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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/BARCLAYS BANK OF ZIMBABWE LTD v COMMISSIONER-GENERAL, ZIMBABWE REVENUE AUTHORITY 2005 (2) ZLR 1 (H)

BARCLAYS BANK OF ZIMBABWE LTD v COMMISSIONER-GENERAL, ZIMBABWE REVENUE AUTHORITY 2005 (2) ZLR 1 (H)

2005 (2) ZLR p1

Citation	2005 (2) ZLR 1 (H)
Case No	Judgment No. HH-9-06
Court	Special Court for Income Tax Appeals
Judge	Hlatshwayo J
Heard	6 July 2005
Judgment	6 July 2005
Counsel	<i>J C Andersen SC</i> , for the appellant <i>L Mazonde</i> , for the respondent
Case Type	Income tax appeal

Annotations[Link to case annotations](#)**Flynote**

C Bills of exchange and negotiable instruments — *promissory notes* — *whether document entitled "Bearer Promissory Note" is a true bearer promissory note*

Revenue and public finance — *income tax* — *tax due on interest payable to issuer of promissory notes* — *income deemed to have accrued when D taxpayer becomes entitled to it even if it is only payable in the future*

Headnote

The appellant bank issued various promissory notes on which it was entitled to receive interest on the date of maturity. Its income tax on the interest was assessed on the basis that the bank was deemed to have received the interest when it was entitled to even if payment was only due under E notes on the date of their maturity.

Held, that if these notes were true promissory notes, with capital and interest redeemable only at maturity or some other evidence of indebtedness, the taxability of the interest earned on a true bearer instrument, before the date of redemption, would appear to be insupportable by the language of the Act.

F *Held*, further, that a promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of, a specified person, or to bearer. These documents were not true bearer promissory notes, being conditional and as such not G negotiable free of equities. Consequently, in terms of s 10(7) of the Act, the interest was deemed to have accrued in the year of assessment in which the bank became entitled to it, despite its being only due and H payable in a future year.

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Held, therefore, that the appeal should be dismissed with costs, and the A amended assessments confirmed.

Cases cited

Mooi v SIR (1971) 34 SATC 1; 1972 (1) SA 675 (A)

Sub-Nigel Ltd v CIR (1948) 15 SATC 381; 1948 (1) SA 580 (A) B

Legislation considered

Income Tax Act [Chapter 23:06], ss 8(1) & 10(7)

Case information

J C Andersen SC, for the appellant

L Mazonde, for the respondent C

Judgment

HLATSHWAYO J: The appellant is Barclays Bank of Zimbabwe Ltd, a company duly incorporated with limited liability under the laws of Zimbabwe, which operates as a commercial and merchant banker with offices throughout Zimbabwe (hereinafter called "the bank") and the respondent is the Commissioner General, Zimbabwe Revenue Authority. D

Three preliminary issues were disposed of at the beginning of the hearing of this matter. The application for the condonation of the late noting of the appeal by the appellant was not opposed and was duly granted. Also unopposed and duly condoned was the late filing of the respondent's case. This was done in terms of the provisions of the Twelfth Schedule to the *Income Tax Act*, [Chapter 23:06], Part I (4) which allows the court to "enlarge any of the times E and periods set out in these

Rules on good cause being shown or by the agreement of the parties". On the question of interest raised by the respondent on the late payment in terms of s 72(7) of the *Income Tax Act*, the parties informed the court that they had entered into a mutual agreement whereunder in the event of the appellant being unsuccessful in this appeal, no interest would be payable, but if the appellant is successful, the appellant would be entitled to a refund with interest.

On 2 December 2003, the respondent issued proposed amended assessments in respect of the dates on which it contended income tax was due by the appellant in respect of interest on promissory notes for the income tax years ended 31 December 1997, 1998, 1999, 2000, 2001 and 2002, together with interest on the alleged late payment of the income tax. The appellant lodged an objection against this proposed assessment and interest and the respondent disallowed the objection. On 17 February 2004, the respondent formally issued amended assessments in terms of the proposals and the appellant appealed against the amended amounts on 11 March 2004, the late noting of which has been condoned as indicated above.

2005 (2) ZLR p3

Hlatshwayo J

A The bone of contention in this matter is that in its income tax returns for the tax years in question, the appellant declared the date of interest received on promissory notes as being the date of their maturity, whereas the respondent contends that the interest accrued to the appellant on dates of issue of the promissory notes and, accordingly, issued the amended assessments on that basis. In terms of the promissory notes, which were drawn up as negotiable instruments, capital and interest was only payable to the bearer, who might not be the person to whom the promissory notes were issued, on presentation on the date of maturity. Accordingly, the appellant contends that it was not entitled to interest on the promissory notes prior to the date of maturity as such interest did not accrue nor was it payable to it prior to that date.

c The Commissioner bases his position that the interest on the promissory notes accrued to the bank notwithstanding the fact that the actual payment of the interest was to be done on maturity on three grounds which will be discussed below, viz., ss 8(1) and 10(7) of the *Income Tax Act*, the accrual basis of accounting as contained in the International Accounting Standards (IAS) and the definition and character of a promissory note. The provisions of the *Income Tax Act* and the nature of a promissory note are related and will be discussed together.

The import of the accrual basis of accounting in relation to the issue before the court needs to be disposed of first. The Commissioner relied on Accounting Rules IAS 1 and IAS 39 whose contents need not detain us here. While accounting principles and practices may coincide with or help illuminate taxation laws, the court in deciding tax cases is not concerned with what might be considered proper from an accountant's point of view or the point of view of a prudent businessperson, but merely with what is required or permissible according to the language of the Act. See *Sub-Nigel Ltd v CIR* (1948) 15 SATC 381.

f Section 8(1) requires to be included in the gross income any 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 ..." In terms of s 10(7), an amount is deemed to have accrued in the year of assessment in which the taxpayer becomes entitled to it, despite its being only due and payable to him or her in a future year. Where, however, a taxpayer's entitlement to an amount remains conditional at year-end, it has been suggested on the basis of the principle in *Mooi v SIR* (1971) 34 SATC 1, that there is no accrual in that year. See L W Hill *Income Tax in Zimbabwe* 5 ed pp 5-6 and the cases discussed therein.

Can it be said, therefore, that the facts of this case fall within the circumstances where the taxpayer's entitlement remains so conditional that there is no

2005 (2) ZLR p4

Hlatshwayo J

accrual in that year? The answer to this question depends on whether the instrument in issue is a true bearer promissory note with capital and interest redeemable only at maturity or some other evidence of indebtedness. The taxability before the date of redemption of interest earned on a true bearer instrument would appear to be insupportable by the language of the Act and case law unless some element of discounting of such interest to its value at year-end was undertaken.

According to R H Christie *Business Law in Zimbabwe* at p 194, a promissory note is defined as “an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of, a specified person, or to bearer”. The actual wording of the promissory note in issue here, *c viz.*, Note 2 to the Promissory Note made by PG Industries (Zimbabwe) Ltd to Barclays Bank of Zimbabwe Ltd, is as follows:

“This promissory note is issued and held subject to the terms and conditions of the Cession and Pledge Agreement concluded in September 1996 between the Issuer and Barclays Bank of Zimbabwe Limited. Any transfer of the promissory note is made subject to the amount payable ^d hereunder being set-off against any and all amounts payable to the Issuer by the bank in terms of the Cash Management Agreement concluded in September 1996 between the Issuer and the bank.”

Although the promissory note in this case is titled “Bearer Promissory Note”, I have come to the conclusion that it is not a true bearer promissory note. It ^e does not comply with the carefully worded definition of a promissory note which is an unconditional promise and therefore, it cannot be “negotiable free of equities, but it may still supply evidence of, and even in itself amount to, a contract” (R H Christie, *op.cit.*). The negotiability of the promissory note is dependent on the specific performance of the terms and conditions agreed to in separate agreements between PG Industries and Barclays Bank. The bearer ^f of the promissory notes throughout the period was Barclays Bank. The promissory note could only be transferred with the consent of the bank. The appellant in its letter to the respondent dated 19 July 2002, acknowledges that it raised interest accrual entries in compliance with International Accounting Standards, but contended that the interest calculated and recognized on accrual basis in the bank’s Income Statement had not accrued for tax purposes. ^g However, as indicated above, I am persuaded by the submissions made on the respondent’s behalf that the appellant had become entitled to the interest accruing from the instruments up to the end of each year of assessment. Maturity was only a condition of payment and not a condition for accrual. ^h

2005 (2) ZLR p5

Hlatshwayo J

A Accordingly, this appeal must fail and the costs, naturally and in the absence of any submissions to the contrary, would follow the outcome.

The appeal is dismissed with costs and the amended assessments are confirmed.

^b *Scanlen & Holderness*, the appellant’s legal practitioners

Kantor & Immerman, the respondent’s legal practitioners

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MUKONOWESHURO v MAHOFA 2005 (2) ZLR 6 (H)

2005 (2) ZLR p6

Citation	2005 (2) ZLR 6 (H)
Case No	Judgment No. HH-60-05
Court	High Court, Harare
Judge	Guvava J
Heard	4 July 2005

Judgment	7 July 2005
Counsel	<i>E T Matinenga</i> , for the petitioner <i>W Mutezo</i> , for the respondent
Case Type	Election petition
Annotations	No case annotations to date

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of c Rights — s 24(2) — "frivolous or vexatious" — meaning of — lower court's right to refuse to refer question where raising of question frivolous or vexatious — identical question already pending before Supreme Court — referral refused*

Election — *election petition — Electoral Act [Chapter 2:13] — s 182 — D requirement for petition to be determined within 6 months of date of presentation — application for stay pending determination of constitutional issue being raised in Supreme Court — outcome of issue having direct bearing on petition — requirements of Electoral Act mandatory — application dismissed E*

Practice and procedure — *abuse of process — stay of proceedings — inherent power of courts to prevent abuse of their process — such power used very sparingly and only in exceptional circumstances.*

Headnote

The courts have an inherent jurisdiction to prevent abuse of their process by staying proceedings in certain circumstances. The power should, F however, be used very sparingly and only in exceptional circumstances.

The petitioner sought an order staying the commencement of an election petition, pending the determination in another case, pending in the Supreme Court, of a constitutional challenge relating to the appointment of Electoral Court Judges. Alternatively, he sought a referral of the G petition to the Supreme Court in terms of s 24(2) of the Constitution. In terms of s 182 of the Electoral Act [Chapter 2:13], his election petition had to be determined within six months of the date of its presentation. This left the court barely three months within which the court had to decide the matter. In argument, it was urged, upon the petitioner's behalf, that were the Supreme Court to rule in the applicant's favour in the other H

2005 (2) ZLR p7

Guvava J

A constitutional challenge presently pending before it, the petitioner would suffer considerable financial prejudice in terms of the costs of litigation. In so far as the alternative argument, relating to the referral of the petition to the Supreme Court, it was argued that the matter had to be referred to that court unless "... the raising of the question [was] merely frivolous or vexatious".

B *Held*, refusing the application for a stay, that the requirement that the election petition be determined within six months of presentation outweighed the financial prejudiced which the petitioner might suffer if, in the other matter pending before the Supreme Court, the constitutional challenge was successful.

C *Held*, further, refusing a referral, that the phrase "frivolous and vexation" in s 24(2) of the Constitution attaches to the raising of the question and not to the issues forming the question. While *in casu* the content of the question could not by any standards be described as "frivolous or vexation," the raising of the question was because it formed the basis of the same constitutional challenge pending in the other matter before the D Supreme Court. In the circumstances, the raising of the question was done solely so as to abuse the process of the Supreme Court.

Cases cited

Martin v Attorney-General & Anor 1993 (1) ZLR 153 (S)

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

Legislation considered

Constitution of Zimbabwe 1980, s 24(2)

Electoral Act [*Chapter 2:13*], s 182

Case information

£ *E T Matinenga*, for the petitioner

W Mutezo, for the respondent

Judgment

GUVAVA J: At the commencement of the trial in this matter, the petitioner sought an order staying the matter pending the determination of a constitutional ¶ challenge relating to the appointment of Electoral Court judges which had been filed in the Supreme Court in *Marimo & Anor v Minister of Justice & Ors* S-160-05 (*Marimo case*). In the alternative, the petitioner applied for a referral to the Supreme Court in terms of s 24(2) of the Constitution.

The application for stay was based on the fact that there is in existence an application which has been filed in the Supreme Court challenging the ¶ appointment of the judges to the Electoral Court. The petitioner submitted that

2005 (2) ZLR p8

Guvava J

the constitutional issues being raised in this matter, are on all fours with the ¶ issues pending before the Supreme Court. It was therefore, argued that it was only appropriate that this petition be stayed pending the determination of that matter. The order sought in the Supreme Court was handed in from the bar and provides as follows:

- “1. IT IS DECLARED THAT – B
 - 1.1 The Electoral Court established by section 161 of the Electoral Act [*Chapter 2:13*] falls within the meaning of a ‘special court’ as defined by section 92(4) of the Constitution,
 - 1.2 Accordingly the manner of appointment of judges to it as provided in section 162(1) of that Act be and is hereby declared to be inconsistent with section 92(1) and section 18 of the c Constitution.
 - 1.3 All appointments already made by the third respondent to the Electoral Court without first consulting the Judicial Services Commission on that specific appointment are accordingly invalid.
 - 1.4 Additionally any appointments made by the third respondent to the Electoral Court without specifying the period of the D appointment are invalid.
2. IT IS ORDERED THAT –
 - 2.1 All appointments made by the third respondent to the Electoral Court under section 162 of the Electoral Act [*Chapter 2:13*] be and are hereby set aside. E
 - 2.2 Those respondents who have opposed this application shall jointly and severally, pay the applicant’s costs herein.”

It is trite that courts have an inherent jurisdiction to prevent abuse of their process by staying proceedings in certain circumstances. This power should however, be used very sparingly and only in exceptional circumstances. In this case, the petitioner is seeking a temporary stay of proceedings (which is £ essentially a postponement) on the basis that there is a pending action, on a question of law or fact and it would be convenient if the question were to be decided before any evidence is led.

It was not disputed by Mr *Mutezo* for the respondent that there was in fact a matter which was before the Supreme Court which raised basically the same ¶ issue as the one being raised by the petitioner. It was also not in dispute that the matter before me was pending as the trial had begun and had not yet been disposed of. For the proposition that the matter was pending, Mr *Matinenga* relied on *Muzuva v United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 at 219 where Gubbay CJ cited with approval the definition of the word “pending” in *Black’s Law Dictionary*, which states as follows: H

2005 (2) ZLR p9

Guvava J

A “ Begun, but not yet completed; before the conclusion of; prior to the completion of; unsettled; undetermined; an action or suit is pending from its inception until the rendition of final judgment.”

The issue to be decided, therefore, was whether this was an appropriate case in which the court could grant the relief prayed for. In deciding whether or not to grant the application, the court has a discretion in the matter. In exercising B this discretion, however, the court must do so judiciously, after looking at all the circumstances of the case.

Mr *Matinenga* argued that the test to be applied was whether or not the petitioner would be prejudiced if the proceedings were not stayed. He submitted that it would cause immense financial prejudice to the parties in C terms of costs in litigation. He argued that if the Supreme Court were to rule in the applicant’s favour, then any trial which would have commenced, would be set aside and evidence led afresh. He further submitted that any judgment by the court could be declared a nullity.

The submissions by the petitioner are persuasive particularly if they are related to any other matter, but election petitions. In my view, the arguments D do not take into account certain facts which are only peculiar to the trial of election petitions. Section 182 of the Electoral Act [*Chapter 2:13*] prescribes the period within which all election petitions must be heard and determined. The provision provides as follows:

“Every election petition shall be determined within six months from the date of its presentation.”

E This provision, in my view, is clearly mandatory and must be complied with by the court. This petition was filed on 15 April 2005 and thus must be determined by 15 October 2005. This leaves barely a period of three months within which this court must determine the matter. In considering whether or not to exercise the court’s discretion in favour of the petitioner the court must F weigh the financial prejudice which the petitioner may suffer (if they win the Supreme Court challenge) against the statutory obligation created by s 182. This factor alone, in my view, tilts the scales in favour of the obligation to proceed with the hearing.

It seems to me that the petitioner’s fear of wasted costs in an aborted trial can G be suitably dealt with by an appropriate order of costs against the respondents in the *Marimo* case, if it is determined in the petitioner’s favour.

For these reasons, the application for stay is denied.

Turning to the application for a referral to the Supreme Court, the petitioner submitted that in terms of s 24(2) of the Constitution, where an application for a H referral is made, the court has no discretion in the matter and must refer the

2005 (2) ZLR p10

Guvava J

constitutional question raised unless the court finds that it is frivolous and A vexatious. It was further submitted that the proviso to s 92 of the Constitution is a clear demonstration of the separation of powers in a true democracy and that it would be absurd for it not to be followed. It was thus submitted that the constitutional question raised was not frivolous or vexatious but had merit.

Section 24 of the Constitution provides an extraordinary remedy which is B availed to a litigant where there is fear that the declaration of rights has been infringed. It gives him the remedy of immediately seeking an order to stop the infringement. Whilst, in this case, it has not been spelt out which of the petitioner’s rights have been infringed, I have assumed that the petitioner is relying on the allegations which have been set out in the *Marimo*’s case to the effect that s 18(1) of the Constitution has been infringed because his right C to a fair hearing has not been observed as he is being tried by an improperly constituted court. If my assumption is correct then the petitioner falls squarely within the requirements of s 24(2) of the Constitution.

Section 24(2) of the Constitution provides as follows:

“(2) If any proceedings in the High Court or in any court subordinate D to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.”

It is not disputed that the issue which has been raised in the Supreme Court E is pertinent. In determining whether or not to refer a matter in terms of s 24(2) of the Constitution, the court must

be satisfied that *the raising of the question* is not merely frivolous and vexatious. In my view, the description “frivolous and vexatious” attaches to the raising of the question and not to the issues forming the question. A distinction between the two must be made. While it appears to me that the content of the question cannot by any standards be ^F described as frivolous and vexatious, the raising of the question on the other hand, especially the circumstances and the manner in which the question is raised leads to no other conclusion than that it is merely frivolous and vexatious. The alleged constitutional question has been raised in each of the electoral petitions which have been set down before the Electoral Court. In ^G each case, this court has declined to refer the question to the Supreme Court for various reasons. The petitioner has nevertheless once again raised the issue in this case in the face of the stance adopted by this court in previous proceedings.

The words frivolous and vexatious have been defined in *Martin v A-G & Anor* 1993 (1) ZLR 153 (S). Gubbay CJ stated as follows at 157 E: ^H

2005 (2) ZLR p11

Guvava J

^A “To my mind, the purpose of the descriptive phrase is to reserve to subordinate courts the power to prevent a referral of a question which would amount to an abuse of the process of the Supreme Court.”

It seems to me that this question is being raised solely for the purpose of abusing the process of the Supreme Court. The issues raised are already before that court and no useful purpose would be served by referring a ^B hundred and one cases which basically raise the same point. The sole reason why this court is proceeding with these applications instead of postponing them pending the determination of the *Marimo’s* case is because of the statutory requirement that the matters be determined within the prescribed time and not to deny the petitioners their right to access the Supreme Court, which in any event they can do directly without first coming to this court.

^C I can come to no other conclusion but to find that the continued raising of this question is merely frivolous and vexatious and I accordingly decline to refer the matter in terms of s 24 (2) of the Constitution and dismiss the application.

In the result and in view of my findings detailed above, I order that the trial ^D of the election petition proceeds.

Coghlan, Welsh & Guest, petitioner’s legal practitioners.

^E *Mutezo & Co*, respondent’s legal practitioners.

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KACHINGWE & ORS v MINISTER OF HOME AFFAIRS & ANOR 2005 (2) ZLR 12 (S)

2005 (2) ZLR p12

Citation	2002 (1) ZLR 12 (H)
Case No	Judgment No. S-145-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Cheda JA, Malaba JA and Gwaunza JA
Heard	17 June 2004
Judgment	18 July 2005

Counsel	<i>E T Matinenga</i> , for the appellants <i>C C Mudara</i> , for the respondents
Case Type	Constitutional application
Annotations	Link to case annotations

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 15(1) — applicability — application under s 24(1) — applicant not a citizen — applicant entitled to protection of section*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 15(1) — protection against inhuman or degrading punishment or treatment — detention in police holding cells — cells not complying with elementary norms of human decency — detention in such cells constituting inhuman or degrading treatment*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 24(1) — application under — relief sought by applicant — what relief applicant entitled to — interest that must be shown in relief sought — failure by applicant to seek a declaratur that rights had been violated — court's power under s 24(4) to address applicant's complaint*

Human rights — *international human rights instruments signed by Zimbabwe F — whether such instruments are part of the law of Zimbabwe*

Police — *standing orders — breach of — standing orders regarding treatment of prisoners at police stations — review matter rather than a constitutional issue*

Practice and procedure — *parties — locus standi — need to establish G "sufficient interest"— what amounts to sufficient interest*

Headnote

The application was brought in terms of s 24(1) of the Constitution. The first applicant had been detained in the cells at the Highlands Police Station and the second applicant had been detained in the cells at the Matapi police Station. Both alleged that the conditions under which they were H

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A detained constituted inhuman and degrading treatment and violated their fundamental rights conferred by s 15(1) of the Constitution. The third applicant was a non-governmental organisation concerned with human rights. It associated itself with the order filed on behalf of the first two applicants. This draft order sought a *declaratur* to the effect that the "police holding cells at police stations in Zimbabwe [were] degrading B and inhumane and unfit for holding criminal suspects." The first and second respondents were, in terms of the draft order, "directed to take all necessary steps and measures within their power to ensure that" a wide variety of things relating to the cells themselves and the circumstances in which people detained therein were held, were attended to.

C In so far as the cells at the two police stations were concerned, much was common cause. In both cases, the cells in which they were detained had no windows, were unlit, and overcrowded. The only toilet available was in the cell itself, in full view of all the inmates. Excrement and urine were collected in the open toilet bowl. There was no soap, toilet paper or running water, nor was there any drinking water. The toilets did not flush, there were no wash basins provided and the cells did not have a sitting D platform or bench. The respondents, however, took the point that the applicants did not have *locus standi* to entitle them to the general relief sought in the draft order. They also made the point that some of what was sought by the applicants related to matters dealt with in police standing orders and a dispute of fact existed, on the papers, as to whether or not E these standing orders were carried out.

The respondents pleaded scarcity of resources for the failure to provide better facilities in the holding cells.

It was also argued for the respondents that the first applicant had no *locus standi* to bring these proceedings as she was a non-citizen (although she was a resident) and, as such, was not entitled to any protection under the F Constitution, in particular s 15. It was also argued that she

was not entitled to the relief set out in the draft order as it was too wide and did not relate to her. On the merits of the matter, the respondents argued that although s 15(1) of the Constitution prohibits inhuman and degrading treatment, the applicants' treatment did not amount to inhuman and degrading treatment. It was argued that the conditions of the police ^G holding cells where the applicants were held, and prisons in general, are not required to and cannot match those of a free person. The order sought by the applicants was of an administrative nature which the courts were unable to regulate. The obligations sought by the applicants from the respondents were dependent upon the resources available for such purposes and that the corresponding rights themselves were limited by ^H reason of lack of resources.

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Held, that s 15(1) of the Constitution, which prohibits the subjection of any ^A person irrespective of the status of that person to torture, or to inhuman or degrading treatment, applies to both citizens and non-citizens of Zimbabwe. Section 15(1) is intended to protect all persons, irrespective of whether or not they are imprisoned consequent upon a conviction or detained in police holding cells on suspicion of having committed ^B criminal offences.

Held, further, that the criteria for establishing a sufficient interest in the relief claimed in the draft order were:

- (a) a direct interest that was not too remote from the relief sought;
- (b) a substantial interest that was not too abstract or academic; ^C
- (c) a real, and not a hypothetical, interest; and
- (d) a sufficient or patrimonial interest.

Held, further, on the facts, neither the first nor the second applicant had established any of foregoing interests so as to entitle them to the general relief sought in the draft order.

Held, further, that although neither applicant had sought a *declaratur* in their ^D draft order that their constitutional right conferred by s 15(1) of the Constitution had been violated by the respondents, that was the essence of their complaint. As such, s 24(4) of the Constitution conferred jurisdiction on the court to enable it to make an order to address this complaint even though it was not specifically set out in the draft order.

Held, further, that although the question of whether or not the police had ^E complied with its standing orders was more a matter for review than a constitutional issue, it was of some relevance to the application but not critical for its determination.

Held, further, that on the papers it was not possible to say whether the police holding cells throughout Zimbabwe were the same as those at Highlands and Matapi. Accordingly, the general *declaratur* and relief set out in the ^F draft order would not be granted.

Held, further, however, that the conditions of detention in the police cells at Highlands and Matapi were inhuman and degrading treatment in violation of s 15(1) of the Constitution.

Semble, that Zimbabwe having signed and ratified the African Charter on ^G Human and Peoples Rights and the International Covenant on Civil and Political Rights, Zimbabwe was bound by the provisions of these treaties which are part of the national law thereof.

Held, further, that even if certain of these instruments were not part of the national law, their provisions were almost identical in effect to s 15(1). The holding cells in which the applicants were detained overnight did not ^H

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^A comply with elementary norms of human decency, let alone comply with internationally accepted minimum standards, and constituted inhuman and degrading treatment.

Cases cited

Bell v Wolfish 441 US 520 (1979)

^B *Blanchard & Ors v Minister of Justice* 1999 (2) ZLR 24 (S)

Cabinet of the Transitional Govt for the Territory of South West Africa v Eins 1988 (3) SA 369

Civil Liberties Organisation v Nigeria 151 of 1996, 13th Annual Activity Report 1999-2000

Conjwayo v Min of Justice & Ors 1991 (1) ZLR 105 (S); 1992 (2) SA 56 (ZS)

c Dalrymple & Ors v Colonial Treasurer 1910 TS 372

De Waal & Ors v van der Horst & Ors 1918 TPD 277

Hilaire, Constantine & Benjamin & Ors v Trinidad & Tobago, Inter-American Court of Human Rights, Series C No. 94 (2002)

Huri-Laws v Nigeria 224 of 1998, 14th Annual Activity Report 2000-2001

d Kalashnikov v Russia (2003) 36 EHRR 34

Ex p Mouton & Anor 1955 (4) SA 460 (A)

Ouko v Kenya 232 of 1999, 14th Annual Activity Report 2000-2001

Roodepoort-Maraiburg Town Council v Eastern Properties (Prop) Ltd 1933 AD 87

S v Petane 1988 (3) SA 51 (C)

E Soobramoney v Min of Health, Kwazulu-Natal 1997 (12) BCLR 1696 (CC)

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

Woods & Ors v Min of Justice & Ors 1994 (2) ZLR 195 (S); 1995 (1) SA 703 (ZS)

Legislation considered ^F

Constitution of Zimbabwe 1980, ss 15(1), 24(1), 24(4) and 111B

Police Act [Chapter 11:10], s 9

Case information

E T Matinenga, for the appellants

C C Mudara, for the respondents

Judgment

^G **CHIDYAUSIKU CJ**: This application is brought in terms of s 24(1) of the Constitution of Zimbabwe. Section 24(1) of the Constitution provides that any person who alleges that the Declaration of Rights has been, is being, or is likely to be, contravened in relation to him, that person may apply to the Supreme Court for redress. The relief sought by the applicants in this matter is set out ^H in the draft order which provides as follows:

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"IT IS DECLARED: ^A

1. That police holding cells at police stations in Zimbabwe are degrading and inhumane and unfit for holding criminal suspects.

IT IS ORDERED:

1. That the first and second respondents are directed to take all necessary steps and measures within their power to ensure that: ^B
 - (a) police holding cells are of reasonable size for the number of persons they are used to accommodate.
 - (b) police holding cells should have good ventilation.
 - (c) police holding cells should have lighting sufficient to read by.
 - (d) police holding cells should be equipped with a means of rest such ^C as a fixed chair or bench.
 - (e) each person obliged to stay overnight in police custody should be provided with a clean mattress and blankets.

- (f) police holding cells should have clean and decent flushing toilets with toilet paper in a sanitary annex in the police cell.
 - (g) police holding cells should have full sanitary provision for ^d women who are menstruating at the time of their detention and should, on request, be permitted to buy personal necessities with their own money.
 - (h) police cells should have clean, decent and adequate washing facilities including soap.
 - (i) police cells should have running water available in the cell. ^e
 - (j) police cells should have good drinking water available in the cell.
 - (k) persons in holding cells should be given wholesome food at appropriate times and should, on request, be permitted to buy food and refreshments with their own money.
 - (l) police holding cells should be cleaned daily and a good standard ^f of hygiene maintained in the police holding cells.
 - (m) persons detained in police holding cells should have reasonable access to medical treatment.
2. The first and second respondents are directed to publish regulations in the *Government Gazette* governing the treatment and maintenance of persons detained in police holding cells. ^g
 3. The first and second respondents are directed to publish regulations in the *Government Gazette* permitting and regulating the inspection of police holding cells by magistrates and official visitors.
 4. That the first and second respondents pay the costs of this application.” ^h

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^a The relevant facts of this case are to a large extent common cause. The first and second applicants (hereinafter referred to as Kachingwe and Chibebe respectively) were arrested by the police and detained in police cells overnight in respect of Kachingwe, and for two days in respect of Chibebe. The third applicant is Zimbabwe Lawyers for Human Rights, a non-governmental organisation with capacity to sue and be sued in accordance with the laws of ^b Zimbabwe. The third applicant has not filed a separate draft order but avers in its supporting affidavit that it seeks an order declaring all police holding cells throughout Zimbabwe as degrading and inhuman.

The first respondent is the Minister of Home Affairs, who is being sued, in his official capacity, as the government Minister to whom is assigned the ^c administration of the Police Act [*Chapter 11:10*].

The second respondent is the Commissioner of Police who has command, superintendence and control of the Zimbabwe Republic Police.

On Friday, 13 June 2003, at about 3.30a.m., Kachingwe was driving home along Enterprise Road. When she turned right into Ardnalea Road, she noticed a white pick-up truck on the side of the road. There were three or four men in ^d the vehicle. The pick-up was driving very slowly on the edge of the road. When she drove past the pick-up it picked up speed and followed her. She turned into Sunninghill Close and the pick-up truck also turned after her. She immediately became concerned that the occupants of the pick-up truck could be car jackers. The road was deserted and Sunninghill Close was a dead end. ^e She decided to stop at Seasons Restaurant which is at the corner of Sunninghill Close and Ardnalea Road because she knew that these premises were guarded. When she stopped her motor vehicle the pick-up truck also came to a stop and the men inside got out and surrounded her car. She blew her motor horn and a woman came out of the restaurant. She explained to the woman why she had stopped outside the restaurant. It turned out that that very night there ^f had been a burglary at the restaurant and that the men in the pick-up truck had been driving around trying to see if they could locate the burglar before he went far.

There were also two officers from the Zimbabwe Republic Police at the restaurant. The two police officers came out and Kachingwe explained to them ^g the circumstances of her stopping her vehicle outside the restaurant. The police officers were satisfied with the explanation of Kachingwe and allowed her to proceed to her home. She drove off and the police officers watched her turn into the gate of her residence at 309 Sunninghill Close.

On Thursday, 19 June 2003, a detective constable Charamba (hereinafter referred to as “Charamba”) drove to Kachingwe’s house and obtained ^h personal details of Kachingwe from her housekeeper. He thereafter telephoned

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Kachingwe round about mid-day. Charamba informed Kachingwe that he was ^A a police officer and that he wished to interview her at Highlands Police Station. Kachingwe consulted her lawyer, Ms Cathrine Chitiyo. It was arranged between them that Chitiyo would accompany her to Highlands Police Station. Kachingwe thereafter telephoned Charamba to re-arrange the time for their meeting at the Police Station and to advise him that she would be accompanied ^B by her legal practitioner. According to Kachingwe, the involvement of a legal practitioner infuriated Charamba who insisted that Kachingwe came to the Police Station before 4 p.m. that day.

At about 4 p.m., Kachingwe, in the company of her legal practitioner, arrived at Highlands Police Station. Her legal practitioner identified herself to the police officers at the reception. Charamba was standing near the reception at ^C the entrance of the Criminal Investigations Department Office. He identified himself as the officer whom Ms Chitiyo and Kachingwe had come to see. According to Kachingwe, Charamba immediately launched into a tirade about Kachingwe's refusal to see him immediately upon his request and that he was incensed with Kachingwe for coming to the police station accompanied by her legal practitioner. He advised Kachingwe that he was not prepared to ^D interview her in the presence of her legal practitioner. Charamba advised Kachingwe that he wanted to interrogate her in connection with the theft that had recently occurred at Seasons Restaurant in Glen Lorne but that he would only do so the following morning. Kachingwe was told that she would have to spend the week-end in police custody and would be taken to Remand Court ^E on Monday 16 June 2003. Ms Chitiyo and Kachingwe protested at this turn of events to no avail.

Charamba then directed that Kachingwe be detained in a police cell. Before being taken to the police cell, a policewoman led her into another office where she was instructed to remove her shoes, her T-shirt, her jacket and her bra and these, and other personal belongings, were placed in a safe. ^F

The police officer informed her that she could only have one layer of clothing in the police cell and that she therefore had to choose one item of clothing from among the T-shirt, the jumper and the jacket. She elected to wear the jumper as she thought that it was warmer than the jacket. This was in June when the weather is fairly cold. The police officer accompanied her barefoot to the police ^G cell. The police cell wherein she was detained is in an outbuilding at the rear of the police station. She alleges that the cell was pitch black. She further alleges that as she stepped into the cell she was greeted by a foul choking stench of human excreta. She also found three other women in the cell. The floor of the cell is concrete and it being in the midst of winter the cell was very cold. She contends that there was one small dirty torn blanket in the cell which ^H

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^A the police expected all the inmates to share. She denies the contention by the police that she was given a blanket and some bedding facility.

At about 7 p.m., her legal practitioner, Ms Chitiyo, arrived back at the police station with a warm cardigan and food. She was permitted to swap the jumper for the warmer cardigan. She was also allowed to eat the food that was brought by Ms Chitiyo and she shared the food with other women in the cell. She ^B contends that the police never offered her any food and refused her request for more blankets.

Later on in the evening, one woman was admitted into the cell bringing the total number to five. It was Kachingwe's contention that the five of them were forced to suffer the indignity of huddling together under a single blanket in ^C order to keep warm. She estimated that the temperature that night was in the region of 7°C.

When she woke up the following morning the police cell was no longer dark because it was now daylight and she observed that there were no windows in the cell. She looked around the cell and made the following observations. The cell was about 3 metres wide and 8 metres long. The cell did not have a ^D flushing toilet. The only toilet facility was a toilet bowl on a raised concrete platform on which one squats. The toilet bowl had faecal matter close to the brim and that caused the whole cell to stink. It appeared to her that the toilet bowl is evacuated at the pleasure of the police officers at the Police Station. She also observed a pool of water that had collected around the bottom of the ^E platform. The concrete platform on which the toilet bowl is set is not partitioned from the rest of the cell and no provision is made for the use of the toilet bowl in privacy. As a result, the occupants of

the police cell are forced to use the toilet bowl in the full view of the other occupants of the cell much to the disgust and humiliation of everyone forced to endure such indecency. There was no toilet paper in the cell. There was no soap, no hand basin and ^F no shower in the cell. There was no running water in the cell and no drinking water either. It was her observation that the floor and the walls of the cell were dirty and dusty. The holding cell had no electric light.

At about 6 a.m. the following day, Kachingwe's legal practitioner brought her a wet towel and a fresh change of clothing and some breakfast. She was ^G permitted to change her clothing and freshen up with the towel. She thereafter had her breakfast in the fenced enclosure where she observed litter of rubbish and scraps of food eaten by previous occupants of the cell.

It was Kachingwe's contention that the police did not offer the women detained with her any breakfast. Kachingwe's office hired another legal practitioner to assist her. A Mr Gula-Ndebele of Gula-Ndebele and Partners ^H arrived at the Highlands Police Station between 9 a.m. and 10 a.m. Kachingwe

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was then interviewed in the presence of her new legal practitioner and she ^A denied any knowledge of the theft at the Seasons Restaurant. She was eventually released at about 12 p.m.

In brief, the contention of Kachingwe is that the conditions under which she was detained constitute inhuman and degrading treatment and violated her fundamental right conferred by ^s 15(1) of the Constitution. She particularized ^B the condition that constituted the inhuman and degrading treatment as follows:

- (1) The cell in which she was detained was filthy as human excrement and urine collected in an open toilet bowl causing her much distress.
- (2) The toilet bowl was not partitioned off from the rest of the cell and ^C therefore, there was no privacy in the use of the toilet.
- (3) The cell was unhygienic as there was no toilet paper, no soap, no running water and no shower.
- (4) The cell had no windows and therefore there was no natural light in the cell.
- (5) There was no lighting in the cell and therefore at sunset the occupants ^D are in the dark all the time.
- (6) She was required to be barefoot in the cell that was filthy and in spite of the low temperatures in the cell.
- (7) There was no bedding in the cell.
- (8) The cell did not have clean drinking water. ^E
- (9) She was forced to wear one layer of clothing in spite of the temperature in the cell being very low.

There is a striking resemblance between the treatment accorded Kachingwe and that of Chibebe. I will, therefore, not recount it in any detail as that will amount to recounting a similar story. ^F

Chibebe was arrested on 9 December 2002 and was detained in police cells at Matapi Police Station. Before being detained in the police cell, he was ordered to remove his shoes, socks, jacket, tie, belt and watch. He was left with only his shirt and trousers. The conditions of the cell at Matapi Police Station were very similar to the conditions at Highlands Police Station as described by ^G Kachingwe.

He too alleges that upon entering the cell he was assaulted by the choking smell of human faeces and urine. He was detained in the same cell with seven other inmates. There was insufficient bedding for each prisoner in the cell and that he and his companion, Mr Shambare, spent the better part of the night standing against the wall and that the inmates had to share a few blankets in ^H

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^A the cell. Shortly after being detained he learnt that the stench in the cell emanated from the toilet inside the cell. The toilet was not a flushing toilet and consisted of a hole in a corner of the cell. Owing to the fact that there was no light in the cell, the prisoners were forced to use their bare feet

to locate the hole in the floor. In a situation where one is naturally fearful of soiling one's feet, people attempted to relieve themselves around the toilet hole instead of **b** the hole itself.

He also discovered that the toilet hole was not partitioned off for privacy and that if the inmates want to relieve themselves they had to do so in the full view of the other inmates. Chibebe contends that the police cell was most unhygienic because there was no running water, no soap, no hand basin, no shower and **c** no toilet paper. There was no drinking water in the cell.

Chibebe and the other inmates were allowed out of their cell into the fenced enclosure for about 10 minutes per day. Chibebe contends that while detained he received no food and the police cells were never cleaned. The inmates had to clean it themselves during the period they were allowed out into the fenced enclosure for exercise. Chibebe contends that his treatment while in detention **d** was inhuman and degrading for substantially the same reasons as Kachingwe.

The third applicant is cited as a Human Rights Organisation whose object is to encourage the growth and strengthening of human rights at all levels of Zimbabwean society. It is a *universitas* that can sue and be sued. The third applicant contends that all the police cells in Zimbabwe are much the same as **e** those described by Kachingwe and Chibebe. On that basis, the third applicant, in its affidavit, is seeking a *declarator* that all police cells throughout Zimbabwe are unfit for the holding of criminal suspects and that the first and second respondents be ordered to take the necessary corrective measures to right the violation of the Constitution of Zimbabwe, or any other relief.

Members of the court visited the police holding cell in question at Highlands **f** Police Station. Kachingwe's description of the police holding cell is consistent with the observation made by the members of the court. In particular, it was observed that the toilet is not partitioned off from the rest of the cell to provide for privacy to the users. There was no toilet paper, no wash-basin, no drinking water, no sitting place. The toilet is flushed from outside and windows were **g** broken. The police holding cell in question is old having been built in 1935.

The criticism relating to the structural conditions of the detention cell, such as the failure to partition off the toilet area, the absence of a wash-basin and a shower are irrefutable. The respondents however contend that Kachingwe and Chibebe were provided with food and blankets. The respondents also **h** averred that the holding cells were cleaned regularly in compliance with

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standing orders. The respondents also pleaded scarcity of resources for the **a** failure to provide better facilities in the holding cells.

Counsel for the respondents also raised a point *in limine*, namely, that Kachingwe has no *locus standi* to bring these proceedings on two grounds. Firstly, it was argued, that she is a foreigner and, as such, is not entitled to any protection under the Constitution, in particular s 15. Secondly, it was argued **b** that she is not entitled to the relief set out in the draft order as it was too wide and did not relate to her.

Dealing with the first objection, s 15(1) of the Constitution provides that:

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

While s 24(1) of the Constitution 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 ... then, without prejudice to any other action with respect to the same matter which is lawfully available, that person ... may, subject to the provisions of subsection (3), apply to the Supreme Court for redress."
d

It is quite clear from the language of s 15(1) of the Constitution that there is no distinction between a citizen and a non-citizen in respect of the protection availed under that section. Section 15(1) prohibits the subjection of any person, irrespective of the status of that person, to torture, or to inhuman or degrading treatment. I see nothing in the language of s 15(1) that the lawmaker intended to limit the protection provided therein to citizens only. **e**

I am, therefore, satisfied that a resident such as Kachingwe is entitled to approach this court in terms of s 24(1) of the Constitution and seek redress for the alleged violation of her constitutional right conferred by s 15(1) of the Constitution. It is also quite clear from the language of s 15(1) of

the Constitution that it applies to both citizens and non-citizens. This point, *in limine*, therefore fails.

Turning to the second ground of objection, namely that the applicant Kachingwe is not entitled to the relief sought in the draft order filed of record. I accept that there is substance in this objection. The relief sought by the three applicants in the draft order is wider than what they are entitled to on the evidence. The applicants seek a *mandamus* compelling the respondents to do ^g all the things set out in the draft order. Mr *Mudara* submitted that Kachingwe has no interests in obtaining such a general order. He argued that for Kachingwe to have *locus standi* she must have direct and substantial interest in the relief sought. In this regard it was submitted that the court must be satisfied that her interest in the relief sought in the draft order satisfies the following criteria: ^h

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- (a) a direct interest that is not too remote from the relief sought;
- (b) a substantial interest that is not too abstract or academic;
- (c) a real interest not a hypothetical one;
- (d) a sufficient or patrimonial interest

In support of the above submissions, the following authorities were cited: ^b *Dalrymple & Ors v Colonial Treasurer* 1910 TS 372 at 379; *de Waal & Ors v van der Horst & Ors* 1918 TPD 277 at 284; *Roodepoort-Maraiburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87 at 101; *Ex p Mouton & Anor* 1955 (4) SA 460 (A) at 464A-B; *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 at 387-389D.

^c On the facts of this case, I am satisfied that neither Kachingwe nor any of the other applicants have established any of the above interests to entitle them to the general relief sought in the draft order. Apart from this, the only evidence before this court relates to two specific police holding cells. There is no evidence regarding the condition of police holding cells throughout Zimbabwe. Although Kachingwe and Chibebe do not seek, in the draft order, a *declarator* ^d that their constitutional right conferred by s 15(1) of the Constitution was violated by the respondents, that is the essence of their complaint in the founding affidavits. In my view, s 24(4) confers jurisdiction on this court to enable it to make an order to address this complaint even though it is not specifically sought in the draft order.

^e In regard to the alleged degrading and inhuman treatment, the respondents' stance is that although s 15(1) of the Constitution prohibits inhuman and degrading treatment Kachingwe's and Chibebe's treatment did not amount to inhuman and degrading treatment. It was argued that the conditions of the police holding cells where the applicants were held, and prisons in general, are not required to and cannot match those of a free person.

^f In support of this submission, counsel for the respondents referred the court to the remarks of Gubbay CJ in *Blanchard & Ors v Minister of Justice* 1999 (2) ZLR 24 (S) at p 30E-F. The learned Chief Justice had this to say:

"The lawful incarceration of the applicants causes the necessary withdrawal or limitation of many privileges and rights previously enjoyed in a free and democratic society. Persons in custody simply do not possess the full ^g range of freedoms of un-incarcerated individuals."

Counsel also referred us to the *dicta* of Rehnquist J in *Bell v Wolfish* 441 US 520 (1979), which was cited with approval in *Blanchard supra*, wherein the learned justice (as he then was) stated as follows at 537:

"Once the government has exercised its conceded authority to detain a ^h person, pending trial, it obviously is entitled to employ devices that are

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calculated to effectuate this detention. Traditionally, this has meant ^a confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, a prison, or a custodial centre, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such ^b detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little

restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment'."

Mr *Mudara* further submitted that the order sought by the applicants was of an administrative nature which the courts are unable to regulate. In support of this proposition he relied on the remarks of Gubbay CJ in *Blanchard supra*, wherein he stated at 34C-D:

"... it is not appropriate for this court to direct, as requested on the applicants' behalf, that the food supplied should not first be tasted by the person delivering it. The power to examine the food and the method employed is not the sort of administrative procedure that courts are inclined to interfere with. To do so would amount to an unnecessary intrusion into the sphere of those charged with and trained in the running of penal institutions."

It was further argued that similar sentiments were expressed in the case of *Soobramoney v Minister of Health, Kwazulu-Natal* 1997 (12) BCLR 1696 (CC) ^ε wherein Chaskalson P made the following remark at 1705-1706, para 29:

"The provincial administration which is responsible for health services in Kwazulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget and at the functional level in deciding upon the priorities ^φ to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility is to deal with such matters."

In conclusion, Mr *Mudara* submitted that the obligations sought by the applicants from the respondents are dependent upon the resources available for such purposes and that the corresponding rights themselves are limited ^θ by reason of lack of resources. The respondents further submitted that the application was fraught with many practical difficulties and that it is not clear from the papers what the applicants want to be remedied or rectified. It was also argued that the relief sought was vague and unenforceable and that on that basis the application should be dismissed. ^η

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A While the relief as set out in the draft order presents the applicants with some difficulty in that the applicants have no *locus standi* to demand such relief and that no evidence was placed before the court to justify the grant of such relief, that does not preclude the court from determining whether the treatment meted out on Kachingwe and Chibebe constitute degrading and inhuman treatment. The issue in this regard is whether or not Kachingwe and Chibebe were ^β subjected to inhuman and degrading treatment contrary to s 15(1) of the Constitution, and whether Kachingwe and Chibebe, as detainees, are entitled to any protection in terms of s 15(1) of the Constitution, and, if so, was such right violated by the respondents? As already stated, s 15(1) of the Constitution provides that no person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.

c I entertain no doubt that the law maker intended s 15(1) of the Constitution to protect all persons irrespective of whether or not they are imprisoned or detained in police cells. Indeed detained and imprisoned persons must have been in the forefront of the lawmaker's mind when he enacted s 15(1) of the Constitution. Incarcerated persons are particularly vulnerable and in need of ^δ such protection as they are liable more than anyone else to torture, inhuman and degrading treatment. Indeed, this court has held that convicted persons are not, by the mere fact of their conviction, denied the constitutional rights they otherwise possess and that no matter the magnitude of their crime they do not forfeit the protection afforded them by s 15(1) of the Constitution of Zimbabwe: see *Conjwayo v Minister of Justice & Ors* 1991 (1) ZLR 105 (S); ^ε 1992 (2) SA 56 (ZSC) and *Woods & Ors v Minister of Justice & Ors* 1994 (2) ZLR 195 (S); 1995 (1) SA 703 (ZS).

I am persuaded by the applicants' further submission that the legal principles enunciated in the cases of *Conjwayo supra*, and *Woods supra*, extend equally to persons who are detained in police holding cells on suspicion of having ^φ committed criminal offences. On this basis, I am satisfied that s 15(1) of the Constitution of Zimbabwe applies to people like Kachingwe and Chibebe who are held by the police in holding cells on suspicion of having committed an offence.

Having come to that conclusion the next issue that falls for determination is whether the treatment Kachingwe and Chibebe received whilst under detention ^θ constitutes a violation of their constitutional right guaranteed by s 15(1) of the Constitution.

The following facts are common cause in this case.

1. That the police cells in which both Kachingwe and Chibebe were detained ^h measured roughly 24 square metres.

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2. That inmates had to relieve themselves in the full view of others. ^a
3. That the toilet could only be flushed from outside the cell.
4. There was no toilet paper.
5. There was no wash-basin.
6. There was no soap. ^b
7. There was no running water in the cell and there was no drinking water either.
8. There was no electric light in the cell.
9. That the detainees were allowed out of the cells for only a short period of time per day. ^c
10. That there were several inmates in one cell.

Kachingwe and Chibebe make further allegations regarding the denial or failure to provide food, blankets, the cleanliness of the cells, etc. These allegations are disputed by the respondents. The respondents contend that Kachingwe and Chibebe were provided with food, blankets, bedding and that this was done in terms of the standing orders and directives regulating ^d conditions of detained persons in police custody.

It is common cause that Police Standing Orders promulgated under s 9 of the Police Act [*Chapter 11:10*] make provision for adequate food to be given to prisoners, that prisoners should be given sufficient bedding, refreshments, and rations etc. In terms of these Police Standing Orders every detainee is ^e supposed to be issued with three clean blankets which are required to be returned to the police upon his release. The Police Standing Orders also require that the blankets should be cleaned, dried and folded. They provide that blankets issued to a prisoner who remains in police custody for a lengthy period shall be washed and dried after seven days. The standing orders provide that a general hand should scrub each police cell daily with detergent ^f and disinfectant. The cell cleaning should take place during the daily exercise period whenever possible.

Further, the Police standing orders provide that the Member-in-Charge should arrange for cells to be checked daily after scrubbing out by the general hand. The standing orders also provide that the exercise yards and cells ^g surrounding should be swept out daily by the general hand and should be inspected simultaneously with the cells inspection, etc.

There is a dispute of fact on the papers on whether the police complied with the requirements of the Police standing orders on the days the first and second applicants were in detention. ^h

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^a The respondents contended that they did while the applicants' contend that whilst they were in detention the police did not carry out their duties as required of them by the Police standing orders. This dispute of fact, in my view, cannot be resolved on the papers. However, this matter can be determined without resolving these factual disputes for the following reasons.

The question of whether the police carried out their duties as set out in the ^b Police standing orders or not is essentially an administrative issue and not a constitutional issue. The question of whether or not the police have complied with what is required of them in terms of the standing orders is more of a matter for review than a constitutional issue. I, however, accept that police compliance with the standing orders is of some relevance to this application but not critical ^c for its determination.

I now turn to deal with the issue of what constitutes torture, inhuman or degrading punishment or treatment and whether the first and second applicants were subjected to treatment or conditions that constitute torture, inhuman or degrading punishment or treatment.

Counsel for the applicants submitted that the court can derive some guidance ^d in determining this issue from decisions of some international tribunals on human rights that have adjudicated on this issue and the reports of the African Commission on Human and Peoples' Rights. The American

Convention on Human Rights, in Article 7, prohibits torture, inhuman and degrading punishment. The African Charter on Human and Peoples' Rights also prohibits ^ε torture, inhuman and degrading punishment in Articles 1 and 5. The International Covenant on Civil and Political Rights also outlaws torture, inhuman and degrading punishment. The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment also prohibits torture, inhuman or degrading punishment and sets out minimum standards for the treatment of detained persons. One can safely say that ^ε torture, inhuman or degrading punishment is universally proscribed.

In *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* Inter-American Court of Human Rights Series C No. 94 (21 June 2002), the Inter-American Court of Human Rights found that the conditions under which the applicants were held were inhuman and degrading because the cells received ^g little or no natural light, lacked sufficient ventilation, the sanitation facilities were primitive and degrading, the cells were tiny and overcrowded, exercise was very limited and medical facilities were virtually non-existent. The cells were so overcrowded that some of the prisoners had to sleep sitting or standing up and the inmates were confined to those conditions for long ^h periods of at least twenty-three hours a day.

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Chidyausiku CJ

The court also found that the applicants suffered these conditions for an ^a extensive period of time and concluded that the State had failed to ensure respect for the dignity inherent in all human beings as well as their right not to be subjected to cruel, inhuman or degrading treatment or punishment.

The court declared that the detention conditions in Trinidad and Tobago were completely unacceptable and that that was sufficient to constitute a violation ^b of Article 5(1) and 5(2) of the Convention.

In the course of its judgment, the Inter-American Court of Human Rights also stated that any person deprived of his liberty has the right to be treated with dignity and the State had the responsibility and the duty to guarantee the detained person's integrity while detained. The court also observed that the State, being responsible for the detention facilities, is the guarantor of the ^c rights of detainees.

In *Kalashnikov v Russia* (2003) 36 EHRR 34, the European Court of Human Rights ruled that the detention of the complainant in a cell that was overcrowded, poorly ventilated, infested with cockroaches and ants, with a lavatory that provided insufficient privacy, with no bedding material and other necessary ^d items constituted inhuman and degrading treatment contrary to the provisions of Article 3 of the European Convention which provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

There are striking similarities between *Kalashnikov's* case *supra*, and this ^e case. In particular, the defences raised by the Russian Government are similar to the defence raised by the respondents in this case. There is also a similarity in what is alleged to constitute inhuman and degrading treatment in the two cases. *Kalashnikov* alleged that he was subjected to inhuman and degrading treatment in the following respects:

- (1) The cell in which he was detained was overcrowded and insanitary. ^f
- (2) The cell measured between 17 and 20 square metres and each bed in the cell was used by two or three inmates and, at any given time, there was between ^g .9 and 1.9 square metres of space per inmate in the applicant's cell. Inmates took turns to sleep on the basis of 8 hours of sleep per person. In this regard, the court observed that the European Committee for the ^g Protection from Torture, Inhuman or Degrading Punishment had set 7 square metres per prisoner as an approximate and desirable guideline of the detention cells.
- (3) There was inadequate ventilation.
- (4) That the inmates were allowed 3 to 4 hours of outdoor activity per day. ^h
- (5) The cell was infested with pests.

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Chidyausiku CJ ^a

- (6) Toilet facilities were inadequate in that only a partition measuring 1.1 metres high separated the lavatory pan in the corner of the cell from a wash stand next to it but not from the living

area. There was no screen at the entrance of the toilet. The applicant had to use the toilet in the full view of other inmates.

- (7) The applicant was detained for a long period of time under the above ^a conditions. He was detained for four years and 10 months.

The Russian Government submitted that it was doing its best but did not have adequate resources to provide better facilities. In this regard, it was common cause that for economic reasons conditions of detention in Russia were very unsatisfactory and fell far below the requirements set out for penitentiary ^c establishments in member states of the Council of Europe. However, the Government of Russia contended that it was doing its best to improve conditions of detention in Russia and that it had adopted a number of programmes aimed at the construction of new pre-trial detention facilities, the reconstruction of the existing ones would lead to the elimination of diseases within the prisons. It was also accepted that the implementation of programmes ^d being undertaken would allow for a two-fold increase of space for prisoners and for the improvements of sanitary conditions in pre-trial detention facilities.

It was further accepted by the court that the Russian Government had taken measures to improve the detention facilities where the applicant's cell was located and the court was satisfied that the Russian Government had no ^e positive intention of humiliating or debasing the applicant and that although such intent is a factor to be taken into account, the absence of any such intent does not necessarily exclude a finding of violation of Article 3 which prohibits torture, inhuman or degrading punishment.

On the basis of the above factors, the court concluded that the applicant's condition of detention, in particular, the severely crowded and insanitary ^f environment and its detrimental effect on the applicant's health and well-being combined with the length of the period during which the applicant was detained in such conditions amounted to degrading treatment. The court, accordingly, concluded that there had been a violation of Article 3 of the Convention, that is to say, that the applicant had been subjected to cruel, ^g degrading and inhuman treatment.

Mr *Matinenga* also argued that the provision of the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights (hereinafter referred to as the "African Charter" and the "ICCPR") are part of our national law and that in terms of these international instruments ^h inhuman and degrading punishment is prohibited. In this regard, he argued

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Chidyausiku CJ

that the Constitution of Zimbabwe Amendment (No. 7) Act 1987 (No. 23 of ^a 1987) which came into effect on 31 December 1987, amended the Constitution of Zimbabwe by inserting a new ^s 111B which provides:

"Any International Convention, treaty or agreement which –

- (a) has been entered into or executed by or under the authority of the President; and ^b
- (b) imposes fiscal obligations upon Zimbabwe;

shall be subject to ratification by the House of Assembly."

The House of Assembly was later repealed and substituted by Parliament. He argued that the effect of that amendment to the Constitution in 1987 was that international conventions and treaties that were signed or acceded to, by, or ^c under the authority of the President and that did not impose a fiscal obligation on Zimbabwe were integrated into the domestic national law of Zimbabwe without explicit legislation, as they did not require the approval or ratification of Parliament.

He further argued that ^s 111B was, however, later amended by the Constitution of Zimbabwe Amendment (No. 12) Act, 1993 (No. 4 of 1993) so that any ^d convention, treaty or agreement which was acceded to, concluded or executed by or under the authority of the President before 1 November 1993 and which, immediately before that date, did not require approval or ratification by Parliament, remained part of the law of Zimbabwe after the 1993 amendment.

He submitted that Zimbabwe signed and ratified the African Charter and the ICCPR in 1986 and 1991, respectively. On that basis, he submitted that by ^e assenting to the African Charter and the ICCPR Zimbabwe is bound by the provisions of these treaties which are part of our national law. In support of this proposition, he relied on the case of *Trendtex Trading Corporation Ltd v Central Bank of Nigeria* [1977] 1 All ER 881 (CA) at p 888F-G. He also relied on the case of *S v*

Petane 1988 (3) SA 51 (CPD) at p 56F-G in which the court held that the attributes of customary international laws which are directly ^Foperative in the national sphere are those that are either universally recognised or have received the assent of the country.

This contention was not disputed by the respondents. I have no doubt that, in all probability, Mr *Matinenga* is correct in this regard. However, I feel that this point was not sufficiently argued for me to make a firm determination of ^Gthis point. The determination of that point of law is not necessary for the determination of this case.

In any event, the provisions proscribing torture, inhuman and degrading punishment as set out in those international instruments are almost identical to the wording of s 15(1) of the Constitution of Zimbabwe that proscribes torture, inhuman or degrading punishment. ^H

2005 (2) ZLR p31

Chidyausiku CJ

^A Mr *Matinenga* also referred us to a number of reports of the African Commission which was established to promote human and peoples' rights and to ensure their protection in Africa. I agree with Mr *Matinenga* that these reports are persuasive. The following are some of the reports which Mr *Matinenga* cited. He cited the case of *Huri-Laws v Nigeria* 225/98 reported in the 14th Annual Activity Report 2000-01. At p 300 of the above-mentioned ^BCompilation, the complainant, a non-governmental organisation, had alleged, amongst other things, that a member of the Civil Liberties Organisation, another human rights non-governmental organisation, had been detained in a sordid and dirty cell under inhuman and degrading conditions where he was denied medical attention and access to his family and lawyer, and also denied access to journals, newspapers and books.

^CThe African Commission ruled in para 41 at p 306 that the detention of the member in a sordid and dirty cell, in health threatening conditions and in which access to medical attention and the outside world was denied amounted to cruel, inhuman and degrading treatment in violation of Article 5 of the African Charter.

^DSimilarly, in the case of *Civil Liberties Organisation v Nigeria* 151/96 reported in the 13th Annual Activity Report: 1999-2000 at p 266 of the above-mentioned Compilation, a complaint was filed against the detention of various persons in dark cells, with insufficient food, no medicine or medical attention. The African Commission made a finding in para 25 at p 270 that the deprivation of light, insufficient food and lack of access to medicine or medical attention ^Econstituted a violation of Article 5 of the African Charter.

In *Ouko v Kenya* 232/99 reported in the 14th Annual Activity Report: 2000-01 at p 144 of the above-mentioned Compilation, the complainant alleged that throughout the period of his detention he was detained in a 2 by 3 metre basement cell with a 250 watt electric bulb which was left on throughout his 10 months' detention and that he was denied bathing facilities and was ^Fsubjected to both physical and mental torture. The African Commission ruled that the conditions of the complainant's detention were a violation of the complainant's right to the respect of his dignity and amounted to inhuman and degrading treatment in violation of Article 5 of the Charter. The African Commission further ruled that the treatment and conditions of Ouko's ^Gdetention ran contrary to the minimum standards contained in the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, particularly Principles 1 and 6.

Principle 1 of the United Nations Body of Principles provides as follows:

"All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human ^H person."

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Chidyausiku CJ

Principle 6 of the United Nations Body of Principles provides: ^A

"No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatsoever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment."

The above international norms provide a useful guideline for the determination ^Bof this case.

I have no doubt, in my mind, that the holding cell that the court inspected at Highlands Police Station, the same holding cell in which Kachingwe was detained overnight, does not comply with

elementary norms of human decency, let alone, comply with internationally accepted minimum standards. In particular, the failure: c

- (a) to screen the toilet facility from the rest of the cell to enable inmates to relieve themselves in private;
- (b) to provide a toilet flushing mechanism from within the cell;
- (c) to provide toilet paper;
- (d) to provide a wash-basin; and d
- (e) to provide a sitting platform or bench;

constitute inhuman and degrading treatment prohibited in terms of s 15(1) of the Constitution. The evidence clearly establishes that Chibebe was subjected to similar treatment.

The third applicant has alleged that conditions in the police holding cells e throughout Zimbabwe are the same as those described by the first and second applicants. This may be the case but the matter cannot be determined on the basis of the third applicant's mere say so. Accordingly, the court cannot grant the relief sought in the draft order but will make the following declaration and order: f

1. That the first and second applicants, that is, Kachingwe and Chibebe, were detained under conditions that constituted inhuman and degrading treatment in violation of s 15(1) of the Constitution.
2. That the conditions of detention in police cells at Highlands and Matapi Police Station are inhuman and degrading. g
3. The respondents are directed to take immediate measures to ensure that the holding cells at Highlands and Matapi Police stations have toilets that are screened off from the living area, with flushing mechanisms from within the cells, wash-basins and toilet paper.
4. The first and second applicants are awarded costs but there will be no order as to costs in respect of the third applicant. h

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Chidyausiku CJ

A SANDURA JA, CHEDA JA, MALABA JA & GWAUNZA JA concurred.

Honey & Blanckenberg, applicants' legal practitioners

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

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/TWIN WIRE AGENCIES (PVT) LTD v CABS 2005 (2) ZLR 34 (S)

TWIN WIRE AGENCIES (PVT) LTD v CABS 2005 (2) ZLR 34 (S)

2005 (2) ZLR p34

Citation	2005 (2) ZLR 34 (S)
Case No	Judgment No. S-46-05
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA & Ziyambi JA
Heard	19 July 2005
Judgment	19 July 2005

Counsel	The appellant in person, through J M Mabureki <i>L T Biti</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Practice and procedure — application — eviction order — defence to — respondent bringing proceedings to set aside sale in execution — not *c* a defence to claim against eviction

Practice and procedure — execution — sale — sale confirmed by Sheriff — transfer effected and price paid — when sale may be set aside by court

Headnote

The appellant failed to pay the mortgage bond on a property and the respondent building society foreclosed. The property was sold in execution to the respondent. The applicant refused to vacate and the respondent brought an action for the eviction of the appellant. The appellant entered an appearance to defend. The respondent applied for summary judgment. The appellant opposed the application but the court granted summary judgment, holding that the appellant had raised no defence to the claim for eviction and that there were no triable issues to necessitate the matter proceeding to trial. On appeal, the appellant argued that it had instituted proceedings to set aside the sale in execution and the court should accordingly not have granted the eviction.

Held, that a challenge to a sale in execution does not constitute a defence against a claim for eviction by the registered owner of the property. Once the sale of the property has been properly confirmed by the Sheriff and transfer effected by him to the purchaser against payment of the price, any application to set aside the transfer falls outside r 359 of the High Court Rules and must conform strictly with the principles of the common law. Under the common law, immovable property sold by judicial decree cannot, after transfer has been passed, be impeached in the absence of an allegation of bad faith or knowledge of the prior irregularities in the sale of execution or fraud. The proceedings brought by the appellant would not amount to an adequate challenge of the respondent's ownership of the property in question and his entitlement to possession or occupation of the property. *H*

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Chidyausiku CJ

Case cited ^A

Mapedzamombe v Commercial Bank of Zimbabwe & Anor 1996 (1) ZLR 257 (S)

Case information

The appellant in person, through J M Mabureki

^B *L T Biti*, for the respondent

Judgment

CHIDYAUSIKU CJ: At the conclusion of submissions by the parties in this matter, the appeal was dismissed with costs. Reasons for judgment were to follow. The following are the reasons for judgment.

The facts of this case are common cause and are aptly summarised by the judge *c* in the court *a quo*. The respondent is the registered owner of stand No. 2796 Kwekwe of stand No. 2999 Kwekwe Township situated in the district of Kwekwe (hereinafter referred to as "the property"). The property is held by the respondent under Deed of Transfer No. 4525/01 dated 27 November 2001. The respondent purchased the property on 27 April 2001 following a Sheriff's sale in execution in a

matter where the respondent was the plaintiff and the D appellant was the defendant. The respondent had foreclosed on a mortgage bond registered by the appellant on the security of stand No. 2796 for a failure by the appellant to maintain its mortgage repayment in terms of the bond. The appellant refused to vacate the property, notwithstanding its purchase and subsequent transfer to the respondent. The respondent launched a court action for the eviction of the appellant. The appellant entered an appearance E to defend. The respondent applied for summary judgment. The appellant opposed the application for summary judgment for eviction on three grounds. The first ground that the appellant gave was that the sale was not properly made and done above board. The second was that the purchase price fetched at the auction was unreasonably low. The third was that the appellant had the F capacity to pay off what was due to the respondent and retain the property and, therefore, should have been given the opportunity to sell the property by way of private treaty. The court *a quo* granted the summary judgment for the eviction of the appellant from the property. In doing so, the court concluded that the appellant had raised no defence to the claim for eviction and that there were no triable issues that would necessitate the matter G proceeding to trial.

The appellant was dissatisfied with this judgment and now appeals to this court.

A perusal of the appellant's heads of argument reveals that the basis of its appeal to this court is captured in para III(b) of its heads of argument H which reads:

2005 (2) ZLR p36

Chidyausiku CJ

"The appellant submitted to the court *a quo* that it must not grant the relief A of ejectment summarily because the appellant had instituted proceedings against the Sheriff challenging the sale under case No. HC 3750/01 referred to by his hardships (*sic*) of the court *a quo*'s judgment. The court must have considered this and other defences and referred the matter to a full blown trial. Further, the court erred in finding for the respondent that the proceedings in case No. HC 3750/01 were withdrawn. The appellant had B not withdrawn the claims and if there was any withdrawal such withdrawal was made without his consent."

In my view, the conclusion of the learned judge in the court *a quo* that case No. HC3750/01 was withdrawn cannot be faulted. The record clearly shows that the case was withdrawn. No evidence was placed before the court to show that the withdrawal was not in accordance with the rules or that the matter had C been reinstated. Accordingly, the court *a quo*, in my view, was correct in proceeding on the basis that the proceedings which the appellant alleged were pending, and because they were pending, afforded him a defence, were in fact not pending. But even if those proceedings were pending they would not afford the appellant any defence to a claim for eviction. In case No. HC 3750/01, D the appellant was seeking to prevent eviction on the basis that it was challenging the sale in execution. A challenge to a sale in execution does not constitute a defence against a claim for eviction by the registered owner of the property.

In *Mapedzamombe v Commercial Bank of Zimbabwe & Anor* 1996 (1) ZLR 257 (S) at pp 260D-261A, Gubbay CJ had this to say: E

"Before a sale is confirmed in terms of r 360, it is a conditional sale and any interested party may apply to court for it to be set aside. At that stage, even though the court has a discretion to set aside the sale in certain circumstances, it will not readily do so: see *Lalla v Bhura supra* at 283A-B. Once confirmed by the sheriff in compliance with r 360, the sale of the property is no longer conditional. That being so, a court would be F even more reluctant to set aside the sale pursuant to an application in terms of r 359 for it to do so: see *Naran v Midlands Chemical Industries (Pvt) Ltd S-220-91* (not reported) at pp 6-7. When the sale of the property not only has been properly confirmed by the sheriff but transfer effected by him to the purchaser against payment of the price, any application to set aside the transfer falls outside r 359 and must conform strictly with the G principles of the common law.

This is the insurmountable difficulty which now besets the appellant. The features urged on his behalf, such as the unreasonably low price obtained at the public auction and his prospects of being able to settle the judgment debt without there being the necessity to deprive him of his home, even if they could be accepted as cogent, are of no relevance. This is because H

2005 (2) ZLR p37

Chidyausiku CJ

A under the common law immovable property sold by judicial decree after transfer has been passed cannot be impeached in the absence of an allegation of bad faith, or knowledge of the prior irregularities in the sale of execution, or fraud: see *Sookdeyi & Ors v Sahadeo & Ors* 1952 (4) SA 568 (A) at 571H-572A; *Gibson NO v Iscor Housing Utility Co Ltd & Ors* 1963 (3) SA 783 (T) at 787A-B; *Maponga v Jabangwe* 1983 (2) ZLR 395 (S) at 396D-E; B *van den Berg v Transkei Development*

Corporation 1991 (4) SA 78 (TkG) at 80G-J; *Erasmus v Michael James (Pty) Ltd* 1994 (2) SA 528 (C) at 552F.

This principle of the common law has been codified in s 70 of the South African Magistrates Court Act of 1944, but not in the comparable Zimbabwean Act or Rules.”

c It is quite clear from the remarks of the learned Chief Justice that the remedy to set aside a sale in execution in terms of r 359 of the High Court Rules is only open to a litigant in circumstances where transfer has not taken place. After transfer, any application to set aside such transfer should conform strictly with the principles of the common law and falls outside the ambit of r 359 of the High Court Rules. Thus, even if the proceedings in case No. HC 3750/01 d were still pending, such proceedings would not amount to an adequate challenge of the respondent’s ownership of the property in question and its entitlement to possession or occupation of the property. The appellant in the above case sought to set aside the confirmation of the sale in execution by the Sheriff and was not seeking transfer of the property from the respondent e to itself. The other proffered defence, that the appellant can now pay the purchase price, is no defence at all. The question of ability to pay is irrelevant.

I am satisfied that, on the papers, the appellant did not allege any facts that would constitute a defence if the matter had gone to trial. Accordingly, the court a quo was correct in granting the summary judgment.

f It was for these reasons that the appeal was dismissed with costs.

SANDURA JA & ZIYAMBI JA concurred.

Masawi Mangwana & Partners, appellant’s legal practitioners

g *Wilmot & Bennet*, respondent’s legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/ZIMBABWE REPUBLIC POLICE BOARD OF TRUSTEES v MANYANGADZE 2005 (2) ZLR 38 (S)

ZIMBABWE REPUBLIC POLICE BOARD OF TRUSTEES v MANYANGADZE 2005 (2) ZLR 38 (S) 2005 (2) ZLR p38

Citation	2005 (2) ZLR 38 (S)
Case No	Judgment No. S-26-05
Court	Supreme Court, Harare
Judge	Malaba J
Heard	17 January 2005
Judgment	21 July 2005
Counsel	<i>R S Tsivama</i> , for the appellant <i>S Mabuye</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Agency — agent — authority — prior authority of principal — whether essential — subsequent ratification by principal of agent's actions — actions thereby validated

Employment — contract — termination — application to labour officer to terminate employment — application made by agent of employer — no ^D prior authority to make application but application subsequently ratified — effect — validity of application

Headnote

The respondent was employed by the Police Club as its Secretary. The Club was not part of the Police Force and its employees were not employees ^E of the Police. The Club was run by a Board of Trustees in terms of the Club's constitution. The Superintendent Amenities at the Police Depot, who was a member of the Board of Trustees, suspended the respondent from duty on allegations of misconduct, and applied to the Ministry of Labour for an order terminating the respondent's employment. The letter of suspension and the application were signed by the Superintendent in ^F his capacity as such. The order was granted. The Board of Trustees subsequently became aware of what the Superintendent had done and ratified it. On appeal, the Labour Court reversed the order. Its reasons for so doing were that the power to bring any action or suits on behalf of the Club were vested in the Club's Board of Trustees, not in one member of the Board acting in his capacity as an officer of the Police Force. The ^G suspension by anyone other than the Board was *ultra vires* the Constitution and so was the application for dismissal. The authority to terminate was therefore based on an illegal action and was therefore of no force or effect. On appeal by the Board to the Supreme Court. ^H

2005 (2) ZLR p39

Chidyausiku CJ

^A Held, that the Superintendent was not acting on his own behalf. He was acting on behalf of the respondent's employer, the Board of Trustees. The Board was the principal and he was the agent. He may have been mistaken as to who he thought the respondent's employer was and may not have had specific authority from the Board. However, the Board subsequently ratified the Superintendent's actions, and ratification of ^B an agent's action has retrospective effect. Even if the application for dismissal and suspension did not have the prior authority of the Board, that would not render it illegal. It was simply voidable at the instance of the Board. In a case where the employer subsequently ratifies the application for dismissal and suspension, such ratification retrospectively ^C validates both the application for dismissal and the suspension.

Case information

R S Tsivama, for the appellant

S Mabuye, for the respondent

Judgment

CHIDYAUSIKU CJ: The respondent in this case was employed by the ^D appellant as a Club Secretary. On or about 21 April 1997, the Superintendent Amenities, ZRP Commandant Depot, Mamera, (hereinafter referred to as Mamera) applied to the Ministry of Labour to terminate the respondent's contract of employment.

On 23 April 1997, Mamera suspended the respondent from employment ^E pending a determination by the Ministry of Labour, of the application. The reasons for the application and subsequent suspension were that when a spot check was carried out by the appellant's internal auditors the respondent failed to account for an amount of \$6 939.98 and yet he was the only person with access to the safe in which the money was kept. The respondent had also unlawfully lent an amount of \$3 500 of the appellant's money to a fellow ^F employee.

A hearing of the matter was duly conducted before a labour relations officer on 5 September 1997 who, on hearing evidence from the two auditors, granted the application for termination of the respondent's employment. The respondent noted an appeal to a senior labour relations officer. When the appeal was dismissed, he noted another appeal to the Labour Court, which ^G allowed the appeal on the basis that the suspension was a nullity as it was done by Mamera and not the

appellant, as this implied that the respondent was a member of the Zimbabwe Republic Police, which he was not.

In coming to this conclusion, the learned President of the Labour Court ^H reasoned as follows:

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Chidyausiku CJ

"The Constitution does not provide for the removal from office of the ^A secretary.

Superintendent C E Mamera, on 23 April 1997, acting on behalf of Zimbabwe Republic Police Office of the Commandant Depot suspended the appellant who was the Secretary. In suspending the appellant, Superintendent C E Mamera did not purport to act on behalf of The Board of Trustees or as the Chairman or member of the Club Committee. He acted ^B in his capacity as Superintendent Amenities.

The same Superintendent then proceeded to apply for termination of the appellant's contract of employment to the labour relations officer in terms of SI 371/85. Again, he acted as Superintendent Amenities. Permission to terminate the contract of employment was granted by the labour relations officer and by the senior labour relations officer after the appellant had ^C noted an appeal.

Thereafter, the appellant appealed and argued on appeal that the Zimbabwe Republic Police acting through its Superintendent Amenities was not his employer. He was employed by the Police Club and it is the Board of Trustees who ought to have acted on behalf of the Club as is provided for by the Club's Constitution which provides that all actions on behalf ^D of the Club are to be instituted and conducted by the Board.

It was argued on behalf of the respondent that the Constitution derives its existence from the Police standing orders and as such, it is these Police standing orders which state how the Constitution is supposed to be applied. The structures of the Zimbabwe Republic Police have a Superintendent Amenities he is the one who sits on the Board of Trustees ^E for the Club. His actions are therefore valid and bind the appellant.

That argument is fundamentally flawed in that nowhere in the Club's Constitution is the Club made a part of the Zimbabwe Republic Police for purposes of administration. It is a separate body. It is governed in terms of its Constitution. The power to bring any action or suits on behalf of the Club are vested in the Club's Board of Trustees not one member of the ^F Board acting in his capacity as an officer of the Regular Police Force with the approval of the Commissioner of Police.

The Constitution does not make the Club subject to the Zimbabwe Republic Police Standing Orders. The action ought to have been taken by the Board of Trustees. The suspension by anyone other than the Board ^G was *ultra vires* the Constitution and so was the application for dismissal. The authority to terminate was therefore based on an illegal action and is therefore, of no force or effect, it is a nullity."

The appellant was dissatisfied with this determination and appeals to this court on grounds set out in the notice of appeal which provide as follows:

"1. The Labour Relations Tribunal erred at law in finding that the ^H

2005 (2) ZLR p41

Chidyausiku CJ

^A Superintendent C.E. Mamera (Superintendent Amenities) suspended the respondent acting on behalf of the Zimbabwe Republic Police, officer of the Commandant and not on behalf of the Zimbabwe Republic Police, Board of Trustees.

2. The Labour Relations Tribunal erred in finding that the Club's Constitution should make provision for the Club to be part of the ^B Zimbabwe Republic Police for administration purposes.
3. The Labour Relations Tribunal erred at law in finding that the Superintendent Amenities acted as an officer of the Regular Force and not on behalf of the Zimbabwe Republic Police Board ^C of Trustees.
4. The Labour Relations Tribunal erred at law in finding that the suspension was not done by the Zimbabwe Republic Police Board of Trustees.
5. The Labour Relations Tribunal erred in finding that the authority to terminate was based on an illegal action and therefore of no force or effect.
6. The Labour Relations Tribunal erred at law in not taking into account the fact that the respondent was guilty of the theft charges against ^D him."

The letter seeking permission to dismiss the respondent from employment reads, in part, as follows:

"Application for order/determination to terminate the contract of employment of Mr Gabriel Manyangadze

£ The above mentioned is employed by the Z R Police Consolidated Fund as Secretary Police Club."

Thereafter, he sets out the grounds for dismissal and concludes by stating:

"It is in view of these serious allegations that I am hereby applying for an order or determination in terms of s 3(d) of SI 371 of 1985 to terminate the contract of employment."

£ The letter is then signed by Mamera, Superintendent Amenities.

The suspension order served on the respondent provided, in part, as follows:

"Suspension Order

I, Superintendent D E Mamera, certify that I have this 23rd day of April 1997 served a Memorandum of Suspension on Mr Gabriel Manyangadze G in the presence of the Acting Secretary ZR Police Club, Assistant Inspector Mutasa.

1. You are hereby suspended without pay from performing duties as Secretary ZR Police Club or in any capacity whatsoever with effect H from today the 23rd April 1997.

2005 (2) ZLR p42

Chidyausiku CJ

2. ... A
3. ...
4. This order shall stand until a determination for or against your dismissal is given by the labour relations officer.

Officer serving order (signed)

C E Mamera Superintendent Amenities." B

It is quite clear from the above documents that Mamera was not acting on his own behalf. He was acting on behalf of the employer of the respondent. The respondent's employer was the principal and he was the agent. It may well be that he was mistaken as to who he thought the respondent's employer was and may not have had specific authority from the principal. The respondent's c employer, the Board of Trustees, subsequently became aware of what Mamera had done and ratified it. Mamera, in his submission to the court, explained that the papers relating to the dismissal of the respondent were circulated to the Board of Trustees at the Police General Headquarters for them to sanction the suspension or refuse to sanction it. If the Board of Trustees had disapproved of Mamera's action they would have refused to sanction his action. It is clear D from the record that the Board of Trustees ratified the action taken against the respondent. The Board of Trustees ratified the action taken by Mamera by conduct and directly in the form of the letter, Annexure "A". In that letter, the Secretary to the Board of Trustees sought to suspend the respondent on identical grounds, which is a clear endorsement of Mamera's action.

The learned President of the Labour Court correctly observed that the E Constitution of the Club does not provide a procedure for the removal from office of the respondent. If such a procedure were provided in the Constitution and Mamera had failed to follow that procedure then his action would have been a nullity for failure to comply with the procedure laid down in the Constitution. Indeed, if that were the case, I would have no difficulty in F concurring with the court a quo that Mamera's actions were a nullity for want of compliance with the Constitution of the Club.

The issue in this case is one of agency. What needs to be determined is whether Mamera was authorised by the respondent's employer to apply for authority to dismiss the respondent. Whether or not he had prior authority is debatable. What is certainly beyond question is that the employer, the G Board of Trustees, ratified his conduct. The principle that ratification of the agent's action has retrospective effect is so trite that it requires no citation of authority.

The learned President of the Labour Court clearly misdirected herself in holding that Mamera's application for dismissal and suspension of the H

2005 (2) ZLR p43

Chidyausiku CJ

A respondent was illegal and, therefore, a nullity. Even if the application for dismissal and suspension did not have the prior authority of the respondent's employer that would not render it illegal. It was simply voidable at the instance of the employer. In a case where the employer subsequently ratifies the application for dismissal and suspension, as is the case here, such ratification retrospectively validates both the application for dismissal and the suspension. B The fact

that Mamera was confused or mistaken as to who was the correct employer of the respondent does not alter the fact that he was acting for a principal or purported principal.

In the result, the appeal is allowed, the order of the labour court is set aside and the determination of the senior labour relations officer is reinstated.

c For the avoidance of doubt, the appellant's dismissal of the respondent is confirmed.

ZIYAMBI JA & GWAUNZA JA concurred.

Sawyer & Mkushi, appellant's legal practitioners

▯ *Mabuye & Co*, respondent's legal practitioners

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Source:

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MAGURENJE v MAPHOSA & ORS 2005 (2) ZLR 44 (H)

2005 (2) ZLR p44

Citation	2005 (2) ZLR 44 (H)
Case No	Judgment No. HB-69-05
Court	High Court, Bulawayo
Judge	Ndou J
Heard	11 October 2004
Judgment	21 July 2005
Counsel	<i>N H Ndlovu</i> , for the applicant <i>A Masawi</i> , for the first respondent <i>C Hikwa</i> , for the third respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Family law — husband and wife — property rights — right of spouse to c dispose of own property — wife selling house registered in her name — husband having personal rights only — when can stop disposal of property

Practice and procedure — affidavit — answering affidavit — when may be submitted — may not be submitted after heads of argument have been ▯ filed unless court gives leave

Practice and procedure — application — serious disputes of fact disclosed on the papers — such disputes of fact not capable of resolution on the papers — discretion of the court in such cases — court may dismiss the application rather than allow the matter to go to evidence E

Property and real rights — ownership — transfer of real property — wife's personal rights against husband — no reason to block the title of the new owner

Headnote

The applicant sought to have the sale of a house set aside. The house had [¶] been registered in the name of his customary law wife (her status was disputed). He remained in the house after she and the applicant had separated. A few years later, she sold the house to the third respondent. The applicant claimed that he had contributed towards the acquisition of the house and that he should have been consulted before the disposal of the house so that he would have a say in relation to the purchase price, [¶] mode of payment and notice period for him to vacate the said house. After heads of argument had been filed, he sought to introduce more evidence by way of an answering affidavit, which was not in proper form. The applicant submitted that he was entitled to do so in terms of the rules.

Held, that the rights of the applicant, if proven, were personal and did not affect the third respondent as a *bona fide* purchaser and a third party. [¶]

2005 (2) ZLR p45

^A The applicant had not averred, let alone proved, that the third respondent was guilty of fraudulent intent. The property was registered in the name of the first respondent. The applicant could only stop disposal of the house if he showed that the first respondent was selling it in order to defeat his just rights. Where there is a genuine transfer, there is no reason where a wife's personal rights against her husband, which are derived [¶] from her status, should enter the field of real property so as to clog the title of an owner (*dicta per* Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] 2 All ER 472 (HL) followed).

Held, further, that in application proceedings, the filing of an answering affidavit after the parties have filed heads of argument may only be done in exceptional cases and only with the leave of the judge. To allow a party ^c to file an affidavit at that stage would defeat the whole purpose of filing heads of argument as set out in r 238(1)(a) of the High Court Rules 1971. For departure from the proper sequence, the indulgence from court or judge is necessary. An applicant should apply for condonation. Without such an application, the judge cannot, on his own initiative, allow the ^d answering affidavit to form part of the record.

Held, further, that where an applicant must be taken to have realised that there were serious factual disputes, not capable of resolution on the papers, which disputes of fact were material and inevitable, it is within the discretion of the court to dismiss the application rather than to allow the matter to go to evidence.

Cases cited [¶]

Caldwell v Chelcourt Ltd 1965 (1) SA 304 (N)

James Brown & Hamer v Simmons NO 1963 (4) SA 656 (A)

Masukusa v National Foods Ltd & Anor 1983 (1) ZLR 232 (H)

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

[¶] *Muzanenhemo & Anor v Katanga* 1991 (1) ZLR 182 (S)

Muzerengi v Muzerengi 1992 (1) ZLR 58 (H)

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

Nyazorwe v Guta & Ors HH-234-88

Rice v Rice 1957 R & N 514 (SR)

[¶] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1158 (T)

Rushizha v Hove & Ors HH-55-95

Satellite Television Users' Assn v PTC 1991 (2) ZLR 226 (H)

[¶] *S v Munn* 1973 (3) SA 734 (NC)

2005 (2) ZLR p46

Ndou J

Legislation considered ^A

High Court Rules 1971 (RGN 1047 of 1971), rr 4C, 226, 234(1) and 238(1)(a)

Case information

N H Ndlovu, for the applicant

A Masawi, for the first respondent

C Hikwa, for the third respondent ^a

Judgment

NDOU J: On 23 July 2003, the applicant obtained a provisional order, *ex parte*, in the following terms:

“(1) Terms of the order sought

That you would show cause to the honourable court why a final order ^c should not be made on the following terms:

1. That the agreement of sale signed by the first and third respondents purporting to alternate (*sic*) the right title and interest and to stand No. 4278 Lobengula, Bulawayo be and is hereby declared null and void.
2. That the first respondent be and is hereby ordered to refund to ^d the third respondent the sum of \$2 million alleged to have been paid by to (*sic*) the first respondent.
In the event a cession has been made in favour of the third respondent, by the second respondent, the second respondent is hereby ordered to delete the name of the third respondent and replace it with that of the first respondent ^e.
3. The first respondent is ordered to pay the costs of this application on an attorney and client scale.

(2) Interim relief granted

Pending the return date of this order, the applicant is hereby granted the following relief:

4. The first, second and third respondents are hereby interdicted ^f from registering the right, title and interests in and to stand No. 4287 Lobengula West in the names of the third respondent.
5. The fourth respondent is interdicted from registering any transfer of stand No. 4287 Lobengula West, Bulawayo to the third respondent, or any third party.” ^g

On 11 October 2004, I discharged the aforesaid provisional order with costs. The applicant has requested that I provide full reasons for the order. This judgment provides the reasons.

The background facts leading to this application are the following. The exact nature of the relationship between the applicant and the first respondent is in dispute. The applicant contends that they were customarily married. The ^h

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Ndou J

A first respondent contends that they were just cohabiting. The parties separated in 1995. On 16 September 2002, the first respondent entered into an agreement of sale with the third respondent. What remained was the transfer of the stand to the third respondent, which transfer was impeded by the issuance of the provisional order in this matter. The applicant made this application on the basis of his perceived rights as the customary law husband of the first ^b respondent, and also alleged that he contributed to the purchase of the house in dispute. All this is disputed by the first respondent. In other words, the applicant’s case is that, as a husband in an unregistered customary law union, he ought to have been consulted before the disposal of the house so that he would have a say in relation to the purchase price, mode of payment and notice ^c period for him to vacate the said house. At the time of launching his application, the applicant was already aware that the house had been sold and that the first respondent disputed the existence of any marriage relationship between her and the applicant. The house in dispute is registered in the sole names of the first respondent. The third respondent’s case is simply that at the time she entered into the agreement of sale with the first respondent on ^d 16 September 2002, there was not any encumbrance to the rights and interests to the house in dispute that she was aware of. She acted *bona fide* in the agreement, i.e., she is an innocent third party purchaser.

The preliminary issue that arose is the filing of the applicant’s answering affidavit (although the applicant called it replying affidavit). This document was filed after the parties had filed heads of argument. The filing is opposed ^e by the respondents on the basis that it is out of time and out of sequence. In fact, even before considering the legal arguments of the parties on this issue, it seems

to me that the document filed is not even an affidavit. On this basis alone, the application to expunge this answering affidavit should succeed. There is not substantial compliance with the formalities: see *S v Munn* 1973 (3) SA 734 (NC) ^F and *Caldwell v Chelcourt Ltd* 1965 (1) SA 304 (N) at 307E; *Satellite Television Users Assn v PTC* 1991 (2) ZLR 226 (H) and *Nyazorwe v Guta & Ors* HH-234-88. I agree with the applicant's contention that there appears to be no time in the Rules of this court for filing an answering affidavit (unlike an opposing affidavit) save only that the answering affidavit must be filed at least ten days before the matter is set down for hearing: see Order 32 ^G r 234(1).

