 15 February 2005, the third respondent, in circumstances not fully explained to the court, shot and killed H. As a result, the third respondent faced trial upon a charge of murdering her erstwhile husband. The applicants opposed the appointment of first respondent as the executor of H's estate and bought an order setting G aside his appointment by the Master. The estate was large and the applicants were the closest surviving adult relatives of H. They also alleged that the third respondent and H had been divorced prior to the fatal shooting. At the commencement of proceedings, two of the respondents challenged the *locus standi* of the applicants to bring the H application.

Bhunu J

Held, that the applicants, being close relatives of the deceased qualified to A compete for appointment as a preferred executor in terms of s 26 of the Administration of Estates Act [*Chapter 6:10*]. Should they establish what they had alleged, they would be entitled to relief. As they had an interest in the administration of the deceased estate, they did have *locus standi* to bring the application. B

Held, further, that in appointing the first respondent as the executor dative, the Master erred grossly. The appointment offended against public policy and common law principles, which strive

to prevent people from benefiting from their criminal conduct. That objective is undoubtedly defeated when a potential murderer or, as *in casu*, his or her agent is appointed to administer the estate of the person allegedly killed. C

Held, further, setting aside the Master's appointment of the first respondent as executor dative, that the latter should pay the costs *de bonis propriis.* His conduct in seeking appointment in the full knowledge that his client was charged with having murdered the deceased was reprehensible and could not be condoned. D

Legislation considered

Administration of Estates Act [*Chapter 6:01*], s 26

Case information

A Gijima, for the applicants

A Kara, for the first and third respondents E

Judgment

BHUNU J: The first three applicants as well as the third respondent together with her minor child Wang Jue are all Chinese Nationals. All these five persons are embroiled in a vicious tag of war for the estate of the late Wang Chuan Hui.

The third respondent claims to be the widow of the late Wang Chuan Hui, a fact which is hotly contested by the applicants. They claim that the deceased F and the third respondent divorced sometime in 1996. They have tendered a copy of the divorce order as annexure B. The applicants also allege that the divorce order awarded custody of the minor child Wang Jue to the deceased.

From the papers, it is clear that the third respondent and the deceased contracted a valid marriage in terms of Chinese law. What is not clear is whether G or not the marriage still subsisted at the time of the fatal shooting.

It is however, common cause that on 15 February 2005 following a misunderstanding, the third respondent shot and killed the late Wang Chuani Hui. She is now on bail pending trial for murder. H

Bhunu J

A During his lifetime the deceased ran a fleet of businesses through a company, Wanson Investments (Pvt) Ltd, the fourth applicants.

The businesses comprise:

1. Jackys Bargain Centre at No. 84 Harare Street.
2. Carriers Bargain at No. 67 Chinhoyi Street. B
3. Hardy's Bargain, at No. 63 Charter Road.
4. Jacky's Bargain Centre, at No. 7 Cameron Street and a
5. Warehouse, at No. 84 Harare Street.

Upon her release from custody on bail and on 21 April 2005, the third respondent succeeded in having her lawyer, Mr P. Ranchod appointed C executor dative to the estate of the late Wang Chuan Hui.

In his report justifying his appointment, the Master had this to say:

> "At an edict meeting held on 21 April 2005, I appointed first respondent as the Executor Dative of the Estate. The applicants were represented by their legal practitioner who failed to address their legal status in the estate. D The applicants are not beneficiaries in the estate nor do they have a certificate of guardianship of the minor child thus I proceeded to appoint the first respondent particularly with a view of protecting the minors interest in the estate.
>
> *The fact that deceased and third respondent had divorced was never mentioned at the Edict meeting by both parties* (my emphasis).
>
> E If the fourth applicant does not form part of the estate as averred by applicants, my office and that of the first respondent do not have jurisdiction."

It is clear from the Master's report that when he made his determination at the edict meeting he did not have the full facts before him.

F There are two important factors which do not appear to have been drawn to his attention. Firstly, that the third respondent had shot and killed the deceased and secondly that the deceased and the third respondent may have divorced way back in 1996.

The circumstances surrounding the fatal shooting are still hazy and the third respondent's liability has not yet been determined by the courts. Despite that G observation I take the robust view that it is repugnant to all notions of justice and public policy that one should be appointed executor to the estate of the person he/she has killed.

A cursory survey of English authorities establishes the principle that a person H who kills another cannot benefit from the estate of the person he has killed.

2005 (1) ZLR p418

Bhunu J

O R Marshal in his book, *Theobald, Wills* 12ed at p 385 says: A

> "Since the passing of this Act it has been held that it is against public policy for a person who is guilty of feloniously killing another to take any benefit from that other's estate. And the principle applies to a case of manslaughter as well as one of murder. It applies to an intestacy as well as a will. If the gift is to the killer and others as members of a group or a class, the killer B is excluded and the others take an increased share."

The law cannot be different in Zimbabwe although I have not been able to unearth relevant local authorities due to the urgency of the matter. Depending on the outcome of the pending criminal trial, the applicant stands in great danger of being disinherited from the deceased's estate. There is no wisdom in appointing such a person or her agent to administer the estate of her alleged C victim.

The first respondent is third respondent's lawyer and agent. His appointment as executor dative amounts to the appointment of the third respondent as executor to the deceased's estate because it is trite in our law that he who does a thing through another does it himself. An agent steps into the shoes of his principal. He cannot be a neutral administrator because he is normally under D an obligation to act in his principal's interest at all material times. In his book *The Law of Agency*, 1972 edition at p 3, AJ Kerr noted that:

> "… an agent's authority amounts to no more than a power of a special sort, a power by doing an act to affect the principal's legal relations as if he had done the act himself." E

The applicants have given a reasonable explanation as to why they were unable to place all the material facts before the Master, citing language barriers. That much is not in dispute.

Having said that, it is in my view, inconceivable and not in the least probable that had all the facts been placed before the Master he would have reached the same decision which he did. The appointment as it stands does not exclude F the possibility of deceased's murderer taking charge of his estate.

The applicant's contest of the appointment of third respondent's lawyer as executor dative is therefore well grounded both on facts and at law.

I also find merit in the applicant's apprehension that the third respondent through her lawyer may, in the interim, plunder the deceased's estate pending G the legal contest. This is because she is aware of the possibility of being disinherited from the estate.

At the beginning of these proceedings, the first and third respondents questioned the applicant's *locus standi*. H

2005 (1) ZLR p419

Bhunu J

A The applicants have demonstrated:

(1) that they are the closest surviving adult relatives of the deceased;

(2) they intend to prove that the first and third respondents have no stake in the deceased's estate as the deceased and third respondents were divorced at the time of the deceased's demise; B

(3) they are shareholders in some of the deceased's business enterprises;

(4) they also claim that in terms of Chinese law they are beneficiaries to the deceased's estate.

In terms of section 26 of the Administration of Estates Act [*Chapter 6:01*] each of the first three applicants being close relatives of the deceased qualify to C compete for appointment as a preferred executor.

If the applicants manage to establish what they allege then undoubtedly they will be entitled to relief. That being the case they have established that they have an interest in the administration of the deceased estate. I therefore, find in their favour that they have the necessary *locus standi*.

D The applicants being foreigners the respondents demanded $20m security for costs whereas the applicants tendered $5m. In my view, the responsibility to establish the sufficiency of security for costs lies with the Master.

When everything is said and done, it is manifestly clear that the ends of justice can only be met by securing the estate in the hands of a neutral person until such time that the legal wrangles have been resolved by the courts.

E I can perceive no undue prejudice or hardship to the third respondent and her son for the simple but good reason that they can turn to the Deceased Persons Family Maintenance Act [*Chapter 6:03*], for relief and support for their day to day needs and sustenance.

Having said that there remains no lingering doubt in my mind that the Master F in this case grossly erred in appointing the first respondent as executor dative. The appointment offends against public policy and is contrary to common law principles. Our law strives to prevent people from benefiting from their criminal conduct. That objective is undoubtedly defeated when a potential murderer or his agent is appointed to administer the estate of the person he has allegedly killed.

G There being no doubt in my mind that the Master's appointment was grossly unreasonable to such an extent that no reasonable person properly applying his mind to the facts would have made such an appointment, I have no H hesitation in issuing a final order.

2005 (1) ZLR p420

Bhunu J

As regards costs, I take the view that it was remiss of the first respondent to A strive for and accept appointment as administrator to the deceased's estate with the full knowledge that his client was facing charges of having murdered the deceased. That type of conduct is reprehensible, it calls for some form of sanction as it cannot be condoned. The court can only express its displeasure by an award of costs *deboni propriis* as claimed by the applicants. Through B his conduct and that of the third respondent, the applicants have been put to unnecessary expense.

In the final analysis, it is ordered that a final order be and is hereby granted in the following terms:

1. that the letters of administration issued to the first respondent by the second respondent in respect of the deceased estate of WANG CHUAN C HUI reference DR 673/05 be and is hereby revoked and annulled;
2. that the second respondent is directed to appoint a neutral executor dative from his list of registered administrators of estates;
3. that the businesses known as Jacky's Bargain Centre at 84 Harare Street, Carriers Bargain at 67 Chinhoyi Street, Hardy's Bargain at 63 Charter Road, D Jacky's Bargain Centre at 7 Cameron Street and the warehouse at 84 Harare Street shall be closed and the stock in trade shall be secured by the first and third respondents pending resolution by the second respondent or by this court as to the owner of the said businesses and stock in trade;
4. that the first respondent shall pay costs of this application *de bonis* E *propriis* and jointly and severally with the third respondent on the legal practitioner and client scale.

Kantor & Immerman, the applicant's legal practitioners

Hussein Ranchod & Company, the first & third respondent's legal practitioners F

The Master of the High Court, for the second respondent

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/MASHOKO v MOBIL OIL ZIMBABWE (PVT) LTD 2005 (1) ZLR 421 (H)

MASHOKO v MOBIL OIL ZIMBABWE (PVT) LTD 2005 (1) ZLR 421 (H)

Citation	2005 (1) ZLR 421 (H)
Case No	HH-51-05
Court	High Court, Harare
Judge	Makarau J
Heard	7 March 2005
Judgment	15 June 2005
Counsel	*E Matinenga* ,for the applicants *R M Fitches*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

D **Contract** — *breach — liability for — servants of party — servants performing acts in breach of contract — when party can be said to have breached contract — need to show that servants acting as agents allegedly in breach — vicarious liability — not a basis for liability for breach of contract*

Headnote

The respondent was in the business of supplying motor oils. It had a number of service stations which were operated under agreements with third parties. The applicant was one such third party. He leased from the applicant a service station in Harare. It was a specific term of the agreement between the parties that the applicant should faithfully E procure from, and sell fuel and lubricants belonging to, the respondent. The applicant's employees were seen to have procured fuel from another company, receiving the delivery in the early hours of the morning. The fuel was paid for with money that was stolen from the applicant. It represented takings from the service station for the day. Records were F falsified to cover up the theft. The employees were subsequently arrested and charged with the theft and other offences. Holding the applicant vicariously liable for the acts of his employees, the respondent terminated the lease agreement between the parties. The applicant claimed that the employees concerned were acting outside the scope of their respective authorities and intended to sell the fuel for their own G benefit without the applicant's knowledge. The issue to be decided was whether the doctrine of vicarious liability applied in contract law to terminate a valid contract on the basis that the breach complained of was occasioned by the employees of the second party.

Held , that the doctrine of vicarious liability arises in delict. *Culpa* is the basis H of the liability as, in a way, the employer is being held responsible for

employing a "negligent" employee even where no fault is attributable to A the employer. The doctrine, based as it is primarily on the dual grounds of *culpa* and social policy, is peculiarly born and bred of the law of delict. It has no equal application in the law of contract.

Held, further, that failure by one party to comply with the terms of an agreement through the conduct of his employees may amount to breach B of the contract in appropriate circumstances, but liability is based on the principles of agency and not on those of vicarious liability.

Held, further, that the respondent did not allege agency but vicarious liability. Even if the respondent had not specifically alleged and argued its case on the basis of agency, the matter could have been decided on that basis had the respondent proved that the applicant's employees C were duly mandated to act as they did or that, on some other recognized basis, their acts were the acts of the applicant. This the respondent failed to do. The applicant's employees were not performing any of his obligations under the agreement with the respondent when they sourced fuel from the other company. They did not have his express mandate to do so nor could such a mandate be implied from the circumstances of the D matter.

Cases cited

Brand v Kotze 1948 (3) SA 769 (C)

Daly v Chisholm & Co Ltd 1916 CPD 562 E

Hotels, Inns & Resorts SA v Underwriters at Lloyds 1998 (4) SA 466 (C)

Mavros v Venturas 1950 SR 180

Case information

E Matinenga ,for the applicants

R M Fitches, for the respondent F

Judgment

MAKARAU J: The issue that falls for determination in this application is somewhat *res nova.* It is whether the doctrine of vicarious liability applies in contract law to terminate a valid contract on the basis that the breach complained of was occasioned by the employees of the second party.

The facts forming the backdrop to the above issue are largely common cause G or are not seriously disputed. I summarize them as follows:

The respondent is a well-known company in Zimbabwe, carrying on the business of supplying fuel and motor oils. It has a number of service stations in the country. These are operated under agreements with third parties. The H

A applicant is one such third party. He leased from the applicant a service station in the southern part of Harare. It is a specific term of the agreement between the parties that the applicant shall faithfully procure from and sell fuel and lubricants belonging to the respondent.