However, as alluded to, this is not the only issue here. The applicant filed the answering affidavit after the parties had filed heads of argument. In fact, a substantial portion is devoted to answering the legal argument raised in the respondents' heads of argument. In my view, the filing of an answering ^H affidavit after the parties have filed heads of argument can only be done in

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Ndou J

exceptional cases and only with the leave of the judge. The applicant did not seek ^A such leave. Instead, he submitted that he was entitled to do so in terms of the rules. He is mistaken as such a procedure would defeat the whole purpose of filing heads of argument as set out in Order 32 r 238(1)(a). For departure from the proper sequence, the indulgence from court or judge is necessary. In this record, I refer to *James Brown & Hamer (Pty) Ltd v Simmons* ^B NO 1963 (4) SA 656 (A) where at 660D-F Ogilvie Thompson JA said:

"It is in the interest of the administration of justice that the well known and well established general rules regarding the number of sets and *the proper sequence* of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: *some flexibility controlled by the presiding judge exercising his* ^C *discretion* in relation to the facts of the case before him, must necessarily also be permitted" (my emphasis).

There is no proper and satisfactory explanation for not filing the "answering affidavit" in its proper sequence. Had I been satisfied in this regard I would have allowed the applicant to remedy the defect in the document and ensured that it is properly in affidavit form: see *Rice v Rice* 1957 R&N 514 (SR) and ^D *Muzerengi v Muchekwa* 1992 (1) ZLR 58 (H). I could have authorised departure from the rules in terms of Order 1 r 4C if necessary. But I cannot do so on my own initiative; the applicant has to make an application for condonation. He has not done so. In the circumstances I ordered that the answering "affidavit" be expunged.

Coming to the substantive order as already alluded to, the applicant bases his ^E application on the existence of an unregistered customary marriage between him and the first respondent. This is disputed by the first respondent. This type of dispute of fact cannot be resolved on the papers on account of the unregistered nature of alleged marriage. Further, the applicant bases his claim on his alleged contribution towards the purchase of the house in dispute. This ^F is also disputed by the first respondent. The nature of these factual disputes are such that *viva voce* evidence is necessary for their resolution. They cannot be resolved by the adoption of a robust approach. Further, the founding affidavit does not deal with the issue whether or not the third respondent is an innocent third party purchaser. Be that as it may, the third respondent's position is that she was not aware, at the time she entered into agreement of ^G sale, that the applicant had an interest in the matter. This is another factual dispute not capable of resolution on the papers. The applicant should have realised that these serious factual disputes are not capable of resolution on the papers at the time he launched the application. These material disputes of fact were foreseeable and inevitable. With the benefit of legal representation, ^H

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Ndou J

^A he deliberately initiated these proceedings by way of application when he knew that there must necessarily arise fundamental disputes of fact: see *Nyazorwe v Guta & Ors supra* and *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162.

In the circumstances, it is within my discretion as to whether to dismiss the application or to allow the matter to go to evidence – see *Masukusa v National* ^B *Foods Ltd & Anor* 1983 (1) ZLR 232 (H): see r 226. *In casu*, the disputed unregistered marriage, if proven, will only afford the applicant a personal right. This is so because the first respondent was involved in a lawful transaction with the

third respondent, and, therefore, applicant even as a spouse does not have real rights. I refer to the authoritative pronouncement of the Supreme Court:

“Where there is a genuine transfer, there is no reason why the wife’s personal rights against her husband, which are derived from her status, should enter the field of real property law as to clog the title of an owner.”

See *National Provincial Bank v Aisworth* [1965] 2 All ER 472 per Lord Wilberforce and quoted with approval in *D Muganga v Sakupwany* 1996 (1) ZLR 217 (S). The personal rights of the applicant, if proven, are personal and as such do not affect the third respondent as a *bona fide* purchaser and a third party. The applicant has not averred, let alone proved, that the third respondent is guilty of fraudulent intent. Proof of ownership for immovable property is registration. The property was registered in the name of the first respondent. In any event, the applicant can only stop disposal of the house if he shows that his “wife” is doing so in order to defeat his just rights: see *Muzanenhano & Anor v Katanga* 1991 (1) ZLR 182 (S) and *Rushizha v Hove & Ors* HH-55-95. From the foregoing, the application is hopelessly without merit.

Accordingly, I discharged the provisional order as shown above.

Lazarus & Sarif, applicant’s legal practitioners

Masawi & Associates, first respondent’s legal practitioners

G Mabhikwa, Hikwa & Nyathi, third respondent’s legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/MAVANGIRA v OKA ANOR 2005 (2) ZLR 50 (H)

MAVANGIRA v OKA ANOR 2005 (2) ZLR 50 (H)

2005 (2) ZLR p50

Citation	2005 (2) ZLR 50 (H)
Case No	Judgment No. HB-73-05
Court	High Court, Bulawayo
Judge	Ndou J
Heard	30 May 2005; 30 June 2005
Judgment	21 July 2005
Counsel	<i>M Munjanja</i> , for the applicant <i>N Mazibuko</i> , for the first respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Practice and procedure — execution — stay of — application for stay of c execution pending hearing of appeal in Supreme Court — no appeal pending — whether application can be granted

Practice and procedure — parties — fugitive from justice — who is — litigant evading arrest and civil imprisonment — not entitled to approach court D

Headnote

The applicant had been imprisoned for contempt of court after he had failed to comply with the terms of a judgment given against him. He filed a notice of appeal and persuaded the second respondent, the Registrar, to issue a warrant of liberation. The notice of appeal was fatally defective and invalid. The first respondent sought to have him re-arrested and E imprisoned. The applicant fled and evaded arrest. From hiding he launched the current application, seeking a stay of execution pending the hearing of his appeal.

Held, that, as conceded by the applicant, the notice of appeal was invalid and there was thus no appeal pending. It would not be proper to stay execution pending an appeal that had not been filed. F

Held, further, that by placing himself beyond the reach of the court, the applicant had made himself a fugitive from justice. Were the court to entertain a suit at the instance the applicant it would be stultifying its own processes. The application accordingly had to be dismissed with costs. G

Cases cited

Dos Santos v De Andrade HB-101-03

Hattingh v Pienaar 1977 (2) SA 182 (O)

Jensen v Acavalos 1993 (1) ZLR 216 (S)

Macfoy v United Africa Co Ltd [1961] 3 All ER 1169 (PC)

Maluleke v Dupont NO & Anor 1966 RLR 620 (A); 1967 (1) SA 574 (RA) H

2005 (2) ZLR p51

Ndou J

A *Min of Home Affairs v Bickle & Ors* 1983 (2) ZLR 400 (S); 1983 (2) SA 457 (ZS)

S v McNab 1986 (2) ZLR 280 (S)

Case information

M Munjanja, for the applicant

N Mazibuko, for the first respondent

Judgment

B **NDOU J:** On 16 June 2004, and in case No. HC 557/03, the first respondent obtained judgment against the applicant in terms of which the latter was to deliver a vehicle specified, or failing which pay the monetary value of the vehicle. This order, was by consent. The applicant, after the issuance of this order received the vehicle in dispute. He did not hand it over to the first c respondent as ordered by the court. Neither did he comply with the alternative prayer of paying its monetary value. The first respondent executed the judgment in HC 557/03. There was a *nulla bona* return by the Deputy Sheriff. The first respondent instituted civil imprisonment proceedings. The first respondent was successful in having the applicant imprisoned – Case No.HC 59 / 05. The applicant was arrested on 12 May 2005 and lodged at Bulawayo D Prison. The applicant filed a notice of appeal with the Supreme Court on 17 May 2005. Acting on that notice of appeal, the applicant's legal practitioner of record, managed to convince the Assistant Registrar of this court into issuing a Warrant of Liberation. The applicant was duly released. After his release, the first respondent's legal practitioner of record was informed of that fact. He brought it to the attention of the applicant's legal practitioner that the notice E of appeal was invalid. In para 6 of his founding affidavit the applicant concedes that the notice of appeal filed on 17 May 2005 is invalid. It is beyond dispute that the applicant was released on the basis of a defective notice of appeal. In the circumstances the first respondent instructed the second respondent to re-arrest the applicant. The second respondent attempted to execute on the F applicant (on 17 May 2005) at the National Merchant Bank and the

applicant fled and has continued to evade arrest. On 20 May 2005, he launched this application whilst still in hiding from the reach of the second respondent. He is a fugitive from justice. In this application, he seeks stay of execution of the judgment in Case No. HC 59/05 pending the hearing of the appeal in the Supreme Court.

¶ The first point is that there is currently no appeal against the decision in Case No. HC 59/05. In his own words, the notice of appeal of 17 May 2005 is invalid. There was no subsequent notice of appeal filed at the time of this application. Even his founding affidavit does not suggest that the defect was regularised. It is, therefore, wrong and misleading for his legal practitioner to

2005 (2) ZLR p52

Ndou J

argue in court that the applicant filed an appeal on 17 May 2005. The applicant, ^A under oath has already conceded that the notice of appeal is invalid. The notice of appeal does not comply with the rules and the Supreme Court has stated that such notice of appeal is fatally defective and invalid. That it is not only bad but incurably bad: see *Jensen v Acavalos* 1993 (1) ZLR 216 (S) at 219H-220D; *S v McNab* 1986 (2) ZLR 280 (S); *MacFoy v United Africa Co Ltd* ^B [1961] 3 All ER 1169 (PC) at 1172I and *Hattingh v Pienaar* 1977 (2) SA 182 (O) at 183. Mr *Munjanja*, for the applicant, relied on the decision in *Dos Santos v De Andrade* HB-101-03. The facts of that case are distinguishable from those in this matter. In the *Dos Santos* case, there was a pending application for condonation seized with the Supreme Court. In this case, the applicant in his own affidavit conceded that the notice of appeal is defective. There is no issue ^C pending determination by the Supreme Court. In the circumstances, I do not think it proper to stay execution pending an appeal that has not been filed.

The second ground on which the application should fail is on account of his flight from arrest by the Deputy Sheriff. The applicant is a fugitive from justice. According to his legal practitioner he filed this application "out of caution" to avoid arrest. In *Maluleke v Dupont NO & Anor* 1967 (1) SA 574 (RAD) at ^D 577C-578A Fieldsend AJA (as he then was) said:

"One of the few reported cases on this topic – *Mulligan v Mulligan* 1925 WLD 164 – although it was concerned with a civil litigant who had estreated his bail and fled the country pending appeal, an appeal against a criminal conviction, based the court's refusal to allow such a person to ^E continue his action upon the very much wider ground than merely his flight from criminal conviction. The important passage in the judgment of De Waal, is at pp 166-168, and is as follows:

'... there is very little difference, if any, between a person declared to be such and a fugitive from justice, as both are outside the law for contempt in wilfully avoiding the execution of the process of the court of the land. ^F Similarly, the difference, if any, is small between banishment or involuntary exile on the one hand and avoiding the processes of the law through flight out of the country (voluntary exile) or hiding within the jurisdiction of the court. In either case the person, whether he be in exile or a fugitive from justice, is not amenable to the process of the court and as such, in my opinion, cannot invoke the authority of the court for the purposes of establishing his legal rights. Before a person seeks to establish his ^G rights in a court of law he must approach the court with clean hands; where he himself, through his own conduct makes it impossible for the process of the court (whether criminal or civil) to be given effect to, he cannot ask the court to set its machinery in motion to protect his civil rights and interests. Were it not so, such a person would be in a much more advantageous position than an ordinary applicant, or even a ^H

2005 (2) ZLR p53

Ndou J

^A peregrinus who is obliged to give security. He would have all the advantages and be liable to none of the disadvantages of an ordinary litigant, because, if unsuccessful in his suit, his successful opponent would be unable to attach either his property, supposing he had any, or his person, in satisfaction of his claim for costs. Moreover, it is totally inconsistent with the whole spirit of our judicial system to take cognisance ^B of matters conducted in secrecy ... Were the court to entertain a suit at the instance of such a litigant it would be stultifying its own processes ..."

The applicant has placed himself beyond the reach of the court. He is aware of process issued out against him. He has deliberately fled when the Deputy Sheriff of this court attempted to execute process of this court on him. He wants ^C this court to determine his matter whilst he is hiding from its authority. He has to be considered as a fugitive from justice: see *Minister of Home Affairs v Bickle* 1983 (2) ZLR 400 (S); 1983 (2) SA 457 (ZS). He has not given an explanation for his flight in his papers. The reason was given from the bar by his counsel. In any event, even this explanation is far from being satisfactory.

▯ Accordingly, the application is dismissed with costs.

Cheda & Partners, applicant's legal practitioners

▮ *Calderwood, Bryce Hendrie & Partners*, respondent's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/ATTORNEY-GENERAL v MAKAMBA 2005 (2) ZLR 54 (S)

ATTORNEY-GENERAL v MAKAMBA 2005 (2) ZLR 54 (S)

2005 (2) ZLR p54

Citation	2005 (2) ZLR 54 (S)
Case No	Judgment No. S-30-05
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Malaba JA and Gwaunza JA
Heard	26 May 2005
Judgment	29 July 2005
Counsel	<i>V Shava</i> , for the appellant <i>G Chikumbirike</i> , for the respondent
Case Type	Criminal appeal
Annotations	Link to case annotations

Flynote

Criminal procedure — charge — exceptions, provisos and exemptions c — when a statutory provision may be regarded as such rather than as part of the substantive offence — Exchange Control Regulations 1996 — s 11(2) — negative element of the offence does not have to be alleged and proved by the State

Criminal procedure — application for discharge of an accused at the ▯ conclusion of the State case — bases for granting such an application

Criminal procedure — review — incomplete proceedings — intervention by a superior court in uncompleted proceedings of a lower court—should only be entertained in exceptional circumstances

Exchange control — Exchange Control Regulations SI 109 of 1996 — s 11 ▮ — making of payment outside the country — not applicable to payments made from "free funds" — onus on accused to show that payment was made with free funds

Headnote

The respondent was being tried before the regional court on charges under s 11(1) of the Exchange Control Regulations. This states that "Subject ▮ to subsection (2)" a Zimbabwean resident is not allowed to make payments outside the country unless authorised. Subsection (2) states that this restriction does not apply to payments made with "free funds". A number of payments were admittedly made by the respondent. Before the close of the State case, the defence made the bald allegation that the ▮ payments were made with free funds, but did not elaborate. The

magistrate refused an application for discharge at the end of the State case. The respondent took the decision on urgent review to the High Court, which upheld the respondent's application to set aside the magistrate's decision. The Attorney-General appealed to the Supreme Court. ^h

2005 (2) ZLR p55

- ^a *Held*, that the phrase "subject to subsection (2)" meant that the prohibition in subs (1) applied in all circumstances except where those described in subs (2) existed. Subsection (2) did not create a negative element of the offence set out in subs (1) which had to be alleged and proved by the State. It was not an element of the offence and failure by the State to incorporate its particulars in the charge sheet did not affect the disclosure ^b of the offence by the charge as framed. Section 11(2) created a special defence, the onus of proving which rested on the respondent in terms of s 146(2)(b) of the Criminal Procedure and Evidence Act.
- Held*, further, that one of the principles to be adopted in determining whether an exempting provision which accompanies the description of an offence ^c is actually an exception to the offence or an additional element in the offence is to decide whether, if all references to the exceptions relevant to the case before the court is eliminated from the indictment, what remains of the indictment discloses the offence. In this situation, if subs (2) did not exist, the remainder of the section would clearly create an offence of general application.
- ^d *Held*, further, that the general rule is that a superior court should intervene in uncompleted proceedings of the lower courts only in exceptional circumstances of proved gross irregularity violating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means or where the interlocutory decision is clearly wrong as to seriously prejudice the rights of the litigant.
- ^e *Held*, further, that in dealing with applications for the discharge of an accused at the close of the case for the prosecution, there is a sound basis for granting such an application where:
- (1) there is no evidence to prove an essential element of the offence;
 - (2) there is no evidence on which a reasonable court, acting carefully, ^f might properly convict;
 - (3) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely action it.

Cases cited

Chinamora v Angwa Furnishers (Pvt) Ltd & Ors 1996 (2) ZLR 664 (S)

^g *Ismail v Additional Magistrate, Wynberg and Another* 1963 (1) SA 1 (A)

Ndlovu v Regional Magistrate, Eastern Division & Anor 1989 (1) ZLR 264 (H)

R v Beebe 1944 AD 333

^h *S v Kachipare* 1998 (2) ZLR 271 (S)

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Legislation considered ^a

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 146(2)(b)

Exchange Control Act [*Chapter 22:05*], s 5 (1)(a)(i)

Exchange Control Regulations 1996 (SI 109 of 1996), s 11(1) & (2)

Case information

V Shava, for the appellant ^b

G Chikumbirike, for the respondent

Judgment

MALABA JA: This appeal is from the judgment of the High Court delivered on 24 August 2004, setting aside the decision of the Regional Magistrate Court Eastern Division ("the Regional Court") dismissing an application for the discharge of the respondent at the close of the case for the prosecution. The respondent had been charged on 16 June 2004 with eleven counts of contravening s 5(1)(a)(i) of the Exchange Control Act [*Chapter 22:05*] ("the Act") as read with the Exchange Control Regulations SI 109 of 96 ("the Regulations").

He pleaded guilty in the regional court to the first six counts of contravening s 4(1)(a)(i) of the Regulations, in that he sold foreign currency to Telecel D Zimbabwe, an unauthorised dealer.

To the other five counts alleging the contravention of s 11(1)(a) of the Regulations in that being a Zimbabwean resident without the authority of the exchange control authority, he unlawfully made payments outside Zimbabwe, the respondent pleaded not guilty. Where convenient, I shall refer to the five E counts as "the charge".

Section 11(1)(a) of the Regulations reads:

"11(1) Subject to subsection (2) unless otherwise authorised by an exchange control authority, no Zimbabwean resident shall —

- (a) make any payment outside Zimbabwe, or F
- (b) incur any obligation to make a payment outside Zimbabwe
- (2) Subsection (1) shall not apply to
 - (a) any act done by an individual with free funds which were available to him at the time of the act concerned; or
 - (b) any lawful transaction with money in a foreign currency account." G

Section 2 of the Regulations defines "free funds" as "money which is lawfully held outside Zimbabwe by a Zimbabwean resident and which was acquired by him otherwise than as the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe". H

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Malaba JA

A The facts on which the five charges denied by the respondent were based were set out in paras 11 to 17 of the outline of the case for the prosecution produced in court as Annexure "A". They were to this effect:

- "11. On 24 November 1998, the accused entered into an agreement with Malcolm David Willets of 3 The Gate House, the Mooring, Myton Road, Leamington Spa, Warwickshire to purchase a house located B at No. 19 Willowmead lane, Colne Valley, Harare, Zimbabwe. The purchase price was 210 000 pounds and the deposit required was 30 000 pounds. The balance of the purchase price was to be paid in five monthly instalments until 1 April 1999 and vacant possession of the house was to be given to accused on 30 April 1999. The agreement was concluded in the United Kingdom. The accused eventually C bought the property and it was transferred from Skanska Jensen International (Africa) (Pvt) Ltd to Dazeout Investments (Pvt) Ltd on 20 April 1999 under Deed of Transfer No. 3367/99. The accused is the Director of Dazeout Investments (Pvt) Ltd.
- 12. When the accused made payments to the seller of the property he had not first obtained authority of the Exchange Control Authority which D is a requirement in terms of the Exchange Control Regulations SI 109/96.
- 13. On 9 June 1999, the accused made a payment of DM 16000 to BMW Parklane Ltd in London, United Kingdom. The bank transfer from accused's account was done by Peter Uhler at the request of the E accused person. The transfer of DM 16 000 was a deposit for a motor vehicle the accused was purchasing.
When the accused caused the transfer to be made he had not first obtained authority of the Exchange Control Authority, which is a requirement in terms of the Exchange Control Regulations SI 109 of 96. F
- 14. Sometime in October 1999, the accused made a total payment of EURO 24431.29 (DM 47783.45) to the account of Daimler Chrysler AG Stuttgart 11/16656 being part payment for the purchase of a Mercedes Benz ML 430. The product number was 09649 10008 for the ML 430. Daimler Chrysler AG Stuttgart sent an e-mail to Zimoco Limited Harare among other things confirming receiving EURO 24431.29 (DM 47783.45) to date as part of the payment for the vehicle on product G No. 09649 10008 ML 430. When the accused made the payments he had not obtained the authority of the Exchange Control Authority which is a requirement in terms of the Exchange Control Regulations SI 109/96.

- 15 On 3 November 1999, the accused made a payment of EURO 28525.76 ^h being an outstanding balance for the purchase of a vehicle Mercedes

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Benz ML 430 product No. 09-649-10008. The payment was made to A Daimler Chrysler AG Stuttgart's account No. 11/16656. The accused requested Mr P Uhler to make the necessary bank transfers from his account to the sellers' account. Daimler Chrysler AG Stuttgart confirmed receiving the payment of EURO 28525.76 on product No. 09-649-10008.

When the accused caused the transfer of EURO 28525.76 as payment ^b of the outstanding balance he had not first obtained authority of the Exchange Control Authority, which is a requirement in terms of the Exchange Control Regulations SI 109 of 96.

16. On 15 October 2002, the accused made a payment of £12650 to the account of HSBC, 26 North Station Road, Colchester account number ^c 11106481. The bank transfer from accused's account was done by C Winning at the request of the accused person. The payment of £12650 was part of the purchase price of a motor vehicle the accused's daughter Chiedza Makamba was buying from Citygate Dealerships Ltd ^{t/a} Citygate Colindale.

When the accused made the payment, he had not first obtained the ^d authority of the Exchange Control Authority which is a requirement in terms of the Exchange Control Regulations SI 109 of 96.

17. The accused person had no right to act in the manner he did".

The respondent excepted to the charge on the ground that it did not disclose an offence cognisable by the court. The contention was that it was an essential ^e averment, which ought to have been made in the charge, that the respondent did not make the payments outside Zimbabwe with "free funds". Mr *Chikumbirike* for the respondent argued that failure by the State to allege that fact produced a fatally defective charge which did not disclose an offence. Mr *Kandemiri* for the State argued that it was not necessary for the prosecution to aver that the respondent did not use free funds to make payments outside ^f Zimbabwe because that matter was an exception, the onus of proving which rested on the respondent.

Mr *Kandemiri* relied on the provisions of s 146(2)(b) of the Criminal Procedure and Evidence Act [Chapter 9:07] ("the Code") to the effect that:

"any exception, exemption, proviso, excuse or qualification, whether it ^g does or does not accompany in the same section the description of the offence in the enactment creating the offence, may be proved by the accused, but need not be specified or negatived in the indictment, summons or charge, and if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the prosecution." ^h

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^a The regional magistrate accepted the submission by State counsel and held that s 11(2) of the Regulations created a special defence the onus of proving which rested on the respondent. The decision of the learned regional magistrate was based on the correct interpretation of s 11(2) of the Regulations, as read with s 146(2)(b) of the Code.

The governing phrase "subject to subsection (2)" can only mean "Except as ^b provided for by subsection (2)" or to similar effect, "Without prejudice to what is provided for by subsection (2)". In *Chinamora v Angwa Furnishers (Pvt) Ltd & Ors* 1996 (2) ZLR 664 (S) at 689 D – F, Gubbay CJ said:

"The phrase 'subject to' is a simple expedient which subjects the provisions of the subject section to the provisions of the master section. Where there ^c is a clash, the concept shows which of the two takes effect". This much emerges clearly from the judgment of Miller JA in *S v Murwane* 1982 (3) SA 717 (A) at 747 H:

"The purpose of the phrase "subject to" ... is to establish what is dominant and what subordinate or subservient; that to which a provision is "subject", is dominant – in case of conflict it prevails over that which ^d is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation."

In this case, the phrase "subject to subsection (2)" means that the prohibition in subs (1) applies in all circumstances except where those described in subs (2) existed. Subsection (2) does not create a negative element of the offence set out in subs (1) which had to be alleged and proved by the

State. It is not an ^E element of the offence and failure by the State to incorporate its particulars in the charge sheet did not affect the disclosure of the offence by the charge as framed.

One of the principles to be adopted in determining whether an exempting provision such as subs (2) which accompanies the description of an offence ^F is actually an exception to the offence or an additional element in the offence is to decide whether if all references to the exceptions relevant to the case before the court is eliminated from the indictment, what remains of the indictment discloses the offence. If subs (2) was eliminated from the regulation the remaining portion of it would provide that any Zimbabwean resident who makes payment outside Zimbabwe without the authority of the exchange ^G control authority to do so shall be guilty of an offence. That portion of the Regulation would clearly create an offence in express terms and it would apply to all Zimbabwean residents generally. From the form in which the provisions of s 11 of the Regulation were cast, the legislature must be taken to have known ^H of the provisions of s 146(2)(b) of the Code: see *R v Beebe* 1944 AD 333 at 336.

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The onus was on the respondent who had peculiar knowledge of them to ^A prove, on a balance of probabilities, the requirements of the exemption in subs (2). These were that payments were made by him as a Zimbabwean resident in his individual capacity:

- " (a) from money lawfully held by him outside Zimbabwe;
- (b) which was available to him at the time of the payment; and ^B
- (c) was acquired by him otherwise than by way of proceeds from any trade, business or other gainful occupation or activity carried on by him in Zimbabwe."

After the dismissal of the exception to the charge by the respondent, evidence placed before the court up to the time the prosecution closed its case was this. An admission of facts contained in paras 11 to 17 of the outline of the case ^C for the prosecution was made. The respondent's legal practitioner said:

"The facts for count 2 that is from para 11 are admitted. We have an agreement of sale to be tendered as exhibit 2."

Exhibit 2 is the agreement mentioned in para 11 of the outline of the State case as having been entered into by Malcolm David Willets ("Willets") as the seller ^D and the respondent as the purchaser of stand No. 19 Willowmead Lane, Colne Valley, Harare ("the property"). In terms of the agreement, which was signed by the parties on 24 November 1998, the respondent undertook to pay a deposit of £30 000 to the "seller's solicitors as agents for the seller forthwith". The word "forthwith" means that the money was paid by the respondent at the time the agreement was signed. The signatures to the agreement were in ^E themselves evidence of the deposit having been paid to the seller's solicitors on 24 November 1998. The balance of the purchase price of £210 000 was payable by way of five installments of fixed amounts on the appointed dates. The final installment was to be paid on 1 April 1999. Time of payment was made of essence suggesting that the schedule of payments had to be strictly ^F adhered to. Clause 4 of the agreement provided that the seller's solicitors had to hold the payments in the United Kingdom "as stakeholders pending completion of the Harare sale and the seller giving the buyer vacant possession of the Harare Property on 30 April 1999".

The Harare sale" was indeed completed on 20 April 1999 after the date when the last installment towards the purchase price would have been paid. The ^G transfer of the property was now from Skanska Jansen International (Africa) Ltd (Skanska International) to Dazeout Investments (Pvt) Ltd, (Dazeout Investments). The purchase price was now recorded as \$6 500 000. The respondent had become the director of Dazeout Investments on 27 January 1999. ^H

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^A At the time the agreement of sale was entered into by the parties on 24 November 1998, they must have known that the property was held by Skanska International under Deed of Transfer No. 2712/96 dated 16 April 1996. Hence reference in the agreement to "The Harare Sale". The admission of facts in para 11 of the outline of the case for the prosecution; the terms of the agreement of sale and the timing of the transfer of the property supported the inference of ^B the fact that the payments set out in the agreement were made to Willets by the respondent outside

Zimbabwe. In fact, the transfer agreement was in itself proof of the fact that the payments in terms of the agreement of sale had been made.

Formal admission was also made by the respondent of the facts relied upon c by the State in relation to the other counts. He admitted that, being a Zimbabwean resident, he made the payments mentioned in the outline of the State case to BMW Parklane Ltd, Daimler Chrysler AG Stuttgart and Citygate Dealerships Ltd t/a Citygate Colindale without having first obtained the authority of the exchange control authority.

The State also produced in evidence a document titled "Schedule of Payments" d (Exhibit 8). The document contained an agreement between Telecel International Ltd (Telecel International) and the respondent in these terms:

"Payment Schedule"

Agreed on this day 16 January 1999 for the acquisition of 20% of Telecel Zimbabwe (Pvt) Ltd (TZL) by Telecel International Ltd a company e registered under the laws of the British Virgin Island, with its registered office at Mill Mall Roadtown, Tortola British Virgin Islands (hereafter referred to as "TIL") represented by Miko Rwayitare and Denis de Penthyen O'Kelly and James Makamba, an individual resident in Harare, Zimbabwe.

The following payment schedule reflects *the payments as defined in the f various agreements between the parties:*

1.	US\$250 000	Due to Empowerment Corporation for the acquisition of the 20% of TZL's shares.
2.	US\$750 000	Due to James Makamba for the acquisition of the 20% of TZL's shares
3.	US\$100 000	Due to James Makamba as the first 2 of the 10 times US\$50 000 for the acquisition of the 20% of TZL's shares
4.	US\$400 000	Payments already advanced
	US\$700 000	Subtotal due
5.	US\$168 000	Due to James Makamba as the first 4 of the 12 times US\$41 600 due for the success fee.
	US\$868 000	Due for payment by 22 January 1999."

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The schedule of payments was produced in evidence to show that the payments made by the respondent outside Zimbabwe may have been with money received from Telecel International. b

There was also placed before the regional court the bald allegation by the respondent that the money he used to make the payments outside Zimbabwe was from "free funds". Further particulars on the sources of the "free funds" were sought by the prosecutor but the respondent's legal practitioner said that no further information could be provided other than that the "free funds" were acquired otherwise than as proceeds from "trade, business or other c gainful occupation or activity carried on" by the respondent in Zimbabwe.

It was in the light of the evidence as narrated above that Mr *Chikumbirike* applied for the discharge of the respondent at the close of the case for the prosecution in terms of s 198(3) of the Code. It reads:

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

The substance of the argument in support of the application was directed at showing that there was no evidence that the respondent had committed the offences charged against him. The contention was that the State had not ^ε shown that the payments made by the respondent outside Zimbabwe were not with "free funds". It was also argued that there was no proof of actual payments having been made to Willets. The property was after all bought by Dazeout Investments from Skanska International, so went the argument. The contention was further made that the payments mentioned in exhibit 8 related ^ε to what was still to be agreed upon by the parties. It must be pointed out that the submission that there was no evidence of payments to Willets contradicted the admission of that fact supported by a half hearted assertion that "free funds" were used to make the payments.

Mr *Kandemiri's* submission was that the respondent had not alleged facts on which his defence was based. The court had no material on which to decide ^ε whether the respondent's defence could possibly be true. He contended that the evidence adduced by the State was sufficiently probative of the essential elements of the offence charged against the respondent for a reasonable court acting carefully to convict him. The effect of his submission was that the position at the close of the case for the prosecution was one where there was evidence of essential elements of the offences having been established ^h

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^a against a defence of a statutory exemption which had not been disclosed on the facts to the court.

The regional magistrate dismissed the application. In the reasons for judgment, she said:

"The accused's defence is that the funds that he used in making the payments were free funds. Both the State and the court have no idea what ^b the source of the funds alleged to be free funds is. A mere assertion cannot amount to a defence unless there are facts to prove/confirm it. In the absence of such evidence by the defence, the court cannot find fault with the inference being sought by the State. The accused thus has a case to answer."

^c The respondent opened his case by giving evidence on oath. In the course of his examination in chief, a question arose as to the admissibility in evidence of a letter written by Mr O'Kelly who was not available to give *viva voce* evidence and be cross examined on the veracity of its contents. The regional magistrate held that the letter was not admissible. Thereafter, the proceedings were adjourned to 29 July 2004.

^d On 28 July, the respondent made an urgent chamber application to the High Court for the review of the decision by the regional magistrate refusing to discharge him at the close of the case for the prosecution. He also sought a review of the decision declaring the letter written by Mr O'Kelly inadmissible in evidence. The application sought to persuade the High Court to exercise its review powers under s 26 of the High Court Act [*Chapter 7:06*] on the ^ε ground of gross irregularity in the decision of the regional court.

The relief sought was in the terms that it be ordered that:

- "1. the judgment of the first respondent dismissing the application for discharge be and is hereby set aside;
2. there be an order that the applicant be discharged and as he had ^f pleaded to the second charge, that he be found not guilty and acquitted;
3. upon service of this order upon the officer-in-charge or any member of the Zimbabwe Prison Service at the reception desk at Harare Remand Prison that applicant be released forthwith;
4. alternatively in the event that the applicant is not found not guilty and ^g discharged as in the foregoing paragraphs;
- 4.1 that Annexure 'B' is hereby declared admissible in evidence in terms of s 282 of the Criminal Procedure and Evidence Act."

After consideration of submissions which were on the same points as had been argued before the regional court in the application for the discharge of ^b the respondent at the close of the case for the prosecution, the learned judge

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held that there was no evidence on which a reasonable court acting carefully ^a might have convicted the respondent. He concluded that the regional magistrate ought to have ordered the discharge of

the respondent at the close of the case for the prosecution. Accordingly, he granted the respondent the relief sought. He did not find it necessary to review the decision of the regional magistrate on the admissibility of the letter in evidence. Nothing was said by the parties ^b in the hearing of the appeal on the assertion of admissibility of the letter in evidence. No more shall be said about the matter.

The first point taken in the appeal was that the learned judge ought not to have exercised the review powers vested in him by s 26 of the High Court Act because there was no allegation or proof of any gross irregularity in the proceedings or decision of the lower court warranting review. The general rule ^c is that a superior court should intervene in uncompleted proceedings of the lower courts only in exceptional circumstances of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means or where the interlocutory decision is clearly wrong as to seriously prejudice the rights of the litigant.

In *Ismail v Additional Magistrate, Wynberg and Another* 1963 (1) SA 1 (A) ^d Steyn CJ at p 4 said:

"It is not every failure of justice which would amount to a gross irregularity justifying intervention before completion ... A superior court should be slow to intervene in unterminated proceedings in a court below and should generally speaking confine the exercise of its powers to 'rare cases ^e where grave injustice must otherwise result or where justice might not by other means be obtained.'"

See also *Ndlovu v Regional Magistrate, Eastern Division & Anor* 1989 (1) ZLR 264 (H) at 269 C-270 G; *Masedza & Ors v Magistrate, Rusape & Anor* 1998 (1) ZLR 36 (H) at 41C.

In my view, there was no evidence of any irregularity gross or otherwise ^f committed by the regional court in the proceedings. There was also nothing in the manner the lower court arrived at its decision which supported the exercise of the review powers by the learned judge. The regional magistrate, in determining the question of the discharge of the respondent at the close of the case for the prosecution which was a matter she was properly seized ^g of, took into account the evidence placed before her and did not consider any extraneous factors.

The second point taken was that having decided to exercise his review powers the learned judge based the intervention in the proceedings on clearly wrong findings of fact. In *S v Kachipare* 1998 (2) ZLR 271 (S), Gubbay CJ stated at 276 D-E that: ^h

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A "There is sound basis for ordering the discharge of the accused at the close of the case for the prosecution where:

- (i) there is no evidence to prove an essential element of the offence:
See *Attorney-General v Bvuma & Anor* 1987 (2) ZLR 96 (S) at 102 F-G;
- (ii) there is no evidence on which a reasonable court, acting carefully, might properly convict:
^b See *Attorney-General v Mzizi* 1991 (2) ZLR 321 (S) at 323 B;
- (iii) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it:
See *Attorney-General v Tarwirei* 1997 (1) ZLR 575 (S) at 576 G."

The learned judge had to carefully examine the evidence placed before the ^c regional court before reaching any of the conclusions listed in *Kachipare's* case *supra*.

He found that there was no evidence that payments were made to Willets by the respondent. He accepted the submission that the property was bought by Dazeout Investments from Skanska International. There were important ^d pieces of evidence that seem to have escaped the attention of the learned judge. The admission of the facts in para 11 of the outline of the State case was ignored. The interpretation of the agreement of sale as evidence of payment by the respondent to Willets was not considered. The deposit of £30 000 had to be paid to the seller's solicitors in the United Kingdom "forthwith". That could only mean at the time of signature to the agreement.

^e The affixing of signatures to the document containing the terms of the agreement of sale was evidence of the fact that the deposit was paid to the seller's solicitors on 24 November 1998. The fact that time of payments was made of essence suggests that the times of payment of the installments towards the balance of the purchase price stipulated in the agreement of sale, ^f were strictly adhered to. The fact that the property was transferred by Skanska International to Dazeout Investments did not detract from the inference being properly made from all the circumstances that

payments were made to Willets by the respondent in terms of the agreement of sale. The transfer was itself proof that the payments had been made in terms of the agreement of sale because Skanska International could only transfer the property to Dazeout ^G Investment after the terms of the agreement of sale had been complied with by Willets and the respondent.

The learned judge also found that there was no evidence that the payments made by the respondent outside Zimbabwe were not from "free funds". It is important to note that the respondent admitted that the payments were made ^H without authority from the exchange control authority. The payments were

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therefore unlawful unless they were made with "free funds". The onus was ^A on the respondent to establish on a balance of probabilities the requirements of "free funds" as described in s 2 of the Regulations.

It was not necessary for the State to adduce evidence to prove that the payments made by the respondent outside Zimbabwe were not from "free funds". He had the peculiar knowledge of the lawfulness of the free funds held ^B by him and how he acquired them. In that regard there were no facts alleged by respondent on which the court could find that the payments made by him outside Zimbabwe were with "free funds".

The last erroneous finding by the learned judge was of the fact that the schedule of payments (exhibit 8) related to payments yet to be agreed upon by the parties. The use of the word "due" in the schedule of payments means ^C that the payments were owing to the respondent. There were agreements in terms of which Telecel International had already undertaken to pay the moneys listed in the schedule to the respondent. The parties made it clear that the payment schedule reflected the payments *as defined in the various agreements between them*. (the underlining is for emphasis). The schedule of ^D payments showed that of the total amount of US\$1 268 000 due to the respondent and the Empowerment Corporation, US\$400 000 had been paid to the respondent by 16 January 1999, leaving a balance of US\$868 000 which Telecel International undertook to pay by 22 January 1999.

Whether or not an inference that the money used by the respondent to make the payments outside Zimbabwe came from Telecel International could be ^E properly drawn from these facts, this would not remove the onus from the respondent of having to prove, on a balance of probabilities, that the payments he made outside the country were with "free funds". That onus could not be discharged for him by the State's failure to show that the payments were not made from "free funds".

The regional magistrate was correct in holding that there was evidence at the ^F close of the case for the prosecution that the respondent committed the offences charged. The appeal against the judgment of the High Court must succeed.

It is ordered that the order of the High Court dated 24 August 2004 be and is hereby set aside. For the avoidance of doubt, the matter is remitted to the trial ^G court for it to continue with and conclude the trial ^H.

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^A Chidyausiku CJ and Gwaunza JA concurred.

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

^B *Chikumbirike & Associates*, respondent's legal practitioners

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PARKSIDE HOLDINGS (PVT) LTD v LONDONER SPORTS BAR 2005 (2) ZLR 68 (H)**2005 (2) ZLR p68**

Citation	2005 (2) ZLR 68 (H)
Case No	Judgment No. HH-66-05
Court	High Court, Harare
Judge	Patel J
Heard	24 February 2005; 8 April 2005
Judgment	3 August 2005
Counsel	<i>H Mutasa</i> , for the applicant <i>G M Mhlanga</i> , for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Landlord and tenant — *lease* — *agreement* — *cancellation* — *notification* — *service of summons claiming ejectment* — *regarded as notification of cancellation*

Landlord and tenant — *tenant* — *rights* — *withholding of rent* — *when rent may be withheld* — *tenant deprived of use of part of premises* — *not a D ground to withhold rent*

Landlord and tenant — *tenant* — *statutory tenancy* — *creation of* — *when comes into effect* — *ejectment of statutory tenant* — *when tenant may be ejected* — *tenant failing to pay rentals either timeously or at all* — *no notice required for landlord to seek ejectment* E

Practice and procedure — *judgment* — *summary judgment* — *claim for eviction* — *a liquid claim* — *relief may be granted by way of summary judgment*

Practice and procedure — *rules of court* — *departure from* — *when permitted* — *substantial compliance with the rules* — *departure from strict F compliance with the rules allowed*

Headnote

A claim for eviction is a liquid claim. Accordingly, ejectment from leased premises may be claimed and granted by way of summary judgment.

At common law the service of summons claiming the ejectment of a lessee is to be considered to be notification of cancellation of the lease G agreement.

A statutory tenancy under ss 22, 23 and 24 of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983) may be created upon the expiry of a contractual lease. Such a tenancy continues for an indefinite period on the same terms and conditions as applied to the pre-existing contractual H

2005 (2) ZLR p69

A lease. Thereafter, so long as the tenant abides by the terms of the expired lease, including paying the rent due within seven days of due date, he is statutorily protected from eviction. However, if the tenant materially breaches any term of the statutory tenancy, the lessor is entitled to seek the eviction of the tenant through the courts. For ejectment to be granted, the lessor must show, firstly, that the lease has expired, either by effluxion of time or in consequence of notice duly given by the lessor. Secondly, the lessor must establish that he has good and sufficient grounds for requiring ejectment, other than his desire to increase the rent or to lease the premises to some other person.

The applicant sought the eviction of the respondent, by way of summary judgment, from premises it leased to the respondent. The lease had been c for a period of six months and had expired on 31 May 2004. Thereafter, the respondent had remained in occupation of the premises but had declined to pay any further rentals to the applicant. The respondent claimed that it was justified in refusing to pay the rentals because the applicant had barred it from using the toilets and had blocked the fire escape. This the applicant denied. In opposing its ejection from the leased premises, the respondent also raised a number of *in limine* points. It claimed that the applicant's founding affidavit was fatally defective for want of compliance with r 64 (2) of the High Court Rules. The respondent alleged that the cause of action had not been verified and that the deponent to the founding affidavit did not indicate her capacity or authority enabling her to depose to the affidavit. In reply thereto, it was argued on behalf of the applicant that there was substantial compliance with the Rules. The cause of action had been verified in the affidavit by reference to the summons, the declaration and the draft order. As far as deponent's capacity and authority were concerned, it was argued that full details thereof need not be *Held*, that as far as the points *in limine* were concerned, on the facts, there had been substantial compliance with the rules of court. In particular, there was nothing in the opposing papers to suggest that the deponent to the founding affidavit was unaware of the facts to which she deposed. In the circumstances and having regard to r 4C(a) of the High Court Rules 1971, departure from strict compliance with the rules could and should be condoned.

⁶ *Held*, further, that a tenant is not entitled to withhold rent if he is denied the occupation or use of only part of the tenanted premises. He can only do so if he is deprived of the occupation and use of the entire leased premises ^h and where the lease has been duly terminated or cancelled for that reason.

2005 (2) ZLR p70

Patel J

In all other cases, the tenant is confined to the remedies of interdict and/ ^a or damages and set off against the cost of repairs effected by himself. He cannot withhold or claim remission of rent.

Held, further, that as a consequence thereof, such dispute of fact as there was between the parties was not material and the respondent had failed to raise a triable issue sufficient to refuse applicant the summary judgment ^b it sought.

Cases cited

Chiadzwa v Paulker 1991 (2) ZLR 33 (S)

Koppell Gilbert (Pvt) Ltd v Campbell HH-117-89

Misid Investments (Pvt) Ltd v Leslie 1960 (4) SA 473 (W) ^c

Morris v Stern 1969 (2) RLR 427 (G)

Parkview Properties (Pvt) Ltd v Chimbwanda 1998 (1) ZLR 408 (H)

Legislation considered

High Court Rules 1971 (RGN 1047/1971) rr 4C and 64(2)

Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), ss 22, 23 ^d and 24

Case information

H Mutasa, for the applicant

G M Mhlanga, for the respondent ^e

Judgment

THE APPLICATION

This is an application for summary judgment on a summons claiming the following relief: (a) the termination of a lease agreement entered into between the parties on 1 December 2003; (b)

ejection of the respondent from the leased premises; (c) payment of arrear rentals; and (d) payment of holding over damages.

The applicant's position is that the fixed term of the lease terminated on 31 May 2004 and that the respondent failed to pay rentals for the next two months. The lease was then terminated on account of the respondent's breach and the respondent has no defence to the applicant's claim. ^g

In its plea, the respondent averred that it withheld the rentals due because the applicant had barred the respondent from using certain toilets and had blocked the fire escape. However, in its opposing affidavit, the respondent avers that it had tendered the rent payments but that the applicant rejected them because it wanted to increase the monthly rental from \$2.2 million to \$13 million. ^h

2005 (2) ZLR p71

Patel J

A POINTS IN LIMINE

At the hearing of this matter, the respondent's counsel raised certain objections *in limine*. The first point taken was that the founding affidavit is fatally defective for want of compliance with r 64(2) of the High Court Rules, 1971, in that it does not verify the cause of action and the amount claimed. Secondly, it was submitted that the deponent to the founding affidavit does not indicate ^b the capacity in which the deposition was made. Such capacity and authority to depose must, as was correctly argued, appear *ex facie* the affidavit itself: see *Chiadzwa v Paulker* 1991 (2) ZLR 33 (S) and *Misid Investments (Pvt) Ltd v Leslie* 1960 (4) SA 473 (W).

In response, the applicant's counsel submitted that the cause of action and ^c amount claimed are verified in clause 4 of the founding affidavit by reference to the summons and the plaintiff's declaration and that they are further verified in the draft order. With respect to the second point, it was contended that the deponent need not give full details as to his or her capacity to depose as long as the court is satisfied that the deponent was aware of the facts deposed to. As regards both of the points *in limine*, counsel argued that the applicant has ^d substantially complied with the requirements. In such circumstances, the court has inherent jurisdiction to condone any departure from or failure to strictly comply with the rules of court where there are good prospects of success on the merits and where justice would otherwise be delayed.

THE MERITS

^e On the merits of its application, the applicant avers that the respondent failed to pay any rentals after the expiry of the lease. Additionally, it is averred that the respondent did not pay for its share of the electricity and water consumption costs at the leased premises except for three months at the end of 2004.

The applicant further avers that the toilets and fire escape were not blocked ^f as alleged by the respondent. In any event, this afforded no basis for withholding rent payments. If a lessor interferes with the use of the premises, the lessee must either seek an interdict or claim damages. The lessee may withhold rentals only if he is deprived of the use of the entire leased premises.

The applicant also avers that the respondent did not offer to pay the old rentals upon the expiry of the lease. Moreover, there is no indication in the opposing ^g affidavit as to when, to whom and how much was tendered as alleged.

For the respondent, it is argued that there are *in casu* material disputes of fact to be decided by way of trial, to wit, the question of the respondent's access to the toilets and fire escape and whether or not the rent due was tendered by ^h the respondent after the expiry of the lease.

2005 (2) ZLR p72

Patel J

The respondent further argues that clause 13(b) of the lease agreement entitles ^a the lessee to an abatement of rent when the premises demised are not wholly fit for occupation.

Lastly, it is submitted for the respondent that the applicant has not given the respondent any statutory notice to vacate and therefore cannot claim its ejection. Moreover, it is contended that

ejection, being in the nature of an **B** unliquidated claim, cannot be granted by way of summary judgment.

JUDGMENT

Points in limine

Rule 64(2) of the High Court Rules, 1971, requires that an application for summary judgment must be supported by an affidavit which: (a) is made by **C** the plaintiff or any other person who can swear positively to the facts set out; (b) verifies the cause of action and the amount claimed; and (c) declares the deponent's belief that there is no *bona fide* defence to the plaintiff's claim.

In casu, I am of the view that the deponent has sufficiently verified the cause of action in para 4 of the founding affidavit, by direct reference to the summons **D** and the plaintiff's declaration. The founding affidavit further avers that the respondent has no *bona fide* defence to the applicant's claim and that the respondent has failed to pay outstanding rentals since June 2004. As for the amount claimed, this is adequately verified by reference to the summons and the draft order annexed to the founding affidavit. In effect, the applicant has substantially complied with the requirements of r 64(2). **E**

As regards the deponent's capacity and authority, the deponent states in paragraph 1 of the founding affidavit that she is "duly authorised by the applicant to depose to this affidavit the facts of which I am aware". However, the capacity in which the deponent is authorised to depose does not appear *ex facie* the affidavit. Nevertheless, despite this deficiency, there is nothing **F** in the opposing papers or submissions to suggest that the deponent was not aware of the facts deposed to in her affidavit. Again, I take the view that the averments contained in the founding affidavit are in substantial compliance with the requirements of r 64(2).

Accordingly, given that there is substantial compliance with the governing rules and in order to avoid delaying the final determination of this case, I am **G** inclined to hold that a departure from strict compliance with the rules can and should be condoned in this case. This approach is sanctioned by and entirely in accord with the provisions of r 4C(a) of the High Court Rules, 1971: see also *Koppell Gilbert (Pvt) Ltd v Alistair Campbell* HH-117-89. It follows that the respondent's objections *in limine* have not been sustained and must therefore **H**

2005 (2) ZLR p73

Patel J

A be dismissed.

Material disputes of fact for trial

The respondent claims that the applicant has barred the respondent from using certain toilets and has blocked the fire escape. The applicant denies these allegations and contends that the respondent could not possibly **B** continue to operate its bar and nightclub business if its allegations were true. Clearly, there is a dispute of fact in this regard. However, whether or not this dispute is material depends upon the legality of withholding rent payments on the grounds alleged by the respondent. In view of the position that I take later in this judgment, this dispute is clearly not material and does not warrant determination by trial.

C The respondent also claims that it has tendered payment of reasonable rent to the applicant. However, the respondent does not indicate how much was tendered, at what stage it was tendered and to whom the money in question was tendered. More importantly, this averment was not made in its plea and was only raised in the respondent's opposing affidavit, two months later. In **D** its plea, the respondent merely cites its lack of access to the toilets and the fire escape as the basis for withholding rentals. In view of this clear contradiction and the generality of the respondent's averments in this regard without specific detail, the court is unable to decide whether the facts averred, if proved at a trial, will constitute a valid defence. Accordingly, I am of the view that there is no material dispute of fact of a triable standard in this regard.

E Entitlement to withhold rentals

At common law, a tenant is not entitled to withhold rent if he is denied the occupation or use of only part of the tenanted premises. He can only do so in the event that he is deprived of the occupation and use of the entire leased premises and where the lease has been duly terminated or cancelled for that reason. In all other cases, the tenant is confined to the remedies of interdict and/or damages or set-off against the cost of repairs effected by himself. He cannot withhold or claim remission of rent: see Cooper *Landlord and Tenant*, 2 ed, at p 123 and Kerr *The Law of Lease* 2 ed at pp 50-51.

This common law position is clearly reflected in clause 13 of the lease agreement concluded by the parties *in casu*. Additionally, clause 13 entitles the lessee to an abatement in rent during any period in which the leased premises are not wholly fit for occupation. As I see it, an abatement of rent entails a proportionate reduction in the rental amount and not the withholding of the entire amount. Moreover, any abatement due under clause 13 is to be determined by mutual agreement or by arbitration. It cannot be unilaterally fixed and withheld by the lessee.

2005 (2) ZLR p74

Patel J

In the present case, even if the respondent has been denied the use of some toilets and the fire escape, as it alleges, it is not entitled to unilaterally withhold the full amount of rent payments due under the lease agreement. By so doing, it is in clear breach of its obligations under the lease agreement.

Ejectment through summary judgment

Under our law, it is now well established that a claim for eviction is a liquid claim. Accordingly, ejectment from leased premises may be claimed and granted by way of summary judgment. (See *Morris v Stern* 1969 (2) RLR 427 following local and earlier Cape decisions on this point). The respondent's resistance to the applicant's claim is clearly ill-founded in this respect and cannot be upheld.

Statutory tenancy

Sections 22, 23 and 24 of the Commercial Premises (Rent) Regulations, 1983 (SI 676 of 1983) create what is commonly known as a statutory tenancy upon the expiry of a contractual lease. Under these provisions of the Regulations, a statutory tenancy continues for an indefinite period on the same terms and conditions as applied to the pre-existing contractual lease. Thereafter, so long as the tenant abides by the terms of the expired lease, including paying the rent due within seven days of due date, he is statutorily protected from eviction. However, if the tenant materially breaches any term of the statutory tenancy, the lessor is entitled to seek the eviction of the tenant through the courts.

For ejectment to be granted, the lessor must show, firstly, that the lease has expired, either by effluxion of time or in consequence of notice duly given by the lessor. (In passing, it is pertinent to observe that the references in s 22 to expiry by effluxion of time or by notice are probably not intended to be exhaustive of the modes of expiry that might arise. At any rate, it is not necessary to delve into this aspect for present purposes). Secondly, the lessor must establish that he has good and sufficient grounds for requiring ejectment, other than his desire to increase the rent or to lease the premises to some other person.

Legal status after termination of lease

In terms of clause 2(a) of the lease agreement *in casu*, the lease was of 6 months' duration. Thereafter, under clause 2(b), the lease continues indefinitely, on the same terms other than the amount of rent payable, subject to two months' written notice of termination by the lessor or the lessee. However, if the lessee materially breaches the lease conditions by not paying the rent due timeously, clause 17(a) of the agreement entitles the lessor, notwithstanding clause 2(b),

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Patel J

A to cancel the lease forthwith, *i.e.* without any notice period.

In the instant case, the respondent failed to pay the rentals due after the expiry of the initial six month period of the lease on 31 May 2004. Thereafter, on 22 July 2004, the applicant instituted the present action for ejectment, payment of arrear rentals and damages.

Ordinarily, upon its expiry on 31 May 2004, the lease would have continued as a consensual tenancy for an indefinite period, subject to two months notice of termination, as per clause 2(b) of the lease agreement. However, the respondent's failure to pay rent on the relevant due dates, viz. on 1 June and 1 July 2004, rendered clause 2(b) inoperative and the lease must be regarded as having expired by effluxion of time on 31 May 2004. The respondent then immediately became a statutory tenant under Part IV of the 1983 Regulations. Thereafter, in order to continue to enjoy its statutory tenancy status, the respondent was obliged to pay the rentals within seven days of due date. *In casu*, the respondent failed to do so and consequently forfeited any entitlement to the protection afforded by s 22 of the 1983 Regulations.

Alternatively, the consensual lease must be assumed to have continued to subsist after the expiry of its original six month period on 31 May 2004, in terms of clause 2(b) of the lease agreement. It is not clear from the papers and the submissions before the court as to precisely when and how the applicant cancelled the lease agreement, in terms of clause 17(a), on the grounds of the respondent's failure to pay rentals timeously. Nevertheless, whatever the factual position in this respect, the lease *in casu* must be regarded as having been cancelled by the applicant, at the latest, when it served its summons on the respondent on 22 July 2004. At common law, it is clear that the service of summons claiming the ejectment of a lessee is considered to be notification of cancellation of the lease agreement. (See Kerr *op cit* at pp 100-102, and the authorities there cited).

In both cases, whether the lease *in casu* was terminated upon its expiry on 31 May 2004 or was cancelled by the issuance of summons on 22 July 2004, it is undisputed that the respondent failed to effect the payment of rentals timeously, viz., by the 1st of each month in terms of the lease agreement or within seven days of due date under the statutory tenancy. Accordingly, in either event, the respondent must be treated as having ceased to enjoy any protection from ejectment in terms of s 22 of the 1983 Regulations.

2005 (2) ZLR p76

Patel J

Statutory notice to vacate before eviction ^A

Having decided the respondent's tenancy status at the critical stage, there remains one further question for determination. Was any further notice to vacate, either statutory or otherwise, required before the applicant could institute the present proceedings for the respondent's ejectment from the leased premises? The answer to this question, in my view, must be in the negative.

By reason of the respondent having failed to pay the rentals due timeously in terms of the lease agreement, the lease automatically expired by effluxion of time on 31 May 2004. Alternatively, the lease is deemed to have been cancelled by notice upon the issuance and service of summons on 22 July 2004. In this respect, the decision of this court in *Parkview Properties (Pvt) Ltd v Chimbwanda* 1998 (1) ZLR 408 (H) is clearly distinguishable on the facts. In that case, the rent due had been properly paid for the month during which summons was issued and the lessor was therefore held disentitled to cancel the lease so long as timeous rent payments were being made. *In casu*, the rentals due were not timeously paid at any stage after 31 May 2004 and before the issuance of summons on 22 July 2004.

As I have already stated, s 22 of the 1983 Regulations contemplates the possibility of ejectment upon the expiry of a lease by effluxion of time or following notice given by the lessor. The section cannot be construed to require any further notice to the lessee before seeking his ejectment. Certainly, there is nothing in the wording of s 22, whether express or implied, to support any contrary interpretation. It follows that the applicant *in casu* was entitled to institute the present proceedings for ejectment without having to furnish the respondent with any further notice to vacate.

Justification for ejectment

On the facts established in this matter, the material ground for seeking the respondent's ejectment is not that it declined to agree to the proposed increase in rent but that it failed to pay any rentals

after 31 May 2004. The failure to pay rent on time is critical not only in the case of a statutory tenancy but also in the case of a contractual lease where the lease agreement contains a forfeiture or cancellation clause. In both cases, the lessee's failure to pay rent ^ctimeously amounts to a major breach of the lease justifying its cancellation and the ejectment of the lessee: see Kerr *loc cit* at pp 92 and 96-97. Having regard to all the material facts in this case, I am satisfied that the respondent's breach *in casu* constitutes good and sufficient grounds for its ejectment and that it has ceased to be entitled to the protection afforded to a statutory tenant. ^h

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Patel J

^a Finally, by virtue of the reasons stated earlier in this judgment, I am also satisfied that the respondent has no *bona fide* defence to the applicant's claim for ejectment, arrear rentals and holding over damages.

Accordingly, the applicant's claim succeeds and it is entitled to the relief that it seeks except as regards formal termination of the lease and the claim for immediate eviction. As regards termination, there is no need for an order ^bformally terminating the lease agreement since it has already been terminated, as I have indicated above, either by effluxion of time on 31 May 2004 or by cancellation upon service of the summons on 22 July 2004. As for the proposed date of ejectment, I take the view that the circumstances *in casu* warrant that the respondent be given some leeway to vacate the leased premises.

^c ORDER

In the result, it is ordered that summary judgment be and is hereby entered against the respondent in favour of the applicant for:

- (i) Ejectment of the respondent, within 30 days from the date of this order, from the property known as First Floor, South Wing, Benhay Art House, ^d No. 130 Chinhoyi Street, Harare.
- (ii) Payment of arrear rentals for the months of June and July 2004, at the rate of \$2 020 000 per month, together with interest thereon from 1 June 2004 to the date of payment, at the rate of 40% *per annum* compounded monthly in accordance with clause 17(b) of the lease agreement.
- (iii) ^e Payment of holding over damages from 1 August 2004 to the date of the respondent's eviction, at the rate of \$2 020 000 per month, together with interest thereon from 1 August 2004 to the date of payment, at the rate of 40% *per annum* compounded monthly in accordance with clause 17(b) of the lease agreement.
- (iv) Payment of costs of suit on a legal practitioner and client scale in ^f accordance with clause 17(d) of the lease agreement.

Gill, Godlonton & Gerrans, applicant's legal practitioners

^g Chihambakwe, Mutizwa & Partners, respondent's legal practitioners

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COLOUR FAST TEXTILES LTD v P & O NEDLLOYD & ANOR 2005 (2) ZLR 78 (H)

2005 (2) ZLR p78

Citation	2005 (2) ZLR 78 (H)
Case No	Judgment No. HH-70-05
Court	High Court, Harare

Judge	Gowora J
Heard	21 June 2005;30 June 2005
Judgment	19 August 2005
Counsel	<i>T Magwaliba</i> , for the appellant <i>G N Mlotshwa</i> , for the first respondent No appearance for the second respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Contract — carriage of goods — bill of lading — applicable law — English law applicable — consignee of goods in Zimbabwe — consignee bound by bill of lading entered into between supplier of goods and carrier

Headnote

The applicant purchased goods from the Far East in terms of a CIF contract. ^D The seller then concluded an agreement with the first respondent for the shipping of the goods to Harare. It issued a bill of lading placing the goods on a ship for conveyance to a port in South Africa and their transportation by road to Harare. The goods arrived in the country and were cleared for entry into the country for customs purposes through a ^E clearing agent appointed by the applicant. Thereafter, they were conveyed to Harare under the responsibility of the first respondent and were conveyed to the second respondent's premises, where they remained for nearly a year, when the first respondent sent the applicant a note claiming demurrage costs. The applicant claimed that the first respondent should have delivered the cargo to its premises in Harare and that the detention ^F of its cargo by the second respondent was unlawful. The first respondent had not been sending monthly invoices to the applicant in respect of storage of cargo. The applicant denied the existence of a contract between itself and the first respondent, as it had paid for freight when it paid the purchase price. It further claimed that in terms of the contract between the first respondent and the supplier, the former was obliged to ^G deliver the cargo to the applicant, which had a right to receive goods lawfully purchased by it and conveyed to Harare by the first respondent under a contract of carriage with the supplier. The applicant applied for an order for the release of the cargo. ^H

2005 (2) ZLR p79

^A The first respondent raised a point *in limine*, that the applicant's claim was based on the bill of lading which was the contract governing the agreement. In terms of the bill of lading, any claim against the carrier should be determined in accordance with English Law and in the High Court of Justice in London. As a result, the court did not have jurisdiction to entertain the claim. The applicant argued that without the express ^B abrogation of the doctrine of privity of contract, the consignee on a bill of lading who is not a party to the contract cannot be bound by its terms without having consented thereto. The applicant contended that it was thus not bound by the terms of the contract as expressed in the bill of lading, and that barring statutory intervention, a shipper and a seller of goods cannot bind a third party, in this case the purchaser.

^C Held, that under s 2 of the General Law Amendment Act [Chapter 8:07], in matters relating to maritime and shipping, English law, unless it is inconsistent with any enactment, shall prevail. Likewise, in terms of s 3 of that Act, when considering claims or disputes relating to fire, life or marine assurance, stoppage *in transitu* or bills of lading, the law to be ^D administered by the High Court is that administered by the High Court of Justice in England, although s 4 of the Act restricts the courts in Zimbabwe from having regard to any statutes passed in the United

Kingdom after 11 September 1879. It is clear, therefore, that when it comes to bills of lading, English law, including common law, is applied.

Held, further, that in terms of the English Bills of Lading Act 1855, every ϵ person who claims property as a consignee under the bill of lading is bound by its terms. The applicant was claiming delivery of the goods on the basis of the contract between the first respondent and the supplier in the Far East. The contract itself was the bill of lading, from which the rights that the applicant was seeking to enforce were derived.

ϵ *Held*, further, that *in casu*, the contract provided that any claim against the carrier had to be determined only according to English law and exclusively in the High Court of Justice in London. Accordingly, the High Court in Zimbabwe had no jurisdiction.

Case cited

ϵ *Brandt & Co & Ors v Liverpool, Brazil & River Plate Steam Navigation Co Ltd* [1923] All ER Rep 656 (CA)

Legislation considered

ϵ General Law Amendment Act [*Chapter 8:07*], s 2

2005 (2) ZLR p86

Gowora J

Case information

T Magwaliba, for the appellant α

G N Mlotshwa, for the first respondent

No appearance for the second respondent

Judgment

GOWORA J: The applicant is a manufacturer of a type of bedding commonly known as "comforters". For the manufacture of these necessary items of β comfort, it purchased in 2004 from a supplier in the Far East a consignment of what is known as hollow fibre. The supplier is known as Far Eastern Textile Ltd and is based in Taiwan. The goods were purchased in terms of a contract of sale commonly known as CIF, in which the purchaser pays up front the cost of the purchase price, the insurance and the freight. In turn, the supplier then concluded an agreement with the first respondent for the shipping of the γ goods to Harare, and issued a bill of lading placing the goods on a ship for their conveyance to a port in South Africa and their transportation by road to Harare. It is not in dispute that sometime in June 2004 the goods arrived in the country through the Beitbridge border post and were, on 12 June 2004, cleared for entry into the country for customs purposes through a clearing agent appointed by the applicant. Thereafter, presumably, they were conveyed δ to the capital under the responsibility of the first respondent and were then conveyed to the second respondent's premises where they remained until 9 June 2005, when the first respondent sent the applicant a note for \$346 622 615 claiming demurrage costs. According to the said invoice, the goods would be released only upon payment of the amount claimed therein. ϵ

The applicant claims that the first respondent should have delivered the cargo to its premises in Harare and that the detention of its cargo by the second respondent is wrongful and unlawful. The applicant states that the first respondent did not notify it of the arrival of the cargo and, if that had been done, the applicant would have instructed that the cargo be delivered to it. The applicant further contends that having wrongfully detained its cargo, it was ϵ wrongful on the part of the first respondent to claim payment for demurrage charges a year after the cargo had arrived in the country when the first respondent had not been sending monthly invoices to it in respect of storage relating to the cargo. The applicant denies the existence of a contract between itself and the first respondent as it had paid for freight when it paid the γ purchase price. It further claims that, in terms of the contract between the first respondent and the supplier, the former was obliged to deliver the cargo to the applicant, which has a right to receive goods lawfully purchased by it and conveyed to Harare by the first respondent under a contract of carriage with the supplier. The applicant has therefore approached this court on a certificate of urgency seeking an order for the release of the cargo. ϵ

Gowora J

A The first respondent has raised in opposition a point *in limine*, to the effect that the applicant's claim is based on the bill of lading which is the contract governing the agreement, and that as a result this court does not have jurisdiction to entertain the claim as, in terms of the bill of lading any claim against the carrier should be determined in accordance with English law and in the High Court of Justice in London. When the parties appeared before me B they addressed the issue without quoting any legal authority. I then requested that both legal practitioners submit to me written heads of argument on the point in order to assist me in arriving at a proper determination of the matter. I am indebted to both counsel for their well researched and well written arguments.

C Central to the argument by the applicant that this court has jurisdiction to entertain its claim, is its insistence that it is not bound by the bill of lading which, it is common cause, is the contract between the carrier and the supplier. The contention by Mr *Magwaliba*, on behalf of the applicant, is that without the express abrogation of the doctrine of privity of contract, a consignee on a bill of lading who is not a party to the contract cannot be bound by its terms D without having consented thereto. The applicant therefore contends that it is not bound by the terms of the contract as expressed in the bill of lading, and that barring statutory intervention, a shipper and a seller of goods cannot bind a third party, in this case a purchaser.

In matters relating to maritime and shipping, according to s 2 of the General E Law Amendment Act [Chapter 8:07], English law, unless it is inconsistent with any enactment, shall prevail. Likewise, in terms of s 3 of that Act, when considering claims or disputes relating to marine assurance, stoppage *in transitu* or bills of lading, the law to be administered by this court shall be the law administered by the High Court of Justice in England. However, s 4 of that Act restricts the courts in Zimbabwe from having regard to any statutes F passed in England after 11 September 1879. It is clear, therefore, that when it comes to bills of lading, English law, including common law, is applied. It is necessary that I discuss briefly the history of the English law on bills of lading.

Prior to the passing of the Bills of Lading Act, 1855, in England the position of consignees on a bill of lading was not clear, in that although property in the goods being conveyed passed, the consignee could not, merely because of G the endorsement, sue the ship owners upon the contract concluded with the seller. The other issues were whether or not the owner of the goods was bound to pay for freight, demurrage or any other matter specified in the contract. The rights of the owner of the goods against the carrier were difficult to enforce H in view of the doctrine of privity of contract, and often they had to rely upon

2005 (2) ZLR p82

Gowora J

an implied contract between them and the carrier. The effect of the passing of A the Act was described by Scrutton LJ as follows:1

"When the Bills of Lading Act was passed in 1855 this part of the difficulty was remedied in that when the property – the whole property — passed by the endorsement to the endorsee, the contract also passed."

The section of the Act being discussed by the learned Lord Justice was in the B following terms:

"(1) Every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom property in the goods therein mentioned shall pass, upon or by reason of such consignment of endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods C as if the contract contained in the bill of lading had been made with himself."

Despite acknowledging that the law of England applies and in this case, except as provided in the General Law Amendment Act, the applicant has not suggested how that provision would not be applicable to it. The bill of lading is the contract between the supplier and the carrier for the delivery of the goods D described therein to the purchaser, which would be the consignee on the bill of lading. In terms of the provisions of the 1855 Act, every person who claims property as a consignee under the bill of lading is bound by its terms. The applicant herein is claiming delivery of the fibre on the basis of the contract between the first respondent and the supplier in the Far East. The contract E itself is the bill of lading, from which the rights that the applicant is seeking to enforce are derived. Yet, surprisingly, the applicant refuses to be bound by the same instrument granting it rights. In the light of the provisions of the 1855 Act, it is clear that the statute abrogated

the doctrine of privity of contract which the applicant wishes to hold onto. The applicant's contention that, in order for it to be bound by the contract, it should have had the bill of lading ^F delivered to it has not been supported by any authority, and is in my view a proposition that cannot be supported. Whether or not the bill of lading was delivered to the applicant is immaterial for present purposes, the overriding factor being whether or not the applicant is endorsed therein as the consignee. Anyone claiming under a bill of lading must be bound by its terms. The applicant cannot seek to base its claim for delivery on the bill of lading and ^G yet escape the terms and conditions governing the transportation of the

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Gowora J

^A goods from the supplier to itself. Once the applicant seeks to claim under the bill of lading then it must be held to be bound by the terms and conditions contained therein.

I turn now to the point *in limine* raised by Mr *Mlotshwa* for the first respondent. It is argued on behalf of the first respondent that the only court to determine the dispute between the applicant and the first respondent is the ^B High Court of Justice in England. My attention has been drawn to the appropriate clause in the contract which provides for jurisdiction and the applicable law governing the bill of lading.

Clause 24 of the bill of lading, which is attached to the first respondent's opposing affidavit, provides: ^C

- "(1) Unless Clause 25 or 27 applies, any claim against the Carrier under this bill of lading shall be determined only according to English law and exclusively in the High Court of Justice in London.
- (2) The Carrier shall be entitled to pursue any claim against the Merchant in London according to English Law or in any jurisdiction in which the Merchant has assets but then in accordance with the local law of ^D that jurisdiction.
- (3) Nothing herein contained shall prevent the parties in any claim or dispute under the bill of lading from agreeing to submit to arbitration by mutually acceptable arbitrators on mutually acceptable terms at a mutually acceptable venue."

^E Although the applicant vehemently opposes the point *in limine*, to my mind the clause is very specific. The contract has spelt out in very clear terms the law governing the contract and has also chosen the jurisdiction which will hear and determine any disputes between the parties. This court cannot be seen to be contracting on behalf of litigants and where specific provision has been made about where the disputes arising out of the contract should be determined, ^F this court does not have the capacity to depart from the provision in the contract and substitute itself as the correct tribunal. The function of courts is to give effect to provisions in a contract, as that reflects the intention of the parties; it is not for the court to depart from those terms and write its own terms. The High Court of Justice in London has been granted exclusive jurisdiction by the contract to adjudicate on the contract as it relates to a claim against the ^G carrier and there is no way that this court can find jurisdiction to hear the matter.

The applicant, as I have found, is bound by the terms of the contract and this court does not have jurisdiction according to the contract. The application is ^H therefore not properly before me.

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Gowora J

Accordingly, the application is dismissed and the applicant is ordered to pay ^A the costs of the first respondent.

Magwaliba, Matutu & Kwirira, applicant's legal practitioners

Antonio & Associates, first respondent's legal practitioners ^B

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/HOVE v GUMBO (MBERENGWA WEST ELECTION PETITION APPEAL) 2005 (2) ZLR 85 (S)

HOVE v GUMBO (MBERENGWA WEST ELECTION PETITION APPEAL) 2005 (2) ZLR 85 (S)
2005 (2) ZLR p85

Citation	2005 (2) ZLR 85 (S)
Case No	Judgment No. S-143-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	5 February 2004
Judgment	23 August 2005
Counsel	<i>S Hwacha</i> , for the appellant <i>T Hussein</i> , for the respondent
Case Type	Election petition appeal
Annotations	Link to case annotations

Flynote

c Election — election petition — allegations made in petition — must be proved beyond reasonable doubt — grounds not particularised in petition — court not entitled to rely on such grounds to set aside election

Headnote

▯ The electoral process should not be reversed and an elected candidate thrown out unless the grounds on which the Electoral Act [*Chapter 2:01*] says the election may be declared void have been proved beyond reasonable doubt. An election petition is not a common law cause of action. It is a special procedure created by statute. The law governing the manner and grounds on which an election may be set aside must be ^ε found in the statute and nowhere else. Section 132 of the Act provides that an election petition may be presented “by reason of want of qualification, disqualification, corrupt practice, illegal practice, irregularity or other cause whatsoever”. This wording indicates that the causes specifically mentioned therein are not exhaustive and that the petition may be presented on any cause of complaint known to the petitioner. ^ϕ This does not, however, mean that the court may set an election result aside on a ground that has not been pleaded as a cause of complaint in the petition at the time of its presentation. For a court to set aside an election, the cause of the complaint should have been pleaded in the petition at the time of its presentation and established by evidence ^g beyond reasonable doubt. The respondent is entitled to know the reason why his election is being challenged so that he is able to answer the case. The relief which the High Court may grant to a petitioner depends on the nature of the cause of the complaint against the election result as pleaded in the petition. Any grounds not particularised in the petition must not ^h be relied upon to set aside an election.

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Malaba JA

Cases referred to ^A

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

Kunju v Unni [1984] 3 SCR 162

Mthinkhulu v Nkiwane & Anor S-136-01

Nath v Singh & Ors [1954] SCR 892

Robinson v Min of Lands & Anor 1994 (2) ZLR 171 (S) ^B

Sahu v Singh & Anor [1985] LRC 31

Legislation considered

Electoral Act [*Chapter 2:01*], ss 105, 132 and 136

Case information

S Hwacha, for the appellant ^c

T Hussein, for the respondent

Judgment

MALABA JA: This appeal is against the judgment of the High Court delivered on 6 March 2002 ^{*} dismissing with costs the election petition presented by the appellant (hereinafter referred to as “the petitioner”) challenging the election ^D of the respondent as the Member of Parliament for Mberengwa West Constituency (“the constituency”). The Parliamentary election (“the election”) was held on 24 and 25 June 2000.

The petitioner was a candidate in the election, sponsored by the Movement for Democratic Change (“the MDC”), whilst the respondent was a candidate ^E sponsored by the ruling party, Zimbabwe African National Union – Patriotic Front (“ZANU-PF”). There were 43 949 registered voters in the constituency, of which 24 691 cast their votes in the election. The respondent secured 18 315 votes as against the petitioner who secured 3 889. There was a majority of 14 426 votes. The remaining votes were divided between two independent candidates. On 27 June 2000, the respondent was declared the duly elected ^F Member of Parliament for the Constituency.

On 17 July 2000, the petitioner presented an election petition to the High Court in Harare in terms of s 132 of the Electoral Act [*Chapter 2:01*] (“the Act”), complaining of “irregularities, illegal practice and corrupt practice” in the election of the respondent. The relief sought was an order declaring that the ^G respondent was not duly elected; the setting aside of the result of the election; and barring of the respondent from standing as a candidate in a Parliamentary election for a period of five years.

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Malaba JA

^A Section 132 of the Act provides that:

- “(1) A petition complaining of undue return or an undue election of a Member of Parliament by reason of want of qualification, disqualification, corrupt practice, illegal practice, irregularity or other cause whatsoever may be presented to the High Court ...”

The particulars of the specific grounds on which the election was questioned ^B were stated in para 7 of the supporting affidavit as being:

- “7.1 The abduction, kidnapping and torture of members of the MDC by supporters and sympathisers of the respondent and his party ZANU (PF). The respondent’s supporters were made up largely of the war veterans in the area who were based at Texas Ranch which is a farm that they had occupied and ZANU (PF) youths most of whom were ^C also based at Texas Ranch occupied by the war veterans. The commander of the entire operation was Wilson Kufa Chitoro, popularly known as Biggie Chitoro of Mawani School, P/Bag Mberengwa presently held at Zvishavane Prison.
- 7.2 Intimidation and threats to the lives of MDC officials, supporters and members of their families making campaigning impossible in the ^D Constituency and threats of physical harm to these people.
- 7.3 Robbery, assaults and rapes on members of the MDC.
- 7.4 The murder of MDC supporters.
- 7.5 Arson and general destruction of property belonging to MDC supporters. ^E
- 7.6 Making a physical and threatening presence at some polling stations by supporters of the respondent who were wearing prohibited campaign material within prohibited distances from the polling station.”

Although “illegal practice and irregularities” were pleaded as some of the causes of the alleged undue election of the respondent as a Member of ^F Parliament, no evidence of probative value was

adduced in support of them. No more shall be said about them.

The evidence led at the trial of the petition sought to prove the charge made against the respondent that he was personally or by his agent guilty of the offence of undue influence within the meaning of s 105 of the Act.

g Section 105 of the Act provides that:

“(1) Any person who directly or indirectly by himself or by any other person –

- (a) makes use of or threatens to make use of any force, violence or restraint or any unnatural means whatsoever upon or against h any person; or

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- (b) inflicts or threatens to inflict by himself or by any other person a any temporal or spiritual injury, damage, harm or loss upon or against any person; or
- (c) does or threatens to do anything to the disadvantage of any person in order to induce or compel that person –
 - (i) to sign a nomination paper or refrain from signing a b nomination paper; or
 - (ii) to vote or refrain from voting;

shall be guilty of the offence of undue influence.”

There was no allegation that the respondent by himself committed the acts of violence which constituted the cause of complaint to the election court. The *gravamen* of the charge against the respondent was that the acts of violence c were committed on MDC supporters in order to induce or compel them to vote or refrain from voting by his agent, Biggie Chitoro (“Chitoro”), or by his supporters with his knowledge and consent or with the knowledge and consent of his agent.

The respondent denied the allegations. d

The question for determination by the court *a quo* was whether the evidence adduced had established the charge of undue influence levelled against the respondent. The court *a quo* held that the evidence of the acts of violence committed on MDC supporters did not establish that they were committed by Chitoro or that those who perpetrated them did so with the knowledge and consent of the respondent or with the knowledge and consent of Chitoro. A e document produced in the trial of the petition showed that the respondent had listed Chitoro as a member of his campaign team. The fact of Chitoro being the respondent’s agent was therefore established.

The election petition had not raised as a ground on which the election should be set aside the occurrence of general violence in the constituency. It was f nonetheless argued on behalf of the petitioner that the acts of violence established on the evidence given by the petitioner’s witnesses were so widespread as to constitute general violence, which permeated the constituency so that the election result may have been affected.

The learned judge held that s 132 of the Act required the petition to specify, at the time of presentation to the High Court, the ground upon which the g validity of the election was being challenged. To wait until general violence was revealed by evidence adduced from witnesses in the course of the election trial as a cause of complaint, was contrary to the statutory requirements and placed the respondent in the disadvantaged position of not knowing in advance what the petitioner’s case was so as to be able to meet it. h

2005 (2) ZLR p89

Malaba JA

A The learned judge nonetheless made the factual finding that the acts of violence established by the evidence adduced by the petitioner were not so widespread in the constituency to constitute general violence that may have affected the election result. It was the finding of the court *a quo* that the election result was in fact not affected by the acts of violence.

In this appeal, it was contended on behalf of the petitioner that the court *a quo* b misdirected itself on each of the questions it was called upon to determine. In determining the appeal, it is important to bear in mind that the purpose of prohibiting acts constituting undue influence on a voter under s 105 of the Act, and holding a candidate accountable not only for his own actions but for those of his agent or any other person if committed with his knowledge and consent c or with the knowledge and

consent of his agent, is to safeguard the purity and freedom of the election process upon which the democratic system of government depends.

An allegation that a candidate committed acts constituting undue influence within the meaning of s 105 of the Act personally or through his agent can have serious consequences on his personal integrity and political career upon ^D being proved. He or she may be disqualified for a period of five years from fighting any election or voting in an election. An election dispute concerns the entire constituency. It is therefore, of paramount importance in a parliamentary democracy that the electoral process is not set at naught and the elected candidate thrown out unless the grounds mentioned in the Act and on which the petition was presented have been clearly and fully proved. The ^E allegations made in an election petition against an elected candidate must be proved beyond reasonable doubt.

To determine whether the court *a quo* was correct when it decided that the evidence adduced by the petitioner on corrupt practice, allegedly committed by the respondent or by his agent or by some other persons with his ^F knowledge and consent, or with the knowledge and consent of his agent, did not meet the standard of proof against which it was appreciated I narrate the evidence led by the parties.

[The learned Judge of Appeal then proceeded to analyse the evidence of the various witnesses, and continued:]

^G In my view, the learned judge made a fair assessment of the effect of the evidence adduced on behalf of the petitioner to establish knowledge of and consent on the part of Chitoro to the commission of acts of violence perpetrated on the witnesses. It is important to note that some of the acts of ^H violence established by the evidence were spontaneous reactions to

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Malaba JA

provocation, which Chitoro could not have anticipated. The evidence that he ^A invariably ordered the release of those kidnapped corroborated his own testimony that he told war veterans not to assault people and force them to take part in farm occupations.

As I have already pointed out, the object of the Act is that the electoral process should not be reversed and an elected candidate thrown out unless the ^B grounds on which the statute says the election may be declared void have been proved beyond reasonable doubt.

In *Kunju v Unni* [1984] 3 SCR 162, Mistr J, of the Supreme Court of India, said at pp 167-168:

"There is total consensus of judicial opinion that a charge of corrupt practice under the Act has to be proved beyond reasonable doubt and ^C standard of proof is the same as in a criminal case: see *Mahant Shree Nath v Chaudrey Ranbir Singh* [1970] 3 SCC 647. This proposition has even not been disputed by counsel for the appellant. We, therefore, do not propose to refer to the catena of decisions affirming the aforesaid view. The High Court applied the right standard in the matter of appreciation of the material placed before it and has come to hold that the allegations ^D of corrupt practice within the meaning of s 123(4) of the Act has not been proved. In such a situation, as pointed out by this court in the case of *Baddepalli Rajagopala Rao v NG Ranga* [1971] AIR SC 261, this court would not re-appreciate the evidence. Shah J, as he then was, observed thus:

'The finding of the learned trial judge is based upon appreciation of ^E evidence of the witnesses in the light of probabilities. A charge of corrupt practice under the Representation of the People Act must be established by clear and cogent evidence. When the court of first instance on a consideration of the evidence of the witnesses had refused to place any reliance upon their testimony the burden lying upon the party setting up a plea of corrupt practice becomes no lighter on appeal. The charge ^F cannot be held established merely upon suspicion or preponderance of probabilities. Unless the appellant establishes that the appreciation of the evidence was vitiated by gross misreading or misconception of the evidence or because of failure to consider important pieces of evidence which had a bearing on the charge or because of serious irregularities in procedure which amount to a denial of a fair trial, the appellate court ^G will not proceed to re-appreciate the evidence on which the findings recorded by the court of first instance on the credibility of witnesses."

See also *Robinson v Minister of Lands & Anor* 1994 (2) ZLR 171 (S) at 175A-C; *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 62G-63A; and *Mthinkhulu v Nkiwane & Anor* S-136-01 at 3. ^H

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Malaba JA

^A After a careful consideration of the circumstances of the case and the evidence of the witnesses, I find myself in agreement with the judgment of the court *a quo* that undue influence was not proved against the respondent. Indeed, it is very difficult to prove a charge of corrupt practice merely on the basis of oral evidence because in election cases it is very easy to get the help of interested witnesses but very difficult to prove charges of corrupt practice.

^B There was, for example, no proof that the acts of violence were in the nature of pressure on the minds of the victims as voters to prevent them from voting in a manner they wished for a candidate of their choice or to refrain from voting in the exercise of their free will. As Chandrachud CJ observed in *Sahu v Singh & Anor* [1985] LRC 31, the offence of undue influence can be said to ^C have been committed only if the voter is put under a threat or fear of some adverse consequence or if he is induced to believe that he will become an object of divine displeasure or spiritual censure if he casts or does not cast a vote in accordance with his decision. There was no evidence that the victims of the violence were told to vote for the respondent or not vote at all.

Realising, perhaps, that that evidence had not established the charge of undue ^D influence against the respondent, Mr *Hwacha*, for the petitioner, argued in his address to the court that the evidence had established general violence which permeated the whole community such that the election result may have been affected. He contended that the election result should be invalidated on the ground of general violence. Mr *Hussein*, for the respondent, argued that ^E general violence had not been pleaded as a cause of the complaint raised against the election in the petition. He said ^S 132 of the Act did not give the court power to set aside an election on a ground not alleged in the petition.

The learned judge held that the words "any other cause whatsoever" in ^S 132 of the Act indicated that the causes specifically mentioned therein were not exhaustive. The petition may be presented on any cause of complaint known ^F to the petitioner. He did not determine the fundamental question whether the court had the power to set an election result aside on a ground that had not been pleaded as a cause of complaint in the petition at the time of its presentation.

Notwithstanding the fact that it was common cause that the petition did not ^G allege general violence as a cause of the complaint the petitioner had made against the election of the respondent, the learned judge determined the factual question whether there was general violence that was so widespread that it permeated the whole community in the constituency that the election result may have been affected. He held that the violence established by the evidence of the witnesses was not extensively prevalent as to vitiate the ^H election.

2005 (2) ZLR p92

Malaba JA

It appears to me the learned judge misdirected himself in accepting the ^A proposition that he could invalidate the election on general violence established by evidence in the course of the trial of the petition when it was not pleaded as a cause on which the election of the respondent was challenged. A petition is not a common law cause of action. It is a special procedure created by statute. The law governing the manner and grounds on which an election ^B may be set aside must be found in the statute and nowhere else.

In *Nath v Singh & Ors* [1954] SCR 892 at 895, Mahajan CJ said:

"The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power. It ^C is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law."

About twenty years later, the same principle was reiterated by Chandrachud CJ in *Sahu's* case *supra*, where at p 39 he said: ^D

"The rights arising out of elections, including the right to contest or challenge an election, are not common law rights. They are creatures of the statutes which create, confer or limit those rights. Therefore, for deciding the assertion whether an election can be set aside on any alleged ground, the courts have to consult the provisions of law governing the particular election. They have to function within the framework of that law ^E and cannot travel beyond it."

For a court to set aside an election, the cause of the complaint should have been pleaded in the petition at the time of its presentation and established by evidence beyond reasonable doubt. The duty of the court is to determine whether the petitioner has by evidence adduced established the

cause of his ^F complaint against the election result. The effect of s 132 of the Act is that a petitioner complaining of an undue election must state the nature of the cause of his complaint. The cause of complaint must be clearly and concisely stated at the time of presentation of the petition to the High Court.

The respondent is entitled to know the reason why his or her election is being challenged so that he or she can be able to answer the case. It is also clear that ^G the relief the High Court may grant to a petitioner depends on the nature of the cause of the complaint against the election result as pleaded in the petition (see s 136). ^H

2005 (2) ZLR p93

Malaba JA

^A The petitioner chose not to rely on general violence as the cause of his complaint against the election of the respondent. For general violence to be a valid ground, it should have been pleaded. As the laws of election are self-contained codes and the rights arising out of elections are the offspring of those laws, the petitioner had no right to have the election invalidated on the ground of general violence unless he had specified it as a ground in the ^B petition. Such an election could be set aside on the grounds specified in s 132 of the Act only and those grounds not particularised in the petition must not be relied upon to set aside an election.

Notwithstanding the misdirection on the law, the learned judge found that the acts of violence established by the evidence of the witnesses were not so ^C general and extensive in their operation as to have permeated the whole constituency so that freedom of election may have ceased. That finding is correct.

There was no basis upon which the election of the respondent could be invalidated.

^D The appeal is accordingly dismissed with costs.

CHIDYAUSIKU CJ & ZIYAMBI JA concurred.

Kantor & Immerman, appellant's legal practitioners

^E *Hussein Ranchod & Co*, respondent's legal practitioners

* See *Mberengwa West Election Petition* 2002 (1) ZLR 233 (H), a judgment of Hlatshwayo J — *Editor*.