On 13 February 2004, the applicant's employees procured fuel from a company B bearing the unlikely name for a fuel company, of Lard Oil. One, Brian Mudungwe, an employee of the respondent, received word of the delivery. He turned up at the applicant's service station and witnessed the applicant's employees receiving the delivery from Lard Oil at the ungodly hour of 1.30 a.m. Holding the applicant vicariously liable for the acts of his employees, the respondent wrote to the applicant terminating the lease agreement between C the parties. The applicant protested at the termination of his lease by pointing out that the employees concerned were acting outside the scope of their respective authorities and intended to sell the fuel for their own benefit without the applicant's knowledge. The respondent dug in its heels, resulting in the applicant filing this application. The respondent not only opposed the application but also filed a counter-application, seeking the eviction of the D applicant from the leased premises.

It is in my view necessary that I detail the alleged conduct of the applicant's employees that led to this litigation, as it is on the basis of such conduct that the respondent argues that the applicant is vicariously in breach of the contract between the parties. This is what the employees did. On 13 February E 2004, the three employees contacted Lard Oil and sourced 10 000 litres of diesel. This was on a Friday. Delivery of the fuel was made around midnight on the Friday. A deposit of $7 million dollars was paid to Lard Oil. This money was stolen from the applicant. It represented takings from the service station for the day. Records were subsequently falsified to cover up the theft. The employees were subsequently arrested and charged with the theft and other offences.

The above conduct by the applicant's employees, although not specifically admitted by the respondent, is not seriously disputed as the respondent maintains in its opposing affidavits that it has no knowledge of the actual role played by the applicant in procuring the foreign fuel. The respondent simply G holds the applicant accountable for the conduct of his employees, whether or not he knew what his employees were up to.

The doctrine of vicarious liability holds an employer liable for all the delicts of his employee when certain conditions are met. It is essentially a doctrine that was born out of the social policy of pillorying the employer with liability, H as the ultimate beneficiary of the activities of the employee, to make good any

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loss occasioned by such employee. The doctrine also seeks to protect the A injured party from going without redress in the case that the employee is without means. *Culpa* remains the basis of the liability as, in a way, the employer is being held responsible for employing a "negligent" employee even in cases where no fault is attributable to the employer. The doctrine, based as it is primarily on the dual grounds of *culpa* and social policy, is B peculiarly born and bred of the law of delict. Due to its origins and development, it is not surprising that the authorities on the doctrine are all in the law of delict.

I would venture to hold that the doctrine of vicarious liability has no equal application in the law of contract.

It is trite that a contract may be validly concluded or effectively terminated through the actions of another (an agent), who may be the contracting party's C employee. Thus, in my view, it stands unassailable that a failure by one party to comply with the terms of the agreement through the conduct of his employees may amount to breach of the contract in appropriate circumstances. It is my further view that the law applicable in such a situation to found liability is based on the principles of agency and not on those on vicarious liability. D

One such instance where the actions of the employee resulted in the employer being held in breach of its contract is illustrated by the facts in the case of *Hotels, Inns & Resorts SA* v *Underwriters at Lloyds* 1998 (4) SA 466 (C). In that matter, the learned judge held that the act of an employee in deliberately setting fires in a building he was guarding led to the employer breaching his agreement with the plaintiff. In coming to this conclusion, the judge rejected E as lacking merit the submission by the defence that the act of the employee was not binding on the employer as the act complained of was not within the course and scope of his employment as he was not employed to start fires. Instead, the court was of the view that:

> "FEND contracted to 'minimise' the risk of loss or damage by fire. The F *Concise Oxford Dictionary* defines 'minimise' to mean 'reduce to … smallest possible amount or degree". If 'minimise' is given its ordinary grammatical meaning, the parties could hardly have intended that FEND would be exonerated from liability if it failed to perform its contractual obligation at all or if it committed a breach going to the root of the contract, such as deliberately starting fires as G did *in casu*", *per* Hlope J (as he G then was) at p 476C.

Further, at D on the same page, the learned judge had this to say:

> "With reference to FEND, both parties must have intended that FEND would provide security services and security personnel in order to minimise the risk of loss or damage by fire. It is most unlikely, in my view, H

> A that they contemplated that FEND would be excused from the consequences of a fundamental breach of contract, such as deliberately causing the fire."

It appears to me that the learned judge viewed the acts of G as the acts of FEND in discharging its contractual obligations to the plaintiff. The learned judge did not at any stage of his reasoning invoke the principles of vicarious liability. B He appeared to be in no doubt that he was considering the actions of FEND itself and not that of G, the employee. I gain this impression from the following passage where the learned judge had this to say at 477A:

> "If one has regard to the agreement as a whole, clearly FEND undertook to minimise the risk of loss or damage by fire. Surely, someone who C deliberately starts fires can hardly be said to be minimising loss or damage by fire. Such a person deliberately causes loss or damage, contrary to the contractual obligation to minimise same. I agree with Mr MacWilliam that it is difficult to imagine a more flagrant breach of contract by FEND than the one that happened in this case."

It is my view that the learned judge was invoking the principles of agency D although he did not specifically articulate this as his basis for holding that the deliberate acts of G were the acts of the company FEND. G was employed to carry out those functions that FEND had contracted to do. FEND was a company that could only render those services through its employees, G included. G was literally the arm through which FEND purported to carry out its obligations to the plaintiff. That arm of FEND deliberately set fires in E violation of its agreement with the plaintiff. It is thus not difficult to envisage why the learned judge did not see it fit to articulate the law of agency as the basis of his decision in the circumstances of the matter, although he appears to have clearly based his decision on such principles.

I have further considered whether there is any other legal principle in the law F of landlord and tenant that imposes vicarious liability on tenants, similar to the one imposed on employers in the law of delict. I was not referred to any by counsel and my own searches have not yielded any. I am however, aware that generally, a tenant is liable for the destruction of or damage to the leased premises caused by members of his household and those residing in the house with his consent. This duty, which is not based on vicarious liability, arises G partly from the tenant's duty of care towards the landlord to return the property in the condition he received it and on his contractual obligation, usually expressed in the contract, to return the property in good condition: see *Mavros* v *Venturas* 1950 SR 180 and *Brand* v *Kotzé* 1948 (3) SA 769 (C). In the case *of Daly* v *Chisholm & Co Ltd* 1916 CPD 562, Juta JP held the lessee H liable for damage that was negligently caused by his servant to the leased

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premises. In his reasoning, it was clear that the learned judge held the conduct A of the servant as being that of the lessee's agent and therefore binding on the principal.

In casu, the respondent has not alleged agency but sought to proceed, in both defending itself in the main application and in presenting its counter-application, on the basis of vicarious liability. It is my view that it is incompetent B for the respondent to so proceed. Even if the respondent had specifically alleged and argued its case on the basis of agency, I would have considered the matter on such a basis had the respondent proved that the applicant's employees were duly mandated to act as they did or that, on some other recognised basis, their acts were the acts of the applicant. This the respondent has, in my view, failed to do. The applicant's employees were not performing C any of the applicant's obligations under his agreement with the respondent when they sourced fuel from Lard Oil. They did not have his express mandate to do so nor can such a mandate be implied from the circumstances of the matter.

On the basis of the foregoing, the main application must succeed and the D counter-application must fail.

In the result, I make the following order:

1. the purported cancellation of the lease agreement between applicant and respondent is declared null and void.
2. the counter-application by the respondent is dismissed. E
3. the respondent pays the applicant's costs.

Wintertons, applicant's legal practitioners

Honey & Blankenberg, respondent's legal practitioners F

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ZIMTRADE v MAKAYA 2005 (1) ZLR 427 (H)

Citation	2005 (1) ZLR 427 (H)
Case No	HH-51-05
Court	High Court, Harare
Judge	Makarau J
Heard	1 June 2005
Judgment	15 June 2005
Counsel	*J Dondo*, for the applicant Respondent in default
Case Type	Unopposed motion
Annotations	Link to case annotations

Flynote

Court — *Labour Court — exclusive jurisdiction of over labour matters — matter ancillary to issue of whether employment properly terminated — not competent for High Court to determine such a matter*

Employment — *Labour Court — exclusive jurisdiction of over labour matters — matter ancillary to issue of whether employment properly terminated — not competent for High Court to determine such a matter*

Headnote

Following her dismissal from the service of the applicant, the respondent kept certain property which had been part of her conditions of service. The validity of her dismissal was referred for determination under the Labour Act. The applicant sought an order in the High Court for the return of the items.

Held, that matters relating to suspension from employment and to dismissals are specifically within the purview of the Labour Court as these are matters that are provided for in the Labour Act [*Chapter 28:01*] and the regulations made thereunder. The jurisdiction of the High Court is ousted in respect of matters of dismissals and suspensions as these are specifically provided for in the Act.

Held, further that it is not possible to separate the determination of the validity of a suspension from employment, on one hand, from the determination of whether or not that suspension affects the benefits enjoyed by the employee, on the other hand. The two are interdependent and are both governed by the existing employment relationship obtaining between the two parties. Where the validity of the suspension of the employee or the termination of his employment is still pending, a vindicatory action cannot properly lie at the instance of the employer.

Makarau J

Cases cited A

Sibanda & Anor v Chinemhute HH-131-04

Legislation considered

Labour Act [*Chapter 28:01*], s 89(6) B

Case information

J Dondo, for the applicant

Respondent in default

Judgment

MAKARAU J: The applicant filed a court application on 25 February 2005, seeking an order compelling the respondent to surrender to it a laptop computer and accessories and a motor vehicle, all fully described in the C application. The application was duly served and the respondent filed a notice of opposition out of the time limits prescribed in the rules of this court. Despite notice to the respondent to regularise her papers, nothing was done to uplift the automatic bar against the respondent, resulting in the matter being properly set down before me on the unopposed roll.

The facts giving rise to the application appear in the applicant's founding D affidavit as follows: the applicant employed the respondent up to 31 December 2004 as its manager for the Micro Small and Medium Enterprises. Following misunderstandings between the two, the respondent was suspended from employment without salary and benefits. On 25 January 2005, the respondent was dismissed from employment with effect from the date of suspension. The E respondent then requested a referral of the matter to a labour officer in terms of s 93 of the Labour Act. She declined to return the property of the applicant in her possession, prompting the applicant to approach this court for relief.

At the hearing of the matter, I *mero motu* raised the issue of jurisdiction in light of the amendment to the Labour Act [*Chapter 28:02*] which limits the jurisdiction of all other courts in the first instance save that of the Labour Court F in matters provided for in the Act. I requested Mr *Dondo* to file heads of argument supporting his submission that this court has jurisdiction in the matter. This he has since done and I express my gratitude to him for promptly filing his submissions.

The issue of parallel jurisdiction between this and the Labour Court appears G set to dog this jurisdiction for some time to come due to the wording of the section of the Act that seeks to create an inferior but exclusive Labour Court in the country. The relevant section could have been drafted in such a way as to make clear matters over which the Labour Court has exclusive jurisdiction. As things stand, different interpretations are being placed on s 89(6) of the H

A Act, placing this court in the invidious position where, on one hand, it has to jealously guard its inherent jurisdiction and allow the widest possible access to all litigants seeking justice from it and, on the other, seek to give effect to the legislature's intention of creating a specialty court of the Labour Court: see *Sibanda & Anor* v *Chinemhute & Anor* HH-131-04.

B Notwithstanding the arguments advanced by Mr *Dondo*, I am of the opinion that matters relating to suspension from employment, with or without salary, and matters relating to dismissals are specifically within the purview of the Labour Court, as these are matters that are provided for in the Act and the regulations made thereunder. There is adequate provision under the Act for the setting up of machinery to resolve such disputes. Thus, following my C reasoning in the *Sibanda* matter, the jurisdiction of this court is specifically ousted in respect of matters of dismissals and suspensions, as these are specifically provided for in the Act.

It is, in my further view, unacceptable splitting of hairs to separate the determination of the validity of a suspension from employment, on one hand, from the determination of whether or not that suspension affects the benefits D enjoyed by the employee, on the other hand. The two are interdependent and are both governed by the existing employment relationship obtaining between

the two parties. The argument that the employer can vindicate his property at any time does not impress me, as the employee can always raise the defence of a claim of right to possess the property until he or she is effectively and E lawfully disentitled to the property. Where the validity of the suspension of the employee or the termination of their employment is still pending, it is my view that the *vindicatio rei* cannot properly lie at the instance of the employer.

On the basis of the foregoing, I hold that this court has no jurisdiction to entertain the above application. In the result, I make the following order: F

1. The application is dismissed.
2. There shall be no order as to costs.

G *Chinamasa Mudimu & Chinogwenya,* applicant's legal practitioners

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Source:
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ZCTU v MAKONESE 2005 (1) ZLR 430 (S)

Citation	2005 (1) ZLR 430 (S)
Case No	Judgment No. S-141-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Malaba JA
Heard	4 May 2004
Judgment	16 June 2005
Counsel	*L T Biti,* for the appellant *T Garabga,* for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Employment — *contract — termination — grounds for — failure to obey* C *lawful order — when order may be said to be lawful*

Headnote

In a case where a person is dismissed for disobeying a lawful order, the order may be said to be lawful where:

(a) it is given by the employer; D
(b) it is capable of being carried out by the employee;
(c) it is for the advancement of the employer's business;

(d) it is closely related to the duties of the employee; and

(e) it is not a wrongful act. E

Cases cited

Matereke v CT Bowring & Associates (Pvt) Ltd 1987 (1) ZLR 206 (S)

Case information

L T Biti, for the appellant

T Garabga, for the respondent F

Judgment

CHEDA JA: The respondent was employed by the appellant as a director of organisations. On 1 March 1995, the appellant applied to a labour relations officer for permission to dismiss the respondent from employment. The appellant had no Code of Conduct and, as such, the request to dismiss the respondent had to be in terms of SI 371 of 1985 before it was amended. G

The authority to dismiss the respondent was sought after several disciplinary hearings, at which the conduct of the respondent had been discussed.