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PARADZA v CHIRWA & ORS NNO 2005 (2) ZLR 94 (S)

2005 (2) ZLR p94

Citation	2005 (2) ZLR 94 (S)
Case No	Judgment No. S-25-05
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Ziyambi JA, Malaba JA & Gwaunza JA
Heard	17 February 2005
Judgment	23 August 2005

Counsel	<i>J J Gauntlett SC</i> , with him <i>E Matinenga</i> , for the applicant No appearance for the first, second and third respondents <i>Mrs F C Maxwell</i> , with her <i>V Mabiza</i> , for the fourth and fifth respondents
Case Type	Constitutional application
Annotations	Link to case annotations

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of c Rights — s 18(9) — right to fair hearing — applicability — tribunal appointed to investigate question of removal of judge from office — not a court — not bound by s 18(9)*

Constitutional law — *Constitution of Zimbabwe 1980 — judge of High Court — removal from office — tribunal to investigate question — D appointment of members of — whether President must personally select members — request to Chief Justice of another country to nominate judge as member — not a delegation of President's powers*

Constitutional law — *Constitution of Zimbabwe 1980 — President — executive powers of — exercise of such powers — extent to which may E be exercised by Minister*

Court — *judge — removal from office — appointment of tribunal to inquire into question — how appointment may be made — procedure before tribunal — who should lead evidence — admissibility of evidence — tribunal not bound by rules of evidence*

Evidence — *admissibility — civil matter — illegally obtained evidence — F court's discretion to admit*

Headnote

The applicant, a High Court judge, was facing charges of attempting to defeat or obstruct the course of justice, alternatively, incitement to contravene s 4(a) of the Prevention of Corruption Act. It was alleged that he had G telephoned three other High Court judges to ask them to show favour by varying or cancelling bail conditions imposed on his business partner, who was facing a charge of murder. The Chief Justice, acting in terms of s 87(3) of the Constitution, advised the President that the question of removal of the applicant from office ought to be investigated. The H

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A President decided to choose the members of the investigating tribunal from among judges of other countries, as provided by s 87(4)(b). Following that decision, the Minister of Justice wrote letters to the High Commissioners of three neighbouring countries, asking them to approach their respective Ministers of Justice to request the Chief Justices of their respective countries to nominate judges of their courts to be members B of the tribunal. The Chief Justices of those countries forwarded to the Minister the names of the first, second and third respondents, who were judges of the Supreme Courts of their respective countries. The President subsequently appointed the tribunal, consisting of the three judges, to inquire into the question of the removal of the applicant from office. Part C of the evidence that was to be led before the tribunal consisted of a secretly tape-recorded telephone conversation one of the Zimbabwean judges had with the applicant.

An application was made to the Supreme Court in terms of s 24(1) of the Constitution, alleging that the appointment of the tribunal was unconstitutional in that its members were not selected by the President D within the meaning of s 87(4) of the Constitution, and that the adduction of the tape-recorded evidence of the telephone conversation would infringe the applicant's constitutional right to a fair hearing, entrenched in s 18(9) of the Constitution, because the evidence was obtained as a result of a breach of the applicant's right to the privacy of E telecommunication enshrined in s 20(1) of the Constitution. It was argued that selection required that the President should be shown to have compared the qualities or attributes of each of the members of the tribunal with those of other persons in category (b) of s 87(4) before choosing them in preference to others. The President did not consciously apply his mind to the question of the suitability of the first three F respondents for selection as members of the tribunal because he had no information on their personal attributes. The Minister had usurped the powers of the President to select members of the tribunal by communicating with the Chief Justices of the three countries through

their respective High Commissioners as if he was the repository of the ^g power to appoint the tribunal. There was an unlawful delegation of the President's power of selection of members of the tribunal by the Minister to the Chief Justices.

Held, (Sandura JA dissenting in part) that the procedure under s 87 of the Constitution for termination of a judge's appointment must be strictly ^h observed at every stage of the process if judicial independence is to mean

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anything. Under the section there are specific powers vested in the President, which ^a he is required to exercise personally, one such power being that to select members of the tribunal. Under s 31H(1), the President has the discretion to exercise executive powers vested in him directly or through the Cabinet, a Vice-President, a Minister or a Deputy Minister. The Minister's action in writing the letters of request was in the exercise ^b of executive authority, as a Minister has no executive authority of his own outside the executive authority of the State vested in the President. His action was to enable the President to exercise his power of selection of members of the tribunal. It was an act of pure administrative agency not a usurpation of the President's functions. Although the Chief Justices of the three countries nominated judges, they could not be said ^c to have made final decisions that the nominees had become members of the tribunal. The fact that the President chose the same persons whose names were submitted did not detract from the fact that he had the right to reject any or all of them. He was not bound by the nominations.

Held, further, that s 18(9) of the Constitution does not apply to a person when ^d he appears before a body whose duty is to investigate and report on the facts found and make recommendations to some other person or body. The tribunal was not a court or an adjudicating authority established by law to determine the existence or extent of the applicant's civil rights or obligations; its duty was to investigate and report on the facts relating to the question of his removal from office to the President. It would not ^e decide whether or not he should be removed from office. The applicant would be entitled to a fair hearing by the tribunal, but not in the context of the cocktail of rights guaranteed to a person appearing before a court of law under s 18(9).

Held, further, that the tribunal was not bound by strict rules of evidence as ^f it was not a court of law or adjudicating authority and did not administer justice. In any case, it was not the law that evidence obtained as a result of an unlawful interception of a telephone conversation should be excluded from use in court proceedings. The admissibility of illegally or improperly obtained evidence is a matter for determination by the court ^g in the exercise of its discretion. Investigating bodies carrying out their constitutional functions should not be prevented from performing their functions unless they are in breach of the rules of natural justice shown to be applicable in the particular circumstances. ^h

2005 (2) ZLR p97

Malaba JA

^a *Held*, further, (*per* Sandura JA) that the rôle of the person leading evidence before the Tribunal is not "to assist the Tribunal with the State's position", because the State does not have a position in such an enquiry, but to assist the Tribunal by selecting the evidence to be placed before the Tribunal and by calling the witnesses and examining them. The evidence should not be led by an official designated by the Minister, but ^b by an independent legal practitioner selected by the Tribunal.

Cases cited

Austin & Anor v Chairman of the Detainees' Review Tribunal & Anor S-168-87

Chavunduka & Anor v Commr of Police & Anor 2000 (1) ZLR 418 (S)

^c *Law Soc of Zimbabwe v Min of Transport* 2004 (1) ZLR 257 (S)

Martin v Attorney-General & Anor 1993 (1) ZLR 153 (S)

Mutasa v Makombe NO 1997 (1) ZLR 330 (S)

Protea Technology Ltd & Anor v Waiver & Anor [1997] 3 All SA 594 (W)

Quinnell v Minister of Lands & Ors 2004 (2) ZLR 293 (S)

▯ *S v Motloutsi* 1996 (1) SA 584 (C)
S v Naidoo & Anor [1998] 1 All SA 189 (D)
S v Tswangira S-184-95

Legislation considered

Civil Evidence Act [*Chapter 8:01*], s 48(1) and (2)
 E Commissions of Inquiry Act [*Chapter 10:07*]
 Constitution of Zimbabwe 1980, ss 18(9), 20(1), 31H(1), 87(4)(6) and (7), and 113

Case information

J J Gauntlett SC, with him *E Matinenga*, for the applicant
 No appearance for the first, second and third respondents
 F Mrs *F C Maxwell*, with her *V Mabiza*, for the fourth and fifth respondents

Judgment

MALABA JA: This is an application in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution") for two declaratory orders on the alleged likelihood of violations of certain rights guaranteed to the applicant under the Declaration of Rights contained in the Constitution.

▮ The first order sought is a declaration that the appointment by the fifth respondent ("the President") of the tribunal ("the tribunal"), consisting of the first, second and third respondents as members, to inquire into the question of the removal of the applicant from office as a judge of the High Court of H Zimbabwe ("the High Court") was unconstitutional and that compelling him

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to appear before such a tribunal to answer charges of misbehaviour was likely A to violate his right to protection of the law, guaranteed under s 18(1) of the Constitution.

The second order sought is a declaration that evidence of the telephone conversation the applicant had with Mr Justice Mafios Cheda ("Mr Justice Cheda") on 16 January 2003, which the latter tape-recorded, was obtained in B breach of the applicant's right to privacy of telecommunication, guaranteed under s 20(1) of the Constitution, and that admission of such evidence in the proceedings before the tribunal was likely to violate his right to a fair hearing enshrined in s 18(9) of the Constitution.

The applicant is a judge of the High Court. He was appointed to that office by C the President on 29 August 2001. On 4 April 2003, the Chief Justice of Zimbabwe ("the Chief Justice"), acting in terms of subs (3) of s 87 of the Constitution, advised the President that the question of removal of the applicant from office ought to be investigated.

Section 87 of the Constitution provides that:

- "(1) A judge of the Supreme Court or the High Court may be removed from D office only for inability to discharge the functions of his office, whether arising from infirmity of body or mind or any other cause, or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section.
- (2) If the President considers that the question of the removal from office E of the Chief Justice ought to be investigated, the President shall appoint a tribunal to inquire into the F matter.
- (3) If, in the case of a judge of the Supreme Court or the High Court other than the Chief Justice, the Chief Justice advises the President that the question of removal from office of the judge concerned ought to be investigated, the President shall appoint a tribunal to inquire into the matter.
- (4) A tribunal appointed under subsection (2) or (3) shall consist of not less than three members selected by the President from the following:
 - (a) persons who have held office as a judge of the Supreme Court or the High Court;
 - (b) persons who hold or have held office as a judge of a court having G unlimited jurisdiction in civil or criminal matters in a country in which the common law is Roman-Dutch or English, and English is an official language; H

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- (c) legal practitioners of not less than seven years' standing who have been nominated under subsection (5);
one of whom shall be designated by the President as chairman.
- (4a) ... (not relevant).
- (5) It shall be the duty of the association which is constituted under an Act of Parliament and which represents legal practitioners practising ^b in Zimbabwe to nominate a panel containing the names of not less than three duly qualified legal practitioners for the purposes of subsection (4)(c) when so required by the President.
- (6) A tribunal appointed under subsection (2) or (3) shall inquire into the matter and report on the facts thereof to the President and recommend to the President whether or not he should refer the question of the ^c removal of the judge from office to the Judicial Service Commission, and the President shall act in accordance with such recommendation.
- (7) The provisions of the Commissions of Inquiry Act [*Chapter 10:07*] as in force at the time or any other law substituted for the same shall, *mutatis mutandis*, apply in relation to a tribunal appointed under subsection (2) or (3) as they apply to commissioners appointed under ^d that Act.
- (8) ... (not relevant).
- (9) If the question of the removal of a judge has been referred to the Judicial Service Commission in accordance with subsection (6) and the Commission advises that the judge be removed from office, the ^e President shall, by order under the public seal, remove the judge from office."

The tribunal was to inquire into and report on the allegations that the applicant attempted to defeat or obstruct the course of justice or acted corruptly in a manner inconsistent with, or prejudicial to, the discharge of his duties as a public officer or abused his office. It appears from the President's affidavit ^f that, after the receipt of the advice from the Chief Justice, he decided to choose the members of the tribunal from persons in category (b) only.

Following that decision by the President, the fourth respondent ("the Minister") wrote letters to the High Commissioners of Zambia, Tanzania and Malawi on 9 December 2003, asking them to approach their respective ^g Ministers of Justice to request the Chief Justices of their respective countries to nominate judges of their courts to be members of the tribunal. The letters ("the letters of request"), which contained the same terms except for the names ^h of the countries, read as follows:

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"Your Excellency, ^a

RE: TRIBUNAL TO INQUIRE INTO THE CONDUCT OF MR JUSTICE B. PARADZA

The above-mentioned judge is facing two counts of attempting to defeat or obstruct the course of justice or, alternatively, incitement to contravening ^b section 4(a) of the Prevention of Corruption Act. He was arrested on 17 February 2003 and was later taken to court where he was formally informed of the charges which the State is preferring against him.

On 4 April 2003, the Chief Justice wrote advising His Excellency the President, in terms of section 87(3) of the Constitution of Zimbabwe, that the question of the removal from office of Mr Justice Paradza ought to be ^c investigated by a tribunal.

It is my desire to have the tribunal appointed, mainly, from Judges who come from outside Zimbabwe. Such an arrangement does, in my view, assist in the area of transparency and fairness.

I should, in view of the foregoing, be grateful if Your Excellency would ^d kindly approach, on my behalf, the Minister of Justice and request him to consult with the Chief Justice ... who would nominate a Judge of his court to be a member of the tribunal."

In accordance with the letters of request, the Chief Justices of Zambia, Tanzania and Malawi forwarded to the Minister the names of the first, second ^e and third respondents, who are judges of the Supreme Courts of their respective countries. The nominees were possessed of the qualifications for selection required by persons in category (b) of ^s 87(4) of the Constitution.

On 12 February 2004, the President appointed the tribunal, consisting of the three judges, to inquire into the question of the removal of the applicant from office pursuant to ^s 87(3) of the Constitution. The terms of appointment ^f required the tribunal to inquire into and report on the facts to the President on the allegations that on different dates between 14 and 23 January 2004, the applicant telephoned Mr Justice Cheda and Mr Justice George Mutandwa Chiweshe of the High Court in

Bulawayo and Mr Justice Lawrence Ndlovu Kamocha of the High Court in Harare and asked them to show favour by ^g varying or cancelling bail conditions imposed on one Russell Wayne Labuschagne ("Labuschagne"), who was his business partner in a safari venture, so that his (Labuschagne's) passport could be released to enable him to travel abroad on business for their common benefit, knowing very well that Labuschagne was awaiting judgment in a murder case in which he was an accused. ^h

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^a It is common cause that after the initial telephone conversation with the applicant, Cheda J approached the police and informed them of the criminal contents of the conversation. The police made arrangements for Cheda J to tape-record a subsequent telephone conversation with the applicant to obtain evidence of the alleged commission of an offence by the applicant. On 16 ^b January 2003, Cheda J surreptitiously tape-recorded the telephone conversation he had with the applicant. The applicant is alleged to have sought to induce Cheda J to show favour to his business partner by varying or cancelling the bail conditions imposed on him (Labuschagne).

When the proceedings of the tribunal commenced for the first time on 5 April 2004, the officer assisting it with leading evidence indicated that she intended ^c using the tape-recorded conversation between Cheda J and the applicant and its transcript to establish the truth of the allegations of misbehaviour levelled against the applicant.

Counsel for the applicant indicated to the tribunal that an application was to be made to this court in terms of s 24(1) of the Constitution, alleging that the ^d appointment of the tribunal was unconstitutional in that its members were not selected by the President within the meaning of s 87(4) of the Constitution, and that the adduction of the tape-recorded evidence of the telephone conversation between Cheda J and the applicant would infringe the applicant's constitutional right to a fair hearing, entrenched in s 18(9) of the Constitution, because the evidence was obtained as a result of a breach of the applicant's ^e right to the privacy of telecommunication enshrined in s 20(1) of the Constitution.

A plea was made to the tribunal to temporarily stay its proceedings pending determination of the constitutional application that was yet to be made to this court. As the matter was not for its determination, the tribunal held that it would ^f not grant the applicant the relief sought unless there was an order of a competent court of law to stay its proceedings. An application was then made to the High Court (case No. HC 4128/04) on 7 April 2004 for an interdict restraining the tribunal from proceeding with the inquiry pending determination of the questions of the constitutionality of the appointment of the tribunal and ^g the intended use of the tape-recorded telephone conversation between Cheda J and the applicant. On 8 April 2004, the High Court dismissed the application with costs. The applicant appealed against the judgment in case No. S-129-04.

Upon resumption of proceedings on 14 April 2004, submissions were made ^h once again on behalf of the applicant to the effect that he would suffer serious

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prejudice should the inquiry into the question of his removal from office be ^a proceeded with in the event of a determination by this court that the tribunal had not been appointed in accordance with the constitutional requirements. Upon further reflection, the tribunal decided to adjourn the proceedings pending determination of the constitutional application that had been made on 13 April 2004. ^b

The applicant averred in his founding affidavit that members of the tribunal were not selected by the President. According to him, selection required that the President should be shown to have compared the qualities or attributes of each of the members of the tribunal with those of other persons in category (b) of s 87(4) of the Constitution before choosing them in preference to others. ^c He said the President did not consciously apply his mind to the question of the suitability of the first, second and third respondents for selection as members of the tribunal because he had no information on their personal attributes.

According to the applicant, the Minister usurped the powers of the President to select members of the tribunal by communicating with the Chief Justices ^d of the three countries through their

respective High Commissioners as if he was the repository of the power to appoint the tribunal. The applicant based his allegation on the fact that in the letters of request the Minister expressed it as being his own desire that the tribunal should consist of judges from foreign countries. ^ε

It was on the interpretation of the letters of request that the applicant alleged that there was an unlawful delegation of the President's power of selection of members of the tribunal by the Minister to the Chief Justices of Zambia, Tanzania and Malawi. He averred that the selection of the first, second and third respondents as members of the tribunal was done for the President by ^φ the Chief Justices of the three countries, who nominated them. According to him, the nominations were conclusive. There was therefore no selection of the first, second and third respondents by the President.

The applicant contended that in the circumstances his right to protection of the law, enshrined in s 18(1) of the Constitution, was likely to be violated if he was compelled to appear before a tribunal whose members were not selected ^ς by the President in terms of subs (4) of s 87 of the Constitution.

On the question of the tape-recorded conversation between him and Mr Justice Cheda, the applicant said the effect of the decision in *Law Society of Zimbabwe v Minister of Transport and Communication* ("the *Law Society* case") 2004 (1) ZLR 257 (S) was that the evidence of the conversation was ^η

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^α obtained in contravention of his right to privacy of telecommunication, enshrined in s 20(1) of the Constitution, and its admission in the proceedings of the tribunal would be in violation of his right to a fair hearing guaranteed under s 18(9) of the Constitution.

In the *Law Society* case supra, a declaratory order was made to the effect that ^β ss 98(2) and 103 of the Postal and Communications Act [*Chapter 12:05*] (Act No. 4 of 2000), conferring on the President unfettered powers to direct any telecommunication licensee or employee of such licensee to intercept any telecommunication if in his opinion it was necessary to do so, in the interests of national security or the maintenance of law and order, were unconstitutional.

The President and the Minister opposed the application. In his affidavit, the ^ς President said that in requesting the Chief Justices of Zambia, Tanzania and Malawi to nominate judges of their courts for the purposes of s 87(4) of the Constitution, the Minister was acting on his behalf. He averred that s 31H of the Constitution authorised him to perform acts which were incidental or ancillary to the exercise of the power of selection of members of the tribunal ^δ through the Minister.

The President said that he chose the first, second and third respondents as members of the tribunal. They were not selected for him by the Chief Justices of their respective countries.

In paras 4 and 5 of his affidavit, the President stated: ^ε

"4. Ad Para 20

... The word 'select' as used in section 87(4) only confers upon myself the right to choose from categories listed under section 87(4). I have discretion to select from any of the said categories. It does not mean that I must have a written list of persons to choose from. I ^φ decided to select from outside Zimbabwe. In choosing from outside the country I cannot be expected to globe-trot and just appoint. I have to go through relevant authorities in those countries. The process done here cannot be faulted.

5. Ad Para(s) 21 and 22

As aforesaid, I exercised my discretion in choosing judges from ^ς category (b) of subsection (4) of section 87. There is no allegation that the tribunal panel is biased and I do not see any reason why the applicant wants to use his own discretion when the power to choose members is not vested in him."

On the question of the intended use of the tape-recorded evidence of the ^η conversation between Mr Justice Cheda and the applicant, the Minister

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deposed that it was for the tribunal to determine the admissibility of the ^A evidence. He said the tribunal was not a court of law bound by strict rules of evidence. The Minister said the judgment of this court in the *Law Society* case *supra*, was not applicable to the circumstances of the tape-recording of the telephonic conversation between Mr Justice Cheda and the applicant.

At the beginning of the hearing of argument in this application, the parties ^B agreed that the application for condonation of the late filing of opposing papers by the President be granted and it be ordered that such costs as were occasioned by the application be paid by the President. It is so ordered by this court.

An application had been made in case No. S-344-04 for dismissal of the ^C applicant's application for want of prosecution. Ms *Maxwell* indicated that the fourth and fifth respondents were abandoning that application. The usual rule that costs follow the result was to apply.

It is also important to mention that, although the President and the Minister had deposed that the applicant had no *locus standi* to make the application ^D in terms of s 24(1) of the Constitution, Ms *Maxwell* conceded that the applicant had *locus standi*. The concession was properly made.

Although the provisions of s 87 of the Constitution are unentrenched and do not guarantee a fundamental right to a judge, it is clear that the application was based on the allegation that failure by the President to comply with the mandatory provisions of s 87(4) of the Constitution violated the applicant's ^E right to protection of the law enshrined in s 18(1) of the Constitution and that compelling him to appear before a tribunal appointed in breach of s 87(4) of the Constitution was likely to violate the same right to protection of the law. "Law" is defined in s 113 of the Constitution to mean, *inter alia*, "any provision of this Constitution". ^F

Sections 86 and 87 of the Constitution secure for a judge of the Supreme Court or the High Court tenure of office and independence in that, except by voluntary resignation or retirement, his appointment cannot be terminated except for inability to discharge the functions of his office or for misbehaviour and even then he "shall not be removed except in accordance with the ^G provisions of" s 87.

It is clear that s 87 of the Constitution provides a procedure, and an exclusive procedure, for termination of a judge's appointment that must be strictly observed at every stage of the process if judicial independence is to mean anything. It is in that context that the applicant alleged that failure by the President to select members of the tribunal as required by s 87(4) of the ^H

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^A Constitution violated his right to protection of the law requiring that his appointment be not terminated except in accordance with the special procedure provided, which included the appointment of a tribunal consisting of members selected by the President from one or each of the categories of persons prescribed under s 87(4) of the Constitution. In other words, the applicant had a fundamental right that the law which affected his rights be complied with ^B strictly in its application: see *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S) at 157G; and *Chavunduka & Anor v Commissioner of Police & Anor* 2000 (1) ZLR 418 (S).

By entrenched provisions, s 20(1) of the Constitution guarantees the applicant freedom from interference with his correspondence, which includes ^C telecommunication. Section 18(9) of the Constitution secures the applicant from infringement of his fundamental right to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations.

^D Unless he was being merely frivolous or vexatious, the applicant was entitled to make the application in terms of s 24(1) of the Constitution, alleging, as he did, that the tape-recording of his telephone conversation with Cheda ^J was in breach of his fundamental right to privacy of telecommunication guaranteed under s 20(1) of the Constitution and that the admission of the evidence in the proceedings of the tribunal was likely to violate his right to a fair hearing ^E guaranteed under s 18(9) of the Constitution.

I now turn to determine the questions raised by the applicant.

The determination of the first question, whether or not the members of the tribunal were selected by the President within the meaning of s 87(4) of the Constitution, depends on the construction and

interpretation of the relevant provisions.

The alleged unconstitutionality of the appointment of the tribunal takes a specific form, in that the allegation is of a complete failure by the President to comply with the mandatory provisions of s 87(4) of the Constitution. The constitutional point at issue therefore requires an interpretation or recognition of the scope of the powers vested in the President by the provisions of s 87(4) of the Constitution and its application to what is found to have been done by the President and others accused of having caused his alleged failure to act in terms of the Constitution.

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I note, as a starting point, that the steps to be taken in the special procedure for the removal of a judge from office show that there are specific powers vested in the President, which he is required to exercise personally. One such power, is the power to select members of the tribunal from one or each of the categories of persons prescribed under s 87(4) of the Constitution.

It is in that context that the submission was made on behalf of the applicant that the Minister, who in the scheme of the provisions of s 87 of the Constitution has no function to discharge in the process of the removal of a judge from office, usurped the independent functions of the President and unlawfully delegated the power of selection vested in him to the Chief Justices of Zambia, Tanzania and Malawi by the letter of 9 December 2003. c

Considerations of the validity of the submission must take into account the effect of s 31H(1) of the Constitution, which vests all the executive authority of the State in the President. Subject to the provisions of the Constitution, s 31H(1) gives the President discretion to exercise executive powers vested in him directly or through the Cabinet, a Vice-President, a Minister or a Deputy Minister. Not every executive power of the State vested in the President can be exercised by him through the subordinate functionaries. Those powers, such as the power to select members of the tribunal in terms of s 87(4) of the Constitution, must be exercised by the President personally.

The Minister's action in writing the letters of request on 9 December 2003 was in the exercise of executive authority. Under our Constitution, a Minister has no executive authority of his own outside the executive authority of the State vested in the President: see *Quinnell v Minister of Lands, Agriculture and Rural Development & Ors* S-47-04 at 30-31. When a Minister performs an act in his or her capacity as a Minister, it must be presumed, in the absence of proof of formal assignment, that he or she is exercising the executive authority vested in the President under administrative agency.

In the case of a Minister exercising executive powers under an administrative agency, it is the President exercising his powers through him or her. In that case, the only question on the validity of the Minister's action would be whether or not the powers he exercised are those the Constitution vested in the President to be exercised by him exclusively.

In this case, it is clear that the action taken by the Minister in the form of writing the letters of request on 9 December 2003 was to enable the President to exercise his power of selection of members of the tribunal. It was an act of pure administrative agency. Enabling a person to effectively exercise his powers

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is not usurpation of his functions. What happened here did not amount to usurpation of the President's power to select members of the tribunal.

The President was entitled under s 31H(1) of the Constitution to perform the purely executory acts that were essentially incidental or ancillary to his exercise of the power of selection of members of the tribunal through the Minister. Indeed, the President averred in his affidavit that the Minister acted on his behalf. The actions of the Minister did not have the effect of usurping the powers of selection vested in the President by the provisions of s 87(4) of the Constitution.

Once the President decided to choose members of the tribunal from persons in category (b) of s 87(4) of the Constitution, he was bound to communicate his intentions to the appropriate authorities responsible for the administration of courts in the three foreign countries from whose judges he intended to select members of the tribunal. The Chief Justices who nominated the first,

second and third respondents are heads of judicial administration of their respective countries. The President could have done so himself without ^d surrendering his power to select the members of the tribunal. In other words, he could have asked the Chief Justices of the three countries to give him the names of persons to be selected as members of the tribunal without surrendering the power vested in him to do the selection ^{xi} himself. So the Minister, in writing the letters of request, did not do anything not sanctioned by the Constitution. It is important to note that s 87, which sets up the stages of the process for ^e removal of a judge from office, is silent as to the procedure to be followed by the President at the stage of selection of members of the tribunal and, as a matter of interpretation, it is not to be construed as necessarily excluding the use by the President of the Minister to perform administrative acts which enable him to exercise his powers.

^f The contention that the Minister usurped the powers of selection vested in the President by subs (4) of s 87 of the Constitution and unlawfully delegated them to the Chief Justices of Zambia, Tanzania and Malawi was based on what the Minister said in the letters of request. The words relied upon were:

"It is my desire to have the tribunal appointed, mainly, from Judges who ^g come from outside Zimbabwe."

There is nothing in these words to justify the submission that the Minister usurped the powers of the President to select members of the tribunal. The object of the Minister's desire was the appointment of a tribunal by someone other than himself. The words do not suggest that the Minister considered ^h himself as having the power to appoint the tribunal. It is common cause that

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the tribunal was appointed by the President. It is also not in dispute that the ^a letters of request were written after a decision had been taken by the President to select members of the tribunal from persons in category (b) of subs (4) of s 87 of the Constitution ^b to the exclusion of persons in the other two categories.

The argument that the members of the tribunal were not selected by the President from persons in category (b) of subs (4) of s 87 of the Constitution is fallacious.

The *Concise Oxford Dictionary* defines the word "selected" to mean, *inter alia*, "chosen for excellence or suitability; picked". Mr *Gauntlett*, for the applicant, referred to the meaning of "select" in the *Shorter Oxford Dictionary*, given as "to choose or pick out in preference to another or others". He emphasised the words "in preference to another or others" to underscore the ^c point that the President was not shown to have undertaken the exercise of comparing the qualities or attributes of the first, second and third respondents with those of other persons in category (b) of subs (4) of s 87 of the Constitution before choosing or picking them out in preference to those others.

Paragraphs 29 and 30 of the applicant's heads of argument also reveal the ^d inferences of fact the applicant wanted drawn from the meaning of the word "selected", as applied to the nominations of the first, second and third respondents by their respective Chief Justices. It is stated:

- "29. To this in each instance there was ultimately a response confirming that each Chief Justice concerned (not, as the fourth respondent had ^e specifically required, the Minister of Justice in consultation with the Chief Justice) 'nominated' one judge. No information whatever is proved as to why the 'nominee' should suitably be selected. Clearly each foreign Chief Justice understood – correctly – that all he was being asked to do was to designate one member of the tribunal, not to offer a possible candidate who, on the basis of information ^f provided, might or might not be selected. In each case his 'nomination' was understood to be conclusive – and, in the event, was conclusive.
30. On these common cause facts, the result is clear. Each Chief Justice *selected* one judge. The fifth respondent thus both split up and abdicated the act of conscious preference central to selection to three ^g other individuals."

In para 5 of his affidavit, the President avers that he chose the first, second and third respondents as members of the tribunal. He clearly states that he exercised his discretion "in choosing judges from category (b) of subs (4) of s 87" of the Constitution. It is surprising that the fact sought to be inferred from the allegations in paras 29 and 30 of the applicant's heads of argument, which ^h

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A was also the subject of the argument in court, was that the President did not “choose” the first, second and third respondents as members of the tribunal.

But the examination of the meaning of the word “selected”, as used in subs (4) of s 87 of the Constitution, reveals that it connotes the making of a final decision by the President as to who, amongst the persons in category (b), B should become a member of the tribunal. In submitting the names of the first, second and third respondents to the Minister in response to the letters of request of 9 December 2003, the Chief Justices of Zambia, Tanzania and Malawi cannot, by any stretch of the imagination, be said to have made final decisions that the nominees had become members of the tribunal. In fact, without the acknowledgement of the nominations by the President as enabling C him to exercise his power of selection of members of the tribunal, the nominations would have had no constitutional relevance except, perhaps, as contended by the applicant, to deceive the President into believing he had chosen the members of the tribunal when in fact he had not done so. The Chief Justices had no power to select members of the tribunal and did not purport D to do so.

Two conditions must exist before a person can become a member of the tribunal. He or she has to be in possession of the relevant qualifications prescribed for persons falling within the categories. The first, second and third respondents undoubtedly fell within category (b) of subs (4) of s 87 of the Constitution. They are judges of the Supreme Courts of their respective E countries. Accordingly, they were qualified to be selected as members of the tribunal. Their professional eminence and ability were not impugned in these proceedings.

The second pre-condition for a person to become a member of the tribunal is that the President must make the final decision that he or she should become F a member of the tribunal. No other person has the power to select a person in the prescribed category as a member of the tribunal. The reposition of the power to choose members of the tribunal in the President is also the condition of its exercise over any person in the prescribed category. As stated above, the President deposed to the fact that he chose the first, second and third G respondents as members of the tribunal. It is clear that at some point in time prior to him appointing the tribunal in terms of subs (3) of s 87 of the Constitution, the President had the names of the first, second and third respondents and had become cognitive of the fact that they were judges of the Supreme Courts of their respective countries and were qualified for H selection as members of the tribunal.

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The President had a right to select the first, second and third respondents as A members of the tribunal from the list of the names submitted by the Chief Justices of the three foreign countries and on the information relating to their professional qualifications. The applicant did not say what additional information should have been made available to the President to enable him to perform his functions. The fact that the President chose the same persons B whose names were submitted does not detract from the fact that he had the right to reject any or all of the nominees if, for any reason, he considered them unsuitable for selection as members of the tribunal. He was not bound by the nominations.

It was for the President, in the exercise of his powers, to ask for additional C information on each of the judges whose names were submitted by the Chief Justices of Zambia, Tanzania and Malawi. To say that the Chief Justices of the three foreign countries “selected” the members of the tribunal for the President, is a contradiction, as one cannot talk of “members of the tribunal” when they have not been selected by the President because under the Constitution he is the only person vested with the power of selection. D

There was no material on the basis of which the President’s sworn statement that he chose the members of the tribunal could be rejected. The applicant’s contention that there was a complete failure by the President to discharge the duty of selecting members of the tribunal in terms of s 87(4) of the Constitution must be dismissed. E

The second question for determination anticipated a determination that the tribunal was appointed in accordance with the provisions of the Constitution. It is whether or not the tape-recorded evidence of the telephone conversation between Mr Justice Cheda and the applicant was obtained in breach of the applicant’s fundamental right to privacy of his telecommunication and whether F admission of it in the inquiry into his removal from office would violate his right to a fair hearing enshrined in s 18(9) of the Constitution.

I consider the second part of the question first. Section 18(9) of the Constitution provides that:

“Subject to the provisions of this Constitution, every person is entitled to ^a be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations.”

I have no doubt in my mind that the provisions of s 18(9) of the Constitution do not apply to a person when he or she appears before a body whose duty ^h

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^a is to investigate and report on the facts found and make recommendations to some other person or body.

In this case, the tribunal appointed to inquire into the question of the removal of the applicant from office is not a court or an adjudicating authority established by law to determine the existence or extent of the applicant's civil ^b rights or obligations. Its duty is to investigate and report on the facts relating to the question of his removal from office to the President. It does not decide whether or not he should be removed from office. The applicant would, of course, be entitled to a fair hearing by the tribunal, but not in the context of the cocktail of rights guaranteed to a person appearing before a court of law under s 18(9) of the Constitution: see *Mutasa v Makombe* 1997 (1) ZLR 330 (S); ^c and *Austin & Anor v Chairman of the Detainees' Review Tribunal & Anor* S-168-87 at 23.

It would be pointless to make a declaration that the effect of the judgment in the *Law Society* case *supra* is that the evidence of the telephone conversation between Cheda J and the applicant was obtained illegally and “accordingly ^d the intended use of the alleged recording and transcript is inadmissible” when the Constitution makes it clear that the tribunal is not to be bound by strict rules of evidence as it is not a court of law or adjudicating authority. It does not administer justice.

The *ratio decidendi* in the *Law Society* case *supra* was that sections 98(2) and ^e 103 of the Posts and Telecommunications Act [*Chapter 12:05*] were *ultra vires* s 20 of the Constitution of Zimbabwe because they were too wide and vague and did not provide sufficient mechanisms to prevent abuse of the powers conferred therein. The judgment recognised that s 20 of the Constitution was not absolute in its prescription of interference with communications.

^f In any case, it is not our law that evidence obtained as a result of an unlawful interception of a telephone conversation should be excluded from use in court proceedings. The rule applicable to courts is that the admissibility of illegally or improperly obtained evidence is a matter for determination by the court in the exercise of its discretion. Evidence is therefore not excluded simply ^g because of the manner in which it was obtained. The court has to take into account all the circumstances of the case, including the manner in which the evidence was obtained, in determining the question whether or not to exclude the evidence from use in the proceedings: see *S v Tswangira* S-184-95; *S v Motloutsi* 1996 (1) SA 584; *Protea Technology Ltd & Anor v Waiver & Anor* ^h [1997] 3 All SA 594 (W); and *S v Naidoo & Anor* [1998] 1 All SA 189 (D).

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Section 48(1) of the Civil Evidence Act [*Chapter 8:01*] enacts the above stated ^a common law rule on the admissibility of illegally or improperly ^{ortq}net uvydence. It provides that:

- “(1) Notwithstanding anything in this Act but subject to subsection (2), a court *may* exclude or refuse to allow the giving of any evidence which – ^b
 - (a) has been obtained illegally or improperly; or
 - (b) ... (not relevant); or
 - (c) ... (not relevant).
- (2) In deciding whether or not to exclude or refuse to allow the giving of any evidence in terms of subsection (1), the court shall have regard to – ^c
 - (a) the nature and extent of the illegality, impropriety, ...; and
 - (b) the probative value of the evidence; and
 - (c) the interests of justice as between the parties; and
 - (d) the general public interest” (my emphasis).

It is clear from the provisions of s 48 of the Civil Evidence Act that, it is on the ^D effect of the consideration of all the factors cumulatively, that the court must decide whether to exclude the evidence or not. But this rule of evidence would apply to proceedings of a court or adjudicating authority. The question of admissibility of the evidence of the telephone conversation between Cheda J and the applicant in the inquiry was for the tribunal to determine in the exercise ^E of its discretion. The mandate for the tribunal was to investigate and establish the truth of the allegations of misbehaviour levelled against the applicant within the terms of its appointment. It is not bound by strict rules of evidence. If the evidence of the tape-recorded conversation between Cheda J and the applicant is probative of the truth of the allegations being inquired into, the ^F tribunal would be abdicating its duty under its terms of appointment if it excluded the evidence on the ground that it was obtained illegally or improperly, if that were to be its finding.

I also do not think it would be proper for this court to declare that the evidence is inadmissible in proceedings of an investigating body, whose duty is to collect information and report on the facts to the President who appointed it ^G for that purpose and is therefore entitled to receive the information. Investigating bodies carrying out their constitutional functions should not be prevented from performing their functions unless they are in breach of the rules of natural justice shown to be applicable in the particular circumstances. ^H

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Malaba JA

^A The tribunal in this case is a body that is carrying out an investigation and does not decide the question of the removal of the applicant from office. It is performing a constitutional function.

The order is therefore made that, apart from it being ordered that the fourth and fifth respondents pay costs of the application in case No. S-344-04 jointly and severally, the one paying the other to be absolved, and that the fifth ^B respondent pay costs in the application for condonation of the late filing of opposing papers, the application is dismissed with costs.

CHIDYAUSIKU CJ, ZIYAMBI JA & GWAUNZA JA concurred.

^C SANDURA JA: I have read the judgment prepared by MALABA JA, but disagree with the finding that the three members of the Tribunal were selected by the President as required by s 87(4) of the Constitution. In addition, there can be no doubt that the participation of the official designated by the Minister to lead evidence before the Tribunal for the purpose of assisting the Tribunal ^D with the State's position is unconstitutional.

In October and December 2003, the Minister wrote, in identical forms, to the Zimbabwean High Commissioners in Zambia and Tanzania, and to the Malawian High Commissioner in Harare. The relevant part of his letter reads as follows:

"^E *It is my desire* to have the Tribunal appointed, mainly, from Judges who come from outside Zimbabwe. Such an arrangement does, in my view, assist in the area of transparency and fairness.

I should, in view of the foregoing, be grateful if Your Excellency would kindly approach, on my behalf, the Minister of Justice and request him to consult with the Chief Justice ... *who would nominate a Judge of his court* ^F *to be a member of the tribunal*" (my emphasis).

On 26 November 2003, the Zambian Minister of Legal Affairs and Attorney-General wrote to the Zimbabwean High Commissioner in Lusaka as follows:

"I thank you for your communication of 22 October 2003 and regret the delay in replying thereto.

Kindly note that *His Lordship the Chief Justice of Zambia has nominated* ^G *Mr Justice D K Chirwa of the Supreme Court of Zambia to serve on the tribunal.*

You may kindly communicate this to my counterpart the Hon. Mr P A Chinamasa, MP" (my emphasis).

Thereafter, on 2 December 2003, the Zimbabwean High Commissioner to ^H Tanzania wrote to the Minister as follows:

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Malaba JA

"As per my telecommunication of today, 2 December 2003, I wish to confirm ^A that *Chief Justice B A Samatta has advised that the nominee is Honourable Mr Justice John Mroso, a Justice of the Court of Appeal*" (my emphasis).

Subsequently, on 7 January 2004, the Malawian High Commissioner in Harare, whose official title had changed to Ambassador, wrote to the Minister as follows:

"I refer to your letter dated 9th December, 2003 in which you kindly asked ^a me to approach the Minister of Justice and the Chief Justice of Malawi to consider nominating a judge who would be a member of the tribunal that is scheduled to enquire into the conduct of Mr Justice B Paradza. I wish to inform you that *His Lordship the Chief Justice of Malawi has nominated Justice Isaac Mtambo, Judge of the Malawi Supreme Court of Appeal, to be on the tribunal.* The curriculum vitae of Justice Isaac Mtambo can be forwarded to your office if need be" (my emphasis).

In due course, the three judges, being the first, second and third respondents, whose names had been submitted to the Minister, were sworn in as members of the Tribunal by the President.

The above facts were common cause. In my view, those facts indicate beyond ^b reasonable doubt that the first, second and third respondents were not selected by the President, but by their Chief Justices. The contemporaneous correspondence set out above is decisive of the issue.

The Minister wrote to each of the three High Commissioners requesting him/her to approach "the Minister of Justice and request him to consult with the ^c Chief Justice ... who would nominate a judge of his court to be a member of the Tribunal". It is pertinent to note that each Chief Justice was requested to nominate only one judge of his court, and not two or more from whom the President might select a member or members of the Tribunal.

In each case, the response to the Minister's request indicated that the Chief Justice concerned had nominated one judge to be a member of the Tribunal, ^d and gave his name. The response did not give any information as to why the judge concerned should be selected as a member of the Tribunal.

Quite clearly, each Chief Justice understood, correctly in my view, that all he was being asked to do was to select one of his judges who would be a member of the Tribunal, and not to nominate a judge who, on the basis of the ^e information provided, might or might not be selected by the President as a member of the Tribunal.

In the circumstances, bearing in mind the fact that in terms of s 87(4) of the Constitution, the Tribunal should consist of not less than three members, one of whom should be designated by the President as chairman, and the fact that each of the three Chief Justices was requested to nominate only one of his ^f

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Malaba JA

^a judges who would be a member of the Tribunal, it is clear beyond doubt that the selections made by the three Chief Justices were intended by the President to conclusively determine the three members of the Tribunal. This was an impermissible delegation of the President's power of selecting the members of the Tribunal.

Consequently, the first, second and third respondents were not selected by ^b the President, as required by s 87(4) of the Constitution, but were selected by the Chief Justices of Zambia, Tanzania and Malawi, respectively, who had no powers to do so in terms of the Constitution. The Tribunal was not, therefore, constituted in compliance with s 87(4) of the Constitution.

Finally, I wish to deal with the participation of the official designated by the ^c Minister to lead evidence before the Tribunal. Commenting on the participation by that official, the Minister averred as follows in his opposing affidavit:

"The State attorney is there to assist the Tribunal with the State's position."

Quite clearly, s 87 of the Constitution does not provide for the participation ^d by such an official in the proceedings of the Tribunal. The Tribunal is supposed to be a wholly impartial body whose function is set out in s 87(6) of the Constitution, which reads as follows:

"A tribunal appointed under subs (2) or (3) shall inquire into the matter and report on the facts thereof to the President and recommend to the President whether or not he should refer the question of the removal of ^e the judge from office to the Judicial Service Commission, and the President shall act in accordance with such recommendation."

The role of the person leading evidence before the Tribunal is not "to assist the Tribunal with the State's position", because the State does not have a position in such an enquiry, but to assist the Tribunal by selecting the evidence to be placed before the Tribunal and by calling the witnesses and

examining them. An enquiry held in terms of s 87 of the Constitution is not a criminal prosecution in which the State alleges that an accused person is guilty of the offence with which he is charged.

In addition, s 87(7) of the Constitution, which provides that the provisions of the Commissions of Inquiry Act [Chapter 10:07] shall, *mutatis mutandis*, apply in relation to a tribunal appointed under subs (2) or (3) of s 87 of the Constitution as they apply to Commissioners appointed under that Act, does not authorise the participation of an official "to assist the Tribunal with the State's position". That is so because there is no provision for the appointment of such an official in the Commissions of Inquiry Act.

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Malaba JA

In the circumstances, I would have made the following order –

1. The selection of the Tribunal comprising the first, second and third respondents was unconstitutional.
2. The evidence before a properly constituted Tribunal shall not be led by an official designated by the fourth respondent, but by an independent legal practitioner selected by the Tribunal.
3. The costs of this application shall be borne by the fourth and fifth respondents, jointly and severally, the one paying the other to be absolved.

Byron Venturas & Partners, applicant's legal practitioners

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

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/S v SIBANDA 2005 (2) ZLR 117 (H)

S v SIBANDA 2005 (2) ZLR 117 (H)

2005 (2) ZLR 117

Citation	2005 (2) ZLR 117 (H)
Case No	Judgment No. HB-59-01
Court	High Court, Harare
Judge	Garwe JP
Heard	24 August 2005
Judgment	24 August 2005
Counsel	<i>B Vito</i> , for the State <i>K Ncube</i> , for the accused
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

C Criminal procedure — trial — completion of — when trial completed — murder case — verdict of guilty — trial complete only after determination of whether extenuating circumstances exist — judge cannot determine the question of extenuation without the assessors — unavailability of trial judge — trial must be considered a nullity — the trial must be commenced *de novo* before another judge

D Criminal procedure (sentence) — common law crimes — murder — extenuating circumstances — finding of — such finding part of verdict, not of sentencing process — unavailability of trial judge — not permissible for another judge to determine the question of extenuation

Headnote

¶ Although the judge and the assessors are required, after convicting an accused person of murder, to consider the question of extenuation, in reality there is but one composite verdict of guilty with or without extenuating circumstances.

A murder trial ends with judge and assessors making findings on the existence or otherwise of extenuating circumstances following a **F** conviction for murder. Until that stage has been reached, the trial is not complete. The judge cannot proceed on his own to determine the question of extenuation without consulting the assessors in order to assess an appropriate sentence in a given case.

The accused had been convicted of murder with actual intent on 16 July 2002. The proceedings were thereupon adjourned to enable the accused to **G** submit evidence on the question of extenuation. Two days later, and before the issue of extenuation had been determined, the trial judge retired from the High Court bench. Thereafter, during September 2002, the judge was arrested on charges of attempting to defeat the course of justice. In June 2003, the charges against him were withdrawn by the State **H** before plea. Upon being asked by the Register of the High Court as to

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when he would be available to conclude the criminal matter involving the **A** accused, the judge indicated that he would not be returning to Zimbabwe from South Africa as the State had refused to withdraw the charges after the plea and had reserved to itself the right to proceed against him in the future. Attempts by the Register to ascertain the address of the judge in South Africa proved fruitless as did in attempts to persuade him to return **B** to the country to conclude the trial against the accused.

In February 2005, the State advised that it did not intend to prosecute the judge and a letter to the effect was sent to him using his Zimbabwean address. The letter was returned to the Register with the inscription "Based in South Africa." In the circumstances, the State sought to argue that as the accused had been found guilty of murder with actual intent, **C** another judge could proceed to deal with question of extenuation being part of the sentencing process, and thereafter impose sentence. In arguing thus, it placed reliance upon **s** 337 of the Criminal Procedures and Evidence Act [*Chapter 9:07*]. It was argued on behalf of the accused, however, this could not be done and that only a trial *de novo* was now possible **D**.

Held, that as the determination of the existence of extenuating circumstances was not part of the sentencing process, it was not something which another judge could deal with in terms of **s** 337 of the Act.

Held, further, that in the circumstances, the accused could not demand a verdict because the trial judge was now resident outside the jurisdiction **F** of the court and the present court was not capable of bestowing one. The trial judge would not be coming back to finalise the matter, which must now be considered a nullity.

Held, further, that the trial must be commenced *de novo* before another judge but that there was no need for a formal order to this effect. **F**

Cases cited

S v de Koker 1978 (1) SA 659 (O)

S v Dehwe 1987 (2) ZLR 231 (S)

S v Mavhunga 1981 (1) SA 56 (A)

S v Mhlanga 1959 (2) SA 220 (T)

S v Shabalala 1966 (2) SA 297 (A) ^G
S v Sparks & Anor 1972 (3) SA 396 (A)
R v Taylor 1949 (4) SA 702 (A)
S v Tsangazi 1997 (2) ZLR 247 (H) ^H

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Garwe JP

Legislation considered ^A

Constitution of Zimbabwe 1980, s 86(4)
Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 180, 333(2), 334(7) & 337
High Court Act [*Chapter 7:06*], s 3

Case information

^B *B Vito*, for the State
K Ncube, for the accused

Judgment

GARWE JP: The accused, in this matter, was on 16 July 2002 convicted of murder with actual intent following a trial. The proceedings were thereafter ^C adjourned at the instance of the accused to enable him to submit evidence on the question of extenuation. On 18 July 2002, however, Blackie J retired from the High Court bench before the issue of extenuation had been determined. The matter has to date not been finalised owing to developments that occurred not long after the trial Judge retired.

^D In September 2002, Blackie J was arrested on allegations that he had attempted to defeat the course of justice in a matter involving one Tara White. He was thereafter placed on remand. In response to a query by the Registrar of this court as to when he would be available to complete six part heard criminal and civil matters, the judge advised the Registrar in November 2002 that since he was facing criminal charges, he would not be coming back to ^E finalise these matters until he was cleared of those charges. In June 2003, the charges against Blackie J were withdrawn before plea. In response to a further minute from the Registrar, the judge advised in a letter dated 20 January 2004, that although the charges against him had been withdrawn before plea he would not be returning to deal with any matter since the State had refused to withdraw the charges after plea and had reserved to itself the right to ^F proceed against him in future. Further attempts by the Registrar to communicate with the judge proved fruitless. The Registrar would deliver mail at a local address but the judge would post his response from South Africa, without giving his contact address or telephone numbers. In February 2005, the Director of Public Prosecutions advised by latter that the "prosecution had been declined". A letter to his effect was sent to Blackie J using his local ^G address. In the letter the Registrar also requested the judge to indicate when he would be available to finalise his part heard matters since the State had now indicated it was no longer proceeding with the prosecution. The letter was returned to the Registrar with the inscription "Based in South Africa". The current situation therefore is that there is no realistic chance that the Registrar ^H can communicate with the judge or that the judge will be coming back to

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Garwe JP

determine his part heard matters. Some of the judgments have been pending ^A since the year 2000. Even at the time the judge retired there had been undue delays in the handing down of some judgments but this only came to light after his retirement.

In the case under consideration, the trial judge convicted the accused of murder with actual intent. He then retired before determining the issue of ^B extenuation. The question that now arises is whether another judge can take over the proceedings at this stage and thereafter determine the matter.

The general rule is that a presiding judicial officer should preside over a trial from commencement until the matter is determined, either by the acquittal of the accused or by the imposition of a sentence following his conviction on the charge preferred against him. Put another way, the judicial officer passing c sentence should be the same judicial officer who returned the verdict: see *S v Karonga* 1960 (4) SA 64, 66. In terms of s 180 of the Criminal Procedure and Evidence Act [Chapter 9:07], a person who has been called upon to plead to a charge or indictment shall be entitled, subject to the proviso to that section, to demand that he be either acquitted or convicted by the judge or magistrate d before whom he pleaded.

The law however recognises that there are instances where this is not possible. The presiding officer might for example fall sick indefinitely or die after taking plea. He might become unavailable for a variety of reasons including dismissal, resignation or recusal.

The position was aptly captured in *R v Mhlanga* 1959 (2) SA 220 (T) where e Claassen J remarked:

"Many events may however occur after the taking of the plea which may render the proceedings abortive and therefore a nullity because the court, as constituted at the plea stage, has ceased to exist or the presiding judicial officer has ceased to have jurisdiction in the matter. Such events may f include the death of a magistrate, his resignation or dismissal, his recusal or his transfer ... One can think of other possibilities too ..." (at p 250).

In such situations, the Criminal Procedure and Evidence Act [Chapter 9:07] has made provision for the following:

- (a) in the High Court, if sentence is not passed forthwith, any judge may pass g sentence upon the convicted person – s 333(2) of the Act;
- (b) in the magistrates court, if sentence is not passed upon an offender forthwith upon his conviction ... any magistrate of that court may, in the absence of the magistrate who convicted the offender ... pass sentence on the offender after consideration of the evidence recorded and in the presence of the offender (s 334(7) of the Act. h

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Garwe JP

A While the general principles applicable in the two situations cited above are the same, it is the provision applicable to the High Court which is the subject of this judgment. Put another way, the question is whether following a conviction for murder another judge of the High Court can proceed to deal with the question of extenuation and thereafter impose a sentence. That another judge has jurisdiction to pass sentence is clear. What is in issue is whether b another judge can determine the question of extenuation and then proceed to pass sentence.

The State has submitted that "once the juridical verdict of guilty of murder has been entered, the second inquiry as to whether any extenuating circumstances exist is a sentencing issue, which issue another judge can deal with in terms c of s 337."

I am not persuaded that this submission is correct in law.

In terms of s 3(b) of the High Court Act [Chapter 7:06], the High Court shall be duly constituted, for the purposes of hearing a criminal trial, if it consists of one judge of the High Court and two assessors. In terms of subs (2) of the d Act, any question of fact arising at a criminal trial in the High Court shall be decided by the majority of the court. In terms of subs (3), at any criminal trial in the High Court, the judge shall have the sole responsibility for fixing the sentence, but he may consult the assessors if he thinks fit. From the above provisions it is clear that whilst the question of sentence is to be determined by the judge, issues of fact arising during the trial are to be decided by the judge e and the two assessors. As stated by Gardiner and Lansdown, *South African Criminal Law and Procedure* 6 ed, Vol 1 at p 348:

"It is to be observed that the assessors are members of the court only for purposes of the trial, and that their oath is to give a true verdict according to the evidence upon the issues to be tried ..."

f On what constitutes "a trial" the learned authors state on the same page:

"A trial is the determination of the matters put in issue, and it concludes with the verdict, or, in the case of a verdict of guilty of murder, with the decision of the question whether there are extenuating circumstances."

On a careful analysis of the law, it is clear that although the judge and the assessors are required, after convicting an accused person of murder, to g consider the question of extenuation, in reality

there is but one composite verdict of guilty with or without extenuating circumstances.

In *R v Taylor* 1949 (4) SA 702 (A), Schreiner JA stated:

"It is clear that in arriving at a conclusion as to whether to express the opinion that extenuating circumstances are or are not present a jury or a court of judge and assessors, has not only to find facts relevant to the

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Garwe JP

subject of extenuation but has also, after considering those facts and the extent of their probable influence on the accused's conduct, to form what is essentially a moral judgment as to whether the circumstances ought to be characterised as extenuating ... the expressed opinion by the triers of fact that extenuating circumstances are or are not present is not part of the sentence or part of the judge's reasons for sentence; it is a distinct procedural step in relation to the power to sentence a convicted murderer B ..."

In *S v Shabalala* 1966 (2) SA 297 (A), the South African Appellate Division held that although on a charge of murder there is only one investigation, namely whether the accused is guilty of murder with or without extenuating circumstances, there are two separate issues in respect of which the onus is not on the same party. In this regard attention is also drawn to *S v Mavhungu* C 1981 (1) SA 56.

In *S v Dehwe* 1987 (2) ZLR 231 (S), McNally JA stated at p 242B-C:

"A murder trial differs from other trials, not only in the sense that it involves a possible death sentence, but also in that it involves a consideration of extenuating circumstances at a separate and distinct stage of the trial. D Because murder, more than other crimes, involves human passions whose operation may often give rise to circumstances of extenuation, it is vitally important, before a decision on extenuation is made, that the court has some impression of the motives and relationships which have led to the killing ..."

The learned judge of appeal went on to stress the need for the trial court: E

"to assess the character of the witnesses, to absorb the atmosphere of the time, to gain some impression of the relationships between the accused and his fellow workers, between the deceased and the accused or indeed between the deceased and the other witnesses."

In the case of *S v Sparks & Anor* 1972 (3) SA 396 (A) at 404C-G, Holmes JA F had the following to say:

"... in particular, 'verdict' is traditionally understood to refer to the decision whether the accused is guilty or not guilty. Indeed, on a plea of guilty being entered, the 'trial' ends, since there are then no further issues to be tried in regard to verdict: see s 173. This leaves the question of sentence, including facts relating thereto, exclusively within the jurisdiction of the G judge. Findings of extenuating circumstances in murder trials provide no exception. Whether made together with the verdict of guilty or thereafter, that finding is part of the verdict ...

In the result, we hold that an assessor's function does not extend beyond verdict." H

2005 (2) ZLR p123

Garwe JP

A Attention is also drawn to du Toit *et al*, *Commentary on the Criminal Procedure Act*, 1993 edition, at pp 21-5.

The conclusion must inevitably be reached that a murder trial ends with the judge and assessors making findings on the existence or otherwise of extenuating circumstances following a conviction for murder. Until that stage is reached, the trial is not complete. Nor can the presiding judge proceed on B his own to determine the question of extenuation without consulting the assessors in order to assess an appropriate sentence in a given case.

If my conclusion is correct, as I believe it is, the submission by the State that the determination of the existence of extenuating circumstances is part of the sentencing process cannot be correct. I am fortified in this view by the various C authorities to which reference has been made and also the fact that were another judge to get involved at the stage of extenuation for the first time this would mean that the judge, who has hitherto not been involved in trial, would have to make findings of fact together with the original assessors in the case, in order to determine the issue of extenuation. This is akin to a judge taking over a criminal trial from another halfway through the proceedings. I am D satisfied that another judge is not empowered to do so under any circumstances.

It is clear, as already noted, that Blackie J will not be coming back to this jurisdiction to deal with this and other part heard matters. In terms of s 86(4) of the Constitution of Zimbabwe, Blackie J was empowered upon retirement to sit as a judge for the purpose of giving judgment or otherwise in relation ϵ to any proceedings commenced before or heard by him while he was in office. The question that arises is whether the proceedings are now a nullity. If they are, a formal order setting them aside would not be necessary. However, if they are not, it would be necessary for an order to be made setting aside the proceedings and directing a trial *de novo* before another judge.

In *S v Tsangaizi* 1997 (2) ZLR 247 (H), this court had occasion to consider the Γ circumstances in which a trial *de novo* would be permissible. At p 249, Gillespie J had this to say:

"The first proposition, that the death or incapacity of a magistrate brings about the nullity of the incomplete proceedings is entirely correct ... the principle is that if during the course of proceedings a judicial officer ceases to have jurisdiction then the proceedings up to that point are abortive. In Γ such an event, the person on trial cannot demand a verdict since the presiding officer is incapable of bestowing one. The part heard matter is accordingly a nullity and may be commenced a fresh without any order of a higher court setting aside the incomplete proceedings.

This was made clear, if greater clarity were required in *S v de Koker* 1978 (1) SA 959 where Flemming AJ held: Γ

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Garwe JP

... According to the decision of the courts, the impossibility of Δ continuing with the trial by reason of the unavailability of the magistrate results, without more, in the proceedings being regarded as abortive and they fall away without it being necessary for a superior court to set them aside before a new trial can take place'."

The issue that needs to be determined at this stage is whether the unavailability of Blackie J is such an incapacity as would render the proceedings null and Δ void. The State has submitted that another judge is empowered to determine this matter whilst the defence has submitted that only a trial *de novo* is now possible.

Blackie J was empowered by s 86(4) of the Constitution to determine this matter. He has in the past indicated that he was prepared to come back and Δ dispose of this matter, amongst others, if the charges against him were dropped permanently. This was eventually done but since then all attempts to contact him have been in vain. The last letter sent to him was returned with the remarks "Based in South Africa". On the available facts, it is clear that Blackie J is no longer residing in this country.

Considering that Blackie J retired three years ago, the fact that it is no longer Δ possible to contact him owing to the fact that he has moved to South Africa and that he has deliberately withheld his contact details from the Registrar, the inference is irresistible that he will not be coming back to finalise any of his part heard matters. He is now outside the jurisdiction of this court and although he has in the past had the authority to determine the present matter, ϵ it is clear that he cannot do so whilst residing outside this country. There is nothing that anyone or any authority can do to bring him back to finalise this matter. Indeed, it is now impossible for the Registrar of this court to communicate with him.

In the light of these circumstances, the accused person in this case cannot demand a verdict because the trial judge is now resident outside the jurisdiction Γ of this court and is not capable of bestowing one. There is no suggestion that the trial judge will be coming back at any time to finalise his part heard cases. The proceedings commenced before him must accordingly be considered a nullity.

The accused has been in custody for a considerable time. He has been awaiting Γ sentence for the past three years. Clearly, the wheels of justice have almost ground to a halt in this case. Why the presiding judge did not find it necessary to conclude this matter soon after his retirement remains unclear. His problems with the law only arose almost three months after he had retired. This matter could have been completed during that time. That the accused now has to Γ

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Garwe JP

Δ undergo a new trial is extremely prejudicial and certainly not in the best interests of justice. It is unknown whether the witnesses are still available and if they are to what extent their recollection of

the events may have been affected by the passage of time. The State in its submissions says the investigating officer is now deceased. The possibility of a different verdict cannot be discounted. There can be no doubt that this matter has not been properly handled. The decision by the trial judge not to come back and determine this matter is a most unfortunate one in view of the difficulties I have just referred to and the obvious prejudice to the accused.

The proceedings before Blackie J are a nullity and for the avoidance of doubt should be commenced afresh before another judge. There will be no need for a formal order to this effect.

▯ *Gill, Godlonton & Gerrans*, accused's legal practitioners

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Source:

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WOOD & ANOR v MUDUNGWE & ANOR 2005 (2) ZLR 126 (S)

2005 (2) ZLR p126

Citation	2005 (2) ZLR 126 (S)
Case No	Judgment No. S-148-04
Court	Supreme Court, Harare
Judge	Sandura JA, Malaba JA & Gwaunza JA
Heard	12 October 2004
Judgment	22 September 2005
Counsel	<i>R M Fitches</i> , for the appellants <i>A Mugandiwa</i> , for the first respondent No appearance for the second respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Contract — *interpretation* — “free of deduction” — meaning c

Contract — *sale* — *immovable property* — *price payable* “free of deduction” — *interpretation*

Sale — *price* — *deductions from price* — *provision that price should be paid* “free of deductions” — *what deductions seller may expect relief from* d

Headnote

The appellants sold a house to the respondents. The contract provided that the price should be paid “free of deduction” to the seller, payment being made to the seller's agent, his legal practitioner. The buyers duly paid the amounts specified in the contract, but when the agent presented his account to the appellants, certain sums had been deducted, particularly e for capital gains tax and a sum in settlement of the appellants' mortgage bond with a building society. The appellants

refused to sign the deed of transfer, claiming that there had been a breach of contract, in that they had not received the full amount of the purchase price, with no deductions.

Held, that in the absence of express enumeration of the things not to be deducted from the purchase price, the words “free of deduction” should be confined to such deductions as might reasonably have been in the contemplation of the parties at the time they entered into the contract. In other words, the phrase would refer to things for the payment of which a purchaser would ordinarily be expected to make deduction from the purchase price. Capital gains tax is not, properly speaking, a deduction but a charge, which the legislature imposes on the person who receives capital gain; and the mortgage bond imposed an obligation on the first appellant and his wife to pay their debt to the building society. The purchaser had no obligation, in the absence of express agreement, to pay the money for them. There was nothing in the context in which the words “

2005 (2) ZLR p127

Malaba JA

A free of deduction” were used to suggest that when the parties entered into the contract they treated capital gains tax and the other debts listed in the statement of account, ordinarily expected to be paid by the sellers, as coming under the meaning of “deduction”. Consequently, the words should be construed in their limited meaning, which would secure for the seller relief from the burden of things that are in the ordinary sense B “deductions” expected at law to be made as of right from the purchase price by the purchaser.

Cases cited

Gleadow v Leetham (1883) 22 ChD 269

c United Mines of Bultfontein v de Beers Consol Mines Ltd (1900) 17 SC 419

Case information

R M Fitches, for the appellants

A Mugandiwa, for the first respondent

No appearance for the second respondent

Judgment

D **MALABA JA:** This is an appeal against an order of the High Court, granted on 24 September 2003, directing the appellants to sign documents for the transfer of Stand No. 13270 Salisbury Township, to Tonderai Daiton Tela, within ten days of service of the order upon them failing which the Deputy Sheriff, Harare, was authorised to sign the transfer documents on their behalf. E The appellants were also ordered to pay the costs of the application for the order granted jointly and severally, the one paying the other to be absolved.

The facts are these: On 28 August 2001, the appellants, who were husband and wife, entered into a contract with Tonderai Daiton Tela in terms of which they sold to him Stand No. 13270 Salisbury Township, situated in the District F of Salisbury (“the property”) for \$5 000 000. Clause 2.1 of the agreement of sale provided that:

“The price shall be paid free of deduction to the seller in the manner set out in the Schedule.”

As to the manner of payment, the parties agreed to: G

- “1. The Purchaser paying the Sellers a deposit of \$3 375 000 (Three million three hundred and seventy-five thousand dollars) on signing this Agreement of Sale.
2. The Purchaser paying a further deposit equivalent to the Agent’s commission of \$250 000 (Two hundred and fifty thousand dollars) to H the Agent.

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Malaba JA

3. The balance of the purchase price amounting to \$1 500 000 (One A million five hundred thousand dollars) shall be paid by the Purchaser within six months of this Agreement of Sale, that is to say, by 28 February 2002.
4. The Agent’s Commission shall be paid by both parties in equal shares i.e. the Sellers \$125 000 (One hundred and twenty-five thousand dollars) and the Purchaser \$125 000 (One hundred and twenty-

five B thousand dollars).

5. The Sellers shall rent the premises at a rent to be negotiated after transfer of (the) property."

Clause 6.1 provided that the purchase price had to be paid to Messrs Coghlan, Welsh & Guest, who were to tender transfer to the purchaser on behalf of the C sellers within a reasonable time after the price had been paid in full. Messrs Coghlan, Welsh & Guest, who were the sellers' agent, shall hereinafter be referred to as "the agent".

The sum of \$3 375 000 was paid to the agent on 30 August 2001 and \$1 345 000 on 5 November 2001. On 11 December 2001, the purchaser paid \$280 000 and transfer fees in the sum of \$261 312.50. As of that date the purchaser had paid D the purchase price of \$5 000 000 to the sellers' agent.

On 15 January 2002, the agent sent to the sellers the following statement of account:

"By purchase price	5 125 000
To provision for CGT	500 000 E
To Agent	250 000
To Volinet	250 000
To BBS' cancellation requirements	473 914
To Cancellation Costs	890
To Volinet	250 000 F
To Tigere	4 546
To W P Enterprise	2 389 639.87
To Edkins	6 900
To Donnelly	9 829
To Rates	20 000 G
To Cheque herewith	<u>858 281.13</u>
	5 125 000"

5 125 000

On 8 February 2002, the first appellant refused to sign the transfer documents, alleging that the payments made by the agent to his creditors were deductions. H

2005 (2) ZLR p129

Malaba JA

A He claimed that as a result of those payments there was a breach of clause 2.1 of the agreement of sale by the purchaser because the price of \$5 000 000 had not been paid to him "free of deduction". He singled out the following payments –

Capital Gains Tax	\$500 000
B BBS Cancellation Requirements	\$473 914

Cancellation Costs	\$890
To Tigere	\$4 546
To Rates	\$20 000.

On 9 May 2002, the first respondent acting on a general power of attorney c given to him by the purchaser on 28 August 2001, applied to the High Court for an order compelling the appellants to sign the documents to effect transfer of the property to the purchaser in terms of the agreement of sale. The founding affidavit averred that the purchaser had performed his obligations in terms of clause 2.1 of the agreement and paid the price of \$5 000 000 to the sellers "free of deduction".

d The first appellant, who opposed the application, admitted that the purchase price had been paid to the agent. He did not deny that they were the sellers' agent with authority to receive payment of the money. It was his contention nonetheless that he did not receive \$5 000 000 into his pocket.

The learned judge held that the payments made by the agent out of the e purchase price and singled out by the first appellant as evidence of a breach of clause 2.1 of the agreement of sale were not reasonably within the contemplation of the parties at the time they entered into the contract. In granting the order the learned judge stated:

"In my view, it is highly unlikely, if at all, that such costs or deductions were in the contemplation of the parties when they entered into the agreement f of sale. In any event, in terms of the Capital Gains Tax Act [Chapter 23:01] capital gains tax is paid by sellers of immovable property in respect of the capital gains accrued in respect of the sales. The money owed to Beverley Building Society by the first respondent [now the first appellant] was his debt and the applicant's principal could not have been expected to pay it unless the agreement of sale specifically provided so.

g ... The deductions or costs that the first respondent claims ought to have been made or paid by the applicant's principal are not recorded as such in the agreement of sale. The applicant's principal thus did not breach the h agreement."

2005 (2) ZLR p130

Malaba JA

In the appeal, Mr *Fitches* argued on behalf of the appellants that the court a *a quo* misdirected itself in construing the phrase "free of deduction" in clause 2.1 of the agreement of sale to exclude relief claimed by the first appellant from the burden of the payments made by the agent to his creditors. The contention advanced was that the phrase "free of deduction" is not usually included in agreements of sale, and the only reasonable inference was b that its inclusion in clause 2.1 was to secure for the sellers freedom from the burden of payments of their debts as reflected in the statement of account prepared by the agent so that they received \$5 000 000 in their pocket.

The question the court a *quo* was called upon to determine was one of the true construction of the language used by the parties in their written contract. When the words "free of deduction" are used in a contract of sale to impose c a duty on a purchaser in respect to the payment of the purchase price they have a technical meaning. In their limited meaning, they would be intended to secure for the seller relief from the burden of things that are in the ordinary sense "deductions" expected at law to be made as of right from the purchase price by the purchaser. Where things which, in the ordinary sense of the word, d would not be "deductions" expected to be made by a purchaser from the purchase price are to be included in the meaning of that word the context in which it is used must be made clear. The parties must specify or enumerate the type of things they intended to be included in the concept of "deduction". In the absence of express enumeration of the things not to be deducted from the purchase price, the learned judge correctly decided, on the authority of *United e Mines of Bultfontein v De Beer Consolidated Mines Ltd* (1900) 17 SC 425 that the words "free of deduction" should be confined to such deduction as might reasonably have been in the contemplation of the parties at the time they entered into the contract. In other words, the phrase would refer to things for the payment of which a purchaser would ordinarily be expected to make deduction from the purchase price. f

So whether or not the purchase price should have been paid to the first appellant free from deduction for capital gains tax and personal debts, listed in the statement of account prepared by the agent, must depend upon the meaning of the words used by the parties; *i.e.* if upon the true construction of the words the court *a quo* considered that it was intended by the parties ^a that the sellers should have the \$5 000 000 without the capital gains tax and the personal debts listed in the statement of account being deducted, there was no rule of law to prevent effect being given to that intention.

The purchaser paid the \$5 000 000 to the agent without deduction, thereby discharging his obligation under clause 2.1 of the agreement of sale. What ^b

2005 (2) ZLR p131

Malaba JA

^a happened to the money once it was in the hands of the agent was a matter between the appellants and the agent. Capital gains tax is not, properly speaking, a deduction but a charge, which the legislature imposes on the person who receives capital gain. See *Gleadow v Leetham* (1883) 22 Ch D 269 at 272. The justification for its imposition is receipt of gain and not payment of the purchase price. The mortgage bond imposed an obligation on the first ^b appellant and his wife to pay their debt to Beverley Building Society, and the purchaser had no obligation, in the absence of express agreement, to pay the money for them. It was important therefore for the parties to show in clear language that the word "deduction" in clause 2.1 was intended to grant to the sellers freedom from the burden of paying capital gains tax and any of the ^c personal debts listed in the statement of account, so that the sellers received the \$5 000 000 from their agent "free of deduction".

As there was nothing in the context in which the words "free of deduction" were used to suggest that when the parties entered into the contract they treated capital gains tax and the other debts listed in the statement of account, ordinarily expected to be paid by the sellers, as coming under the meaning of ^d "deduction", the learned judge correctly construed the words "free of deduction" in their limited meaning.

The appeal is accordingly dismissed with costs.

^e SANDURA JA & GWAUNZA JA concurred.

Musunga & Associates, appellant's legal practitioners

^f *Wintertons*, first respondent's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/MZWIMBI & ORS v RESERVE BANK OF ZIMBABWE & ORS 2005 (2) ZLR 132 (S)

MZWIMBI & ORS v RESERVE BANK OF ZIMBABWE & ORS 2005 (2) ZLR 132 (S)

2005 (2) ZLR p132

Citation	2005 (2) ZLR 132 (S)
Case No	Judgment No. S-35-05
Court	Supreme Court, Harare
Judge	Sandura JA, Malaba JA & Gwaunza JA
Heard	7 March 2005
Judgment	5 September 2005

Counsel	<i>S Moyo</i> , for the appellants <i>E K Mushore</i> , for the first and third respondents <i>E I Manikai</i> , for the second respondent
Case Type	Civil Appeal
Annotations	No case annotations to date

Flynote

Bank — *curatorship* — *curator* — *decision of* — *appeal against* — *appeal must be made to Reserve Bank*

Bank — *curatorship* — *purpose of* — *curator's powers to sell or dispose of bank's assets* — *limits to such powers* — *curator may not sell all assets* ^D of bank

Bank — *officer of* — *bank placed under curatorship* — *officer's right to bring legal action* — *curator's permission required*

Practice and procedure — *parties* — *locus standi* — *directors and shareholders of a bank under curatorship* — *such persons are interested parties and have locus standi to bring an action against a curator* — *E permission of curator required before action is commenced*

Headnote

The first and second appellants were directors of, and shareholders in, the third appellant, which prior to being placed under curatorship in terms of s 53(1) of the Banking Act [*Chapter 24:20*], had conducted business ^F as a banking institution. The Reserve Bank subsequently announced the implementation of a "Troubled Bank Resolution Policy", one of the features of which was that "troubled" banking institutions would be amalgamated into one entity, the ZABG. The Troubled Financial Institutions (Resolution) Act [*Chapter 24:28*] was promulgated to give effect to this policy. Thereafter, the curator and the ZABG concluded an ^G agreement of sale, in terms of which the curator sold to the ZABG all the assets of the appellants' bank. It was common cause that the curator did not purport to act in terms of the Troubled Financial Institutions Act. The first two appellants filed an urgent chamber application in the High Court against the respondents, seeking a provisional order calling upon the ^H

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Sandura JA

^A respondents to show cause why a final order should not be made restraining them from, *inter alia*, using the premises, motor vehicles and other assets of the bank, and setting aside any purported disposal or alienation of the business or assets of the bank to the ZABG. It was common cause, however, that they had not sought the permission of the third respondent, in terms of s 54(1) of the act, before filing the application.

^B *Held*, that s 55(2) of the Banking Act [*Chapter 24:20*] does not authorise a curator to dispose of all the assets of a banking institution. The principal objective in placing banking institution under the management of a curator is not to liquidate the institution, but to enable it to become a successful concern. It is for this reason that a curator's power to sell any asset or branch of a banking institution in terms of this provision could ^C only be exercised in order to achieve that objective.

Held, that while the first and second respondents, as interested parties, did have *locus standi*, their failure to obtain the permission of the curator before filing the application meant that it should not have been entertained. In terms of s 55(4) of the Banking Act, the appellants should have ^D appealed to the Reserve Bank against the curator's decision to sell the bank's assets to the ZABG. Any adverse decision given by the Reserve Bank in such an appeal could have been challenged by the appellants in the High Court. The appeal must therefore be dismissed.

Held, further, that in disposing of all the assets of the bank the respondents had acted unlawfully and it was appropriate therefore to make no order ^E as to costs.

Legislation considered

Banking Act [*Chapter 24:20*], ss 25(1), 53(1), 54(1) 55(1), 55(2) & 55(4)

Companies Act [*Chapter 24:03*], s 228

Case information

¶ *S Moyo*, for the appellants

E K Mushore, for the first and third respondents

E I Manikai, for the second respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court which 6 dismissed with costs the appellants' application for an interdict and other relief.

The background facts are as follows. The first appellant ("Mzwimbi") is the chief executive officer of the third appellant ("Royal Bank") and the second appellant ("Simba") is an executive director of Royal Bank. Mzwimbi and 8 Simba hold forty-five percent of the shares in Royal Bank.

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Sandura JA

On 4 August 2004, the first respondent ("the RBZ"), acting in terms of s 53(1) 9 of the Banking Act [*Chapter 24:20*] ("the Banking Act"), issued a written direction to Royal Bank, placing it under the management of the third respondent ("the curator") for a period of six months. That period was subsequently extended.

Section 53(1) of the Banking Act reads as follows: 10

"Where –

- (a) the Reserve Bank considers that a banking institution is in an unsound financial condition and is not operating in accordance with sound administrative and accounting practices and procedures, adhering to proper risk management policies; or
- (b) a banking institution has failed to comply with the minimum financial 11 requirements prescribed in terms of this Act, and the Reserve Bank considers that it is unlikely to comply with them unless it is placed in curatorship;
- (c) the Reserve Bank may issue a written direction to the institution placing the institution under the management of a curator for such 12 period, whether definite or indefinite, as in the Reserve Bank's opinion will permit the institution's condition to be remedied or resolved."

After his appointment, the curator examined the affairs and transactions of Royal Bank before it was placed under curatorship, and on 23 September 2004 submitted a report to the RBZ. In that report he alleged, *inter alia*, that 13 Mzwimbi and Simba had violated certain provisions of the Companies Act [*Chapter 24:03*] ("the Companies Act").

Thereafter, on 28 October 2004, the RBZ issued its "Monetary Policy Statement: 2004 Third Quarter Review" ("the monetary policy statement"), in which it announced the implementation of a "Troubled Bank Resolution Policy". The 14 relevant paragraphs of the monetary policy statement read as follows:

- "3.29 With effect from January 2005, the Reserve Bank will implement a comprehensive Troubled Bank Resolution (TBR) Policy, to decisively deal with the troubled banks who (*sic*) have failed to tread out of their difficulties.
- 3.30 The following are the salient features of this framework: 15
 - (a) All amounts owed to the Reserve Bank by the troubled banks will be converted into equity.
 - (b) A Special Purpose Vehicle (SPV) will be established to hold the equity in the troubled banking institutions, acquired through conversion of debt to equity. 16

2005 (2) ZLR p135

Sandura JA 17

- (c) Existing shareholders will write down whatever is left of their shareholding, if any, in line with assessed levels of under capitalisation and bank losses deemed to be a result of misappropriation and/or mismanagement.

- (d) To safeguard the Central Bank's independence and neutrality in discharging its supervisory and surveillance roles, the ^b SPV, called Allied Financial Services Ltd, will be a jointly owned entity between Government, creditors, and depositors who would have converted their deposits into equity. The SPV is, thus, not a Reserve Bank-owned entity.
- (e) *The troubled banking institutions will be amalgamated into one entity, under the name Zimbabwe Allied Banking Group (ZABG)*, initially to be managed by an appointed Management Board of turnaround and integration experts, supported by a competent Management Board of Directors.
- (f) Post stabilisation, Government and its partners can offload the shares in ZABG to a wider base of owners, under indigenisation and empowerment programs that benefit a ^d wider cross-section of the people of Zimbabwe than is the case at present.
- (g) Banking institutions amalgamated into the ZABG will be taken as Special Business Units (SBUs), managed by the said experts at appropriate levels.
- (h) The SBUs will have one main board in order to ensure ^e efficient and effective co-ordination of strategy and alignment of operations.

3.31 *In coming to this policy position, immense preparatory work has been done to ensure that there is a smooth transition and integration of the individual previously troubled banks into one entity*" (my emphasis).

^f Subsequently, in order to give legal effect to the troubled bank resolution policy, the Troubled Financial Institutions (Resolution) Act [*Chapter 24:28*] ("the Troubled Financial Institutions Act") was promulgated on 14 January 2005. The Act provided for, *inter alia*, the administration of troubled financial institutions, and the formulation and implementation of schemes of resolution ^g in respect of such institutions.

Thereafter, on 20 January 2005, the curator and the second respondent ("the ZABG") concluded an agreement of sale, in terms of which the curator sold to the ZABG all the assets of Royal Bank. The appellants were not informed ^h about the sale.

2005 (2) ZLR p136

Sandura JA

Six days later, on 26 January 2005, the legal practitioners acting for the ^a appellants wrote to the respondents as follows:

"Our clients have been advised that public statements, advising the bank's customers, creditors, shareholders and other interested persons have been made to the effect that the bank is part of an institution known as Zimbabwe Allied Banking Group, whereas the correct position is that the ^b legal requirements for the amalgamation of banking institutions as provided for in the Troubled Financial Institutions (Resolution) Act and the Banking Act have not at all been pursued. Requisite notices to former directors, creditors and shareholders have not been issued in terms of the Troubled Financial Institutions Resolution Act. No confirmation application has been made to a judge of the High Court as is required in terms of that Act. No amalgamation application has been made in terms ^c of the Banking Act. Consequently, the highly publicised amalgamation of Royal Bank with any other bank is manifestly unlawful.

We are advised that notwithstanding the fact that no lawful amalgamation has taken place in terms of the law, advertising signs of Royal Bank have been removed from its premises and have been replaced by advertising signs of Zimbabwe Allied Banking Group. There is no legal basis whatsoever ^d for this action at this stage. Former directors, shareholders, creditors and other interested parties have received no communication whatsoever regarding what is taking place. You have displayed a brazen and contemptuous disregard of their interests and the law relating to amalgamation of banks.

In all the circumstances, we have been instructed to demand, as we hereby ^e do, the legal basis on which the above have been done, failing which our clients shall be left with no option but to seek the urgent intervention of the High Court."

When there was no substantive response to the above letter, the appellants filed an urgent chamber application in the High Court against the respondents on 31 January 2005, seeking a provisional order calling upon the respondents ^f to show cause why a final order should not be made restraining them from, *inter alia*, using the premises, motor vehicles and other assets of Royal Bank, and setting aside any purported disposal or alienation of the business or assets of Royal Bank to the ZABG.

In due course, the opposing and answering affidavits were filed and the matter ^g was heard on 7 February 2005. Since all the relevant papers had been filed, the matter was argued on the basis

that what was being sought by the appellants was a final order. After hearing counsel's submissions, the learned judge reserved his judgment. About two weeks later, the learned judge dismissed the application with costs. Aggrieved by that result, the appellants appealed to this court. ^h

2005 (2) ZLR p137

Sandura JA

^A Although several issues were argued in this appeal, I believe that the appeal may be disposed of on the basis of two of those issues. The first is whether the curator acted lawfully when he sold the assets of Royal Bank to the ZABG; and the second is whether the appellants had the right to file the urgent chamber application without the curator's permission. I will deal with these issues in turn.

^B It was common cause that when the curator sold the assets of Royal Bank to the ZABG he did not act in terms of the Troubled Financial Institutions Act. It was also common cause that the transfer of Royal Bank's assets to the ZABG was not in compliance with s 25(1) of the Banking Act which provides for the amalgamation of banking institutions.

^C However, it was argued on behalf of the respondents that in selling the assets the curator had acted in terms of ss 55(2) of the Banking Act. That subsection, in relevant part, reads as follows:

"A curator shall have the following powers, to the extent that he is authorised to exercise them in terms of the direction under which he was appointed – ^D

- (a) –(g) ...
- (h) to dispose, by public auction, tender or individual negotiation, of any asset of the banking institution concerned, including –
 - (i) ...; and
 - (ii) any asset for the disposal of which an approval contemplated in ^E section 228 of the Companies Act [*Chapter 24:03*] would have been a prerequisite;
- (i) ...;
- (j) generally, to take any action necessary for the administration or operation of the banking institution concerned, including the sale or closure of any branch, agency, or other office of the institution ..."

^F It was common cause that in terms of his letter of appointment the curator was authorised to exercise the powers set out in s 55 of the Banking Act.

In the circumstances, it was submitted on behalf of the respondents that as the curator had the power to sell any asset or branch of Royal Bank he could lawfully sell all the assets of Royal Bank. That submission cannot be accepted ^G because the principal objective in placing a banking institution under the management of a curator is not to liquidate the institution but to enable it to become a successful concern. Accordingly, the curator's power to sell any ^H asset or branch of the banking institution concerned could only be exercised

2005 (2) ZLR p138

Sandura JA

in order to achieve that objective. ^A

In my view, placing a banking institution under the management of a curator is akin to placing a company under a judicial manager, the principal objective being to remove the causes of the financial difficulties experienced by the company so that the company can function normally.

In addition, the proviso to s 55(1)(g) of the Banking Act is significant. It states ^B as follows:

"... if at any time he (the curator) is of the opinion that continued curatorship will not enable the banking institution to become a successful concern, he shall advise the Reserve Bank accordingly."

That, in my view, is a clear indication that the principal objective of the ^C curatorship is to enable the banking institution to become a successful concern. Such an objective cannot be achieved by selling all the assets of the banking institution.

It was further submitted that in terms of s 55(2)(h)(ii) of the Banking Act, which I have already set out in this judgment, the curator had the power to dispose of all the assets of Royal Bank. Section 55(2)(h)(ii) empowers the curator to ^D sell:

"any asset for the disposal of which an approval contemplated in s 228 of the Companies Act [*Chapter 24:03*] would have been a prerequisite."

The difficulty with this provision is that it refers to s 228 of the Companies Act, which does not at all deal with the disposal of assets, but with the obligation ^Ε of the court, after making a winding-up order, to settle a list of contributories. Faced with that difficulty, counsel for the second respondent submitted that for s 228 this court should substitute s 183(1)(b) of the Companies Act, which provides that the directors of a company are not empowered, without the approval of the company in general meeting, to dispose of all or the greater part of the assets of the company. ^Φ

In my view, that is highly speculative because there is no basis for the conclusion that that is the section of the Companies Act which the legislature intended to refer to. In any event, there are other sections of the Companies Act in terms of which some type of approval is a prerequisite to the disposal of a company's assets. ^Γ

Accordingly, subs (2) of s 55 of the Banking Act does not authorise a curator to dispose of all the assets of a banking institution. It follows, therefore, that the curator acted unlawfully when he sold the assets of Royal Bank to the ZABG. In the circumstances, the sale and transfer of the assets were null and void, and of no force or effect. ^Η

2005 (2) ZLR p139

Sandura JA

^A I now wish to consider whether the appellants had the right or power to file the urgent chamber application without the curator's permission. Before answering that question, I wish to state that there can be no doubt that the appellants had an interest or special reason entitling them to sue the respondents. The assets unlawfully sold and transferred to the ZABG belonged to Royal Bank, and the unlawful sale and transfer of the assets adversely affected the ^B value of the shares held by Mzwimbi and Simba. The appellants, therefore, had the requisite *locus standi in judicio*.

However, having said that, I do not think that the appellants could exercise their power to sue the respondents without the curator's permission. I say so because of the provisions of s 54(1) of the Banking Act. The section reads as ^C follows:

"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."

It was common cause that when the appellants filed the urgent chamber ^D application in the High Court they had not sought the curator's permission, and had not been permitted to file the application. In the circumstances, there can be no doubt that the application was not properly before the High Court and should not have been entertained.

However, there is another reason why the application was not properly before ^E the High Court. It is found in s 55(4) of the Banking Act, which reads as follows:

"Any person who is aggrieved by any decision or action taken by a curator may appeal against it to the Reserve Bank."

The appellants should have appealed to the RBZ against the curator's decision to sell Royal Bank's assets to the ZABG. The fact that the unlawful sale took place with the approval of the RBZ would not necessarily mean that ^F the RBZ could not have objectively determined such an appeal. In any event, any adverse decision given by the RBZ in such an appeal could have been challenged by the appellants in the High Court.

It, therefore, follows that if the appellants had complied with the provisions of the Banking Act in challenging the curator's actions, they would not have ^G been without a remedy.

In the circumstances, whilst it is clear beyond doubt that Royal Bank's assets were unlawfully sold and transferred to the ZABG, the appeal cannot succeed.

Finally, I wish to consider the issue of costs. In this regard, an important ^H consideration is the fact that in disposing of the assets in question the

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Sandura JA

respondents did not comply with the provisions of the Troubled Financial ^A Institutions Act or the Banking Act, and therefore acted unlawfully. In the circumstances, it seems to me that this is an appropriate case in which this court should mark its disapproval of the unlawful conduct of the respondents by making no order as to costs.

The appeal is, therefore, dismissed with no order as to costs. ^b

MALABA JA & GWAUNZA JA concurred.

Scanlen & Holderness, appellants' legal practitioners

Atherstone & Cook, first respondent's legal practitioners ^c

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

Mawere & Sibanda, third respondent's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/S v SILULI 2005 (2) ZLR 141 (S)

S v SILULI 2005 (2) ZLR 141 (S)

2005 (2) ZLR p141

Citation	2005 (2) ZLR 141 (S)
Case No	Judgment No. S-146-04
Court	Supreme Court, Bulawayo
Judge	Chidyausiku CJ, Malaba JA & Gwaunza JA
Heard	30 November 2004
Judgment	6 September 2005
Counsel	Ms A Masawi, for the appellant A V Mabande, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

^c **Criminal procedure (sentence)** — *common law crimes — murder — extenuating circumstances — constructive intent to kill — not necessarily a circumstance of extenuation — need for court to weigh up other factors very carefully before finding no extenuating circumstances exist*

Headnote

- ^d Where, on a charge of murder, only a constructive intent to kill is proved, the court need not necessarily find that this is a circumstance of extenuation, but the court should examine the other features of the case very carefully indeed before rejecting a plea that the offence was committed in extenuating circumstances. A constructive intent to kill is a factor which must be put on the credit side in the accused's favour in that weighing-up process.

Cases cited ^e

S v Jacob 1981 ZLR 1 (H)

R v Mharadzo 1966 RLR 240 (A)

S v Sigwahla 1967 (4) SA 566 (A)

Case information

¶ *Ms A Masawi*, for the appellant

A V Mabande, for the respondent

Judgment

CHIDYAUSIKU CJ: The appellant was charged with murder. He pleaded not guilty but was found guilty. He was convicted of murder with constructive ^G intent and sentenced to death, the trial court having found that there were no extenuating circumstances. The appellant appeals to this court against both conviction and sentence.

There is no challenge to the facts found by the court *a quo* which are briefly as follows. The deceased and the appellant were relatives and they both were ^H lovers of one Nakai Zhou (hereinafter referred to as "Nakai"). Nakai was also

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Chidyausiku CJ

related to both the appellant and the deceased through marriage. The ^A deceased was her husband's nephew while the appellant was her husband's elder brother's son. She had sexual relations with both men. Nakai was present when the appellant fatally assaulted the deceased and her account of what transpired was accepted as correct by the court *a quo*. Her account of what occurred is briefly as follows. On 4 September 2001, at around 8 o'clock, the ^B appellant visited Nakai at her huts. He asked her to assist him in the brewing of beer at his homestead. She replied that she could not immediately assist him as she was about to retire to bed because she was exhausted. She also said that the appellant requested to have sexual intercourse with her, which request she turned down because she was exhausted. Nakai asked the appellant to stay for a while to allow his aunt a chance to finish bathing. She then left the ^C appellant seated by the kitchen hut and retired to bed in her bedroom hut. She bade him farewell and assumed that he would leave shortly. Shortly thereafter, the deceased arrived and at that time Nakai had retired to bed in her bedroom hut. Upon the deceased knocking on her door, she went out and sat with him on a flat rock behind her bedroom hut. The deceased began fondling her breasts and buttocks. While this was happening she looked in the direction ^D of the kitchen and saw a person moving towards her kitchen hut. She invited the deceased to go and find out what was happening. When she saw the figure moving in the direction of her kitchen hut she called "Who is it?" but no one responded. She proceeded with the deceased to the kitchen hut to check as to what or who had made the movements. The deceased was walking in front ^E of her and got to the kitchen hut and opened the door. Upon opening the door, the deceased struck a match and exclaimed "Ah, but it is you Uncle Takunda". She saw the deceased fall down immediately after uttering the above words and the appellant came out of the kitchen hut running. She gave chase and caught up with the appellant and invited him to return to the kitchen hut. She then nursed the deceased, whom she found conscious and sitting on a rock, ^F by washing and rinsing his head with water in the presence of the appellant. She heard the deceased remark "You have injured me". The deceased rose from his seat and proceeded to his home. Likewise, the appellant left.

It is common cause that the appellant struck the deceased on the head with a pestle that was produced in court as Exhibit 5 and that the pestle belonged ^G to Nakai. The condition of the deceased deteriorated and he passed away on 15 September 2001, some ten days after the assault. It is common cause that the deceased died as a result of the assault by the appellant. The appellant was thereafter charged with murder and arraigned accordingly.

According to the medical report, the deceased died of subarachnoid haemorrhage, skull fracture and head injury. There is no indication in the ^H

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a medical report or on any other evidence of the degree of force used by the appellant to inflict the injuries sustained by the deceased.

The appellant, at his trial, raised the defence of self-defence and provocation. Both defences were rejected by the court *a quo*. The appellant was found to be an unreliable witness as he gave different, and at times conflicting, accounts of the altercation he said he had with the deceased. The court found *b* Nakai to be a reliable witness. This assessment of the two witnesses by the court cannot be faulted. Indeed, it has not been challenged by the appellant. As I have said, Ms *Masawi*, for the appellant, did not seek to challenge the trial court's conclusion that Nakai was a credible witness and that her account of the events correctly reflect what transpired. She, however, submitted as *c* against conviction that on the evidence accepted by the court *a quo*, the proper verdict should have been one of culpable homicide as opposed to murder with constructive intent. In particular, in paras 13 and 14 of her heads of argument, she made the following submissions:

- "13. Looking at the totality of the State evidence it is clear that in fact the State did not prove beyond reasonable doubt that the appellant *d* deliberately committed an act which he appreciated might result in the death of the deceased and acted reckless as to whether such death resulted or not. The court found so but there was no basis for such finding on the evidence.
14. There was no justification in finding that the State has proved constructive intent beyond reasonable doubt. The most that can be *e* said having regard to the circumstances discussed above and having regard to the weapon used and that only one blow was struck is that objectively the appellant ought to have foreseen the reasonable possibility of the resultant death.
In the circumstances, the verdict should be one of guilty of culpable homicide as the conviction of murder cannot stand on the facts before *f* this court. The mental element which accompanies the killing is a vital issue and this has to be discerned from evidence of the circumstances of the killing."

In convicting the appellant of murder with constructive intent, the learned judge in the court *a quo* reasoned as follows:

" *g* The State has in our view proved beyond reasonable doubt that the accused unlawfully attacked the deceased with exhibit 5. In perpetrating this attack, it is clear that although he did not desire death he foresaw the possibility of causing death to the deceased by virtue of the fact that he used this pestle on the head while deceased was in a crouching position. Despite this possibility, he continued to assault the deceased in the *h* manner he did thus resulting in his death. The accused is accordingly

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found guilty of murder with constructive intent." *A*

[The Chief Justice referred to answers the appellant had given in response to questions by the court and then continued:]

The above evidence establishes that the appellant was fully appreciative of the nature of his conduct, namely, that he could have caused the deceased serious harm. Were it not for this admission, I would have been persuaded by *b* Ms *Masawi's* submission. Only one blow was struck with a pestle. The degree of force used has not been established. The deceased died some ten days after the assault. On these facts alone, I entertain some doubt that the appellant must have foreseen the possibility of death ensuing. The admission by the appellant that he was fully aware of the risk involved in the assault removes *c* that doubt.

I would, therefore, dismiss the appeal against conviction on that basis.

Turning to the question of sentence, the court *a quo* found no extenuating circumstances and imposed the death sentence. In its finding that there were no extenuating circumstances, the court *a quo* reasoned as follows:

"We have taken into account all the submissions made by both State and *d* defence counsel. Mr *Nyamukomba* has urged the court to find that the fact that accused cooperated with the police should be regarded as extenuation. State counsel concedes [that the accused co-operated] but however extends that argument further, that it should not only end there but one must also take into account the state of the mind of the accused during the commission of the crime. *e*

The court agrees with that because almost all accused persons that are caught red handed, as it were, they cooperate with the police because they have no alternative. Most importantly, I am of the view that the fact that one has co-operated with the police should not on its own be regarded as enough to stand as extenuating. The case should be viewed in totality with all other relevant factors namely the accused's state of mind at the *f* time of the commission of the murder and also whether he was drunk, provoked or

was acting in some legally acceptable defence. And above all, whether there was any danger to his life or limb at the time this was committed.

The court therefore, finds that there are no extenuating circumstances in *g* this case."

The court *a quo* found the appellant guilty of murder with constructive intent. It is clear from the above remarks of the learned trial judge that in considering extenuation the court *a quo* attached very little weight to constructive intent as a factor of extenuation. In this regard, the court merely remarked that it had considered the submissions of counsel and counsel had submitted that the *h*

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Chidyausiku CJ

A constructive intent be considered as extenuation. The court should have carefully weighed this factor against the aggravating features of this case before arriving at its conclusion on extenuation. The correct approach to extenuation when a court has found the accused guilty of murder with constructive intent was set out by Beadle CJ in *R v Mharadzo* 1966 RLR 240 (A) *b* at 241G-I. The learned Chief Justice had this to say:

"Where, on the evidence it is possible to do so, I would, with respect, suggest that it is desirable for trial courts to make a positive finding on the precise state of mind of the accused, before determining the question of whether or not extenuating circumstances exist, because here this question of the actual state of mind of the accused is, I think, a factor of considerable importance. I do not wish it to be inferred from this that, *c* where the court finds that only a constructive intent to kill is proved, that the court must necessarily find that this is a circumstance of extenuation, but I do suggest that, where only a constructive intent to kill is proved, the court will examine the other features of the case very carefully indeed before rejecting a plea that the offence was committed in extenuating circumstances."

d The trial court did make a specific finding on the question of constructive intent. What the court failed to do was to weigh this factor carefully with other factors of the case before concluding that extenuating circumstances did not exist and passing the death sentence. The correct approach for a trial court is aptly summarised in the headnote in *Mharadzo's case supra*, which reads *e* as follows:

"That where, on a charge of murder, only a constructive intent to kill is proved, the court should examine the other features of the case very carefully indeed before rejecting a plea that the offence was committed in extenuating circumstances."

Mharadzo's case, supra, was followed in *S v Jacob* 1981 ZLR 1 (H) where the *f* court held:

"There are two permissible approaches to the assessment of extenuating circumstances in murder cases: the first is to make a finding that extenuating circumstances exist if there are any mitigating features in the case, and then to decide whether, notwithstanding that finding, the aggravating features necessitate the imposition of the death sentence; the second *g* approach involves balancing at the outset the mitigating against the aggravating features and, depending on the result, finding that extenuating circumstances exist or imposing the death sentence. Both approaches involve a careful weighing up of the mitigating factors against the aggravating factors and the passing of the death sentence only if the latter outweigh the former. *h*

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Chidyausiku CJ

The finding of a constructive intent to kill in a murder case will not *a* necessarily lead to an overall finding, once the weighing-up process has been completed, that there are extenuating circumstances justifying a sentence other than death, but it is a factor which must be put in the credit side in the accused's favour in that weighing-up process."

Similarly, in *S v Sigwahla* 1967 (4) SA 566 (A) at 571E, Holmes JA had this *b* to say:

"There is a further factor. More than four years ago in *R v Mini* 1963 (3) SA 188 (A) at p 192A, I raised the question whether, depending on the circumstances, the moral blameworthiness of an accused is not reduced if the murder is committed with legal intention to kill known as *dolus eventualis*, as distinct from intention where the will is directed to the *c* bringing about of death (*dolus directus*). The suggestion, then novel, attracted favourable comment in 1963 *South African Law Journal* 467 at 468, and 1964 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* p 71; and it was applied in *S v Arnold*, 1965 (2) SA 215 (C) at 219C *et seq*; and was mentioned by this court in *S v Manyathi, supra*, at pp 438C *et seq*. Furthermore, the Appellate Division of Rhodesia recently applied much the same reasoning; see *R v Mharadzo* 1966 (2) SA 702 (R A) at pp *d* 703C-D and 704A. Accordingly, it now seems appropriate to say:

(a) Trial courts, in their *conspectus* of possible extenuating circumstances, should not overlook the fact (if it be such) that it is a case of *dolus eventualis*.

- (b) While it cannot be said that this factor must necessarily be an *E* extenuating circumstance, in many cases it may well be so, either alone or together with other features, depending on the particular facts of the case."

The effect of the above authorities is that constructive intent on its own, or together with other factors, can constitute extenuating circumstances and that, before arriving at a conclusion, the court is enjoined to balance carefully *F* the mitigating features and aggravating features. This the court did not do in the present case. The trial court's misdirection leaves this court with two options, either to remit the matter for sentencing *de novo* or for this court to pass sentence itself. The latter is the more common practice: see *Mharadzo's case supra*.

The court, in this case, will follow the more common practice and assess the *G* sentence itself. The court *a quo* held that this was a gratuitous murder devoid of any motive. I do not agree with this conclusion. The evidence of the State witness, Nakai, clearly establishes facts from which the inescapable inference is that this was a crime of passion. It is common cause that Nakai was having an intimate relationship with both the deceased and the appellant. Shortly *H*

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Chidyausiku CJ

A before the assault the deceased was fondling Nakai's breasts and bottom, most probably in preparation for being intimate. The probabilities are that the appellant saw this and must have been piqued by it and felt jealous. A short while earlier, the appellant was denied similar favours by Nakai who was his lover. This must have exacerbated the appellant's sense of grievance. While this cannot, in any way, justify the appellant's assault on the deceased it *B* certainly provides a motive for the assault. This was a crime of passion and not a motiveless assault. The assault itself was not particularly brutal. Only one blow was struck. There is no evidence on the severity of the force used to inflict the injuries sustained by the deceased. One can only infer from the post-mortem report's description of the injury and the fact that the deceased *C* died about ten days after the assault, that the degree of force used in striking the deceased with a pestle was moderate to severe. On the other hand, the only aggravating feature is that the offence led to the death of the deceased and violated the sanctity of life. An innocent man was killed for no good reason.

Given the above factors, I am satisfied that this is not a proper case for the imposition of the death sentence. The trial court should have found that *D* extenuating circumstances justifying the court imposing a sentence other than a death sentence existed in the form of the constructive intent and the fact that only one blow was struck when the appellant, in a fit of jealousy, saw his lover about to be intimate with another man. In the circumstances, I would allow the appeal against the death sentence. Other than that, I am satisfied that the appellant committed a very serious offence that led to the loss of an *E* innocent life. There is no doubt that a lengthy period of imprisonment is called for in this case. In my view, the justice of this case can be met by sentencing the appellant to a term of 13 years' *F* imprisonment with labour.

The appeal against conviction is dismissed but the appeal against sentence is allowed to the extent that the sentence of death is altered to 13 years' imprisonment with labour.

G MALABA JA & GWAUNZA JA concurred.

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MADZIVIRE & ORS v ZVARIWADZWA & ORS 2005 (2) ZLR 148 (H)

2005 (2) ZLR p148

Citation 2005 (2) ZLR 148 (H)

Case No	Judgment No. HH-74-05
Court	High Court, Harare
Judge	Makarau J
Heard	26 May 2005
Judgment	7 September 2005
Counsel	<i>H Zhou</i> , for the applicants <i>H Simpson</i> , for the respondents
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Company — *director* — legal action on behalf of company — right of c individual director to bring action — need for action to be authorised by board — when individual directors or shareholders may bring action to protect company

Practice and procedure — *parties* — company — right of director or shareholder to bring action on behalf of company — need for action to be authorised by board — when individual directors or shareholders may bring action to protect company

Headnote

The first three applicants were directors of the fourth applicant, a registered company. The applicants brought an application in which the wrong ^E complained of was done primarily to the fourth applicant, in that its records had allegedly been falsified. The falsified records comprised returns filed on the allotment of shares in the company which excluded the second and third applicants and two annual returns for the company which allegedly bore the forged signature of the first applicant. The first, second and third applicants purported to bring the application on behalf ^F of the fourth applicant, as well as on their own behalves as directors of the fourth applicant. In support of the application, the first applicant filed an affidavit in which he claimed that, as the managing director and as a shareholder, he was authorised to make the subsequent statements on behalf of the fourth applicant. The second and third applicants submitted ^G affidavits, in which they purportedly authorised the first applicant to depose to the contents of the founding affidavit on behalf of the company and themselves.

Held, that outside a board meeting, individual directors of a company cannot speak for and in the name of the company, even if they are of the same mind and are in the majority, as they were *in casu*. Consequently, the first, ^H

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Makarau J

^A a second and third respondents had no authority to bring the application on behalf of the company nor to seek, on its behalf, the relief that they were seeking.

Held, further, that in general, according to the rule in *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189 no member (or shareholder) can sue to redress a wrong done to the company. Thus, where the company itself can use its ^B corporate character to obtain redress for the alleged wrong, no suit can lie at the instance of shareholders. The right of directors or shareholders to bring an action on behalf of the company on allegations of fraud relates mainly to minority shareholders who, in a formal meeting, fear defeat by the fraudulent majority. This was not the case here, the applicants being in the majority.

^C *Held*, further, that the applicants had thus not established a proper basis upon which they, as members, could bring this application, nor had they proved that they were authorised to bring

this application for and on behalf of the fourth applicant.

Cases cited ^D

D'Arcy v Tamar, Kit Hill & Caelington Rly Co (1867) LR 2 Exch 158

Foss v Harbottle (1843) 2 Hare 461; 67 ER 189

Case information

H Zhou, for the applicants

ε *H Simpson*, for the respondents

Judgment

MAKARAU J: The first applicant is the managing director of the fourth applicant. The second and third applicants are also directors of the fourth applicant. So is the first respondent. It may be pertinent at this stage to mention that the parties are involved in other litigation before this court relating to the ^F respective shares each holds in the company and, more specifically, to who has the controlling stake.

On 4 November 2004, the applicants brought the above application seeking an order that certain documents filed with the third respondent, relating to the shareholding structure of the fourth applicant be declared of no force and ^G effect as having been forged. It was specifically alleged that the first respondent had forged these documents.

The first respondent, who although not denying that the information in the documents complained of was false, denied being the author of such. In his opposing affidavit, the first respondent avers that he invited the first to third ^H applicant to join as directors of the fourth applicant and that they did not pay

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Makarau J

for any of the shares allocated to them in the fourth respondent. He claims to ^A have financed the capital of the company through the second respondent where he is also a director.

The first, second and third applicants purport to bring this application on behalf of the fourth applicant as well as on their own behalves as directors of the fourth applicant. I shall deal with each of these capacities separately. ^B

The fictional legal *persona* that is a company still enjoys full recognition by the courts. Thus, for any acts done in the name of a company, a resolution, duly passed by the board of directors of the company, has to be produced to show that the fictional *persona* has authorised the act. In my view, so trite is this proposition or so settled is this position at law that no authority need be cited. The applicant are well aware of this position at law for issue is taken that ^C no resolutions were passed by the company authorising the first respondents and others to do certain acts complained of in that paragraph. Due to lack of such authority stemming from the Board of Directors, the applicants argue that the purported acts by the first respondent are null and void. Such may be the case, but the irony of it all is that the applicants themselves are guilty of the ^D oversight forming the basis of their complaint to this court. No resolution was produced before me to show that the first to third applicants are authorised to bring this action on behalf of the fourth respondent.

In seeking to lay a foundation for purporting to act on behalf of the fourth applicant, the first applicant had this to say in para 2 of his founding affidavit:

"I am making this affidavit on my own behalf and on behalf of the fourth ^E applicant who is a legal *persona* wherein I am the managing director and shareholder respectively and in that capacity, I am authorised to make the following statements on behalf of the fourth applicant."

Needless to say, this is woefully inadequate to clothe the deponent with authority to make any statement on behalf of the fourth applicant. The ^F paragraph does not even attempt to lay a basis for holding that the bringing of the proceedings in the name of the fourth applicant is authorised.

The second and third applicants each filed an affidavit styled "Confirmatory Founding Affidavit". In both documents, appears a paragraph in identical wording to this effect:

"I confirm that I have authorised the first applicant to depose to the **g** contents of the main founding affidavit on behalf of the fourth respondent and on my behalf."

The impression I gather from this averment by the second and third applicants is a belief on the part of the deponents that they can confer authority on the first applicant to act on behalf of the fourth respondent. This is, of course, **h**

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Makarau J

a erroneous for outside a board meeting, individual directors of a company cannot speak for and in the name of the company even if they are of the same mind and are in the majority as appears to have been the case in this matter. The belief of the applicants *in casu* are reminiscent of the facts in *D'Arcy v The Tamar, Kit Hill and Caelington Railway Co* (1867) LR 2 Exch 158 where two directors of the company wrote to the company secretary approving the **b** passing of a bond by the company. The third director met the secretary in the street and gave his oral consent. The three never met as a board to pass the resolution. In declaring the bond so passed as invalid, the court was not persuaded that the three directors were of the same mind and comprised a quorum for the board of directors.

c On the basis of the above, it does appear to me that the first, second and third respondents have no authority to bring the above application on behalf of the fourth applicant nor to seek on its behalf, the relief that they seek from me.

The first to third applicants have expressly averred in their respective affidavits that they also bring this application on their own behalves as directors and shareholders of the fourth respondent.

d The wrong complained of in the application is a wrong done primarily to the fourth respondent in that its records have allegedly been falsified. The falsified records comprise of a return filed on the allotment of shares in the company which excludes the second and third applicants and annual returns for the company for the years 2000 to 2003 which allegedly bear the forged **e** signature of the first applicant.

The general rule under company law referred to as the rule in *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189 and also known as "the proper plaintiff rule", holds that no member (or shareholder), can sue to redress a wrong done to the company. Thus, where the company itself can use its corporate character to obtain redress for the alleged wrong, no suit can lie at the instance of **f** shareholders. This encompasses the entire philosophy on which company law is based and upon which our courts' respect for the fictional persona of the company rests. The company as a fictional legal *persona* is separate and distinct from its members or shareholders.

In casu, no averment has been made before me that after discovery of the **g** alleged falsified and forged documents, the directors of the company attempted to convene a meeting for the requisite resolutions to be passed by the company to correct the wrong done to it. In saying this, I do not lose sight of the fact that the parties have been before this court in other cases referred to in the affidavits in which allegations of lack of good faith amongst the directors **h** have been exchanged. If that was the case, then in my view, it behoved the

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applicant to show that that the company itself, using its corporate character, **a** cannot procure the redress that they as members are now seeking.

I have considered whether this is a case where the three directors may be permitted to bring an action on behalf of the company on allegations of fraud. This right relates mainly to minority shareholders who, in a formal meeting, fear defeat by the fraudulent majority. This is hardly the case before me. The **b** applicants appear to me to be in the majority and I cannot find a legal principle justifying turning the courtroom into the boardroom of the fourth applicant to resolve issues that the company itself should resolve at a meeting of its directors.

It is therefore, my finding that the applicants, acting on their own behalves, have not established a proper basis upon which they as members, can seek **c** bring this application. Having also failed to prove that they are authorised to bring this application for and on behalf of the fourth applicant, I find no basis upon which this application can succeed. In the result, I make the following order:

1. The application is dismissed. ^D
2. The first second and third applicants are to meet the respondents' costs.

Mhiribidi Ngarava & Moyo, applicants' legal practitioners

Mushonga & Associates, first and second respondents' legal practitioners ^E

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S C SHAW (PVT) LTD v MINISTER OF LANDS 2005 (2) ZLR 153 (S)

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Citation	2005 (2) ZLR 153 (S)
Case No	Judgment No. S-32-05
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Ziyambi JA, Malaba JA & Gwaunza JA
Heard	10 March 2005
Judgment	12 September 2005
Counsel	<i>A P de Bourbon SC</i> , with him J B Colegrave, for the appellant <i>N Mutsonziwa</i> , for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

^C **Constitutional law** — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 16(1)(a) — acquisition of land — requirement for acquisition to be "reasonably necessary" for one of purposes stated — provision of Land Acquisition Act [Chapter 20:10] effectively fettering Administrative Court's discretion to determine whether acquisition "reasonably necessary" — such provision not constitutional*

^D **Court** — *contempt of — unsubstantiated allegations by counsel of improper pressures brought to bear on judges — such allegations scandalizing court and constituting contempt*

Land — *acquisition — Land Acquisition Act [Chapter 20:10] — s 7 — need for acquisition to be "reasonably necessary" for one of purposes set out in section — amendment to Act effectively restricting Administrative Court's discretion to determine whether acquisition "reasonably necessary" — unconstitutionality of amendment*

Headnote

The respondent Minister had designated certain of the appellant's farms for ^F compulsory acquisition. The appellant objected and a confirmation hearing was held in the Administrative Court. In respect of some of the properties, it was conceded that the Minister had failed to comply with certain procedural requirements. In respect of the others, the appellant's lawyer requested that the case be referred to the Supreme Court in terms of s 24(2) of the Constitution. The matter that was referred to the Supreme ^G Court was whether the amendments made to the Land

Acquisition Act by ss 3(3) and 9(2) of Act 1 of 2004 were irreconcilable with s 16(1)(a) of the Constitution, as they purported to restrict or inhibit consideration of factors which might otherwise be relevant to the issue of whether it is "reasonably necessary" to acquire the land in question. These

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amendments reflected a change in policy in the criteria to be used in the identification of the land that was to be compulsorily acquired in terms of the Act. The first Land Reform Programme Document published in April 2001 had a set of criteria that was used in the identification of farms for acquisition. The criteria in that document exempted certain categories of farms from acquisition. The document was later amended by removing the protection previously accorded to certain land. The amendment to the Act was intended to realign the law and the revised document.

Another ground raised for referral to the Supreme Court was to allege that the acceptance of offers of land by judges prior to the determination of the validity of the acquisition of the land, together with improper pressures brought to bear on judges by members of the government and cabinet, was not compatible with the constitutional concept of a fair trial before an independent tribunal. No evidence was submitted in support of this allegation, and the Administrative Court refused to refer the matter to the Supreme Court on the grounds that it was frivolous and vexatious

Held, that it was the duty of the Administrative Court, in determining confirmation proceedings in terms of s 7 of the Act, to have the closest possible regard to what is "reasonably necessary". Unless the court was satisfied that the acquisition was "reasonably necessary" for one of the three purposes set out in s 7(4)(b) of the Act (which reflected s 16(1)(a)(i) of the Constitution), it could not confirm the acquisition. No Act of Parliament could truncate what was "reasonably necessary" in acquiring land for purposes of s 8 of the Act. The impugned sections effectively prohibited the Administrative Court from taking into account factors previously set out in ss 6A and 6B of the Act in determining whether "reasonably necessary" grounds for acquisition of the land existed. That prohibition, *ipso facto*, inhibited the discretion of the Administrative Court. By effectively prohibiting the Administrative Court from considering that an acquired farm was, for example, a "plantation" in its determination of the question whether "reasonably necessary" grounds for the acquisition of the land existed, the sections fettered the discretion of the Administrative Court and were thus unconstitutional.

Held, further, that courts in Zimbabwe have a responsibility to protect their dignity. Where legal practitioners, who are officers of the court, and as such, are expected to know better, make irresponsible submissions scandalizing the court, mere admonition is inadequate and action should be taken to punish such legal practitioners for contempt of court.

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Chidyausiku CJ

Legislation considered

Constitution of Zimbabwe 1980, s 16(1)(a)

Land Acquisition Act [Chapter 20:10], ss 6A and 6B

Land Acquisition Amendment Act 1 of 2004, ss 3(3) and 9(2)

Case information

A P de Bourbon SC, with him *J B Colegrave*, for the appellant

N Mutsonziwa, for the respondent

Judgment

CHIDYAUSIKU CJ: This matter comes before this court on referral from the Administrative Court. The referral is in terms of s 24(2) of the Constitution which provides as follows:

c "24 Enforcement of protective provisions

(2) If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so

requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely **d** frivolous or vexatious."

The factual background of this matter is briefly as follows. The Minister of Lands, Agriculture and Resettlement ((as he then was called) and who hereinafter is referred to as "the respondent"), sought confirmation of the acquisition of ten properties which are registered under the name of SC Shaw (Pvt) Ltd (hereinafter referred to as "the appellant"). The confirmation was **e** sought in terms of s 7 of the Land Acquisition Act [*Chapter 20:10*](hereinafter referred to as "the Act"). Initially, the matters were heard separately but were consolidated by consent. The consolidated matters were heard by the Administrative Court on 22 September 2004.

At the commencement of the hearing in the Administrative Court, the **f** appellant raised a number of preliminary objections or points *in limine* which were two-fold.

Firstly, the appellant raised the issue of the respondent's failure to comply with the procedural requirements of the Act when he acquired six of the ten properties of the appellant. The court *a quo* saw merit in this and the application for confirmation was dismissed.

g Secondly, the appellant raised a number of constitutional issues as points *in limine*. Some of the constitutional points *in limine* were dismissed as vexatious while others were found to have merit and referred to this court. In dismissing one of the points *in limine* that the court considered vexatious, the **h** learned President of the Administrative Court made the following observation:

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"I now move on to deal with other issues raised on pp 2 and 3 of the **a** respondent's heads of argument, namely paras 5.1 to 5.3. It is important for me to re-state what is stated in these heads. It was stated in the heads:

'Members of the government, which applicant is a minister have been party to providing improper inducements by making and exerting improper pressure on the judges of the Supreme Court, the High Court and the Administrative Court to ensure that such persons give judgments that **b** are favourable to the acquiring authority, thus rendering the judicial officers in question judges in their own cause, thus denying the respondent a fair hearing by an independent and impartial court as required by s 18(9) of the Constitution. The respondent, in particular, wishes to lead evidence regarding improper inducements to members of the Administrative Court and wishes to lead evidence regarding **c** inducements given to judges. Such evidence will be tabled at the commencement of the hearing.'

Then it went on: (*sic*)

'The respondent accordingly requests this honourable court in terms of s 24 of the Constitution to refer to the Supreme Court questions of whether or not the acceptance of offers of land by judges prior to the **d** determination of the validity of the acquisition of the land together with improper pressures brought to bear on judges by members of the government and cabinet is compatible with constitutional concept of a fair trial before an independent tribunal.'

Counsel for the respondent indicated in court that despite the fact that **e** he did not himself prepare the heads, he stood by them. He went on to make submissions on the alleged improper pressure brought upon judicial officers. Departing from the specific averments in the heads of argument that evidence was going to be tabled in this regard, counsel went on and stated as follows:

'I want to say at the onset that I am not in a position to lead evidence on **f** improper pressure brought upon judicial officers. However, I will reiterate the point that I made this morning that practitioners must have a huge concern that some powerful people living in government and other high places are endeavouring to exert pressure on unfortunate judicial officers. You know better than I that it was common knowledge what befell Mr Majuru. He was a colleague of yours, a brother member of the Bench. Indeed, before he was elevated to the Bench he was a colleague **g** of my learned friend.'

Now the court did ask counsel to shed more light by way of evidence on what befell Majuru and counsel retorted: 'I cannot take this particular matter any further at the moment for reasons I have already stated'. **h**

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a Now, this court takes the view that the allegations raised by counsel against members of the Bench are extremely serious allegations. Such allegations naturally scream to be supported by evidence. If such allegations are true, then it goes without saying that there is no judiciary to talk about in this country. Commenting on the respondent's averments, the applicant's counsel was of the view that the respondent's

position was an attack on the Bench and that such allegations were spurious and unsubstantiated and as such must be censured by this court. I agree.

The allegations raised against the Bench were expressed in unsupported manner. It is unacceptable to this court that such senior members of the legal fraternity would gather such courage to denigrate the Bench and hope to get away with it. Such an approach lacks both professionalism and the dignity which is invariably associated with members of the legal fraternity particularly those who are officers of this court. It was wrong for counsel to try and use the unceremonious departure of Mr Majuru from service as indicative of conclusive evidence on the alleged pressure brought to bear upon members of the Bench in land related matters. One does not speculate on evidence. You table such evidence for scrutiny. I am guided by very simple foundational principles in litigation, that is, if one cannot sustain certain allegations by way of evidence, then one must not raise such allegations. What counsel did was merely to cast aspersions on the Bench. His actions border on naked contempt of the Bench.

The court will take judicial notice of the fact that at the time Mr Majuru left the Bench, the case which prompted his departure had nothing to do with the allocation of land and that both the public and private media in this country gave conflicting views surrounding his departure from service. There was no evidence led in this court to try and link Mr Majuru to the alleged inducements to ensure that he gave a judgment or judgments that were favourable to the acquiring authority in the manner captured in item 5.1 or in any other manner stated by counsel for the respondent.

In the final analysis, on this particular issue, I made the finding that the bald allegations made by counsel for respondent do not establish a *prima facie* breach of s 18(9) of the Constitution. It is clear that the allegations in the form they have been presented are clearly frivolous and vexatious. It would be an abuse of the process of the Supreme Court to refer such issues to it. Indeed, it would be a miscarriage of justice on my part to do so. Accordingly, this particular issue cannot be referred to the Supreme Court."

I agree with the learned President of the Administrative Court on the admonition of counsel for making irresponsible and unprofessional submissions. I, however, wish to add that courts in Zimbabwe, including the Administrative Court, have a responsibility to protect their dignity. Where legal practitioners,

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who are officers of the court, and as such, are expected to know better, make a totally irresponsible submissions scandalizing the court mere, admonition is inadequate and more appropriate action should be taken to punish such legal practitioners for contempt of court. I have previously issued warnings in this regard. Time for admonition and warnings is over. The courts should now deal firmly and decisively with such wayward legal practitioners. B

The learned President of the Administrative Court, however, found merit in and referred the following issues to this court:

1. Whether or not the amendments to SI 394 of 1998 (Administrative Court Rules) by SI 143A of 2004 which gives respondent two days within which to file its heads of arguments infringe s 18(9) of the Constitution of Zimbabwe which provides that "subject to the provisions of this c Constitution, every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations."
2. Whether or not s 3(3) of Act 1 of 2004 infringes s 16(1)(a) of the D Constitution by fettering the discretion of the Administrative Court.
3. Whether or not s 9(2) of Act 1 of 2004 infringes s 16 (1)(a) of the Constitution by fettering the discretion of the Administrative Court.

Section 4(4)(b) of the rules that gave a respondent, in confirmation proceedings in terms of s 7 of the Act, two days in which to file heads of arguments in E response to those filed on behalf of the acquiring authority, has been amended to extend the *dies inducia* for the filing of a respondent's heads of argument. The cause for complaint has fallen away and the issue was not pursued.

The arguments in respect of the constitutional validity of ss 3(3) and 9(2) of the Land Acquisition Amendment Act (hereinafter referred to as Act 1 of 2004) are substantially the same. I intend, therefore, to consider the referrals set out F in para 2 and 3 above together.

The appellant submits that both ss 3(3) and 9(2) of Act 1 of 2004 are irreconcilable with s 16(1)(a) of the Constitution as they purport to restrict or inhibit consideration of factors which might otherwise be relevant to the issue of whether it is "reasonably necessary" to acquire the land in

question. Put ^g differently, the appellant argues that the two sections fetter the discretion of the Administrative Court in determining what constitutes “reasonably necessary” in the process of acquiring land in terms of the Act. ^h

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^a The impugned provisions provide as follows:

“3. **Repeal of sections 6A and 6B of Chapter 20:10**

(3) The fact that –

- (a) any land was offered in substitution for agricultural land required for resettlement purposes, whether in terms of s ^b 6A or 6B of the principal Act or otherwise; or
- (b) any portion of agricultural land required for resettlement purposes was offered in substitution for the whole of such land, whether in terms of s 6A or 6B of the principal Act or otherwise;
- (c) the offer of any land or portion of agricultural land was ^c accepted in terms of s 6A or 6B of the principal Act and, before the commencement of this Act, was confirmed by the Administrative Court after the owner had initially objected to the proposed acquisition in terms of s 5 of the principal Act;

shall not constitute valid grounds for an objection to the compulsory ^d acquisition of the whole or part (as the case may be) of the agricultural land required for resettlement purposes, nor shall it form the basis of any claim or right in law.

...

9. **Declaratory provisions respecting application of the Land Reform Programme**

(2) ^e For the avoidance of doubt it is declared that –

- (a) the criteria listed in the Land Reform Programme for the acquisition of agricultural land required for resettlement purposes are not binding on the acquiring authority; accordingly the fact that the land to be acquired –
 - (i) ^f is a plantation farm engaged in large-scale production of tea, coffee, timber, citrus fruit, sugar cane or other plantation crops;
 - (ii) is an agro-industrial property involved in the integrated production, processing or marketing of poultry, beef and dairy products and seed-multiplication;
 - (iii) ^g is within an export processing zone or operates under a permit issued by the Zimbabwe Investment Centre;
 - (iv) is an approved conservancy;
 - (v) is the only piece of land belonging to the owner;

^h *shall not constitute valid grounds for any objection to the*

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compulsory acquisition of the land nor *shall such criteria form ^a the basis of any claim or right in law;*

- (b) the total hectareage of land required for resettlement purposes specified in the Land Reform Programme is indicative only of the minimum hectareage of such land: accordingly, the acquiring authority is not prevented by that Programme from acquiring ^b land in excess of the hectareage so specified” (my emphasis).

Counsel for the respondent submitted that the background to the enactment of s 3(2) and 9(2) of Act No. 1 of 2004 was a change in policy in the criteria to be used in the identification of the land that was to be compulsorily acquired in terms of the Act.

The first Land Reform Programme Document published in April 2001 had a set ^c of criteria that was used in the identification of farms for acquisition. The criteria in that document exempted a certain category of farms from acquisition. In other words, once a farm fell into the exempted category it would not be acquired. Examples of land or farms excluded from acquisitions were plantations, agro-industrial properties, property with Export Processing Zone and Zimbabwe ^d Investment permits, etc.

The increase in demand for land led to the revision of the first Land Reform Programme Document. The revised document amended the initial document by removing the protection previously accorded

to certain land. The protection from acquisition previously afforded plantations and agro-industrial properties in terms of the initial document was removed. The enactment of s 3(3) and 9(2) of Act No. 1 of 2004 was intended to realign the law and the Revised Land Reform Programme Document.

It was argued that as ss 3(3) and 9(2) of Act No. 1 of 2004 were merely bringing the law into line with the revised Land Reform Programme Document, therefore, they could not be unconstitutional.

It was also argued in the alternative that in the event that this court was not persuaded by the above argument it should not strike down s 3(3) and 9(2) of the Act No. 1 of 2004 but instead read them in such a manner that they conform with ss 16 and 16A of the Constitution. The intention of the legislature was to use the same test in acquiring any farm for resettlement purposes, the criteria being "reasonable necessity".

The respondent also argued that s 3(3) of Act 1 of 2004 does not fetter the Administrative Court's discretion. It only seeks to remove the consideration that the property being acquired was left out as a result of a settlement in terms of the repealed ss 6A and 6B of the Land Acquisition Act [Chapter 20:10] and places the property being acquired into the realm of being subjected to

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at the test of reasonable necessity. The removal from protection from compulsory acquisition on the basis that the acquisition was once done in terms of ss 6A and 6B of the Land Acquisition Act [Chapter 20:10] is meant to place the respective properties being acquired in the same position with that being acquired for the first time. This development was necessitated by the need to acquire more land. The land required for resettlement was initially set at 6 million hectares. This was subsequently revised to a minimum of 11 million hectares. So the high demand for land for resettlement necessitated the enactment of ss 3(3) and 9(2) of Act No. 1 of 2004 and the repealing of ss 6A and 6B of the Land Acquisition Act [Chapter 20:10] to facilitate the acquisition of more land for resettlement purposes. The respondent contends that the said provisions do not, in any way, fetter the discretion of the Administrative Court.

The respondent further submitted that the test applicable to properties affected by ss 3(3) and 9(2) of Act 1 of 2004 remains the same. The respondent still has to prove that it is "reasonably necessary" to acquire such property. Accordingly, the allegations that the sections impinge upon s 16(1)(a) of the Constitution are far fetched and premised on an incorrect interpretation of the provisions.

It is quite clear that the respondent, as the acquiring authority, prohibited himself from acquiring certain land such as plantations. The prohibition was enacted into law in the form of the repealed ss 6A and 6B of the Act. The prohibition was not necessary in terms of the Constitution. The respondent now wished to liberate himself from self imposed restriction by repealing ss 6A and 6B of the Act. The respondent sought to do so by enacting the impugned ss 3(3) and 9(2) of Act 1 of 2004. In my view, if ss 3(3) and 9(2) of Act 1 of 2004 merely repealed sections 6A and 6B of the Act they would not fall foul of the Constitution. I, however, agree with the appellant's contention that the impugned provisions go beyond the mere repeal of ss 6A and 6B of the Act.

The impugned sections, in effect, prohibit the Administrative Court from taking into account factors previously set out in ss 6A and 6B of the Act in determining whether "reasonably necessary" grounds for acquisition of the land existed. That prohibition, *ipso facto*, inhibits the discretion of the Administrative Court. Put differently, the appellant contends that by effectively prohibiting the Administrative Court from considering that an acquired farm is a "plantation" in its determination of the question whether "reasonably necessary" grounds for the acquisition of the land existed, the impugned sections are fettering the discretion of the Administrative Court. The appellant's

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argument in this regard is succinctly set out in paras 3 to 7 of the heads of argument wherein he submitted:

- "3. There can be no doubt at all that it is the duty of the Administrative Court in determining confirmation proceedings in terms of s 7 of the Act, to have the closest possible regard to what is 'reasonably necessary'. Unless he is satisfied that the acquisition is 'reasonably necessary' for one of the three purposes set out in subpara (b) of s 7(4) of the Act, he cannot confirm the acquisition.

More importantly, for present purposes, this provision essentially mirrors s 16(1)(a)(i) of the Constitution, which is the highest law of the land.

4. *Prima facie*, s 9(2) of Act 1 of 2004 does not restrict or inhibit a consideration of what is 'reasonably necessary'. The argument c which is currently being proffered by the Civil Division, representing the acquiring authority, is essentially the same in all cases where the point has arisen. It is submitted, on behalf of the acquiring authority, that the provisions are declaratory only and '... do not in any way interfere with the court's discretion'.
5. This argument is, with respect, not easy to follow because although d the five possible objections set out in subpara (a) of s 9(2) of the Amending Act (Act 1 of 2004) refer specifically to the '... compulsory acquisition of the land ...', which is the concern of section 8 of the Act, the discretion of the acquiring authority may not be restricted or inhibited either. To clarify this, the acquiring authority is bound by s 16(1)(a) of the Constitution. It may only acquire land where 'reasonably necessary' for one of the three purposes set out in e subpara (i) thereof. This is reflected in s 3(1)(b) of the Land Acquisition Act. Therefore, no act of Parliament may truncate what is 'reasonably necessary' in acquiring land for purposes of s 8 of the Act. Section 9(2) of the Amending Act (Act 1 of 2004) does just this. It gives the acquiring authority wider powers of acquisition because it limits what is 'reasonably necessary'. f
6. Section 8 of the Act (the acquisition provision) and s 7 thereof (the confirmation provision) are inextricably linked. If the erstwhile landowner could not protest the acquisition on the basis, let us say, that he only had one farm, he cannot logically make the same protest when it came to the confirmation proceedings. Thus, s 9(2) of the Amending Act (Act 1 of 2004) restricts or inhibits the acquisition g procedure at both the s 8 stage and the s 7 stage. In both instances, the procedure is out of harmony with s 16(1)(a) of the Constitution.
7. The argument in relation to s 3(3) of the Amending Act (Act 1 of 2004) is precisely the same. The three factors set out therein, in subparas (a), (b) and (c) may be very relevant to the question of reasonable h

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a necessity. No Act of Parliament, other than a constitutional amendment, can constitutionally restrict or inhibit the discretion of the acquiring authority in deciding what is 'reasonably necessary'. Similarly, for the purposes of s 7, relating to the confirmation proceedings, the Administrative Court cannot be precluded from considering these factors in its determination of the reasonable b necessity for the acquisition. It would first require an amendment to the Constitution."

I am persuaded by the above submissions that s 3(3) and 9(2), by prescribing what shall not constitute valid grounds for objection to compulsory acquisition have, in effect, fettered the discretion of the Administrative Court at the confirmation stage of the acquisition of land. An invalid ground of objection c by operation of law, namely s 3(3) and 9(2), cannot be a valid ground for opposing confirmation by the Administrative Court. The two processes, as the appellant correctly submits, are inextricably linked. The discretion of the Administrative Court cannot be fettered without amending the Constitution. It is for the Administrative Court to determine what constitutes or does not constitute a valid ground for acquisition of the land. Parliament cannot fetter d that discretion without first amending the Constitution.

In the result, s 3(3) and 9(2) of Act 1 of 2004 are struck down as unconstitutional as they are inconsistent with s 16(1)(a) of the Constitution. The appellant is entitled to its costs.

e SANDURA JA, ZIYAMBI JA, MALABA JA & GWAUNZA JA concurred.

Webb Low & Barry, appellant's legal practitioners

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

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Source:

ZVOBGO v CITY OF HARARE & ANOR 2005 (2) ZLR 164 (H)**2005 (2) ZLR p164**

Citation	2005 (2) ZLR 164 (H)
Case No	Judgment No. HH-80-05
Court	High Court, Harare
Judge	Makarau J
Heard	7 March 2005
Judgment	14 September 2005
Counsel	Mrs S Jarvis, for the applicant L T Biti, for the first respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Administrative law — *administrative decisions and acts — validity of — acts c performed by commission running affairs of city — commission effectively running affairs although its term had expired and its re-appointment was unlawful — whether such decisions can be legitimated on basis of Kelsen's theory of efficacy*

Jurisprudence — *Kelsenian theory of efficacy — applicability — theory D cannot be invoked to validate illegal acts done under domestic law — relates to vacuums created at a national level where one regime has been ousted from power by another and not provided for in the grundnorm*

Jurisprudence — *Kelsenian theory of efficacy — not a rule of law — theory serves to validate the court itself — serves as a justification for a court E involving itself in fundamental questions arising from a revolution*

Headnote

The applicant and 17 other employees of the City of Harare were suspended from duty, following the findings of a committee of inquiry set up by the Minister of Local Government in terms of the Urban Councils Act. At the time of the suspension of the applicant and the other employees, the F City's affairs were under the management of a commission appointed by the Minister in terms of s 80 of the Act, following the suspension of the elected councillors. The appointment of the commission in terms of s 80(3) was for a period of six months. In spite of this limitation, the Minister re-appointed the commission, which continued in office for G nearly three years. During the first six months of its tenure, the commission resolved to appoint a special committee to inquire into the allegations faced by the 18 suspended employees. After the first six months of its lifetime, the commission appointed a committee in accordance with the resolution. That committee was dissolved and another appointed, which commenced inquiries into the allegations of misconduct by the applicant H

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A in spite of objections raised by the applicant about the legitimacy of its actions. The applicant sought an order setting aside the committee's actions as void. The respondents accepted that it was illegal for the commission to continue in office after six months, but argued that since the commission was the only authority running the affairs of the City, its otherwise illegal E acts must be legitimated on the basis of Kelsenian B efficacy.

Held, that the fact that the committee was appointed by an illegal commission in pursuance of a resolution passed during the lawful tenure of the commission did not clothe the committee with legitimacy, as the passing of the resolution and the appointment of the committee were two separate c juristic acts. The resolution of a legal entity, lawfully constituted, cannot be carried into effect by an unlawful body and, in the absence of some validating procedure, cannot create and confer legal rights and obligations.

Held, further, that the Kelsenian theory of efficacy has found expression mainly in international law situations to avoid vacuums created by the d toppling of one *grundnorm* by another. It is only applicable in situations where the *grundnorm* has been suspended or has become defunct and a vacuum has thereby been created and will remain if the court does not validate the new *grundnorm*. It has thus been applied in cases of revolutionary changes to entire governmental regimes where such change is deemed successful, the measure of success being the response e of the governed people to the coup and the fact that there is no other government in opposition to the new order. It is not a rule of law, but a convenient theory which serves to validate the court itself and therefore to validate the court's actions, and serves as a justification for the court involving itself in fundamental questions arising from a revolution (*dicta f per* Davies J in *Matanzima v President of the Republic of Transkei* 1998 (4) SA 989 (Tk), followed).

Quaere, whether the theory is anything other than a useful weapon in the arsenal of a court which intends to capitulate or seek to recognise the illegal regime, as the only other option would be for the court to fearlessly declare the law as the court sees it to be, whatever the future consequences g will be. It is an excuse on the part of the court to expressly support and uphold the coup or revolution without appearing to have participated in the illegality.

Held, further, that the Kelsenian theory is not meant to fill all vacuums of power no matter how created. In particular, it cannot be invoked to h validate illegal acts done under domestic law, because there is no change

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in the *grundnorm*. Domestic law is itself not the fundamental law and a needs no independent validation other than that which the *grundnorm* confers on it. Vacuums created by the domestic law should be filled by making reference to the *grundnorm* and applying domestic remedies. The theory cannot be invoked to destroy the *grundnorm* by legitimising acts that are illegal under the *grundnorm*. Thus, an unconstitutional act b cannot be declared valid and legitimate by invoking the theory as this will lead to anarchy and self help in domestic law.

Held, further, that the vacuum sought to be filled by the application of the theory was fictional. It was created not by the absence of relevant domestic laws but by the misapplication of those laws. Domestic remedies in the form of the express provisions of the Urban Councils Act abounded c on how to fill the alleged vacuum. The commission was allowed to remain in office past its legal mandate, thereby creating the fictional vacuum. To legitimise what was clearly illegal would be to offend against the clear letter of the law as contained in the Act and to usurp the functions of Parliament by seeking to legislate from the bench by excusing that which parliament has decreed illegal. d

Cases cited

Binga v Administrator-General SWA & Ors 1984 (3) SA 949 (SWA)

Combined Harare Residents' Assn & Anor v Registrar General HH-210-01

Madzimbamuto & Anor v Lardner-Burke NO & Anor 1968 (1) RLR 203 (A); 1968 (2) SA 284 (RA) e

Matanzima v President of the Republic of Transkei & Anor 1998 (4) SA 989 (Tk)

R v Ndhlovu & Ors 1968 (4) SA 515 (RA)

Stevenson v Min of Local Govt & Ors 2002 (1) ZLR 498 (S) f

Legislation considered

Urban Councils Acts [Chapter 29:15], s 80

Case information

Mrs S Jarvis, for the applicant ^G

L T Biti, for the first respondent

Judgment

MAKARAU J: This is an application for review, brought by the applicant to set aside as null and void, the proceedings of a committee of inquiry set up by the first respondent under the second respondent, to inquire into certain alleged misconduct by the applicant. ^H

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A INTRODUCTION

1. The applicant and 17 other employees of the City of Harare were suspended from duty on 24 June 1999, following the findings of a committee of inquiry duly set up by the Minister of Local Government and National Housing ("the Minister"), in terms of the Urban Councils Act [*Chapter 29.15*], ^B ("the Act").
2. At the time of the suspension of the applicant and the other employees, the affairs of the City were under the management of a Commission headed by one Elijah Chanakira, and appointed by the Minister on 8 March 1999 in terms of section 80 of the Act, following the suspension of the elected councillors on 25 February 1999. In terms of this section, a commission ^C so elected would act as council in terms of the Act. The appointment of the Commission in terms of s 80(3) of the Act was for a period of six months. I shall revert in detail to this provision of the Act.
3. At its meeting of 30 June 1999, the Commission resolved to appoint a special committee to inquire into the allegations faced by each of the ^D suspended 18 employees, the applicant included.
4. It is common cause that after the first six months of its appointment, the Commission remained in office up to early 2002 when a mayor and councillors were elected for the City following a ruling by the Supreme Court directing that elections for these officials be held.
5. The Commission, having been appointed on 8 March 1999, could validly ^E act as a council in terms of s 80(1) and (3) of the Act for a period of six months, up to 7 September 1999.
6. On a date that has not been disclosed in the papers filed of record but after the first six months of its lifetime, the Commission appointed a committee in accordance with the resolution of 30 June 1999. This committee was ^F dissolved before it conducted any inquiries into the alleged misconduct and another committee, presided over by the second respondent, was set up in its place.
7. The second committee commenced inquiries into the allegations of misconduct by the applicant and in October 2000, the applicant raised an objection to the continuation of the proceedings on the basis that the ^G committee lacked jurisdiction and legitimacy to conduct the inquiry as it was appointed by a commission that itself was illegally purporting to act as council for the City of Harare. The objection was overruled with the committee holding that it had the necessary jurisdiction as it was appointed under a resolution passed during the first six months of the lifetime of the ^H commission.

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8. The issue raised at this stage but that went unresolved, was whether the ^A extension of the lifetime of the commission beyond the first six months of its lifetime was valid or rendered the re-appointed commission an illegal authority whose acts were null and void *ab initio*.
9. Dissatisfied with the ruling of the committee, the applicant immediately filed this application, seeking the relief that I have detailed in the opening ^B part of this judgment. The application was opposed.
10. The hearing of the application was by consent held over pending determination of another application filed before his court directly challenging the legality of the commission.

11. At the hearing of the application, this court and the Supreme Court had c in two separate matters, passed judgments in which the extension of the lifetime of the Commission beyond the first six months was described as illegal. The illegality of the Commission after the first six months of its lifetime was thus not in issue before me.
12. In its opposition, the first respondent argued that the committee headed by second respondent was appointed in pursuance of a resolution passed d during the first six months of the lifetime of the Commission and was therefore not tainted by any alleged illegality attaching to the Commission as subsequently re-appointed. In oral argument, this ground was abandoned. Instead, it was strenuously argued that since the commission was the only authority running the affairs of the City, its otherwise illegal e acts must be legitimated on the basis of efficacy. Thus, reliance was sought for this contention on the Kelsenian general theory of efficacy.

THE ISSUES

13. As indicated above, it was not in issue before me that the re-appointed commission was a not a legal authority, capable of running the affairs of f the City and bringing about legal consequences by its transactions. The parties appeared to have accepted as correct and binding, the dicta by Sandura JA in *Stevenson v Minister of Local Government & Ors* 2002 (1) ZLR 498 (S) that the re-appointments of the commissioners was unlawful. In determining whether the appointment of a commission in terms of s 80 of the Act postponed the holding of elections in terms of the g Act, the learned Judge of Appeal had this to say at p 10 of the judgment:
 "Consequently, the Minister could not avoid having a general election of councillors by continually re-appointing the commissioners. In my view, s 80(5) of the Urban Councils Act was not enacted for that purpose. The Power given to the Minister by that section was intended for use, h

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- a as a temporary measure, during the period preceding the holding of elections as required by the Electoral Act. The re-appointments of the commissioners were, therefore illegal."
14. This court had expressed similar sentiments in *Combined Harare Residents Association & Anor v The Registrar-General* HH-210-01. In that matter, Hungwe J had to determine whether the power granted the Minister to b appoint Commissioners in terms of the Act could be used to indefinitely postpone the holding of elections for councillors and for a mayor for the City. In useful dicta, the learned judge had this to say at p 9 of the judgment:
 "The matter which gave urgency at the inception of this application, at c least from the papers, was that the term of office of the current Commissioners expires at the end of December 2001. There is a real danger that should there be no duly elected mayor in office by 31 December 2001, then the City of Harare will grind to a halt as it will not be legally able to expend any money for any purpose. This fear arises from the fact that the Minister cannot lawfully reappoint Commissioners *ad infinitum*. Any such re-appointment is illegal." d
15. I agree that the re-appointment of the commission after the first six months period was not in accordance with the provisions of the Urban Councils Act and was therefore illegal. No useful purpose will be served by my giving further reasons as to why the re-appointment of the commission offends against the provisions of the Act over and above the sentiments e expressed by Sandura JA and Hungwe J in the cases cited above. Further, the parties to the dispute before me have properly in my view, accepted this as representing the correct position at law.
16. The fact that the resolution to appoint a committee of inquiry into the alleged misconduct of the applicant was passed during the lawful tenure of the commission was not relied upon in oral argument as making the f proceedings of the committee legitimate. Although no reason was given for abandoning the argument, it is my view, that such abandonment was proper. It is common cause that the committee presided over by the second respondent was appointed after the commission had exhausted its lawful tenure. It is my view that the fact that the committee was g appointed by an illegal commission in pursuance of a resolution passed during the lawful years of the commission does not clothe the committee with legitimacy as the passing of the resolution and the appointment of the committee are two separate juristic

acts. Both must emanate from a commission or council lawfully in office. In law, one cannot envisage a situation where the resolution of a legal entity, lawfully constituted, can

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lawfully be carried into effect by an unlawful body, and in the absence of A some validating procedure, create, and confer legal rights and obligations on the parties concerned.

17. This I believe, is the basis upon which the first respondent placed much reliance on the Kelsenian theory of efficacy as some form of validation of the transactions of the commission after it had exhausted its lawful B lifetime.
18. There are other adjectival issues that I think best disposed of at this stage so that they do not cloud the real issue before me. The first one relates to the amendment sought by the applicant to his draft order to include a declaration that the subsequent dismissal of the applicant by the first respondent was null and void. The first respondent objects to the C amendment on the basis that it will introduce a new cause of action. I think not. The subsequent dismissal of the applicant was directly predicated on the proceedings that have been challenged and in the event that such are found void *ab initio*, then the dismissal will fall away by way of a domino effect as anything resting on the void proceedings will have to D fall with the proceedings. In this regard, the amendment is not necessary even if it will not prejudice the respondent and does not seek to introduce a new cause of action.
19. The second adjectival issue relates to the attempt by the applicant in his heads of argument to have the proceedings of the committee set aside on the basis that in terms of the Act, a suspension lapses after six months. E The applicant attempts to argue that the proceedings before the commission were merrily proceeding well after the six months deadline. This ground for review was raised for the first time in the heads of argument and does not appear in the body of the applicant's founding affidavit, by which his application stands or falls.
20. The first respondent properly in my view, objected to the review of the F purported dismissal of the applicant on this basis. It is common cause that this was not the case that the respondents were brought to court to meet. The case was not brought by the application before me and an attempt was made to smuggle it into the courtroom through the applicant's heads. It cannot properly constitute an issue for me to decide. G
21. It is therefore my view that the sole issue that remains for my determination is whether the Kelsenian theory of efficacy has any application in domestic law in general and in this particular case. H

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Makarau J A

22. Although the point was not articulated, it appears to me clear that since the illegality of the commission is undisputed, the onus rests squarely on the first respondent to prove that there is a basis upon which its actions can be validated by this court.

THE KELSENIAN THEORY B

23. It is not intended to fully critique the theory but to briefly outline its essential elements for the purposes of understanding the premise of the disposition I make at the end of the judgment. The theory has been described in detail in the judgments cited in this judgment and it is not necessary that I burden this judgment with such detail but to acknowledge, with respect, the work done by the courts whose judgments I now seek C to use.
24. "The Kelsenian authority from which the doctrine (of revolutionary legality) is based is not a rule of law, but a convenient theory which serves to validate the court itself and therefore to validate the court's actions, (and) serves as a justification for the court involving itself in fundamental D questions arising from a revolution." 1
25. The Kelsenian general theory of law and state was developed by Professor Hans Kelsen and holds that in the legal system of every state, there is a fundamental law, which he describes as "the *grundnorm*", from which all other laws derive their legal validity. This *grundnorm* and the entire legal system based on it depend for their validity, on their efficacy and the E acquiescence of the people to the binding nature of the *grundnorm* and the other laws deriving validity from it.²

26. The Kelsenian theory found expression in this jurisdiction in the infamous constitutional case of *Madzimbamuto v Lardner-Burke NO & Anor NO* 1968 (1) RLR 203 (A) 1968 (2) SA 284 where the fact that the rebel ^F government was in effective control of the country was used to declare it the government of the day and to clothe its actions and laws with legitimacy on that basis. The court went on further to find that the existing *grundnorm*, being the 1961 Constitution given by the colonial government had become either completely defunct or had been entirely suspended and the court, which had been appointed under the defunct *grundnorm*, ^G transmogrified and embraced the new order and derived authority from the fact that the new order allowed it to function and enforced its orders: see also *R v Ndhlovu & Ors* 1968 (4) SA 515 (R, AD).

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Makarau J

27. The Kelsenian doctrine as applied in the *Madzimbamuto* matter was ^A applied with slight modification in the matter of *Matanzima v President of the Republic of Transkei supra* where the revolutionary government of Transkei of 1988 was declared lawful and its laws legitimated *ab initio* on the basis that it was in effective control of the administration of the country and the people had by and large acquiesced in its laws and were ^B behaving in conformity with its mandates.
28. In *Binga v Administrator-General SWA & Ors* 1984 (3) SA 949 (SWA), Mouton J gave effect to the submission by counsel in that matter to the effect that the law abhors a vacuum and acts of government necessary to peace and good order which would be valid if emanating from lawful government, must be regarded in general as valid when proceeding from ^C an actual though unlawful government. He upheld the application of a South African law conscripting indigenous South West Africans to serve in the South African army before that country gained independence as Namibia.
29. From the above, it appears to me that the theory of efficacy has found ^D expression mainly in international law situations to avoid vacuums created by the toppling of one *grundnorm* by another. It is, therefore, in my view only applicable in situations where the *grundnorm* has been suspended or has become defunct and a vacuum has thereby been created and will remain if the court does not validate the new *grundnorm*.
30. It further appears to me to have been applied in cases of revolutionary ^E changes to entire governmental regimes where such change is deemed successful, the measure of success being the response of the governed people to the coup and the fact that there is no other government in opposition to the new order.
31. It further appears to me to be nothing other than a useful weapon in the ^F arsenal of that court which intends to capitulate or seek to recognise the illegal regime as the other option would be for the court to fearlessly declare the law as he or she sees it to be, whatever the future consequences will be, a course that Beadle CJ and other judges in *Madzimbamuto* shied away from: see p 329 of the judgment.
32. In my view, the application of the theory is therefore an excuse on the part ^G of a court to excuse the illegal on account of the recognition that the court itself will derive from the new order. It is therefore an excuse on the part of the court to expressly support and uphold the coup or revolution without appearing to have participated in the illegality. ^H

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^A THE KELSENIAN THEORY AND DOMESTIC LAW

33. The first hurdle that the theory faces in domestic law is the absence of a change in the *grundnorm*. Domestic law itself finds expression and validity under a fundamental law. It is itself not the fundamental law and needs no independent validation other than that which the *grundnorm* ^B confers on it. In the absence of a change in the *grundnorm*, the theory cannot be invoked to validate illegal acts done under domestic law.
34. The theory is not meant to fill all vacuums of power no matter how created and particularly, cannot fill vacuums created by the domestic law as such vacuums should be filled by making reference to the *grundnorm* and applying domestic remedies. The theory has been invoked to

fill vacuums created at national level where one regime has been ousted from power in a manner not anticipated or provided for in the *grundnorm*.

35. It cannot be invoked to destroy the *grundnorm* by legitimising acts that are illegal under the *grundnorm*. Thus, an unconstitutional act cannot in my view, be declare valid and legitimate by invoking the theory as this will lead to unprecedented anarchy and self help in domestic law. Illegal bodies may set themselves up without reference to central governments on the flimsy reason that they are effective, the people accept their mandate, and there is no other equivalent body opposing them in the sphere of society they chose to operate in. One need not think beyond the operations of the black market in foreign currency in this country presently to realise the potentially dangerous precedent that may unwittingly be set by upholding the contentions that permanence, efficacy and general acceptance by the public are the only determining features of validating an illegal authority under domestic law.
36. It is my further view that, the court is not placed in a dilemma by the existence of a perceived vacuum in domestic law. Its omnipotence granted and guaranteed by the *grundnorm* is not rendered impotent by a vacuum in domestic law, as is the situation when there is a vacuum at institutional law. Thus, the need for the court to recognize and validate the illegal in exchange for its continued existence and recognition does not arise.
35. It is thus my view, that the theory as presently formulated and developed has no application in domestic law. Whether the principle can be further developed and adapted for application in some aspects of domestic law is an issue that I need not consider in this matter.

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Makarau J

THE FACTS ^A

38. *In casu*, there has been no suggestion that there were changes in the fundamental law of the land that created a vacuum to be filled by the invocation of the theory. There has been no revolution nor change of regime that replaced the Constitution of Zimbabwe as presently formulated. The Constitution remains the supreme law in the land and the Urban Councils Act that was promulgated under it remains valid and in force.
39. The vacuum sought to be filled by the application of the theory is in my view, fictional. It was created not by the absence of relevant domestic laws but by the misapplication of those laws. Domestic remedies in the form of the express provisions of the Urban Councils Act abound on how to fill the alleged vacuum. A commission was allowed to remain in office past its legal mandate, thereby creating the fictional vacuum. It is my view that, to legitimise the clearly illegal in the circumstances of this matter would be to offend against the clear letter of the law as contained in the Urban Councils Act and to usurp the functions of Parliament and seek to legislate from the bench by excusing that which parliament has decreed illegal.

DISPOSITION

40. While failure to abide by the provisions of domestic law does not in my view trigger the application of the theory, the consequences of holding that the actions of the illegal Commission were void *ab initio* are not lost on me.
41. It has been submitted by counsel for the first respondent, that to unscramble the actions of the illegal commission, is simply unimaginable. This is true. Salaries have been paid. Rates have been levied and collected and services have been rendered by the illegal entity. While it is conceded that the illegal Commission transacted business for and on behalf of the City of Harare under the genuine but mistaken belief that it had a lawful mandate to do so, the mistaken belief on the part of the commissioners is in my view no basis in law for this court to usurp the functions of Parliament and validate that which Parliament has expressly decreed to be illegal. It is my further view that, the function properly reposes in Parliament, if it is so minded and so advised, to retrospectively confer validity on the transactions enacted by the illegal commission and which were invalidly done in good faith. The function of this court in this matter ends with declaring the law. It cannot confer validity on illegal acts on the basis that has been alleged.

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Makarau J A

42. In the result, the application is granted as prayed and an order is made as follows:

42.1 The proceedings of the special committee of inquiry set up by the first respondent in 1999 to inquire into alleged acts of misconduct by the applicant are hereby set aside as null and void *ab initio*. B

42.2 The first respondent shall bear the applicant's costs.

Atherstone & Cook, applicant's legal practitioners

c Honey & Blankenberg, first respondent's legal practitioners

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VILLA REAL FLATS (PVT) LTD v UNDENG & ORS 2005 (2) ZLR 176 (H)

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Citation	2005 (2) ZLR 176 (H)
Case No	Judgment No. HH-86-05
Court	High Court, Harare
Judge	Gowora J
Heard	7 April 2005
Judgment	14 September 2005
Counsel	<i>N Madya</i> , for the applicant <i>Miss P Mukwengi</i> , for the respondents
Case Type	Civil applications
Annotations	Link to case annotations

Flynote

Landlord and tenant — *tenant* — *statutory tenant* — *eviction of* — *certificate from Rent Board that eviction fair and reasonable* — *when required* — *not required when statutory tenant withholds rent*

Headnote

Three applications for eviction were heard together, since all raised the same point. The respondents were statutory tenants in the same block of flats owned by the applicant. They had become statutory tenants after the applicant raised the rent. They did not continue to pay rent, though they tendered payment after the landlord applied for their eviction. They contended that the landlord should have obtained a certificate from the Rent Board that their eviction was fair and reasonable.

Held, that in terms of s 30(2) of the Rent Regulations 1982 (SI 626 of 1982), ^E a statutory tenant, which all the respondents were, is protected from eviction only in certain circumstances. The protection afforded by the subsection is available only so long as the lessee continues to pay the rent due within seven days of due date and performs the other conditions of the lease. In terms of s 30(4) of the Regulations, a certificate from the ^F Rent Board is required only in the situations referred to in paras (c) and (d) of s 30(2), that is (a) when the premises are required for use by the lessor or where a sub-lessee is in occupation by the lessee and (b) where the lessor has given notice to the lessee of his intention to renovate the dwelling. It is not in every situation that a certificate is required. No certificate was required in the present circumstances. Consequently, an ^G eviction order would be granted in each case, with arrear rentals and holding over damages to be paid by the second and third respondents. ^H

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Case cited ^A*Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T)**Legislation considered**^B Rent Regulations 1982 (SI 626 of 1982), s 30(2) & (4)**Case information***N Madya*, for the applicantMiss *P Mukwengi*, for the respondents**Judgment**

GOWORA J: These matters were set down before at the same time as they ^C concerned the same issue, between the applicant and the respondents. The applicant is the registered owner of a block of flats where all the respondents are tenants. There are no written agreements of lease between the parties, their relationship being governed by oral agreements of lease. In all the applications, the applicant is seeking an order for the eviction of the respondents and all those claiming right of occupation through them.

^D In an affidavit filed on behalf of the applicant against the first respondent, Pat Brogan, a director of the applicant avers that the respondent is in occupation of Flat No. 3 Villa Real Flats in terms of an oral lease agreement concluded between the parties on 1 August 2001. The applicant further avers that it was a term of the agreement that the respondent pays rental for the flat in advance ^E on or before the first day of each month, and that should the respondent fail to pay such rental on due date then the applicant would be entitled to cancel the agreement and take any action necessary for the immediate eviction of the respondent. The applicant avers that rental for the flat was increased to \$70 000 per month with effect from 1 May 2003. The applicant avers further that the respondent has refused or failed to pay rentals for the months of May, June ^F and July 2003 amounting to \$210 000 and is therefore in unlawful occupation. As against the first respondent, the applicant seeks in addition an order that he pay arrear rentals in the sum of \$210 000 for the months of May, June and July 2003 and interest on the said amount at the prescribed rate from January 2003 to date of payment. The applicant seeks as well holding over damages ^G in the sum of \$70 000 for each month that the respondent remains in occupation of the flat from 1 August 2003 and interest thereon at the prescribed rate from that date to the date of final payment.

The respondent disputes that the rental was increased to \$70 000 per month from May 2003, and avers instead that it was increased to \$50 000 with effect ^H from December 2002. He further states that the applicant's director demanded

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that he and the other tenants pay the rental in foreign currency in order for her ^A to meet the costs of her child who was studying in South Africa. He further states that he and his co-tenants complained to the applicant's director about her manner of dealing with them and attaches a copy of

the letter in question to his opposing papers. He also incorporates the affidavits of the other two respondents to his as their circumstances are the same. ^b

He denies that rentals were not being paid promptly and states that the applicant has consistently refused to accept payment of rentals in local currency despite his constant tender of payment. He adds that there is no agreement that he pay \$70 000 as rental. He states that on 1 May 2003, he had gone to pay the rent but Mrs Brogan had refused to accept it demanding that he pay her in foreign currency and subsequently on 10 May 2003 she had ^cwritten the letter annexed to the applicant's papers. He contends that the applicant at one stage advertised the flats for sale and has not been maintaining them in a habitable state.

He states that there was no systematic manner of collecting rent, and that the applicant was solely to blame for the problems. It was his expressed view that ^dthe procedure followed by the applicant in bringing the matter to court was irregular and that instead the correct procedure would have been to refer the matter to the Rent Board in accordance with the provisions of ss 30(2)(e), 30(4) and 32(1) of the Rent Regulations 1982 (SI 626 of 1982).

The lease agreement in relation to Memory Kudzedzereka was concluded on 1 March 2002 from which date she has been in occupation of Flat No. 2 on the ^epremises in question. The agreed monthly rental was \$24 000 payable on or before the first day of the month. The lease was also subject to the same terms as discussed above in the event of failure to pay rentals on due date. According to the applicant, Memory Kudzedzereka has failed to pay rentals for the months of January and February 2003, in the total sum of \$48 000.

In relation to Dr Ndawana, the lease agreement was concluded on 27 August ^f2001 and was in respect of Flat No. 4 at a monthly rental of \$17 500. The other terms were identical to the ones for Undenge and Kudzedzereka. The respondent has been in occupation thereof since 1 September 2001. The applicant avers that the rental in respect of Flat No. 4 was increased to \$25 000 in September 2002. The applicant further alleges that the respondent is in breach of the lease ^gin that he has not paid rentals for the months of January and February 2003 in the total sum of \$50 000.

Against the second respondent, the applicant seeks in addition to the eviction, holding over damages of \$48 000 for the months of January and February 2003 and interest thereon at the prescribed rate from the month of ^h

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^aJanuary 2003. The applicant also seeks holding over damages of \$24 000 for each month the respondent remains in occupation of the premises from 1 March 2003 and interest on the damages from 1 March to date of payment. As against the third respondent, the applicant in addition claims arrear rentals in the sum of \$75 000 for the months of January, February and March 2003 as well as interest on the amount in issue at the prescribed rate from January 2003 ^bto date of payment. The applicant also seeks holding over damages of \$25 000 per month from 1 April 2003 and interest thereon from the effective date until payment has been effected.

Kudzedzereka and Ndawana have taken the same position and have filed identical affidavits. They deny being in breach and allege that the applicant ^cdid not have a systematic manner of collecting rentals and that when she was unavailable for various reasons of her own they would withhold rentals. They further claim that they would withhold rentals when she refused to accept payment and she had refused to give them her bank account in order that they would pay into the same. Both state that they have the rentals in their custody as a result and tender payment of the said rentals. They further claim that they ^dhad not committed any breach and that there were intractable disputes of fact which were not capable of resolution on the papers. They state that the applicant should have issued summons as oral evidence was required in order to resolve the disputes of fact. They contend that in February 2003 they had given their rentals to the first respondent and requested him to pay on their behalf but that the applicant's director Pat Brogan had rejected the payments ^esaying they should pay individually. The applicant's director had allegedly advised that the flats had been sold and payment would have to be made to the new owner. The name of the new owner or his details, were not furnished to the respondents. They stated that on 28 February 2003 a letter was written by them to the applicant's sales agent and no response had been forthcoming ^fand that it was at that stage that the applicant started to refuse rentals from all four tenants. When the letter cancelling the lease agreements was received, on their instructions their

legal practitioner had addressed a letter to the applicant protesting against the flawed notice of cancellation of the lease agreement.

Both of them contend that the applicant's reasons for cancelling the leases ^g are spurious and unfounded. The applicant had refused to accept the rentals and the applications should therefore be dismissed with costs on the higher scale.

It is common cause that the respondents have all not paid rentals for the periods in respect of which the applicant seeks arrear rental. The question ^h therefore that springs to mind is whether in fact they are in breach. For

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Undenge, the period is May, June and July 2003, whilst for the other two the ^a alleged breach occurred in January and February 2003. It is clear that all three were paying different rentals for the units they occupied, and that the problem in respect of payment of rental did not affect Undenge until May 2003.

The respondents have all raised an issue of dispute of fact. It is their contention that there exist such material disputes of fact on the papers that ^b the matter cannot be resolved without *viva voce* evidence. The applicant denies that there are disputes of fact and contend that in the event that there are such disputes of fact, the matter is capable of resolution without recourse to oral evidence. I am invited to take a robust approach of the matter. I quote with respect the *dicta* of Murray AJP in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*¹ to the following effect: ^c

"A bare denial of the applicant's material averments cannot be regarded as sufficient to defeat the applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by the respondent to enable the court to conduct a preliminary examination ... and to ascertain whether the denials are not fictitious intended merely to delay the hearing. The respondent's affidavits must at least disclose that ^d there are material issues in which there is a *bona fide* dispute of fact capable of being decided only after *viva voce* evidence has been heard."

The first aspect on which to consider whether or not a dispute of fact exists relates to whether or not the respondents tendered payment of rentals. Whilst Kudzedzereka and Ndawana state that they had given their rentals to Undenge ^e to pay on their behalf in February 2003, he does not mention this in his opposing affidavit, and even though I accept that he has incorporated their affidavits to his own, an explanation should have been given in his affidavit why he was able to make payment for January February March and April without encountering the difficulties that the others were being subjected. He does not confirm their averment that he had been given rentals to pay on their ^f behalf nor does he bother to explain how the applicant reacted to his bringing rentals for the others. The applicant states that Kudzedzereka and Ndawana tendered payment in January (of the old rental), through Undenge. The payment was not accepted. The applicant denies that there was any tender of payment in February as claimed by the respondents. The applicant denies that its director was unavailable to accept the rentals as claimed by them. ^g

The question to be asked is why at the time the rental for Undenge would be accepted and that of Kudzedzereka and Ndawana rejected. Undenge is the one ^h

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^a who supposedly tendered payment on behalf of the others and in the absence of an explanation from him as to whether he tendered payment as alleged and what occurred when the tender was made, I am not inclined to accept that what Kudzedzereka and Ndawana are saying in their affidavits is true. In addition, Undenge seems to have had the facility to be able to locate whoever was responsible for accepting rentals to the flats and as one of the reasons given ^b by the other two was that they were never able to find Mrs Brogan to give her the rent, I am unable to accept that as a reason for non payment. Again, going by the versions of Kudzedzereka and Ndawana they gave their rentals to Undenge in February for him to pay on their behalf. They do not explain when tender for the January rental was made and to whom it was made. I notice too that the other two do not dispute that the rental for their units was increased ^c in the year 2002 and that the amounts being claimed are correct. I can only conclude that they tendered an incorrect amount in January which the applicant refused to accept. In any event, neither of them disputes that they have not paid rent for the period in question.

Turning to the claim against Undenge, he denies being in breach merely **D** because the applicant's representative refused to accept rentals in local currency and was in fact demanding that payment be made in foreign currency. The respondent does not say what currency was to be used in effecting payment nor does he mention the amount being demanded as foreign currency. Although he states in his opposing affidavit that the applicant's director had demanded that they pay the rentals in foreign currency and that **E** he and his co-tenants had rejected this demand, neither Kudzedzereka nor Ndawana mention this in their opposing affidavits. He gives this as the reason why his payments were being rejected and avers that the applicant had consistently refused payment of rent in local currency despite his constant tender to make payment. It is only logical to assume that the applicant would, **F** if indeed payment for the units was to be preferred in foreign currency, instead of local currency demand that all the tenants pay in foreign currency. It would not be logical to demand in the circumstances that only one of a number of tenants pay in foreign currency whilst the rest paid in local currency.

The applicant has demanded arrear rentals from Undenge for the months of May, June and July totalling \$210 000 at \$70 000 per month. The applicant also **G** seeks holding over damages in the said sum for each month that the respondent remains in occupation of the premises. According to the applicant, the rent was increased to \$70 000 with effect from 1 May 2003. The applicant has not tendered any proof of the increase. The respondent has denied that the rent due by him was in the amount stated by the applicant but does not **H** state how much it was. All that the respondent has said is that he denies that

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the rental was \$70 000, but omits to mention in specific terms how much it was **A**.

The respondent herein states that the applicant proposed to increase the rental in December 2002 to \$50 000. The other two respondents to the applicant's claim do not mention this. Unlike the other three tenants, he paid rent from January to April 2003 when the others did not. He omits to mention how much he paid. If there had been an attempt by the applicant to raise the **B** rent to \$50 000 would the applicant have accepted less. There is no dispute that his rental for those months was accepted. The respondent would have me find that there are disputes of facts. In so far as the rental is concerned, the court has not been furnished with detail on the alleged dispute as to permit an examination of the facts

On 28 January 2003, a letter was written to the firm of Robert Root who were **C** advertising the property for sale asserting the rights of the respondents to be given first refusal to purchase their respective units in the event of a sale of the same. Again, another letter dated 4 March 2003, was written by the same legal practitioners to the applicant's erstwhile legal practitioners this time in connection with the issue of rentals. Inexplicably, although the issue is to do **D** with the issue of rent Undenge is mentioned therein yet his difficulties regarding rent had not at that stage commenced. In the letter, the respondents' legal practitioners state that their clients had tendered rentals which had been refused by the applicant who was demanding unreasonable rentals without giving the respondents sufficient prior notice of such change. There is no mention as to when such tender of rentals had been made and rejected in turn. **E** The two respondents in question have not in their papers challenged the amounts being claimed by the applicants as arrear rent. They do not say what those unreasonable amounts being claimed were and when such claims were made. They also do not in their affidavits claim that the applicant had demanded unreasonable rentals without giving them sufficient notice for the increases. A statement is made in the following vein – "Our clients again went **F** with the rentals in February 2003, but your client rejected receipt of rentals". No details of this alleged tender of payment of the rentals are given, and in particular the letter is silent as to which clients are being referred to. The letter does not make a tender for the payment of rent in respect of the months of January February or March which was clearly outstanding at that juncture in **G** respect of Kudzedzereka and Ndawana. The letter also does not mention that there was a demand for the payment of rent in foreign currency as alleged by Undenge.

I find myself unable to agree with the submission made on behalf of the respondents that there are disputes of fact in this matter which would disable **H**

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Gowora J

A me form dealing with the matter on the basis of the papers before me. The respondents have not in their papers established that there exist such disputes of fact. None of the respondents have shown that they made tender of payment in respect of the periods in question and that such tenders of payment as they made were rejected by the applicant. None of them have shown that the applicant was not available to accept their rental and that in ^B fact the non-payment was due to the difficulties caused by the applicant itself as the statements from the respondents and the correspondence written on their behalf are in conflict. The respondents in fact admit to withholding rentals and there is no legal justification for them to withhold the rental whilst still in occupation of the rented premises. In my view all of them are in breach of their ^C obligations to pay rent in accordance with the terms of their oral leases. Where it concerns Undenge there is a dispute of fact on the amount of rent due from 1 May which dispute is not capable of being resolved on the papers. The applicant should have anticipated a dispute on this issue and as it is material for the determination of holding over damages the applicant ought to have in this respect proceeded by way of action. When this application against ^D Undenge was launched the other tenants had already shown their mettle by opposing the applications against them. The applicant should have realized in fact that Undenge would follow suit and in the absence of any document confirming the monthly rental to be paid by the respondent, should have anticipated a dispute of fact. I am therefore not inclined to refer the matter to trial on this issue. The respondent is entitled to a dismissal of the applicant's ^E claim for arrear rental and holding over damages.

In heads of argument filed on behalf of all the respondents, it is submitted that the respondents are all statutory tenants and that their ejectment cannot legally be sought without following the procedures outlined in SI 626/1982. The argument is made on behalf of the respondents that the Rent Board is ^F required to determine whether or not is fair and reasonable for the landlord to evict his tenant, and that the lessor had to obtain a certificate from the Rent Board to that effect.

In terms of s 30(2), a statutory tenant, which all the respondents are, is protected from eviction either through the effluxion of time or notice having been given by the lessor unless in addition to the foregoing the lessee has ^G caused material damage to the dwelling or his conduct has or is likely to cause material or substantial inconvenience to the neighbours or the lessor; that the dwelling is required for occupation by the lessor or where the occupant is a sub-lessee by the lessee; or that the lessor requires the building for reconstruction or a rebuilding scheme; or that the appropriate board has issued a certificate ^H to the effect that the requirement that the lessee vacate the premises is fair and

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reasonable. The protection afforded by the subsection is available only so ^A long as the lessee continues to pay the rent due within seven days of due date and performs the other conditions of the lease. The respondents have not contended that they have been paying rent and I have found against them to the effect that they were not entitled to withhold rentals. They have only made tender of such rentals in their opposing affidavits, and despite their legal ^B practitioners having addressed letters to the applicants, no tender of the outstanding rentals was ever made. *In casu*, all three respondents admit to "having withheld rentals" from the applicant and cannot therefore seek the protection provided for in subs (2).

The additional argument is made that in the absence of a certificate from the Rent Board this Honourable Court does not have jurisdiction as its jurisdiction ^C is ousted by statute. Section 30(4) of the Rent Regulations provides:

"No order for the ejectment of a lessee from a dwelling shall be made on the grounds referred to in para (c) or (d) of subs (2) unless the appropriate board has, on the application of the lessor, issued a certificate to the effect that the requirement that the lessee vacate the dwelling is fair and reasonable, and the date specified in the certificate for the vacation of the ^D dwelling has passed."

In turn, s 30(2) has the following provisions in paras (c) and (d):

"Subject to the provisions of this section, no order for the recovery of possession of a dwelling or for the ejectment of a lessee therefrom, which is based on the fact of the lease having expired by effluxion of time or in ^E consequence of notice having been given by the lessor, shall be made by any court so long as the lessor continues to pay the rent due within seven days of due date and performs the other conditions of the lease, unless, in addition —

- (a) ...
- (b) ... ^F

- (c) the lessor has given the lessee not less than two months' written notice to vacate the dwelling on the ground that the dwelling is required —
 - (i) by the owner; or
 - (ii) where the lessee is a sub-lessee, by the person letting the dwelling to the sub-lessee; or
- (d) the lessor has given the lessee not less than two months' written notice to vacate the dwelling on the ground that the dwelling is required for the purpose of a reconstruction or rebuilding scheme, and the nature of such reconstruction or rebuilding would preclude human habitation. ^h

2005 (2) ZLR p185

Gowora J

A The requirement for a certificate from the Rent Board are consequently concerned with paras (c) and (d). My reading of the paragraphs in question leads me to conclude that a certificate from the board is a requirement only when the premises are required for use by the lessor or where a sub-lessee is in occupation by the lessee and also in the situation where the lessor has given notice to the lessee of his intention to renovate the dwelling. It is therefore, ^B not in every situation that a certificate is required, but those specified in paras (c) and (d) of subsection (2). *In casu*, the applicant contends that the respondents have not been paying rentals and is therefore praying for relief on that account. In my view, ^s 30(4) of the Regulations does therefore not apply to the matter before me. There was no obligation on the part of the applicant to seek a certificate from the Rent Board.

c In the premises with the exception of the claim for arrear rentals and holding over damages against Undenge, the applicant succeeds. I therefore, issue an order in the following terms:

CASE No. HC 7844/03

It is ordered that:

- 1. the respondent and all those claiming right of occupation through him be and are hereby ordered to vacate the property known as Flat No. 3, Villa Real, 9 Perth Road, Avondale, Harare within ten (10) days of the date of this order, failing which the Sheriff for Zimbabwe or his lawful Deputy be and is hereby authorized to evict the respondent and all ^E those claiming right of occupation through him from Flat No. 3, Villa Real, 9 Perth Road, Avondale, Harare, and render vacant possession to the respondent.
- 2. the applicant's claim for arrear rentals and holding over damages is hereby dismissed.
- 3. the respondent is ordered to pay the applicant's costs.

F CASE No. HC 3488/03

It is ordered that:

- 1. the respondent and all those claiming right of occupation through him be and are hereby ordered to vacate the property known as Flat No. 2, Villa Real Flats, 9 Perth Road, Avondale, Harare within ten (10) days of ^G the date of this order failing which the Sheriff for Zimbabwe or his lawful Deputy be and is hereby authorised to evict the respondent and all those claiming right of occupation through him from Flat No. 2, Villa Real Flats, 9 Perth Road, Avondale, Harare and render vacant possession ^H to the applicant.

2005 (2) ZLR p186

Gowora J

- 2. the respondent be and is hereby ordered to pay to the applicant arrear ^A rentals in the sum of \$48 000 in respect of the months of January and February 2003 and interest thereon at the prescribed rate from 1 January 2003 to date of payment in full.
- 3. the respondent be and is hereby ordered to pay holding over damages in the amount of \$24 000 for each month commencing from 1 March 2003 ^B that she remains in occupation of Flat No. 2, Villa Real Flats together with interest thereon at the prescribed rate with effect from 1 March 2003 to the date of payment.
- 4. the respondent is ordered to pay the applicant's costs.

CASE No. HC 3489/03

It is ordered that: c

1. the respondent and all those claiming right of occupation through him be and are hereby ordered to vacate the property known as Flat No. 4, Villa Real Flats, 9 Perth Road, Avondale, Harare, within ten (10) days of the date of this order, failing which the Sheriff for Zimbabwe or his lawful Deputy be and is hereby authorised to evict the respondent and d all those claiming right of occupation through him from Flat No. 4, Villa Real Flats, 9 Perth Road, Avondale Harare, and render vacant possession to the applicant.
2. the respondent be and is hereby ordered to pay to the applicant arrear rentals in the sum of \$75 000 for the months of January, February and March 2003, together with interest thereon at the prescribed rate with e effect from 1 January 2003 to the date of payment.
3. the respondent be and is hereby ordered to pay holding over damages in the sum of \$25 000 with effect from 1 March 2003 for each month that he remains in occupation of Flat No. 4, Villa Real Flats together with interest thereon at the prescribed rate with effect from 1 March 2003 to f the date of payment.
4. the respondent is ordered to pay the applicant's costs.

Wintertons, applicant's legal practitioners

Ziweni & Co, respondent's legal practitioners g

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/MUCHENA v MUZIRA (MUTOKO SOUTH ELECTION PETITION APPEAL) 2005 (2) ZLR 187 (S)

MUCHENA v MUZIRA (MUTOKO SOUTH ELECTION PETITION APPEAL) 2005 (2) ZLR 187 (S) 2005 (2) ZLR p187

Citation	2005 (2) ZLR 187 (S)
Case No	S-132-04
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA and Malaba JA
Heard	4 November 2004
Judgment	19 September 2005 [*]
Counsel	<i>L Mazonde</i> , for the appellant <i>E T Matinenga</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

c **Election** — election petition — need for precision in — need to contain essential averments on which petitioner relies — court not entitled to rely on grounds emerging during hearing but not averred in petition

Election — election petition — procedure — court having no power to exempt petitioner from strict adherence to terms of statute

Headnote

- Ⓓ An election petition must contain the essential averments upon which a petitioner intends to rely as well as the relief sought. It is impermissible for the petitioner to allege one cause of action in his petition and then to rely on a different one at the trial. The respondent is entitled to know at the time when the petition is served on him what case he is being called upon to meet.
- Ⓔ In the case where, for the purposes of section 124 (a) of the Electoral Act [*Chapter 2:01*], it was alleged that corrupt or illegal practices had been conducted by agents of the successful parliamentary candidate but there was no averment to that effect in the electoral petition of the unsuccessful candidate, the petition disclosed no cause of action.
- Ⓕ The cause of action in an election petition being derived from statute, the court has no power to exempt a petitioner from strict adherence to its terms.