The letter to the labour relations officer, in which permission to dismiss the respondent was sought, stated as follows: H

Chidyausiku CJ

A "We wish to seek permission to dismiss Mr I Makonese, Head of Organising Department, in terms of SI 371(a) H.

1. We will submit evidence that Mr Makonese refused to drive the assigned organising vehicle because it was labelled with the ZCTU logo, thereby undermining and compromising the organising programme. B
2. We will further submit that Mr Makonese is incompetent and inefficient in the performance of his duties by not submitting 1995 Department Work Plan (SI 371H); the ZCTU programmes like May Day Preparation, Labour Forums and Regional Conferences have been severely compromised."

C Following the above request, a hearing was convened at the Harare Regional Offices of the Labour Relations Department of the Ministry of Labour on 4 May 1995, at which the respondent was present. The summary of the hearing officer is to the effect that he wondered why the respondent did not want to be identified with the organisation that represented the interest of the workers and said that if he did not want to be so associated, he was not fit to be part D of that organisation. He noted that the respondent refused to take lawful instructions form his employer. He granted permission to dismiss him. The labour relations officer found that the respondent had for personal reasons refused to drive a Zimbabwe Congress of Trade Unions ("ZCTU") vehicle marked with the ZCTU logo, then parked the vehicle at a hotel and surrendered the keys to the Secretary General.

E It is noted from the numerous hearings held with the respondent that he had not denied that he refused to drive ZCTU vehicles, but had instead said that the Secretary General had excused him so that he could attend a "*bhira*" for his son who was going overseas. The suggestion that he declined to drive for the sake of his life seems to be an afterthought.

F At the hearing before the Labour Relations Tribunal ("the Tribunal"), the respondent said:

> "If he had given me instructions, I could have altered my visit to the rural area because I wanted to take my groceries to go and drop my groceries and bring back the car unless they wanted me to attend the workshop, but he said 'Okay that are going home and do your *bhira* laughing me off' G (*sic*)."

This is in direct contrast to the submission that he declined to drive as his life was at risk.

With regard to his fear to drive the vehicle, the respondent was asked by his H counsel the following question:

Chidyausiku CJ

"After the vehicle had been labelled did you continue to use this vehicle?" A

His reply was:

> "Whenever I was given a duty, I could use the motor vehicle during the day."

Again, this shows that the refusal to drive for the sake of his safety, as earlier stated, was not true. B

A suggestion has been made as to whether the order to drive the vehicle was lawful or not. Since the respondent denied that he refused to carry out the instruction, the lawfulness or unlawfulness of the order is irrelevant and cannot be available to him as a defence.

However, on the other hand, if the lawfulness were to be considered, can it C be said an order is unlawful when –

(a) it is given by one's employer;

(b) it is capable of being carried out by the employee;

(c) it is for the advancement of the employer's business;

(d) it is closely related to the duties of the employee; and

(e) it is not a wrongful act? D

In this case, the respondent was responsible for organising conferences and seminars and the driving concerned was to take people to one such conference.

It was not necessary for the Tribunal to refer to the respondent's duties as not being those of a driver. His duties involved organising conferences and seminars. The vehicle was issued to him for that purpose, and the instruction E to drive was for the purpose of taking officials to a conference. I do not agree that this was an instruction to carry out a duty that was unrelated to the nature of his employment.

I find that there was nothing unlawful about the order. It was lawful. He refused to obey it. He gave false and different excuses.

Once the labour relations officer made a finding that the respondent refused F to carry out the order, he was entitled to allow the dismissal of the respondent.

The respondent was aware of the allegation against him. He gave conflicting excuses. Having alleged that he was excused, he turned around and said he refused because he feared for his life. At some stage he said if he had been instructed to drive, he would have taken his groceries with him and returned. G

These different stories would have made the labour relations officer find, as I do, that the respondent was not being truthful. The conclusion that he had refused to carry out the order to drive people to a conference cannot be faulted. The order was to advance the business of his employer. Refusal to carry it out H

Chidyausiku CJ

A would have frustrated arrangements of the conference if the Secretary General had not finally driven the people to the conference himself.

The respondent has not shown that there was any real danger to his life, as he admitted that he used to drive the vehicle.

It is clear that there was a wilful and deliberate refusal to carry out the order B given by the Secretary General. The suggestion that the respondent refused for his own safety does not excuse him from disobeying a lawful order or instruction: see *Matereke v CT Bowring & Associates (Pvt) Ltd* 1987 (1) ZLR 206 (S).

It was not necessary for the appellant to show that its programme was compromised. The Secretary General saved that situation by driving the C vehicle himself.

The suggestion that the respondent had not disobeyed a lawful order entitled this court to deal with the appeal and the question of law as to whether the order was lawful or not.

I am therefore of the view that the refusal to obey the order by the respondent D was sufficiently proved.

The appeal is allowed with costs. The order of the Tribunal is therefore set aside and the decision of the labour relations officer is reinstated.

Chidyausiku CJ & Malaba JA concurred.

E *Honey & Blanckenberg*, appellant's legal practitioners

Chingore & Garabga, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/GOSA v MUJERI 2005 (1) ZLR 434 (H)

GOSA v MUJERI 2005 (1) ZLR 434 (H)

Citation	2005 (1) ZLR 434 (H)
Case No	Judgment No. HH-54-05
Court	High Court, Harare
Judge	Bhunu J
Heard	7March 2005
Judgment	22 June 2005
Counsel	Details not supplied
Case Type	Civil review
Annotations	No case annotations to date

Flynote

Family law — *child — custody — Guardianship of Minors Act [Chapter 5:08]* C — *s 5(1)— parents of minor child commencing to live apart — custody staying with the mother until resolved by the court — s 5(10) authorizing mother to make an application concerning custody — no power of judicial officer to make a unilateral decision awarding custody of minor child* D

Practice and procedure — *review — distinction between civil reviews and criminal review — no automatic review of civil matters — civil review are party driven*

Review — *distinction between civil review and criminal reviews — no automatic review of civil matters — civil reviews are party driven* E

Headnote

Unlike in criminal matters, in terms of r 256 of the High Court Rules, 1971 (RGN 1047 of 1971) civil reviews are party driven. There is no provision for automatic review or reference for review by judicial officers.

Section 5(1) of the Guardianship of Minors Act [*Chapter 5:08*] prescribes that where the parents of a minor child commence to live apart, custody F of the minor child shall be with the mother until

such time as custody is determined by the courts. The section does not, however, authorize a provincial magistrate, whether in his administrative or judicial capacity, to make a unilateral decision awarding custody of the minor child to the mother. It simply authorizes the mother to make an application for a G declaratory order from the children's court.

Case cited

Moyo v Ndlovu 1971 (2) RLR 50 (G)

Bhunu J

Legislation considered A

Guardianship of Minors Act [*Chapter 5:08*], s 5(1)

High Court Rules 1971 (RGN 1047 of 1971, r 256

Magistrates Court (Civil) Rules 1980 (SI 290 of 1980), Order 22 r 1(1)

Judgment

B **BHUNU J**: This matter was submitted for review by the provincial magistrate, Mashonaland Central Province.

The circumstances under which the matter was referred for review to this court are simple and straight forward.

The papers before me establish that the applicant Pardon Gosa issued summons against the respondent Lydia Mujeni claiming custody of their C 5 year old son, Emmanuel.

The matter went before the trial magistrate Mr N Chivhunga on the 19 November 2004. He reserved judgment and delivered his written judgment on the 15 December 2004 awarding custody to the father and granting the mother reasonable access. Whilst judgment was pending and on the D 16 December 2004, the respondent lodged an application in the same court but before a different magistrate, Mr L Murendo, claiming custody of the same child. Mr Murendo granted the application notwithstanding that his colleague Mr Chivhunga was already siezed with the matter and was in the process of preparing his written judgment.

E Mr Murendo explains the circumstances under which he granted the application as follows:

> "The hearing in that matter commenced on 19 November 2004 before my brother magistrate. From the record all the evidence was heard on that day and, it seems judgment was reserved.
>
> It would appear, from the record that the parties were advised that F judgment would be ready on 24 November 2004 and then 10 December 2004.
>
> Lydia Mujeni then visited the clerk of court on the above dates only to be informed that judgment was not yet ready.
>
> On the 16 December 2004, Lydia Mujeni became anxious and suspected that something was happening as according to her the father of the child G was always being seen milling around the court premises.
>
> Accordingly, on that date 16 December 2004, she made an application for custody of the minor child in terms of the Guardianship of Minor(s) Act. After hearing her story as heard (*sic*) of the province and after failing to H locate the record I granted her application."

Bhunu J

Unlike in criminal matters, in terms of r 256 of the High Court Rules, civil reviews A are party driven. There is no provision for automatic review or reference for review by judicial officers. The Rule provides as follows:

> "256 Review proceedings by notice of motion.
>
> Save where any law otherwise provides, any proceedings to bring under review the decision or proceedings of any inferior court or of any tribunal, B board or officer performing judicial, quasi-judicial or administrative functions, *shall be by way of court application directed and delivered by the party seeking to review* such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected." (my emphasis) C

In interpreting the same provisions, which have not been materially amended since 1971 Greenfield J in the case of *Moyo* v *Ndhlovu* 1971(2) RLR 50 (G) at 53A observed that:

> "The High Court's general powers of review are contained in ss 31 and 32 of Act 22 of 1964, but neither section deals with the question who may initiate review proceedings. Order 25 of the Rules of Court, however, deals D with the procedure for initiating a review. Rule 6 provides that a party to proceedings in an inferior court shall do so by application by way of notice of motion, and that this must be done within eight weeks, subject to the proviso that the High Court may for good cause extend the time.
>
> The only authority I have been able to find for the right of a tribunal or inferior court to initiate a review *mero motu* is in cases under the South E African law of adoption."

It was therefore remiss and incompetent for the provincial magistrate, not being a party to the proceedings, to refer the matter for review. Apart from that, the handling of this matter by the provincial magistrate raises eyebrows such that if it is not brought to check, it may bring the due administration of justice F into disrepute.

It is clear from the record of proceedings that the provincial magistrate was wearing two hats, one as the station administrator and the other as a judicial officer both of which required him to act fairly and reasonably.

The *audi alteram partem* rule, that is to say, the need to hear both sides before G making a judicial or administrative decision which affects the other party is the bedrock upon which our judicial and administrative systems firmly rest.

From the provincial magistrate's narration of events it emerges that after listening to Lydia's complaint in privacy, he threw all caution to the winds and proceeded in great haste to accept her story hook, line and sinker. H

2005 (1) ZLR p437

Bhunu J

A He then proceeded to act on the basis of her complaint without first ascertaining the facts with the trial magistrate, let alone her adversary. Thus by his conduct he was condemning his colleague without giving him a chance to be heard. As Lydia was questioning the trial magistrate's competence and integrity the provincial magistrate was duty bound to consult him and ascertain the facts before interfering with the proceedings.

B Section 5(1) of the Guardianship of Minors Act [*Chapter 5:08*] prescribes that where the parents of a minor child commence to live apart custody of the minor child shall be with the mother until such time custody is determined by the courts.

The section does not however, authorise a provincial magistrate whether in C his administrative or judicial capacity to make a unilateral decision awarding custody of the minor child to the mother. It simply authorises the mother to make an application for a declaratory order from the children's court.

The section reads:

> "5(1) Where either of the parents of a minor leaves the other and such D parents commence to live apart, the mother of that minor shall have the sole custody of that minor until an order regulating the custody of that minor is made under section *four* or this section or by a superior court such as is referred in subparagraph (ii) of paragraph (a) of subsection (7).
>
> (2) Where —
>
> (a) the mother of a minor has the sole custody of that minor in terms E of subsection (1); and
>
> (b) the father or some other person removes the minor from the custody of the mother or otherwise denies the mother the custody of that minor;
>
> the mother may apply to a children's court for an order declaring that she has the sole custody of that minor in terms of subsection (1) and, F upon such application, the children's court may make an order declaring that the mother has the sole custody of that minor and, if necessary, directing the father or, as the case may be, the other person to return that minor to the custody of the mother.
>
> (3) .....
>
> G (4) An application in terms of subsection (2) or (3) may be made to any children's court and that court may, at any stage of the proceedings:
>
> (a) remit the matter to another court for the taking of evidence; or

(b) transfer the application to another children's court for the H determination of that application by that children's court."

2005 (1) ZLR p438

Bhunu J

Order 22 r 1(1) of the Magistrates Court (Civil) Rules,1980; provides that: A

> "Except otherwise provided, an application to the court for an order affecting any other party or person shall be on not less than seven days' notice to such other party or person stating shortly the terms of the order applied for and the time at which the application will be made to court."

It will be noted that the above rule incorporates the *audi alteram partem* rule B and yet the provincial magistrate acted hastily in contravention of that fundamental rule of procedure well grounded both in common law and statute.

As a result of the provincial magistrate's conduct the proceedings in this case are now mired in serious controversy likely to tarnish the reputation of our judicial system and the due administration of justice. There are now allegations and counter allegations of corruption leveled against both the trial magistrate C and the provincial magistrate.

It is clear that the wheels of justice altered and came off somewhere along the line. It is the function of the administrators in the Ministry to repair them and put the justice train back on track. Nothing should be swept under the carpet.

It is for this reason that I have directed the registrar to make a copy of this D judgment available to both the secretary and the chief magistrate.

It is clear to me that there is no confusion as to which decision is now binding. The provincial magistrate's decision or order was simply a temporary or interim measure pending the final determination by the trial court.

Thus the provincial magistrate's order was simply a suspensive interim order which automatically lapsed when the trial court finally issued its determination. E It is the trial magistrate's determination which is now binding between the parties.