Cases cited

Hove v Gumbo (Mberengwa West Election Petition) 2002 (1) ZLR 233 (H)

Ⓔ *Hove v Gumbo (Mberengwa West Election Petition Appeal)* 2005 (2) ZLR 94 (S)

Nath v Singh & Ors [1954] SCR 892

Mithilesh Kumar v Venkataraman [1989] LRC (Const) 1

2005 (2) ZLR p188

Ziyambi JA

Legislation considered ^A

Electoral Act [*Chapter 2:01*], ss 124 (a) & 132

Case information

L Mazonde, for the appellant

E T Matinenga, for the respondent

Judgment

ZIYAMBI JA: This is an appeal against a judgment of the High Court ^B upholding an election petition presented by the respondent. The petition was presented to the court in terms of s 132 of the Electoral Act [*Chapter 2:01*] ("the Act") (now repealed and replaced by the Electoral Act [*Chapter 2:13*]).

The appellant, currently the Minister of Science and Technology Development, contested the Mutoko South Parliamentary seat as a candidate for the Zanu ^C (PF) party in the Parliamentary Elections held on 24 and 25 June 2000, while the respondent contested the same seat as a candidate for the MDC party. The appellant polled 19 228 seats while the respondent polled 1 177 seats.

On 26 July 2000, the respondent filed a petition in the High Court seeking the setting aside of the election on the basis that it was — Ⓓ

"... not conducted in accordance with the principles not only laid out in this Act but principles of fairness as guaranteed and implied in our Constitution ... My principle (*sic*) grounds for complaint are:

- (A) CORRUPT PRACTICES in the form of undue influence as defined in s 105 of the Electoral Act [*Chapter 2:01*] ("the Act"). These were ^E manifested in the following forms –
 - (i) gross pre-election violence;
 - (ii) polling day violence, intimidation and duress;
- (B) ILLEGAL PRACTICES as defined in Part XX1 of the Electoral Act ... (infractions of ss 116, 117 and 118 of the Act were cited);
- (C) GROSS IRREGULARITIES and GROSS UNREASONABLENESS ... ^F (certain acts by the constituency Registrar were cited); and
- (D) GROSS INFRINGEMENT OF (MY) CONSTITUTIONAL RIGHTS."

Under this head, it was alleged that the Government of Zimbabwe had unleashed war veterans, bandits and vigilantes in the rural areas and on commercial farms thereby preventing opposition political leaders, in particular ^g the MDC, from having access to the electorate:

"The violence unleashed by Zanu (PF) sponsored vigilantes was as widespread as it was widely reported. At least 30 MDC supporters were killed during the run up to the election and hundreds were maimed and tortured." ^h

2005 (2) ZLR p189

Ziyambi JA

^a He continued:

"I maintain that my constitutional rights as protected by ss 18, 20, 21, 22 and 23 were infringed upon. I pray, that notwithstanding the narrow grounds for setting aside elections as defined in the Electoral Act, where there has being (*sic*) a serious infringement of Constitutional Rights then surely the court ought to set aside the election."

^b He also averred that there was widespread violence in the area and that war veterans, led by Maxwell Wise Rwodzi ("Rwodzi"), set up base camps at Mutoko Centre, Cornerstore, Kushinga and Chimurenga. Many people were kidnapped and taken to these base camps, where they were subjected to serious assaults and torture.

^c He concluded his affidavit with the following averment:

"The fact of the matter is that the people of Mutoko South were thus denied the right to exercise their vote as a result of the embarrassing violence, intimidation and irregularities perpetrated by *the respondent* and Zanu (PF) ... " (my emphasis).

^d Supporting affidavits were filed sworn, *inter alia*, by –

- (a) Matthew Rukwata, who would testify as to the "violence that took place before the elections. He was kidnapped on 24 April 2000 for three weeks and taken to Mutoko base camp. The leaders of the perpetrators of the violence were Rwodzi and Ndemera";
- (b) George Mabiri, who would testify "as to the killing of the headman (of) ^e Nyamhanga, Mationa Mushaya and his son, Peter Mushaya, on 16 May 2000 by war veterans and Zanu (PF)"; and
- (c) Kingstone Mwenye, who would testify "as to the intimidation and assaults which forced him to flee from the Constituency."

There were, in addition, four supporting affidavits by persons who would ^f testify as to various irregularities that took place at the various polling stations.

Save for the passing mention of the appellant in the concluding paragraph set out above, there was no allegation of impropriety made against the appellant.

That is the case the appellant was called upon to answer in the petition – a ^g hotchpotch of allegations including general violence and intimidation by war veterans and supporters of Zanu (PF), irregularities and breach of constitutional rights. It is not surprising that the manner in which the petition was presented drew criticism from the learned judge who commented at p 1 of the cyclostyled ^h judgment:

2005 (2) ZLR p190

Ziyambi JA

"In this petition, in which it is prayed that the election of the respondent ^a be declared void, every conceivable complaint which may be made against an election has been made and, for the most part, has not been made with the necessary degree of precision required by the law."

And later at p 3 of the cyclostyled judgment:

"Procedure lies at the heart of the law. Its aim is to guarantee precision in ^b order that the ends of justice may be achieved and unnecessary time and expense avoided. These ideals are placed in jeopardy where lack of precision leads to the person accused not knowing with sufficient clarity the case he has to meet. Much time and expense is wasted by the failure to set forth succinctly and according to the law the charge raised and the particulars relied upon.

In regard to those complaints made relating to the procedures and rules ^c prescribed in the Act for the administration of the electoral process, the Registrar General, who was not cited, was nonetheless served with the petition and he filed a detailed affidavit in which he disputed and raised substantial disputes of fact on the allegations of non-compliance with the election procedures. Likewise, the respondent in her

opposing papers had to deal with each and every allegation made. The numerous charges **d** made were not pursued with any seriousness of purpose in the evidence and indeed, Mr *Matinenga* for the petitioner in his closing submissions to his credit relied upon only one ground of challenge, namely, that specific acts of intimidation had been committed by named persons; and that the conclusion of law to be drawn from the evidence as a whole was that the respondent had recognised and accepted these persons as her **e** agents, even though there was no express agency. I have satisfied myself, having re-examined the petition in the form it was presented with some thoroughness, *that this ground of challenge, that the respondent is answerable in law for the acts of her agents, is made no mention of in the petition and that agency is not mentioned save by necessary implication not made* [My emphasis]. As to the procedural propriety of raising **f** constitutional grounds for challenge in a petition brought in terms of the Act, and reliance on international election observer reports as evidence upon which the court must act, I have already made my views known on this subject and have nothing further to add. Where the conduct of the office of the Registrar General in regard to the administration of the electoral process is relied upon to impeach the election, as was done in **g** this case, counsel should heed the provisions of s 159 of the Electoral Act, which states that:

'An election shall be *set aside* by the High Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the High Court that – **h**

2005 (2) ZLR p191

Ziyambi JA **a**

- (a) the election was not conducted in accordance with the principles laid down in this Act; and
- (b) such mistake or non-compliance did affect the result of the election.'

This section introduces a cause of action separate and distinct from s 124 of the Act which deals with when an election is *void* owing to corrupt or illegal practices as opposed to when it may *be set aside*. The section is **b** concerned with the technical requirements for the conduct of an election to be observed by all parties, in particular the Registrar General" (my emphasis).

It was never alleged that acts of undue influence, in the form of violence or intimidation, were carried out with the knowledge, consent or approval of the **c** appellant or her agents. No averment was made that might have put the appellant on her guard that it might be alleged at the trial that the war veterans were her agents in committing corrupt or illegal practices.

On 27 February 2001, a synopsis of evidence was filed on behalf of the respondent. It was said that:

"Dereck Muzira will affirm his petition and give *general evidence of d difficulties in campaigning, general violence and problems with polling agents ...* " (my emphasis).

The trial began on 6 March 2001. It was not until 8 March 2001 that the affidavits sworn by Arumigio Jimu, Muradzi Tafirenyika Tafa and Bernignous Jacha (referred to collectively as "the additional affidavits"), were filed, all deposing **e** to the occurrences at a meeting which took place at Cornerstore on 27 April 2000, and which I will refer to as "the Cornerstore meeting".

Indeed, at the commencement of the hearing on 6 March 2001, in his opening address to the court *a quo*, the respondent's legal practitioner said:

"ADV. MATINENGA: My Lord you would have noticed that the papers in this petition are *slightly different from the previous petition which was f before you ...* " (my emphasis).

There appears, surprisingly, to have been no objection to the production of the additional affidavits, although they contained evidence that had not been pleaded in the petition presented to the court in terms of s 132 of the Act.

As will be seen below, the respondent's oral evidence centred on the **g** Cornerstore meeting. His evidence was as follows:

Matthew Rukwata ("Rukwata"), the designated candidate for the MDC in the Mutoko South Constituency, was kidnapped by war veterans on 24 April 2000. The respondent therefore volunteered to be the MDC candidate there. He was asked by an informant to go to Mutoko to facilitate the release of **h** Rukwata on 26 April 2000. He was advised that a Zanu (PF) rally was being

2005 (2) ZLR p192

Ziyambi JA

held at Cornerstore in Mutoko South on 27 April 2000. On that date, he set out **a** to attend the rally, accompanied by three men. They left their vehicle in Murehwa, for fear of its being burnt, and

boarded lifts to Cornerstore, a shopping centre in the Muyuyu resettlement area. On arrival, there they found people gathering for the rally. There were some six hundred people at the rally and the Governor for Mashonaland East addressed the crowd in anti-MDC ^B sentiments. The purpose of the meeting was to ascertain whether the resettled farmers in the area were being sufficiently provided with tillage necessities. After addressing the tillage issue, the Governor spoke of the MDC, which he "aligned with the white people".

The Governor then gave the appellant an opportunity to speak. The appellant chanted the party slogan and addressed the crowd on the tillage program. She ^C then "ventured into political issues about MDC". He was:

"... very much frightened by the manner in which she was uttering at this meeting such that I nearly left the rally before it was over. She was saying that the MDC was the white man's party and that anyone who will be supporting MDC will be killed. She was urging ZANU (PF) supporters that should they find out that (if there) was anybody supporting MDC (he) ^D should be killed."

While the appellant was addressing the people, a Nissan Hi-Rider truck from the District Development Fund ("DDF") arrived with about fifteen young men, two of whom were in handcuffs. The appellant continued addressing the crowd. When she was finished, the delegation from Mutoko stood up, ^E including the two men in handcuffs, who were introduced to the Governor and the appellant. Rwodzi, the person who had brought these young men from Mutoko, said "we want to show you what (we) will do on apprehending the enemies from the MDC". The meeting was told "that the two young men who had been apprehended were supporting the white man's party". The appellant then stood up and chanted a slogan, saying "down with them" and they ^F "should be struck with a knobkerrie on the head". She then said that they (ZANU (PF)), are the people who had liberated this country and that she would give jobs to these people so they would look after the country which they had liberated.

The two young men were made to sit and at that moment another truck arrived ^G with two young men in handcuffs and fifteen others. These two young men were made to stand up and the same procedure was followed as with the other two. When they introduced them to the Governor and the appellant, they said "these young men from MDC will never been seen again ... "

The young men were made to sit on the ground and a war veteran, Gwishiri, complained to the appellant that there was no food at the base camp. At this, ^H

2005 (2) ZLR p193

Ziyambi JA

^A the appellant, the Governor and others donated some \$5 000 or so. In answer to a question by the court, the respondent said that as the appellant contributed the money she said "we have heard your request and we have given you money, we want you to carry out the job which we had assigned you to do".

The respondent later learned the identity of the men who were in handcuffs ^B (from his informant) as being Matthew Rukwata and Arumigio Jimu.

It was put to the respondent in cross-examination on this incident that his evidence was a recent fabrication since none of it had been included in the petition. The respondent's reply to the question as to why he had not alleged in the petition that the appellant had urged "beat the people with knobkerries" ^C was:

"I think I have clearly indicated that if at all I wanted to write all the details I could have written books and books. In this regard our lawyers advised us to touch on pertinent issues and that the other evidence would be adduced in court."

One asks what was more pertinent to the respondent's case than the damaging ^D occurrences and utterances alleged by the respondent to have taken place at the Cornerstore meeting.

That notwithstanding, at the end of the evidence, the issue for determination by the court *a quo* was whether the war veterans were the agents of the appellant and whether the appellant was therefore responsible for the corrupt ^E practices found by the court to have been ^F committed by them.

The learned judge, relying on the evidence of the respondent and his witnesses of the occurrences at the Cornerstore meeting, found that the war veterans were the agents of the appellant and that the appellant was accordingly responsible for the corrupt practices proved in evidence to have been committed by them.

In relying on this evidence, the learned judge erred, firstly because the issue of agency was not pleaded and secondly, the evidence which was relied upon to establish the fact of agency was unreliable.

THE ISSUE OF AGENCY – THE PLEADINGS

It is common cause that the issue of agency was not pleaded in the petition. The learned judge made that finding in the course of his criticism, already quoted above, of the manner in which the petition was presented.

The evidence of the respondent's witnesses on the violence perpetrated on them and on other followers of the MDC by war veterans was not disputed. The learned judge found as a fact that corrupt practices in the form of undue

2005 (2) ZLR p194

Ziyambi JA

influence had prevailed extensively during the election but that no corrupt practice had been proved in evidence to have been committed by or with the knowledge and consent of the appellant. He went on to find, however, that:

"... the agency of the war veterans at Mutoko base camp was such as to render the respondent responsible for all that they did and for which the respondent is answerable in law." B

The issue which must be determined in this appeal is whether the court is endowed with power to determine an election petition on grounds other than those pleaded in the petition at the time it was presented to the High Court and served on the party against whom the petition is being brought.

In *Hove v Gumbo* S-143-04 (not yet reported) *, Malaba JA remarked at p 19 c of the cyclostyled judgment:

"It appears to me the learned judge misdirected himself in accepting the proposition that he could invalidate the election on general violence established by evidence in the course of the trial of the petition when it was not pleaded as a cause on which the election of the respondent was challenged. A petition is not a common law cause of action. It is a special procedure created by statute. The law governing the manner and grounds on which an election may be set aside must be found in the statute and nowhere else."

Section 132 of the Act provides that:

"(1) A petition complaining of undue return or an undue election of a Member of Parliament by reason of want of qualification, disqualification, E corrupt practice, illegal practice, irregularity or other cause whatsoever may be presented to the High Court ..."

As Hlatswayo J remarked in *Hove v Gumbo* 2002 (1) ZLR 233 (H):

"... my reading of the above provision is that it sets out wide grounds on the basis of which the election petition may be brought. However, it stands to reason that any petitioner must indicate specifically the grounds F upon which she or he requires the respondent's election to be voided. Further, the very fact that the provision is so widely framed as to include 'any other cause whatsoever', though of course the ambit of this phrase must be understood in the light of the maxim, *ejusdem generis*, is additional reason to require that the petitioner should plead his case with specificity so that the respondent is put on sufficient notice concerning G the case he has to answer. It is not fair for any respondent to be dragged into court without being informed of the basis upon which his election is being challenged. H

2005 (2) ZLR p195

Ziyambi JA

A Accordingly, when s 136(3) states, as it does, that at the conclusion of an election petition, the court shall determine whether the respondent was duly elected, it is clear that such a decision must be arrived at in terms of what is specifically pleaded in the petition and not on what was revealed by chance in the course of the inquiry."

Thus, an election petition must contain the essential averments on which the B petitioner intends to rely, as well as the relief sought. It is impermissible for the petitioner to allege one cause of action in his petition and then rely on a different one at the trial. The respondent is entitled to know at the time when the petition is served on him what case he is being called upon to meet. After all, the grounds on which it is sought to set an election aside must be clear to the petitioner at the time he files his petition.

c The respondent relied at the trial on corrupt and illegal practices alleged to have been committed by war veterans who, so it was alleged, were shown on the evidence to be agents of the appellant. The learned judge found that the corrupt and illegal practices complained of were committed by or with the knowledge and consent or approval of the agents of the appellant in terms of s 124(a) of the Act, which provides as follows:

“124 When election void owing to corrupt or illegal practices

Subject to sections one hundred and twenty, one hundred and twenty-five and one hundred and twenty-six:

- (a) if upon the trial of an election petition the High Court certifies to the Minister that any corrupt practice or illegal practice has been committed with reference to the election the subject of the petition, by or with the knowledge and consent or approval of the candidate returned at that election, or with the knowledge and consent or approval of *any of his agents*, the election of that candidate shall be void, and a fresh election shall thereupon be held;” (my emphasis).

As I have stated above, not only was the evidence of agency suspect and unreliable by reason of the conflict in the evidence of the witnesses but, as the learned judge found, there was no averment in the petition that the war veterans who allegedly committed the corrupt practices were agents of the appellant. That being so, the learned judge ought to have held that the petition disclosed no cause of action. Compare *Kumar v Venkataraman* [1989] LRC (Const.) 1.

g The cause of action in an electoral petition being derived from statute, the court has no power to exempt a petitioner from strict adherence to the terms of the statute. In *Nath v Singh & Ors* [1954] SCR 892 at 895, Mahajan CJ said:

“The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action h at law or a suit in equity but is a purely statutory proceeding unknown to

2005 (2) ZLR p196

Ziyambi JA

the common law and that the court possesses no common law power. It a is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law.”

For the above reasons, the petition ought to have been dismissed. b

THE ISSUE OF AGENCY – THE EVIDENCE

The evidence of the respondent has been set out above.

[The learned judge of appeal then dealt further with the evidence and continued.]

The material inconsistencies in the evidence of the petitioner and his witnesses, c as well as the date and contents of the newspaper article, ought to have placed the learned judge on his guard against possible fabrication of evidence. However, despite the inconsistencies, the learned judge proceeded on the basis that the evidence led had established facts on which he could find that the appellant had accepted the agency of the war veterans in running of the Mutoko base camp and that the appellant was accordingly answerable at law d for the corrupt practices committed by the war veterans for the purposes of s 124 of the Act.

In this regard, the learned judge also erred in basing his conclusions on the unreliable evidence adduced by the respondent.

Accordingly, the appeal is allowed with costs. e

CHIDYAUSIKU CJ & MALABA JA concurred.

Gambe & Associates, appellant’s legal practitioners

Honey & Blanckenberg, respondent’s legal practitioners f

* Note: The judgment appealed against was reported as *Mutoko South Election Petition* 2001 (1) ZLR 308 (H). — Editor.

* See page 85 of this volume — Editor

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/CHAUKE v MARE (CHIREDDI NORTH ELECTION PETITION APPEAL) 2005 (2) ZLR 197 (S)

CHAUKE v MARE (CHIREDDI NORTH ELECTION PETITION APPEAL) 2005 (2) ZLR 197 (S) 2005 (2) ZLR p197

Citation	2005 (2) ZLR 197 (S)
Case No	Judgment No. S-147-04
Court	Supreme Court, Harare
Judge	Malaba JA, Chidyausiku CJ & Cheda JA
Heard	14 June 2004
Judgment	22 September 2005
Counsel	<i>W J Mutezo</i> , for the appellant <i>H Zhou</i> , for the respondent
Case Type	Election petition appeal
Annotations	No case annotations to date

Flynote

Election — election petition — grounds for — general violence — what must be shown — acts of violence constituting undue influence — distinction from general violence — such acts extensively prevalent — election may be set aside on that ground

Headnote

- ^D Acts of violence that constitute extensively prevalent undue influence on voters in a constituency are not necessarily evidence of general violence, which is a condition akin to break-down of law and order in a constituency. General violence manifests itself through riotous behavior which must have been so grave as to amount to intimidation liable to induce persons ^E of ordinary courage to refrain from exercising their votes. It must be general and of a nature that the result of the election might reasonably be supposed to have been affected, without proof that it was in fact affected – in other words, conditions must have prevailed which negated the concept of a free election
- ^F To prove general violence as a cause of an undue election, a petitioner does not have to show that particular voters were induced to vote or to refrain from voting, as is the requirement for establishment of undue influence within the meaning of s 105 of the Electoral Act. Whilst acts of violence constituting corrupt practices which extensively prevailed in a constituency may have the same effect as general violence – that of ^G producing an undue election – they are different causes which must be pleaded by the petitioner at the time of presentation of the petition to the High Court.

Section 105 prohibits the commission of undue influence on a voter by “any person” and an election may be set aside if corrupt practices found by the court to have been committed by persons other than the respondent ^H or his agent were so extensively prevalent in the constituency as to have

2005 (2) ZLR p198

Malaba JA

negated the existence of freedom of choice in the electorate. The ^A existence of corrupt practices had been pleaded as a cause of complaint against the election result. The evidence established that corrupt practices committed by war veterans, in the form of undue influence on voters to refrain from voting at all or to vote for ZANU-PF, extensively prevailed in the constituency so that it could not be said the election was free and ^B fair.

Cases cited

Hove v Gumbo (Mberengwa West Election Petition Appeal) 2005 (2) ZLR 85 (S)

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

Legislation considered

Electoral Act [*Chapter 2:01*], s 105

Case information

W J Mutezo, for the appellant

H Zhou, for the respondent

Judgment

MALABA JA: This appeal is from a judgment of the High Court delivered on ^D 20 June 2001, to the effect that the appellant was not duly elected as the Member of Parliament for Chiredzi North Constituency (“the constituency”) and that no other person was entitled to be declared duly elected in the Parliamentary election (“the election”) held on 24 and 25 June 2000.

The respondent (hereinafter referred to as “the petitioner”) was a candidate ^E in the election sponsored by the Movement for Democratic Change (“the MDC”), whilst the appellant (hereinafter referred to as “the respondent”) was a candidate sponsored by the ruling party, Zimbabwe African National Union – Patriotic Front (“ZANU-PF”). There were 46 852 registered voters in the constituency, of which 18 919 cast their votes in the election. The respondent ^F secured 10 154 votes as against the petitioner who polled 8 765. He was declared the duly elected Member of Parliament for the constituency on 26 June 2000.

On 24 July 2000, the petitioner presented an election petition to the High Court in Harare in terms of s 132 of the Electoral Act [*Chapter 2:01*] (“the Act”), ^G complaining of “irregularities, illegal practices and corrupt practices” which he alleged had rendered the election neither free nor fair. The basis for the complaint against the election result was that it had been secured by means of assaults, threats of violence, arson and malicious injury to property perpetrated by war veterans and ZANU-PF supporters led by one Boniface ^H

2005 (2) ZLR p199

Malaba JA

^A Mutemachani on members of the electorate in the constituency known or suspected to be MDC supporters. The allegation was that the corrupt practices, which took the form of undue influence as defined in s 105 of the Act, were committed with the knowledge and consent of the respondent or his election agent.

^B Section 132 of the Act provides that:

“(1) A petition complaining of undue return or an undue election of a Member of Parliament by reason of want of qualification, disqualification, corrupt practice, illegal practice, irregularity or other cause whatsoever may be presented to the High Court ...”

Section 105 of the Act provides that:

- c“(1) Any person who directly or indirectly by himself or by any other person –
- (a) makes use of or threatens to make use of any force, violence or restraint or any unnatural means whatsoever upon or against any person; or
 - (b) inflicts or threatens to inflict by himself or by any other person any temporal or spiritual injury, damage, harm or loss upon or against any person; or
 - (c) does or threatens to do anything to the disadvantage of any person in order to induce or compel that person –
 - (i) to sign a nomination paper or refrain from signing a nomination paper; or
 - (ii) to vote or refrain from voting;
- shall be guilty of the offence of undue influence.”

At the conclusion of the trial of the election petition, the learned judge found that the evidence had not proved that the respondent had, by himself or by his agent, committed corrupt practices within the meaning of s 105 of the Act.

The court *a quo* also found that the corrupt practices which extensively prevailed in the constituency had not been committed with the knowledge and consent of the respondent or his election agent. I can do no better than quote what the learned judge said in making the findings of fact, the correctness of which was not challenged on appeal. She stated:

“I find it proved that Chief Tshovanu was intimidated into gathering all the village heads at his residence to be addressed by Boniface Mutemachani and other war veterans to advise their families to vote for ZANU-PF or risk death.

The following MDC supporters and office bearers were assaulted or otherwise intimidated –

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Malaba JA

Kudzayi Chisirimunhu had the windows of his shop smashed and his patrons attacked and intimidated.

The Mujaji family suffered the loss of their home which was razed to the ground with all their property therein contained and their children were assaulted by Mutemachani and other war veterans causing them to flee from the area until after the election.

The house of Percy Mavheneka was broken into, his windows destroyed and himself and his family assaulted with whips, knobkerries and sticks by war veterans.

Rose Chauke and her husband were assaulted by Mutemachani and other war veterans, their two year old child kicked from the arms of its father and the family forced to flee to Chikombedzi where they remained until the elections were over.

The petitioner had the windows at his residence smashed and was forced to flee from his home with his wife and children.

Richard Nyekwani of Muteo Village was assaulted severely by MUTEMACHANI and three others and threatened with death.

Kenneth Mwenga was assaulted by Mutemachani when he went to the assistance of an MDC supporter whose T-shirt was being forcibly removed by Mutemachani.

Chademana Sungano, an NCA supporter and a teacher at Chitepo School, had the walls of his house spray-painted with (the) words ‘down with Chademana’ and his friend Proud Zava was assaulted in his presence.

James Jekero and the village heads in the constituency were told by war veterans to urge their subjects to vote for ZANU-PF or else there would be war.”

A reading of the record of the evidence given by witnesses who were victims of acts of violence satisfies me that the above findings of fact made by the court *a quo* were justified. The facts established that the same type of acts of violence were perpetrated on MDC supporters at different places across the constituency. The evidence also established that MDC supporters also perpetrated acts of violence against ZANU-PF supporters.

Notwithstanding clear evidence of the fact that corrupt practices were extensively prevalent in the constituency, the learned judge based the determination that the respondent had been unduly elected and that no other person was entitled to be declared duly elected on “general violence”, which had not been pleaded as a cause of the complaint against the election at the time the petition was presented. The learned judge stated:

“It was submitted by Mr Zhou that the grounds on which a court may find there was an undue election are not limited to corrupt practices, illegal

Malaba JA

a practices or irregularity but extend to 'any other cause whatsoever'. He submitted that even if the respondent or his agent was not found by the court to have engaged in corrupt practices the respondent could be found to have been unduly elected and the elections could be set aside by the court if the elections were found not to be free and fair. He submitted that the evidence showed that there was such widespread violence and terror b prevailing in the constituency during the pre-election period that no election could possibly be free and fair in these circumstances."

The learned judge then continued:

"I incline to the view that the grounds on which a finding of undue election may be made are not limited to want of qualification, disqualification, corrupt practice, illegal practice and irregularity but may extend to 'any c other cause whatsoever' and that widespread violence and intimidation of the electorate can, depending on the degree thereof, be a valid cause for a finding of an undue election in terms of the Act. The degree of violence and intimidation must be such as is liable to induce persons of ordinary courage from exercising their votes."

It is clear from what the learned judge said that she determined that the d respondent had been unduly elected by reason of the existence of "general violence" in the election as an independent cause from corrupt practices. To the extent that "general violence" had not been pleaded by the petitioner as a ground on which the election was to be declared an undue election, the learned judge misdirected herself in accepting the submission that she should invalidate the election because of the existence of general violence established e by evidence in the course of the trial of the election petition.

Acts of violence that constitute extensively prevalent undue influence on voters in a constituency are not necessarily evidence of general violence, which is a condition akin to a break-down of law and order in a constituency. To prove general violence as a cause of an undue election a petitioner does f not have to show that particular voters were induced to vote or to refrain from voting, as is the requirement for the establishment of undue influence within the meaning of s 105 of the Act. In *Snyman v Schoeman & Anor* 1949 (2) SA 1 (A) at 6, it was stated that general violence manifests itself through "riotous behaviour" which:

"... g must have been so grave as to amount to intimidation liable to induce persons of ordinary courage to refrain from exercising their votes; it must be general and of a nature that the result of the election might reasonably be supposed to have been affected, without proof that it was in fact affected – in other words conditions must have prevailed which negative h the concept: free election."

Malaba JA

Whilst acts of violence constituting corrupt practices which extensively A prevailed in a constituency may have the same effect of producing an undue election as general violence, they are different causes which must be pleaded by the petitioner at the time of presentation of the petition to the High Court. In *Hove v Gumbo* S-143-04 (not yet reported), * it is stated at pp 20-21 of the cyclostyled judgment that: B

"For a court to set aside an election, the cause of the complaint should have been pleaded in the petition at the time of its presentation and established by evidence beyond reasonable doubt. The duty of the court is to determine whether the petitioner has by evidence adduced established the cause of his complaint against the election result. The effect of s 132 of the Act is that a petitioner complaining of an undue election must state c the nature of the cause of his complaint. The cause of complaint must be clearly and concisely stated at the time of presentation of the petition to the High Court.

The respondent is entitled to know the reason why his or her election is being challenged so that he or she can be able to answer the case. It is also clear that the relief the High Court may grant to a petitioner depends on d the nature of the cause of the complaint against the election result as pleaded in the petition (see s 136).

The petitioner chose not to rely on general violence as the cause of his complaint against the election of the respondent. For general violence to be a valid ground, it should have been pleaded. As the laws of election are self-contained, codes and the rights arising out of elections are the e offspring of those laws, the petitioner had no right to have the election invalidated on the ground of general violence unless he had specified it as a ground in the petition. Such an election could be set aside on the grounds specified in s 132 of the Act only and those grounds not particularised in the petition must not be relied upon to set aside an election."

Notwithstanding the misdirection of the learned judge, the evidence established ^F that corrupt practices committed by persons other than the respondent or his election agent, and without their knowledge and consent, extensively prevailed in the constituency so that it could not be said that there was a free election. Section 105 of the Act prohibits the commission of undue influence on a voter by "any person". An election may be set aside in terms of s 136 of the Act for ^G being an undue election if corrupt practices found by the court to have been committed by persons other than the respondent or his agent were extensively ^H

2005 (2) ZLR p203

Malaba JA

A prevalent in the constituency, so as to have negated the existence of freedom of choice in the electorate. In this case, the existence of corrupt practices had been pleaded as a cause of complaint against the election result. The evidence established that corrupt practices, in the form of undue influence on voters to refrain from voting at all or to vote for ZANU-PF, committed by Muchemachani and other war veterans, extensively prevailed ^B in the constituency so that it could not be said the election was free and fair.

Although for different reasons, I come to the same conclusion as was reached by the court *a quo*, that the respondent was not duly elected and that no other person was entitled to be declared duly elected as a Member of Parliament for Chiredzi North Constituency in the general election held on 24 and 25 June ^C 2000.

The appeal is accordingly dismissed with costs.

CHIDAYUSIKU CJ and CHEDA JA concurred.

^D *Mutezo & Co*, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

* See p 85 of this volume — *Editor*

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/NYATHI v NCUBE (GWANDA ELECTION PETITION) 2005 (2) ZLR 204 (S)

NYATHI v NCUBE (GWANDA ELECTION PETITION) 2005 (2) ZLR 204 (S)

2005 (2) ZLR p204

Citation	2005 (2) ZLR 204 (S)
Case No	Judgment No. HB-100-05
Court	High Court, Bulawayo
Judge	Ndou J
Heard	22 September 2005
Judgment	22 September 2005
Counsel	<i>A P de Bourbon SC</i> , for the petitioner <i>M Makonese</i> , for the respondent

Case Type	Election petition
Annotations	No case annotations to date

Flynote

Election — election petition — application by petitioner to examine c electoral material — limited circumstances when application may be refused

Election — Electoral Court — status of — whether a special court in terms of s 92(4) of the Constitution — appointment of judges to by Chief Justice in terms of 162(1) of Electoral Act [Chapter 2:13] — in conflict with s 92(1) of the Constitution — whether Electoral Court can decline to hear d petition before Supreme Court has ruled on constitutionality of provision of Act

Headnote

In terms of s 79 of the Constitution, the judicial authority in Zimbabwe vests in the Supreme Court, the High Court and such other courts subordinate to the Supreme and the High Court as may be established by or under an e Act of Parliament. The Judicial Services Commission must be consulted before any person is appointed to a special court. The Electoral Court, established by s 161 of the Electoral Act [Chapter 2:13] is an inferior court to the Supreme Court. The fact that the Act gives a very limited appeal in respect of election petitions to the Supreme Court, being f appeals on points of law only, does not remove the Electoral Court from the status of special court. If it did, that would mean that Parliament could easily circumvent the provisions of Chapter VIII of the Constitution and ensure that courts with wide-ranging functions could be established without the Judicial Services Commission being involved. The Act does not require the Chief Justice to consult the Commission before appointing g judges to the Electoral Court and this would appear to be in conflict with s 92(1) of the Constitution. The Electoral Court could not merely decline to hear a matter brought to it unless that provision of the Electoral Act was set aside or declared unconstitutional by the Supreme Court.

Where the petitioner in an election petition applies in terms of s 70(4) of the Electoral Act to examine electoral material, he does not have to disclose h

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Ndou J

a his hand in advance as to exactly what he intends to look for in the election material, but he has to show that the inspection "is required ¼ for the purposes of a petition questioning an election or return". It will only be in extreme cases, where the *mala fides* of the application is shown, that the court will refuse an application brought.

Cases referred to b

Beverley Bldg Soc v de Courcy 1963 R & N 208; 1964 (4) SA 264 (SR)

du Preez v Philip-King 1963 (1) SA 801 (W)

Ewing McDonald & Co Ltd v M & M Products 1991 (1) SA 252 (A)

Goldschmidt & Anor v Folb & Anor 1974 (1) SA 576 (T)

R v Correia 1958 (1) SA 533 (A) c

S v Weinberg 1979 (3) SA 89 (A)

Sekretaris van Binnelandse Inkomste v Lourens Erasmus (Edms) Bpk 1966 (4) SA 434 (A)

Tsvangirai v Mugabe & Ors HH-46-05

Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (In Liquidation) 1987 (4) SA 883 (A) d

Legislation considered

Constitution of Zimbabwe 1980, ss 79, 92(1) and 92(4)

Electoral Act [Chapter 2:13], ss 46(19), 70, 161, 162(1), 171(4), 172(1) and 172(2)

Case information

A P de Bourbon SC, for the petitioner ^Ε

M Makonese, for the respondent

Judgment

NDOU J: The preliminary issue raised is one of jurisdiction. That is whether ^Ε this court has the right or authority under the law of Zimbabwe to entertain the election petition between the parties. According to Nienaber JA in *Ewing McDonald & Co Ltd v M & M Products* 1991 (1) SA 252 (A) at 256G:

“Jurisdiction in the present context means power vested in a court by law to adjudicate upon, determine and dispose of the matter.”

^Γ According to Voet 2.1.1 (Gane’s Translation, vol 1 at 203), jurisdiction is:

“The public power of deciding cases, both civil and criminal and putting the decisions into execution.”

See also *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (In Liquidation)* 1987 (4) SA 883 (A) ^Η

2005 (2) ZLR p206

Ndou J

The basis of the objection here is the identity and the establishment of this ^Α Electoral Court. Mr *de Bourbon*, for the petitioner, submitted that the issue is not personal but one of principle. If it is personal, the route would have been one of recusal directed at the judges appointed to sit in the Electoral Court. What is in issue is whether this court has power vested by law to adjudicate upon, determine and dispose of this election petition. The petitioner’s case ^Β is that my appointment, as well as that of my brother and sister judges in the newly established Electoral Court, is flawed. On that basis, he asks that I decline to exercise the jurisdiction conferred by the alleged flawed appointment. But has the petitioner made a case for the declination? That is what I have to determine. Mr *Makonese*, for the respondent, seems to rely on the basis of voluntary submission of the petitioner to the jurisdiction of this court, as ^Γ evinced by the making of the current application, *inter alia*. I should point out that the petitioner did indicate that it was appearing “under protest”. To me, this appearance was for the purposes of the registration of the objection and not much should be read into it. If, on the first appearance, the petitioner did not raise his objection to the jurisdiction, his conduct would only be consistent with submission by acquiescence: see *du Preez v Phillip-King* 1963 (1) SA 801 (W) ^Δ at 803 and *Beverley Building Society v de Courcy* 1964 (4) SA 264 (SR) at 268. It is important to note that there are a number of well-recognised instances in which a submission to jurisdiction alone is not an acceptable basis for conferring jurisdiction on the court: see *Pollak on Jurisdiction* 2ed by D Pistorius at p 9. Is this case one such instance? ^Ε

The bottom line is that parties cannot by agreement (or acquiescence) confer on a court jurisdiction which it could not otherwise have: see *Goldschmidt v Folb* 1974 (1) SA 576 (T).

The background facts are that the petitioner and the respondent were general election candidates for Gwanda Constituency, representing Movement for Democratic Change and ZANU-PF, respectively. The respondent was declared ^Ε winner of the said constituency. The petitioner is not satisfied with the result and this petition is evidence of his protestation.

An application challenging the appointments was heard by Cheda J in *Gasela v Madubeko* EP-6-05 [HB-60-05]. Although the relief sought is slightly different, the basis of the application is the same i.e. alleged flaw in the ^Γ appointment. The decision in that matter was taken on appeal and the matter was stayed pending the determination of the appeal. I directed that in this matter be stayed pending the determination of the legal issue on the appointments to the Electoral Court. It has been brought to my attention that the said appeal had been withdrawn and I now have to determine the application before me. ^Η

2005 (2) ZLR p207

Ndou J

A Coming back to this case, the first question relates to the identity of the Electoral Court. Is it a special court? In terms of s 79 of the Constitution of Zimbabwe, the judicial authority in Zimbabwe vests in the Supreme Court, the High Court and such other courts subordinate to the Supreme and the High Court as may be established by or under an Act of Parliament. The Electoral Court, established by s 161 of the Electoral Act [*Chapter 2:13*] is an inferior ^a court to the Supreme Court. The question is whether it is a special court, as defined in s 92(4) of the Constitution. A judge of the Electoral Court has power in terms of s 46(19) of the Electoral Act to deal with an appeal against the rejection of a nomination paper. In terms of para (b) of that subsection, there is no appeal from the decision of that judge. In terms of s 172(1) of the Electoral ^c Act, in dealing with election petitions, the decision of the Electoral Court on questions ^f fact is final, and thus not subject to appeal. In terms of s 172(2), a decision of the Electoral Court on a question of law may be the subject of an appeal to the Supreme Court. Thus, the Electoral Act gives but a very limited appeal in respect of election petitions to the Supreme Court. In reality, it is no different from special courts such as the Income Tax Special Court and the ^d Fiscal Appeal Court. The main functions of the Electoral Court are to determine whether or not a person has been guilty of corrupt or illegal practices and whether or not an election was conducted in accordance with the principles laid down in the Electoral Act and whether any mistake or non-compliance affected the result of the election. Those would largely be questions of fact. In the current Electoral Courts, the great majority of their decisions are bound ^e to be based on questions of fact. The aggrieved party has, therefore, a right of appeal on limited grounds.

A finding that the fact that there is a right of appeal on a question of law is sufficient to remove the Electoral Court from the status of special court would mean that Parliament could very easily circumvent the provisions of Chapter ^f VIII of the Constitution and ensure that courts with wide-ranging functions could be established without the Judicial Services Commission being involved. That would mean that the protection provided by requiring consultation with the Judicial Services Commission before appointments were made would be removed. There is no unlimited right of appeal from a decision of the Electoral Court as contemplated by s 92(4)(b) of the Constitution of Zimbabwe. The ^g purpose of that provision is to ensure that if the High Court or Supreme Court cannot have the final say as to whether or not the decision of the court is a special court and therefore the Judicial Services Commission must be consulted before any person is appointed to preside over the court.

Accordingly, I hold that the Electoral Court is a special court and I now proceed ^h to consider the provisions relating to the appointments. In terms of s 92(1) of

2005 (2) ZLR p208

Ndou J

the Constitution, the power to appoint persons to preside over a special court ^a vests in the President, after consulting the Judicial Services Commission. The proviso to this provision reads:

“Provided that Parliament may provide that the Chief Justice may, after consulting the Judicial Services Commission, appoint a person holding the office of judge of the High Court to preside over a special court for such ^b period as he may specify.”

Thus, there are two ways in which a person can be appointed to preside over a special court. The first is by the President, after consultation with the Judicial Services Commission. That route does not arise in the present case. The second is for Parliament to provide in the legislation that the Chief Justice may, after consulting the Judicial Services Commission, appoint a judge of the High ^c Court to preside over a special court for the period specified by the Chief Justice. Apparently, acting in terms of the above proviso, Parliament enacted s 162(1) of the Electoral Act which provides:

“The Chief Justice shall, after consultation with the Judge President, appoint one or more judges of the High Court to be judge or judges, as the case may be, of the Electoral Court ^d ...”

This provision is apparently not consistent with the proviso to s 92(1) of the Constitution. Clearly, Parliament has not provided for the Chief Justice to consult with the Judicial Services Commission. It has provided that he consults with the Judge President. The fact that the Chief Justice initially appointed judges to the Electoral Court, after consultation with the Judge ^e President, has been acknowledged now to have been an error. The Chief Justice has now consulted the Judicial Services Commission and made fresh appointments effective from 1 June 2005. The petitioner’s submission in this regard is as follows:

“It is respectfully submitted that no matter how well intentioned the actions of the Chief Justice, he was acting in terms of a law that did not permit or ^f require him to consult with the Judicial Services

Commission. He cannot, with respect, amend the legislation to conform with the Constitution by taking an Act which the Constitution requires to be stated in the legislation, and thus seek to cure a defect in the legislation. The fact that the legislation does not require the Chief Justice to consult with the Judicial Services Commission renders the legislation contrary to the Constitution. The Chief Justice cannot remedy that contravention by acting as though the legislation conforms with the Constitution."

On the basis of the above, it is prayed that I hold that the hearing of this petition cannot take place until such time as presiding officers have been appointed by the President in consultation with the Judicial Services Commission. These

2005 (2) ZLR p209

Ndou J

A appointments were done by the Chief Justice. He is not cited as party in these proceedings. Can I decline jurisdiction on the basis that he acted outside the law without giving him an opportunity to have his say in the matter?

The remedy sought here is not a referral to the Supreme Court under s 24(2) of the Constitution, but to simply decline to hear the matter. The problem is B that I do not think I can decline the exercise of the jurisdiction without considering the demise of the alleged offending provisions of the Electoral Act. As a statute, the Electoral Act presents itself as a written body of norms, valid and binding upon all members of a public, social institution by virtue of its promulgation by a competent lawgiver: L M du Plessis in *The Interpretation of Statutes*. Unless the provision of the Electoral Act is set aside or declared C unconstitutional by the Supreme Court in terms of s 24 of the Constitution, I have to invoke the presumption that no enactment contains invalid provisions. The presumption is that a legislature cannot be expected to enact invalid or purposeless provisions: *Die Uitleg van Wette* 5 ed (Juta) 1981 by L C Steyn at 119-124; *R v Correia* 1958 (1) SA 533 (A). The presumption should operate here to eliminate uncertainty and confusion: *Sekretaris van Binnelandse D Inkomste v Lourens Erasmus (Edms) Bpk* 1966 (4) SA 434 (A) at 443 and *S v Weinberg* 1979 (3) SA 89 (A) at 99. The Electoral Act must be so construed that it best serves its purpose. For these reasons, I find that I cannot decline the exercise of the jurisdiction in this matter.

Having made this finding, I have to consider the other two issues raised in turn.

E JOINDER OF THE ZIMBABWE ELECTORAL COMMISSION AND THE CONSTITUENCY ELECTION OFFICER

The Zimbabwe Electoral Commission and the Constituency Election Officer have objected in writing to the joinder. The petitioner is also against the joinder. The respondent has made a concession that joinder is not proper. I F think this concession is properly made because of the following. Parliament had the power to limit those persons who should receive notice of a petition. That is precisely what has been done in the present matter. In terms of s 169 of the Electoral Act, notice of a petition must be served on the respondent. The respondent is specifically defined in s 166 to mean the member of Parliament whose election is complained of in an election petition. Parliament G specifically limited the identity of the respondent who had to be party, by notice, to the election petition. Had it been the intention of Parliament to provide otherwise, then the legislation would have made such provision. Indeed, s 171(4) provides an interesting illumination as to the thinking of Parliament. If an election petition establishes electoral malpractices, the H Electoral Court is obliged in terms of s 171(4) to report the names of the persons

2005 (2) ZLR p210

Ndou J

guilty of the malpractices in writing to the Speaker. Thereafter, the Speaker A must present the report to Parliament. Persons guilty of corrupt practices or illegal practices are dealt with in Part XIX and Part XX by way of criminal prosecution, but do not become parties to an election petition by virtues of that allegation being made against them. Guvava J, in *Registrar-General of Elections & Anor v Tsvangirai* Case No. HV 6168/03 held that since the B definition of "respondent", in the equivalent section to s 166 of the Electoral Act, did not apply to Presidential elections, the issue has to be determined based on common law. Under the common law, all persons who have direct and substantial interest in the subject matter before the court and who might be affected prejudicially by the judgment must be joined. On this approach, the learned judge found that the Registrar-General of Elections and the C Minister of Justice, Legal and Parliamentary Affairs did not have a direct and

substantial interest. It is to be remembered that at the time of her findings, the actual conduct of the elections vested in the Registrar-General of Elections, which is not no longer the position. His role in the running of elections has to a great extent been taken over by the Zimbabwe Electoral Commission. It was the Registrar-General of Elections who was in control of the electoral ^D process and, in particular, in control of the polling officers and presiding officers, but who had the responsibility for the conduct of the elections. By parity of reasoning, neither the Zimbabwe Electoral Commission or the constituency elections officer has a direct and substantial interest in the outcome of this petition. Even if their conduct is the subject of criticism and, ^E indeed, the basis to set aside the declaration that the respondent was duly elected as the Member of Parliament for Gwanda, the two are functionaries who must carry out the next election. They are independent of the result of the election an of this petition and thus have no interest in the result of the litigation. I associate myself with the reasoning of Guvava J. Before, I have been asked by the parties to deal with the prayer for costs "on the punitive ^F scale, *de bonis propriis*" against the petitioner and the respondent contained in the opposing affidavit of the second respondent. As against the petitioner, there is simply no basis as the petitioner opposed the joinder. His position is similar to that of the second respondent, so on what basis is the order sought? Even in the petition itself, the first respondent is the is the sole party cited. As against the respondent, I do not think it was proper to use such intimidatory ^G averment of costs on a punitive scale and *de bonis propriis*. Anyway, the issue of these costs does not arise as the application for joinder was abandoned. ^H

2005 (2) ZLR p211

Ndou J

A APPLICATION TO EXAMINE ELECTORAL MATERIAL

In terms of s 70 of the Electoral Act, all electoral material, as specified in subs (1), must be placed in the custody of the Chief Elections Officer. It may be opened by order of the Electoral Court in terms of s 70(4). That provision and subs (5) reads as follows:

^B "(4) No person shall open any packet referred to in subsection (1) or permit any such packet to be opened except in terms of an order of the Electoral Court, which may be granted by the Electoral Court on it being satisfied that the inspection or production of the contents of such packets is required for the purposes of instituting or maintaining a prosecution for an offence in relation to an election or for the purpose of a petition ^C questioning an election or return.

(5) An order of the Electoral Court referred to in subsection (4) may be made subject to such conditions as the Electoral Court may think fit to impose:

Provided that an order which authorises the opening of any sealed packet containing counterfoils or counted ballot papers shall be made ^D subject to such conditions as are necessary to ensue that the way in which any particular voter has voted shall not be discovered until it is proved that he or she has voted and his or her vote has been declared by the Electoral Court to be invalid."

The application sets out the grounds upon which an examination of the election material is required. The petitioner does not have to disclose his hand ^E in advance as to exactly what he intends to look for in the election material, but he has to show that the inspection "is required ... for the purposes of a petition questioning an election or return". It will only be in extreme cases where the *mala fides* of the application is shown, that the court will refuse an application brought in terms of s 70(4) of the Electoral Act: see *Tsvangirai v Mugabe & Ors* HH-46-05.

^F From papers before me, I am satisfied that the petitioner had shown that the inspection of the election material is vital and essential for the questioning of the Gwanda election or return.

Accordingly, it is ordered that:

1. In terms of s 70(4) of the Electoral Act [*Chapter 2:13*] the Chief Elections ^G Officer shall open and allow the petitioner and/or his duly appointed representative to inspect all the sealed packets containing all counted and rejected ballot papers together with counter foils and voters' rolls, used in the constituency of Gwanda for the general election held on 31 March ^H 2005.

2005 (2) ZLR p212

Ndou J

2. The Chief Elections Officer shall permit the petitioner and/or his duly ^A appointed representatives –

- 2.1 To examine the seals on the packets referred to in para (1) above and make a record of any seal which appears to any of them to have been tampered with; and
- 2.2 To open all the election documents referred to in para (1) above at the ^B offices of the Deputy Registrar of this court in Bulawayo by not later than three days of the date of service of this order on him and shall be entitled to examine, count and make notes or other records of and concerning the contents thereof then make a copy, of any voters' roll including any supplementary voters' roll therein, for the purpose of ^C the election petition.
3. The petitioner and/or his duly appointed representatives shall undertake such inspection and examination in the presence of officers employed in the office of the Chief Elections Officer and during normal office hours, unless other times are agreed between the petitioner and/or his representatives and the Chief Elections Officer and/or his officers. ^D
4. Costs shall be costs in the cause.

Webb, Law & Barry, petitioner's legal practitioners

Makonese & Partners, respondent's legal practitioners ^E

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/MIDLANDS STATE UNIVERSITY COUNCIL v MIDLANDS STATE UNIVERSITY LECTURERS ASSOCIATION 2005 (2) ZLR 213 (S)

MIDLANDS STATE UNIVERSITY COUNCIL v MIDLANDS STATE UNIVERSITY LECTURERS ASSOCIATION 2005 (2) ZLR 213 (S)

2005 (2) ZLR p213

Citation	2005 (2) ZLR 213 (S)
Case No	Judgment No. S-42-05
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Ziyambi JA
Heard	5 May 2005
Judgment	3 October 2005
Counsel	<i>J C Andersen SC</i> , for the appellant <i>A M Gijima</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Education — university — Midlands State University — employees of — not part of public service

Education — university — Midlands State University — legal status of — whether Ministerial approval required for expenditure — university a ^D separate legal persona — not a designated corporate body under Audit and Exchequer

Act [Chapter 22:03]

Employment — dispute — reference to compulsory arbitration — award by arbitrator — increase in salary — employee of State university — whether arbitrator may award increase without approval of responsible ϵ Minister

Public service — public servant — who is — employee at university created by statute — not a public servant even though Government funds university

Headnote

ϵ After the lecturers at a State university went on strike, the matter was referred for compulsory arbitration in terms of the Labour Act [Chapter 28:01]. Neither party attended the hearing. The arbitrators awarded various general and specific increases in salary for lecturers at the university. The arbitrators made it clear that one of the problems they had was that the Government, through the Ministry of Education, provided funds for the ϵ State universities. It also controlled the level of fees paid by students. Not knowing the Ministry's attitude or wishes, the arbitrators set what they believed were fair salaries and allowances.

The appellant (the university council) appealed to the Labour Court, although the appeal was, due to a *bona fide* error, noted well out of time. The Labour Court refused the application on the basis that the appellant's ϵ prospects of success on appeal were non-existent as the appeal was

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based on a question of fact, and not law. It held that the appellant was ϵ a legal *persona* with capacity to employ the respondent and determine the respondent's salaries without the consent of the Minister. On appeal to the Supreme Court, the essential issue was whether it was competent for an award to be made for increases which had not been approved by the responsible Minister. The appellant argued that the Minister's consent had to be obtained before the appellant could increase the ϵ salaries of the lecturers.

Held, that the university was a legal *persona* created by the Midlands State University Act [Chapter 25:21]. There was no provision in the Act requiring the Council to submit any statements of financial estimates to the Minister, nor was there any provision for the approval of the Minister ϵ to be sought for any financial purpose unless he has designated certain employees. The lecturers concerned had not been so designated.

Held, further, that the University was not included in the description of designated corporate body that was prescribed in terms of s 32 of the Audit and Exchequer Act [Chapter 22:03] and so s 33, under which expenditure had to be approved by the responsible Minister, did not ϵ apply to it.

Held, further, that the lecturers were not public servants as defined in s 113 of the Constitution.

Held, further, that although the government was the *de facto* paymaster while the appellant was the *de jure* paymaster of the lecturers, neither the Minister nor the government had any legal obligation to pay the salary ϵ increases to the lecturers. Neither the arbitrators nor the Labour Court nor the Supreme Court could issue an order obliging the government to pay the salary increases to the lecturers.

Cases cited

PTC Managerial Employees Workers' Cttee v PTC & Anor 1998 (1) ZLR 444 (H)

Legislation considered

Audit and Exchequer Act [Chapter 22:03], ss 32, 33, 34

Constitution of Zimbabwe 1980, ss 109(6) and 113

State University in the Midlands Act [Chapter 25:21], ss 4(2) and 11(1)(g) ϵ

Case information

J C Andersen SC, for the appellant

A M Gijima, for the respondent ϵ

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Chidyausiku CJ

Judgment

^A **CHIDYAUSIKU CJ**: The facts of this matter, which are common cause, are as follows. The respondent is an association of lecturers employed by Midlands State University. The Midlands State University is represented in this matter by the appellant which is the Council of the University.

A dispute arose between the parties as to the benefits payable by the appellant to the respondent's members. The respondent's members engaged in a ^B collective job action. The appellant applied for a show cause order to the labour court. The parties consented to the matter being referred to compulsory arbitration in terms of the Labour Act [*Chapter 28:01*] (hereinafter referred to as the Act). The consent order provides as follows:

- "1. The respondent's members' Collective Job Action embarked on on ^C 22 August 2003 and terminated on 6 October 2003 was illegal and unlawful for want of compliance with the provisions of the Labour Act.
2. Both parties consent to the issue that gave rise to the Collective Job Action being referred to compulsory arbitration in terms of Part XII of the Act. ^D
3. On or before 14 October 2003, each party appoints its own arbitrator and the two arbitrators appointed shall appoint a third arbitrator who shall be the chairperson.
4. Arbitration on the matter shall commence by 20 October 2003.
5. The arbitrators shall determine the matter on or before 21 November 2003."

^E Three arbitrators were duly appointed to determine the dispute and made the following award:

- "1. We award for the lowest grade lecturer, a starting salary of \$1 200 000 per month, plus 15% transport allowance and 15% housing allowance, a total package of \$1 560 000 per month, with effect from 1 July 2003.
2. In making the determination, the arbitrators admitted to We award for each of the other grades of academic staff as shown in the table set out in the circular letter to State Universities from the Permanent Secretary for Higher and Tertiary Education dated 22 August 2003, a proportionate increase.
3. We award an increment of 30% on basic salaries with effect from 1 October 2003."

^G In making the determination, the arbitrators admitted to facing a number of constraints. Among the constraints the arbitrators faced were firstly, that the government, or more specifically the Minister of Higher and Tertiary Education, was not a party to the proceedings and yet, in their view, it lurked in the background as it is the paymaster of all State Universities. Secondly, separate ^H arbitration awards had been made to other State Universities and thirdly, both

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Chidyausiku CJ

parties indicated that they did not wish to address the arbitrators in support ^A of their cases. The parties left it to the arbitrators to decide the matter on the papers.

The arbitrators adopted the following approach to these constraints:

"The chain of financial authority for state universities is one of the major weaknesses. The staff have to negotiate with the University authorities. ^B The University authorities have to negotiate with the Ministry of Higher and Tertiary Education. They are not even allowed to increase their incomes by charging students economic fees. Fees are controlled by Government at ridiculously low levels. And finally that Ministry has to negotiate with the Ministry of Finance and Economic Development. It is apparent to us that the University authorities in the present case are in ^C sympathy with the claims of the academic staff. The only objection they have put in the face of those claims is that they fear they will not get the funds from the Ministry to pay the salaries and allowances sought.

We have no indication as to where lie the sympathies of the Ministry of Higher and Tertiary Education, but we know they are constrained ultimately by the Budget, and we have heard the views of the Minister of Finance ^D on the question of a Supplementary Budget.

Our mandate from the labour court is simply to arbitrate upon the issues which gave rise to the dispute. Those issues were salaries and allowances. We are therefore required to determine what are fair and reasonable salaries and allowances payable to academic staff at Midlands State University with effect from 1 July 2003. We cannot be influenced by the ^E attitude of a third party. And in any event, insofar as that third party is the government of the country, we must assume that the government is prepared and indeed anxious to see academic staff adequately rewarded so that University standards are not just maintained, but significantly improved. Our Universities are in an appalling state. They need a rescue operation, not a financial garrote. ^F

We cannot assume that the government will follow political policies regardless of the economic impact of those policies upon its people. We will therefore proceed on the basis that some means will be found to fund the level of salaries and allowances we award as fair and reasonable.”

Having adopted this approach, the arbitrators made the determination I have set out above. ^G

The appellant was dissatisfied with the determination of the arbitrators and noted an appeal to the labour court. The appeal was noted in terms of s 98(10) of the Act. In terms of the Labour (Settlement of Disputes) Regulations, SI 217/03, an appeal has to be noted within 14 days. The determination was handed down on 19 December 2003. The appellant noted its appeal on 17 ^H

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Chidyausiku CJ

A February 2004. Thus, the appeal was out of time. The appellant’s legal practitioner was under the mistaken belief that the appellant had three months within which to note an appeal in terms of s 98 of the Arbitrators Act [*Chapter 7:15*]. Upon realizing the mistake, the appellant applied for condonation of the late noting of an appeal or for an extension of time within which to note an appeal. The application was made to the labour court. The labour court ^B accepted that the delay was not inordinate and the explanation for the delay plausible. However, the labour court was of the view that the appellant’s prospects of success on appeal were non-existent and refused the application on that basis.

The appellant was dissatisfied with the outcome and appeals to this court ^C upon the following grounds set out in the Notice of Appeal:

- “1. The learned honourable president of the Labour Court (herein called The President) erred and was completely misdirected when he dismissed the appellant’s application for condonation to file its notice of appeal out of time on the basis that the appeal had no prospects of success as it was based on a question of fact, and not ^D law.
2. The learned honourable president erred and was misdirected when he ruled that the Labour Court could ‘not order the Government to do what it (was) not legally obliged to do’ whereas there was absolutely no argument nor prayer for the Labour Court to order Government to do anything. The application was among other ^E grounds, for the arbitral award to be set aside on the basis that Government, an interested party and the true paymaster of the respondent was not a participant in the arbitration proceedings. The argument was that this was a basis upon which the arbitral award should be set aside.
3. The court *a quo* erred and was misdirected when it made a finding that ^F appellant had used the wrong forum in that the basis of its appeal was based on a question of fact and not law.
4. The learned honourable president erred in completely ignoring, and not addressing, nor alluding to, nor distinguishing, nor discrediting, nor applying his mind to the plethora of eminent legal authorities that were furnished to him, that clearly, in no uncertain terms, made it clear ^G that appellant’s grounds of appeal were based on a question of law, and not fact. This misdirection is made grossly glaring by the fact that not even one single legal authority was furnished by the court *a quo* in support of its insupportable finding.
5. The honourable president erred and misdirected himself when he ^H made an order for costs against the appellant.”

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Chidyausiku CJ

The above grounds of appeal were subsequently amended without, in my ^A view, adding substance to the issues that fall for determination by this court.

The issue that falls for determination by this court is aptly summarised by Mr *Andersen*, for the appellant, in para 12 of his Heads of Argument which reads:

“The essential issue between the parties is as to whether it was competent ^B for an award to be made for increases which had not been approved by the responsible Minister.”

In dismissing the application for the extension of time in which to note an appeal, the learned President of the Labour Court reasoned thus:

“However, the applicant has difficulties concerning the merits of its case. The heart of the applicant’s case on the merits is set out in Mr Manners ^C Jaravaza’s supporting affidavit dated 26 March 2004 which in para 12 reads as follows:

'The applicant submits that it has bright prospects of success on appeal as it is obvious that the salary dispute can never be resolved without the inclusion and participation of Government. It is a matter of common knowledge and public record that applicant relies on funding from D Government. The applicant on its own is hopeless in addressing or enforcing the arbitral award.'

The same point is applied in the grounds of appeal by the averment that the award should be set aside because of the respondent's failure to cite the Government when it initiated proceedings in this matter. But the point, which is well made in the respondent's heads of argument, is that the E Government is not *legally* obliged to assist the applicant financially. The applicant was established in terms of the State University In The Midlands Act [Chapter 25:21] (promulgated as Act 4 of 1999, hereafter called the Act). In terms of s 4(2) of the Act, the applicant itself is given powers to enter into contract, to appoint its staff, to take fees and to borrow monies for any purpose which applicant's council thinks fit. The Act gives the F applicant *legal* responsibility for its financial affairs. Nowhere in the Act is the Government saddled with an obligation to bankroll the applicant. Given this scenario, joinder of the Government does not achieve anything. The arbitrator/s of this court cannot order Government to do what it is not *legally* obliged to do. Government may well have been funding the applicant and the applicant may have no other source of funding but that G does not change the legal position."

In essence, the learned President concluded that the appellant was a legal *persona* with capacity to employ the respondent and determine the respondent's salaries without the consent of the Minister.
H

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Chidyausiku CJ

A Mr *Andersen* submitted that it is a requirement of the law that the Minister's consent be obtained before the appellant can increase the salaries of the respondent's members. In this regard, he relied on *TC Management Employees Workers' Committee v PTC & Anor* 1998 (1) ZLR 444 (H) at 450A-B. He argued that in that case it was pointed out that in terms of s 39 of the Audit and Exchequer Act [Chapter 22:03] increases in salary could not be made without B the Minister's approval. He also sought to rely on ss 34, 35, 36 and 37 of the Audit and Exchequer Act and s 109(6) of the Constitution of Zimbabwe.

Section 33 of the Audit and Exchequer Act reads:

"33. **No payment of expenditure to be incurred without approval**

Subject to this Act, *no designated corporate body* shall commit itself C to or incur –

- (a) ...
- (b) expenditure other than capital expenditure unless provision therefore has been made in revenue and expenditure budget approved in terms of this part or such expenditure has been approved by the appropriate Minister" (my emphasis).

D Section 34 provides for the submission of budgets in respect of revenue and expenditure for approval and budgets approved may be varied in terms of ss 36 and 37. The Constitution provides generally that there be no expenditure from the consolidated revenue or other public funds without approval. Section 109(6) of the Constitution in particular provides that *no law* shall E increase or authorise an increase in salaries in respect of the "Public Service" unless the Minister has agreed thereto. Mr *Andersen* also argued that "Public Service" is widely defined in s 113 as the service of the State, which would include the State universities.

Mr *Gijima*, on the other hand, submitted that s 109(6) of the Constitution F cannot apply to members of the respondent because "Public Service" as defined in s 113 of the Constitution does not include the members of the respondent. He argued that the members of the respondent were not included in the definition of "Public Service" which reads in the appropriate parts that:

"'Public Service' means the service of the State but does not include –

- (c) service as a member of any Commission established by this G Constitution or body corporate established directly by or under any Act of Parliament for special purposes specified in that Act ..."

He submitted that the Midlands State University was established in terms of the Midlands State University Act [Chapter 25:21], Act 4 of 1999, for special purposes specified in that statute. Accordingly, this section of the Constitution H does not apply to the parties in this matter. Mr *Gijima* noted, quite correctly

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Chidyausiku CJ

in my view, that this section of the Constitution is concerned with the making ^A of a law and not salary increments which are at issue in this case.

Mr *Gijima* further submitted that the appellant is not a parastatal but a body corporate with an independent legal *persona*. It is run by the Council whose functions are set out in s 11 of the Midlands State University Act. In particular, s 11(1)(g) of that Act provides that: ^B

“(1) Subject to this Act and the Statutes, the Council shall –

(g) cause to be prepared annually estimates of income and expenditure for the following financial year.”

There is no provision in the Midlands State University Act for requiring the Council to submit any statements of financial estimates to the Minister nor is there a provision for the approval of the Minister to be sought for any financial ^C purpose unless he has designated certain employees. The employees designated are those in grade one and two and some in grade 3. The respondent’s members, as lecturers, are not included and are in grade 6.

Mr *Gijima* further submitted that the Audit Act does not further the case of the appellant as Part VI of the Act deals with statutory bodies. Section 32 of ^D the Audit Act reads:

“In this Part –

‘designated corporate body’ means –

(a) any statutory body; or

(b) any corporate body or company in which the State has a controlling ^E interest, whether by virtue of holding or controlling shares therein by virtue of a right of appointment of members to the controlling body thereof or otherwise;

and which is *prescribed* to be a designated corporate body for the purposes of this Part” (my emphasis).

Mr *Gijima* contended that it had not been argued or averred by the appellant ^F that the Midlands State University is included in the description of a designated corporate body that was prescribed.

It would appear to me that the legal propositions made by both counsel are correct. Mr *Andersen’s* submissions were predicated on the assumption that the Midlands State University is a *designated corporate body which is* ^G *prescribed*. There is no basis for the court to make that assumption without which Mr *Andersen’s* contention cannot succeed. The *PTC Management Employees Workers’ Committee* case *supra*, which Mr *Andersen* sought to rely on, involved a designated corporate body which was prescribed. I accept, as correct, Mr *Gijima’s* contention. On that basis, I agree with the conclusion ^H

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Chidyausiku CJ

^A of the learned President of the Labour Court that the appeal has no prospects of success and the application for condonation was correctly dismissed on that basis.

The appellant also argued that it was impossible for it to pay the award. I agree with the learned President of the Labour Court that the issue of the capacity ^B of the appellant to pay the award is an issue of fact that could only be determined by the arbitrators and no appeal to the Labour Court on an issue of fact can be entertained by the Labour Court. The appellant elected not to give evidence of its capacity to pay the demanded salary increments. It elected to have the arbitrators determine that issue as best as they could on the papers. There is nothing on the record to show that, on the papers before the ^C arbitrators, the appellant had established its inability to pay the increases.

The President of the Labour Court was correct in concluding that in terms of the Midlands State University Act, the Minister or the government has no legal obligation to pay the salary increases to the respondent. Neither the arbitrators, nor the Labour Court, nor indeed this court can issue an order obliging the Government to pay the salary increases to the respondent. The ^D remedy to the anomaly making the Government the *de facto* paymaster while the appellant is the *de jure* paymaster of the respondent is in the hands of the Government that should amend the law to remove the anomaly.

In the result, the appeal is dismissed with costs.

^E CHEDA JA & ZIYAMBI JA concurred.

Dzimba, Jaravaza & Associates, appellant’s legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/ZESA v MARE 2005 (2) ZLR 222 (S)

ZESA v MARE 2005 (2) ZLR 222 (S)**2005 (2) ZLR p222**

Citation	2005 (2) ZLR 222 (S)
Case No	Judgment No. S-43-05
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Gwaunza JA
Heard	6 June 2005
Judgment	3 October 2005
Counsel	<i>L Mazonde</i> , for the appellant No appearance for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — *code of conduct — disciplinary proceedings under — investigation preceding such proceedings — member of workers' committee — not entitled to obstruct investigation*

Employment — *workers' committee — member of — duty to defend workers' rights — requirement to act lawfully in doing so — not entitled to interfere in lawful investigation process*

Headnote

The respondent was employed by the appellant. He was also a member of the workers' committee. He intercepted and forcibly took from another employee a report that that employee was preparing regarding certain misconduct proceedings involving two other employees. The confiscated E report was prepared for submission to the senior depot foreman who required it for use as evidence at a disciplinary hearing into the alleged misconduct of the two employees. An altercation ensued as a result of the respondent's conduct. The respondent was charged *inter alia* with hindering or obstructing any employee from performing his duties, convicted on that charge and dismissed. The Labour Court set aside his F dismissal on the ground that when the appellant intervened he had been requested to do so by the employees under investigation. In doing so, he was discharging his duties as a representative of the workers and was therefore not subject to the control of his employer. He was not acting in his capacity as an employee as he was defending a worker's rights. On G appeal by the employer:

Held, that members of a workers' committee are not a law unto themselves. There was no legal basis for the respondent, as a member of a workers' committee, to simply, through the use of

force, seize a report from a fellow employee. While a member of a workers' committee has a duty to defend ^H

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Chidyausiku CJ

^A workers' rights, in so doing he is enjoined to observe due process. It is lawful for an employer to investigate any alleged misconduct of its employees and after such investigation to institute disciplinary proceedings. That is due process. It is not lawful for a member of a workers' committee to forcefully obstruct the lawful investigation into an employee's misconduct. The investigation must be allowed to proceed ^B without obstruction. It is open to a member of the workers' committee to defend the worker charged with misconduct at the disciplinary hearing.

Case information

L Mazonde, for the appellant

No appearance for the respondent

Judgment

^C **CHIDYAUSIKU CJ:** The respondent in this matter, an employee of the appellant, was charged with four counts of misconduct. He was charged with contravening the following sections of the code of conduct: s 7(e)(viii), conducting oneself or behaving in a manner which brings or is likely to bring the name of the Authority into disrepute; s 7(e)(vi), hindering or obstructing ^D any employee from performing his duties; s 7(j)(i), taking and converting or attempting to take and convert to his own private use property or money belonging to the Authority or in its lawful possession; and, s7(j)(iii), making any false claims or returns e.g. for travel and subsistence allowance.

The disciplinary committee which tried the respondent in the first instance ^E found the respondent guilty on three of the four counts. They found him guilty of conducting himself or behaving in a manner which brings or is likely to bring the name of the Authority into disrepute; of hindering or obstructing any employee in the performing of his duties, and of making false claims or returns.

Upon being found guilty of the above charges of misconduct, the respondent was dismissed from employment. The respondent appealed against the ^F determination of the disciplinary committee to the appeals committee in terms of the code of conduct. The appeals committee dismissed the appeal.

The respondent appealed to the then Labour Tribunal, now the Labour Court. I shall refer to the Tribunal as the Labour Court hereinafter. The Labour Court allowed the appeal and reversed the determination of both the appeals ^G committee and the disciplinary committee. The Labour Court ordered the reinstatement of the respondent without loss of salary and benefits.

The appellant was dissatisfied with this outcome and now appeals to this ^H court.

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Chidyausiku CJ

COUNT ONE ^A

The respondent was found guilty by both the disciplinary committee and the appeals committee of contravening s 7(e)(vi) of the code of conduct, that is, of hindering or obstructing any employee from performing his duties.

Factual findings of both the disciplinary and the appeals committee, which findings were not challenged on appeal, are that on 2 November 1994 and at ^B Masvingo depot the respondent intercepted and forcibly took from Mr Samangure, ("Samangure") a ZESA employee, a report that Samangure was preparing regarding certain misconduct proceedings involving two ZESA employees, Messrs Chakauya and Makoni ("Chakauya and Makoni"). Samangure was preparing the confiscated report for submission to the Masvingo Senior Depot Foreman who required it for use as evidence at a ^C disciplinary hearing into the alleged misconduct of Chakauya and Makoni.

Both the disciplinary and the appeals committee concluded that the taking of the report by the respondent was unauthorized and involved harassment to fellow ZESA employees, namely,

Samangure and Shoshore. The disciplinary committee found as a fact that the respondent had forcibly and against the will ^d of Samangure taken the report from him. It was also common cause that an altercation ensued as a result of the respondent's conduct. That conclusion on the evidence led before the disciplinary committee cannot be faulted and was never challenged.

The learned president of the Labour Court allowed the appeal on this count ^e upon the following basis:

"In the present case, when the appellant intervened during the course of some investigations he had been requested to do so. He was not hindering the normal production processes as such. He was discharging his duties as a representative of the workers and therefore not subject to the control of his employer. He was not acting in his capacity as an employee as he ^f was defending a worker's rights."

It is common cause that the respondent is a member of the workers' committee and that he intervened in this matter at the request of the employee who was under investigation for misconduct. In my view, members of the workers' committee are not a law unto themselves. There is no legal basis for a member of the workers' committee to simply, through the use of force, seize a report ^g from a fellow employee in the above circumstances. I accept that a member of the workers' committee has a duty to defend workers' rights. In defending the rights of the workers, a member of the workers' committee is enjoined to observe due process. It is lawful for the employer to investigate any alleged misconduct of its employees and after such investigation to institute ^h

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Chidyausiku CJ

A disciplinary proceedings. That is due process. It was not lawful for the respondent or any member of the workers' committee to forcefully obstruct the lawful investigation into an employee's misconduct. The investigation should have been allowed to proceed without obstruction. It was open to the respondent to defend the worker charged with misconduct at the disciplinary hearing.

^b The President of the Labour Court clearly misdirected herself in concluding that because the respondent was a member of the workers' committee he was entitled to take the law into his hands and obstruct the investigations that were being conducted by the employer. All these events happened at the work place, in the course of employment and accordingly there is no basis for ^c concluding, as the learned President of the Labour Court did, that these events occurred outside the scope and course of employment.

COUNTS TWO AND THREE

It is convenient to deal with these two counts as one as the factual basis relating to these counts is essentially the same. The facts of counts two and ^d three are that the respondent submitted two claims, one to NEC and the other to the ZESA Pension Fund, for travel and subsistence in respect of the same journey and same period. It is alleged that such conduct is dishonest and contravenes ^s 7(j)(iii) of the code of conduct which proscribes the making of false claims. It is further alleged that by conducting himself in that manner the respondent brought into disrepute the name and image of the appellant ^e contrary to the provisions of ^s 7(e)(viii) of the code of conduct which proscribes such conduct.

The respondent, by virtue of his employment with ZESA, is a member of the ZESA National Employment Council ("NEC") and a trustee of the ZESA Pension Fund. The respondent traveled from Masvingo to Harare to attend ^f a meeting of NEC and a Christmas party of the ZESA Pension Fund. The appellant contends that the respondent brought the name of ZESA into disrepute or tarnished ZESA's image by making double and false claims for travel and subsistence allowance from both NEC and the Pension Fund in respect of the same period, namely 8 and 9 December 1994. The two claims for travel and subsistence allowance, one of which was submitted to NEC and the ^g other to the Pension Fund, clearly show that the respondent claimed from both NEC and the Pension Fund breakfast and lunch in respect of 9 December 1994. The same document also reveals that he claimed transport from both NEC and the Pension Fund in respect of a single journey to Harare. There is no doubt that in respect of these expenses the respondent claimed from both NEC and ^h the Pension Fund.

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Chidyausiku CJ

When asked to explain why the respondent submitted the double claims to ^a the two organisations his response was that somebody had forged or altered the dates on the travel and subsistence claims so that he could get into trouble. He claimed that somebody with a hidden agenda had endorsed or altered the date on the claim form from 8 December to 9 December to get him into trouble. When asked to explain the double claim in respect of the transport allowance ^b his explanation was that it was not a double claim because after the meeting at NEC in the late afternoon of 8 December he traveled to Masvingo in order to get his invitation card to the Pension Fund Christmas party due to be held in Harare the following evening of 9 December. He stated that he travelled overnight getting to Masvingo in the morning and driving back to Harare immediately in order to be in time for the party. In short, he was alleging that ^c he made two trips to Harare over the period in question.

The respondent's explanations for the double claims were rejected by both the disciplinary committee and the appeals committee as false. The rejection of the respondent's explanations as false cannot be faulted. That rejection was never challenged on appeal. It is quite clear from the travel and subsistence claim forms completed by the respondent that he claimed transport from both ^d NEC and the Pension Fund in respect of the same journey and that he claimed breakfast and lunch from both NEC and the Pension Fund in respect of the same day, the 9 December 1994. The appellant contends that this conduct of the respondent was dishonest. The respondent no doubt appreciated that his conduct was dishonest. This is the only possible reason why he offered a false ^e explanation for his conduct. If the respondent thought that his conduct was in order there would have been no need for the false explanation. He would have simply said that he was entitled to two transport allowances as well as the two breakfasts and lunches for 9 December 1994.

I have no doubt in my mind that the respondent was not entitled to the two transport allowances, two breakfasts and two lunches in respect of 9 December ^f 1994. The respondent must have appreciated that he was not entitled to make the double claims and in making the double claims he was acting dishonestly. He compounded his transgression by offering false explanations for such conduct.

The conduct of the respondent was fraudulent and certainly amounts to a ^g contravention of the above sections of the code of conduct.

The learned President of the Labour Court misdirected herself in her approach to this issue. In this regard this is what she had to say:

"If indeed the respondent established that at no time did the appellant handle its money then charging the appellant with dishonesty of any form ^h

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Chidyausiku CJ

^a is in my view improper. Had the appellant been dishonest to both ZEEWU and the Pension Fund the position would have been different. To the appellant's credit not only is there proof that the claims he lodged were properly checked and honoured by the relevant authorities but at p 37 of the record ZEEWU wrote to ZESA pleading for clemency on behalf of the appellant."

^b Clearly, the learned President of the Labour Court failed to appreciate the gravamen of the charge against the respondent. The respondent was being charged with dishonest and fraudulent conduct. The conduct of the respondent was clearly dishonest and fraudulent. The respondent never disclosed to the two parties that he was claiming from both transport allowance in respect of the same journey. He never disclosed to the two parties that he was claiming ^c breakfast and lunch from them in respect of the same day. Had he made such disclosure, there would be no basis for alleging that he was dishonest. The contention by the respondent that the appellant had no *locus standi* to complain about the double claims has no substance. The record shows that ZESA is a major contributor to the ZESA Pension Fund and has a substantial interest in NEC. On the facts of this case, who was the victim of the ^d respondent's dishonesty is a matter of little consequence. His conduct was dishonest and fraudulent and ZESA was entitled to charge him with misconduct.

A reading of the proceedings against the respondent before the disciplinary and appeals committees clearly shows that the evidence was properly ^e assessed and the law properly applied to the facts and the right conclusion reached. There was no basis for interference by the Labour Court.

In the result, the appeal is allowed, the order of the Labour Court is set aside, and the determination of the appeals committee is reinstated. The costs follow the result and the respondent is ordered to pay the costs.

F ZIYAMBI JA & GWAUNZA JA concurred.

G *Muzangaza Mandaza & Tomana*, appellant's legal practitioners

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Source:

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MPOFU v MPOFU 2005 (2) ZLR 228 (H)

2005 (2) ZLR p228

Citation	2005 (2) ZLR 228 (H)
Case No	Judgment No. HB-99-05
Court	High Court, Bulawayo
Judge	Cheda J
Heard	6 October 2005
Judgment	6 October 2005
Counsel	<i>M Khupe</i> , for the plaintiff <i>S Siziba</i> , for the defendant
Case Type	Divorce action
Annotations	No case annotations to date

Flynote

Family law — husband and wife — divorce — division of property following c — customary marriage followed by civil marriage — misconduct during — when may be taken into account

Headnote

The parties were married under customary law in 1979 and under civil law in 1989. The marriage had broken down, the cause of the breakdown being that the defendant, who had six children, committed adultery resulting d in pregnancy. The adultery was committed in the matrimonial home in the communal lands and the defendant was caught red handed. The pre-trial conference had been held in June 2002, but the papers had gone missing till September 2005.

The divorce was granted. The custody of the three older children was granted e to the plaintiff because of the better schooling available in Bulawayo. The custody of the three younger children was granted to the defendant, with maintenance payable each month. At the hearing to determine the distribution of the matrimonial property:

Held, that a home, in general, and in the rural areas, in particular, largely derives its dignity from the conduct of the woman who runs it. Such a f woman is therefore expected to exhibit high moral standards as she is a beacon of uprightness. The defendant having brazenly committed adultery under those circumstances, she could not be expected to benefit wholesale from her misdemeanour. This would be both unjust and against public policy. Consequently, it would not be

appropriate to award her the properties situated in the rural area, since to award her ^g substantially might be viewed as partial condonation of her behaviour.

Case information

M Khupe, for the plaintiff

S Siziba, for the defendant ^h

2005 (2) ZLR p229

Cheda J

Judgment

^A **CHEDA J:** The plaintiff issued summons out of this court wherein he claimed divorce and other ancillary relief. The defendant entered an appearance to defend. Pleadings were closed and a pre-trial conference was held before me on 19 June 2002. The record has been missing and was only located in mid-September 2005. At the hearing, the issue of divorce and custody of the minor children was solved in that divorce was agreed to and custody of all the ^B minor children was awarded to the defendant.

The remaining question therefore, was that of the distribution of the matrimonial assets and quantum of maintenance to be contributed by the plaintiff.

1. MATRIMONIAL ASSETS

Both parties are in agreement that all the movable assets were acquired during ^C their marriage. It is clear that the bottle store and homestead also fall within the category of property acquired during their union. The contentious property is house No. 5176 Magwegwe West. The plaintiff submitted through his legal practitioner Mr *Khuphe* that this was availed to him before the parties got married and subsequently donated to him by his brother. He, therefore, argued that it should not form part of the matrimonial assets. However, the ^D defendant has argued that the house was acquired by the parties in 1980 during the subsistence of their marriage while they were married under customary law and only solemnised their marriage in 1989. This, therefore, makes it part of the matrimonial assets. The defendant though, would like the said house awarded to her. It is common cause that indeed the parties were ^E married in 1979 under customary law and acquired property, this house, therefore, forms part of the matrimonial assets. The plaintiff's argument that the house was acquired before their marriage has no substance for the reason that, even though the marriage was not yet registered the parties for all intents and purposes were husband and wife under customary law. The house is therefore subject to distribution.

^F The bottle store and rural home are no doubt matrimonial assets. It is common cause, therefore, that the defendant contributed in her own way in the acquisition of the matrimonial assets. The parties' marriage has broken down. The cause of the breakdown cannot, in my view, be ignored by the court. The defendant, a married woman with six children, committed adultery resulting in pregnancy. The adultery was committed in the matrimonial home in the ^G communal lands and the defendant was caught red handed. Her behaviour and conduct is profoundly reprehensible. It is her immoral conduct which has solely caused the breakdown of the marriage. The rural home and bottle store are both in the rural areas. In my view, it will be improper for her to be awarded these properties taking into account that her stay in the same community ^H where she committed adultery will no doubt be frowned upon.

2005 (2) ZLR p230

Cheda J

The court takes judicial notice that a home in general and in the rural areas in ^A particular largely derives its dignity from the conduct of the woman who runs it. Such woman is therefore expected to exhibit high moral standards as she is a beacon of uprightness. The defendant, having brazenly committed adultery under those circumstances, can not be expected to wholesomely benefit from her misdemeanour. This, in my view, will be both unjust and against public policy. While recognising her contribution in my opinion, it will ^B be improper to award her substantially as to do so maybe viewed as partial condonation of her behaviour.

2. CUSTODY OF CHILDREN

The parties have a house in Magwegwe West which the family uses. The plaintiff has argued that it will be in the best interest of some of the children c that their custody be granted to him, so that they can benefit by attending school in town (Bulawayo). This argument, in my view, is well placed and reasonable. It is common knowledge that urban schools have better educational facilities than the rural ones. Therefore, it will be in the children's best interest that they attend school in Bulawayo. d

Where the parties' marriage is disintegrating, the best interest of the children should no doubt be paramount. Our courts will, as a general rule, therefore always abide by this time honoured principle.

Taking into account all the circumstances of the matter, the following order is made: e

It is ordered that:

1. Divorce be and is hereby granted.
2. The plaintiff be and is hereby awarded custody of the following children:
 - (a) Sibusiso Mpofu
 - (b) Memory Mpofu; and f
 - (c) Busani Mpofu
 while the defendant is awarded custody of:
 - (a) Nomsa Mpofu
 - (b) Thuli Mpofu; and
 - (c) Sipho Mpofu g
3. The plaintiff be and is ordered to pay maintenance in the sum of \$5 000 per month per child until the children reach the age of 18 years or become self supporting whichever shall sooner occur.
4. Both parties shall have reasonable access to those children who are not in their custody. h

2005 (2) ZLR p231

Cheda J A

5. The plaintiff be and is hereby awarded the following immovable property:
 - (a) Mzola 52 homestead, Lupane; and
 - (b) Siwale Bottle Store at Mzola 52, Lupane
6. The plaintiff be and is hereby awarded 60% of the current market value of house No. 5176 Magwegwe West while the defendant is awarded 40% b thereof.
7. The plaintiff be and is hereby awarded the following movable property:
 - (a) 5 head of cattle
 - (b) 5 donkeys
 - (c) borehole and its accessories c
 - (d) scotch cart
 - (e) 1 hoe
 - (f) 1double bed in Bulawayo with blankets
 - (g) wardrobe in Bulawayo
 - (h) children's wardrobe without mirror d
 - (i) black and white television set
 - (j) 3 plate stove
 - (k) small fridge at Bulawayo home
 - (l) 1 wheel barrow
 - (m) half cutlery and utensils
 - (n) E 3 shovels
8. The defendant be and is hereby awarded the following property:
 - (a) vacant stand in Tsholotsho Growth Point

- (b) 4 herd of cattle
- (c) 1 water cart _F
- (d) 1 hoe
- (e) 1 plough
- (f) 1 double bed at Lupane homestead
- (g) 1 wardrobe at Lupane homestead
- (h) set of sofa at Lupane homestead _G
- (i) half cutlery at Lupane homestead
- (j) children's bed at Lupane homestead
- (k) small radio at Lupane homestead
- (l) 1 display cabinet _H
- (m) 1 Omega radio at Lupane homestead

2005 (2) ZLR p232

Cheda J

- (n) kitchen cupboard _A
- (o) 1 sewing machine

9. There will be no order as to costs.

Mabhikwa, Hikwa & Nyathi, plaintiff's legal practitioners

Messrs Cheda & Partners, defendant's legal practitioners _B

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Source:

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ZIMBABWE PHOSPHATE INDUSTRIES LTD v MATORA & ORS 2005 (2) ZLR 233 (S)

2005 (2) ZLR p233

Citation	2005 (2) ZLR 233 (S)
Case No	Judgment No. S-44-05
Court	Supreme Court, Harare
Judge	Sandura JA, Malaba JA & Gwaunza JA
Heard	27 January 2005
Judgment	10 October 2005
Counsel	<i>G V Mamvura</i> , for the appellant <i>GT Chapwanya</i> , for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Appeal — Labour Court — noting of — effect — provision that order appealed against is suspended — amendment providing to the contrary — appeal noted before amendment came into place — not affected

Employment — appeals under Labour Act [Chapter 28:01] and regulations — ^D appeal to Labour Court — noting of — effect — provision that order appealed against is suspended — amendment providing to the contrary — appeal noted before amendment came into place — not affected

Interpretation of statutes — presumption against retrospectivity — existing rights and obligations not to be impaired unless stated clearly in amending statute or by necessary implication

^E **Statutes** — Labour Relations Amendment Act 2002 (No. 17 of 2002) — s 47(5) — not intended to affect rights already vested in an appellant in terms of s 97(3) of the Labour Relations Act [Chapter 28:01] before its amendment

Headnote

^F Before the Labour Relations (Amendment) Act 17 of 2002 was promulgated, s 97(3) of the principal Act provided that the noting of an appeal in terms of subs (1) had the effect of ^G suspending the determination or decision appealed against. The subsection was repealed and replaced, and now provides that the noting of an appeal shall not have the effect of suspending the determination or decision appealed against. There was a savings provision in the amending Act, to the effect that any proceedings that were commenced before the promulgation of the amending Act were deemed to have been commenced in terms of the ^H appropriate provisions of the principal Act, as amended.

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Before the Act was amended, the respondents were dismissed from their ^A employment following disciplinary proceedings. Appeals under the code of conduct having failed, the respondents appealed to the Labour Court. After the amending Act came into effect, they applied for an order that they be reinstated pending the determination of their appeal.

Held, that the general rule is that, in the absence of express provision to the ^B contrary, statutes should be considered as affecting future matters only. In particular, they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation. There is a strong presumption that retrospective operation is not to be given to an enactment so as to remove or in any way impair existing rights or obligations unless such a construction appears clearly from the language ^C used or arises by necessary implication (*dicta per* Gubbay JA, as he then was, in *Agere v Nyambuya* 1985 (2) ZLR 336 (S) at 338, followed).

Held, further, that s 97(3) of the Labour Relations Act [Chapter 28:01], before it was amended by the Labour Relations Amendment Act 2002 (No. 17 of 2002), gave an appellant a clear right not to reinstate respondents in its employ pending the determination of the appeal. Section 97(1) was a ^D separate provision from s 97(3). It used to give the right to appeal to the Labour Relations Tribunal. The new s 97(1) gave a similar right in respect of appeals to the Labour Court. Section 47(5) of the amending act (No. 17 of 2002), which dealt with the commencement of proceedings or the noting of appeals in terms of s 97(1) of that act, was not intended to affect the rights already vested in an appellant in terms of s 97 (3) of the ^E Act at the time of the commencement of the amending act (No. 17 of 2002).