If the defendant is aggrieved by the trial court's decision she is free to appeal or seek a review in the High Court in the normal way.

In the final analysis I come to the conclusion: F

1. that the matter is not properly before the High Court;
2. that there is need to investigate allegations and counter allegations of corruption leveled against both the presiding magistrate and the provincial magistrate in this case;
3. that the provincial magistrate's order whether competent or otherwise has G since expired upon the issuing of the trial magistrate's order;
4. that the trial magistrate's order awarding custody to the father is the current binding order;
5. the registrar is directed to ensure that the parties are furnished with copies of this judgment. H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/TEDCO MANAGEMENT SERVICES v CHIKWANDA 2005 (1) ZLR 439 (S)

TEDCO MANAGEMENT SERVICES v CHIKWANDA 2005 (1) ZLR 439 (S)

2005 (1) ZLR p439

Citation 2005 (1) ZLR 439 (S)

Case No Judgment No. S-23-05

Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Gwaunza JA
Heard	10 February 2005
Judgment	23 June 2005
Counsel	*E Matinenga,* for the appellant The respondent in person
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

C **Employment** — *contract — termination — application to Labour Relations Officer for order terminating employment — dismissible misconduct proved — no discretion other than to order dismissal*

Headnote

The respondent was suspended from employment without pay, pending D determination by a labour relations officer of an application to terminate his employment. Although the stated allegations of misconduct were proved, the Labour Relations Tribunal, on appeal, ordered that the appellant be allowed to dismiss the respondent, subject to paying him an exit package as at the date of suspension. On appeal and cross-appeal:

E *Held;* that once dismissible misconduct is established, the judicial officer has no discretion and may not order anything other than the punishment of dismissal imposed by the Regulations. If, on the other hand, the grounds of suspension are not proved, he must order reinstatement. No other option is open to him.

Cases cited E

Masiyiwa v TM Supermarkets 1990 (1) ZLR 166 (S)

Wholesale Centre (Pvt) Ltd v Mehlo & Ors 1992 (1) ZLR 376 (H)

Legislation considered

G Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations (SI 371 of 1985), s 3(2)

Case information

E Matinenga, for the appellant

H The respondent in person

Ziyambi JA

Judgment

ZIYAMBI JA: This is an appeal against a decision of the Labour Court. The A appeal turns on the interpretation of s 3(2) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations SI 371 of 1985 which provides as follows:

> "Upon application being made in terms of subsection (1) the labour relations officer shall investigate the matter and may, according to the B circumstances of the case —

(a) serve a determination or order on the employee concerned terminating his contract of employment if the grounds for his suspension are proved to the satisfaction of the labour relations officer;

or

(b) serve a determination or order on the employer concerned to remove C the suspension of the employee concerned and to reinstate such employee if the grounds for his suspension are not proved to the satisfaction of the labour relations officer."

The respondent who was employed by the appellant as a Credit Operations Manager, was, on 7 June 2001, suspended from his employment pending an application for the termination of his services. The allegations against him D were set out in a letter to him of even date. It read in relevant part:

"Further to my discussions with you today, you are suspended from duty without pay and benefits with immediate effect pending full investigations into some very serious anomalies that I have discovered pertaining to your duties and conduct. E

As already highlighted to you, these anomalies are that:

(a) You failed to check and verify the commission claims brought to you for authorisation and payment by Mr B Sharara and Mr P Chakanyuka resulting in the organisation to be deprived of a substantial amount through fraudulent claims. It was your responsibility to ensure that all the claims brought to you for authorisation by the two Freelance F Tracers had been thoroughly checked and verified against the amounts collected.

My initial investigations have revealed that you failed in this respect. This is a very serious omission and amounts to gross negligence on your part.

(b) I have also learnt and subsequently established that you are a G Co-director together with Mr P Chakanyuka at a private company called **ERPLEX (PRIVATE) LIMITED** which is duly registered with the Government Deeds Registry Certificate No. 5208/99 dated 6 June 1999. This is a gross violation of your employment contract as you did not declare your interests in the above-named company. You H

Ziyambi JA

A have further violated your contract of employment in that one of the main objects of your company is Debt Collection and Tracing, which directly conflicts with your responsibilities at Tedco.

(c) In view of (b) above, I am inclined to believe that you also connived with Mr Chakanyuka to defraud the Company.

You may be called for a formal Disciplinary Enquiry once a full investigation B has been carried out. However, this may not be necessary in which case, we will apply to the Ministry of Labour for your dismissal and you will be informed."

Clause 3 of the conditions of service governing the respondents' employment with the appellant provided that:

C "He shall be a full time employee of the Company and shall not, without the written consent of his Group Managing Director, be engaged or interested in, directly or indirectly, any other business or profession, nor engage in any work other than his Company duties, whether for gain or not."

The application made to the Labour Relations Officer for the termination of his employment was unsuccessful. The Labour Relations Officer ordered the D reinstatement of the respondent or, in the alternative, an agreed "exit package". This determination was confirmed by the Senior Labour Relations Officer.

The Labour Court, before whom the matter was heard on appeal found:

"The employer alleged that contrary to this condition, the respondent was a co-director together with P Chakanyuka of Erplex (Private) Limited, a E company whose main objective was Debt Collection and Tracing which objectives conflicted with his own responsibilities at his place of employment since the Credit Finance Division largely debt collected and traced defaulters on behalf of the company.

That there was no written consent has not been disputed. The respondent however says he had requested for authority and had been given the F authority by the then General Manager Mrs Chalmers who had since left the organisation. This verbal consent by the General Manager however falls short of the clear requirement of a written consent by the Group Managing Director.

It is therefore clear that the respondent breached his conditions of service.

It is in my opinion just and equitable under the circumstances that G reinstatement should not be ordered. It is clear that the trust that should exist in any employer employee relationship has been lost. But having made a finding that respondent did breach clause 3 of his conditions of service I order as follows:

'That the appellant be allowed to terminate the respondent's contract of employment, subject to their paying the respondent an exit package as H at the date of the suspension.'"

2005 (1) ZLR p442

Ziyambi JA

The appellant now appeals against the judgment of the Labour Court. There A is also a cross appeal by the respondent against the finding of that court that he had breached the terms of his employment and the order of the Labour Court allowing termination of his contract of employment. He seeks an order setting aside the order of the Labour Court and granting him reinstatement with no loss of salary and benefits alternatively, damages in lieu of reinstatement B including back pay and benefits.

The main ground of appeal raised by the appellant, was that having correctly found that the respondent had breached his contract of employment by failing to adhere to the specific requirements of the terms and conditions of his employment, the Labour Court erred in law in failing to grant the application to dismiss the respondent on the allegations which were contained in the letter C of suspension.

In this regard it was submitted by Mr *Matinenga*, that once a dismissible misconduct had been established, the judicial officer had no discretion in the matter and that the court *a quo* had erred in altering the punishment of dismissal imposed by the Regulations. This submission is in my view correct. D The wording of the regulation is clear. Where the grounds of suspension are proved to his satisfaction, the judicial officer must terminate the employee's contract of employment. If, on the other hand, the grounds of suspension are not proved, he must order reinstatement. No other option is open to him. See *Masiyiwa* v *TM Supermarkets* 1990 (1) ZLR 166 (SC) at 170G – 171A; *Wholesale Centre (Private) Limited* v *Mehlo & Ors* 1992 (1) ZLR 376 (H). E

I am therefore of the view that the appeal should succeed on this ground and that it is not, in the circumstances, necessary to consider the other grounds raised by the appellant.

Accordingly the appeal is allowed with costs.

The cross appeal is dismissed with costs. F

The order of the Labour Court is set aside and substituted by the following:

"The appellant is granted authority to terminate the respondent's employment from 7 June 2001, being the date of his suspension."

SANDURA JA and GWAUNZA JA concurred. G

Atherstone & Cook, appellant's legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/S v NYAMBO 2005 (1) ZLR 443 (S)

S v NYAMBO 2005 (1) ZLR 443 (S)

2005 (1) ZLR p443

Citation	2005 (1) ZLR 443 (S)
Case No	Judgment No. S–24–05
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Gwaunza JA

Heard 19 May 2005

Judgment 23 June 2005

Counsel *F M Katsande,* for the appellant
V Shava, for the respondent

Case Type Criminal appeal

Annotations No case annotations to date

Flynote

C **Constitutional law** — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 15(1) — protection against inhuman treatment — delay in carrying out death sentence — sentence passed after 13th Amendment of Constitution — appeal against sentence noted in time but record and notice of appeal not reaching Supreme Court until 10 years later —* D *delay not a breach of s 15*

Headnote

The appellant was sentenced to death for murder in October 1994, nearly a year after the coming into effect of the 13th amendment to the Constitution. This amendment provided that any delay in carrying out sentence of death should not be treated as a violation of the convicted person's right E under s 15 of the Constitution (which prohibits inhuman or degrading punishment or treatment). The murder was a brutal one and as no extenuating circumstances were found, he was sentenced to death.

On 20 October 1994, he noted an appeal against the sentence. However, for reasons which could not be explained, the record and the notice of appeal did not reach the registrar of the Supreme Court until 10 years and 23 days F later. On appeal against sentence, it was argued that because of the inordinate delay in hearing the appeal, the sentence of death amounted to a violation of the appellant's rights and the sentence should be altered to one of life imprisonment. Accordingly, it was urged upon the appellant's behalf that the appeal be referred to the constitutional court so as to G determine the issue of the delay in bringing the appeal.

Held, that having regard to the amendment to s 15 of the Constitution which was brought about by s 2 of the Constitution of Zimbabwe Amendment (No 13) Act 1993, and which came into effect in November 1993, the H appellant was not entitled to the relief he was seeking.

Sandura JA

Held, accordingly that there was no basis for referring the appeal to the A constitutional court and in the absence of any extenuating circumstances, the appeal against sentence must be dismissed.

Cases cited

CCJP v A-G & Ors 1993 (1) ZLR 242 (S) B

S v Njerere & Anor S-170-93

Legislation considered

Constitution of Zimbabwe 1980, s 15(5) and (6) C

Case information

F M Katsande, for the appellant

V Shava, for the respondent

Judgment

CHEDA JA: The appellant was convicted of murder with actual intent by the High Court in Harare. The court found that there were no extenuating circumstances and sentenced him to death on 10 October 1994. D

On 20 October 1994 he noted an appeal against the sentence, by completing the relevant form ("the prison form") provided by the Prisons Department which is for noting an appeal in person from prison.

It is not clear what happened to the record and the notice of appeal. The appellant submitted, and I have no reason to doubt, that the record and the E notice of appeal did not reach the registrar of the Supreme Court until ten years and twenty-three days later.

The State accepted that the appeal was noted, but could not explain what happened thereafter. The form on which the appellant noted the appeal is addressed to the registrars of the High Court and the Supreme Court. There F is nothing to show that it is intended for the Attorney-General as well. The same applies to the accompanying letter from the Department of Prisons. It is addressed to the registrar of the Supreme Court, but it is not copied to the Attorney-General. In order to ensure that the Attorney-General is made aware of such an appeal, the prison form should be copied to the Attorney-General's Office so that he is informed about the appeal as soon as it is noted. G

Mr *Katsande*, for the appellant, conceded that there were no extenuating circumstances. The appellant has now approached this court with an argument that this court should now deal with the delay in hearing his appeal as a violation of his fundamental rights in terms of the Constitution of Zimbabwe, and that this court should commute his sentence to life imprisonment. H

2005 (1) ZLR p445

Sandura JA

A The appellant submitted that the matter be heard by this court sitting as a Constitutional Court. He cited the following cases which he claimed supported his case – *Simplicio Njerere & Anor* v *S* , S-170-93 and *Catholic Commission for Justice & Peace iv Zimbabwe* v *Attorney General & Ors* 1993 (1) ZLR 242 (S)

B Mr *Katsande*, for the appellant, suggested that the Supreme Court should refer the matter to the Constitutional Court to determine the issue of the delay in bringing the matter on appeal. He submitted that the delay of ten years before the execution of the death penalty amounted to a violation of the appellant's fundamental rights, and that it should be commuted to life imprisonment.

C This argument is based on the decision in *Catholic Commission for Justice and Peace in Zimbabwe* v *Attorney-General & Ors supra*, where the Supreme Court set aside the sentences of death and substituted them with life imprisonment. The appeal was decided in June 1993.

However, subsequent to that judgment, in November of that year, Parliament D enacted the Constitution of Zimbabwe Amendment (No. 13) Act, 9 of 1993 ("the Amendment Act"), which provided as follows in s 2:

> "2. Section 15 of the Constitution is amended by the insertion after subsection (4) of the following subsections –
>
> '(5) Delay in the execution of a sentence of death, imposed upon a person in respect of a criminal offence of which he has been convicted, shall not E be held to be a contravention of subsection (1).
>
> (6) A person upon whom any sentence has been imposed by a competent court, whether before, on or after the date of commencement of the Constitution of Zimbabwe Amendment (No. 13) Act 1993, in respect of a criminal offence of which he has been convicted, shall not be entitled to a stay, alteration or remission of sentence on the ground that, since the F sentence was imposed, there has been a contravention of subsection (1)."

The appellant committed the crime of which he was convicted in July 1993. Sentence was passed on 13 October 1993. In view of the provisions of the Amendment Act, the appellant is therefore not entitled to the relief he is seeking.

G Accordingly the application to have the Constitutional Court determine whether the delay in his execution violates his fundamental rights cannot be granted.

Having conceded the non-existence of extenuating circumstances, Mr *Katsande* did not make any submissions on the merits of the sentence H imposed. His attitude is understandable.

2005 (1) ZLR p446

Sandura JA

The appellant raped a twelve year old girl. Once she indicated that she A recognised him, he chopped her on the head with an axe on the left ear and on the back of the head. It was a brutal murder of a young girl. According to his warned and cautioned statement, he left her body in the bush and proceeded to cut firewood before returning to the compound where he lived.

In the circumstances, the trial court was justified in holding that there were no B extenuating circumstances. Accordingly, there is no basis on which to interfere with the death sentence that was imposed. The sentence will stand.

The application to have the matter referred to a Constitutional Court is dismissed. The appeal against sentence is also dismissed.

The registrar of the Supreme Court is directed to bring this judgment to the C attention of the Commissioner of Prisons so that the form on which prisoners note appeals in person can be copied to the Attorney-General's Office.

Sandura JA and Gwaunza JA concurred D

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/HUNTING INDUSTRIES LIMITED v BARCLAYS BANK OF ZIMBABWE LTD & ORS 2005 (1) ZLR 447 (H)

HUNTING INDUSTRIES LIMITED v BARCLAYS BANK OF ZIMBABWE LTD & ORS 2005 (1) ZLR 447 (H)

Citation	2005 (1) ZLR 447 (H)
Case No	Judgment No. HH-57-05
Court	High Court, Harare
Judge	Gowora J
Heard	26 August 2004
Judgment	29 June 2005
Counsel	*R Y Phillips,* for the applicant *H Zhou,* for the first respondent *T Matinenga,* for third respondent No appearance for the second respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

C **Practice and procedure** — *garnishee proceedings — by tax collecting authority — need for a directive to be served on the garnishee before notice is given to the defaulting taxpayer*

E **Revenue and public finance** — *income tax — appointment of bank as agent for revenue authority — taxpayer having overdraft at bank — not a reason why bank should not be appointed agent — "income" — meaning of — appointment of Reserve Bank as agent to garnishee monies held there by taxpayer's bank — no assessment issued against bank — garnishee unlawful*

Revenue and public finance — *income tax — Income Tax Act [Chapter 23:06] — s 58 — appointment of agent — bank controlling or managing taxpayer's money — nothing to prevent bank from being appointed taxpayer's agents — overdrawn account of the taxpayer — does not necessarily mean that the taxpayer is devoid of income*

Revenue and public finance — *income tax — overdraft facility — taxpayer having overdraft facility with a bank — account with bank overdrawn — moneys made available for use by the taxpayer treated as an asset for purpose of a garnishee — payment to tax collecting authority treated as payment by taxpayer's bank*

Headnote

G It is of the essence of garnishee proceedings by a tax collecting authority that a direction be served on the garnishee before notice is given to the defaulting taxpayer. If the taxpayer were to receive prior warning he could frustrate the tax collector's ability to recover the amount due from his assets in the hands of a third party, for example, by instructing the third H party to pay the money to someone else or to the taxpayer himself, or by

---

Gowora J

ceding his claims to another (*dicta per* Wunsh J in *Hindry* v *Nedcor* A *Bank Ltd & Anor* 1999 (2) All SA 163 (W) at 179 followed).

The applicant held three accounts with the first respondent (the bank). In terms of an arrangement between the parties, the applicant had been granted an overdraft facility by the bank, which was based on the aggregate of the three accounts. Early in 2003, the Zimbabwe Revenue B Authority (ZIMRA) assessed a tax liability on the party of applicant in the sum of $175 113.29, which sum applicant disputed. On 4 April 2003, the bank received a notice from ZIMRA appointing it as an agent for the applicant in terms of s 58 of the Income Tax Act [*Chapter 23:06*]. On 23 May 2003, ZIMRA, by garnishee, expropriated the bank's funds held by the Reserve Bank of Zimbabwe (RBZ) in the foregoing sum in satisfaction C of the applicant's tax liability. RBZ debited the bank accordingly. In turn, the bank debited the applicant's accounts. As that debit was passed without its authority, the applicant brought an order against the bank reversing this debit entry. Placing reliance on s 55 of the Act, the bank opposed the relief sought by the applicant. In view, however, of the involvement of both ZIMRA and RBZ, it joined both of them to the D proceedings as the second and third respondents, respectively. In particular, it sought relief against RBZ claiming the return or refund to it of the sum of the sum taken.

In the proceedings which followed, it was the contention of the bank that before turning it into agent or representative taxpayer, ZIMRA ought to have conducted an assessment against it, in its own name, in respect of E income due to the applicant which could be said to have been under its management or control in terms of s 54 (1) of the Act.

In its action against the bank, the applicant laid stress on the argument that as it owed money to the bank in the form of its overdraft, the latter did not hold any monies in its behalf, which could form the subject of a F garnishee. The applicant further argued that the bank had no right to be indemnified, as it did not pay ZIMRA any tax on its behalf. All it did was to vary unilaterally the overdraft agreement between the parties.

Held, that a person is not necessarily devoid of income because his account at the bank is overdrawn. In terms of the definition of "gross income" in the Act, what is the target of the taxing authority are those amounts that G accrue to the person from operations not of a capital nature. The accounts in which the applicant's moneys were being deposited were under the control or management of the bank. There was, therefore, nothing to prevent the bank from being legally appointed an agent for the applicant as it controlled or managed income belonging to the applicant. H

Gowora J

A *Held,* further, however, that tax against the bank could not have been due in the absence of an assessment from ZIMRA. As there was no such assessment, the legal justification for the garnishee fell away.

Held, further, that in the light of the illegality of the garnishee the debit against the bank by RBZ should be aside.

B *Held,* further, that even though the applicant's account with the bank was overdrawn, the overdraft facility, made available for the use of applicant was an asset. In the circumstances, the applicant could not be heard to argue that it had no assets in the control of the bank to satisfy the payment of tax.

Held, further, that the effect of the payment by RBZ to ZIMRA by means of C the garnishee was in effect payment by the bank. It could not be argued, therefore, that the bank did not pay ZIMRA on the applicant's behalf.

Held, further, however, that so as to avoid an unjust enrichment in favour of the bank at the expense of the applicant, the latter should succeed. As it succeeded merely due to the reversal of the payment by RBZ against the bank, the applicant was not entitled to recover costs against the Bank.

Cases cited D

Contract Support Svcs & Ors v SARS & Ors 1999 (3) SA 1133 (W)

Hindry v Nedcor Bank Ltd & Anor 1992 (2) All SA 163 (W)

Re Hone (a bankrupt): ex p *Trustee v Kensington Borough Council* [1950] 2 All ER 716 (Ch)

E *Trust Bank of Africa Ltd v Senekal* 1977 (2) SA 587 (W)

Legislation considered

Income Tax Act [*Chapter 23:06*], ss 8 (1), 53(1), 54(1), 54(4), 55, 56 and 58

Case information

F *R Y Phillips,* for the applicant

H Zhou, for the first respondent

T Matinenga, for third respondent

No appearance for the second respondent

Judgment

G **GOWORA J:** The facts in this matter are common cause. They are as follows: The applicant holds three corporate accounts with the Anchor Branch of the first respondent. Through an arrangement between the parties, the applicant had an overdraft facility on the accounts, which facility is based on the H aggregate of the accounts from time to time. On 4 April 2003, Barclays Bank,

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which I will refer to as the Bank, received a notice Annexure (A), appointing A it an agent for the applicant for the purposes of s 58 of the Income Tax Act [*Chapter 23:06*]. The applicant disputed the tax liability. On 23 May 2003, the Zimbabwe Revenue Authority (ZIMRA) expropriated by garnishee the Bank's funds held by the Reserve Bank of Zimbabwe (RBZ), namely the sum of $175 113 755.29 in satisfaction of the applicant's tax liability. The Bank, in turn, B debited the account of the applicant resulting in a debit balance of $258 507 559.97.

In this application therefore, the applicant seeks a reversal of the debit entry effected by the Bank against its bank account and any interest charges following upon the debit of the stated amount. The applicant bases its claim on the undisputed fact that the debit was passed without its authority or C instruction to that effect. According to the applicant it had given specific instructions to the contrary. The applicant contends further that the Commissioner General may not exercise powers of seizure unless the Bank owes money to its customer. In the instant case, the applicant owed money to the Bank, and in any event the money that was seized was that of the Bank D on deposit with RBZ. The unlawful action on the part of the Commissioner General did not also entitle the Bank to pass a debit against the applicant's accounts with it.

The Bank opposes the relief sought by the applicant. The Bank's contention is that it was entitled to an indemnity in terms of s 55 of the Act and that therefore the applicant's authority or instructions to the contrary were of no E consequence. The Bank contends further that it was entitled at law to pass on the debit to the applicant, and further to that, that it was up to the applicant to resolve its dispute with ZIMRA. In addition, the Bank has had ZIMRA and RBZ joined to the proceedings as parties. Against them, the Bank has counter applied for an order directing that second and third respondents jointly and severally restore or refund its funds or an amount in the sum of $175 113 755.29. F It contends that the expropriation of the amount by ZIMRA was unlawful. The basis of the contention by the Bank is that it did not hold any monies for or due to Hunting Industries as contemplated by the Act that could be paid over to ZIMRA. Accordingly, so the argument goes, ZIMRA could not simply garnishee the Bank's account with RBZ without first having made an G assessment on the Bank in its personal account as required by s 56 of the Act. Due to the lack of assessment of the Bank, it then did not become a representative taxpayer for Hunting Industries as would have made it personally liable to ZIMRA in terms of s 56. Additionally, it is argued, RBZ should not have acted on an unlawful instruction and/or direction from ZIMRA without H

A giving prior notice to the Bank. Also, RBZ should not have simply complied with the garnishee when there was no assessment for tax against the Bank in its own name as a representative taxpayer in terms of s 54 of the Act, thus rendering the garnishee unlawful. In addition, the Bank contends that, given the relationship between it and RBZ, the latter should have notified the Bank of the unlawful garnishee and thus afforded the Bank an opportunity to B protect its own interest before the harmful garnishee was implemented. The funds that were thus unlawfully expropriated were held by RBZ and the Bank therefore wishes for RBZ to reverse the debit. A draft order is attached to the counter claim.

ZIMRA has not opposed the relief sought against it by the Bank. The Bank C contends therefore that an order in default be granted against it. RBZ has filed papers and appeared in opposition of the Bank's claim. The position of RBZ is that it has no knowledge whether any assessment had been issued by ZIMRA in respect of the Bank save for the fact that an assumption that such assessment had been made is implied by the Notice of Appointment of Agent dated 20 May 2003, which notice was in fact served on RBZ by ZIMRA. D A copy of the notice is attached to the opposing affidavit filed on behalf of RBZ. In terms of the notice, RBZ was appointed agent for the payment of tax by the Bank in the sum of $175 113 755.29. RBZ further denied any knowledge of the tax relationship between the other three. RBZ further contends that irrespective of whether or not any assessments had been issued in respect of E Hunting Industries or the Bank and irrespective of whether or not any monies were due, it had acted lawfully and *bona fide* in complying with the notice, and accordingly made payment to ZIMRA in accordance with the provisions of s 58 and s 59 of the Act. It contends that the notice was valid on the face of it and it was therefore duty bound to act on it. It prays that the court find that it was not liable to the Bank even if this court were to find that there was no tax due by the Bank. It also denies being liable to the Bank for interest at market rates. It prays that the claims against it be dismissed with costs.

As the garnishee of the account of the Bank was the catalyst for the whole debacle, it is logical in my view, to commence this enquiry with the dispute between the three; Barclays Bank, ZIMRA and RBZ. The argument advanced on behalf of the Bank is two pronged. First it is submitted that the garnishee G was unlawful for a number of reasons. The first reason was that when the Bank was appointed agent for the applicant it then became a representative taxpayer for purposes of s 53(1) of the Act. However, in terms of s 53(1) a person is an agent for purposes of s 58 only in relation to income possessed, disposed of, controlled or managed by one. Accordingly, the Bank could not be an agent H for the applicant because at the relevant time it did not possess, dispose of,

control or manage any income belonging to the applicant. On the eve of the A garnishee, the overall net position of the applicant's accounts with the Bank was a debit balance and therefore there was no income belonging to the applicant in the possession or control of the Bank.

Section 58 provides:

> "1. The Commissioner General may, if he thinks it necessary, declare any B person to be the agent of any other person, and the person so declared an agent shall be the agent of such other person for the purposes of this Act, and, notwithstanding anything to the contrary contained in any other law, may be required to pay any tax due from any moneys in any current account, deposit account, fixed deposit account, or savings account or from any other moneys including C pensions, salary wages or any other remuneration, which may be held by him for, or due by him to the person whose agent he has been declared to be."

The Bank further contends that before turning it into an agent or representative taxpayer ZIMRA ought to have conducted an assessment against it in its own name in respect of income, if any, due to the applicant, which could be in the D "management or control" of the Bank in terms of s 54(1) of the Act. Since ZIMRA chose not to respond to the applications at all I do not have the benefit of an alternative view to the contention. Before moving on to the issue of assessment referred to herein, I will dispose of the matter of what *income* in this context means. The Act does not define 'income' but however there is a E definition of gross income. Gross Income is defined in s 8(1) of the Act as follows:

> "Gross income means the total amount received by or accrued to or in favour of a person or deemed to have been received by or accrued to or in favour of a person in any year of assessment from a source within or deemed to be within Zimbabwe excluding any amount (not being an F amount included in gross income by virtue of any of the following paragraphs of this definition) so received or accrued which is proved by the taxpayer to be of a capital nature and, without derogation from the generality of the foregoing includes."

In the *Longman Dictionary of Contemporary English* income has the following definition:

> "money which one receives regularly, usually as payment for one's work or interest from investments."