Held, further, that on a true construction of s 47 (5) of the Labour Relations Amendment Act, 2002 (No. 17 of 2002), the intention of the legislature in enacting s 97 (3), which repealed and substituted s 97(3) of the Labour Relations Act [Chapter 28:02], was not retrospectively to take away ^F rights vested in an appellant in an appeal which had been noted in terms of the appropriate provisions of the principal act, pending determination by the Labour Court.

Cases cited

Agere v Nyambuya 1985 (2) ZLR 336 (S) ^G

Bell v Voorsitter van die Rasklassifikasieraad en Andere 1968 (2) SA 678 (A)

Curtis v Johannesburg Municipality 1906 TS 308

Nkomo & Anor v A-G & Ors 1993 (2) ZLR 422 (S) ^H

2005 (2) ZLR p235

Malaba JA

Legislation considered ^A

Labour Relations Act [*Chapter 28:01*], ss 97(1) & 97 (3)

Labour Relations Amendment Act 2002 (No. 17 of 2002), s 47(5)

Case information

G V Mamvura, for the appellant

^B *GT Chapwanya*, for the respondents

Judgment

MALABA JA: This appeal raises the question whether upon a true construction of s 47(5) of the Labour Relations Amendment Act No. 17 of 2002 ("Act 17") the intention of the legislature in enacting s 97(3) repealing and substituting s 97(3) of the Labour Relations Act [*Chapter 28:01*] ("the principal Act") was ^Cto retrospectively take away rights vested in an appellant in an appeal noted in terms of the appropriate provisions of the principal Act and pending determination by the Labour Court on the date Act 17 was promulgated.

The question has to be determined on these facts:

The appellant instituted disciplinary proceedings against the respondents ^D who were its employees, in terms of the employment code of conduct. The allegation made against the respondents was that they had engaged in unlawful collective job action. They were found guilty by the Disciplinary Committee and dismissed from employment. An appeal to the Appeals Committee of the Employment Council for the Chemicals and Fertilizer Manufacturing Industry ("the Appeals Committee") by the respondents was ^E upheld on 25 November 2002, and their reinstatement ordered.

On 5 December 2002, the appellant appealed to the Labour Relations Tribunal ("the Tribunal") in terms of s 97(1) of the principal Act which gave a person aggrieved by the determination or decision of a disciplinary body acting under a registered code of conduct a right to appeal against the determination or ^F decision to the Tribunal within such time and in such manner as may be prescribed.

At the time the appeal was noted s 97(3) of the principal Act provided that:

"An appeal in terms of subsection (1) shall have the effect of suspending the determination or decision appealed against."

^G On noting the appeal against the decision of the Appeals Committee the appellant acquired the right not to reinstate the respondent pending determination of the appeal by the Tribunal.

On 7 March 2003, and whilst the appeal was pending before the Tribunal, Act 17 was promulgated. Section 83 of the principal Act which had established the ^H Tribunal was repealed and substituted with s 84(1) establishing a new court

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Malaba JA

called the Labour Court. Section 97(1) of the principal Act was repealed and ^A substituted with a section bearing the same number, the provisions of which also gave a person aggrieved by a determination or decision made under an employment code of conduct the right to appeal against such determination or decision to the Labour Court within such time and in such manner as may be prescribed. ^B

Section 97(3) of the principal Act now provided that:

"An appeal in terms of subsection (1) shall not have the effect of suspending the determination or decision appealed against."

Section 47(5) of Act 17 which formed part of the savings and transitional provisions enacted that:

"Any proceedings that were commenced in terms of Part XII of the principal ^C Act before the date of commencement of the Labour Relations Amendment Act 2002, or were pending before the Labour Relations Tribunal on that date, shall be deemed to have been commenced in terms of the appropriate

provisions of the principal Act as amended by the Labour Relations Amendment Act 2002 and shall be proceeded with accordingly.”

It is common cause that the appeal noted by the appellant against the decision of the Appeals Committee was a proceeding pending before the Tribunal on the date of the commencement of Act 17. On 31 July 2003, the respondents applied to the Labour Court for an interim order directing the appellant to reinstate them in employment without loss of salary and benefits pending determination of the appeal against the decision of the Appeals Committee. ^ε

The basis of the application was the construction of the new s 97(3) of the principal Act by the respondents as having been intended to operate retrospectively and take away the right vested in the appellant at the time it noted the appeal against the decision of the Appeals Committee, not to reinstate them pending determination of the appeal.

On 22 October 2003, a panel of three Presidents of the Labour Court was ^φpersuaded to accept, as a correct statement of the law, the contention that s 97(3) of Act 17 retrospectively took away the right vested in the appellant not to reinstate the respondents pending determination of the appeal and granted them the interim order. The learned president who wrote the judgment of the court said: ^ς

“The argument by Mr *Chapwanya* that the legislature intended s 97(3) to have retrospective effect thereby taking away existing rights is supported by the words used by the legislature. In this section and again in s 47(5) the words used are clear and unambiguous and admit of no other meaning other than that the legislature intended retrospectivity. While the cases ^η

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Malaba JA

^α cited by Mr *Mamvura* support the position that there is a general presumption against a statute being construed as having retrospective effect, all these cases have a *proviso* that the general presumption can be rebutted where a statutory provision is expressly stated to be retrospective in its operation. In our view, s 47(5) clearly expressed this as the intention of the legislature ...

^β It is our finding therefore that s 97(3) as read with s 47(5) has retrospective effect”.

At the appeal hearing, Mr *Mamvura* argued that there was nothing in the language of s 47(5) of Act 17 to support the construction adopted by the court *a quo*. Although Mr *Chapwanya*, for the respondents, presented a spirited argument in support of the decision appealed against, the contention that the ^ς true construction of s 47(5) does not reveal an intention on the part of the legislature to have s 97(3) operate retrospectively and take away the right not to reinstate the respondents pending determination of the appeal is correct.

The principles applicable in the determination of the question whether or not a statute is intended to operate retrospectively and take away accrued rights ^δ have been stated in numerous cases.

In *Curtis v Johannesburg Municipality* 1906 TS 308 at 311, Innes CJ said:

“The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation”.

^ε In *Bell v Voorsitter van Die Rasklassifikasieraad en’ Andere* 1968 (2) SA 678 (A) which is in Afrikaans, the head note states that:

“It is clear that our law accepts the rule that, where a statutory provision is amended, retrospectively or otherwise, while a matter is pending, the rights of the parties to the action, in the absence of a contrary intention, ^φ must be decided in accordance with the statutory provisions in force at the time of the institution of the action.”

In *Agere v Nyambuya* 1985 (2) ZLR 336 (S) at 338G-339A, Gubbay JA (as he then was) stated the general rule as follows:

“It is a fundamental rule of construction in our law, dating probably from Codex 1:14:7, that there is a strong presumption that retrospective ^ς operation is not to be given to an enactment so as to remove or in any way impair existing rights or obligations unless such a construction appears clearly from the language used or arises by necessary implication. For instance, where it is expressly retrospective, or deals with past events, or concerns a matter of procedure, practice or evidence. The supposition is that the legislature intends to deal only with future events and ^η circumstances”.

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Malaba JA

Lastly, in *Nkomo & Anor v Attorney-General & Ors* 1993 (2) ZLR 422 (S) ^A Gubbay CJ at 429C said:

“Care must always be taken to ensure that retrospectivity is confined to the exact extent which the section of the Act provides.”

In holding that s 47(5) expressed as being the clear intention of the legislature that the retrospective effect of the new s 97(3) of the principal Act 17 was to ^B take away the right vested in the appellant at the time of its promulgation not to reinstate the respondents pending determination the of appeal the court *a quo* overlooked the structure of s 97 of the principal Act.

Section 97(1) was a separate provision from s 97(3). Its provisions gave a person aggrieved by a determination or decision of a disciplinary body the right to appeal to the Tribunal. The new section 97(1) of the principal Act also gave a similar right in respect of appeals to the Labour Court. Except for the body ^C to which the appeal lay, there was no difference in the substance of the right created by s 97(1) to the extent that in s 47(5) of Act 17 the legislature provided that appeals which were pending before the Tribunal on the date of the commencement of Act 17 were to be deemed to have been commenced in ^D terms of the appropriate provisions of the principal Act as amended. The only appropriate provision of the principal Act as amended in terms of which the appeal pending before the Tribunal could be deemed to have been commenced before the Labour Court was s 97(1).

Section 97(3) of the principal Act before and after the amendment did not deal with commencement of proceedings or the noting of appeals to the Tribunal. ^E

Section 97(3) of the principal Act, before it was amended, gave the appellant a clear right not to reinstate the respondents in their employment pending determination of the appeal. In my view, s 47(5) which dealt with the commencement of proceedings or the noting of appeals in terms of s 97(1), was not intended to affect the rights vested in the appellant in terms of s 97(3) of ^F the principal Act at the time of the commencement of Act 17. An obligation was now imposed on an appellant to act in accordance with the requirements of the determination or decision appealed against pending determination of the appeal.

One cannot construe the provisions of s 97(3) dealing with substantive rights and obligations of an appellant as the “appropriate provisions of the principal ^G Act as amended” by Act 17 in terms of which proceedings pending before the Tribunal at the commencement of Act 17 were to be deemed to have been commenced. The language of s 47(5) of Act 17 does not support the contention that it was the intention of the Legislature to have the retrospective effect of s 97(3) of the principal Act as amended take away the right vested in the ^H

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Malaba JA

^A appellant not to reinstate the respondents pending determination of the appeal.

On the question of costs, Mr *Mamvura* conceded that each party pay its own costs.

The appeal is allowed. It is ordered that the decision of the Labour Court dated ^B 24 October 2003, be and is hereby set aside and substituted with the following order:

“The application is dismissed, with each party paying its own costs.”

SANDURA JA and GWAUNZA JA concurred.

^C *Scanlen & Holderness*, appellant’s legal practitioners

^D *Tizirai-Chapwanya & Mabukwa*, respondents’ legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/GASELA v CONSTITUENCY ELECTIONS OFFICER, GWERU RURAL CONSTITUENCY & ORS 2005 (2) ZLR 240 (S)

GASELA v CONSTITUENCY ELECTIONS OFFICER, GWERU RURAL CONSTITUENCY & ORS 2005 (2) ZLR 240 (S)

2005 (2) ZLR p240

Citation	2005 (2) ZLR 240 (S)
Case No	Judgment No.S-54-05
Court	Supreme Court, Harare
Judge	Chidyausiku CJ
Heard	2 June 2005
Judgment	11 October 2005
Counsel	<i>E T Matinenga</i> , for the applicant <i>G Chikumbirike</i> , for the respondents
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Appeal — costs — appeal against order of — when appeal court may interfere with lower court's discretion — need for leave to appeal against order of costs — effect of failure to seek leave

Costs — appeal — against order of costs — need for leave of court a quo to D appeal against order

Costs — order of — discretionary nature of — when order may be interfered with on appeal — appeal court may only interfere in event of misdirection by the court a quo or if the order is such that no reasonable court could have made it E

Headnote

In terms of s 43 of the High Court Act [*Chapter 7:06*], the issue of costs is a matter for the discretion of the court. The Supreme Court can only interfere with the exercise of such discretion if there has been misdirection or the order is so unreasonable that no reasonable court, applying its mind to the facts of the case, could have made such an order.

The applicant sought leave from the Supreme Court for an extension of time G within which to note an appeal against an order of costs in the High Court. He had not sought leave from the High Court to note such an appeal as is required in terms of s 43(2)(c) of the High Court Act.

Held, that the applicant should have first applied for leave to note an appeal from the High Court against the order of costs. Once such leave had been G either granted or refused by the court a quo, then the applicant could approach a judge of the Supreme Court for an extension of time. If leave to appeal has been refused, then the applicant could approach the Supreme Court for: (a) the granting of such leave; and (b) for extension of time within which to note an appeal. H

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Chidyausiku CJ

A *Held*, further, dismissing the application, that the failure of the applicant first to seek leave of the High Court before approaching the Supreme Court was a fatal irregularity.

Legislation considered

B High Court Act [*Chapter 7:06*], s 43(2)

Case information

E T Matinenga, for the applicant

G Chikumbirirke, for the respondents

Judgment

This is an application for an extension of time to appeal. The application is headed "court application for extension of time in which to appeal in terms of r 30 subrule 3". The notice reads:

"Take notice that the applicant intends to apply to the Supreme Court for an order in terms of the draft order annexed to this notice and that the accompanying affidavits and documents will be used to support the application."

o The draft order provides as follows:

"IT IS ORDERED:

1. That leave be and is hereby granted to the appellant to file an appeal against the order of the High Court made under case No. HC 495/2005 awarding costs in favour of the first, second and third respondents e on an attorney and client scale.
2. That such notice of appeal be filed with the Registrar of this Honourable Court within 7 days of the date of this order.
3. That respondents should pay the costs of this application only if they oppose it."

f The application was opposed. The applicant avers that he was unable to note an appeal on time because of the delay in the handing down of the reasons for judgment. The reasons for judgment were handed down some time after the judgment. The applicant submitted that the appeal has prospects of success. The applicant's grounds of appeal are:

- "1. The court *a quo* erred in law in concluding that the procedural flaws g in the application were of such a nature as to warrant an award of costs on a punitive scale.
- 2 The court *a quo* erred in considering the scale of costs in not lending weight to the fact that the reason the appellant proceeded by way of h an urgent application was that the appellant wanted the matter

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Chidyausiku CJ

determined before the holding of a parliamentary election which was a only a week away and to that extent the matter was urgent.

3. The court *a quo* erred in considering costs by ignoring the fact that the period between 18 February 2005 and 18 March 2005 when the urgent application was filed was only a month during which appellant had sought legal advice before deciding to approach the court and therefore could not be said to have waited until the last minute before b approaching the court.
4. The court *a quo* should have found it a factor in favour of the appellant when considering costs, that the contents of the application met all the requirements of the High Court Rules dealing with review applications *but for* the fact that it was an urgent chamber application.
5. The court *a quo* should have given due weight, in determining the c scale of costs, to the fact that the issues raised in the application against the third respondent's nomination were meritable and, if considered by the court, would have led to the disqualification of the third respondent from contesting the election.

RELIEF SOUGHT

The appellant prays that this Honourable Court sets aside the order of the d court *a quo* awarding costs against appellant on an attorney and client scale and substitute the following order:

'Accordingly, the application is dismissed with costs on an ordinary scale'."

The respondents opposed the application on the grounds that the appeal has e no prospects of success. It is quite clear on the papers that the applicant is not appealing against the entire judgment but against the order as to costs on the attorney and client scale. The applicant contends costs should have been on the ordinary scale.

The issue therefore is whether this was a proper case for the awarding of costs f on the attorney and client scale. The reason for awarding costs at an attorney and client scale was that the application was riddled with procedural flaws and was an abuse of court process. The court also held that the urgency of the matter was created by the applicant's failure to act timeously and that the matter should not have been brought to court on an urgent basis.

A perusal of the record clearly establishes that this matter was handled most ^g ineptly particularly by the legal practitioners for the applicant. The conclusion of the court *a quo* in this regard cannot be faulted. Even this application is characterized by ineptitude and incompetence. ^h

2005 (2) ZLR p243

Chidyausiku CJ

^a Firstly, this application states that it is being made in terms of ^r 30 subrule 3. There is no indication as to whether this is ^r 30 subrule 3 of the High Court or Supreme Court Rules. The court expects such indication for the purposes of clarity. The rule cited is the wrong rule. There is no ^r 30 subrule 3 of the High Court Rules. Rule 30 of the Supreme Court Rules does not have subrule 3. It is ^r 31 subrule 3 of the Supreme Court Rules that deals with applications for ^b an extension of time to appeal. It would appear this is the rule that the applicant must have intended to cite or should have cited.

Secondly, this application does not comply with s 43(2)(c)(ii) of the High Court Act [*Chapter 7:06*] which provides:

"43(2) No appeal shall lie – c

(a) ...

(b) ...

(c) from –

(i) ...

(ii) an order as to costs only which by law is left to the discretion of ^d the court, without the leave of the High Court or of the judge who made the order or, if that has been refused, without the leave of a judge of the Supreme Court."

It is clear from s 43 of the High Court Act that an appeal against an order of costs has to be with the leave of the court *a quo*. In the event of such leave being refused only then can application be made to this court. *In casu*, no such ^e leave was applied for and, therefore, such leave was neither granted nor refused. The applicant is seeking, in this application, an extension of time to note an appeal in respect of which he has no leave. Such leave is required in terms of the Act. The applicant should have first applied for leave to note an appeal against the order of costs. Once such leave has been granted by the ^f court *a quo* or such leave has been refused by the court, then the applicant can approach a judge of the Supreme Court for an extension of time. If leave to appeal has been refused then the applicant can approach this court for: (a) the granting of such leave and; (b) for the extension of time within which to note an appeal. The failure by the applicant to first seek the leave of the court *a quo* before approaching this court is a fatal irregularity and on that ground ^g alone this application cannot succeed.

Apart from this, the prospects of success on the merits are virtually non-existent. The issue of costs is a matter for the discretion of the court *a quo*: see s 43 of the High Court Act. This court can only interfere with the exercise of such a discretion if there has been a misdirection or the order is so ^h unreasonable that no reasonable court applying its mind to the facts of the

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Chidyausiku CJ

case could have made such an order. A perusal of the judgment of the court *a quo* reveals no misdirection nor can the order be said to be unreasonable let alone grossly unreasonable. Thus, even if the application were properly before me it was bound to fail on the ground that there were no prospects of success.

In the result and for the foregoing reasons, the application is dismissed with ^b costs.

Coghlan & Welsh, appellant's legal practitioners

Chikimbirike & Associates, respondents' legal practitioners ^c

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/IMPERIAL ASSET MANAGEMENT (PVT) LTD v KUIPA NO & ORS 2005 (2) ZLR 245 (H)

IMPERIAL ASSET MANAGEMENT (PVT) LTD v KUIPA NO & ORS 2005 (2) ZLR 245 (H)**2005 (2) ZLR p245**

Citation	2005 (2) ZLR 245 (H)
Case No	Judgment No. HH-95-05
Court	High Court, Harare
Judge	Gowora J
Heard	11 October 2005
Judgment	11 October 2005
Counsel	<i>M Sinyoro</i> , for the appellant <i>F Mutamangira</i> , for the first respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

c Bank — bank placed under curatorship — legal proceedings against — restrictions on right to bring such proceedings — interlocutory application brought by party against whom curator had instituted proceedings — right of party to bring such application

Practice and procedure — application — against banking institution placed under curatorship — suit brought by curator of banking institution — right of defendant to defend himself and to bring interlocutory application arising from suit

Headnote

The first respondent was curator of a bank which had been placed under curatorship in terms of s 53 of the Banking Act [*Chapter 24:20*]. The ^ε curator obtained default judgment against the applicant and a writ of execution was issued. The applicant sought an urgent stay of execution. The first respondent opposed the application, on the grounds that: (1) the applicant was not entitled to institute legal proceedings against the first respondent without first having sought and obtained the leave of the court in terms of s 54(2) of the Banking Act; and (2) the application ^τ was premised on an application for rescission of judgment by the applicant which was filed out of the time limits provided for in r 63 of the High Court Rules. The applicant argued that the matter was an interlocutory one and that to give effect to s 54(2) of the Banking Act in the manner contended for by the first respondent would lead to a result which was ^ς absurd and which could not have been by the intention of the legislature. As the matter was an interlocutory one which would not determine the main dispute but was incidental thereto, it fell outside the ambit of "all legal proceedings" or "legal process" as contemplated by s 54(2) of the ^η Banking Act.

2005 (2) ZLR p246

Held, that the purpose of s 54 of the Banking Act was to guard and protect ^α the banking institution and to preserve the assets for the benefit of the creditors and depositors. The aim was to suspend all litigation against the banking institution that would result in the depletion of the assets of the institution and thus prejudice the depositors and creditors. It was also intended to protect the institution from frivolous and vexatious ^β suits. It is only to those litigants with suits

that appear to the court to be well founded that leave is granted to pursue their claims against the institution.

Held, further, that it was not the purpose of the section to prevent those litigants against whom the banking institution has mounted legal suits from being able to exercise their right to defend the suits or litigation *c* brought against them. Such an interpretation would lead to absurdity and unreasonableness. It would also lead to injustice as, in order to exercise his right to a fair trial, a litigant would have limitations set upon him which are prejudicial, by being required to obtain leave at additional expense to be heard in a legal wrangle started by the financial institution. It could not have been the intention of the legislature to thus fetter a *D* person's right to a fair trial. It could also not have been the intention of the legislature to take away a procedural right vested in a litigant to defend himself against a suit brought by another. Where, as here, the court is dealing with procedure rather substantive law, it is better to avoid the strictly logical path in favour of a pragmatic or expedient interpretation, *E* if that is at all possible.

Held, further, that in interlocutory proceedings deriving from proceedings instituted by the banking institution, it is not necessary that leave be obtained from the High Court before such interlocutory proceedings are embarked on.

Held, further, that, on the merits, it was not clear whether the application for *F* rescission was out of time or not, but this would not prevent the present application being heard.

Cases cited

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

Transvaal Investment Co v Springs Municipality 1922 AD 337 *G*

Venter v Rex 1907 TS 910

2005 (2) ZLR p247

Gowora J

Legislation considered ^A

Banking Act [*Chapter 24:20*], s 54(2)

Case information

M Sinyoro, for the appellant

F Mutamangira, for the first respondent

Judgment

^B **GOWORA J:** The first respondent is *the* curator for CFX Bank Ltd. On 1 June 2005, this court granted an order in default of appearance by the applicant, in favour of the first respondent, for the due payment by the applicant of an amount of \$2 944 000 000 to the first respondent. On 3 June 2005, the Registrar of this court issued out a writ of execution against the applicant and consequent thereto certain items belonging to the applicant were attached in *c* execution. A sale in execution in respect of the attached items was scheduled for 8 July and 6 August 2005. On 19 July, the applicant filed this application on a certificate of urgency seeking an order for the stay of the sales in execution pending the determination of an application for the rescission of the judgment of 1 June 2005. The application for rescission had been filed on 7 July 2005 *D* under case No. HC 3301/05. The first respondent, whom I shall refer to as the "respondent" hereinafter, has filed an opposing affidavit in which he was content to rely on two points *in limine*. The first contention by the respondent is to the effect that firstly the applicant was not entitled to institute legal proceedings against him without first having sought and obtained the leave of this court as provided for in terms of s 54(2) of the Banking Act [*Chapter E 24:20*] ("the Act"). The respondent contends that the absence of such leave means that the application is before me improperly and it should therefore be dismissed with costs. On the second point *in limine*, it is the contention of the respondent that the application for stay of execution was premised on the application for rescission of judgment by the applicant. The respondent contends that the application was filed out of the time limits provided for in *F* r 63 of the High Court Rules. The application, the respondent contends, should have been filed within 30 days from the date that the applicant had knowledge of the judgment. In the instant case,

the applicant only filed the application for rescission on 7 July 2005 and had not applied for condonation for its failure to abide by the rules. In the event, further contends the respondent, the ^g application was doomed to fail and the application for a stay of execution should therefore, be dismissed with costs.

After hearing submissions from counsel on the matter I was constrained to request counsel to submit further written submissions on the interpretation to be placed on s 54(2) of the Act. I am indebted to both counsel for the ^h extensive research they undertook in answer to my request.

2005 (2) ZLR p248

Gowora J

Section 54(2) of the Act provides as follows: ^a

- “(2) With effect from the date on which a direction under section *fifty-three* was issued –
- (a) all legal proceedings and the execution of all writs, summonses and other legal process shall be stayed and not be instituted or proceeded with unless the High Court has granted leave; and ^b
 - (b) the operation of set-off in respect of any amount owed by a creditor to the banking institution shall be suspended.”

The contentious issue before me is whether or not the applicant is entitled to approach this court for an order staying execution of a judgment obtained against him by the respondent.

In the construction of a statute, courts are obliged to give effect to the ^c intention of the legislature. Where the words of the statute are clear and unambiguous, then words and phrases are to be given their ordinary grammatical meaning. The difficulty in construing a statute will arise where the words are themselves ambiguous or capable of more than one meaning. The contention by the respondent is that the words are clear and unambiguous and that ^d therefore this court should interpret the section in such a manner as to give effect to the words in their ordinary meaning. It is further argued by the respondent that the interpretation of a statute is not so much about avoiding what may be construed as absurdities, it is first and foremost to discover the true intention of Parliament, however absurd. The applicant is of the view that to give effect to the section in the manner in which it is phrased would lead ^e to a result which is absurd, which, as far as the applicant is concerned, could not have been the intention of the legislature.

However, the intention of the legislature is not always easy to glean, even when the words appear clear and unambiguous, as stated by Innes CJ in *Venter v Rex* 1907 TS 910 at 913, as follows: ^f

“By far the most important rule to guide courts in arriving at that intention, is to take the language of the instrument of the relevant portion of the instrument, as a whole; and when the words are clear and unambiguous, to place upon them their grammatical construction and give them their ordinary effect. But it is universally recognized that though this is what some judges call a golden rule, it is subject to certain exceptions. These ^g arise from the difficulty: a difficulty inherent in the nature of language – that no matter how carefully words are chosen there is a difficulty in selecting language which, while on the face of it expressing generally the idea of the framer of the measure, will not when applied under certain circumstances, go beyond it, and when applied under other circumstances, fall short of it.” ^h

2005 (2) ZLR p249

Gowora J

^a Later on at 914, the learned Chief Justice stated:

“That being so, it appears to me that the principle we should adopt may be expressed somewhat in this way-that when to give effect to the plain words of a statute their ordinary meaning would lead to an absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, ^b as shown by the context or such other considerations as the court is justified in taking into account, the court may depart from the ordinary effect of the words to the extent necessary to give effect to the true intention of the legislature.”

Where the words are plain and unambiguous and admit of only one meaning, the task of the court is made much easier. When, however, the words are not ^c clear, then the intention of the legislature becomes difficult to deduce. Words are not to be construed contrary to their meaning. The duty of the court is to expound the law as it stands and to leave the remedy to others.

That the application before me is an interlocutory application is not in dispute. It is therefore not a stand alone legal process instituted by the applicant ^d against the respondent. It is *in casu* an application which is incidental to the main issue. Its disposition by me will not resolve the main

dispute between the parties. The applicant, in seeking the order on the papers before me, is concerned with defending the claim brought against it by the respondent and it is in this connection that the applicant contends that the section is inapplicable. In the view of the applicant, the nature of the application, that ^ε it is an interlocutory one which will not determine the main dispute but is incidental thereto, renders it outside the ambit of "all legal proceedings" or "legal processes" and "other legal process" as contemplated by the provisions of s 54(2) of the Act. The applicant therefore seriously disputes the correctness of the interpretation placed on the section by the respondent that there is need for the applicant to have obtained the leave of this court to launch this ^η application and that the lack of leave has rendered the application still-born.

The applicant has invited the court, in order to arrive at the true intention of the legislature, to harness the tenets of the mischief rule and as a result cure some of the absurdities arising from a literal construction of the section in question. I believe that, in enacting s 54 of the Act, the intention of the ^θ legislature was to guard and protect the banking institution and to preserve the assets for the benefit of the creditors and depositors. The aim is to suspend all litigation against the banking institution that would result in the depletion of the assets of the institution and thus prejudice the depositors and creditors, and in this regard it is worthy of note that not only are proceedings stayed, ^η but the execution of all writs and summonses are likewise stayed. It is also

2005 (2) ZLR p250

Gowora J

intended, I believe, to protect the institution from frivolous and vexatious suits ^α and it is only those litigants with suits that appear to the court to be well founded that leave is granted by the court to pursue their claim against the institution. The mandate of the curator is to turn the banking institution into a successful concern. Was it, therefore, in seeking to promote this noble and worthwhile objective, the intention of the legislature in promulgating the ^β section, to prevent those litigants, against whom the banking institution has mounted legal suits, from being able to exercise their right to defend the suits or litigation brought against them. In other words, are the rights of those litigants brought to court by the banking institution suspended by reason of s 54(2) of the Act? Are parties denied their right to be heard by the promulgation of the section? ^γ

According to the respondent, the words "all proceedings" cover any proceedings of whatever nature, whether such proceedings are of an interlocutory nature or otherwise. The applicant would therefore not be entitled, even in this case, to mount an application for the setting aside of a default judgment or to stay execution against its property unless and until leave of the High Court to institute the proceedings concerned has been ^δ obtained. If this court were to accept the very restricted interpretation placed on the section by the respondent, it would result in a situation where the banking institution could embark on legal proceedings against all and sundry and, in the event that any of the persons thus dragged before the court by it sought to obtain relief from court directly arising from such suit, the litigant ^ε would be hampered in the prosecution of its case by the requirement first to seek leave for such process. This interpretation would not only lead to absurdity but also to unreasonableness and it is not, in my view, the intention of the legislature to cause absurdity or unreasonableness. In *S v Kachipare* 1998 (2) ZLR 271 (S) at 283C-E, McNally JA in interpreting a section in the Criminal Procedure and Evidence Act [*Chapter 9:07*], had this to say: ^φ

"I take the view that one is entitled to look closely at the wording of the section in order to find an interpretation which achieves sense rather than nonsense, justice rather than injustice, in the application of the section in a situation almost certainly not contemplated by the legislature. This must be especially so in a statute which deals with procedure rather than with substantive law: see e.g. *Cross Statutory Interpretation* 2 ed p 168; ^θ *Bennion Statutory Interpretation* p 259 r 117 and p 336 r 141 (and see also rr 120, 122, 127, 128, 137, 140 and 321); Maxwell on the *Interpretation of Statutes* 12 ed p208). See also the remarks of Griffiths LJ in *R v Deputy Governor of Camphill Prison, ex p King* [1984] 3 All ER 897 at 903:

'The common law of England is not always developed on strictly logical lines, and where logic leads down a path that is beset with practical ^η

2005 (2) ZLR p251

Gowora J

A difficulties the courts have not always been frightened to turn aside and seek the pragmatic solution that will best serve the needs of society.'

Where, as here, we are dealing with procedure rather than substantive law, I would prefer to avoid the strictly logical path in favour of a pragmatic or expedient interpretation, if that is at all possible."

If I follow the strictly logical interpretation of s 54(2), it would lead to a situation ^B where the applicant in this case would not be in a position to apply for a rescission of the default judgment obtained against it by the respondent or to obtain a stay of execution against such judgment until and unless the High Court has given leave for such application for rescission and stay. It would, in the words of McNally JA, make nonsense of the Act in question. It would ^C also lead to absurdity and an injustice in the sense that, in order to exercise his right to a fair trial, a litigant has limitations set upon him which are prejudicial. The litigant is thus required to obtain leave, at additional expense, to be heard in a legal wrangle started by the financial institution. It could not have been the intention of the legislature to thus fetter a person's right to a fair trial. It can also not have been the intention of the legislature to take away ^D a procedural right vested in a litigant to defend himself against a suit brought by another. The right to apply for rescission of judgment and stay of execution of such judgment are fundamental rights enshrined in natural justice and in particular the *audi alteram partem* rule, the right to be heard.

In *Transvaal Investment Co v Springs Municipality* 1922 AD 337 at 347, ^E Solomon JA said:

"It is a well-established rule in the construction of statutes that where an Act is capable of two interpretations, one should be preferred which does not take away existing rights, unless it is plain that such was the intention of the legislature."

I prefer, therefore, in this case to give an interpretation of the section that ^F would result in justice being given effect to. The legislature has not expressly taken away a party's right to institute proceedings to set aside judgments obtained in default or in error and, in the absence of a clear indication to that by Parliament, I am unwilling to so construe the section. In my view, in interlocutory proceedings of this nature derived from proceedings instituted by the banking institution, it is not necessary that leave be obtained from the ^G High Court before such interlocutory proceedings are embarked on.

I turn now to the merits of the application before me. The respondent obtained a judgment in default against the applicant on 1 June 2005 in the sum of \$2 944 000 000. On 7 July 2005, the applicant filed under case No.HC 3301/05 an application to have the judgment rescinded. The application for rescission of ^H judgment is yet to be set down by this court. Pursuant to the judgment the

2005 (2) ZLR p252

Gowora J

respondent had issued out this court a writ of execution and as a result a ^A number of assets belonging to the applicant were attached. The assets were then advertised for sale by public auction, prompting the applicant to launch these proceedings. The applicant contends that it has prospects of success on the application for rescission and that if the application to stay execution is not granted, it stands to suffer irreparable harm. It claims that it does not owe ^B the banking institution any money as it liquidated the Treasury Bills Security after CFX Bank had made default in paying to the applicant its investment with the same. The applicant further contends that it had entered into negotiations with the respondent for an out of court settlement and had received assurances from the respondent that he would not proceed with litigation. To the surprise of the applicant, the respondent then obtained judgment without notification ^C and attached and removed its goods without notice.

The respondent has not sought to defend the matter on its merits but has raised another point *in limine*, that the application for rescission of the default judgment, upon which application the application before me is premised, was filed out of time. The effect of the delay in filing meant that the applicant was ^D time barred, making this application a non-event.

In terms of r 63 of the High Court Rules, a party is presumed to have had knowledge of a judgment granted in default two days after such judgment has been granted. Rule 63 also provides that an application for rescission of a judgment granted in default shall be filed within 30 days from the day that the party applying for rescission had knowledge of the judgment. It is common ^E cause that the applicant had knowledge of the judgment on 7 June 2005, when its vehicles and other goods were attached and removed. The application for rescission was filed on 7 July 2005. The applicant contends that the application was filed within the period contemplated by the rules. The application for rescission is not before me and, whilst I can take note of the time limits within which the application ought to have been filed, I cannot in this judgment make ^F a finding as to whether or not the applicant is time barred. The issue before the court hearing the application will depend on the

interpretation of what is meant by the 30 day period referred to in the Rules and I cannot at this stage make a determination on whether the interpretation placed on it by any of the parties is correct or not. In any event, the fact that at the present there is no ^g application for condonation by the applicant for the late filing of the application does not necessarily put the applicant out of court. That is an option open to it should it find it necessary and expedient to do so. I am, therefore, not persuaded that the applicant is time barred in so far as the application for rescission is concerned. ^h

2005 (2) ZLR p253

Gowora J

^a The respondent argues that the matter is not urgent, that the execution against the applicant's goods was effected on 7 June 2005 and that the applicant actually assisted in the execution of the order by surrendering certain vehicles. The respondent submits further that the applicant undertook to have settled the matter within 14 days from the date of execution, failing which the execution process would proceed.

^b The applicant has attached to its papers certain correspondence entered into between the parties' legal practitioners regarding the settlement. Regard was also had to the application for rescission of judgment. I note that the application in terms of which the judgment in default was granted was received by the applicant on 5 May 2005 and that on 6 May a meeting was arranged at ^c the instance of the applicant to arrange an amicable settlement of the dispute by the parties. On 9 May 2005, the applicant dispatched a facsimile to the respondent's legal practitioners making certain proposals for settlement. Judgment was obtained thereafter and further correspondence towards a settlement ensued. What emerges from the letters themselves is an indication by the applicant that it was pursuing the application for rescission of judgment ^d and wished for execution to be stayed whilst the parties attempted to reach a negotiated settlement. The applicant also sought assurances from the respondent that he would not proceed with execution pending the negotiations. It is also clear that proposals made to the curator were not responded to, in fact they were met with silence. I am unable to say on these papers that the urgency is self created. The applicant did not sit on its rights until the eleventh ^e hour. It engaged the respondent in dialogue right from the first moment and did not intend to apply for a stay of execution unless driven to it. In the circumstances of this case, I am unable to state that there is no urgency to the application.

The respondent did not choose to oppose the application on the merits and, ^f as the points *in limine* raised by him have not succeeded, it is only proper that the application for stay of execution be granted.

In the result, the provisional order sought by the applicant be and is hereby issued.

^g *Sinyoro & Company*, tppllicant's legal practitioners

Mutamangira & Associates, first respondent's legal practitioners

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Source:

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FIRST FACTORING CO OF ZIMBABWE v SIBANDA 2005 (2) ZLR 255 (H)

2005 (2) ZLR p254

Citation	2005 (2) ZLR 255 (H)
Case No	Judgment No. HB-101-05
Court	High Court, Bulawayo
Judge	Cheda J

Heard	13 October 2005
Judgment	13 October 2005
Counsel	<i>C Dube</i> , for the applicant <i>T Ndhlovu</i> , for the respondent
Case Type	Application for stay of execution
Annotations	No case annotations to date

Flynote

Practice and procedure — notice to defend — defective — when may be removed from record — correct procedure to follow — effect of failure to do so — stay of execution granted *C*

Headnote

The first defendant obtained summary judgment against the applicant. When it sued on the debt, the applicant entered appearance to defend, but this appearance was defective. The first respondent asked the Registrar to remove the notice from the record and when this was done obtained summary judgment. Pending an application for rescission of that judgment, *D* the applicant sought a stay of execution.

Held, that the removal of the notice of appearance to defend was unlawful as it was not done in accordance with the rules of court; the Registrar should not have removed the notice of appearance to defend on the instruction of the first respondent's legal practitioners. Once the *E* appearance to defend has been filed, it forms part of the record and it may not be removed or destroyed without the authority of the court or a judge. It may not be removed on the mere instructions of and/or request to the Registrar by the offended party. The court could not ignore the procedural irregularity adopted by the first respondent in obtaining the summary judgment. This irregularity justified the stay of execution pending the *F* outcome of the applicant's application for a rescission of judgment.

Cases referred to

Banda v Pitluk 1993 (2) ZLR 60 (H)

Case information

C Dube, for the applicant *G*

T Ndhlovu, for the respondent

Judgment

CHEDA J: The applicant filed an application for a stay of execution pending the outcome of its application for a rescission of judgment in case No. HC 1258/05. *H*

2005 (2) ZLR p255

Cheda J

A The brief facts are that the applicant and the first respondent entered into a commercial transaction in which the respondent invested \$50 million into the applicant's company. At the maturity of that investment, the applicant failed to pay back to the respondent his investment, which, together with interest, now amounts to \$103 668 623.73. Summons was issued against the applicant, who filed a notice of appearance to defend. The notice of the appearance to *B* defend was defective. This fact was pointed out to the applicant's erstwhile legal practitioner, basically calling upon it to rectify the anomaly, which it failed to do. As a result of that failure, the respondent then

asked the assistant registrar's office to expunge the notice of appearance to defend from the record which was done, and the respondent thereafter applied for and was granted summary judgment.

It is that judgment in respect of which the applicant applied for rescission in case No. HC 1645/05.

The applicant's argument is that the expunging of the notice of appearance to defend was unlawful as it was not done in accordance with the rules of this court. The Registrar should not have removed the notice of appearance to defend on the instruction of the respondent's legal practitioners. It is the applicant's submission that what should have been done for the respondent to apply to court for the removal of the notice. Mr *Dube's* argument therefore is that the procedure adopted was irregular. He further argued that the application for rescission of judgment should not have been made in the first place; the applicant should have invoked r 449(1). He referred the court to *Banda v Pitluk* 1993 (2) ZLR 60 (H). While I agree with him that this should have been the correct procedure, sight should not be lost of the fact that this application is for a stay of execution and not for rescission of judgment.

I will therefore determine it on the basis of the principles of a stay of execution. The fact that the notice of appearance to defend filed by applicant is defective admits of no doubt.

My view is that the court cannot ignore the procedural irregularity adopted by the respondent in obtaining the summary judgment. In my view, this cannot be ignored, because once the appearance to defend has been filed, it forms part of the record and it can not be removed or destroyed without the authority of the court or judge. In the event that it is defective, the respondent should apply for its removal before applying for a summary judgment. It cannot be removed on the mere instructions and/or request to the Registrar by the offended party.

The respondent is in possession of a writ which entitles him to an execution. Execution entitles the judgment creditor to finalise its claim against the

2005 (2) ZLR p256

Cheda J

judgment debtor. This is the logical process in litigation of this nature. In certain circumstances, however, the judgment creditor's right to execution can be stayed pending the outcome of a certain event. The rationale of the stay is to prevent irreparable harm being done to a judgment debtor in the event of an execution. These courts have a discretion in allowing such a stay of execution. That discretion must be judiciously exercised. Good cause must be shown in order to convince the court to stay its own order, as there will be two competing interests, namely, those of the judgment creditor on one hand, and those of the judgment debtor, on the other.

In casu, the first respondent obtained summary judgment after he had caused the irregular removal of the notice of an appearance to defend from the court record. This irregularity, in my view, justifies the stay of execution pending the outcome of applicant's application for a rescission of judgment.

In light of the above, it is ordered that:

1. The respondent be and is hereby interdicted from executing the default judgment granted on 9 August 2005 under cover of case No. HC 1258/05; and if the attached vehicles have already been removed they be released to the applicant pending the finalisation of the said matter.
2. The applicant be and is hereby ordered to maintain the vehicles in good shape and order and not to dispose of them until the finalisation of this matter.
3. Costs of this application be costs in the cause.

Dube & Partners, applicant's legal practitioners

Cheda & Partners, respondent's legal practitioners

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/MABUTO v BHILA 2005 (2) ZLR 257 (H)

MABUTO v BHILA 2005 (2) ZLR 257 (H)**2005 (2) ZLR p257**

Citation	2005 (2) ZLR 257 (H)
Case No	Judgment No. HB-108-05
Court	High Court, Bulawayo
Judge	Cheda J & Ndou J
Heard	20 October 2005
Judgment	20 October 2005
Counsel	<i>O Moyo</i> , for the appellant <i>J Dlamini</i> for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

c Court — judicial officer — duties — unrepresented female litigant — obliged to assist to enforce rights

Customary law — application — determination — court must apply criteria set down in Customary Law and Local Courts Act [Chapter 7:05]

Customary law — marriage — unregistered — dissolution — distribution of matrimonial estate — general law to be applied if necessary to achieve justice

Headnote

The couple were dissolving an unregistered customary law marriage, and a property distribution had been made under customary law in the community court. The wife was dissatisfied with the outcome and ^ε appealed to the High Court. It appeared that during the hearing in the lower court, as an unrepresented litigant, she had not pursued her case effectively even though prior to the court appearance she had demonstrated determination to obtain her rights. In her appeal she was now represented and argued that a community court had no jurisdiction to hear the matter, as matrimonial assets can only be distributed under ^ϕ general law.

Held, that the court *a quo* erred in not following the requirements of s 3 of the Customary Law and Local Courts Act [Chapter 7:05] to determine whether customary or general law should apply. In this case the parties had not expressly chosen customary law and they demonstrated an urbanized life style, hence they should be governed by general law. ^g Application of customary law had resulted in injustice and in such a case general law should be applied.

Held, further, that an unrepresented female litigant is in a vulnerable position due to cultural beliefs in male dominance, and the courts must assist them ^h in enforcing their proprietary and other rights.

2005 (2) ZLR p258

Cheda J

Cases cited ^A

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

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

Legislation considered

Customary Law and Local Courts Act [*Chapter 7:05*], s 3 ^B

Case information

O Moyo, for the appellant

J Dlamini for the respondent

Judgment

CHEDA J: This is an appeal against the decision of the Community Court regarding the distributing of property upon the dissolution of an unregistered customary law union.

The parties were married under customary law since 1981, and the union was blessed with three children. The respondent issued summons against appellant which she opposed. However, on the day of hearing, according to the record she had no questions to put to the respondent as she merely said: ^D

“I have no cross examination. I agree the applicant bought all the property alone. I did not contribute anything towards the purchase of the property.”

The respondent offered her some property as he stated that, despite the fact that she did not contribute anything towards the acquisition of the matrimonial assets, he was offering her certain property as the mother of his children. ^E

Mr *Moyo*, on behalf of the appellant, has argued that the court *a quo* had no jurisdiction to hear this matter under customary law as the said assets can only be distributed under general law.

The respondent, however, argued that since the parties had an unregistered customary law union, the court *a quo* had jurisdiction to deal with this matter. ^F His reasoning is that such assets are not matrimonial assets but parties’ assets.

The question, in my view is whether or not the court *a quo* had jurisdiction to hear this case. The fact that the parties had an unregistered customary law union admits of no doubt. The next enquiry then, is under what circumstances does customary law apply in a civil case in relation to customary law unions. ^G Guidance is found in s 3 of the Customary Law and Local Courts Act [*Chapter 7:05*] which states:

“3(1) Subject to this Act and any other enactment, unless the justice of the case otherwise requires – ^H

2005 (2) ZLR p259

Cheda J ^A

- (a) Customary law shall apply in any civil case where –
 - (i) the parties have expressly agreed that it should apply; or
 - (ii) regard being had to the nature of the case and surrounding circumstances, it appears that the parties have agreed that it should apply; or
 - (iii) regard being had to the nature of the case and surrounding ^B circumstances, it appears just and proper that it should apply;
- (b) ...”

Subsection 2 of the Act goes further to define what constitutes the “surrounding circumstances”. It reads:

“(2) For the purposes of paragraph (a) of subsection (1) –

^C ‘Surrounding circumstances’ in relation to a case, shall without limiting the expression, include –

- (a) the mode of life of the parties;
- (b) the subject matter of the case;
- (c) the understanding of the parties of both customary law and general ^D law of Zimbabwe, as the case may be, which apply to the case;
- (d) the relative closeness of the parties to customary law or general law of Zimbabwe as the case may be.”

There is no evidence in the record which indicates that the parties agreed that customary law should apply. The parties should make a choice and that choice and/or consent should be made expressly, and therefore it should appear on the record. *In casu*, this consent is clearly absent and the record does not even show the date when this matter was heard. The parties are urbanised and their life styles are completely different from those in the rural areas. This is evidenced by their acquisition and use of advanced electrical gadgets on a daily basis, a practice which does not obtain in the rural areas. The nature and surrounding circumstances therefore puts them in the category of an urban couple whose life style would be governed by general law.

In addition to the above, it is not clear why a litigant who had all along been putting up such a spirited fight would all of a sudden abandon this fight in court completely surrendering what she perceived to be her right to the respondent. The appellant had gone out of her way to file numerous affidavits in support of her claim. This shows that she had a strong conviction that she was entitled to some of the property. As an unrepresented litigant, the court should have made a further enquiry in order to establish whether she was freely abandoning her claim and that she was now electing to have her matter adjudicated upon in terms of the customary law. The vulnerability of an African woman because of the ever present male dominance as a result of

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Cheda J

deeply rooted cultural beliefs cannot be ignored. Therefore, in my view, our courts should always bear in mind that the docility of an African woman can easily be mistaken for a consent while, in fact, it is not, but merely an external manifestation of societal pressure. It is therefore necessary for the courts to assist them in enforcing their propriety and other rights.

It is my view, that the court *a quo* did not follow the requirements laid down in s 3 of the Act under discussion. As a result of such failure, the application of customary law has resulted in failure to attain justice. If the attainment of justice fails as a result of such misapplication of customary law, general law should apply: see *Matibiri v Kumire* 2000 (1) ZLR 492 (H) and *Mtuda v Ndudzo* 2000 (1) ZLR 710 (H).

I note that appellant has already sued under general law in case No. HC 1280/02. This matter is still pending.

Accordingly, this appeal succeeds and it is ordered that:

1. the order of the court *a quo* be and is hereby set aside;
2. there be absolution from the instance; and
3. there is no order for costs.

NDOU J concurred.

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MARVO STATIONERY MANUFACTURING (PVT) LTD v JOKWANI & ORS 2005 (2) ZLR 261 (S)
2005 (2) ZLR p261

Citation 2005 (2) ZLR 261 (S)

Case No S-47-05

Court Supreme Court, Bulawayo

Judge Chidyausiku CJ, Cheda JA and Ziyambi JA

Heard	23 July 2005
Judgment	24 October 2005
Counsel	<i>H Moyo</i> , for the appellant <i>A Muchadehama</i> , for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — *code of conduct — disciplinary proceedings under — code providing for dismissal for offence so serious as to amount to breach of employee's obligations — gambling on an isolated occasion — not such a breach — conduct constituting a criminal offence — not necessarily a breach of employee's obligations*

Headnote

The respondents who were former employees of the appellant had been charged with misconduct. It was alleged that they were among a group of employees who had been found gambling at the appellant's premises ^E during working hours. Section 3.8.1 of the code of conduct, which governed the respondents' employment, provided that discharge was the final sanction and should be applied "when the offence committed is of so serious a nature that it amounts to breach of, or repudiation of [an employee's] contractual obligations such as..." The section then went on to set out a number of examples of acts of misconduct. The list ^F was not exhaustive. Although the evidence suggested that the gambling which had taken place was an isolated occurrence, the respondents were discharged in terms of the code of conduct. They appealed successfully to the Labour Court which ordered their reinstatement, alternatively a payment of damages in respect of their wrongful discharge. Against this order of the Labour Court, the appellant appealed.

^G *Held*, that gambling at work during working hours is conduct which is in breach of an employee's contractual obligations. An employee is contracted to work, not to gamble during working hours. However, it was clear that not every breach of contractual obligation by an employee constituted a contravention of the code; a breach had to be of a serious ^H nature in order to constitute a contravention. Just as a short period of

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Chidyausiku CJ

absenteeism did not breach the code, so also would gambling on the odd ^A occasion not be serious and not covered.

Held, further, that, assuming gambling constituted a criminal offence, there was nothing in the language of the code to conclude that every conduct of an employee that is criminal constituted misconduct. It would only be criminal conduct which is of such a serious nature as to amount to a ^B breach of the employee's contractual obligation that would constitute a contravention of the code.

Held, further, that the appeal should be dismissed with costs as, on the papers, the gambling was not of such a serious nature. ^C

Case information

H Moyo, for the appellant

A Muchadehama, for the respondents

Judgment

CHIDYAUSIKU CJ: The respondents in this case are former employees of the appellant company. They were charged with misconduct. The allegation was that the respondents were amongst a group of employees that were found **d** gambling at the appellant's company premises during working hours.

A hearing was held in terms of the code of conduct on 3 December 1996. The respondents denied the charge but were found guilty and dismissed. After a series of sittings, further hearings and applications the respondents' appeal was finally heard by the Labour Court on 11 November 2003. The Labour Court held that the respondents had been unfairly dismissed and ordered that they **e** be reinstated with an alternative for payment of damages. It is against this decision that the appellant company now appeals to this court.

The learned President of the Labour Court allowed the appeal on the following basis:

"This act of misconduct is not specified in the respondent's code of **f** conduct namely the Collective Bargaining Agreement for the Printing Packaging and Newspaper Industry, SI 322 of 1993.

According to the dismissal letters served on the appellants dated 4 December 1996, the concession is made that neither the offence of gambling nor the penalty of dismissal is expressly provided for in the code. The respondent, however, dismissed the appellants for conduct **g** inconsistent with the fulfillment of the express conditions of their contract of employment.

A perusal of the said code of conduct shows that the act of misconduct for which the appellants were eventually dismissed is also not specified as an offence at all. This explains the difficulty encountered by the **h**

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Chidyausiku CJ

A respondent in trying to impose a penalty right from the initial hearings. At first, the initial hearing committee came up with a penalty of deducting eight hours off the appellant's tickets. Later, the penalty was changed to termination thereafter on appeal, the penalty was again changed to suspension for six weeks and then application for reemployment upon good behaviour by the appellants.

b A submission was made by **c** the respondent's legal practitioner that the respondent was empowered in terms of s 3.1.2 of the code to impose a heavier penalty where in its opinion the offence is of such a serious nature.

That may be so, but sight should not be lost of the fact that, that particular section relates to specified offences in the code and not where the code is silent about a particular offence. That Section therefore cannot assist the respondent."

The learned President of the Labour Court went on to conclude at p 3 of her judgment:

"So there being no definition of the actions by the appellants in the respondent's code of conduct, it was not proper for the respondent to charge them as such. There was no contravention of the code."

d The appellant appeals to this court on the following grounds:

- "1. It is respectfully submitted that the learned President erred in law in holding that since the act of gambling was not specified as an offence in the code of conduct, the respondents did not therefore commit an offence and could not be dismissed.
2. **e** It is further respectfully submitted on behalf of the appellant that the learned President erred in law in holding that the list of dismissable (*sic*) offences provided for in the code of conduct was exhaustive.
3. The preamble of s 3.8 of the code of conduct stated that discharge should be used when the offence committed is so serious a nature that it amounts to a breach of or repudiation of contractual obligations. **f** Examples of such offences are therefore listed. This list of offences is only given as examples but does not exclude any other offence of a serious nature as described in section 3.8
4. Gambling is a criminal offence according to the laws of Zimbabwe. The respondents did not deny that they were engaged in such conduct at the work premises during working hours (letters of **g** apology written by them were produced and are part of the record).
5. Such conduct is clearly inconsistent with the nature of their duties and is an offence of a serious nature warranting dismissal." (See the notice of appeal).

It would appear from the grounds of appeal that the issue that falls for **h** determination by this court is the correct interpretation of s 3.8.1 of the

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Chidyausiku CJ

Collective Bargaining Agreement: Printing, Packaging and Newspaper Industry A (Code of Conduct) SI 322 of 1993 (hereinafter referred to as "the code"). The relevant section of the code provides as follows:

"3.8.1 Discharge is the final sanction and should be used –

- (a) ...
- (b) ... B
- (c) when the offence committed is of so serious a nature that it amounts to a breach of, or repudiation of, his contractual obligations such as –
 - (i) willful and unlawful breach of company safety regulations or security regulations or any act of omission which intentionally endangers the health or safety of c others;
 - (ii) absence from work for five or more consecutive working days without prior approval and an unacceptable reason for such absence;
 - (iii) willful and unlawful damage to plant or company property D through negligence or any act or omission which is likely to cause damage to company property;"

Mr *Moyo*, for the appellant, submitted that notwithstanding the fact that the code does not specifically provide for gambling as an act of misconduct, it should be interpreted to include gambling. He argued that s 3.8.1(c) of the code merely gives examples of possible misconduct and that the list is not E exhaustive. The fact that gambling is not included in the list of examples given does not mean that it is specifically excluded.

I agree with Mr *Moyo*'s submission that the examples set out in paras (i), (ii) and (iii) of s 3.8.1(c) are not exhaustive examples. They are only examples and the fact that gambling is not specifically mentioned does not mean that F gambling at work does not constitute an act of misconduct in terms of the code, s 3.8.1(c) in particular.

I have no doubt in my mind that gambling at work during working hours is conduct which is in breach of the employee's contractual obligations. An employee is contracted to work and not to gamble during working hours. It is also clear from s 3.8.1(c) that it is not every breach of contractual obligation G by an employee that constitutes a contravention of the section. The breach has to be of a serious nature in order to constitute a contravention of s 3.8.1(c) of the code.

For instance, an employee who absents himself from work for one day or two days or three days or four days is clearly in breach of his contractual obligation H

2005 (2) ZLR p265

Chidyausiku CJ

A to the employer. Yet absence from work for a period of less than five days does not constitute a contravention of s 3.8.1(c) of the code. It is only absenteeism for a period of five days or more that constitutes a contravention of s 3.8.1(c) of the code.

As I have already said gambling during working hours is conduct that is inconsistent with an employee's contractual obligation. An employee is B contracted to work and not to gamble. However, for such gambling to be covered by s 3.8.1(c) of the code it has to be of a serious nature. Gambling on the odd occasion, as seems to be the case here, is not of a serious nature and is not covered by s 3.8.1(c) of the code. If it had been established that the gambling had been persistent in terms of frequency and for considerable C periods of time during working hours I would have had no hesitation in concluding that it is of a serious nature and amounts to misconduct in terms of s 3.8.1(c) of the code. Absenteeism from work for one day is not a contravention of s 3.8.1(c)(ii) of the code while absenteeism for five days is a contravention. By parity of reasoning gambling at work and during working hours on the odd occasion is not a contravention of s 3.8.1(c) while serious D and persistent gambling during working hours would amount to a contravention of the section.

In the present case, the respondents dispute that the gambling took place during working hours. Some of them suggest that the gambling took place during lunch hour. The evidence does not establish that the gambling was E serious. If anything the evidence establishes that it was a one-off occurrence.

It may well be that the respondents, by gambling, committed a criminal offence.

The appellant argued that commission of a criminal offence on the employer's premises constitutes misconduct in terms of s 3.8.1 of the code. I do not accept that there is substance in this submission. There is nothing in the language of s 3.8.1 of the code to justify the conclusion that

every conduct of an F employee that is criminal constitutes misconduct in terms of s 3.8.1 of the code as contended for by the appellant. It is only criminal conduct which is of such a serious nature as to amount to a breach of the employee's contractual obligation that constitutes a contravention of s 3.8.1 of the code.

In the result, I arrive at the same conclusion as the learned President of the G Labour Court, that the allegations against the respondents do not constitute a contravention of s 3.8.1 of the code, but for different reasons. I arrive at my conclusion on the basis that, although gambling during working hours is *prima facie* conduct that is in breach of an employee's contractual obligation, such a breach has to be of a serious nature before it can amount to a H contravention of s 3.8.1 of the code. The gambling revealed on the papers is

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Chidyausiku CJ

not of such a serious nature as would amount to a contravention of the code. A

For these reasons, the appeal is dismissed with costs.

CHEDA JA & ZIYAMBI JA concurred.

Joel Pincus Konson & Wolhuter, appellant's legal practitioners B

Mbidzo Muchadehama & Makoni, respondent's legal practitioners C

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MUSARIRA v ANGLO-AMERICAN CORPORATION 2005 (2) ZLR 267 (S)

2005 (2) ZLR p267

Citation	2005 (2) ZLR 267 (S)
Case No	Judgment No. S-53-05
Court	Supreme Court, Harare
Judge	Cheda JA, Malaba JA & Gwaunza JA
Heard	30 May 2005
Judgment	24 October 2005
Counsel	<i>L T Biti</i> , for the appellant <i>R M Fitches</i> , for the respondent
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

c Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 13(3) — right to legal representation — proceedings before domestic tribunal — no constitutional entitlement to legal representation*

Employment — *code of conduct — disciplinary proceedings under — bias — what must be shown for allegation of bias to succeed*

D Employment — *code of conduct — disciplinary proceedings under — right to legal representation — no absolute right — right depends on what is stated in the code*

Headnote

The appellant was first suspended and then dismissed by the respondent, his employer, on the grounds of misconduct. He appealed unsuccessfully ^ε to the respondent's appeals committee and then to the Labour Relations Tribunal. He then appealed to the Supreme Court and the respondent cross-appealed.

The court dealt with three issues: (a) bias; (b) denial of legal representation; and (c) the contention that since he was discharged on the first counts he should not have been convicted on the third.

^ε *Held*, that where a charge of misconduct is preferred by an employer against an employee there is always a certain element of institutional bias, as the employer is the offended party. What is important is that the matter is dealt with in a manner that is fair and impartial and that the rules of natural justice are followed. These rules in such a case are that the party ^g concerned: (a) must be given adequate notice; (b) must be heard or be able to present his side of the story; and (c) should be allowed to call witnesses if he so wishes. Where bias is alleged, there must be reasonable grounds for the employee believing that he could not receive justice and ^h a fair hearing and decision.

2005 (2) ZLR p268

Cheda JA

Held, further, that although s 13(3) of the Constitution refers to a right to legal ^a representation, this does not apply in internal disciplinary hearings. Where a hearing takes place before a tribunal other than a court of law, there is no general right to legal representation. Where the relationship between the parties is governed by contract, the right of the person who is the subject of an enquiry arising out of that contract to be legally represented at such enquiry must depend upon the terms of the contract ^b itself. Where there is a code of conduct, the employee's right to legal representation will depend on what is stated in the code.

Held, further, that, as to the third contention, there was no basis in fact for his submission and his guilt on the third charge was clear and supported by his own admissions. ^c

Held, accordingly, that his appeal should be dismissed with costs and the cross-appeal allowed with costs.

Cases cited

Cuppan v Cape Display Supply Chain Svcs 1995 (4) SA 175 (D)

Dabner v SAR&H 1920 AD 583 ^d

Dladla & Ors v Administrator, Natal & Ors 1995 (3) SA 769 (N)

Foya & Anor v R and Jackson NO 1963 R & N 318 (FS)

Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd 1994 (1) ZLR 255 (S)

Rose v Johannesburg Local Rd Transportation Bd 1947 (4) SA 272 (W) ^e

Legislation considered

Constitution of Zimbabwe 1980, s 13(3)

Case information

L T Biti, for the appellant ^f

R M Fitches, for the respondent

Judgment

CHEDA JA: The appellant was employed by the respondent as a departmental controller. In the course of his duties, he handled foreign currency transactions for staff accounts.

Following reports made to his employer, investigations were carried out on the company's staff foreign currency accounts. The investigations led to the appellant's suspension. The appellant was later charged with misconduct and eventually dismissed from employment. He appealed, first to the respondent's appeals committee and then to the Labour Relations Tribunal ("the Tribunal"). The appeals were not successful. ^H

2005 (2) ZLR p269

Cheda JA

^A The appellant has now appealed to this court. In his notice of appeal, he gave the following grounds for appealing:

"GROUNDS OF APPEAL

1. The court *a quo* grossly erred as a question of law in not finding that –
 - (a) There was bias in this matter sufficient to render the initial disciplinary hearings null and void. More importantly, the court ^B ignored the fact that Mr A B Wishart, the hearing officer, had been involved in the investigations and in addition had actually wrote a letter containing the charges and was, therefore, disqualified from being the hearing officer (*sic*).
 - (b) *A fortiori*, the court *a quo* ignored the fact that the Disciplinary and Grievance Committee was also biased, in that certain members ^C of the same had also participated in the investigation proceedings.
 - (c) The court *a quo* greatly erred as a question of law (by) not finding that there was a procedural irregularity, in that the investigations were not carried out by the Human Resources Department as stipulated in the code of conduct. ^D
2. Further, the court *a quo* grossly erred in not considering the fourth ground of objection with regards to the competency of the charge. The court *a quo* ought to (have held) that, since the appellant had been acquitted of the first two charges, he could therefore not have been convicted on the third charge as it stood.
3. Further, whilst the court *a quo* was correct in holding that the denial ^E of legal representation in this matter was fatal, the court erred in not setting aside the entire disciplinary proceedings including the disciplinary proceedings before the hearing officer. Even if the court could not set aside the findings of the hearing officer, to the extent that the appellant was not responsible for the sins of the Disciplinary and Grievance Committee, the court erred in not directing that the ^F respondent pay the appellant his arrear salaries and benefit(s) up until such time as a newly constituted Disciplinary and Grievance Committee will rehear the matter."

Following the noting of this appeal, the respondent noted a cross-appeal on the following grounds:

- "1. The court *a quo* erred in finding that the denial of legal representation ^G in proceedings under a code of conduct violates s 18 of the Constitution of Zimbabwe and is a gross irregularity, vitiating the proceedings in question.

The court (*a quo*) ignored the point that in proceedings under a code ^H of conduct, there is no inherent right for an accused employee to be

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Cheda JA

represented by a legal practitioner. The issue is governed by the ^A provisions of the code of conduct and, *in casu*, the code of conduct specifically defines officials who may represent accused employees in such proceedings. Legal practitioners are excluded."

I will deal with the matter under the following heads, which I consider to be the main issues: (a) bias; (b) legal representation; and (c) the discharge on ^B charges one to three.

BIAS

The appellant argued that the Tribunal ought to have found that there was bias on the part of Mr A B Wishart ("Wishart"), the hearing officer, as he was the one who laid the initial charges against the appellant. He referred to the letter written to him by Wishart, who invited the appellant to attend the disciplinary ^C hearing on 1 February 2002. He says Wishart was the investigating officer, prosecutor and judge and that this was not in keeping with the terms of the code of conduct, which

required that all the investigations have to be carried out by the Human Resources Department of the respondent.

A reading of the correspondence shows very clearly that Wishart requested D Omega Research (Pvt) Ltd ("Omega") to investigate the matter. It is, therefore, incorrect to say that Wishart investigated the matter himself. The report from Omega confirms that they were asked to investigate and they submitted a report on their findings. On that basis alone, the complaint that Wishart was the investigating officer cannot stand.

It has not been shown that the investigations by Omega prejudiced the E appellant in any way. The fact that it was not the Human Resources Department that investigated the matter does not make any difference at all. Omega submitted the report to the respondent, just as the report by the Human Resources Department would have been. In any case, Omega would have been more independent than the Human Resources Department of the F respondent, as Omega is not part of the respondent company.

After receiving the report from Omega, Wishart wrote to the appellant, advising him of the allegations in detail and the date of the disciplinary hearing.

I would point out here that as long as a charge of misconduct is preferred by an employer against an employee there is always a certain element of G institutional bias, as the employer is the offended party. However, this happens to be the situation in all misconduct cases. What is important is that the misconduct matters are dealt with in a manner that is fair and impartial and that the rules of natural justice are followed. The rules of natural justice in such a case are that the party concerned: (a) must be given adequate notice; (b) must H

2005 (2) ZLR p271

Cheda JA

A be heard or be able to present his/her side of the story; and (c) should be allowed to call witnesses if he/she so wishes. See *Dabner v SA Railways and Harbours* 1920 AD 583 at 598.

The appellant was given adequate notice in writing of the date of the disciplinary hearing and the nature of the charges against him; he was afforded an opportunity to respond in writing and to be present and be heard during B the proceedings; and he was afforded an opportunity to call witnesses.

At the end of the proceedings, the appellant was actually found not guilty of misconduct on those charges where it was felt that there was no evidence to support the charges against him. In my view, this shows that the disciplinary and grievance committee ("the committee") was not biased against him in any C way, as he was convicted only on those charges that the committee felt had been sufficiently proved. We have not been referred to any action on the part of Wishart or Mr Bruce, a director of the respondent, that indicates any bias or which would even cause any suspicion of bias on the part of any person.

Further to that, Wishart was the hearing officer only at the very initial stage. He only put the charges to the appellant and recorded his response. He did D not make the final decision in the matter. His part was to make recommendation based on what he had gathered.

It is worth noting that when the matter went to the committee no allegation of bias was made.

The appellant referred to several authorities on the issue of bias. The case of E *Rose v Johannesburg Local Road Transportation Board* 1947 (4) SA 272 shows that there must be reasonable ground for the appellant believing that he could not receive justice and a fair hearing and decision. See also *Foya & Anor v R and Jackson* NO 1963 R&N 318 (FS) and *Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S).

F The suggestion that there was a likelihood of Wishart being biased is based on the allegation that he was involved in the investigations. This allegation, being incorrect, does not therefore support or show any likelihood of bias on his part. I have already pointed out that the investigations were carried out by an independent organisation and not by either of the two officials of the respondent.

G The appellant was free to state what he was admitting and what he was denying. He admitted that the foreign currency he took was not for his official use on business, but for his wife who was to travel with him. He admitted that he knew who was to authorise the foreign currency. He admitted using the H names of person who had since left the respondent and said he was not

Cheda JA

prompted by anyone to act as he did. He disclosed that he owned up regarding ^a the processing of the transactions, as the respondent would not have known that he was responsible.

In view of the above, there is no basis to say that any reasonable person could suspect that there was any bias.

LEGAL REPRESENTATION ^b

The cross-appeal was against the Tribunal's conclusion that the refusal to allow the appellant to be legally represented was wrong.

The right of a person who is accused is firmly entrenched in s 13 of the Constitution of Zimbabwe Act [*Chapter: 1*] ("the Constitution"). Section 13(3) of the Constitution reads as follows: ^c

"(3) Any person who is arrested or detained shall be informed as soon as is reasonably practicable, in a language that he understands, of the reasons for his arrest or detention, *and shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and hold communication with him*" (my emphasis).

The above right is not limited to arrests and detentions only, but extends to ^d many other situations that the courts have had to deal with. However, authorities, both old and new, make the position clear as to what situations require legal representation.

The point was dealt with extensively in *Dabner v South African Railways and Harbours supra*. ^e

Dabner had been charged with a criminal offence, for which he faced imprisonment or a fine not exceeding fifty pounds or both such fine and such imprisonment. The charge was later withdrawn and he was then charged with misconduct of a serious nature in terms of the South African Railways and Harbours Regulations ("the Regulations"). The Regulations under which he was charged provided for appeal to the assistant general manager, then to the ^f appeal board, and finally to the Railways and Harbours Board ("the Board"). Reports were to be made to the general manager, who would give his decision.

Section 155 of the Regulations provided that, and I quote from p 584 of the judgment:

"... no servant charged in (the) manner provided by Regulations numbers ^g 150 and 151 may appear by a legal adviser, nor shall he be entitled to a copy of the record of the proceedings, but he shall be entitled to personal inspection of the record of proceedings at any reasonable time."

Dabner was served with a notice of an enquiry in terms of the Regulations. He applied for leave to be legally represented by his attorney, and suggested that ^h

Cheda JA

^a the matter be held over pending a legal decision on the point of legal representation. The Board allowed Dabner to be legally represented and proceeded with the hearing before the issue of legal representation was determined. The charge was not sustained.

The Administration noted an appeal against legal representation to the Provincial Division. It was argued that the Regulation prohibiting legal ^b representation by an attorney was invalid and violated a fundamental right to be legally represented at such proceedings. The Appellate Division held as follows at p 597 of the judgment:

"Now, clearly the statutory Board with which we are concerned is not a judicial tribunal. Authorities and arguments, therefore, with regard to ^c legal representation before courts of law are beside the mark, and there is no need to discuss them. For this is not a court of law, nor is this enquiry a judicial enquiry. True, the Board must hear witnesses and record their evidence, but it cannot compel them to attend, nor can it force them to be sworn; and, most important of all, it has no power to make any order. It reports its finding, with the evidence, to an outside official, and he considers both and gives his decision. Nor can it properly be said that ^d there are two parties to the proceedings. The charge is formulated by an officer who is no party to the enquiry. The Board is a domestic tribunal constituted by statute to investigate a matter affecting the relations of employer and employee. And the fact that the enquiry may be concerned with misconduct so serious as to involve criminal consequences cannot change its real character."

^e Further down on p 598, Innes CJ stated in the same judgment:

"The Act before us does not confer the right of legal representation; it leaves all matters of procedure to be governed by regulations, and, as already stated, I know of no authority in our law which would invalidate a rule compelling the right of appearance and audience to be personally exercised. Tribunals specially created to deal with disputes relating to administration or discipline are not bound to follow the procedure of a court of law."

Before the matter went on appeal to the Appeal Court, Gardner J had made the following observation at p 588 of the judgment delivered by the Provincial Division:

" G The Board of Inquiry is not a court of law, nor do I think it can properly be styled a judicial tribunal. There is no provision in the Act or Regulations for the officer, who has laid the charge, being present or represented at the inquiry; there is no prosecutor. The Board has no power of administering an oath to witnesses, and it does not even give a decision having a binding

2005 (2) ZLR p274

Cheda JA

effect upon the person into whose conduct inquiry is made. According a to Regulation 153, all that the Board has to do is to report to the convening officer its conclusion upon the evidence. It is then for him, under Regulation 154, after considering the report, to give his decision upon the case. He may acquit the employee, inflict a penalty, or, if the offence calls for more severe punishment than he is empowered to impose, refer the papers, with his recommendation, to a higher authority for decision. The B Board is, therefore, merely an inquiring body, clothed with no power of returning a verdict as to the guilt of the employee, and the convening officer is not bound to accept its conclusions."

The above shows that there is no absolute right to legal representation at the preliminary hearing which is mainly a domestic enquiry.

Reference was made also to the exercise of discretion in allowing legal c representation. According to *Dladla & Ors v Administrator, Natal & Ors* 1995 (3) SA 769 (N), the hearing officer should use his discretion where the procedural rules are silent as to whether legal representation should be allowed or not.

In the present case, representation is clearly limited to a Union official, or a D member of the workers committee, or a colleague from his working section, as prescribed in the code of conduct. I do not think that it was intended to provide for both representation by a legal practitioner and a Union official or fellow employee.

In *Cuppan v Cape Display Supply Chain Services* 1995 (4) SA 175 (D), it was E held at p 180 that:

"It appears to be settled law that where a hearing takes place before a tribunal other than a court of law, there is no general right to legal representation; and where the relationship between the parties is governed by contract, the right of the person being subjected to an enquiry arising out of that contract to be legally represented at such enquiry must depend F upon the terms of the contract itself."

The appellant's case is governed by the respondent's code of conduct, which excludes the right to be legally represented.

THE DISCHARGE ON CHARGES ONE TO THREE

The appellant argued that since he was discharged on the first two counts he G should not have been convicted on the third charge. This charge concerned:

"Concealment of or failure to report a business irregularity which an employee becomes aware of."

It is clear that the appellant became aware of irregularities carried out by his superior, Ms Ncube. He became aware of irregular entries, which he tried to H

2005 (2) ZLR p275

Cheda JA

A cover up and even used the names of persons who had left the respondent's employ in order to cover up the irregularities. In his own explanation at the hearing, he said he reversed certain entries and backdated them to January 2001. He used a silent journal that resulted in the transactions passing through the system without any explanation, authorisation or detection. This was clear concealment of the irregularities that he had become aware of. The finding of B guilt on that charge was, therefore, proper.

CONCLUSION

In conclusion, I cannot find any basis for the alleged bias on the part of Wishart and Mr Bruce. There was no absolute right for the appellant to be allowed legal representation at the initial hearing. In any case, when the matter eventually came before the Tribunal the appellant was legally represented. The finding that the appellant concealed business irregularities is confirmed, even by the appellant himself in his own admissions.

Accordingly, the appellant's appeal is dismissed with costs. The cross-appeal by the respondent is allowed with costs.

▯ MALABA JA & GWAUNZA JA concurred.

Honey & Blanckenberg, appellant's legal practitioners

▯ *Scanlen & Holderness*, respondent's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/S v
MASIKE 2005 (2) ZLR 276 (H)

S v MASIKE 2005 (2) ZLR 276 (H)

2005 (2) ZLR p276

Citation	2005 (2) ZLR 276 (H)
Case No	Judgment No. HH-78-05
Court	High Court, Harare
Judge	Bhunu J
Heard	26 October 2005
Judgment	26 October 2005
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Court — *magistrates court* — *magistrates court a court of record* — *effect*

Criminal procedure (sentence) — *statutory offences* — *Gold Trade Act c [Chapter 21:03] — s 3(1) — dealing in gold — consequent prohibition under s 24 on entering mining location — requirement for court to enquire into and record reason for ordering otherwise — failure to record reasons deprives a reviewing court of the opportunity to determine whether the magistrate has exercised his discretion properly* ▯

Headnote

Under s 24 of the Gold Trade Act [Chapter 21:03], a person convicted of, *inter alia*, unlawfully dealing in gold is automatically prohibited from entering or being upon any precious metals

mining location during the period of five years from the date of his conviction unless the court for any reason (which it shall record) thinks fit to order otherwise. The trial ^E court thus has discretion as to whether or not a convicted person should automatically be banned from entering any precious metal mining location. This discretion must be exercised fairly, judiciously and responsibly.

A magistrate court is a court of record, as provided for by s 5(1) of the Magistrates Court Act [Chapter 7:10]. The mere fact that s 24 of the Gold Trade Act obliges the court to record its reasons if it thinks that the ^F accused should *not* be banned from entering a precious metal mining location does not relieve the court from the duty of recording the proceedings if it thinks otherwise. If there was an enquiry as to whether or not the automatic provision of s 24 of the Act should apply, then the trial magistrate was under a duty to record the enquiry. In the absence ^G of such a record, a reviewing court has no basis for determining whether or not the trial magistrate exercised his discretion properly.

Cases cited

R v Margolis 1968 (2) RLR 190 (G)

R v Docherty 1968 (1) RLR 123 (A) ^H

2005 (2) ZLR p277

Bhunu J

Legislation considered ^A

Gold Trade Act [Chapter 21:03], s 24

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

Judgment

BHUNU J: The accused was convicted on his own plea of guilty on a charge of contravening s 3(1) as read with s 30(2) of the Gold Trade Act [Chapter ^B 21:03] in that he was found in unlawful possession of 31.0659 grammes of Reef Gold valued at \$1 667 922.

On those facts, the accused was sentenced to pay a fine of \$500 000 or in default of payment 10 months' imprisonment. In addition, 12 months' imprisonment was suspended on the usual conditions of good behaviour for a period of five ^C years. The reef gold concerned was forfeited to the State.

Section 24 of the Act prohibits persons convicted of illegal possession or dealing in gold from entering a mining location for a period of five years from the date of conviction unless the court for any reason thinks otherwise. The section reads:

^D "If any person is convicted of an offence in terms of section three, ten, eleven, twelve or twenty-six, the conviction shall have the effect of prohibiting such person from entering or being upon any precious metals mining location during the period of five years from the date of his conviction *unless the court for any reason (which it shall record) thinks fit to order otherwise*, and any such person who fails to comply with a prohibition under this section shall be guilty of an offence.

^E Provided that nothing in this section contained shall be deemed to prohibit any such person from passing through a precious metals mining location upon a road to which the public have a right to access" (my emphasis).

In sentencing the accused, the trial magistrate did not invite the accused to ^F show cause why the automatic provisions of s 24 may not apply to him.

Justice and fairness require that whenever a person stands to be prejudiced by a court order he must be given a chance to make representations to the court before the order is made.

When I raised the issue with the trial magistrate he responded as follows:

^G "With all due respect my reading of s 24 of the Gold Trade Act [Chapter 21:03] (The Act) suggests that the prohibition from entering a precious metal mining location on the part of an accused is automatic and consequent upon his conviction unless the court thinks fit to order otherwise. In that ^H event, the court now has a duty to record reasons for that decision.

...

2005 (2) ZLR p278

Bhunu J

I can confirm on tapes not in the long hand record. I asked the accused ^A whether he had any reason why the court should not prohibit him from entering a precious metal mining location and he advanced no such reason."

With respect, the trial magistrate's response betrays a serious misapprehension of his duties as a magistrate. The magistrate's court is a court of record as provided for by s 5(1) of the Magistrates Court Act [*Chapter 7:10*]. The mere ^B fact that s 24 of the Gold Trade Act obliges the magistrate to record his reasons if he thinks that the accused should not be banned from entering a precious metal mining location does not relieve the trial magistrate from the duty of recording the proceedings, if he thinks otherwise.

If there was an enquiry as to whether or not the automatic provisions of s 24 ^C should apply then the trial magistrate was under a duty to record the enquiry under s 5(1) of the Magistrates Court Act. In the absence of such record, this court, sitting as a reviewing court, has no basis for determining whether or not the trial magistrate properly exercised his discretion.

The trial magistrate now states that he can establish that indeed he invited the ^D accused to show cause why he may not be banned from entering a gold mining location through tapes but not his long hand notes which he submitted for review.

I have waited for a very long time indeed but the trial magistrate has not furnished me with such proof. The net result is that the record before me has no written record of the enquiry which the trial magistrate says he made. ^E

A perusal of the authorities shows that the trial court has discretion as to whether or not a convicted person should automatically be banned from entering any precious metal mining location. It is trite that whenever a court is called upon to exercise its discretion that discretion must be exercised fairly, judiciously and responsibly. In the absence of a record of how the trial court ^F exercised its discretion, the reviewing court is unable to determine the justice of the determination. The cases of *R v Margolis* 1968 (2) RLR 190 (G) and *R v Docherty* 1968 (1) RLR 123 (A) are instructive.

Both cases clearly demonstrate that a convicted person can successfully avoid the automatic provisions of s 24. An unrepresented accused can only successfully argue his case if the provisions of the section are drawn to his ^G attention and he is invited to make submissions. The review court can only satisfy itself that the trial magistrate properly discharged his duty if a record of the proceedings is kept.

In this case, I am unable to say that the trial magistrate properly discharged his duty. In the result, it is accordingly ordered: ^H

2005 (2) ZLR p279

Bhunu J ^A

1. That the sentence be and is hereby quashed and set aside.
2. That the matter be and is hereby remitted for sentence before a different magistrate.
3. That in resentencing the accused the trial court should not exceed the sentence imposed by the original trial court.

^B UCHENA J concurs.

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/COMMUNICATIONS AND ALLIED SERVICES WORKERS UNION OF ZIMBABWE v TEL-ONE (PVT) LTD 2005 (2) ZLR 280 (H)

COMMUNICATIONS AND ALLIED SERVICES WORKERS UNION OF ZIMBABWE v TEL-ONE (PVT) LTD 2005 (2) ZLR 280 (H)

Citation	2005 (2) ZLR 280 (H)
Case No	Judgment No. HH-91-05
Court	High Court, Harare
Judge	Makarau J
Heard	13 September 2005
Judgment	26 October 2005
Counsel	<i>L T Biti</i> , for the applicant <i>S Hwacha</i> , for the responden
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Employment — *code of conduct — disciplinary proceedings under — right of employer to bring such proceedings — employees engaged in lawful strike — employer having no right to discipline employees under code of conduct*

Employment — *code of conduct — nature of — essentially part of the terms of the contract of employment — override the law of the country* D

Employment — *trade union — rights of — right to bring action on behalf of members*

Practice and procedure — *application — domestic remedies available — E approach by court — avoidance of duplication unless good cause shown*

Practice and procedure — *parties — locus standi — principles — need for party to show some legal interest in action — no requirement to show practical interest in outcome*

Practice and procedure — *parties — trade union — right of trade union to F bring action on behalf of members*

Headnote

In addition to having a voice before a determining authority and the Labour Court, in terms of s 29(4)(d) of the Labour Act [*Chapter 28:01*], a trade union may be a party before the High Court as long as its constitution G allows it to sue in the subject matter and as long as it can establish a standing before the Court.

The applicant was a duly registered trade union whose duty it was to represent the interests of workers in the communications and related industries. A number of these workers were employed by the respondent. H

A The employees of the respondent went on strike after giving it notice of their intention to do so. Conciliation proceedings took place but to no avail. The respondent successfully applied for a show cause order to have the strike declared illegal. The applicant, on behalf of the employees, noted an appeal against the order to the Labour Court. The appeal was upheld.

B However, prior to the determination of the appeal, the respondent wrote letters of suspension to a large number of the employees, while others were charged with misconduct and dismissed from their employment. The applicant thereupon commenced proceedings in the High Court seeking to set aside the termination of employment of the concerned employees. Among the points raised by the respondent, in opposition C to the application, was the submission that the applicant had no standing to bring the application on behalf of the employees and that in proceeding against the employees in terms of its code of conduct, the respondent was acting within its rights.

Held, that representative or public interest litigation is now a feature of our ^D jurisprudence. The party must show that it has a direct and substantial interest in the subject matter. What is required is a legal interest in the subject matter of the action. It is not necessary to demonstrate real and practical prejudice directly stemming from the outcome of the litigation. The applicant had the statutory duty of protecting the interests of its members and was seeking to protect the rights of its members not to be ^E untreated unfairly by their employer in matters of discipline and collective job actions. A trade union plays an important role that is recognised by statute in both spheres of discipline and collective job actions. Consequently, the applicant had established sufficient and legal interest in the application to give it standing before in the proceedings before the court.

^F *Held*, further, that the High Court enjoys jurisdiction to determine matters placed before it even where domestic remedies have not been exhausted. But the court, in its discretion, will sometime withhold that jurisdiction, so as to allow the domestic remedies to expend themselves. The approach of the Court is to discourage the duplication of proceedings unless good ^G cause has been shown. *In casu*, an attempt had been made by the applicant to invoke the domestic remedies. The dispute, as an unfair labour practice, was referred to a labour officer, who erroneously declined to hear it on the basis that he did not have jurisdiction. This meant that there was no parallel domestic procedure between the parties that is ^H duplicated by the application before the High Court. The labour officer's

2005 (2) ZLR p282

refusal to entertain the matter demonstrated that he did not appreciate ^A the nature of the dispute between the parties, thereby bringing into question the efficacy of the domestic remedy. To follow the domestic remedies to exhaustion would mean that the applicant would not be afforded an expeditious and proper determination of the matter. Just cause had thus been shown for approaching the court.

Held, further, that under s 102 of the Labour Act, employees, workers ^B committees and trade unions have the right to resort to collective job action to resolve disputes of interest. Section 108(3) affords protection to employees engaged in lawful collective action. Such employees are not liable for breach of contract and their employment may not be terminated on the ground that they engaged in a lawful collective action. ^C Since the show cause order was discharged by the Labour Court, the strike was lawful and the respondent was barred from resorting to its code of conduct to discipline the employees concerned. A code of conduct is essentially part of the terms of the contract of employment between employer and employee and cannot override the law of the country. The disciplinary proceedings were thus a nullity. ^D

Cases cited

Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 (O)

Law Soc of Zimbabwe & Ors v Min of Finance 1999 (2) ZLR 231 (S)

P E Bosman Tpt Works Cttee & Ors v Piet Bosman Tpt (Pty) Ltd 1980 (4) SA 801 (T) ^E

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

Wood & Ors v Ondangwa Tribal Authority & Anor 1975 (2) SA 294 (A)

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

Zimbabwe Teachers Association & Ors v Minister of Education and Culture 1990 (2) ZLR 48 (H) ^F

Legislation considered

Labour Act [Chapter 28:01], ss 29(2), 29(4), 102, 106, 107 and 108(3)

Case information

L T Biti, for the applicant

S Hwacha, for the respondent ^G

Judgment

MAKARAU J: This is a labour dispute between a trade union and an employer over the suspension and termination of services of members of the union, the employees of the respondent. ^h

2005 (2) ZLR p283

Makarau J

A INTRODUCTION

1. The applicant as its name implies, is a trade union, duly registered in accordance with the laws of the country, to represent the interests of the workers in the communications and related industries. The respondent is a provider of communication services. Its employees are members of the applicant. ^b
2. On 6 October 2004, the employees of the respondent went on strike after giving the employer notice of their intention to do so.
3. When served with the notice of intention to go on strike, the respondent applied to the Minister of Public Service, Labour and Social Welfare for a cause order to be issued in terms of section 106 of the Labour Act ^c [Chapter 28:01], ("the Act"). The parties were invited to a hearing at which the matter was referred to internal dialogue. A certificate of no settlement was issued. On 6 October 2004, the employees of the respondent went on strike and the respondent once again applied for a show cause order to have the strike declared illegal and stopped. A show cause order was issued and the strike was declared illegal. The applicant noted an ^d appeal against the show cause order issued in the matter. On 9 November 2004, the Labour Court upheld the applicant's appeal.
4. Prior to the determination of the appeal by the Labour Court, the respondent wrote letters of suspension without pay and benefits to 1 254 of its employees who had participated in the strike. A number of the employees were charged with misconduct and were dismissed.
5. ^e The above application was then filed, seeking to have set aside the termination of the employment of the concerned workers as being grossly unprocedural, amongst other grounds.
6. The application was opposed. In its opposing affidavit, the respondent took two points *in limine* that I shall deal with in detail shortly. Regarding ^f the merits of the matter, the respondent argued that it was not barred by any law from proceeding against the concerned employees in terms of its code of conduct.

THE ISSUES

7. The respondent raised *in limine*, the *locus standi* of the applicant to bring this application on behalf of its members. It contended that since the ^g disciplinary proceedings were brought against each individual employee, the applicant has no *locus* to challenge the proceedings. Secondly, and still *in limine*, the respondent argued that the applicant should have exhausted the domestic remedies available to it before approaching this ^h court on review.

2005 (2) ZLR p284

Makarau J

8. Regarding the merits, the issue respondent argued that there is no law ^a barring it from resorting to its code of conduct after invoking the provisions of the Labour Act in a bid to break the collective job action.
9. Thus, the three issues that fall for determination are whether the applicant has standing to bring this application, if so, whether the applicant should be ordered to exhaust the domestic remedies provided for under the Act ^b and, regarding the merits of the matter, whether the invocation of the code of conduct by the respondent after failing to break the collective job action was grossly unprocedural.

THE LAW

10. Dealing with the first issue, I note that s 29(2) of the Act clothes trade ^c unions with corporate status and specifically provides that trade unions shall be capable of doing all such acts that are authorised by its constitution. The section proceeds in subs (4)(d) to grant a trade union the right to make representations before any determining authority or the ^d Labour Court.