The *Shorter Oxford Dictionary* defines income as:

> "That which comes in as periodical produce of one's work, business, lands, or investments (commonly expressed in terms of money); annual or H periodical receipts accruing to a person or corporation; revenue."

2005 (1) ZLR p453

Gowora J

A Apart from making a bald submission that the applicant did not have income as it had a net debit balance on the eve of the garnishee, the Bank has not substantiated the submission. It would seem that the applicant operated current accounts with the Bank at the relevant time. It would also appear that the applicant made deposits into the accounts as is confirmed by the following statement in the affidavit of Makuyana in para 13 of the application to join B ZIMRA and RBZ as parties to this dispute:

> "In terms of the overdraft facility aforesaid Barclays was entitled *inter alia* to aggregate or amalgamate at the end of each day the various accounts and to set-off any debit balances in any one set of accounts against any credit balances in the other set."

C I will deal later on with the issue of whether or not the Bank had money or assets belonging to the applicant and it would serve no purpose to repeat them here. Suffice it to say as long as the overdraft that the applicant had with the Bank had not been overshot then the applicant would have income in the bank thus falling squarely within the section. In addition, a perusal of the affidavit of Makuyana would tend to show, and it appears, that substantial deposits were D made to the various accounts by the applicant even if the net effect was that of a debit balance. The applicant itself has not made mention of the deposits into the accounts in question, and clearly there was movement of money from and into the accounts. If the position is as stated by Makuyana that there were deposits into the accounts, what nature were these deposits if they were not E income belonging to the applicant? There is no suggestion that the deposits constituted capital amounts, which would place them beyond the taxman's reach. If they were not capital, then they were income and they could only have been deposited for the benefit of the applicant. The fact that there was an overdraft is irrelevant in my view, as that could not exist in the absence of deposits to the accounts. The applicant could utilise whatever funds were F available under the overdraft and that would constitute an income for purposes of the section.

Therefore income can be defined to mean money or money's worth received, and in this connection it cannot be disputed that there were deposits into the accounts in question given the statement by Makuyana on the manner in which the various accounts of the applicant were being operated. Neither the G applicant nor the Bank have suggested that the applicant was not receiving money into

the accounts. Their suggestion is that due to the overdrawn nature of the accounts then the applicant did not have an income under the control or management of Barclays. A person is not necessarily devoid of income because their account at the bank is an overdrawn, especially if it is an H operating account for the running of an enterprise, which overdraft has been

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arranged to assist the person in the conduct of the enterprise in question. In A terms of the definition of gross income in the Act, what is the target of the Commissioner are those amounts that accrue to the person from their operations which are not of a capital nature. The accounts in which the applicant's moneys were being deposited were under the control or management of the Bank. There was therefore nothing to prevent the Bank from being legally B appointed as agent for the applicant in terms of s 58 of the Act as it controlled or managed income belonging to the applicant. C

The second and in my view more compelling argument by the Bank is that before invoking s 58 and turning it into a representative taxpayer ZIMRA should have conducted an assessment on the Bank in respect of any income that the latter might have had belonging to the applicant.

Although the appointment of agency for purposes of this Act is provided for in s 58 thereof, the liability to pay such tax as a representative taxpayer is found in s 54 of the Act. Subsection (1) of s 54 provides as follows:

> "1. Every representative taxpayer, in respect of the income to which he is entitled in his representative capacity, or of which in such capacity D he has the management, receipt, disposal, remittance, payment or control, shall be subject in all respects to the same duties, responsibilities and liabilities as if such income were received by or accruing to or in favour of him beneficially and shall be liable to assessment in his own name in respect of such income, but any such assessment shall be deemed to be made upon him in his representative E capacity only."

A perusal of the subsection makes it clear the income in the control or possession of a representative taxpayer is liable to assessment in the name of the representative but only in that capacity. Therefore ZIMRA should have conducted an assessment in the name of the Bank in respect of the income that the Bank had in its possession belonging to the applicant and based on that F assessment, the Bank would then have been required to pay tax as an agent. Subsection (4) provides that any tax payable in terms of the assessment is limited to the assets of the taxpayer that are in the possession of the representative taxpayer. In the notice sent to RBZ and appointing it as an agent for the Bank, it is stated that the Bank was indebted to ZIMRA in the sum of $175 113 755 for income tax, showing that RBZ was being appointed agent for G the payment of income tax due by the Bank, yet at the time of such appointment, ZIMRA had not issued an assessment for tax in the name of the Bank in respect of income belonging to the applicant in the possession of the Bank. In view of the fact that there had been no assessment issued against Barclays in its own name the argument by the Bank seems to have merit. Tax against the Bank H

A could not have been due in the absence of an assessment from ZIMRA. There was no such assessment and in my view the legal justification for the garnishee then falls away.

The Bank further contends that it is only if a representative taxpayer alienates, charges or disposes of the income concerned that personal liability would lie B for the unpaid tax against the representative taxpayer personally in terms of s 56 of the Act. Section 56 is in the following terms:

> "Every representative taxpayer shall be liable personally for any tax payable by him in his representative capacity if, while it remains unpaid –
>
> (a) he alienates, charges or disposes of the income in respect of which the tax is chargeable; or C
>
> (b) he disposes of or parts with any fund or money which is in his possession or comes to him after the tax is payable when from out of such fund or money the tax could lawfully have been paid."

It cannot be disputed that the Bank did none of the things mentioned by the section under which a representative taxpayer would be found to be personally liable for the tax and accordingly be made to pay the same. There is no D suggestion that the Bank alienated or disposed of money belonging to the applicant which could have been used to pay the alleged tax due. It then begs the question why

ZIMRA found it necessary to garnishee the tax from the Bank when the Bank had not disposed of any income belonging to the applicant.

E The liability of RBZ in favour of the Bank is premised on the fact that it garnisheed the tax and paid it to ZIMRA. Can it be said that it was liable to the Bank for a reverse of the garnishee on the basis that the garnishee was unlawful? Despite the spirited opposition by RBZ to the relief sought, in the absence of a defence by ZIMRA I cannot conceive how an order setting aside F the debit should not follow in the light of the illegality of the garnishee.

The Bank has, however, also suggested that that RBZ should have notified it once it was served with the Notice appointing it agent for the collection of tax before acting on it. It submits that RBZ simply took its money without prior notice and paid it to ZIMRA and as a result RBZ in its own right was liable to the Bank. Here it is not clear if the Bank is alluding to a right to be heard or G whether it is imputing some form of duty on RBZ towards itself. Counsel for the Bank did not refer me to any authority for either of the propositions. However, I am indebted to Mr *Matinenga* for referring me to various authorities in which the issue of prior notice was discussed. In *Contract Support Services (Pty) Ltd & Ors* v *C: SARS & Ors*1999 (3) SA 1133 (W), Brett AJ in H discussing a similar argument had this to say at p 350:

Gowora J

> "… I agree with the submissions made by Mr Du Toit that not all A administrative acts require the application of the *audi alteram partem* rule before they are given effect to. Indeed, s 47 itself requires no such prior hearing. I also agree with Mr *Du Toit* that to require prior hearing would defeat the very purpose of the notice. It would alert the defaulting Vat payer to the intention to require payment from the latter's debtor and so enable the defaulting taxpayer to receive payment of the funds due and B to enable the taxpayer to spirit such funds away. Where prior notice would render the proposed act nugatory, no such prior notice or hearing is required."

In *Hindry* v *Nedcor Bank Ltd & Anor*,1999 (2) All SA 163 at p 179 Wunsh J stated:

> "In none of these statutes is the taxing officer required to give the taxpayer C advance notice of an attachment to enable him to make representations to avoid it. Once the notice is served the garnishee is at risk (even in the USA) unless the notice is withdrawn or set aside. It is of the essence of proceedings of this nature that a direction be served on the garnishee before notice is given to the defaulting taxpayer. If the taxpayer were to receive prior warning he or she could frustrate the tax collector's ability D to recover the amounts due from his or her assets in the hands of a third party, for example by instructing the third party to pay the money to someone else or to the taxpayer him /herself or by ceding his/her claims to another."

The short answer to the submission by the Bank is that as the appointment of agent did not create an opportunity for the Bank to create a defence or an E objection, a prior hearing was not required. *In casu*, the section in terms of which RBZ was appointed agent did itself not require a prior hearing before the appointment was effected, and to afford the taxpayer a hearing not afforded to the agent would "render the purpose of the section" nugatory. The RBZ did not have the right to question its appointment as agent or go behind F the notice to ascertain if there had been an assessment done. The duty to act in accordance with the provisions of the Act fell upon ZIMRA and cannot be extended to RBZ. It is also trite that in collection of revenue the legislature has granted to the authorities a lot of latitude to facilitate the due collection of taxes and the lack of prior notice does not infringe the *audi alteram partem* rule. Counsel for the Bank did not specifically claim that the Bank was owed a duty G of care apart from saying RBZ should have notified it prior to effecting the garnishee and I do not believe I can pursue it further in the absence of argument on the point. The Bank has failed to establish that RBZ acted improperly in responding to the notice appointing it agent, and the counter-claim against RBZ therefore fails. H

Gowora J

A I turn now to the claim by the applicant. Although ZIMRA and RBZ have been joined as parties hereto, Hunting Industries has not sought any relief against them. All it seeks is a reversal of the debit effected against its account by the Bank. It contends that the Bank was supposed to pay any tax from monies which were held by the Bank on its behalf or money due by the applicant to the Bank. Hunting Industries did not have any monies as all it had was an B overdraft with the Bank. Therefore, as far as the applicant is concerned, in owing money to the Bank as an overdraft, it was

"a lending of money" by the bank to the customer. The Bank therefore did not hold moneys on its behalf. Also true is the fact that the applicant's accounts had, at all relevant times to this dispute, an aggregate overdraft and one must accept the contention by C the applicant that the grant of an overdraft is a lending of money by the bank to its customer: see *Trust Bank of Africa Ltd* v *Senekal* 1977 (2) SA 587 at 598E. In the circumstances can it be said that the Bank had "any moneys … which may be held by him for, or due by him to, the person whose agent he has been declared to be" as required by the Act for the purposes of payment of tax by a representative tax payer? With the exception for an assessment upon the D public officer of a company, s 54(4) limits the collection of tax from a representative taxpayer in respect of any assessment, only to the extent of the assets belonging to the person whom the representative represents that are under his control, management or disposal. The submission is made on behalf of the applicant that it did not have any assets under the control of the Bank to satisfy the payment of tax on its behalf by the Bank in a representative E capacity. *In Re Hone (a bankrupt) ex parte The Trustee* v *Kensington Borough Council* [1950] All ER 716 at 718-719 Harman J stated as follows:

> "Next there is taken a point which is formidable. This debtor was overdrawn, and, therefore, it is said, the money with which the debt was paid, was not her money, not her asset, but the bank's money. In my judgment, that is F not right. A payment by a bank under an arrangement by which the customer has an overdraft is a lending by the bank to the customer of the money. The customer pays the money not the bank. Otherwise, in certain circumstances which might arise, the bank might be able to sue for the money, which they clearly could not do. They have only paid the money as agent for the customer just as if her account was in funds. Therefore, the money paid was, in my judgment, the bankrupt's money."

G Those views are, in my opinion, apposite in this case. The function of overdrafts is to provide the customer with working capital to enable him to manage his resources more efficiently. The borrower is thus through the overdraft, availed of funds for use at his disposal provided that it is within the H limits set by the bank providing the overdraft. Although the applicant states

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that it had been availed of overdraft facilities, the limitations on the facilities A by the Bank are not stated by the applicant. In the circumstances where funds through an arrangement with the applicant's bank are made available for use by the applicant, can it be said that the funds thus available even if the applicant's account was in the red, did not constitute an asset for the applicant? Any moneys paid out by the Bank in terms of the overdraft were B clearly to the benefit of the applicant and the overdraft facility was therefore a useful or valuable arrangement for the applicant. Further any moneys paid under the same would have to be paid by the applicant either on demand or through the conditions in terms of which it was arranged between the parties. In terms of the overdraft facility, the Bank had undertaken to meet the financial requirements of the applicant up to a certain limit. There is no suggestion by C the applicant that the debit passed by the Bank in the sum of $175 113 755.29 had the effect of pushing the overdraft beyond the levels stipulated between the parties and as a result there were no moneys available to the applicant in the control of the Bank. The applicant does not say that the overdraft facility had been withdrawn thus removing from its reach funds that it could use. It does not therefore avail the applicant to plead that there no assets in the D control of the Bank to satisfy payment of the tax as provided for in subsection 4 of s 54 of the Act. In my view, the overdraft constituted an asset in terms of s 54(4).

The further argument on behalf of the applicant is that the Bank did not pay any tax on behalf of the applicant either in terms of s 54 or s 58 of the Act and E as a result it cannot seek to be indemnified under s 55 of the same. The applicant further contends in this regard that all the Bank did was to unilaterally vary the overdraft agreement between the parties. The applicant contends that the indemnity can only be exercised if the Bank actually paid tax on its behalf. The garnishee against the funds of the Bank in its account with RBZ was payment, and it cannot be the contention of the applicant that as long as the Bank did F not itself effect payment to ZIMRA, then whatever was retained by RBZ and transmitted to ZIMRA in satisfaction of the tax was not payment for purposes of s 55.