11. In my view, the fact that the Act entitles a registered trade union with the right to make representations before any determining authority or the Labour Court does not limit it to that role only as suggested by Mr *Hwacha*. It appears to me that if its constitution authorises it to sue and be sued on behalf of its membership, a trade union can bring or defend representative actions on behalf of its members. In my further view, s 29(4)(d) is expressly providing for a trade union to have a voice in labour ^Edisputes that are before determining authorities and the Labour Court, which voice may have been denied at common law and on the narrow construction of the general rule governing rules of procedure as to who may address a determining authority or court in formal hearings.
12. It is my further view that in addition to having a voice before a determining authority and the Labour Court, a trade union may be a party before this ^Fcourt as long as its constitution allows it to sue in the subject matter and as long as it can establish a standing before this court.
13. The issue of standing has been before this and the Supreme Court in a number of cases recently. As observed by McNally J in *Law Society of Zimbabwe & Ors v Minister of Finance* 1999 (2) ZLR 231 (S), the ^Gdevelopment of the law of class actions or representative actions in this jurisdiction is nascent. That class actions are desirable in this jurisdiction is evidenced by the passage of the Class Action Act [*Chapter 8:17*], which came into operation in 2000. Thus, as a jurisdiction, it is my view that we have moved miles from the position held in cases such as *Wood* ^H

2005 (2) ZLR p285

Makarau J

^A & Ors v *Ondangwa Tribal Authority & Anor* 1975 (2) SA 294 (A) to the effect that an individual person is not entitled to protect the right of the public or to "champion the cause of the people". Jurisprudence of today recognises not only that a member of the public can bring a matter in the public interest if he or she shows sufficient legal interest in the litigation but that classes or groups may collectively bring suits to protect class or ^Bcollective legal interests. The definition of sufficient legal interest in any case, like any other matter in which the court makes a value judgment, is a reflection of the judges' values of the rights to access justice permissible at any given time in that jurisdiction. Sometimes access is perceived as narrow, sometimes as wide, but the fact remains that representative or ^Cpublic interest litigation is now a feature of this jurisprudence.

14. It was for a time held as the correct position at law that for a party to demonstrate sufficient interest for the purpose of bringing representative or public interest litigation, they had to demonstrate real and practical prejudice directly stemming from the outcome of the litigation. See *PE Bosman Transport Works Committee & Ors v Piet Bosman Transport* ^D(Pty) Ltd 1980 (4) SA 801 (T); *Henri Viljoen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151 (O).
15. An attempt was made by Mr *P A Chinamasa* to rely on this formulation of the test establishing standing for representative bodies in *Zimbabwe Teachers Association & Ors v Minister of Education* 1990 (2) ZLR 48 (H). In that case, an association of teachers brought an application against the ^Edismissal of its members, a situation similar to the one before me. Mr *Chinamasa* contended that the association of teachers did not suffer any real and direct prejudice as a body to warrant it being given standing before the court. In rejecting the contention, Ebrahim J (as he then was) reviewed a number of authorities dealing with the subject before he had ^Fthis to say: "from these authorities it is apparent what the legal approach to the issue of locus standi should be. The petitioners must show that they have a direct and substantial interest in the subject matter and what is required is a legal interest in the subject matter of the action".
16. In holding thus, Ebrahim J effectively widened the basis upon which standing could be founded in public interest litigation in this jurisdiction. ^GThis was prior to the enactment of the Class Action Act.
17. The test as formulated by Ebrahim J above was referred to with approval by McNally JA in the *Law Society of Zimbabwe* case where he held that the statutory obligation on the part of the Law Society to represent the views of the legal profession and to deal with all matters affecting the ^Hprofession was sufficient to give it standing on its own, although, out of

2005 (2) ZLR p286

Makarau J

an abundance of caution, a member of the Society was added to the ^A proceedings as a party in that matter. At p 234, he had this to say: "I conclude therefore, that the Law Society has *locus standi* in this matter, if only on the basis that it is statutorily empowered to assist and join with Mrs Mollat in her application. In so ruling, I do not wish it to be understood that I am saying that the Law Society's application could not have stood on its own. I take the view that it could. It has real and substantial interest ^B in the proceedings ..."

18. The applicant has the statutory duty of protecting the interests of its members just like the Law Society of Zimbabwe and the Zimbabwe Teachers Association. The other two associations were held by this court to have sufficient standing to protect the interests of their members. I do ^C not see a legal basis upon which I can treat the applicant differently in the circumstances of this matter. It is seeking to protect the rights of its members not to be untreated unfairly by their employer in matters of discipline and collective job actions. It plays an important role that is recognised by statute in both spheres of discipline and collective job actions. In conclusion, therefore, it is my finding that the applicant has ^D established sufficient and legal interest in the application to give it standing in the proceedings before me.
19. I now turn to the second issue raised by the respondent *in limine*. This relates to the need for the applicant to exhaust domestic remedies before approaching this court. Again, this issue has been before this and the ^E Supreme Court in a number of matters. In *Zikiti v United Bottlers* 1998 (1) ZLR 389 (H), Gillespie J explained in detail and in a manner that appeals to me the rationale behind the reluctance of the courts to allow access *ad libitum* where proceedings and recourse are still available in the lower courts. Instead of the availability of domestic remedies being held as a complete bar to the bringing of proceedings before this court, it is used ^F as a measure to select the instances where the court will withhold its jurisdiction pending the exhaustion of domestic remedies.
20. The position regarding the need to exhaust domestic remedies thus presents itself to me: this court always enjoys jurisdiction to determine matters placed before it even where domestic remedies have not been ^G exhausted but this court, in its discretion, will sometimes withhold that jurisdiction to allow the domestic remedies to expend themselves.
21. The criteria used by the court in determining whether to withhold its discretion was also discussed in the various cases referred to by Gillespie J in the *Zikiti* case. After reviewing the various cases, the conclusion reached by Gillespie J is that the approach of the court is to discourage ^H

2005 (2) ZLR p287

Makarau J

^A the duplication of proceedings unless good cause has been shown. I do not have a good cause for not following that approach in this matter.

22. *In casu*, it is common cause that an approach was made by the applicant to invoke the domestic remedies. The dispute, as an unfair labour practice, was referred to a labour officer. The labour officer who was assigned the case declined to hear it on the basis that he did not have jurisdiction in ^B the matter.
23. The labour officer was clearly in error when he declined jurisdiction in the matter. Three issues, however, arise from this error on the part of the labour officer. Firstly, since his ruling that he did not have jurisdiction stands, one can assume that there is no parallel domestic procedure between the ^C parties that is duplicated by the application before me. Secondly, the refusal by the labour officer to entertain the matter clearly demonstrates that he did not appreciate the nature of the dispute between the parties thereby bringing into question the efficacy of the domestic remedy. Thirdly, it appears that for the applicant to follow the domestic remedies to exhaustion, it now has to appeal against the decision of the labour ^D officer against refusal of jurisdiction. Thereafter, the matter may then be heard at first instance, provided the Labour Court finds that the labour officer was in error in declining jurisdiction.
24. In my view, the complications surrounding the domestic remedies introduced by the labour officer who erroneously declined jurisdiction, ^E is such that the applicant will not be afforded an expeditious and proper determination of the matter: see *Tutani v Minister of Labour & Ors* 1987 (2) ZLR 88 (H).
25. On the basis of the above, I am satisfied that just cause has been made for the approach to this court at this stage and that the proceedings before me are not in duplication of any other

process already under way in terms ^F of the provisions of the Labour Act.

26. I finally turn to the merits of the application. The applicant has sought to have the decision of the respondent to use its code to discipline the workers set aside on the basis that it was grossly unprocedural, was tainted with bias and that the respondent set up an incompetent body to ^G enforce the code.
27. It was submitted by Mr *Hwacha* for the respondent that after the show cause order was discharged by the Labour Court, the parties were at large to dispose of the dispute using other remedies and that there is no law that restricted the respondent from resorting to its code of conduct. In my ^H view, it is in this regard that the respondent erred.

2005 (2) ZLR p288

Makarau J

28. Section 102 of the Labour Act provides that, subject to the provisions of ^A the Act, all employees, workers committees and trade unions shall have the right to resort to collective job action to resolve disputes of interest. The Act proceeds under s 107 to provide for the issuance of disposal orders disposing of illegal collective action. In s 108(3), the Act affords protection to employees engaged in lawful collective action. Such employees are not liable for breach of contract and their employment shall ^B not be terminated on the ground that they engaged in a lawful collective action.
29. In my view, it is these clear provisions of the law that provide the short answer to Mr *Hwacha's* submission and bar the respondent from resorting to its code of conduct to discipline employees that engaged in the ^C collective job action.
30. For the respondent to proceed to charge the employees who engaged in collective job action under its code was grossly irregular and flies in the face of the express letter of the law. It is not permissible. It seeks in vain to make the code superior to the provisions of the Act under which the code is registered. A code is not part of the *corpus juris* of this country. ^D It is essentially part of the terms of the contract of employment between employer and employee. It cannot override the law of the country.
31. In view of the finding I make above, it is not necessary that I proceed to determine the other two grounds raised by the applicant in its application. The disciplinary hearings held by the respondent were a nullity *ab initio*. Nothing lawful could emanate from them nor attach to them even if they ^E observed all the other requirements of the code and the law. They have to be set aside as being grossly irregular.
32. In the result, I make the following order:
 - (a) The disciplinary proceedings by the respondent against all its employees who engaged in the collective job action of 6 October 2004 ^F are hereby set aside.
 - (b) The respondent shall pay the costs of this application.

Honey & Blankernberg, applicant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners ^G

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/ZIMBABWE FINANCIAL HOLDINGS v MAFUNGA 2005 (2) ZLR 289 (S)

ZIMBABWE FINANCIAL HOLDINGS v MAFUNGA 2005 (2) ZLR 289 (S)

2005 (2) ZLR p289

Citation 2005 (2) ZLR 289 (S)

Case No Judgment No. S-45-05

Court	Supreme Court, Harare
Judge	Gwaunza JA, Sandura JA & Malaba JA
Heard	5 May 2005
Judgment	1 November 2005
Counsel	<i>A M Gijima</i> , for the appellant <i>C Phiri</i> , for the respondent
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

c Employment — *code of conduct — disciplinary proceedings under — standard of proof — proof on balance of probabilities required — evidence of accomplices — not subject to same scrutiny as in criminal cases*

Evidence — *accomplice — civil case — standard of proof required — no higher standard required than in normal civil case*

Headnote

- The respondent, a bank teller, was dismissed after he had facilitated several large withdrawals from a fraudulent opening of an account and the subsequent withdrawals made from it. In finding him guilty the bank's officials relied, *inter alia*, on affidavits from witnesses who claimed to ^ε have been the respondent's accomplices in the fraudulent opening of the account, and the subsequent withdrawals made from it. The Labour Court, in ordering reinstatement, held that no reliance could be placed on the affidavit unless the witness had given *viva voce* evidence and the veracity of his evidence subjected to scrutiny by cross-examination and corroborated by some other evidence.
- *Held*, that the Labour Court's approach suggested that it was applying a higher test for proving a case against the respondent than is required in a case of this kind. On the evidence before the court, the appellant had proved, on a balance of probabilities, that the respondent had committed the acts of misconduct that he was charged with.

Case information

Ⓒ *A M Gijima*, for the appellant

C Phiri, for the respondent

Judgment

GWAUNZA JA: This is an appeal against the judgment of the labour court, in terms of which the appellant was ordered to reinstate the respondent to his ^η former employment without any loss of salary or benefits. In the event that

2005 (2) ZLR p290

Gwaunza JA

reinstatement was no longer possible, the appellant was ordered to pay the ^α respondent damages in *lieu* thereof.

The facts of the matter are as follows. The respondent, who was employed by the appellant as a cashier in one of its branches, cashed two savings account withdrawals amounting to \$400 000. This was on 29 May and 1 June 1999. It is common cause that fraudsters had used a fictitious name to open the ^β account from which the withdrawals were made. The fraudsters again visited the

appellant's premises on 21 June 1999, with the intention of withdrawing more money from the fraudulent account. A trap that the appellant had set for them failed to "net" the suspected fraudsters because, it was alleged, one of them was surreptitiously alerted to the trap by someone inside the bank, leading to their escape. The appellant alleged that the respondent was the one c who had warned the suspected fraudsters off, a circumstance that the appellant believed pointed to the possibility of collusion between him (the respondent) and the fraudsters.

Charges were subsequently brought against the respondent in terms of category D of the appellant's code of conduct as follows:

- "1. You committed a serious act, conduct or omission which is D inconsistent with the fulfillment of the express or implied conditions of your contract.
2. You were grossly incompetent and inefficient in the performance of your work.
3. You were grossly negligent and caused a very serious loss to the E bank; and
4. You failed to comply with standing instructions or follow established procedures which resulted in a very substantial loss to the bank."

A disciplinary hearing conducted on 3 August 1999 considered, among other evidence, sworn statements made by deponents who claimed to have played F a role in the opening of the fraudulent account from which the withdrawals in question were later made. One of the deponents implicated the respondent in the scam. The statements were sworn at the police station following the arrest of two suspects, one being the suspected fraudster allegedly warned off by the respondent. At the end of the disciplinary hearing, the respondent was found guilty as charged and dismissed from his employment. He appealed to G the grievance and disciplinary committee, which dismissed his appeal. On 7 October 1999, the Appeals Board, to which the respondent had appealed following the decision of the grievance and disciplinary committee, upheld the respondent's appeal and ordered the appellant to reinstate him. The appellant was aggrieved by this decision, and appealed to the labour court, which, in its turn, dismissed the appeal. H

2005 (2) ZLR p291

Gwaunza JA

A The appellant's grounds of appeal are as follows:

"Grounds of Appeal

1. that the labour court erred on a point of law by holding that the appellant failed to justify its dismissal of the respondent on a balance of probabilities for lack of compliance with its BEAM procedures as articulated in circular No. 16/3/99, whereas, the labour court's record B of proceedings contained sufficient evidence which proved otherwise;
2. that the labour court further erred in law in failing to place reliance on affidavits deposed to by respondents' accomplices, confessing to the fraud, on the basis that the deponents had not given *viva voce* evidence in the court; and C
3. that consequently, the labour court erred in law in holding that the respondent's dismissal by the appellant was unlawful."

I will consider these grounds separately.

FIRST GROUND OF APPEAL

The appellant contends that there was sufficient evidence before the labour D court to prove that the respondent had not complied with the appellant's BEAM procedures as articulated in circular No. 16/3/99. In this connection, it is alleged that the respondent, in contravention of these procedures, cashed cheques of over \$20 000 without referring to the manager or accountant. The appellant charges that the labour court ignored the document on p 148 of the record, which was an extract from the BEAM procedures and which increased E the control limit of \$5 000 on BEAM authorisation for teller withdrawals to \$20 000. Further, that the history of the account in question should have alerted the teller to the fact that all was not in order, and therefore the need to refer the matter to the manager or accountant. There, is in my view, merit in these submissions.

While it is true, as noted by the court *a quo*, that the teller's manual produced F by the appellant in the court *a quo* made no reference to the need for tellers to refer cash withdrawals of over \$20 000 for authorisation by management, there is indeed a document on p 148 of the record which clearly increased the control limit for authorisation for teller withdrawals from \$5 000 to \$20 000. The document is an extract from the BEAM procedures that the court *a quo* was G persuaded the

respondent had followed before cashing the two savings account withdrawals. The court *a quo* made no reference to this document, a circumstance that lends some weight to the appellant's assertion that the court had ignored this evidence. It has not been said by either party that this document did not form part of the record in the court *a quo*.

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Gwaunza JA

It is not in dispute that the respondent did not refer the withdrawals, which ^A far exceeded the \$20 000 threshold, to management for authorisation. The two withdrawals that the respondent cashed were for \$200 000 each. In 1999, these constituted very large amounts of money. If, as a general rule, cheque and cash withdrawals of \$20 000 needed authorisation, it is difficult to understand how the respondent could have believed he could cash withdrawals of amounts ten times more than the \$20 000, without some kind of authorisation. The ^B respondent's actions become even more suspect when regard is had to what the appellant termed the "history" of the account in question. According to the evidence before the court, the account in question had been fraudulently opened on 17 April 1999 with a cash deposit of \$1 000. On 19 May 1999, a large deposit of \$874 720.25 was made into the account. On 28 April 1999, two small ^C withdrawals were made. The following day, 29 April 1999, the respondent cashed a withdrawal of \$200 000 from this account, and two days after that, another withdrawal of \$200 000. Between these two withdrawals, a large amount of \$450 000 was withdrawn from the same account but through the services of a different teller. The appellant contends, and I find myself in agreement with its contention, that any diligent teller would have viewed with ^D suspicion the frequency of the withdrawals from this account. He or she would then have felt obliged to take the type of action envisaged in the teller's manual under "General Routines" which reads as follows:

"Do – always refer to your accountant any transaction on which there is any uncertainty." ^E

The account was new and, given the fact that a fictitious name was used to open it, the "client" was also new. Yet the respondent, allegedly, saw nothing unusual and felt no suspicion when, after making one large cheque deposit, the client then went on, with unusual frequency, to withdraw huge amounts of cash from the account. Instead, the respondent facilitated the withdrawals in question, resulting in the appellant suffering serious financial loss. In my ^F view, the respondent was properly charged with gross negligence and causing a very serious loss to the bank.

The Labour Court found that the probabilities favoured the respondent's denial that he was required to refer withdrawals in excess of \$20 000 to management and based its decision partly on that finding. This ^I find is where ^G the court *a quo* fell into error. Even if the respondent was indeed not required to refer withdrawals in excess of \$20 000, he was surely not exempted from the general rule that tellers were required "always" to refer to their accountant any transaction on which there was any uncertainty. In my opinion, there was "uncertainty" in the transactions in question. The respondent did not refer ^H

2005 (2) ZLR p293

Gwaunza JA

^A the transactions to his accountant. The labour court therefore clearly erred in disregarding, as it obviously did, this important provision.

On that ground alone, the appeal should succeed.

SECOND GROUND OF APPEAL

The appellant's second ground of appeal is concerned with the rejection, by ^B the court *a quo*, of statements made by witnesses who claimed to have been the respondent's accomplices in the fraudulent opening of the account in question, and the subsequent withdrawals made from it. It is not in dispute that one of the suspected fraudsters, Sebastian Muriritirwa, was arrested following a report made to the police by an administrative officer with the bank, Mr Mutanga ("Mutanga"). Mutanga had observed the respondent ^C communicating with a suspected accomplice of Muriritirwa, who had come into the bank to make a further withdrawal from the account in question. The suspected accomplice was then seen walking quickly away from the bank and, in the company of Muriritirwa who met him at the door, getting into the latter's motor vehicle and driving away quickly. Because the suspected accomplice ^D walked away quickly from the bank after communicating with the respondent, and without conducting the business he had come to the bank

for, the appellant suspected him of having warned the accomplice off, thereby facilitating his escape. The appellant also suspected him of being an accomplice to the fraud. Following his arrest, Muriritirwa deposed to an affidavit in which he implicated the respondent as follows:

ε "As I was (about) to get into the main entrance, I met Leonard at the main entrance coming out of the bank. He advised me that he had been told to get out of the bank by Kuda, a bank teller based at the bank."

In rejecting this evidence, the learned President of the Labour Court said in his judgment:

" ρ The same applies for the appellant's reliance on affidavits made by self-confessed accomplices — men of dubious probity, whose evidence could not be tested by cross examination. I am satisfied that the accomplices, being men of dubious character, had every reason to colour and manufacture evidence in an attempt to wriggle out of trouble or to lessen the severity of punishment by shifting blame. That being the case, no σ reliance can be placed on their affidavits unless they had given *viva voce* evidence and the veracity of their evidence subjected to scrutiny by cross examination and corroborated by some other evidence.

One could not safely rely on their evidence without falling in danger of η convicting an innocent man."

2005 (2) ZLR p294

Gwaunza JA

The court *a quo* makes reference to cross-examination of the deponents to the α affidavits – in effect one deponent since the other made no reference to the respondent by name – or corroboration of their statements by some other evidence. I am satisfied there was adequate and credible corroboration of Muriritirwa's evidence. Such corroboration came from Mutanga, who described how he had seen Muriritirwa's suspected accomplice being "warned off" by β the respondent, rushing out of the bank and together with Muriritirwa, whom he met at the entrance, getting into the latter's car and driving away. This evidence dovetails neatly with that of Muriritirwa. There could not have been any collusion between the two, since they were on opposite sides of the dispute. In what amounts, in my view, to a misdirection of facts so gross as to constitute a misdirection on a point of law, the learned President of the γ Labour Court rejected Mutanga's evidence, stating as follows on p 4 of the judgment:

"Mr Mutanga's evidence has no ring of truth. His conduct was grossly unreasonable and illogical in the extreme. Surely, a bank accountant cannot pursue a fraudster on his own without raising any alarm or alerting colleagues and security..." δ

The evidence on record shows clearly that Mutanga, having observed the suspicious communication between the respondent and Leonard Chidharara, the suspected fraudster, rushed into the office of a bank official referred to as Renzie Vulalo and reported what he had observed. According to Vulalo's statement, the two then rushed after the suspect and saw him hurrying to a ε parked car together with Muriritirwa. They then drove away. Vulalo stated in his report that he knew Muriritirwa, since he was a client at the bank. Thus, contrary to the finding of the court *a quo*, Mutanga did not single handedly "pursue" the suspect without raising any alarm or alerting colleagues and security. He took the precaution, before rushing after the suspect, to alert a colleague and enlist his aid in following the movements of the suspect after ρ he rushed out of the bank.

The evidence relating to the actions of Mutanga and Vulalo, in my view, clearly corroborates Muriritirwa's sworn evidence. Based on its own argument, therefore, the Labour Court should have accepted, and not rejected, Muriritirwa's sworn statement concerning the involvement of the respondent in the perpetration of the fraud in question. When this is taken together with σ the respondent's apparent disregard of the suspicious history of the fraudulent account in question, and his failure to refer the transaction to an accountant, the probabilities in my view, favour a finding that the respondent was complicit in the fraud. The Labour Court's reference to the "danger of convicting an innocent man" to my mind suggests that the court was applying a higher test η

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Gwaunza JA

α for proving a case against the respondent than is required in a case of this kind. I am satisfied, on the evidence before the court, that the appellant proved, on a balance of probabilities, that the respondent had committed the acts of misconduct that he was charged with.

The appellant's third ground of appeal, that the Labour Court erred in law in holding that the respondent's dismissal was unlawful, is, therefore, well β founded.

I find, when all is said, that the respondent was properly charged and found guilty of the misconduct in question. ▯ In the result, it is ordered as follows:

1. The appeal be and is allowed with costs;
2. The determination of the labour court is set aside and is substituted with c the following:
"The appeal be and is hereby allowed with costs."

SANDURA JA & MALABA JA concurred.

▯ *Gill, Godlonton & Gerrans*, appellant's legal practitioners
Kantor & Immerman, respondent's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/CHAIRMAN, ZIMBABWE ELECTORAL COMMISSION & ANOR v BENNETT & ANOR 2005 (2) ZLR 296 (S)

CHAIRMAN, ZIMBABWE ELECTORAL COMMISSION & ANOR v BENNETT & ANOR 2005 (2) ZLR 296 (S)

2005 (2) ZLR p296

Citation	2005 (2) ZLR 296 (S)
Case No	Judgment No. S-48-05
Court	Supreme Court, Harare
Judge	Sandura J, Ziyambi JA & Cheda JA
Heard	16 June 2005
Judgment	1 November 2005
Counsel	<i>G C Chikumbirike</i> , for the appellant <i>A P de Bourbon SC</i> , for the first respondent No appearance for the second respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Court — *Supreme Court* — *jurisdiction* — *review powers* — *when Supreme c Court may exercise review powers* — *no right for litigant to institute review before Supreme Court*

Headnote

The appellants were dissatisfied with a decision of the Electoral Court in which a decision by the second appellant to reject the first respondent's nomination papers was reversed (see *Bennett v Constituency Elections ▯ Officer, Chimanimani & Ors* 2005 (1) ZLR 258 (H)). In terms of s 46(19) (b) of the Electoral Act [*Chapter 2:13*], no appeal lies against a decision of a judge sitting in terms of that section. The appellants accordingly sought to bring the matter before the Supreme

Court by way of review, arguing that the decisions of the Electoral Court are reviewable by the Supreme Court, which possesses the same review powers as does the [£]High Court. Alternatively, they argued, the prohibition against appeals applies only in respect of the candidate whose nomination papers had been rejected, not to the constituency election officer.

Held, that the Supreme Court is an appellate court. It has no original jurisdiction except when it sits as a constitutional court by virtue of s 24 [£] of the Constitution. Although s 25(1) of the Supreme Court Act [*Chapter 7:13*] gives the court or a judge of the court the same review powers as the High Court, the effect of subsections (2) and (3) is that, although the Supreme Court may correct an irregularity in proceedings or in the making of a decision which comes to its attention (which may not necessarily be by way of appeal or application), no person has the right to institute any [£] review in the first instance before the court.

Held, further, that the argument that the prohibition against appeals applies only to the candidate was far-fetched. The prohibition against any appeal whatsoever was clear and indicative of the legislature's intention that the decision of the judge should be final. [£]

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Ziyambi JA

Legislation considered ^A

Electoral Act [*Chapter 2:13*], s 46(19)(b)

Supreme Court Act [*Chapter 7:13*], s 25

Case information

G C Chikumbirike, for the appellant

A P de Bourbon SC, for the first respondent

^B No appearance for the second respondent

Judgment

ZIYAMBI JA: On 18 February 2005, nominations were held in terms of the Electoral Act [*Chapter 2:13*] ("the Act"). A nomination court sat at Mutare magistrates court for the purpose of accepting nomination papers in respect ^c of aspiring candidates for the elections scheduled to take place on 31 March 2005. The second applicant was the constituency elections officer who received and processed the nomination papers for all the constituencies in the Manicaland Province.

The first respondent, who at the time was the member of Parliament for Chimanimani, submitted his nomination papers through his chief elections ^D agent. The nomination papers were rejected by the second applicant on the ground that the first respondent was, at that time, serving a term of twelve months' imprisonment imposed on him by Parliament for contravening item 16 of the Schedule of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*].

The second applicant, relying on the provisions of para 3(2)(c) of Schedule ^E 3 ("the Schedule") of the Constitution of Zimbabwe, took the view that the first respondent was disqualified, notwithstanding the fact that his name was on the voters' roll, and rejected his nomination papers. Subparagraph (2) of para 3 of the Schedule states:

"(2) The following shall be disqualified for registration as a voter for the ^F periods stated hereunder –

- (a) ...
- (b) ...
- (c) any person who has been convicted –
 - (i) within Zimbabwe of a criminal offence; or
 - (ii) ...

^G 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 was aggrieved by that decision and appealed to a judge ^H of the Electoral Court in terms of s 46(19)(b) of the Act.

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Ziyambi JA

The learned judge of the Electoral Court found that the rejection by the second ^a applicant of the first respondent's nomination papers was not "legally correct", in that the finding by Parliament that the first respondent was guilty of "a contempt offence" did not constitute a criminal offence in the conventional sense and that accordingly the sentence imposed upon the first respondent did not disqualify him from registration as a voter or standing as a candidate ^b for election to the office of Member of Parliament. He accordingly reversed the decision of the second applicant. In terms of s 46(19)(b), no appeal lies against the decision of a judge sitting in terms of that subsection.

The applicants have brought this application by way of review. They claim that they may lawfully do so because, the Electoral Court being an inferior court, its decisions are reviewable by this court which possesses the same ^c powers on review as the High Court. For this proposition they rely on s 25 of the Supreme Court Act [*Chapter 7:13*] ('the Supreme Court Act'), which provides as follows:

"25 Review Powers

- (1) *Subject to this section, the Supreme Court and every judge of the ^d 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.*
- (2) *The power, jurisdiction and authority conferred by subsection (1) may be exercised whenever it comes to the notice of the ^e 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.*
- (3) *Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance ^f before the Supreme Court or 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 for determination" (my emphasis). ^g*

Alternatively, they contend, rather curiously in my view, that the prohibition against appeals contained in s 46(19)(b) of the Act, applies only in respect of the candidate whose nomination papers would have been rejected or regarded as void by the Constituency Elections Officer. Thus, they argue, the second applicant was not denied a right of appeal by s 46(19)(b) of the Act. Accordingly, if this court is not persuaded that the application for review is ^h

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Ziyambi JA

^a properly before it, the court was being asked, to grant, to the applicants, leave to appeal out of time and to regard the papers filed before it as an application seeking such relief.

The application was opposed by the first respondent (whom I shall refer to as "the respondent") on the following grounds, namely:

- "(1) that the applicants are not properly before this court on review by ^B virtue of s 25(2).
- (2) that the applicants have not established a legal right to approach this court on review as a court of first instance.
- (3) that reviews by the Supreme Court are limited to those done at the instance of the Supreme Court or a judge thereof and in terms of ^c subs (3) individual litigants cannot directly approach the Supreme Court on review."

In any event, so the respondent submitted, the applicants had not complied with Order 33 on which they rely and the application should, on that ground also, fail.

It is proposed, firstly, to deal with the issue of whether the application is ^d properly before this court for review for, if it is not, that is the end of the matter.

It appears to me that the effect of subss (2) and (3) of s 25 of the Supreme Court Act is that, although the Supreme Court may correct an irregularity in proceedings or in the making of a decision which comes to its attention, not necessarily by way of appeal or application, no person has the right to institute ^e any review in the first instance before this court. Thus, it is not open to a party aggrieved by proceedings in a lower court to apply directly to the Supreme Court on review for redress. This much is clear from the wording of s 25 (3) of the Supreme Court Act.

The Supreme Court is an appellate court. It has no original jurisdiction except ^F when it sits as a constitutional court by virtue of s 24 of the Constitution of Zimbabwe ("the Constitution"). The powers conferred on the Supreme Court by s 25(1) of the Supreme Court Act are, therefore, to be exercised as part of its appellate jurisdiction. This view is, in my judgment, emphasized by the fact that the legislature has made the provisions of subs (1) "subject to" the rest of the section, that is, subs (2) and (3).

^G Section 25(2) confers additional jurisdiction which may be exercised when it comes to the notice of the Supreme Court or a judge of that court that an irregularity has occurred in proceedings not before it on appeal or application. Thus, s 25(2) deals with irregularities in respect of which no appeal or application is before the Supreme Court and the review is undertaken at the ^H instance of the Supreme Court and not of any litigant. Reviews of such

2005 (2) ZLR p300

Ziyambi JA

irregularities would, but for the provisions of s 25(2), fall outside the jurisdiction ^A of the Supreme Court acting in terms of its appellate jurisdiction or sitting in terms of s 24 of the Constitution. This view is emphasized by s 25(3), which states that s 25(1) and (2) must not be construed as giving a right of review at first instance.

It was submitted on behalf of the applicants that, whilst it is generally accepted ^B that the Supreme Court, being a court of appeal, its powers of review and the power of review of individual judges are normally used only in circumstances in which the matter, the subject of review, is properly before the court by way of appeal, this, however, does not mean that a matter cannot be brought for review before this court at first instance. Support for this stance, it was submitted, was to be found in subs (3) of s 25 which, while conferring no right ^C to institute proceedings in the first instance before this court, places the institution of proceedings at first instance in the Supreme Court at the discretion of the court.

This submission is, in my view, untenable for, if the intention of the legislature was that applications for review in the first instance should be instituted in ^D the Supreme Court and at its discretion, that intention would be expressly stated. On the contrary, there is a clear prohibition against the institution of review proceedings in the Supreme Court as a court of first instance.

What is also clear from a reading of s 25 is that, but for s 25(2), the Supreme Court would be unable to correct such irregularities as are envisaged in that subsection unless such proceedings were the subject of an appeal or ^E application properly before it. Thus, s 25(2) relaxes, to the extent stated therein, the limitation on the jurisdiction of the Supreme Court to appeals and applications in terms of s 24 of the Constitution.

However, lest it should be thought that litigants have, because of the provisions of s 25(2), the right to approach the Supreme Court directly in order ^F to obtain redress for perceived irregularities, s 25(3) was enacted to correct any misconception that a litigant may approach this court directly for review. Thus the Act expressly prohibits any attempt to approach the Supreme Court as a court of first instance in an application for review.

It is clear from the above that the intention of the legislature was to ensure that the Supreme Court remains the final court of appeal. The application before ^G us is one for review at first instance – the very thing which is prohibited by s 25(3). In the premises, I agree with the submission advanced on behalf of the first respondent, namely, that this application was contrary to statute.

I turn to consider the alternative relief sought by the applicants. ^H

2005 (2) ZLR p301

Ziyambi JA

^A The applicants seek leave to appeal out of time. The success of such an application depends in the first place, on the applicant having a right of appeal and, *inter alia*, on there being prospects of success on appeal.

Subsection (19) of s 46 of the Act provides:

"If a nomination paper has been rejected in terms of subsection (10) ^B or been regarded as void by virtue of subsection (16) –

(a) ...

- (b) the candidate shall have the right of appeal from such decision to a judge of the Electoral Court in chambers and such judge may confirm, vary or reverse the decision of the constituency elections officer and *there shall be no appeal from the decision of that judge;*" (my c emphasis).

The submission advanced by the applicants – that the prohibition against appeals in terms of this subsection applies only to the candidate, in this case, the respondent – is far fetched. The prohibition against any appeal whatsoever is clear and does not in my view admit of the interpretation sought to be placed on it by the applicants. The language used by the legislature is indicative of its intention that the decision of the judge sitting in terms of s 46(19)(b) should be final. Since the applicants have no right of appeal, not only are there no prospects of success on appeal but in the absence of a right of appeal, the application for leave to appeal cannot be entertained by this court.

Accordingly, the application was ill advised and not properly before us. In the e circumstances, no consideration of the merits of the application is possible and it is therefore struck off the roll. The costs of the application shall be borne by the first applicant.

e SANDURA JA & CHEDA JA concurred.

f *Chikumbirike & Associates*, applicants' legal practitioners

Kantor & Immerman, first respondent's legal practitioners

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Source:

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ZIMBABWE BANKING CORPORATION v TRUST FINANCE LTD 2005 (2) ZLR 302 (H)

2005 (2) ZLR p302

Citation	2005 (2) ZLR 302 (H)
Case No	Judgment No. HH-97-05
Court	High Court, Harare
Judge	Uchena J
Heard	7 September 2005
Judgment	2 November 2005
Counsel	<i>P C Lloyd</i> , for the applicant <i>A Moyo</i> , for the defendant
Case Type	Contested claim for provisional sentence
Annotations	Link to case annotations

Flynote

Bills of exchange and negotiable instruments — promissory note — distinction between promissory note and bill of exchange — Bills of Exchange Act [Chapter 14:01] — s 95(3) — inapplicability of certain provisions to promissory

notes — does not cover presentment for payment — s 44(1)(a) — effect of failure to present promissory note on maturity date ^D

Headnote

Negotiable certificates of deposit were issued by the defendant. They matured approximately two months after the date of issue and were to be presented for payment to the defendant on the endorsed maturity dates. The plaintiff, who was the bearer, did not present them on those dates but a few months later. The defendant did not pay and the plaintiff sought ^E provisional sentence. The defendant opposed the claim, arguing that because the negotiable certificates of deposit were not presented on the due dates the defendant was discharged in terms of s 44(1)(a) of the Bills of Exchange Act [*Chapter 14:01*]. The plaintiff argued that because of the wording of s 95(3), s 44(1)(a) was not applicable to promissory notes. ^F Under s 95(3), the provisions relating to bills in respect of presentment for acceptance do not apply to promissory notes.

Held, that s 95(3) does not cover presentment for payment as opposed to presentment for acceptance and s 44(1)(a) applied, whether the documents were bills or promissory notes.

Held, further, that the difference between a bill of exchange and a promissory ^G note is that in the case of a bill of exchange the issuer of the bill gives an order to another to pay to a third party, while in the case of a promissory note the issuer makes a promise to pay.

Held, further, that the wording of the negotiable certificates of deposit showed that they were not bills of exchange but promissory notes. There was no order to another party to pay. The documents were an ^H

2005 (2) ZLR p303

Uchena J

^A unconditional promise by the defendant to pay at a stated period after sight to the order of the bearer.

Cases cited

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

Zimbank v Interfin Merchant Bank of Zimbabwe Ltd 2005 (1) ZLR 114 (H)

Legislation considered ^B

Bills of Exchange Act [*Chapter 14:02*], ss 3(1), 44(1)(a), 89(1) and 95(1) and (3)

High Court Rules 1971 (RGN 1047 of 1971), rr 20 and 223(1)(a)

Case information

^C *P C Lloyd*, for the applicant

^A *Moyo*, for the defendant

Judgment

UCHENA J: The plaintiff, Zimbabwe Banking Corporation, is the bearer of two negotiable certificates of deposit issued by the defendant Trustfin on the 11 ^D December 2003 and 20 January 2004. The negotiable certificates of deposit matured on 2 January 2004 and 3 February 2004 respectively.

It is common cause that they were not presented for payment on due dates. The plaintiff, in his summons for provisional sentence, alleges they were presented for payment on 5 April 2004. The defendant denies this and says the first communication it received from the plaintiff was a letter of demand ^E dated 12 May 2005.

The plaintiff has now issued summons for provisional sentence. The defendant has filed an opposing affidavit in terms of r 25 of the High Court Rules 1971, contesting the plaintiff's claim for provisional sentence.

In terms of r 21 of the High Court Rules, the plaintiff in his summons required ^F the defendant to appear before this court on 7 July 2005 to answer to his claim.

The case was subsequently enrolled for the motion court of 27 July 2005 which was presided over by Mavangira J. The plaintiff's counsel, Mr *Sadomba*, applied for a postponement to 7 September 2005. Mr *Moyo* for the plaintiff made submissions to the effect that the case should not be postponed to the motion court of 7 September 2005 as it was a contested claim for provisional sentence.

Mr *Sadomba*, relying on *Zimbabwe Banking Corporation Ltd v Interfin Merchant Bank of Zimbabwe Ltd* 2005 (1) ZLR 114 (H), submitted that it was proper to enroll a contested claim for provisional sentence on the roll for a motion court. Mavangira J reserved judgment on the postponement of this case to 7 September 2005. In her judgment delivered on 4 August 2005, she

2005 (2) ZLR p304

Uchena J

after referring to the case of *Zimbabwe Banking Corporation supra* at p 2 of her judgment said:

"In the circumstances, I would grant the application for a postponement to the motion court of 7 September 2005."

The case then appeared before me on 7 September 2005. Mr *Moyo*, again, strongly objected to the case being heard by the motion court. He referred me to r 223(1)(a) which provides as follows:

"Subject to subrule (5) –

- (a) uncontested cases for provisional sentence; and
- (b) ...
- (c) ...
- (d) ... c
- (e) ...

may be set down for hearing: (i) in Harare, on any Wednesday by filing a notice of set down with the registrar not later than the Thursday, preceding the Wednesday of set down."

The rule cited by Mr *Moyo* is clear. It only allows the setting down of uncontested cases for provisional sentence for hearing by the motion court. This, in my view, excludes contested cases.

Mr *Lloyd* for the plaintiff, while still relying on the *Zimbabwe Banking Corporation case supra* conceded the effect of r 223(1)(a) but suggested that r 223(1)(a) was not correctly worded. He further submitted that I should not decide the issue of the enrolling of this case as it has already been decided on by Mavangira J. He submitted that it would be undesirable for litigants to be given conflicting orders in the same case. I accept Mr *Lloyd's* submissions. This court cannot reconsider an issue that has already been considered by another judge of this court on the same facts and between the same parties. If Mr *Moyo's* client was aggrieved by Mavangira J's decision he should have sought leave to appeal against it and appealed to the Supreme Court. It also seems to me that r 223(1)(a) was not brought to Mavangira J's attention

I will therefore proceed to consider the case on the merits.

As previously indicated, the dispute between the parties arose from the issuance of two negotiable certificates of deposit by the defendant on 11 December 2003 and 20 January 2004.

Their maturity dates were 2 January 2004 and 3 February 2004, respectively. The negotiable certificates were in the sums of one billion dollars and nine billion six hundred and forty nine million two hundred and seventy thousand and thirty seven dollars and sixty six cents.

2005 (2) ZLR p305

Uchena J

The first one was endorsed "At 22 (twenty two) days after sight pay to the order of bearer \$1 000 000 000".

The second one was endorsed "At 14 (fourteen) days after sight pay to the order of bearer \$9 649 207 137.66".

Both were also endorsed "for value received. Payable on maturity date upon presentation of this certificate to Trustfin" (my emphasis).

They were therefore to be presented for payment to the defendant on the endorsed maturity dates.

Armed with these documents, the plaintiff in terms of order 4 r 20 issued summons for provisional sentence. As required by r 23, the documents were c attached to the summons for provisional sentence.

The defendant has strenuously challenged the validity of the plaintiff's claim. I am therefore, now called upon to either grant the provisional sentence or refuse to grant the claim and order that the claim for provisional sentence stand over for trial.

A claim for provisional sentence is granted if the defendant fails to discharge D the onus on him of satisfying the court that the balance of probability of success in the main action is against the plaintiff. In *Hicks v Dobriskey* 1976 (1) RLR 218 (H) at 220A-C, Goldin J (as he then was) said:

"When the plaintiff sues on a liquid document the court will ordinarily grant provisional sentence unless the defendant produces proof that the probability of success in the principal case is against the plaintiff. It is E therefore necessary to decide whether or not there is a balance of probability in favour of the defendant which would justify the refusal of an order for provisional sentence. If there is no balance of probability in favour of either party in any principal case that may eventuate, the law is that the plaintiff is entitled to provisional sentence: see *Allied Holdings v Myerson* 1948 (2) SA 961 (W) at 966; *Abraham v du Plessis* 1962 (3) SA 162 (T) at 169." F

I therefore have to decide whether the balance of probabilities favour the defendant in which case I can refuse to grant the provisional sentence. If they do not, then I can grant the provisional sentence.

In the present case, it is common cause that the plaintiff is the bearer of the G negotiable certificates of deposit. It is also common cause that negotiable certificates of deposit are liquid documents. It is not in dispute that the defendant issued the negotiable certificates of deposit.

The defendant's contention is that the plaintiff is holding these negotiable certificates of deposit long after their maturity dates and that the plaintiff did H not present the certificates for payment on their dates of maturity.

2005 (2) ZLR p306

Uchena J

The defendant relies on s 44 of the Bills of Exchange Act [*Chapter 14:01*], A hereinafter called the Act. He says the negotiable certificates of deposit are bills of exchange which should have been presented for payment on due date. Mr Moyo for the defendant argued that because the negotiable certificates of deposit were not presented on due dates the defendant was discharged in terms of s 44(1)(a) of the Act. He also submitted that s 44(1) would apply even B if the negotiable certificates of deposit were promissory notes. For this, he relied on s 95(1) and (3) of the Act. Section 44(1) provides as follows:

"Subject to this Act a bill must be duly presented for payment. If it is not so presented the drawer and any endorser shall be discharged. A bill is duly presented for payment which is presented in accordance with the following rules C —

- (a) where the bill is not payable on demand, presentment must be made on the day it falls due;
- (b) ...
- (c) ...
- (d) the bill is presented at the proper place —
 - (i) where a place of payment is specified in the bill and the bill is there D presented;
 - (ii) where no place of payment is specified but the address of the drawee or acceptor is given in the bill, and the bill is there presented ..."

It is clear that if s 44(1) is applicable to the negotiable certificates of deposits E in question the defendant has discharged the onus on him to prove his probability of success in the main case. In *Hicks v Dobriskey supra*, it was held that the onus to establish probabilities of success in his favour in the principal case is on the defendant.

Mr Moyo submitted that s 44(1) of the Act is applicable to both bills of F exchange and provisory notes. Mr Lloyd submitted that they are not applicable to promissory notes because s 95(3) of the Act provides as follows:

- "95(3) The following provisions as to bills do not apply to notes, namely the provisions relating to —
- (a) presentment for acceptance; G
 - (b) acceptance;

- (c) acceptance *supra* protest;
- (d) bills in a set."

In my view, s 95(3) does not refer to s 44(1) which deals with presentment for payment. Section 95(3) excludes provisions as to bills relating to presentment for acceptance which is provided for under s 40 of the Act. It does not cover ^h

2005 (2) ZLR p307

Uchena J

A presentment for payment. Section 95(1) relied on by Mr *Moyo* provides as follows:

"95(1) Subject to this part and except as by this section provided, the provisions of this Act relating to bills apply with the necessary modifications to notes."

This means the provisions of s 44(1) would be applicable in this case whether ^b the negotiable certificates of deposit are bills of exchange or promissory notes.

For the sake of clarity, I will first determine whether the negotiable certificates of deposit are bills of exchange or promissory notes. A bill of exchange is defined in s 3(1) of the Act as follows:

"A bill of exchange is an unconditional order in writing addressed by one ^c person to another, signed by the persons giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of a specified person or bearer."

The requirements of a bill of exchange are therefore: ^d

- (1) an unconditional order in writing;
- (2) addressed by one person to another;
- (3) signed by the person giving it;
- (4) requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time or to the order of a specified person, or to bearer.

^e A bill of exchange should therefore be an unconditional order addressed by the person giving it to another requiring that other person to pay a specified person or to bearer on demand or at a fixed or determinable future time.

An examination of the negotiable certificates of deposit reveals that Trustfin issued them and was the one to pay to the bearer on maturity date. There is ^f therefore no unconditional order addressed to one person by another. The negotiable certificates of deposit are therefore not bills of exchange.

A promissory note is defined in s 89(1) of the Act as follows:

"89(1) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay on ^g demand or at a fixed or determinable future time a sum certain in money to, or to the order of a specified person, or to bearer."

The requirements of a promissory note are therefore:

- (1) an unconditional promise in writing; ^h
- (2) made by one person to another;

2005 (2) ZLR p308

Uchena J

- (3) signed by the maker, engaging to pay on demand, or at a fixed or ^a determinable future time;
- (4) a sum certain in money to, or to the order of, a specified person or bearer.

The difference between a bill of exchange and a promissory note are therefore:

In the case of a bill of exchange, the issuer of the bill gives an order to another to pay to a third party, while in the case of a promissory note, the issuer makes ^b a promise to pay.

An examination of one of the negotiable certificates of deposit will reveal whether or not it is a bill or a promissory note.

The first negotiable certificates of deposit, which is identical in form to the second except for the dates and amounts, reads: ^c

"Negotiable certificate of deposit

Settlement & date 2 January 2004 at 22(twenty-two) days after sight pay to the order of bearer \$1 000 000 000 amount in words one billion dollars only).

For value received payable on maturity date upon presentation of this D certificate to Trustfin.”

Trustfin’s logo address and certificate number are then indicated. Trustfin’s authorised signatories then signed the negotiable certificates of deposit.

The information on the negotiable certificates of deposit, therefore, reveals that Trustfin issued the document and that it is Trustfin which should pay. This clearly demonstrates that it is not a bill of exchange but a promissory note. E There is no order to another party to pay. It is clearly an unconditional promise by Trustfin to pay 22 days after sight to the order of bearer.

I now must proceed to deal with the effect of the negotiable certificates of deposits being promissory notes. In my view, the provisions of s 95(1) leaves promissory notes open to challenge by the defendant as the defendant can F rely on the provisions of s 44(1).

The negotiable certificates of deposit themselves clearly state that they are “payable on maturity date upon presentation of this certificate to Trustfin”. The issue raised by the defendant which enabled it to discharge the onus on its having probabilities of success against the plaintiff in the principal case is in the plaintiff not having presented the negotiable certificates of deposit G on the maturity dates indicated on them and the plaintiff having according to its summons presented the negotiable certificates of deposit for payment on 5 April 2004. 5 April 2004 is not the maturity date for any of the negotiable certificates of deposit. It is long after the maturity dates for the negotiable certificates of deposit. H

2005 (2) ZLR p309

Uchena J

A The defendant produced the plaintiff’s letter of demand dated 12 May 2005 and says that was the first communication it received from the plaintiff on the negotiable certificates of deposit. This, coupled with the provisions of s 44(1)(a) of the Act, raised the defendant’s probability of success against the plaintiff in the main case.

In the circumstances, the claim for provisional sentence is refused and the case B is ordered to stand over for trial in terms of r 34 of the High Court Rules 1971.

Gill Godlonton & Gerrans, plaintiff’s legal practitioners

C Kantor & Immerman, defendant’s legal practitioners

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Source:

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NATIONAL CONSTITUTIONAL ASSEMBLY v THE PRESIDENT & ORS 2005 (2) ZLR 310 (H)

2005 (2) ZLR p310

Citation	2005 (2) ZLR 310 (H)
Case No	Judgment No. HH-110-05
Court	High Court, Harare
Judge	Guvava J
Heard	11 March 2004
Judgment	2 November 2005

Counsel	<i>A Muchadehama</i> , for the applicant <i>N Mutsonziwa</i> , for the respondents
Case Type	Civil Application
Annotations	Link to case annotations

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — s 20 — freedom of expression — section not encompassing a situation where persons are forced to receive information and ideas against their will — right of civic group to compel Government to receive group's proposals for constitutional reform — no right given under section*

Constitutional law — *Constitution of Zimbabwe 1980 — s 21 — protection of freedom of association — section preventing the restriction of a person's right to associate with others of their own choice — nothing to compel persons to associate against their own will — right of civic group to compel Government to receive group's proposals for constitutional reform — no right given under section*

Constitutional law — *Constitution of Zimbabwe 1980 — s 23 — prohibition against discrimination — actions only discriminatory if other persons are accorded the same privileges which are denied to others — right of civic group to compel Government to receive group's proposals for constitutional reform — no other group engaged in such activities — no right given under section*

Costs — *constitutional matter — constitutional issues raised — no proper basis for raising such issues — costs awarded against applicant which raised such issues*

Practice and procedure — *parties — President — proceedings against — leave of court to sue is required*

Headnote

After holding two conferences at which a new constitution for Zimbabwe was considered and discussed, the applicant, a civic group formed for the purpose of advocating constitutional reform, prepared a final draft constitution which it sought to hand over to the first respondent. It wrote ^H

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^A two letters to the second respondent, being the Minister of Justice, Legal and Parliamentary Affairs, seeking his assistance in arranging a meeting with the first respondent. The second respondent replied to neither letter. The applicant, in its affidavit, stated its belief that the refusal of the Government to receive its draft constitution was grossly unreasonable and offended various provisions of the Constitution. In seeking an order ^B compelling respondents to meet with it, to receive the draft and to respond thereto, the applicants relied upon s 23 of the Constitution, alleging that it has been wrongful discriminating against. It also alleged that its right to receive and impart ideas had been curtailed in contravention of s 20 of the Constitution and that its freedom of association had been infringed in contravention of s 21 thereof. Finally, it alleged that it was ^C being denied its lawful right of access to Government. However, no court application had been made in terms of r 18 of the High Court Rules before citing the first respondent as a party to the action.

Held, that on a proper interpretation of s 23 of the Constitution, actions may only be discriminatory if other persons are accorded the same privileges ^D which are being denied to the applicants. *In casu*, there was no evidence that the Government had been meeting other groups to discuss constitutional amendments.

Held, further, that the crux of the right under s 20 of the Constitution is the curtailment of the freedom of expression. It does not envisage a situation where persons, such as the respondents, are forced ^E to receive information and ideas which they do not wish to receive.

Held, further, that the right which is being protected by s 21 of the Constitution is the restriction of a persons right to associate with persons of their own choice. There is no right in the Constitution, however, which forces person to associate against their own will.

¶ *Held*, further, that there is nothing in the Constitution according citizens a legal right to meet Government officials and to raise their concerns with them.

Held, further, and in any event, that in the absence of court order granting leave sue the first respondent, as required by r 18 of the High Court Rules, the application against him must be dismissed on that basis alone.

¶ *Held*, further that the application against the respondent must be dismissed. As there was no legal basis for bringing the application, the respondents were entitled to their costs, notwithstanding the constitutional issues ¶ which were raised.

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Guvava J

Case cited ^A

Kathii Raning Rawat v State of Sarashra (1952) SCR 435

Re Munhumeso & Ors 1994 (1) ZLR 49 (S)

Legislation considered

Constitution of Zimbabwe 1980, ss 20, 21 and 23 ^B

High Court Rules 1971 (RGN 1047 of 1971), r 18

Case information

A Muchadehama, for the applicant

N Mutsonziwa, for the respondents

Judgment

GUVAVA J: The National Constitutional Assembly (NCA) is a civic c organisation which was formed in May 1997 with the objective of advocating for a new constitution in Zimbabwe. The NCA has two categories of members, that is individuals and civic organisations in Zimbabwe. Institutional members of the NCA include among others a broad based membership of organisations such as the Zimbabwe Congress of Trade Unions (ZCTU), the Zimbabwe b National Students Union (ZINASU), and various opposition political parties. Individual members are natural persons who are either citizens or permanent residents of Zimbabwe.

The first respondent is the President of the Republic of Zimbabwe. He is the head of State and Government. The second respondent is the Minister of Justice, Legal and Parliamentary Affairs. The third respondent is the Attorney- e General, who is the Government's chief legal advisor. The respondents are cited in their official capacities in this application.

The applicant approached this court seeking the following order:

- "1. That within fourteen days of the service of this order upon them the respondents be and are hereby directed to meet and receive from ¶ applicant, a document entitled 'Proposed Draft Constitution of Zimbabwe'.
2. That within thirty days (30) days of receiving the 'Proposed Draft Constitution of Zimbabwe' the respondents be and are hereby directed to communicate to the applicant, the response of the Government of Zimbabwe to the said document. g
3. That there will be no order as to costs.
4. That in the event of opposition the second respondent pays the costs."

The application was based on four main grounds. Firstly, that the applicant had been discriminated against in terms of s 23 of the Constitution. Secondly, ¶

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Guvava J

A that its rights to receive and impart ideas had been curtailed in contravention of s 20 of the Constitution. Thirdly, that its freedom of association had been infringed in contravention of s 21 of the Constitution and finally that it was being denied its lawful right of access to Government.

The facts upon which the applicants brought this application may be summarized thus. On 6 November 2000, the NCA wrote to the Minister of ^b Justice, Legal and Parliamentary Affairs calling upon Government to convene a stakeholders' conference to decide on the way forward following the outcome of the referendum which was held in February 2000. During the referendum, the people in Zimbabwe voted against Constitutional reform, a government initiative, at the instigation of the applicant. It was the position ^c of the NCA that constitutional reform should not come about as it was against the manner of establishment and the *modus operandi* of the Constitutional Review Commission which had drafted the draft constitution. The Minister rejected the suggestion by the NCA in his letter dated 14 November 2000. In that letter, the Minister stated that following the rejection of the draft Constitution the Government's priority was now centered on economic ^d recovery and land redistribution and no longer focused on constitutional reform.

The applicant thereafter embarked on a process of drafting a new Constitution for Zimbabwe. A Stakeholders' Conference was convened and following that meeting, a draft Constitution was launched on 28 September 2001. In December 2001, the applicant held a second Stakeholders' Conference which made ^e substantial amendments to the initial draft. On 17 December 2001, the applicant wrote another letter to the second respondent seeking the assistance of the Minister in facilitating a meeting with the President, the first respondent, for purpose of the formally handing over of the draft Constitution. There was no response to the letter. This letter was followed by another letter by the ^f applicants' legal practitioners demanding that the second respondent facilitates a meeting between the applicant and the President of Zimbabwe, failing which they would file the application which is now before me. No response was received from the second respondent.

The applicant stated in its affidavit that it believed that the Governments ^g refusal to receive the NCA's draft Constitution was grossly unreasonable and offends various provisions of the Constitution.

The application was opposed by the respondents on the basis that it was frivolous and vexatious. The respondents prayed for the dismissal of the application with costs on a legal practitioner and client scale.

Before dealing with the merits of the matter, it is important to point out that ^h in terms of our law, the President of Zimbabwe cannot be sued without the

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Guvava J

leave of this court. Rule 18 of the High Court Rules, 1979 provides as follows: ^a

"No summons or other process of this court may be sued out against the President or against any of the judges of the High Court without the leave of the court granted on court application for that purpose."

No court application was made for such leave in this matter as required by this rule. In my view, the first respondent has thus been improperly cited as no ^b leave from this court was granted for the President to be sued. Accordingly, the application against first the respondent is dismissed on that basis.

I will now proceed to deal with each of the issues raised by the applicant in turn, as against the second and third respondents.

SECTION 23 OF THE CONSTITUTION

The argument by the applicant was that the second respondent had ^c contravened s 23(1) of the Constitution as it was being discriminated against on political grounds. This assertion was based on the fact that the second respondent had refused to meet with the applicant and discuss issues pertaining to the proposed draft constitution, which had been drafted by the applicant. In order to determine whether or not there has been such ^d discrimination, it is necessary to examine the relevant provision.

Section 23 of the Constitution provides as follows:

"23(1) Subject to the provisions of this section –

- (a) no law shall make any provision that is discriminatory either of itself or in its effect; and
- (b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority." ^e

Section 23(2) of the Constitution however qualifies the discrimination. It provides thus:

"(2) For the purposes of subsection (1), a law shall be regarded as ^F making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour or creed are prejudiced –

- (a) by being subjected to a condition, restriction or disability to which ^G other persons of another such description are not made subject; or
- (b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description;

and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable ^H

2005 (2) ZLR p315

Guvava J

^A to the description by race, tribe, place of origin, political opinions, colour and creed of the persons concerned."

It seems to me, therefore, that a proper interpretation of s 23 of the Constitution is that actions may only be discriminatory if other persons are accorded the same privileges which are being denied to the applicants. The applicants must also be denied on the basis of race, tribe place of origin, political opinions, ^B colour and creed. PM Bakshi in his book *The Constitution of India*, explains the meaning of discrimination as set out in Article 15 of the Constitution of India which is similar to s 23 of the Zimbabwe Constitution. At p 22, he states that the crucial word in this article is "discrimination" which means "making an adverse distinction with regard to or distinguishing unfavourably from ^C others: see *Kathii Raning Rawat v State of Sarashtra* (1952) SCR 435 at 442". In other words, the discrimination cannot be abstract but must be in relation to other persons or groups.

The applicant has not alleged in its papers that the Minister has been meeting other groups in order to discuss constitutional amendments but has refused to meet with the applicant. To the contrary, it was conceded by the applicant ^D that, at the time that the respondents were considering constitutional reform they were actually invited to take part in the Constitutional Commission but they decided not to take part in the process. In its papers, the applicant explained that it refused to take part in the process and was instrumental in members of the public rejecting the draft Constitution during the Referendum in 2000. Whilst the applicants were perfectly entitled to decline the invitation ^E to take part in this process, it illustrates clearly that the respondents were in actual fact not discriminated against at all as they gave applicant an opportunity to make submissions if it so wished. After the rejection of the Constitutional reform, the first and second respondent abandoned the process and have not been consulting with any person or group of persons in this respect. This ^F position was made very clearly in the letters in response to the applicant's request for consultations.

On the facts before me, I can come to no other conclusion than that the applicant has failed to establish a basis upon which they can assert that they have been discriminated against by the respondents within the ambit of s 23 of the Constitution.

^G SECTION 20 OF THE CONSTITUTION

The applicants also alleged that the second respondent had contravened s 20 of the Constitution as he had refused to share ideas with the applicant. Section 20 of the Constitution protects the fundamental freedoms of expression i.e. freedom to hold opinions and to receive and impart ideas without ^H interference. From the facts before me, there has been no allegation made that

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Guvava J

the second respondent in any way, interfered with the applicants rights as set ^A out in s 20 of the Constitution. To the contrary, the background information which was provided by the applicant, covering how their process began and the various meetings they have held proves beyond doubt that its rights have not been curtailed at all. The crux of the right under s20 is the curtailment of the freedom of expression: see *In re Munhumeso & Ors* 1994 (1) ZLR 49 (S). It does not, in my view,

envisage a situation where persons, such as the ^B respondents, are forced to receive information and ideas that they do not wish to receive.

In any event, it was conceded during argument that the applicant had other methods by which they could impart their ideas to the second respondent without necessarily holding meetings. It was conceded by Mr *Muchadehama* ^C that the applicant could publish its draft constitution in the public media or could post the document to the second respondent. These were both acceptable and long practised methods of disseminating information to members of the public or targetted groups.

I therefore find that the applicant has not proved a contravention of s 20 of ^D the Constitution.

SECTION 21 OF THE CONSTITUTION

The third point which was raised by the applicant was that the second respondent had contravened s 21 of the Constitution as he had refused to associate with the applicant for the purpose of discussing the draft constitution. ^E This provision in the Constitution guarantees the right to every person to freely associate as long as the association is lawful. The only restrictions to that right are the derogations which have been given by the Constitution in subs (3). It is not clear to me why the applicant would seek to compel the respondents to associate with it as forced association is expressly prohibited by subs (2) of s 21. This provision states as follows: ^F

“(2) The freedom referred to in subsection (1) shall include the right not to be compelled to belong to an association.”

In my view, the right which is being protected by the Constitution is the restriction of a persons right to associate with persons of their own choice. There has not been an allegation, on the papers before me that the applicant’s ^G rights have been restricted in any way. I know of no right in the Constitution which forces persons to associate against their will. Indeed, it would be a total negation of that very freedom which s 21 of the Constitution strives to uphold, particularly the freedom of association. ^H

2005 (2) ZLR p317

Guvava J

A RIGHT OF ACCESS TO PUBLIC OFFICIALS

The applicant also raised the point that citizens have a legal right to meet Government officials and raise their concerns and that public officials have a duty to meet with their citizens. The applicant did not provide any authority for this proposition and I was unable to find any in terms of our law. In my view, whilst it is a worthwhile exercise for government to engage in dialogue with ^B its citizens, and has in fact done so on a number of occasions, I know of no law which gives citizens a justiciable right to force government to meet with them.

In respect to costs, the applicant submitted that there should be no order made as the issues raised were important constitutional ones. I am however not ^C persuaded by this argument on the facts of this particular case. This application was in my view clearly misguided, as there was no legal basis for bringing such an application. The respondents have successfully defended the application and are thus entitled to their costs.

Accordingly, the application is dismissed with costs.

^D *Mbizo, Muchadehama & Makoni*, applicant’s legal practitioners

Civil Division of the Attorney-Generals Office, respondents’ legal practitioners

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RURAL DISTRICT COUNCIL v MAKWEMBERE 2005 (2) ZLR 318 (S)

MUDZI RURAL DISTRICT COUNCIL v MAKWEMBERE 2005 (2) ZLR 318 (S)**2005 (2) ZLR p318**

Citation	2005 (2) ZLR 318 (S)
Case No	Judgment No. S-90-05
Court	Supreme Court
Judge	Chidyausiku CJ, Sandura JA & Cheda JA
Heard	15 November 2005
Judgment	15 November 2005
Counsel	<i>C Warara</i> , for the appellant <i>T Pasipanodya</i> , for the respondent
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

Employment — *labour relations officer* — *decision by* — *procedure to be followed by party dissatisfied with officer's decision* — *referred under c s 93 of Labour Act* — *courses open to labour relations officer*

Headnote

The appellant rural council suspended the respondent pending an application to a labour relations officer to dismiss him for maladministration. The officer ordered that he be reinstated. Eleven months later, the same matter was placed before another labour relations officer who purported to make an arbitration award setting aside the reinstatement order and confirming the dismissal. The Labour Court upheld the decision of the first officer. On appeal:

Held, that after the determination of the first labour relations officer, an appeal should have been made to a senior labour relations officer within fourteen days. This was not done. The treatment of the matter by the second labour relations officer as an arbitration matter was also wrong. He purported to be acting in terms of s 93 of the Labour Relations Act [Chapter 28:01] but he did not follow the provisions of that section. Under the section as amended, he could have tried conciliation, not arbitration. The matter had not been referred to him as an unfair labour practice or referred for arbitration. The only valid proceedings were those before the first labour relations officer. The proceedings before the second labour relations officer were a nullity.

Case information

C Warara, for the appellant

T Pasipanodya, for the respondent

Judgment

CHEDA JA: After hearing submissions from both counsel in this matter, we dismissed this appeal with costs and indicated that reasons would follow in due course. These are they. ^H

2005 (2) ZLR p319

Cheda JA

^A The appellant is a Rural District Council established in terms of the Rural Districts Councils Act [Chapter 29:13], hereinafter referred to as "the Council". The respondent was employed by the

appellant as its chief executive officer.

Following two meetings of the Council, it was decided that the respondent be discharged from employment for maladministration of the Council's affairs. He [ⓑ] was suspended pending dismissal.

On 20 November 2001, an application was made to a labour relations officer to dismiss the respondent from employment. The labour relations officer determined that the respondent be reinstated without loss of status, salary and other benefits that he had enjoyed, with effect from the date of his [ⓒ] suspension. The date of the hearing was given as 10 July 2002, and the date of determination of the application as 24 September 2002.

On 15 August 2003, the same matter was placed before another labour relations officer, who made an arbitration award on 26 September 2003. According to the record, this was because the Council appealed against the first labour [ⓓ] relations officer's determination on 30 January 2003.

There is nothing in the papers to show whether the second labour relations officer was a senior labour relations officer, but, even assuming that he was, he did not deal with the matter as an appeal case but treated it as an arbitration matter.

Acting as an arbitrator, the second labour relations officer set aside the [ⓔ] determination of the first labour relations officer, thus confirming the dismissal of the respondent.

The Council then appealed to the Labour Court, but its appeal was dismissed and the Labour Court ordered the reinstatement of the respondent. The Council is now appealing against the Labour Court's decision.

[ⓕ] In its grounds of appeal, the Council submitted that the Labour Court erred by overlooking the fact that the matter brought before the second labour relations officer was not an appeal but a review. This contention is not supported by the papers.

The Council also submitted that the Labour Court ordered reinstatement of [ⓖ] the respondent without dealing with the appeal filed on 30 January 2003.

What the appellant has overlooked in this matter is that after the determination of the first labour relations officer, an appeal should have been made to the senior labour relations officer within fourteen days. This was not done.

The treatment of the matter by the second labour relations officer as an [ⓓ] arbitration matter was also wrong. He purported to be acting in terms of [Ⓢ] 93

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Cheda JA

of the Labour Relations Act [*Chapter 28:01*] ("the Act"), but he did not follow [ⓐ] the provisions of that section. The matter had not been referred to him as an unfair labour practice or referred for arbitration.

In any case, when the matter was placed before the second labour relations officer, [Ⓢ] 93 had been repealed and substituted by a new section. He could have tried conciliation as provided in the amendment, [Ⓢ] 30 of Act 17 of 2002, and [ⓑ] not arbitration.

It follows that the only valid proceedings concerning the matter were those before the first labour relations officer. Proceedings before the second labour relations officer were a nullity.

No condonation had been sought for the delay in noting the appeal from the [ⓒ] decision of the first labour relations officer. This means that there was no appeal on the matter. There was, therefore, no basis upon which the Labour Court could consider the merits of the matter, as submitted by the appellant.

In short, there was no condonation applied for before the noting of the appeal and it was out of time. The second hearing, which was supposed to be an appeal and later called arbitration, was a nullity. The second labour relations [ⓓ] officer who purported to treat it as arbitration did not follow the provisions of [Ⓢ] 93 that he referred to.

The Labour Court's decision was sufficiently clear and I do not see any misdirection in it.

It was for these reasons that we ordered that the appeal be dismissed with [ⓔ] costs.

CHIDYAUSIKU CJ & SANDURA JA concurred.

Warara & Associates, appellant's legal practitioners

Manase & Manase, respondent's legal practitioners

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S v KAWADZA 2005 (2) ZLR 321 (H)

2005 (2) ZLR p321

Citation	2005 (2) ZLR 321 (H)
Case No	Judgment No. HH-5-06
Court	High Court, Harare
Judge	Garwe JP & Uchena J
Heard	15 November 2005
Judgment	15 November 2005
Counsel	<i>H Simpson</i> , for the appellant <i>R Tokwe</i> , for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal law (common law offences) — robbery — doctrine of recent c possession of stolen property — may be applied in any case in which theft is a component, such as robbery

Criminal procedure (sentence) — common law crimes — receiving stolen property knowing it to have been stolen — motor vehicle — appellant attempting to smuggle stolen motor vehicle out of the country — aggravating feature to be taken into account in assessing sentence

Ⓓ **Evidence** — recent possession — when such evidence may be relied on — applicability in charge of robbery — evidence of recent possession maybe used in any case where theft is an element of the crime

Headnote

The appellant had been convicted of robbery of a motor vehicle. The ε evidence disclosed that the appellant was found in possession of the stolen vehicle, while endeavouring to drive it across the international boundary between Zimbabwe and Mozambique within 24 hours of the robbery. The complainant, however, was unable to identify him as one of the two robbers. Further, his description of neither robber fitted that of the appellant. On appeal, it was conceded by the State that the ϕ conviction for robbery was unsafe. In altering the conviction of the regional court to one of receiving stolen property knowing it to have been stolen, the court took the opportunity to consider whether the doctrine of recent possession applied to cases of robbery. In considering sentence, the court while noting that the appellant was a first offender, gave ϑ consideration to the fact that the appellant had attempted to drive the vehicle out of the country.

Held, that the doctrine of recent possession is based on an inference being drawn that the possessor of recently stolen property stole the property. It may be relied on where if he cannot give an innocent explanation of his possession and the inference that he stole the property is the only ^H reasonable inference that can be drawn from such possession. There is

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no reason why the doctrine cannot be used in any case of which theft ^A is a component, like robbery. If the only inference that can be drawn from the totality of the evidence is that he stole the goods, then he can be convicted of the robbery of those goods and others robbed from the complainant at the same time.

Held, further, that in arriving at a sentence of seven years, two years of which ^B were suspended, it was an aggravating feature that the appellant had received the vehicle for the purpose of smuggling it out of the country.

Cases cited

S v Chimanga S-51-93

S v Chimbwanda S-110-93 ^C

S v Manyika S-175-93

S v Parrow 1973 (1) SA 603 (A)

R v Samson AD-106-69

Case information

H Simpson, for the appellant

R Tokwe, for the respondent ^D

Judgment

UCHENA J: The appellant was convicted on one count of armed robbery by the regional court sitting at Harare. He had been charged with two counts of armed robbery of two motor vehicles. He was due to lack of evidence acquitted on the other count. He was sentenced to 10 years' imprisonment of which one year was suspended on conditions of good behaviour and another one and ^E a half years on conditions of restitution.

At the hearing of the appeal, Mr *Tokwe* for the respondent conceded that the regional magistrate erred when he convicted the appellant of armed robbery when there was no evidence linking him to the robbery. Mr *Simpson* agreed with Mr *Tokwe* that the appellant should have been convicted of receiving ^F the motor vehicle knowing it to have been stolen.

The complainant in the count for which the appellant was convicted only had 30 seconds in which he observed the robbers. Thereafter, he was ordered not to look at his assailants and a gun was pointed at his head. In the 30 seconds, he said he observed that the robber who approached his motor vehicle from ^G the right was short, dark and stout. It is common cause that the appellant does not fit that description. The complainant said the robber who approached his motor vehicle from the left was tall and slim. Again, the appellant does not fit that description.

It must be noted that the complainant did not have sufficient time to observe the robbers. His brief observation which was split between the robbers on ^H

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Uchena J

^A either sides of his motor vehicle could not have founded the appellant's conviction even if the description he gave fitted the appellant. On the contrary, the complainant said he was not able to identify the appellant as one of the robbers.

In view of the above, we were satisfied that the regional magistrate erred when he convicted the appellant of armed robbery in the absence of evidence ^B identifying him as having been at the scene of the robbery. We therefore found that the concession made by Mr *Tokwe* was properly made.

Mr *Tokwe* in making the concession submitted that the applicant should be convicted on the competent verdict of receiving stolen property knowing it to have been stolen. He said this was to be premised on the appellant being ^c in possession of the stolen motor vehicle the next morning after it had been robbed from the complainant after 10.00 p.m. the previous night. He further pointed out that the appellant's conduct after taking possession of the motor vehicle proves he knew it was stolen. He pointed to the following as proof of such knowledge.

- (1) That the appellant used an illegal exit from Zimbabwe to Mozambique ^d resulting in the motor vehicle being stuck in Mukumbura river.
- (2) He gave Cst Muchira incorrect information about his identity and that of the motor vehicle.
 - (a) He told Cst Muchira that he was Victor Mujuru Chatibva.
 - (c) He showed him a driver's licence in the name of Victor Mujuru ^e Chatibva.
 - (d) He gave an incorrect registration number and colour of the motor vehicle.

This proves the appellant did not want to be linked to the motor vehicle he had driven from Harare to Mukumbura River. This can only be because he knew ^f the motor vehicle had been stolen.

Mr *Simpson* for the appellant agreed with Mr *Tokwe* that the evidence proved that the appellant received the motor vehicle knowing it to have been stolen.

We were satisfied that the concessions made by counsel for both parties were properly made. After hearing counsel's submissions on sentence and hearing ^g the appellant's father's evidence in mitigation, we set aside the appellant's conviction on armed robbery and substituted it with one of receiving stolen property knowing it to have been stolen. We also set aside the regional magistrate's sentence of 10 years' imprisonment with one and a half years suspended on conditions of good behaviour and restitution and substituted ^h it with one of seven years' imprisonment with two years suspended on

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Uchena J

conditions of good behaviour. We gave our brief reasons on tapes and ^a indicated that a detailed judgment would follow.

In his submissions against the appellant's conviction on armed robbery, Mr *Simpson* submitted that the doctrine of recent possession does not apply to robbery. Mr *Tokwe* in his submissions submitted that he has not been able to find a case where it was applied to robbery but submitted that it has been used ^b in housebreaking with intent to steal and theft cases. This is an important point of law which this court must determine even though this case can be resolved without relying on the doctrine of recent possession.

In *S v Parrow* 1973 (1) SA 603 (A), referred to by Mr *Tokwe*, Holmes JA at p 604B-E said:

"I pause here to refer briefly to the so-called doctrine of recent possession ^c of stolen property. In so far as here relevant, it usually takes this form. On proof of possession by the accused of recently stolen property, the court may (not must) convict him of theft in the absence of an innocent explanation which might be reasonably true. This is an epigrammatic way of saying that the court should think its way through the totality of the facts of each particular case and must acquit the accused unless it can ^d infer, as the only reasonable inference that he stole the property. (Whether the further inference can be drawn that he broke into the premises in a charge such as the present one will depend on the circumstances). The onus of proof remains on the state throughout. Hence, even if, after the closing of the cases for the State and the defence, it is inferentially probable that the accused stole the property, he must be acquitted unless ^e the only reasonable inference is that he did so for the law demands proof beyond reasonable doubt."

I respectfully agree with the learned judge of appeal. The important aspects of Holmes JA's decision in *S v Parrow* *supra* are:

- (1) the doctrine of recent possession is based on an inference being drawn ^f that the possessor of recently stolen property stole the property;
- (2) if he cannot give an innocent explanation of his possession; and
- (3) the inference that he stole the property is the only reasonable inference that can be drawn from such possession.

In other words, recent possession can be used to found a conviction if the ^g court after sifting through the whole evidence before it finds that the only reasonable inference which can be drawn from the recent possession is that the accused stole the property.

In *S v Parrow*, the doctrine was applied to a house breaking with intent to steal and theft case. In my view, there is no reason why the doctrine cannot be used in any case of which theft is a component, like robbery. It would be absurd for ^H

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Uchena J

A the court in a robbery case to be satisfied that if it was only dealing with theft, it could have drawn the inference that the accused stole the property but hesitate to find that since he stole the property he is the robber. There is in my view, no reason for the hesitation. If the doctrine can be applied to house breaking with intent to steal and theft cases, there is no reason why it can not be applied to robbery cases. The issue should simply be does the evidence ^B of recent possession prove he is the thief. If it does and the stealing was during a robbery then he will have been proved to be the robber just as such evidence can be used to prove that the thief is the housebreaker.

In *R v Samson* AD-106-69, Beadle CJ at p 2 of the cyclostyled judgment said:

"It appears from these cases that where fairly shortly after a housebreaking, ^C the accused is found in possession of some of the articles which were stolen at the time and does not give an explanation that he received the stolen goods from a third party who may have stolen them, the court is perfectly justified in finding him guilty not only of housebreaking but also of the theft of the articles stolen at the time when the housebreaking occurred. *The reasoning behind these cases is that where the evidence ^D is sufficient to establish the fact that the accused stole a particular article from the complainant and if the theft of that particular article involved housebreaking, that evidence is sufficient to establish that the housebreaking which occurred at the time of the theft was committed by the accused ...*" (my emphasis).

In my view, this also applies to a person who is found in recent possession ^E of goods stolen during a robbery. If the only inference that can be drawn from the totality of the evidence is that he stole the goods then he can be convicted of the robbery of those goods and others robbed from the complainant at the same time.

On the question of sentence, Mr Tokwe for the respondent, having urged the court to substitute the conviction for robbery with that of receiving the stolen ^F motor vehicle knowing it to have been stolen, submitted that the appellant still deserved a custodial sentence. He submitted that there should be little difference between the sentence imposed on a motor vehicle thief and the receiver, as in both cases the victim is grounded. He submitted that the offence becomes serious and is more reprehensible if the motor vehicle is received with ^G the intention of smuggling it out of the country for commercial gain.

He referred us to the cases of *S v Manyika* S-175-93, *S v Chimanga* S-51-93 and *S v Chimbwanda* S-110-93.

In *Manyika supra*, the appellant was convicted of receiving a stolen motor vehicle knowing it to have been stolen. He was found in possession of the ^H

motor vehicle in 1991 after it had been stolen in 1988. He bought the motor

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Uchena J

vehicle in circumstances which revealed that it could have been stolen. His ^A sentence of seven years, two suspended, was reduced to five years' imprisonment of which two years' imprisonment was suspended on appropriate conditions. In the present case, the appellant had the motor vehicle hours after the robbery. He immediately thereafter drove it to an illegal exit into Mozambique for gain. He said he was to be paid for driving it into Mozambique and handing ^B it over to an Indian on behalf of Mike Zengeya.

In *Chimanga supra*, the appellant was convicted of theft of motor vehicle. He had surrendered it to the police saying he suspected it could have been stolen. Evidence proved he had dealt with the motor vehicle in a manner showing he knew it was stolen. On appeal, his conviction of theft was set aside and substituted with one of receiving the motor vehicle knowing it to have been ^C stolen. The sentence of seven years, two suspended which had been imposed by the magistrate was not interfered with.

In *Chimbwanda's* case, the appellant received a truck knowing it to have been stolen. A sentence of six years' imprisonment with two and a half years suspended was considered to be on the lenient

side. He had acquired the vehicle in exchange for his Peugeot truck and twenty head of cattle and it had ^D been re-registered in his name. He therefore, had bought a stolen motor vehicle distinguishing the case from the appellant's case on the basis that the appellant received the motor vehicle for purposes of smuggling it out of the country.

Mr *Simpson* for the appellant, in his heads of argument dated 3 October 2005, ^E suggested a sentence of seven years' imprisonment with two years suspended on conditions of good behaviour. In his supplementary heads dated 9 November 2005, he suggested a sentence of seven years of which four years could be suspended.

The appellant's father gave evidence and told this court that his son's ^F conduct in committing this offence was out of character. He told the court that his son was managing a family business before he was imprisoned and that he was a good and humble young man. He believes that the appellant may have been tempted into committing the offence.

The appellant is a first offender. He is 28 years old. He is married with two children aged six and four years respectively. His parents are high blood ^G pressure patients. He himself suffers from migraine headaches and since May 2004, when he was admitted into remand prison, he suffers from swollen legs. He spent 10 months in remand prison prior to his being sentenced.

He has now been convicted of receiving a stolen motor vehicle knowing it to have been stolen. ^H

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Uchena J

^A The motor vehicle was fortuitously recovered. If it had not been stuck in Mukumbura river, he would have smuggled it into Mozambique where he was to hand it over to an Indian man as instructed by his principal Mike Zengeya.

The motor vehicle was not damaged. This was obviously in the appellant and his principal's interest as the motor vehicle had to be delivered in good condition. The complainant, however, fortuitously benefits from the ^B undamaged state of the motor vehicle. In assessing sentence afresh, I have been guided by case law and counsel for both parties whose submissions were to the effect that a sentence of seven years with two or four years suspended would be appropriate.

In arriving at the sentence of seven years two suspended, I considered the ^C accused's age and his status as a first offender and weighed this against the gravity of the offence. I considered it aggravating that the appellant received the motor vehicle for the purposes of smuggling it out of the country to Mozambique. He almost succeeded. He failed because it got stuck in mud at the crossing point in Mukumbura river.

After he got stuck in the mud, he lied about his identity and that of the motor ^D vehicle to Cst Muchira. He obviously still intended to smuggle the motor vehicle out of the country. He travelled back to Harare so that the motor vehicle could be removed from the mud and be smuggled to Mozambique. It is only the timeous reaction of the police which prevented him and Zengeya from achieving their purpose. They had brought a Nissan Sunny to the scene but ^E were intercepted by the police.

The appellant was therefore, determined to smuggle the motor vehicle out of the country. He was acting with conscious deception to cover his tracks. He used someone else's driver's licence with a picture which could have passed as his when he was younger. This shows careful planning on his part. His deception succeeded to the extent that the police at Kamutsenzere ^F accommodated him over night and Cst. Muchira travelled with him on the bus up to Mount Darwin. He had carefully planned the offence. It is his determination, deception and careful planning which aggravates the offence and diminishes his status as a youthful first offender. When the appellant's case is compared to the cases referred to above, it becomes more serious ^G because he intended to smuggle the motor vehicle out of the country. When the appellant was arrested he attempted to escape by running away from police custody. This was after he had indicated Mike Zengeya to the police. As Zengeya got off the bus, the appellant ran away from the police. In the confusion, Zengeya shot and killed a police officer. This demonstrates the ^H appellant's determination to avoid arrest even after he had been positively

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Uchena J

identified by Cst Muchira and had himself told the police that Mike Zengeya ^A was the owner of the stolen motor vehicle he had driven to Mukumbura river. Clearly, he was not remorseful for the offence he had committed.

Though no statistics were given on the prevalence of motor vehicle thefts, the facts of this case proves that organised motor vehicle thefts and robberies are still to be deterred. The two complainants were robbed of their vehicles the ^B same night within four hours of each other in the same neighbourhood. The robbers and thieves are encouraged by the receivers who provide a market and outlets for the stolen motor vehicles. In this case, the appellant had taken the motor vehicle to the illegal exit point in less than a day after the robbery.

It is for these reasons that we suspended only two years of the sentence of seven years' imprisonment which counsel for both parties had urged us to ^C impose. The sentence had to be one with a deterrent effect in spite of the appellant's status as a young first offender.

The portion of the sentence suspended against restitution could not be retained as a receiver of stolen property cannot be held responsible for property stolen by the thief which was not passed onto him. ^D

These, then, are our reasons for setting aside the appellant's conviction on armed robbery and substituting it with one for receiving stolen property, knowing it to have been stolen and reducing his sentence to seven years' imprisonment of which two years' imprisonment are suspended for five years on condition the appellant does not, during that period commit any offence ^E involving dishonesty.

GARWE JP concurred.

Manase & Manase, appellant's legal practitioners

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

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Source:

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MANDIRINGA & ORS v NATIONAL SOCIAL SECURITY AUTHORITY 2005 (2) ZLR 329 (S)

2005 (2) ZLR p329

Citation	2005 (2) ZLR 329 (S)
Case No	Judgment No. HH-98-05
Court	High Court, Harare
Judge	Malaba J
Heard	21 October 2005
Judgment	17 November 2005
Counsel	<i>L Chibwe, L Uriri, E Musendekwa, G Macheyo and B Dhlakama</i> , for the applicants Second and third applicant in person <i>S V Hwacha, H Nkomo, CA Maunga, N Bvekwa and DC Dhumura</i> for the respondents
Case Type	Chamber applications
Annotations	Link to case annotations

Flynote

Employment — *Labour Act [Chapter 28:01] — arbitral award under — award ordering reinstatement — need for award to sound in money either in the main or in the alternative — incompetent to award reinstatement alone — such award not capable of registration in terms of s 98(14) of the Act*

Headnote

The six applicants had all had arbitral awards given in their favour after being dismissed by their employers. In all cases, the arbitrators had ordered reinstatement but had not made an award for the payment of damages in a specified sum in lieu of reinstatement, nor did they compute what the loss of pay and benefits to the date of the award amounted to. The applicants sought registration of the awards under s 98(14) of the Labour Act [*Chapter 28:01*].

Held, that in ordering reinstatement in terms of the Labour Act [*Chapter 28:01*], the Labour Court, labour officers and arbitrators appointed under the Act are duly bound to assess damages in lieu of the reinstatement. Any judgment, determination or award by these officials that fails to do so is a misdirection.

Held, further, that the arbitrators' awards, which ordered reinstatement of the respective applicants without awarding a specified amount in damages in lieu of their reinstatements, were incomplete. The awards could not be registered in terms of s 98(14) of the Act as orders of the court.

Held, alternatively and in any event, that writs of execution could not issue in respect of claims for the registration of arbitral awards, in terms of s 98(14) of the act without an assessment of damages by the arbitrators in lieu of the reinstatement awards.

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Makarau J

Cases cited ^A

Hama v NRZ 1996 (1) ZLR 664 (S)

Mhowa v Beverley Bldg Soc 1998 (1) ZLR 546 (S)

United Bottlers (Pvt) Ltd v Murwisi 1995 (1) ZLR 246 (S)

Zesa v Bopoto 1997 (1) ZLR 126 (S)

Legislation considered ^B

High Court Rules 1971 (RGN 1047 of 1971), r 246(1)(b)

Labour Act [*Chapter 28:01*], ss 89(2), 98(9) and 98 (14)

Case information

L Chibwe, L Uriri, E Musendekwa, G Macheyo and B Dhlakama, for the applicants ^C

Second and third applicant in person

S V Hwacha, H Nkomo, CA Maunga, N Bvekwa and DC Dhumbura for the respondents

Judgment

MAKARAU J: The above six matters raise the same issue. The matters came before me and other judges of this court as individual chamber applications for registration in terms of s 98(14) of the Labour Act [*Chapter 28:01*] of certain arbitral awards in favour of each applicant. For the purposes of arguing the legal point of practice and procedure arising, I set down for hearing all the chamber applications in terms of r 246(1)(b) of the High Court Rules, 1972. For convenience, I combined the hearings of the chamber applications. I also received, separately, submissions from Messrs *Dlakama* and *Matizanadzo*, who could not attend the combined hearing of the chamber applications.

I received valuable submissions from all the legal practitioners, to whom I extend my gratitude.

In each of the six matters, the respondent purportedly dismissed or suspended ^F the applicant from employment without salary and benefits. Each labour dispute was then referred to arbitration in terms of the Labour Act [*Chapter 28.01*], ("the Act") and an arbitral award issued. The effect of each of the awards in the six matters was to set aside the purported dismissal or suspension of the applicant and to order his or her reinstatement without loss of salary or benefits. ^G

For the purposes of this judgment, it appears to me desirable that I set out in full, the wording of each of the six awards made.

In the first matter, the arbitral award was worded as follows:

"National Social Security is ordered to reinstate Mandiringa without loss of salary and benefits from the time of dismissal." ^H

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Makarau J

^A In the second matter, it reads:

"Therefore, in line with the above, I do hereby order Innscor Africa to reinstate Ganizio Jamu from the date of suspension without loss of salary or benefits or alternatively pay him damages in lieu of reinstatement quantum to be agreed between the parties."

^B In the third matter, the award was worded as follows:

"Having considered the submissions made, I find that the company's dismissal of Mr Chigaba was procedurally and substantively unfair. I order that he be reinstated to his former position, without any loss of pay and other benefits. The reinstatement is with effect from the date of dismissal."

^C And in the fourth:

"Whilst the arbitrator does not condone theft *in toto*, it is very clear that the respondent erred at labour law by not exhausting all the proper termination procedures as laid down in the Labour Relations Termination Regulations SI 130 of 2003. As such, it is hereby determined that the appellant, Mr Garikai Nelson, be reinstated to his previous position without any loss of pay or other benefits due to him from the date of the ^D unlawful suspension. In the event that that reinstatement is no longer feasible the appellant be paid an agreed amount as damages in lieu of reinstatement in addition to his terminal benefits as laid down in s 13 of the Labour Act [*Chapter 28.01*]."

In the fifth and sixth matters respectively, the awards read:

"^E In light of the above, I determine that V Sanyika be reinstated without loss of pay and benefits or alternatively be paid damages quantum to be agreed upon between the parties if the employment relationship cannot be salvaged"; and

"Saybrook is ordered to reinstate Mr C Mesikano without loss of salary and benefits with effect from date of dismissal."

^F Section 98(14) of the Act provides that:

"Any party to whom an arbitral award relates may submit for 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 ^G arbitral award exceeds the jurisdiction of any magistrates court, the High Court."

It is in terms of this section that the above six applications were purportedly made to this court.

It is common cause that in all of the six matters, each arbitrator ordered the ^H reinstatement of the applicant but did not make an award for the payment of

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Makarau J

damages in a specified sum in lieu of reinstatement nor did they compute what the ^A loss of pay and benefits to the date of the award amounted to. In a few of the matters, the arbitrator left the quantification of the damages due to the applicant in lieu of reinstatement to be agreed upon between the parties. Needless to say and as one can expect in such matters, no such agreement was reached at the time of the filing of the chamber applications before me.