In my view, that is taking too simplistic a view. It is also in my view too restrictive an interpretation of the section. The effect of the payment by RBZ G to ZIMRA through the garnishee was in effect payment by the Bank. A garnishee is accepted as a mode of execution available to enforce a judgment expressed in money terms. It is inconceivable that a judgment debtor would deny having paid a debt where payment was satisfied through a garnishee, nor would a creditor in the same circumstances claim non-payment on grounds H

Gowora J

A that recovery of the debt had been by way of a garnishee. In the opposing affidavit filed on its behalf, the Bank contends that it made a debit entry against the account of the applicant following the garnishee of its own funds held with RBZ. It contends that it was entitled to indemnity in terms of s 55 of the Act and that therefore the applicant's authority and or instructions were not necessary and that its instructions to the contrary were of no consequence. B The Bank itself contends in argument that as it did not pay tax "in respect of any assessment" as required by subsection (4) of s 55 it did not pay in terms of s 58, and therefore its right to seek indemnity in terms of s55 is not subject to the limitations of s 54 (4). So, although the Bank relies on s 55 for seeking indemnification against the debit order against the applicant's accounts, the C Bank considers that even though it had no funds available to the applicant for the payment of taxes, and even though it paid no taxes on behalf of the applicant, but was subjected to an unlawful expropriation of its funds by RBZ, nevertheless it is entitled to indemnification by virtue of the garnishee.

Section 54 (4) provides:

> "Any tax payable in respect of any assessment shall, save in the case of D an assessment upon the public officer of a company, be recoverable from the representative taxpayer, but to the extent only of any assets belonging to the person whom he represents which are in his possession or under his management, disposal or control."

It is common cause that what was paid by way of the garnishee was the total E amount that ZIMRA sought from the applicant. As the full amount has been paid I cannot understand the logic of the Bank in relying on the limitation. The limitation operates to protect a representative taxpayer to pay tax only to the extent of assets of the representative taxpayer has in his possession or control. The section which provides for indemnification has no qualifications, entitling the representative taxpayer to be indemnified to the full extent of what has been F paid as tax under s 58. The Bank would therefore be entitled to indemnification in the amount paid as tax irrespective, in my view, as to how payment was effected.

The Bank has pointed out in heads of argument that the applicant has not challenged the alleged tax indebtedness with ZIMRA. When on 4 April 2003, the Bank received a notification of appointment as agent for the applicant in G terms of s 58, it notified the applicant in writing and the latter indicated that it disputed the tax and would take all necessary steps against ZIMRA. The Bank in turn advised ZIMRA and indicated that it was unable to pay as it held no funds on behalf of the applicant. Having had sight of the bank statements relating to the applicant's accounts with the Bank, ZIMRA insisted that there H were deposits against the accounts which should have been paid to it and

Gowora J

threatened to expropriate the Bank's funds with RBZ to effect payment. The A threat by ZIMRA was communicated to the applicant. On 23 May 2003, ZIMRA garnisheed the Bank's account with RBZ and recovered the amount allegedly due by the applicant in the form of tax. There is no indication that at any stage prior to the garnishee the applicant had objected to the assessment of tax. B

However, in view of the illegality of the garnishee, the Bank is entitled to a reversal of the debit against its account with RBZ. The entitlement of the Bank to indemnity would lie if it paid tax as provided for in s 56 of the Act. In the event of a reversal of the debit order against its account with RBZ, then there would be no payment by Barclays and, in my view, a corresponding reversal order against the applicant's account with Barclays should follow, as the bank C would then be unjustifiably enriched at the expense of the applicant. The only entitlement for the Bank to retain the money would be on the basis of indemnity and there can be no claim for indemnity without a corresponding payment by the Bank. The applicant therefore succeeds merely due to the reversal of the payment by RBZ. In view of my finding herein the applicant is not entitled to recover costs from the Bank. D

The Bank has sought interest on the amount expropriated through the garnishee at market rates, the contention being that it is a financial institution which has been deprived of the use of its money during the period of expropriation. I have not been referred to any authority for this proposition, and in my view, the only applicable rate of interest in the absence of such is E the prescribed rate of interest. However, the Bank has not indicated the basis upon which, in any event, it would be entitled to interest. The amount removed by way of garnishee was in an account held with RBZ.

There is no indication from the Bank what type of account the funds were held in. There is no evidence before me that RBZ was paying interest to the Bank on the deposits held with it or whether or not the Bank was entitled to earn any interest or F income on the funds in question. There is no evidence that through the garnishee the Bank has in fact lost out on investment opportunities that would have been available to it at the time the garnishee was effected. The claim for interest not having been substantiated therefore fails.

I therefore make an order in the following terms: G

1. The first respondent be and is hereby ordered to reverse the debit of $175 113 755.29 passed against the applicant's account No. 0123 23 2259 with the first respondent on 27 May 2003, and reverse any interest charges arising as a consequence of the passing of such debit entry. H

Gowora J A

2. The Second respondent shall return or restore or refund to the first respondent the sum of $175 113 755.29 which the Second respondent expropriated by garnishee on 23 May 2003.
3. The costs of the counter-application will be borne by the second respondent. B
4. There will be no order of costs in favour of the applicant.

Gill, Godlonton & Gerrans, the applicant's legal practitioners

Scanlen & Holderness, the first respondent's legal practitioners

C *Coghlan, Welsh & Guest*, the third respondent's legal practitioners

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MACKENZIE v RIO TINTO ZIMBABWE 2005 (1) ZLR 462 (S)

Citation	2005 (1) ZLR 462 (S)
Case No	S-144-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	1 November 2004
Judgment	30 June 2005
Counsel	*A Kara,* for the appellant *A Chauraya,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Administrative law — *appeal — code of conduct — provision that decision of designated authority "shall be final" — effect — appeal allowed on technical grounds, not on merits — designated authority entitled to remit matter for hearing afresh*

Employment — *appeal — code of conduct — provision that decision* C *of designated authority "shall be final" — effect — appeal allowed on* D *technical grounds, not on merits — designated authority entitled to remit matter for hearing afresh*

Headnote

The appellant was suspended on allegations of misconduct. His subsequent dismissal was set aside by the High Court on a technicality. A rehearing E was convened and he was again dismissed. He appealed to the authority designated under the code of conduct. The authority set aside the dismissal on the grounds of technical irregularities and remitted the matter for a fresh hearing in terms of the code of conduct. The appellant argued that the authority had no right to remit the matter as the code provided that the decision of the authority "shall be final". This meant F that the decision should be one that concluded the matter one way or the other, either by way of acquittal or a finding of guilty. It was also argued that the rehearing could not proceed, as the code provided that proceedings had to be convened within 72 hours of the submission of the complaint form.

Held, that an appeal court or a body vested with inherent authority to hear G an appeal has, at least, the jurisdiction to allow the appeal, to dismiss the appeal, or to remit the matter for a re-hearing. If the lawmaker does not wish the appeal court or authority to have any of these options the language of the statute has to be explicit. H

2005 (1) ZLR p463

Chidyausiku CJ

A *Held,* further, that where an appeal is allowed on procedural grounds, the remittal of a matter for hearing *de novo* does not breach the time requirement of the code.

Cases cited

B *Dalney Mine v Banda* 1999 (1) ZLR 220 (S)

Standard Chartered Bank of Zimbabwe Ltd v Matsika 1996 (1) ZLR 123 (S)

Case information

A Kara, for the appellant

C A Chauraya, for the respondent

Judgment

CHIDYAUSIKU CJ: The appellant in this case was employed by the respondent. On 25 July 2002, the respondent suspended the appellant pending investigations into allegations of fraud and theft. On 8 August 2002, the respondent extended the suspension as the investigations were not complete. D On 19 August 2002, the respondent notified the appellant that there would be a disciplinary hearing on 23 August 2002. Before that date, on 21 August 2002, the appellant applied to the High Court for an order setting aside his suspension and a stay of disciplinary proceedings against him. Before the matter was set down for hearing in the High Court the respondent convened a disciplinary hearing and dismissed the appellant. The decision to dismiss E the appellant was set aside by a High Court provisional order issued on 12 September 2002. The provisional order was confirmed and set aside the dismissal of the appellant on a technicality, namely, that the person who had dismissed the appellant had no authority to do so.

The respondent complied with the High Court order and reinstated the F appellant but later invited the appellant to a disciplinary hearing on 30 June 2003. The charges were the same as those that had led to the dismissal that was set aside by the High Court. The disciplinary hearing commenced on 30 June 2003 and was adjourned to 8 July 2003. The appellant attended the hearing on 30 June 2003 with his legal representative. He did not attend the hearing on 8 July 2003. The appellant was found guilty *in absentia* and was dismissed with G effect from 8 July 2003.

The appellant appealed to the designated authority as is provided in the code of conduct. The designated authority, Mr Sachikonye, heard the appeal on 9 September 2003. The appellant's grounds of appeal to the designated H authority as set out in the Notice of Appeal were:

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Chidyausiku CJ

"1. He was technically not given effective notice of the hearing. A

2. The disciplinary committee was not properly constituted in that it lacked a quorum.

3. The reconvened meeting had no capacity to carry out the disciplinary hearing because of the judgment passed by Justice R Makarau on the matter on 13 May 2003." B

The appellant was happy with the first part of Mr Sachikonye's determination which nullified his dismissal. He, however, was aggrieved with the second part of the determination which remitted the matter to the respondent for a fresh hearing. He appealed against that part of the judgment to the Labour Court upon the grounds set out in his Notice of Appeal which provide as follows:

"1. The respondent has clearly issued a directive, which he cannot do C in terms of the code of conduct.

2. The applicant reasonably apprehends that the purported remittal is merely intended to attempt to dismiss him.

3. In terms of the code of conduct, disciplinary proceedings cannot proceed unless proceedings are convened within 72 hours of the D submission of the complaint form. The complaint form was originally submitted in May/August 2003.

4. Should the respondent proceed as threatened, the applicant will be dismissed and have his salary and benefits withdrawn. This is obviously prejudicial to him and his family."

The main issue before the Labour Court was whether or not the designated E authority had the power to remit the matter to the respondent for determination. The Labour Court concluded that the designated authority had the legal power to remit the matter for further hearing. In arriving at that conclusion, the learned Senior President of the Labour Court reasoned as follows:

> "The appellant's grounds of appeal are based on the issue of remittal. I think, in order to place the issue of remittal in proper perspective, we need F to be guided by the grounds of appeal that were placed before Mr Sachikonye. I have indicated these on p 4 of this judgment. As argued by the respondent, the grounds were on procedural irregularities. There was no appeal on the merits of the matter. To that end, Mr Sachikonye correctly ruled in favour of the appellant and then directed that a fresh hearing be conducted in terms of the code. His finding was that no hearing G had been held yet and the issue was still pending. He could not proceed and conclude on the merits when that issue was not before him. The message of his determination was clear i.e. Reinstate the appellant and rehear the matter against him in terms of the law. Mr Sachikonye could not have been expected to end up at reinstatement when he knew there was still a dispute." H

2005 (1) ZLR p465

Chidyausiku CJ

A The appellant, in this court, has argued that the Labour Court was wrong in concluding that the designated authority has the jurisdiction to remit a matter for a re-hearing *de novo*. The main thrust of the appellant's argument was that the code of conduct, in s 3(d) of Part D, which states:

> "(d) The designated authority shall make a determination in respect of the B appeal within a period of five working days and the form endorsed accordingly. The decision of the designated authority shall be final and"

does not authorise a designated authority to remit the matter for further consideration.

It was argued, for the appellant, that the words "shall be final" means that the C decision should be one that concludes the matter one way or the other, either by way of acquittal or a finding of guilty. It was argued that that is the meaning that should be ascribed to the words "the decision of the designated authority shall be final".

I am not persuaded by this argument. I would agree with the conclusion of the learned Senior President of the Labour Court that the designated authority D had the jurisdiction to remit the matter to the respondent. An appeal court or a body vested with authority to hear an appeal has, at least, the jurisdiction to allow an appeal, to dismiss an appeal, or to remit the matter for a re-hearing. The jurisdiction to do any of the above is inherent in the authority to hear an appeal. Where the lawmaker does not wish the appeal court or authority to E have any of the above three options, the language of the statute has to be explicit. Thus, in the absence of explicit language or

implication from the language that an appeal authority cannot remit a matter for a hearing *de novo,* the appeal court or authority has such jurisdiction. I do not accept that the words "shall be final" mean that the designated authority cannot remit a matter for a hearing *de novo.* In the present case, the designated authority was F satisfied that the decision of the respondent was a default judgment reached in the absence of the appellant and, therefore, not on the merits. He also was satisfied that the committee that adjudicated on the matter was not properly constituted. In those circumstances, the proper course to follow was to remit the matter for a hearing *de novo*. The decision of the designated authority in G this case cannot be faulted.

I also agree with the learned Senior President of the Labour Court that even if Sachikonye had not directed a re-hearing the respondent, as the employer, was not barred from proceeding with a fresh disciplinary hearing. Authority for this proposition, as was pointed out by the learned Senior President of the H Labour Court, is to be found in the case of *Standard Chartered Bank of*

Chidyausiku CJ

Zimbabwe Ltd v *Matsika* 1996 (1) ZLR 123 (S) wherein Gubbay J (as he then A was) had this to say:

> "… if the suspension of an employee is nullified by the omission of the employer to apply forthwith to a labour relations officer for an order of termination, the employer is not precluded from re-suspending the employee and applying forthwith on the same ground as before or on a B different ground or from simply applying to the labour relations officer without re-suspending the employee, on any of the grounds specified in section 3(1) of the Regulations."

The facts of this case may be different from the *Standard Chartered Bank* case *supra*, but the principle set out in that case applies to this case with equal force. This conclusion also disposes of the other argument raised by the appellant C that the proceedings against him should have been concluded within 72 hours after the submission of the complaint. The principle that disciplinary proceedings that are tainted with irregularities regarding procedure can be set aside and commenced afresh was restated by McNally JA in the case of *Dalny Mine* v *Banda* 1999 (1) ZRL 220 (S) wherein the learned Judge of Appeal had this to say: D

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

For the aforegoing reasons, the appeal in this case cannot succeed and is, accordingly, dismissed with costs. F

Ziyambi JA & Malaba JA concurred.

Hussein Ranchlod & Co, appellant's legal practitioners

Gill Godlonton & Gerrans, respondent's legal practitioners G

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 1/MATOPO INDIGENOUS BUSINESS DEVELOPMENT ASSOCIATION v MATOPO RDC 2005 (1) ZLR 467 (H)

MATOPO INDIGENOUS BUSINESS DEVELOPMENT ASSOCIATION v MATOPO RDC 2005 (1) ZLR 467 (H)

Citation 2005 (1) ZLR 467 (H)

Case No Judgment No. HB-55-05

Court	High Court, Bulawayo
Judge	Ndou J
Heard	6 May 2005; 13 May 2005; 27 May 2005
Judgment	30 June 2005
Counsel	*J Dhlamini*, for the applicant *T Khumalo*, for the respondent
Case Type	Application for interdict
Annotations	No case annotations to date

Flynote

Local government — *rural district council — rates and charges — objection to — procedure for dealing with objections — no requirement for council to hold consultative meetings with affected parties*

Headnote

In terms of ss 76 and 96 of the Rural District Councils Act [*Chapter 29:13*], the respondent rural council published a notice to all affected parties, including the applicant, stating its intention to increase its tariffs. Various objections were made as provided for in the Act. Meetings were held which yielded no meaningful results. After a meeting with the E Provincial Governor, the respondent agreed that it would take into account the applicant's objections and call another "stakeholders'" meeting, discuss the matter and reach a consensus. The respondent, however, did not do this but instead held a special full council meeting at which the council considered the proposed increases, together with objections by the applicant, amongst others. There was no disagreement F amongst the councillors present to decrease some of the proposed tariffs but confirm the other increases. The applicant sought an order *inter alia* setting aside the proposed tariffs and compelling the council to meet with the applicant to agree on tariffs, failing which the matter would go to arbitration.

G Held, that in terms of s 76(2) of the Act, if charges or tariffs are to be increased, the proposed increases must be posted for 30 days and published in a newspaper. More than thirty voters having lodged objections to the proposed increases, s 76(3) enjoins the council to reconsider the proposed increases together with the objections. This was done. Such increases "shall not come into operation unless passed by a majority of the total H membership of the council." Again, this was done: there being no

Ndou J

disagreement amongst the councillors present, the practical need for A voting did not exist. The council took into account the objections, resulting in a reduction of some of the proposed tariffs. Whilst, apparently in fulfilment of their political mandate, the councillors have held such consultative meetings with "stakeholders", there is no legal requirement for such meetings under s 76. The council adhered to the legal B requirements of the section.

Cases cited

Mutare City Council v Mutare Residents & Ratepayers' Assn 2003 (1) ZLR 612 (S)

Mutare Residents & Ratepayers' Assn v Mutare City Council 2002 (2) ZLR 361 (H) C

Zvimba Rural Traders' Assn v Zvimba RDC & Anor HH-30-03

Legislation considered

Rural District Councils Act [*Chapter 29:15*], s 76 D

Case information

J Dhlamini, for the applicant

T Khumalo, for the respondent

Judgment

NDOU J: The applicant obtained, by consent, interim relief in terms of provisional order in the following terms: E

"A. **Terms of the final order sought**

1. That the respondent be and is hereby interdicted from closing or interfering with any businesses belonging to the applicant's members.
2. That the respondent convenes a meeting with applicants within 30 days of the granting of this order. F
3. That should the meeting referred to in para 2 above fail to yield any results then the parties are hereby ordered to go to arbitration within 30 days. Where the arbitrator's decision shall be final and unappealable.
4. That the respondent's unpublished notice to increase tariffs be and is hereby declared null and void. G
5. That the respondent should pay the costs of this application.

B. **Interim relief granted**

1. That pending the finalisation of this application the respondent is hereby interdicted from closing any business belonging to the applicant's members. H

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2. That the respondent is interdicted from disconnecting members' shops and if such disconnections have been done the respondent be and is hereby ordered to reconnect supply upon service of the order."

The applicant's case is aptly captured in two paragraphs of their founding B affidavit which state:

"4. In terms of ss 76 and 96 of the Rural District Councils Act [*Chapter 29:13*], the respondent published a notice to all stakeholders, including the applicant, stating its intention to increase tariff. The notice is hereto annexed marked 'A'. The tariff reflected a 350-400% increase. Various objections were made as provided for in the Rural District Councils Act. Various meetings were held which yielded no C meaningful results. The assistance of the Governor was sought by the applicant. At the meeting with the Governor, the respondent agreed that it would take into account our objections and call another stakeholders' meeting, discuss the matter and reach a consensus.

5. The respondent, however, did not do this but instead issued a response to our objections refusing to decrease the tariff except for D motor vehicles. The respondent's response is hereto annexed marked 'B'. Page 2 of the response clearly indicates that the respondent is in a combative form. It states that the publication of the increase does not affect is implementation despite objections."

It is clear from the above that the application is mainly premised on the E provisions of s 76, *supra*. Section 76(2) provides:

> "Before any charges, rents or deposits fixed in terms of subsection (1) come into operation, a statement setting out the proposed charges, rents or deposits and any existing such charges, rents or deposits for the same matters shall, for a period of not less than thirty days, be posted in the manner in which notices are usually posted in the council area and published in a newspaper or F in such other manner as the Minister may direct."

It is common cause that the applicant filed written objections in response to the publication by the respondent. The said objections were filed in this application. The said objections (for a reason not clear) were also copied to the District Administrator, Matabeleland South Governor and Resident G Minister, Matabeleland South and the Permanent Secretary of Local Government and National Housing. The applicant gave detailed figures forming the basis of their objections. The respondent held a special full council meeting on 1 April 2005 (a bad choice of date for serious business). From

the minutes, the council considered the proposed increases, together with H objections by the applicant, amongst others. The applicant does not challenge

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Ndou J

the composition and authority of the council in respect of this meeting. In the A circumstances, the respondent did all that is required by s 76 of the Act. There was no disagreement amongst the councillors present. No one dissented, so the practical need for voting does not exist: see *City of Mutare* v *Mutare Residents and Ratepayers Association* 2003 (1) ZLR 612 (S). This case dealt with the requirements of s 219 of the Urban Councils Act [*Chapter 29:15*] B whose provisions are similar to those of s 76, *supra*.

In casu, the respondent adhered to the provisions of the Act. The requirements of the Act must be strictly observed: see *Mutare Residents and Ratepayers Association* v *City of Mutare* 2002 (2) ZLR 361 (H) and *Zvimba Rural Traders Association* v *Zvimba Rural District Council & Anor* HH-30-03. The requirements of s 79 are, firstly, that proposed increases of charges, rents or C deposits must be published in a manner prescribed in subs (2). This was done in this case. Secondly, more than thirty voters must have lodged objections to the proposed increases. From the papers, I can infer that this was the case. In the circumstances, subs (3) enjoins the respondent to consider the proposed increases *together with* the objections. From the minutes of the council meeting referred to above, this was done. Thirdly, such increases D "shall not come into operation unless passed by a majority of the total membership of the council". Once more, this was done, as I have already alluded to above. It is clear that the respondent took into account the objections resulting in the drastical reduction of the proposed vehicle licence fees and other tariffs by 50%. This is common cause and, as such, it is obvious E that the respondent took into account the objections. There is no provision of s 76 that the respondent did not adhere to. The applicant seems to believe that s 76 makes provision for the respondent to hold consultative meeting with stakeholders. Whilst, *in casu*, apparently in fulfilment of their political mandate, the councillors have held such stakeholders' consultative meetings, there is no legal requirement for such meetings under s 76. It is a good approach F by councillors in line with current local governance of accountability and transparency, but it is certainly not a legal requirement. In the circumstances, whether the respondent promised to hold a further consultative meeting or not does not take the legal issues any further. The bottom line is that they complied with the strict requirements of s 76. Further, there is no provision for the reaching of consensus by the objectors and the council in the Act. The G consultative meetings are fora for the ratepayers and residents to lobby the council to rule in favour of their objections. These meetings cannot take decisions on the increases which bind the council. These meetings provide public participation fora in the council business but it is the council that enjoys H

2005 (1) ZLR p471

Ndou J

A the statutory power to make such increases. In terms of s 96 of the Act, the respondent is vested with the power to impose levies which are subject to this application. The public participation mechanisms created by s 76 are meant to prevent the arbitrary exercise of such power. From the foregoing it is clear that the respondent adhered to the legal requirements set out in s 76.

B Accordingly, the provisional order granted by this court on 6 May 2005 be and is hereby discharged with costs.

Lazarus & Sarif, applicant's legal practitioners

C *James, Moyo-Majwabu & Nyoni*, respondent's legal practitioners

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Source:

S v MHONA, S v MOYO 2005 (1) ZLR 472 (H)

Citation	J 2005 (1) ZLR 472 (H)
Case No	Judgment No. HB- 56-05
Court	High Court, Bulawayo
Judge	Ndou J
Heard	30 June 2005
Judgment	30 June 2005
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure — *review — remittal to trial court — when matter may* C *be remitted — trial court not having considered mandatory provisions regarding punishment for driving offence— matter remitted for sentence to be passed afresh*

Headnote

The two accused were bus drivers who had been convicted, in separate trials, of negligent driving. They were sentenced to a fine and were prohibited D from driving for six months. The legislation requires that, unless the court determines that there are special circumstances justifying a shorter period, a bus driver who is convicted of negligent driving must be prohibited from driving for at least two years. There was no enquiry carried out by the magistrate on the existence of special circumstances and thus there was no finding in this regard. E

Held, that there is no other specific situation, apart from s 29(5)(b) of the High Court Act [*Chapter 7:06*] in which a reviewing court may remit a case to the trial court for sentence. However, the court's wide powers to remit the case to the trial court, with instructions about the further proceedings to be had in the case, would entitle it, in appropriate circumstances, to F confirm the conviction entered by the magistrate but send the case for sentence to be passed afresh, in the light, for example, of further evidence which the magistrate is instructed to hear. Accordingly, the matter would be remitted to the trial court for the magistrate to impose sentence afresh, having regard to the mandatory provisions regarding prohibition. G

Legislation considered

High Court Act [*Chapter 7:06*], s 29(5)(b)

Road Traffic Act [*Chapter 13:11*], s 52(4)(c) H

Ndou J

Judgment

A **NDOU J:** These two matters were dealt with by the same Bulawayo magistrate, sitting at the Traffic Court, Drill Hall. The accused in each case was charged with the contravention of s 52(1) of the Road Traffic Act [*Chapter 13:11*] i.e. negligent driving. In both cases the public service vehicle being driven by the accused was an AVM omnibus. In the *Mhona* case, the accused, who is a holder of a valid class one drivers' licence, lost control of the vehicle and it B veered off the road and landed on its left hand side. He apparently fell asleep. This occurred at 1312 hours along the Nkayi-Bulawayo road. The bus had a (shocking) total of 101 passengers at the time of the accident.

In the *Moyo* case, the accused approached the intersection of Main Street and 13th Avenue at a high speed. He was travelling along Main Street due south. C He intended to turn right into 13th Avenue due west. On account of the high speed, he lost control and the bus uprooted a tree which was by the road side. Due to the impact, the front left side of the bus was extensively damaged. The accident occurred around 0030 hours. The record does not reveal whether or not there were passengers in the bus.

In each case, the accused was a first offender and each was sentenced to D $1 000 000 or in default of payment 12 months' imprisonment. In addition, each one was prohibited from driving for a period of six months. Nothing turns on the conviction and the fine (and alternative imprisonment) imposed by the learned trial magistrate. There is however, a serious problem with the period of prohibition. The prohibition was not imposed pursuant to the provisions E of s 52(4)(c) (and the proviso thereto) of the Act. The relevant provision reads:

> "(c) in the case of an offence involving the driving of a commuter omnibus or a heavy vehicle, shall prohibit the person from driving for a period of not less than two years.
>
> Provided that the court may decline to prohibit the person from driving in terms of paragraph (b) or (c) if it – F
>
> (a) considers that there are special circumstances in the case which justify the court in so declining; and
>
> (b) endorse the special circumstances referred to in paragraph (a) on the record of the case when passing sentence."

This provision was introduced by section 16 of the Road Traffic Amendment G Act, No. 3 of 2000. There was no enquiry carried out by the learned trial magistrate on the existence of special circumstances. Obviously, there was no finding in this regard. How should this be remedied? In *Criminal Procedure in Zimbabwe* by John Reid Rowland, the learned author (at 26-9 to 26-10) H stated:

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> "There is no other specific situation [apart from section 29(5)(b) High Court A Act [*Chapter 7:06*] in which a reviewing court may remit a case to the trial court for sentence, but it is submitted that the court's wide powers to remit the case to the trial court, with instructions about the further proceedings to be had in the case, would entitle it, in appropriate circumstances to confirm the conviction entered by the magistrate but send the case for sentence to be passed afresh, in the light for example, of further evidence B which the magistrate is instructed to hear."

I agree with this statement. I also hold the view that the above cases are appropriate for the adoption of this procedure.

Accordingly, I confirm the convictions in both these cases. I, however, set aside the sentences imposed and remit the matters to the trial magistrate to C impose sentence afresh having regard to the mandatory provisions of s 52(4)(c) and the proviso, supra. The fine and the alternative custodial sentence shall not exceed the ones originally imposed by the trial court. As for the period of prohibition, the trial court may exceed the original period imposed by trial court as s 52(4)(c) requires a mandatory minimum penalty in the absence of special circumstances. D

CHEDA J concurred. E

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