In my view, the wording of s 98(14) strongly suggests that the award submitted ^B for registration in terms of the section should sound in money either in the main or in the alternative.

Firstly, regarding the issue of the civil jurisdiction of our courts, it is trite that this court has inherent jurisdiction to hear and determine all issues arising within Zimbabwe. On the other hand, the magistrates court, being a creature of statute, can only enjoy that jurisdiction expressly conferred upon it by the Magistrates Court Act [Chapter 7:10]. The jurisdiction of the magistrates court is limited in specific instances provided for in the Act and, generally, to claims not exceeding an amount to be prescribed in the rules of the court. Currently the prescribed amount is \$50 million.

In my view, for the purposes of s 98(14) of the Act, an award can only exceed the jurisdiction of the magistrates court if it sounds in money and the amount of that money exceeds, currently, \$50 million.

Secondly, it is my further view that it is only when the award sounds in money that a proper determination can be made as to which of the two courts mentioned in the section has jurisdiction.

It appears to me that following the wording of the section, all awards that require the payment to the applicant of a sum in excess of the sum of \$50 million are to be registered with this court. In entertaining this view, I am aware that the magistrates court does have some other grounds other than money, restricting its jurisdiction. For instance, the magistrates court's jurisdiction is also defined territorially. Thus, a cause of action arising in one province of the country cannot be determined in a magistrates court situated in another province. In my view, this ground is only relevant when determining which magistrates courts has jurisdiction. It is not relevant for the purposes of s 98(14), when the only relevant factor becomes the amount of the award.

It is my further view that the interpretation I have rendered to the section to the effect that an award submitted for registration under it must sound in money either in the main or in the alternative, also finds some support in s 89(2)(c)(iii) of the Act. The section provides:

"89(2) In the exercise of its functions, the Labour Court may –

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Makarau J A

- (a) ...
- (b) ...
- (c) in the case of an application made in terms of subparagraph (ii) of subsection (7) of section ninety three, make an order for any of the following or any appropriate order –
 - (i) ... B
 - (ii) ...
 - (iii) reinstatement or employment in a job:

Provided that any such reinstatement shall specify an amount of damages to be awarded to the employee concerned as an alternative to his reinstatement or employment."

In turn, s 98(9) of the Act provides that an arbitrator appointed by the Labour Court shall determine any dispute as if he or she was the Labour Court. In effect, the arbitrator so appointed can order reinstatement provided that any such reinstatement shall specify an amount of damages to be awarded in lieu of the reinstatement.

An interpretation of the precursor to s 89(2)(c)(iii) of the Act was rendered in *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S). In deciding that case, the Supreme Court overruled its earlier decision in *United Bottlers (Pvt) Ltd v Murwisi* 1995 (1) ZLR 246 (S) to the effect that a determining authority under the Labour Act had just the two options of either dismissing or reinstating the employee and could not award damages. The Supreme Court judges did not hesitate to hold that the peremptory provisions of the section left no room for doubting that the determining authority, in its determination, was duty bound to make an assessment of damages as an alternative to reinstatement.

The decision in *Hama v National Railways of Zimbabwe supra* has since been followed in other matters as representing the correct position at law. See *ZESA v Bopoto* 1997 (1) ZLR 126 (S) and *Mhowa v Beverley Building Society* 1998 (1) ZLR 546 (S).

It is, therefore, the settled position in our law that, in ordering reinstatement in terms of the Labour Act, the Labour Court, labour officers and arbitrators appointed under the Act are duty bound to assess damages in lieu of the reinstatement. Any judgment, determination or award by these

officials that fails to do so is liable to be interfered with as a misdirection or as failing to comply with the Act in a material way.

An award that orders the reinstatement of the applicant without awarding a specified amount in damages in lieu of the reinstatement is incomplete and ^H consequently, incompetent and cannot be registered in terms of s 98(14) of

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Makarau J

the Act as an order of this court. ^A

Assuming that I have erred in holding that an award that does not specify an award of damages in lieu of reinstatement is incompetent and incapable of registration as an order of this court, I still would have denied all the six chamber applications before me on another basis.

It is clear, from a reading of each of the awards that were made in the six matters, ^B that the applicants were to be reinstated without loss of pay and benefits from certain given dates, in each case to date of reinstatement. The awards did not compute the loss that each employer had to make good even if he chose to reinstate the respective applicant. It is conceded that while such computations are relatively easy by comparing what a similarly placed employee received in emoluments over the same period, the issue remains that the quantum ^C thereof is not part of the award made and was not determined as part of the arbitration proceedings in the presence of both parties. It was not agreed upon in any one of the matters.

The purpose of submitting arbitral awards to this court (and to the magistrates court), is to enable the applicants to execute upon the awards. Arbitrators do ^D not issue writs of execution. This court does and so does the magistrates court.

In terms of rr 322 and 323 of the High Court Rules 1971 a writ may be sued out by any holder of a judgment or order in terms of which has been ordered "the payment of money, the delivery up of goods or premises or for ejectment". A writ may not be sued out in this court for reinstatement in employment. Aware of this impediment created by the rules of this court, all the applicants before ^E me calculated their own losses and attached computation of these to the awards ordering their reinstatement. Such computations, no matter how accurate, are not part of the awards made by the arbitrators and have not been before any determining authority for quantification. They remain the claims that the applicants are making against their respective employers. A writ of ^F execution cannot therefore issue in respect of such claims before they are made part of the arbitral award. On their own, they are not capable of registration as orders of this court as they fall outside the ambit of the provisions of s 98(14) of the Act.

On the basis of the foregoing, it is my view that, all the six applications before me cannot succeed. ^G

Regarding costs, I note from the submissions made by the legal practitioners who appeared before me that the practice of this court in past matters may have contributed to the mistaken belief on the part of the applicants that arbitral awards that do not sound in money can be registered as orders of this court. ^H

2005 (2) ZLR p335

Makarau J

^A Further, I also take into account that the "opposition" to the applications was at my specific direction and request in a bid to clarify the practice of this court on the matter. Finally and refreshingly, in my view, all the legal practitioners who appeared before me were of the view that the correct practice of this court should be to deny registration of arbitral awards that do not sound in money and, through this judgement, to remind all determining authorities dealing with ^B labour matters to strictly follow the peremptory wording of s 89(2)(c)(iii) of the Labour Act when ordering reinstatement of suspended or dismissed employees in accordance with the decision in *Hama v National Railways of Zimbabwe supra*. It is on the basis of the foregoing that I am of the view that no party should be mulcted with an order of costs.

^C In the result, I make the following orders:

1. Each application is dismissed. ^D
2. Each party in each application shall bear its own costs.

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/EASTVIEW GARDENS RESIDENTS ASSOCIATION v (ZIM) REINSURANCE CORP LTD & ORS 2005 (2) ZLR 336 (S)

EASTVIEW GARDENS RESIDENTS ASSOCIATION v (ZIM) REINSURANCE CORP LTD & ORS 2005 (2) ZLR 336 (S)

2005 (2) ZLR p336

Citation	2005 (2) ZLR 336 (S)
Case No	Judgment No. S-65-05
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Gwaunza JA
Heard	19 May 2005
Judgment	17 November 2005
Counsel	<i>R M Fitches</i> , for the appellant <i>D S Mehta</i> , for the first respondent No appearance for the second and third respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Appeal — *evidence on appeal — further evidence not led at trial — principles — failure to lead evidence due to inexperience of legal practitioner — when relevant*

Headnote

An application to lead fresh evidence is never lightly granted. The matters to be considered by a court in exercising its discretion are:

- (a) the evidence tendered could not have been obtained with reasonable diligence for use at the trial;
- (b) the evidence must be such as is presumably to be believed or is apparently credible;
- (c) the effect which it would have on the case; and
- (d) that conditions since the trial must not have so changed that the fresh evidence will prejudice the opposite party.

The inadequate presentation of the defence case at the trial will only in the rarest instances be remediable by the adduction of further evidence at the appeal stage.

Cases cited

E H Lewis & Son Ltd v Morelli & Anor [1948] 2 All ER 1021 (CA)

Farmers' Co-op Ltd v Borden Syndicate (Pvt) Ltd 1961 R & N 28; 1961 (1) SA 441 (FS) ^G
Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd 1994 (1) ZLR 255 (S)
Madan v Macedo Heirs & Anor 1991 (1) ZLR 295 (S)
^H*Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA

2005 (2) ZLR p337

Sandura JA

310 (A) ^A

R v Carr 1949 (2) SA 693 (A)

S v Banga 1995 (2) ZLR 297 (S)

Warren-Codrington v Forsyth Trust (Pvt) Ltd 2000 (2) ZLR 377 (S)

Case information

R M Fitches, for the appellant

^B*D S Mehta*, for the first respondent

No appearance for the second and third respondents

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed with costs the appellant's application for an order granting the appellant's members, totalling three hundred and nine, the right to purchase ^C the flats which they were renting from the first respondent. The background facts are as follows. The first respondent owned a complex of flats in Harare, collectively known as Eastview Gardens, and the appellant's members occupied the flats as tenants. At the beginning of 2001, the first respondent decided to sell the flats. Accordingly, it instructed the second and third respondents to ^D do so on its behalf.

Thereafter, on 9 February 2001, the second respondent, acting on the instructions given by the first respondent, wrote to the tenants as follows:

"Reference is made to the above matter.

The owners of Eastview Gardens, the Zimbabwe Reinsurance Co Ltd, ^E have advised that they shall be selling the premises you are leasing from them. The sale shall be on sectional title basis and each flat shall have title deeds on transfer.

As a sitting tenant, we are hereby giving you notice of the owner's intention to sell the flat and advise that we are offering you to purchase (*sic*) if you are interested in doing so. The purchase price for the flat is ^F \$950 000. The terms of payment are as follows:

- 25% cash deposit and the balance payable by mortgage loan; or
- 30% cash deposit and the balance payable over six equal monthly instalments; or
- cash deposit and/or full mortgage bond/loan from employer.

May you please advise us in writing whether or not you shall be taking ^G up the offer as soon as possible and in any event by 28 February 2001. In addition, if you are taking up the offer, may you please call at our offices in person to complete the necessary formalities by the same date."

Subsequently, on 15 February 2001, the second respondent wrote to the ^H tenants as follows:

2005 (2) ZLR p338

Sandura JA

"Reference is made to our letter of 9 February 2001 in respect of the above ^A matter.

Please be advised that the offer made to purchase the unit you occupy has been withdrawn. This follows the decision by the seller to sell the flats block by block. However, should you wish to purchase a unit into Eastview Gardens now, you may choose from the block that shall be selling at any one point in time. ^B

In any event, you still need to confirm your interest in purchasing a unit by close of business on 28 February 2001."

Before 28 February 2001, some of the tenants accepted the offer but others did not. Those who accepted the offer indicated how they proposed to pay the purchase price, and subsequently signed

agreements of sale. These tenants c now own their flats and are not involved in this appeal. However, on 28 February 2001, the appellant wrote to the second respondent, expressing some concern about the manner in which the sale of the flats was being handled, and suggesting that the idea of selling the flats be shelved until various issues were clarified. The letter, in relevant part, reads as follows:

"Please note that we would like to register our objection in the manner in d which you are handling the sale of the flats. It is of great concern that you are denying the sitting tenants the first option to buy the flats, instead you are offering the backdoor sale through a third party.

It has become obvious that your intention as mentioned in your letter dated 09/02/2001 was not in good faith, hence your immediate withdrawal of the offer on the 15/02/2001. It is also disturbing to note that your pricing e of the flats is haphazard with no uniformity. Your pricing is ranging so far from \$800 000 to \$1 300 000.

You also intend to play the residents against each other by not allowing them to purchase their own flats, instead you offer them to buy another flat, thereby antagonising people who have been living harmoniously.

Therefore, it is our belief that you shelve the idea of selling these flats until f the various issues with the tenants have been clarified."

The papers placed before the learned judge in the court a quo did not indicate whether or not there had been any response to this letter. Nevertheless, on 8 March 2001, the third respondent wrote to the tenants as follows:

"Our letter refers (sic) to introduce ourselves as the selling agents for the g flat you occupy. As the sitting tenant, we would like to offer you the first refusal to purchase the flat.

We are giving you seven days notice to make your offer to buy the same, failing which the flat will be offered to the public. Your offer should be made to the writer within the stipulated period and your failure to respond h

2005 (2) ZLR p339

Sandura JA

a will be assumed as a rejection to our proposal. Therefore, we would like you to allow our prospective buyers to view your flat at (a) reasonable time."

It would appear that this letter was written to those tenants who had not accepted the offer by 28 February 2001. However, no agreements of sale appear to have been concluded as a result of the new offer. Subsequently, b when the flats in respect of which no sale agreements had been concluded were offered for sale to members of the public, the appellant, acting on behalf of three hundred and nine of its members, filed a court application in the High Court seeking an order granting those members the right to purchase the flats which they were occupying. That application was dismissed with costs. c Aggrieved by that result, the appellant appealed to this court. Before the appeal was heard, the appellant filed a court application in this court for leave to adduce further evidence on appeal. The application was filed in terms of r 39(4) of the Supreme Court Rules 1964, which reads as follows:

"An application to lead further evidence on appeal shall be accompanied by that evidence in the form of an affidavit and also by an affidavit, or a d statement from a legal practitioner, showing why the evidence was not led at the trial, and also a copy of the judgment appealed from, and a statement indicating in what manner it is alleged the evidence sought to be adduced affects the matters at issue."

The evidence which the appellant intended to adduce on appeal consisted of affidavits signed by some of the three hundred and nine tenants, alleging that e they had informed the second respondent, before 28 February 2001, that they intended to purchase the flats which they were occupying, and copies of the letters received by some of the tenants from the second respondent. The statement from the appellant's legal practitioner, showing why the evidence was not led before the court a quo, in relevant part, reads as follows: f

- "1. The appellants (sic) issued a court application in the High Court in case No. 3277/01. Messrs Ziweni & Co drafted this court application. No evidence of the individual members of the appellant were (sic) attached or alluded to.
2. The matter at the hearing was then handled by a Mr Mambosasa of Kentor (sic) & Immerman. The founding affidavit shows that the g appellant members (sic) tried in vain to get their legal practitioner at the hearing to furnish the court with proof of the appellant's responses to the first respondent's two offers. The appellants (sic) when they complained to Messrs Kentor & Immerman (sic) were told that the legal practitioner in question lacked legal experience to deal with the h matter."

Sandura JA

No affidavit or statement from Messrs Ziweni & Co and Messrs Kantor & A Immerman was filed in order to explain why the evidence sought to be adduced on appeal was not placed before the court *a quo*.

The leading case in this jurisdiction on whether a court should allow the admission of fresh evidence on appeal is *Farmers' Co-op Ltd v Borden* 1961 (1) SA 441 (FS). At 442G-443B, Clayden FJ, who was considering an *B* application for leave to adduce fresh evidence on appeal, said the following:

"An application of this nature is never lightly granted. In *Brown v Dean* [1910] AC 373 at p 374, Lord Loreburn LC, stressed –

'the extreme value of the old doctrine "*interest reipublicae ut sit finis litium*", remembering as we should that people who have means at their command are easily able to exhaust the resources of a poor antagonist.' *c*

And in *Colman v Dunbar* 1933 AD 141 at p 161, Wessels CJ said:

'It is essential that there should be finality to a trial, and therefore if a suitor elects to stand by the evidence which he adduces he should not be allowed to adduce further evidence except in exceptional circumstances.'

There are certain guiding principles which the courts apply in exercising *D* discretion. The first is that the evidence tendered could not have been obtained with reasonable diligence for use at the trial: see *Ladd v Marshall* [1954] 3 All ER 745 at p 748; *Colman v Dunbar supra* at p 161. The second is that the evidence must be such as is 'presumably to be believed' or 'apparently credible': see *Ladd v Marshall supra* at p 748; *Colman v Dunbar supra* at p 162. The third relates to the effect which it *E* would have on the case ... The last is that conditions since the trial must not have so changed that the fresh evidence will prejudice the opposite party: see *Colman v Dunbar supra* at p 162."

The principles set out by Clayden FJ in the *Farmers' Co-op* case *supra* have been applied in a number of cases. See, for example, *Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) at *F* 260C-H; *S v Banga* 1995 (2) ZLR 297 (S) at 301G-H; and *Warren-Codrington v Forsyth Trust (Pvt) Ltd* 2000 (2) ZLR 377 (S) at 380G-H.

Applying the principles set out by Clayden FJ to the facts of this case, there can be no doubt that the application for leave to adduce fresh evidence on appeal cannot succeed. According to the appellant's own evidence, the fresh evidence sought to be adduced on appeal was in the possession of the *G* appellant's legal practitioner when the application was heard in the court *a quo*. However, for reasons best known to him, the legal practitioner concerned decided not to place the evidence before the court which heard the application. If the appellant were now permitted to adduce such evidence on appeal, that *H*

2005 (2) ZLR p341

Sandura JA

A would set a dangerous precedent, and there might be no end to litigation. The appellant's allegation that the legal practitioner who represented it in the court *a quo* was inexperienced does not assist the appellant. As Greenberg JA said in *R v Carr* 1949 (2) SA 693 (A) at 699:

"... it must be emphasised that the inadequate presentation of the defence case at the trial will only in the rarest instances be remediable by the *B* adduction of further evidence at the appeal stage. However serious the consequences may be to the party concerned of a refusal to permit such evidence to be led, the due administration of justice would be greatly prejudiced if such permission were lightly granted."

In my view, the present case is not one of those "rarest instances" where the inadequate presentation of a party's case at the trial stage, assuming that to *C* be true, should be remedied by allowing the party to adduce fresh evidence on appeal. As already stated, no affidavit or statement from the legal practitioner concerned, confirming that the evidence in question was in his possession when the application was heard in the court *a quo*, and explaining why he did not place it before the court, has been filed. In addition, the fresh evidence *D* sought to be adduced on appeal is contradictory to the averments made by the appellant in its founding affidavit filed in the court *a quo*.

In its founding affidavit, the appellant alleged that its members had been wrongfully prevented from accepting the offer made in the letter dated 9 February 2001 by the withdrawal of the offer by the second respondent before 28 February 2001. That was a clear admission that the appellant's

members had ^E not accepted the offer before 28 February 2001. However, in the founding affidavit filed in this court by the appellant in support of its application for leave to adduce fresh evidence on appeal, the appellant avers that at least sixty-two of its members accepted the offer before 28 February 2001. The obvious contradiction has not been explained by the appellant. Since the ^F evidence sought to be adduced on appeal was in the possession of the appellant's legal practitioner when the application was heard in the court *a quo*, the effect which the evidence would have on the case, if admitted on appeal is of no significance in determining whether or not the evidence should be adduced at this stage.

As Tucker LJ said in *E H Lewis & Son Ltd v Morelli & Anor* [1948] 2 All ER ^G 1021 (CA) at 1024A-B:

"For the purposes of my judgment, I am prepared to assume that the evidence, if admitted, would be conclusive in favour of counsel for the plaintiffs, but, nonetheless, it is evidence which could have been obtained with the greatest possible ease. True that it is evidence dealing with the ^H status of premises, but it is evidence of a fact which it was necessary to

2005 (2) ZLR p342

Sandura JA

prove to show the status of the premises. In view of the admission made ^A in the court below, and in view of the fact that this evidence could have been obtained by ordinary elementary precautions and care, I think that, if we were to admit it, we should be creating a dangerous precedent and be acting far beyond what has been laid down in the authorities. In my view, therefore, this evidence should not be admitted."

I shall not, therefore, consider what effect the evidence would have if admitted. ^B In the circumstances, the application for leave to adduce fresh evidence on appeal cannot succeed. The appeal should, therefore, be determined on the basis of the evidence which was placed before the learned judge in the court *a quo*. Although, in its notice of appeal, the appellant set out eleven grounds of appeal, the two main ones are that:

- "1. The honourable judge erred in finding that no right of pre-emption ^C was extended to the applicant's (appellant's) members.
2. In the alternative, the learned judge *a quo* erred in not finding that as the acceptance of the offer embodied in the second respondent's letter dated 9 February 2004 (*sic*) was conditioned to be made within a time prescribed by the first respondent, then the prescribed time ^D limit should have been adhered to and not unilaterally withdrawn or altered before the expiry of the said time limit."

The main argument advanced on behalf of the appellant in this court and in the court *a quo* was that the letter of 9 February 2001 granted the appellant's members the right of pre-emption which could not be withdrawn. I disagree with that contention. The right of pre-emption is a right created by an ^E agreement between the grantor and the grantee of the right, in terms of which the grantor of the right undertakes that before selling the subject-matter of the right to a third party, he will give the grantee of the right the opportunity to purchase the subject-matter of the right at the price offered by the third party which is acceptable to the grantor. See, for example, *Madan v Macedo Heirs & Anor* 1991 (1) ZLR 295 (S) at 302A-B; and *Owsianick v African Consolidated ^F Theatres (Pty) Ltd* 1967 (3) SA 310 (A) at 316C-D.

In my view, it is clear beyond doubt that the letter of 9 February 2001, did not set out an agreement between the appellant's members and the respondents on the right of pre-emption allegedly granted to the appellant's members. The letter did not even constitute an offer, to the appellant's members, of the right ^G of pre-emption. In addition, as already stated, the appellant averred in its founding affidavit that its members had been prevented from accepting the offer of 9 February 2001 by the withdrawal of that offer before 28 February 2001. That was a clear admission that the appellant's members did not accept the offer within the specified period. Thus, even if the letter of 9 February 2001 were ^H

2005 (2) ZLR p343

Sandura JA

^A construed as containing the offer of the right of pre-emption to the appellant's members, no agreement would have been concluded on the matter as the offer had not been accepted, and no right of pre-emption would, therefore, have been granted to the appellant's members.

However, the offer of 9 February 2001 was obviously not an offer of the right of pre-emption, it was a simple offer which specified the period within which ^B it could be accepted and which could, therefore, be withdrawn by the offeror at any time before it was accepted by the offeree. In

addition, the evidence placed before the court *a quo* did not indicate that any of the appellant's three hundred and nine members had accepted the offer set out in the letter dated 15 February 2001 or the one contained in the letter dated 8 March 2001. Indeed, c the appellant did not rely upon these two letters for the submission that its members had been granted the right of pre-emption. Furthermore, it is pertinent to note that nowhere in the letter dated 9 February 2001, or in the one dated 15 February 2001, was it stated that the second respondent undertook to keep the offer open until 28 February 2001, or declared that the offer was irrevocable during the specified period. That being the case, the second d respondent was not estopped from revoking the offer before 28 February 2001. As none of the appellant's three hundred and nine members accepted the offer of 9 February 2001, or the one in the letter dated 15 February 2001, within the specified period, *cadit quaestio*. That is the end of the matter, and the appeal cannot succeed.

e In the circumstances, the appeal is dismissed with costs.

CHEDA JA & GWAUNZA JA concurred.

Hussein Ranchhod & Co, appellant's legal practitioners

f *Costa & Madzonga*, first respondent's legal practitioners

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Source:

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THOMAS MEIKLE STORES LTD v MUVIRIMI & ANOR 2005 (2) ZLR 344 (H)

2005 (2) ZLR p344

Citation	2005 (2) ZLR 344 (H)
Case No	Judgment No. HH-99-05
Court	High Court, Harare
Judge	Bhunu J
Heard	13 October 2005; 2 November 2005
Judgment	23 November 2005
Counsel	<i>S Chihambakwe</i> , for the applicant <i>A Mugandiwa</i> , for the first respondent <i>P Machaya</i> , for the second respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Bills of exchange and negotiable instruments — *signatory to* — *personal liability of* — *signatory signing on behalf of employer* — *failure to put words indicating that he is signing on behalf of another* — *effect* — *need d to examine bill as a whole to ascertain intention*

Headnote

The respondents, employees of a discount house, were signatories to their employer's bank account. In that capacity, they signed a cheque issued to the applicant. The cheque was clearly inscribed on the face of it with ^εthe name and bank account number of the respondents' employer. The respondents did not use any recognised symbols such as "pp" or "for" to show that they were signing in their representative capacities. The discount house was placed under provisional liquidation and the cheque was dishonoured. The applicant sought summary judgment against the respondents, relying on s 25(1) of the Bills of Exchange Act [*Chapter 14:02*], which provides that where a person signs a bill as drawer and adds words indicating that he signs for and on behalf of a principal or in a representative character, he is not personally liable. The applicant argued that the respondents' failure to disown personal liability rendered them personally liable.

Held, that although there is a "universal rule" that a person who puts his name ^αto cheque makes himself personally liable unless he states on the cheque that he is signing for another, personal liability may be excluded by inference upon a careful examination of the totality of the disputed instrument. Whether or not the inscription of the discount house's name and account number provided sufficient cover so as to exclude personal ^η

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Bhunu J

^α liability by necessary inference was a matter of evidence and interpretation. A triable issue was thereby raised and summary judgment would be refused.

Cases referred to

Akasia Finance v Da Souza 1993 (2) SA 337 (W)

^β *Clan Tpt Co (Pvt) Ltd v Pemhenayi & Anor* 1999 (1) ZLR 520 (H)

Leadbitter v Farrow (1816) 105 ER 1077

Schmidt & Anor v Jack Brillard Printing Svcs CC 2000 (3) SA 824 (W)

Legislation considered

Bills of Exchange Act [*Chapter 14:02*], s 25

Case information

^γ *S Chihambakwe*, for the applicant

A Mugandiwa, for the first respondent

P Machaya, for the second respondent

Judgment

BHUNU J: The facts in this case are, to a large extent, common cause. The ^δ undisputed facts are that both respondents are employees of Century Discount House Ltd, a company duly incorporated in terms of the laws of Zimbabwe. In that capacity, they were authorised signatories for and on behalf of Century Discount House Ltd.

Their duties included issuing and signing cheques on behalf of their employer.

^ε On 29 December 2003, and in the course of employment, both the respondents issued and signed a cheque in the applicant's name for \$757 024 582.47. In signing the cheque, both the respondents did not use any recognised symbols such as "pp" or "for" to show that they were signing in their representative capacity. Century Discount House Ltd subsequently ran into problems and was placed under provisional liquidation, with the result that ^φ the cheque was dishonoured upon presentation. In consequence thereof, the applicant sued both respondents in their personal capacities for redress.

The respondents entered appearance to defend, claiming that they were not personally responsible for the applicant's loss because they signed the cheque in their representative capacities.

^α Relying on s 25(1) of the Bills of Exchange Act [*Chapter 14:02*], the applicant is now seeking summary judgment on the basis that it has an unassailable case against the respondents.

The section reads:

"Where a person signs a bill as drawer, endorser or acceptor adds words ^h to his signature including that he signs for and on behalf of a principal or in a representative character, he is not personally liable thereon."

2005 (2) ZLR p346

Bhunu J

It is common cause that, in issuing and signing the cheque, the respondents ^a did not expressly disown personal liability by making any endorsements upon the face of the cheque.

Placing reliance on a plethora of decided cases and legal texts, the applicant argues that the respondents' admitted failure to disown personal liability renders them personally liable. ^b

After having surveyed a number of authorities, Chatikobo J made the following pertinent observation in *Clan Transport Co v Pemhenayi & Anor* 1999 (1) ZLR 520 (H) at 523A-E:

"The principle that a person who signs a cheque on behalf of a company without qualifying his signature is personally liable is so engrafted into our law that Hiemstra J ... referred to it as a universal rule ^c ...

A signer of a company cheque who does not intend to attract personal liability on the cheque must use words which make his status as an agent clear."

At 523C, the learned judge was at pains to proffer guidance on how a court should determine whether or not the signer has excluded personal liability. ^d The learned judge articulated the guidelines as follows:

"In deciding whether the instrument, on the face of it, indicates that the defendants signed in a representative capacity, one considers the instrument as a whole in search of inferences or obvious conclusions to be gathered from its terms, bearing in mind at all times that the question has to be decided, not according to other documents or allegations but ^e according to the tenor of the cheque, which on the face of it renders both defendants jointly and severally liable: *per* Leon J in *Trust Bank Ltd v Dugmore & Anor* 1972 (3) SA 926 (D) at 931A."

The elevation of the principle to a universal rule of law finds expression in the words of Lord Ellenborough in the very old case of *Leadbitter v Farrow* (1816) 105 ER 1077 at 1079 where he remarked: ^f

"Is it not a universal rule that a man who put his name to a bill of exchange thereby makes himself personally liable unless he states upon the face of the bill that he subscribes it for another, or by procuration of another which are words of exclusion? Unless he says plainly 'I am the mere scribe,' he becomes liable."

Undoubtedly, Lord Ellenborough's remarks related to a rather archaic and ^g primitive era more than 200 years ago. Since then, there have been technological developments which have drastically altered the mode of generating and transacting bills of exchange. Those remarks related to an era when computer generation of bills of exchange and electronic banking were unheard of. The computer placement of a company's name and account number on a bill of exchange as a way of identifying the company was virtually unknown. ^h

2005 (2) ZLR p347

Bhunu J

^a What emerges quite clearly from a perusal of the cases is that the law has tended to lag behind technological developments.

In more recent times, there has been a gradual awakening to the need for the legal developments to keep pace with technological developments if justice and fairness is to be done.

^b As a result, doubts have been expressed in at least two cases as to whether Lord Ellenborough's dictum continues to stand the test of time. See *Akasia Finance v Da Souza* 1993 (2) SA 337 (W) at 339 and *Schmidt & Anor v Jack Brillard Printing Svcs CC* 2000 (3) SA 824 (W) at 830E.

Having said that, it appears to me that there is need in our jurisdiction for a careful reassessment and authoritative pronouncement of the legal effect of ^c what has been termed the universal rule and a proper interpretation of ^s 25 of the Bills of Exchange Act [*Chapter 14:02*] in relation to technological developments and common intention of the parties concerned.

It is trite in our law that consensus is of the essence of contract. Contracts ought, therefore, to be interpreted with a view to giving effect to the common ^d intention of the parties.

It is apparent from the foregoing sentiments that personal liability need not be expressly excluded. Liability may be excluded by inference upon a careful examination of the totality of the disputed instrument.

While it is true and a matter of common cause that both respondents did not expressly exclude personal liability, it is also true and correct that the disputed instrument is clearly inscribed on the face of it with the name and bank account number of the respondents' principal. Both respondents have sought to rely on that inscription for cover. Whether or not the inscription provides sufficient cover so as to exclude personal liability by necessary inference is a matter of evidence and interpretation.

¶ It is clear to me that the respondents' reliance on the above inscription points to a valid defence and therefore, raises a triable issue.

It is trite that summary judgment provides an extraordinary remedy designed to give speedy relief to a litigant who has established a clear unassailable case without the rigors and expense of a fully fledged trial. It however, negates the basic principle of natural justice, that is to say, the *audi alteram partem* rule. As such, it should be granted only in clearly unanswerable cases.

In this case, the respondents having pointed to a possible valid defence on the merits, the application cannot succeed.

It is accordingly, ordered that the application be and is hereby dismissed with costs.

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Bhunu J

Chihambakwe, Mutizwa and Partners, applicant's legal practitioners A

Wintertons, first respondent's legal practitioners

Scanlen and Holderness, second respondent's legal practitioners B

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ORIGEN CORPORATION (PVT) LTD v DELTA OPERATIONS (PVT) LTD 2005 (2) ZLR 349 (H)

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Citation	2005 (2) ZLR 349 (H)
Case No	Judgment No. HH-101-05
Court	High Court, Harare
Judge	Kamocha J
Heard	1 February 2005
Judgment	23 November 2005
Counsel	<i>A P de Bourbon SC</i> , for the applicant <i>R Y Phillips</i> , for the first respondent No appearance from the second respondent
Case Type	Civil application

Annotations

No case annotations to date

Flynote

Arbitration — award — setting aside of — grounds for — arbitrator failing to give reasons for award — failing to enforce contractual penalty which should have been awarded — award contrary to law of Zimbabwe — ^D arbitrator awarding damages based on value determined other than at time of breach

Headnote

The applicant sought the setting aside an arbitrator's award while the respondent sought to have it enforced. In terms of the contract between ^E the parties, the applicant was to deliver a specified tonnage of barley suitable for brewing, while the respondent was to deliver an equal tonnage suitable for stock feed. The contract provided that if there was a shortfall in the applicant's delivery, the applicant would pay a specified sum for every tonne short.

The dispute was referred to arbitration, there being two questions for the ^F arbitrator: (1) whether the respondent was entitled to an order for specific performance; and (2) whether interest was payable. In his award, the arbitrator ordered the applicant to deliver the shortfall, failing which it should pay the respondent what it would actually cost the respondent to buy the shortfall from elsewhere. The applicant argued, in respect of the second part of the award, that the arbitrator

should have enforced the

^G penalty provision; that the award conflicted with the law of Zimbabwe; that the effect of the order was to give the respondent more than it expected and more than the law allowed; and that the arbitrator had failed to give reasons for the award.

Held, that the arbitrator was obliged to give reasons.

^H *Held*, further, that the arbitrator had ignored a penalty stipulation which he

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should have enforced. ^A

Held, further, that for a breach of contract, the damages should be assessed as at the date of performance or the date of the breach. The arbitrator had awarded damages based on a value which was determined several months later and which was much higher than the stipulated amount. For these reasons, the award would be set aside. ^B

Cases cited

Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd 1994 (1) SA 162 (A)

Cone Textiles (Pvt) Ltd v Commercial Union Fire, Marine & General Ins Co Ltd 1989 (2) ZLR 152 (S)
^C

Cone Textiles (Pvt) Ltd v Redgment & Ors 1983 (1) ZLR 88 (S)

Dickensen & Brown v Fisher's Exors 1915 AD 166

Novick v Benjamin 1972 (2) SA 842 (A)

Rens v Coltman 1996 (1) SA 452 (A)

Victoria Falls & Transvaal Power Co. Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1 ^D

Zimbabwe Electricity Supply Authority v Maposa 1999 (2) ZLR 452 (S)

Legislation considered

Arbitration Act [Chapter 7:15], First Schedule Art 31(2)

Contractual Penalties Act [Chapter 8:04] s 4(1) and (2) ^E

Case information

A P de Bourbon SC, for the applicant

R Y Phillips, for the first respondent

No appearance from the second respondent

Judgment

KAMOCHA J: These two applications were argued at the same time. In the first application, Origen Corporation (Pvt) Ltd was seeking to have an arbitral award of 27 April 2004, granted to the first respondent; set aside pursuant to art 34 of the Model Law contained in the Arbitration Act [Chapter 7:15]. In the second application, Delta Operations (Pvt) Ltd, on the other hand, was seeking an order enforcing the same arbitral award in terms of art 35. ^g

The circumstances giving rise to these proceedings are these. On 21 August 2002, the parties signed a contract in terms of which Delta Operations (Pvt) Ltd ("Delta"), would deliver a quantity of barley suitable for use as stock feed to Origen Corporation (Pvt) Ltd ("Origen") during June and July 2002 and in return Origen would deliver during October 2004 an equivalent quantity ^h

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A of barley suitable for brewing. The relevant provisions of the agreement are these –

- "1.1 During the month of June and July 2002 Natbrev shall supply to Origen at the Northern Products grain silos in Chinhoyi a quantity of not less than 2 400 metric tonnes and not more than 2 450 tonnes of barley. ^b
- 1.2 The Natbrev Delivery shall comprise of barley unsuitable for brewing purposes but suitable for use as stock feed.
- 1.3 During the month of October, 2002 Origen shall deliver to Natbrev at Northern Products or GMB Banket a tonnage of barley grown in the 2002 winter season and of an exactly equivalent tonnage to the Natbrev Delivery. ^c
- 1.4 In the event that, and to the extent that, Origen may fail to deliver the tonnage of barley required to be delivered by it in terms of clause 1.3 then, recognizing that Natbrev shall suffer loss as a consequence of such breach, Origen shall pay to Natbrev the sum of \$75 000 per tonne in respect of each tonne which Origen, has failed to deliver in terms of clause 1.3."

^d Delta delivered 2019.28 tonnes of barley suitable for stock feed as *per* the agreement. But Origen only delivered 1127.848 tonnes, leaving a shortfall of 891.432 tonnes.

It was the above shortfall of barley which gave rise to a dispute which the parties agreed to refer for arbitration. In preparation for an arbitration hearing, ^e the parties held a preliminary meeting with the arbitrator at which the issues for the determination by the arbitrator were formulated and crystallised as these.

- "(a) Whether the claimant is entitled to an order for specific performance, *viz*; that the respondent deliver 2019.28 metric tonnes of barley to the claimant; and, if not
- (b) Whether the claimant is entitled to interest on the amount awarded ^f and, if so, from what date and at what rate?"

The arbitrator heard the matter on 23 April 2004 and handed down an arbitral award on 27 April 2004 whose order reads thus:

"It is ordered that:

- A. On or before 30 May 2004, Origen Corporation (Pvt) Ltd shall deliver ^g to Delta Operations (Pvt) Ltd 891.432 tonnes of barley of the quality specified in the contract signed by the parties on 21 August 2002.
- B. Failing compliance with Order A, Origen Corporation (Pvt) Ltd shall pay to Delta Operations (Pvt) Ltd, promptly on demand, the full amount expected by Delta Operations (Pvt) Ltd in purchasing the ^h tonnage of barley not delivered by Origen Corporation (Pvt) Ltd in

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accordance with Order A."

Aggrieved by the arbitral award, Origen has approached this court seeking ^A to have the award set aside on the basis that it was grossly unreasonable and was in conflict with the public policy of Zimbabwe. However, at the hearing, Origen did not persist with the challenge in respect of Order "A" and stated that the purpose of an arbitration was to determine issues between parties ^B submitted to an arbitrator for a decision. It conceded that in making Order "A", the arbitrator had clearly understood the issue placed before him, and made a determination (rightly or wrongly was beside the point) on that. Although it disagreed with the decision of the arbitrator on that point, it conceded that it was still bound by that decision as it was a consequence of arbitration.

The applicant persisted with its complaint against Order B and alleged that the ^C arbitrator had gone on "a frolic". It contended that Order B was in conflict with the public policy of the Zimbabwe because "the reasoning or conclusion in (the award) went beyond mere fault or correctness and constituted a palpable inequity that was so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would ^D consider that the conception of justice in Zimbabwe would be intolerably hurt by the award". This quotation is by Gubbay CJ in *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S) at p 466F.

The applicant based the above allegations on the following grounds:

- (a) that the arbitrator failed to enforce a penalty stipulation as provided for in s 4 of the Contractual Penalties Act [*Chapter 8:04*]; ^E
- (b) that the award conflicts with the law of Zimbabwe in material respects;
- (c) that the arbitrator gave no reason for the order that he made in Order B; and
- (d) that the arbitrator failed to properly consider the issues before him.

It was submitted on behalf of Origen that, in terms of clause 1:4 of the ^F agreement, the parties agreed that in the event of Origen failing to deliver the tonnage of barley required to be delivered, it was obliged to pay Natbrew the sum of \$75 000 per tonne in respect of each tonne which it had failed to deliver in terms of clause 1.3. It, however, admits of no doubt that the parties intended the ^G penalty stipulation to be enforced in the event of Origen's failure to deliver as agreed. Section 4(1) of the Contractual Penalties Act provides that a penalty stipulation shall be enforceable in any competent court. A court can, however, decline to enforce a penalty stipulation or reduce a penalty if it appears to it that the penalty is out of proportion to any prejudice suffered by the creditor ^H

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^A – see s 4(2). It seems to me that the above provisions do not permit a court to ignore a penalty stipulation and refuse to enforce it in favour of a creditor. It should be enforced provided its enforcement is not prejudicial to the debtor.

Origen went further and submitted that the award conflicted with the law of Zimbabwe in a material respect. It went on to state that the law was clear on the nature of damages for breach of contract. It relied on ^B *Victoria Falls and Transvaal Power Co. Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at p 22 where Innes CJ stated that:

"The agreement was not one for the sale of goods or commodity procurable elsewhere. So that we must apply the general principles which govern the investigation of that most difficult question of fact – the assessment of compensation for breach of contract. *The sufferer by such a breach ^C should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party*" (my emphasis).

In *Rens v Coltman* 1996 (1) SA 452 (A) at p 458, Scott AJA put it thus:

^D "The fundamental rule with regard to the award of damages for breach of contract is now well established. The innocent party should be placed in the position he or she would have occupied had the contract been properly performed, so far as this can be done by the payment of money without undue hardship to the party in breach. The application of this rule will ordinarily require in many cases, and typically the case of a breach of ^E a contract of sale by the purchaser, *that the date for assessment of damages be the date of performance, or as it has often been expressed, the date of the breach*" (my emphasis).

Similarly, in *Novick v Benjamin* 1972 (2) SA 842 (A) at 860 A-D, Trollip JA had this to say:

" ^F A fundamental principle of our law is that for a breach of contract the sufferer should be placed by an award of damages in the same position as he would have occupied had the contract been performed, so far as that can be done by the payment of money, provided: (a) that the sufferer is obliged to mitigate his loss

or damage as far as he reasonably can; and (b) that the parties, when contracting, contemplated (actually or presumptively) that the loss or damage would probably result from such a breach of contract: see *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22; *Lavery & Co Ltd v Jungheinrich* 1931 AD 156. Where the contract is one of purchase and sale of a marketable commodity which is broken by non-performance (i.e. non-delivery), effect is ordinarily given to that principle by awarding the sufferer the adverse difference (if any) between the contract price and the

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market price or value of commodity at the proper time and place of a performance. That is the general, working rule by which his loss or damage is ordinarily measured, the adverse difference in prices being regarded as representing the loss or damage that the parties usually contemplated is likely to ensue on such a breach ..."

In the light of the above authorities, Origen submitted that in doing what he did, the arbitrator was re-writing the law of this country – a thing he has no power to do. It was for the legislature and the judges to develop the law of Zimbabwe. To allow an arbitrator to do so will be to offend the public policy considerations of Zimbabwe.

Further, it was submitted that the effect of order B was that the arbitrator gave the first respondent something, quite a lot more than it sought and considerably more than the law permits. The first respondent sought only \$75 000 per tonne as an alternative, and the law permits only the actual value of the barley as at the date of breach. But the arbitrator gave the first respondent the price of barley several months later, by which time the price had obviously increased.

What that meant was that the arbitrator made an award which neither the parties asked for nor the law permitted. The order sought to put the first respondent into a position it did not seek and which the law did not allow. In the result, applicant submitted that such action by the arbitrator was outrageous, defying both logic and the public policy of Zimbabwe. The order constituted exemplary damages, which are not permitted under Zimbabwean law. E

Finally, it was submitted, under this head, that the arbitrator had given to himself a role which neither the parties nor the law gives him. His decision should not be allowed to stand.

A further complaint by the applicant was that the arbitrator did not give any reasons for issuing order B of the award. In terms of the contract Delta sought F only \$75 000 per metric tonne as an alternative. The arbitrator ought to have given the reasons why he would not give effect to the intention of the contracting parties. The result was that the award was repugnant to the provisions of Article 31(2) of the UNCITRAL Model which provides that:

"31(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is G an award on agreed terms under Article 30."

These provisions are peremptory. The arbitrator had no discretion in the matter since there was no agreement by the parties that he should not furnish his reasons for the decision he was going to make. He ought to have provided reasons for his decision. H

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A Furthermore, it was submitted by Origen that the arbitrator *in casu* had misconducted the proceedings by failing to properly consider the two issues before him. The public policy of Zimbabwe does not permit arbitrators to consider extraneous issues to those placed before them by the parties for consideration. It was asserted that the arbitrator *in casu* had failed to understand the issues before him. That failure led him to create an issue which B did not arise from the pleadings or submissions of the parties. He went on a frolic of his own outside the real issues placed before him. See for instance, *Cone Textiles (Pvt) Ltd v Commercial Union Fire, Marine & General Insurance Co Ltd*. 1989 (2) ZLR 152 (S) where it was held that an arbitrator misconducts himself if he fails to consider an issue placed before him for consideration. *Vide supra* what the arbitrator did *in casu*.

C Delta, on the other hand, submitted that this court should not lose sight of the fact that courts in this country and, indeed, in other jurisdictions are always most reluctant to interfere with an award of an arbitrator. Some of the reasons for the reluctance were set out by Fieldsend CJ in *Cone Textiles (Pvt) Ltd v Redgment & Ors* 1983 (1) ZLR 88 (S) at 92:

"^o The starting point is that the parties have chosen to go to arbitration instead of resorting to the courts, they have specifically selected the personnel of the tribunal and they have agreed that the award shall be final and binding: it is for these reasons that a court will always be most reluctant to interfere with the award of an arbitrator."

The Supreme Court quoted with approval the words of Solomon JA in *Dickenson and Brown v Fisher's Executors* 1915 AD 166 where he said at p 176:

"But in ordinary circumstances where an arbitrator has given fair consideration to the matter which has been submitted to him for decision, I think it would be impossible to hold that he had been guilty of misconduct ^f merely because he had made a *bona fide* mistake either of law or of fact."

Delta further submitted that the binding nature of an arbitral award was emphasised in *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A) at 169F-H when Goldstone JA had this to say:

"When parties agree to refer a matter to arbitration, unless the submission ^g provides otherwise, they implicitly, if not explicitly (and subject to the limited power of the Supreme Court under s 3(1) of the Arbitration Act), abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator ... In my opinion, the courts ^h should in no way discourage parties from resorting to arbitration and

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should deprecate conduct by a party to an arbitration who does not do ^a all in his power to implement the decision of the arbitrator promptly and in good faith."

It, however, seems to me that, *in casu*, what the arbitrator did, by making order B of his award, calls for the interference of the court. Firstly, he ignored a penalty stipulation and refused to enforce it when he ought to have enforced ^b it, provided its enforcement was not prejudicial to Origen.

Secondly, the arbitrator gave Delta the price of barley several months later, by which time the price had increased. By so doing, the order put Delta into a position it did not seek and which the law did not allow. He ought to have given the actual price of the value of barley as at the time of the breach.

Thirdly, order B of the award offends the provisions of Article 31(2) of the ^c Uncitral Model Law quoted at p 7 above. He ought to have given reasons for making the order which gave Delta what it did not ask for. He should have explained the departure.

Lastly, the arbitrator failed to properly consider the issues placed before him for consideration. He instead created an issue which did not arise from the ^d pleadings or submissions of the parties.

In the light of the foregoing, it seems to me that order B should not be allowed to stand and must therefore be set aside.

I am in agreement with Origen's submission that the setting aside of order B should affect order A, otherwise order A standing alone would not make ^e sense, the reason being that if Origen does not have barley to deliver it cannot be held to be in default. It was not obliged to buy barley in order to deliver to Delta. It was submitted by Delta that order B should just be severed and order A modified. But Delta did not suggest how the modification should be done. It seems to me that order A should also be set aside. Having arrived at that conclusion, it seems to me that the matter should be left for the parties to ^f proceed the way they deem fit, as laid down by Gubbay CJ in *Zimbabwe Electricity Supply Authority v Maposa supra* at p 467B when he said:

"Party autonomy is a paramount feature under the arbitration regime in this country and where a court sets aside an arbitral award it may not usurp this right of the parties by remitting the matter to the arbitrator for re-determination. *It must leave it to the parties to proceed as they deem fit*" ^g (my emphasis).

Consequently, I would issue the following order.

It is ordered that:

1. The arbitrator's arbitral award of 27 April 2004 be and is hereby set aside in its entirety. ^h

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2. Delta's application for the enforcement of the arbitral award be and is hereby dismissed.
3. The parties are left to proceed as they deem fit.
4. Delta shall bear the costs of these proceedings.

By *Costa & Madzonga*, applicant's legal practitioners

Gill, Godlonton & Gerrans, first respondent's legal practitioners

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KOMICHI v TANNER & ANOR 2005 (2) ZLR 358 (H)

2005 (2) ZLR p358

Citation	2005 (2) ZLR 358 (H)
Case No	Judgment No. HH-104-05
Court	High Court, Harare
Judge	Makarau J
Heard	11 November 2005
Judgment	23 November 2005
Counsel	<i>O T Masendeke</i> , for the plaintiff <i>D S Mheta</i> , for the first defendant
Case Type	Civil trial
Annotations	Link to case annotations

Flynote

Damages — delictual — assessment of — damages consequent upon a traffic c accident — vehicle treated as a write-off although it could have been repaired — damages sought upon basis of replacement costs — no evidence led by plaintiff as to the pre-accident value of the vehicle — erroneous approach as to damages — absolution from the instance granted

Damages — delictual — assessment of — date at which loss assessed — effect of inflation — whether plaintiff may claim damages based on true value of loss — interest rate — should reflect inflation rate

Damages — delictual — assessment of — principles — requires calculation of amount of money necessary to place plaintiff in the financial position he would have enjoyed but for the delict — plaintiff required to establish extent of estate before and diminution after the delict

Headnote

It is the settled position that the measure of delictual damages, also known as the negative *interesse*, is the calculation of an amount of money which is necessary to place a plaintiff in the hypothetical financial position he would have enjoyed had the delict not been committed. The measure of *restitutio in integrum* damages requires a plaintiff to establish the extent of his estate before the delict and a diminution to that estate as a result of the delict.

The plaintiff, who had been driving her motor vehicle, had been involved in an accident with a vehicle driven by the first defendant. It was accepted that the accident had been caused solely as a result of the latter's negligence. At the trial liability was not an issue between the parties. ^g Although the plaintiff's vehicle had been extensively damaged in the car, it was accepted that it could have been repaired at a cost of Z\$7 million. However the vehicle had been insured for half the amount. Upon seeing the quotation for the repair thereof, the plaintiff's insurers treated the vehicle as a complete write-off and, upon surrender of the wreck, paid out the full amount of the insurance cover. In respect of her damages, she ^h

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^a sought to prove that because of the high inflation rate, the replacement value of the car at the time of the issue of the summons was, in monetary terms, far higher than the insured value. She claimed payment of the sum of \$35 million being the replacement cost of her motor vehicle. While there was evidence as to the post accident value of the vehicle, the plaintiff led no evidence as to its pre-accident value.

^b *Held*, that the measure of delictual damages in our law is the calculation of an amount of money which is necessary to place the plaintiff in the (hypothetical) financial position he would have enjoyed had the delict not been committed. The principle of currency nominalism holds that a debt sounding in money has to be paid in terms of its nominal value, irrespective of any fluctuations in the purchasing power of the currency. ^c This places the risk of depreciation of the currency on the creditor and saddles the debtor with the risk of appreciation.

Held, further, that the unsatisfactory result reached in adopting currency nominalism could be resolved by the Minister of Justice aligning the Prescribed Rate of Interest Act [*Chapter 8.10*] to the inflation rate, the current prescribed rate of interest being woefully out of step with ^d inflation.

Held, further, that the applicability of the traditional sum-formula approach in a inflationary environment, where the face value of the plaintiff's estate after the delict is higher than the pre-delict value, was a matter that might have fallen for consideration had the plaintiff not adopted a wrong approach. She sought the replacement value of the motor vehicle at the ^e time summons were issued. In so doing, she erred. She did not lose her vehicle as a direct result of the first defendant's negligence, because it could have been repaired at a given cost and put back on the road. It was the cost of those repairs which constituted her loss or the extent to which her patrimony had been diminished.

^f *Held*, further, that in the circumstances, the court was compelled to grant the first defendant absolution from the instance together with costs.

Cases cited

Union Government (Minister of Railways and Harbours) v Warneke 1911 AD 657

Min of Defence v Jackson 1990 (2) ZLR 1 (S)

Everson v Allianz Ins Ltd 1989 (2) SA 173 (C)

^g *SA Eagle Ins Co Ltd v Hartley* 1990 (4) SA 833 (A)

Muzeya NO v Marais & Anor 2004 (1) ZLR 326 (H)

Case information

^O *T Masendeke*, for the plaintiff

^H *D S Mheta*, for the first defendant.

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Makarau J

Judgment

MAKARAU J: At the pre-trial conference of this matter, the parties agreed to ^A proceed by way of a stated case as most of the facts giving rise to the suit are common cause.

On 6 December 2002, the plaintiff was driving her motor vehicle, Peugeot 405, with the registration No. 698-058 H at the intersection of Samora Machel Avenue and Maiden Drive, Harare. The motor vehicle was involved in an ^a accident with the first defendant's vehicle, a Toyota Land Cruiser, registration number 799-714. The accident was caused solely through the negligence of the first defendant who accepted liability for the accident in full and without reservation.

The plaintiff's motor vehicle was extensively damaged in the accident. One garage quoted the plaintiff the sum of \$7 million to repair the accident damage. ^c The motor vehicle was insured for \$3.5 million at the time and upon seeing the quotations for repairs, the plaintiff's insurers declared the motor vehicle a complete write off and paid out the full amount of the insurance cover. The plaintiff then surrendered the wreck to the insurer in accordance with the terms of the insurance agreement between her and her insurers. The defendant's insurers also paid out the sum of \$250 000 to the plaintiff. It was not disclosed ^d to me what that payment was in respect of.

On 9 March 2004, the plaintiff issued summons out of this court, claiming payment of the sum of \$35 million together with interest thereon from the date of the accident to the date of payment. She also prayed for costs of suit.

Thus, the only issue referred to trial at the pre-trial conference of the matter ^e was the quantum of damages payable to the plaintiff. It was further agreed that the measure of damages payable to the plaintiff is the diminution in value of the motor vehicle by reason of the damage sustained in the accident. Thus, the plaintiff had to prove the pre-accident value of the motor vehicle and its post accident value, revealing the diminution thereof.

In support of her claim, the plaintiff led evidence. She confirmed the facts that ^f are common cause between the parties. She had no evidence to adduce on the pre-accident value of the motor vehicle nor on its post accident value as the quotations for repairs were sourced by her husband.

It was clear that the plaintiff should not have been called to testify and ^g Mr *Mehta* had no questions for the witness.

Mr Nyika Komichi, the plaintiff's husband took the witness stand. He is an engineer by qualification, specializing in metallurgy and has no expertise in motor vehicles and motor vehicle repairs. He instructed the plaintiff's legal practitioners to sue for the sum of \$35 million as the replacement value of the motor vehicle as he had perused the local press and established that similar ^h

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^a models of the vehicle were selling at between \$30 and \$40 million. The sum claimed thus represented the median of the range.

After the accident, he took the motor vehicle to Supreme Panel Beaters for a quotation on the repairs. They quoted the sum of \$7 million. He also took the vehicle to Frank's Bodyshop, which quoted the sum of \$5 million. In March 2004, he established by way of a proforma invoice that a similar model of the ^b vehicle, manufactured in the same year, would cost \$12 650.

Under cross-examination, Mr Nyika conceded that there was some delay between the date of the accident and the date of the issuance of summons and attributed the delay to all the parties involved in the suit. He also conceded that the plaintiff had the option to have the motor vehicle repaired in December ^c 2002 for \$6 million and that she failed to do so, as she did not have the requisite funds. Regarding the quotation from Frank's Bodyshop, which had been adduced into evidence by consent as exhibit "2", he readily agreed that it was non-sequential and should be disregarded by the court

The witness gave his evidence well and impressed the court as a solid and honest person. He did not seek to exaggerate or to prevaricate in fielding ^d questions under cross-examination. Any weakness in the plaintiff's case is not attributable to his manner of testifying but to the content of such testimony, as I shall detail hereunder.

After the testimony of Mr Nyika, the plaintiff closed its case and the defendant declined to call any evidence.

^e As agreed between the parties, it is indeed the settled position that the measure of delictual damages in our law, also known as the "negative *interesse*", is the calculation of an amount of money which is necessary to place the plaintiff in the (hypothetical) financial position he would have

enjoyed had the delict not been committed. See *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657; *Minister of Defence v Jackson* 1990 (2) ZLR 1 (S). The measure of damages requires the plaintiff to establish the extent of her estate before the delict and a diminution to that estate as a result of the delict.

The issue that would have arisen for debate in this matter were it not for the wrong approach adopted by the plaintiff in assessing her damages, would have been the applicability of the traditional sum-formula approach in a ^G inflationary environment where the face value of the plaintiff's estate after the delict, is higher than the pre-delict value. A straight application of the formula would not show a diminution in the estate but a nominal gain. It apparently cannot be argued that in such circumstances the plaintiff would have suffered no loss. The issue remains as to how that real damage suffered by the plaintiff ^H in such circumstances should be computed. It may be necessary for a court

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Makarau J

properly seized with the issue to come up, not only with the formula applicable ^A in such an inflationary environment, but maybe also to develop a concrete concept approach that will compensate the plaintiff for the real loss suffered.

In making the above suggestion, I am aware that this court has shunned the approach used by Howie J in *Everson v Allianz Insurance Ltd* 1989 (2) SA 173 (C), where the learned judge made an allowance to compensate the plaintiff ^B before him for the lost buying power of the rand. In his words at p 175E:

"[The] plaintiff is therefore entitled, subject to a ten per cent contingency deduction, to an award comprising the numerical rand value of his past loss of earnings and an upward adjustment of that value so as to express the loss in real terms."

A year later, the decision by Howie J was overruled by the Appellate Division ^C of the South African Supreme Court in *SA Eagle Insurance Co Ltd v Hartley* 1990 (4) SA 833 (A). In that judgment, it was held that currency nominalism is firmly entrenched in South African law.

In essence, the principle of currency nominalism holds that a debt sounding in money has to be paid in terms of its nominal value irrespective of any ^D fluctuations in the purchasing power of the currency. This places the risk of depreciation of the currency on the creditor and saddles the debtor with the risk of appreciation.

Grosskoff JA, who delivered the judgment in the *SA Eagle Insurance* case, was at pains to point out that any departure from currency nominalism in the assessment of damages in patrimonial loss suits would represent a revolutionary ^E transformation of the entire legal system as it relates to the law of obligations. The net result of taking inflation on board would entail the court determining the true correct value of all obligations sounding in money.

In this jurisdiction, the principle of currency nominalism was discussed by Chinhengo J in *Muzeya v Marais & Anor* 2004 (1) ZLR 326 (H). In that matter, ^F the learned judge heavily relied on the *SA Eagle Insurance* case to express the view that it is correct to adopt the principle of capital nominalism when dealing with all obligations sounding in money. He also expressed the view that the unsatisfactory result reached in adopting currency nominalism could be resolved by the Minister of Justice, Legal and Parliamentary Affairs aligning the Prescribed Rate of Interest Act [*Chapter 8:10*] to the inflation ^G rate. I reiterate the recommendation to the Minister herein as the current prescribed rate of interest is woefully out of step with the inflation rate. It may be prudent for the Minister not to fix a specific rate of interest in the Act but possibly to relate to relate the legal rate of interest to some rate that rises and falls with inflation like the prime-lending rate of some financial institution. This ^H

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Makarau J

^A will avoid the need on the part of the Minister to constantly amend the Act to change the rate in this volatile economic climate. Such a strategy will also cater for when the inflation rate eventually goes down.

Even if I were sufficiently moved to revolutionarily transform the law on the assessment of damages in this matter by taking into account the ravages of inflation on the plaintiff's claim, it is

my view that, *in casu*, the plaintiff has ^B incorrectly perceived the measure of damages due to her.

In computing her damages, the applicant sought the replacement value of the motor vehicle at the time summons were issued. In this regard, she erred. She did not lose her vehicle as a direct result of the negligence of the first defendant. Her vehicle could have been repaired at a given cost and put back ^C on the road. It is the cost of those repairs that constitute her loss or the extent to which her patrimony was diminished.

In my view, because she based her computation of the damages due to her on the wrong concept, she did not place evidence before this court as to the true value of the vehicle before the accident. She also did not place before this court the value of the vehicle after the accident. While it is common cause that the ^D motor vehicle was declared a total loss by the insurer in terms of the insurance policy that the plaintiff had and in relation to the sum assured, as stated above, it is not correct that the "wreck" of the vehicle was without a value for the purposes of computing the damages due to the plaintiff under the *actio legis Aquilae*, which the plaintiff has invoked.

^E Thus, it is my specific finding that the net effect of the testimony adduced on behalf of the plaintiff does not assist me in computing the damages that are due to her, notwithstanding the defects in the quotations adduced into evidence by the plaintiff as highlighted by Mr *Mehta*.

In my view, the plaintiff had to establish the value of the vehicle prior to the ^F accident and the value of the vehicle as at 6 December 2002, immediately after the accident. Having established the nominal value of her loss, she may then have requested the court to inflate that nominal value to shield her from the ravages of inflation. Whether or not this court would have taken inflation into account in assessing the amount of damages due to her will have to remain unanswered in this judgment.

^G On the basis of the foregoing, I am compelled to grant absolution from the instance in this matter.

In the result, I make the following order: ^H

1 The first defendant is granted absolution from the instance.

2005 (2) ZLR p364

Makarau J

2. The plaintiff shall bear the first defendant's costs of suit. ^A

Chibune & Associates, plaintiff's legal practitioners

Atherstone & Cook, first defendant's legal practitioners ^B

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/MUKAHLERA v CLERK OF PARLIAMENT & ORS 2005 (2) ZLR 365 (S)

MUKAHLERA v CLERK OF PARLIAMENT & ORS 2005 (2) ZLR 365 (S)

2005 (2) ZLR p365

Citation	2005 (2) ZLR 365 (S)
Case No	Judgment No. HH-107-05
Court	High Court, Harare
Judge	Patel J
Heard	21 September 2005: 27 October 2005

Judgment	23 November 2005
Counsel	<i>S Mawere</i> , for the applicant <i>S Chihambakwe</i> , for the first respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

C Practice and procedure — parties — citation of — Clerk of Parliament — *ex officio* member of board of Vehicle Loan Fund — application relating to matter directly within purview of Fund's objects — not proper to cite Clerk of Parliament — Fund itself should be cited

Prescription — interruption of — by issue of process — letter of demand **D** through party's lawyer — not process

Prescription — running of — when begins — cause of action — meaning of — when cause of action may be said to arise

Flynote

The applicant, a member of Parliament, had applied in 2001 for a motor vehicle **E** through the Members of Parliament Vehicle Loan Scheme, the Fund for which was established in terms of the Audit and Exchequer Act [*Chapter 22:03*]. The Clerk of Parliament was an *ex officio* member of the Board of the Fund. The Fund paid the fourth respondent, a motor dealer, for the vehicle requested, but before it was delivered the applicant decided he wanted a different type of vehicle. The vehicle originally requested was **F** allocated in 2001 to another member of Parliament. In June 2002, the applicant's contributions were refunded to him. The respondents raised several objections to the applicant's claim that the respondents pay for a motor vehicle of the type originally requested by him. The principal objections were: (1) that the claim had expired, having been instituted more than three years after the cause of action arose; and (2) that the fund **G** itself should have been cited, rather than the respondents. The applicant argued that prescription was interrupted by the writing of a letter of demand to the first respondent's lawyer; and that prescription only began to run in June 2002, when the applicant's contributions were **H** refunded

2005 (2) ZLR p366

Held, that prescription began to run when the cause of action arose, the **A** "cause of action" being the combination of facts material for the plaintiff to prove in order to succeed in his action. On the facts, this was in 2001, when the car was allocated to another member of Parliament. It was not necessary to prove the refund of the applicant's contributions to found his claim.

Held, further, that a letter of demand, whether issued through a lawyer or **B** otherwise, does not constitute "process" in its ordinary sense or within the meaning of that term as defined in s 19(1) of the Prescription Act [*Chapter 8:11*].

Held, further, that the Constitution of the Fund made it clear that the Fund could sue and be sued in its own name. It was the Fund, through its Board, **C** which administered the Scheme and disbursed the moneys required to purchase the vehicles acquired under the Scheme. The relief sought by the applicant pertained to matters directly within the purview of the Fund's objects and operations; and the respondents were acting as officers or agents of the Fund in its administration of the Scheme. The failure to cite the Fund was fatal. **D**

Cases cited

Abrahamse & Sons v SAR&H 1933 CPD 626

Benson & Anor v Walters & Ors 1984 (1) SA 73 (A)

Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman E Deutsch (Pty) Ltd 1991 (1) SA 525 (A)

Dube v Banana 1998 (2) ZLR 92 (H)

Eskom v Stewarts & Lloyds SA (Pty) Ltd 1979 (4) SA 905 (W)

Masara & Ors v Forestry Commission & Anor 1999 (1) ZLR 174 (H)

Ndlovu v PTC 1998 (2) ZLR 334 (H)

Patel v Controller of C&E 1982 (2) ZLR 82 (H) ^F

Peebles v Dairibord Zimbabwe (Pvt) Ltd 1999 (1) ZLR 41 (H)

Legislation considered

Prescription Act [*Chapter 8:11*], s 19(1)

Case information

S Mawere, for the applicant ^G

S Chihambakwe, for the first respondent ^H

2005 (2) ZLR p367

Patel J:

Judgment

^A **PATEL J:**

THE APPLICATION

The applicant in this matter seeks an order, *inter alia*, compelling all the respondents to facilitate and pay for a Pajero motor vehicle which he had ordered through the fourth respondent. The basis of his claim is that he is ^B entitled to acquire the said vehicle through the Members of Parliament Vehicle Loan Scheme which was initiated in 2001 ("the Scheme") and that the respondents have unlawfully denied him the benefits of that facility.

OBJECTIONS IN LIMINE

At the hearing of this matter, counsel for the parties canvassed certain points *c in limine* that were raised in the first respondent's opposing papers.

Firstly, it was submitted by Mr *Chihambakwe* that the agreement on which the applicant's claim was predicated was concluded in April 2001 and that his claim had therefore prescribed in April 2004. Secondly, the point was taken that the applicant should have cited the Members of Parliament Vehicle Revolving Fund ("the Fund") and not the present respondents. Thirdly, it was argued ^D that the applicant's claim was one sounding in South African rands and that a claim in foreign currency was incompetent as the Fund was denominated in local currency. Lastly, it was contended that the papers before the court evinced a number of material and triable disputes of fact and that the application procedure instituted *in casu* was accordingly incompetent.

^E Mr *Mawere*, for the applicant, countered all of the first respondent's objections. He submitted that the applicant's claim had not prescribed as his cause of action only arose in June 2002 and the present application was therefore timeously launched in March 2005 within the prescription period of three years. He further contended that the running of prescription had in any event been interrupted by dint of a letter of demand written to the first respondent ^F by the applicant's erstwhile legal practitioners in June 2002. As for the citation of the parties *in casu*, it was argued that it was the first, second and third respondents who effectively operated the Fund and the attendant Scheme and that the present respondents were therefore properly cited as agents of the Fund. It was also argued for the applicant that he was unaware of the ^G existence of the Fund as a legal entity in its own right.

CLAIM IN FOREIGN CURRENCY

As part of the relief claimed, the applicant seeks an order compelling the second and third respondents to pay the sum of R243 396 as the purchase price for the motor vehicle identified by

him. There is nothing in the papers before the court to justify a claim sounding in rands or in any other foreign currency.

2005 (2) ZLR p368

Patel J

Nevertheless, the principal thrust of the applicant's claim is an injunction to provide the money required, in whatever currency is available, to purchase the vehicle in question for him. This is obviously an aspect that can be readily cured by amending the specific relief sought in the draft Order so as to reflect the equivalent amount in local currency. Accordingly, I do not deem the first respondent's objection in this regard to be sufficient to preclude the applicant's claim.

MATERIAL DISPUTES OF FACT

The applicant in his papers avers that he has been unlawfully discriminated against and that he was superseded in the provision of motor vehicles under the Scheme. The respondents repudiate the applicant's assertions in this respect. Whatever the factual position may be, it is undisputed that the applicant was the only Member of Parliament who, being eligible as such, did not benefit from the Scheme at the relevant time. That being so, I do not think that the factual disputes alluded to are of vital significance to a proper determination of this matter. In any event, even if they were to be treated as being material, I foresee little difficulty in having them referred to trial on the papers before the court.

PRESCRIPTION OF CLAIM

In terms of s 15(d) of the Prescription Act [Chapter 8:11], the period of prescription applicable to debts generally is three years. Section 16(1) provides that prescription commences to run "as soon as a debt is due". The word "debt" in this context encompasses "anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise" (see s 2 of the Act). By virtue of s 16(3), a debt is not deemed to be due "until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises". However, a creditor is "deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof by exercising reasonable care".

The authorities cited by MALABA J in *Ndlovu v Posts & Telecommunications Corporation* 1998 (2) ZLR 334 (H) at 336 illustrate the circumstances when a debt becomes due. A debt is due when it is "owing and already payable" (*Escom v Stewarts & Lloyds SA (Pty) Ltd* 1979 (4) SA 905 (W) at 908E) or "immediately claimable" (*Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532H) or "immediately exigible at the will of the creditor" (*Benson & Anor v Walters & Ors* 1984 (1) SA 73 (A) at 82H).

The "cause of action" in relation to a claim is "the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be

2005 (2) ZLR p369

Patel J

proved to entitle a plaintiff to succeed in his claim" (*per* Watermeyer J in *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637). Similarly, in *Patel v Controller of Customs & Excise* 1982 (2) ZLR 82 (H) at 86, Gubbay J (citing *Controller of Customs v Guiffre* 1971 (1) RLR 91 (G) 1971 (2) SA 81 (R) at 84A, and *Read v Brown* (1888) 22 QBD 131) defined the cause of action as being "every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgement of the court". Again, Smith J, in *Dube v Banana* 1998 (2) ZLR 92 (H) at 95, observed that "the cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed in his action". See also *Peebles v Dairiboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 (H) at 45.

Having regard to the affidavits filed *in casu*, the relevant facts are as follows. At the beginning of 2001, the applicant submitted his application to the Fund to obtain a motor vehicle through the Scheme. In April 2001, the Fund made arrangements to purchase a Nissan Double Cab vehicle for the applicant. In June 2001, the Fund paid the sum of *circa* \$21 million in local currency to the fourth respondent for the purchase of the vehicles bought under the Scheme, including the original Nissan vehicle identified for the applicant. However, before the vehicle was delivered, the applicant

decided that he did not want that particular vehicle and identified a Mercedes Benz ML 320 instead. Since the Nissan vehicle had already been purchased, it was allocated in 2001 to the next Member of Parliament eligible under the Scheme. Thereafter, on 10 June 2002, the applicant was advised that he would be refunded the contributions ^ε deducted from his salary under the Scheme.

On these facts, the applicant's cause of action arose either in 2001, when the vehicle acquired for him under the Scheme was allocated to another Member of Parliament, or later in June 2002, when he was advised that the contributions paid by him under the Scheme were to be refunded. I take the view that proof ^φ of the latter event is immaterial and was not necessary to found the applicant's claim in this matter. Rather, the material fact giving rise to his cause of action was the re-allocation of the Nissan vehicle originally acquired for him under the Scheme. This is a fact that the applicant was either aware of at the time that it occurred or should have become aware of by exercising reasonable care at that time. It follows that the applicant's claim was prescribed in 2001 and not ^α in June 2002 as was argued on his behalf.

Before concluding this aspect, it is necessary to deal with Mr *Mawere's* contention that the letter of demand written by the applicant's erstwhile legal practitioners in June 2002 constituted the service of process entailing the ^η judicial interruption of prescription in terms of s 19(2) of the Prescription Act.

2005 (2) ZLR p370

Patel J

In support of this proposition, counsel cited a case supposedly reported in ^α the 1995 Zimbabwe Law Reports, a case which I have scoured for in vain.

It is abundantly clear to me that a letter of demand, whether issued through a lawyer or otherwise, does not constitute "process" in its ordinary sense nor within the meaning of that term as defined in s 19(1) of the Act. Indeed, this was precisely the position taken by Smith J in *Masara & Ors v Forestry ^β Commission & Anor* 1999 (1) ZLR 174 (H) at 176, where it was held that a letter of demand by legal practitioners claiming damages, which was followed by negotiations and correspondence to reach a settlement, was not court process and did not operate to interrupt prescription. Mr *Mawere's* contention in this respect is patently misconceived and must be rejected out of hand. ^α

CITATION OF PARTIES

The applicant in this matter has cited the first three respondents, namely, the Clerk of Parliament, the Ministry (*sic*) of Finance and the Reserve Bank of Zimbabwe, on the basis that they played an active part in running the Scheme and the Fund. However, the Fund itself has not been cited as a party to these proceedings. This is so even though the applicant must have been aware of ^β its existence and its constitution when he applied for a vehicle under the Scheme and also when he signed the requisite pledge of security for a loan from the Fund.

The Constitution of the Fund declares, in Article 1, that it was established in terms of s 30 of the Audit and Exchequer Act [*Chapter 22:03*]. Article 2 makes ^ε it clear that the Fund has the power to sue and be sued in its own name in all matters affecting it or its operations and assets. In terms of Article 3, the object of the Fund is to grant loans to Members of Parliament for the purchase of motor vehicles. By virtue of Article 4, the Fund is to be administered, controlled and applied by the Board established under Article 8. The first respondent, *qua* Clerk of Parliament, is an *ex officio* member of this Board. ^φ

It is very clear from the foregoing that the Fund is an independent and distinct entity with its own legal *persona* and the capacity to sue or be sued in its own name. It is equally clear that it is the Fund, through its Board, which administers the Scheme and that it is the Fund which disburses the moneys required to purchase the vehicles acquired under the Scheme. Again, the relief sought by ^α the applicant pertains to matters which are directly within the purview of the Fund's objects and operations.

In these circumstances, it clearly behoved the applicant to make the Fund a party to these proceedings. Indeed, it should have been cited as the principal respondent in this matter. The other respondents *in casu*, properly regarded, were acting as officers or agents of the Fund in its administration of the ^η

Patel J

A Scheme. The failure to cite the Fund is, in my view, fatal to the disposition of this application and the relief sought thereunder.

CONCLUSION

To sum up, I am of the view that the applicant's claim *in casu* has prescribed and that this application was therefore instituted out of time. I am also of the B view that these proceedings are defective for want of citation of the Fund as the principal respondent.

In the result, the first respondent's objections *in limine* are upheld and this application is accordingly dismissed with costs.

C Garikayi & Co, applicant's legal practitioners

Chihambakwe, Mutizwa & Partners, first respondent's legal practitioners

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Source:

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CHIRIKURE & ORS v KENMAST FARMING & ORS 2005 (2) ZLR 372 (H)

2005 (2) ZLR p372

Citation	2005 (2) ZLR 372 (H)
Case No	Judgment No. HH-106-05
Court	High Court, Harare
Judge	Uchena J
Heard	12 October 2005:18 October 2005:31 October 2005:7 November 2005
Judgment	25 November 2005
Counsel	<i>N Matsunge</i> , for applicant <i>A N B Masterson</i> , for the first and second respondents <i>Miss R Sweto</i> , for the third, fourth, fifth and sixth respondents
Case Type	Chamber application
Annotations	Link to case annotations

Flynote

Constitutional law — *Constitutional Amendment Act (No 17)* — acquisition C of land which had taken place before the introduction of the Act — such acquisition not invalidated — eviction — right to evict accruing before the introduction of the Act— *Land Acquisition Act [Chapter 20:10]* — s 9(1)(b) — not rendered nugatory by introduction of the *Constitutional Amendment Act D*

Land — acquisition — compulsory acquisition of farming land — acquisition notice issued before coming into effect of constitutional amendment No. 17 — remains in force — former owner's rights limited to those set out in Land Acquisition Act

Land — acquisition — offer letters — such letters not constituting grant of a lease — cannot be impugned on the grounds of a failure to comply with s 9 of the Agricultural Land Settlement Act [Chapter 20:10]

Practice and procedure — parties — joinder — different respondents having conflicting interests — not a reason why such respondents cannot be joined

Practice and procedure — parties — locus standi — eviction — applicants not in possession of a farm — applicants however in possession of offer letter — no locus standi to evict the respondents — applicants having locus standi to apply for order declaring the offer letters valid

Headnote

Where two or more respondents have conflicting interests, it does not follow ^g that all such respondents cannot be joined in the same application.

The provisions of the Land Acquisition Act [Chapter 20:10], which provide for what happens after the acquisition of land has taken place, are not affected by s 16B(3) of the Constitution because those provisions are not referred to in s 16(1) of the Constitution. Thus, the provisions remain valid and operational. ^h

2005 (2) ZLR p373

^a The applicants were individuals who had been settled on a commercial farm which had been compulsorily acquired by the respondent Minister. The ^y had been evicted from the farm on the grounds that their letters of offer were invalid because they were issued before the coming into effect of the Constitutional Amendment Act No. 17 of 2005. The first two respondents were, respectively, the owner of the farm before it was ^b compulsorily acquired and his tenant. The applicants had, however, been issued with new offer letters in respect of the same farm from which they had been evicted. They sought to be allowed to return to the farm on the basis of these new offer letters. The first and second respondents, however, opposed the relief sought upon a number of grounds which included submissions that: ^c

- (1) the applicants had no *locus standi* to make the application as they were neither owners of the farm nor were they in possession of it;
- (2) the Minister of Lands did not comply with s 3 of the Administrative Justice Act [Chapter 10:28], if the intention in offering land to the applicants was to evict the first and second respondents; and
- (3) consequent on the coming into effect of s 16B(3) of the Constitution ^d which was introduced by the Constitutional Amendment Act (No. 17), there was no law entitling the acquiring authority to evict the first and second respondents.

Held, that while the applicants, not being in possession of the farm, had no *locus standi* to apply for the eviction of the first and second respondents, ^e they did have *locus standi* to apply to the court for an order declaring their new offer letters to be valid and for other consequential orders arising from the issuance of the new offer letters.

Held, further, that the objection that the Minister did not comply with s 3 of the Administrative Justice Act [Chapter 10:28] could not properly be raised in the opposing papers, as it would have to be raised by way of ^f an application for review.

Held, further, that the introduction of Constitutional Amendment Act (No. 17) did not remove from the acquiring authority the right to evict the first and second respondents. It did not invalidate acquisitions which had already taken place before the introduction thereof, nor, in respect of such acquisitions, did it render nugatory s 9(1)(b) of the Land ^g Acquisition Act [Chapter 20:10], which provided for the eviction of the former owners of the land.

Held, further, that as for as the fresh offer letters were concerned, such letters did not constitute the granting of a lease and could not, therefore, be impugned on the grounds that they did not comply with s 9 of the ^a Agricultural Land Settlement Act [Chapter 20:01]

2005 (2) ZLR p374

Uchena J

Cases cited ^a

Airfield Investments (Pvt) Ltd v Min of Lands & Ors 2004 (1) ZLR 511 (S)

Airport Game Park (Pvt) Ltd v Karidza & Anor 2004 (1) ZLR 391 (S)

Banda v Pitluk 1993 (2) ZLR 60 (H)

Bodasingh's Est v Suleman 1960 (1) SA 288 (N)

Pedzisa v Chikonyora 1992 (2) ZLR 445 (S) ^B

Legislation considered

Administrative Justice Act [*Chapter 10:28*], s 3

Constitution of Zimbabwe 1980, ss 16(1), 16B(3), 16B(6), 18(1) and 18(9)

High Court Rules 1971 (RGN 1047 of 1971), rr 85 & 87(1)

Land Acquisition Act [*Chapter 20:10*], ss 8(2) and 9(1)(b) ^C

Case information

N Matsunge, for applicant

A N B Masterson, for the first and second respondents

Miss *R Sweto*, for the third, fourth, fifth and sixth respondents

Judgment

UCHENA J: The applicants in this case are resettled farmers who were evicted ^D from a farm on which they had been settled by the acquiring authority. The eviction was ordered by Patel J in HC 3216/05. The eviction was based on their offer letters being held to be invalid because they were issued prior to the coming into effect of the Constitutional Amendment Act No. 17/2005 herein after called the Constitutional Amendment Act. They have now been ^E issued with fresh offer letters dated 26 September 2005. In para 5 of his order, Patel J had ordered as follows:

"In the event of any relevant change of circumstances affecting the respective rights of the parties, any such affected party shall be at liberty to approach this court with a view to seeking such order or relief as may ^F be appropriate."

In view of the new offer letters, the applicants have made this urgent application. The first respondent is the former owner of the farm in question. The second respondent was the first respondent's lessee which was conducting farming operations on Farnley farm.

The *third* respondent is the chief lands officer for Mashonaland West. The ^G fourth respondent is the officer-in-charge of ZRP Norton being cited for purposes of enforcing the orders to be granted by this court. The fifth respondent is the Commissioner of Police in his capacity as Head of the Zimbabwe Republic Police. The sixth respondent is the Minister-in-charge of Lands, Land Reform and Resettlement. He is the acquiring authority. ^H

2005 (2) ZLR p375

Uchena J

^A The applicants seek the following orders:

1. That the acquisition of Farnley farm in the District of Chegutu in terms of the acquisition order published in the *Gazette* on 29 July 2005, remained unconfirmed and was overtaken by the promulgation of the Constitution of Zimbabwe Amendment No. 17 of 2005 on 14 September 2005. ^B
2. By virtue of s 16B(2) of the Constitution of Zimbabwe, the entirety of the said Farnley Farm was duly acquired by and vested in the State with effect from 14 September 2005.
3. The State is therefore entitled with effect from 14 September 2005, to allocate lease or otherwise dispose of the said Farnley Farm in accordance with the Agricultural Land Settlement Act [*Chapter 20:01*] or the Rural ^C Land Act [*Chapter 20:08*] or such other law as may be applicable.
4. That the letters of offer dated 26 September 2005 from the sixth respondent to the first, second and third applicants were issued after the said Farnley Farm was acquired by the State and are accordingly of legal force and effect. ^D

5. That at the present time the first, second and third applicant's have been lawfully granted or allocated the right to occupy subdivisions 1, 2 and 3 of the said Farnely Farm and they therefore have the right or entitlement to enter upon or occupy the said farm or any portion thereof.
6. From the date of the offer letters of 26 September 2005, the first and second respondents became unlawful occupiers of subdivisions 1, 2 and 3 of Farnely Farm which has been allocated to the first, second and third applicants.
7. The first and second respondents or their agents shall vacate Farnely Farm.
8. The first and second respondents or their agents shall not in any way F interfere with the farming operations of the first, second and third applicants on the property or with the activities of the applicant's officers, workers, agents and contractors on the property.

In the event of any inconsistencies between this order and any previous orders in this matter, this order shall prevail over any such order.

G The first and second respondents shall pay costs of this application.

The applicants later applied to include an order that any appeal against this court's order shall not suspend the operation of this order. I must point out from the outset that such an order would be incompetent as it would have the effect of prejudging the issue of an appeal which may or may not be noted H without hearing the parties on the merits of the appeal.

2005 (2) ZLR p376

Uchena J

The applicant's draft order follows closely the order granted in HC 3216/05. A

The parties first appeared before me on 12 October 2005. The case was postponed to 18 October for the respondents to file opposing papers. On 18 October at 2.30 p.m., the first and second respondents did not attend the hearing. I granted the applicant's order in default. It however, turned out that Mr *Masterson* for the first and second respondents had been referred to court B where I was to deliver judgment at 3.00 p.m. in an opposed case in which one party was represented by Mr *Andersen*. My clerk had mistaken Mr *Masterson* for Mr *Andersen*.

The first and second respondents applied for rescission of the default judgment in terms of Order 49 r 449(1) of the High Court Rules 1971. The first to third applicant's counsel opposed the application. Counsel for the third to C sixth respondents did not oppose the application. Even though the application did not strictly comply with the rules I granted the application for rescission as r 449(1) (a) authorises the court or a judge to *mero motu* rescind or vary any judgment or order which was erroneously sought or erroneously granted in the absence of any party affected thereby. In my view, this was a proper case D for me to rescind the order granted on 18 October 2005 *mero motu* as the mistake was caused by my own clerk. I was also satisfied that I could exercise that power even in circumstances where the first and second respondents had applied for rescission. I refer to *Banda v Pitluk* 1993 (2) ZLR 60 (H) in which that procedure was followed by Robinson J.

After rescinding the default judgment, I ordered the parties to file their papers E by stipulated dates and set down the case for hearing on 7 November 2005.

The applicants' case is based on their having been issued with new offer letters dated the 26 September 2005 after their previous offer letters dated 8 September 2005 which were issued after a valid S 8(1) acquisition order had been served on the respondents on 29 July 2005, were held to be invalid. Their F prayer is to be now allowed to go back to the farm as they now hold valid offer letters. They also seek the eviction of the first and second respondents.

The first and second respondents opposed the applicant's application on the following grounds:

1. That the applicants have no *locus standi* to make this application as they G are not owners of the farm and are not in possession of it.
2. That the first and second respondents were allocated the land by the Chegutu District land committee in 2002.
3. That the Minister of Lands and Land Resettlement did not comply with s 3 of the Administrative Justice Act No. 12 of 2004 [Chapter 10:28] if his H

2005 (2) ZLR p377

Uchena J

a intention in offering the land to the applicants was to evict the first and second respondents.

4. That there is now no law entitling the acquiring authority to evict the first and second respondents as s 16B(3) of the Constitutional Amendment Act No. 17 of 2005 provides that laws regulating the compulsory acquisition of land in force on the appointed day shall not apply in relation to land b referred to in s 2(a).

The first and second respondents concede that the issuance of new offer letters constitutes the change of circumstances referred to in Patel J's order entitling the applicants to come back to this court to seek such order or relief as may be appropriate. They also concede that the land now belongs to the c sixth respondent, but contend that the sixth respondent cannot give the applicants possession of the land without first evicting the current occupiers of the land.

The third to sixth respondents do not oppose the applicant's application. The sixth respondent in his affidavit explains that he had allocated the land to the applicants prior to the coming into effect of the Constitutional Amendment d Act. When his offer letters to the applicants dated 8 September 2005 were declared invalid in HC 3216/05, he rectified that situation by issuing new offer letters on the 26 September 2005. He prays that the applicant's application be granted.

The first and second respondents also objected to being made co-respondents e with the third to sixth respondents whose interests are opposed to theirs. They also challenged the sixth respondent's authority to issue offer letters.

The sixth respondent's response was that he is entitled to issue offer letters in terms of s 8(2) of the Land Acquisition Act [Chapter 20:10] and common law. The first and second respondent's counsel conceded the acquiring f authority's common law right to allocate land which belongs to the State provided he complies with s 3 of the Administrative Justice Act.

Counsel for sixth respondent urged the court to concentrate on the application and ignore issues which should be properly raised by way of review. I agree with Miss *Sveto* that the challenge to the sixth respondent's issuance of offer letters can only be raised by way of applying for the review of the acquiring g authority's decision. I will therefore, not pursue this issue.

The issues in this case are:

1. Do the applicants have *locus standi* to apply for the eviction of the first h and second respondents?

2005 (2) ZLR p378

Uchena J

2. What is the effect of s 16B(3) of the Constitutional Amendment Act on a ss 7, 8 and 9 of the Land Acquisition Act [Chapter 20:10] and the issuance of new offer letters dated 26 September 2005?
3. Whether or not the first respondent was ever allocated what Mr *Masterson* called the remaining extent of Farnley Farm.
4. Whether or not there has been a misjoinder of the parties. b

LOCUS STANDI

On the issue of *locus standi*, the applicants' counsel submitted that applicants were authorised by Patel J to come back to this court if there were changes entitling them to apply to be granted orders redefining their rights to Farnley Farm. It must be pointed out that the invitation to come back to court if there c were changes does not confer legal capacity on the applicants. One's legal capacity emanates from his rights in respect of the cause of action. It is common cause that there are changed circumstances. Mr *Masterson* submitted that the fact that they are not in possession of the farm means they have no *locus standi* to evict the first and second respondents. In my view, sight must not be lost of the fact that they were in possession prior to the court's order d in HC 3216/05. It is in recognition of those rights that the court granted the order authorising either party to come back if circumstances changed. I am therefore, satisfied that the applicants have *locus standi* to make this application in respect of all other aspects except the eviction of the first and second respondents which is the responsibility of the acquiring authority. In *Pedzisa* e v *Chikonyora* 1992 (2) ZLR 445 (S) at 452C-E, Gubbay CJ said:

"I prefer to approach the issue of whether the respondent's personal right against council ever became a real right, by taking account of the primary duty of a lessor. It is to deliver not only *vacua possessio* but also *commodus usus* (undisturbed use) of the property let – to transfer to the lessee the detention or physical control enabling him to use and enjoy it: ^F see *Tshandii v City Council, Johannesburg* 1947 (1) SA 494 (W) at 497, *Saffiantini v Moold* 1956 (4) SA 150 (E) at 153D. That duty will not of course be fulfilled if, when the property is handed over, it is occupied by some other person whether he be a trespasser or there under colour of right. In such an event, the court, at the request of the lessee, will grant specific performance, that is, direct the lessor to give occupation of the ^G property to the lessee. The lessor will be compelled to comply if it is in his power to do so, but where not, he will be ordered instead to pay damages."

In the present case, we are not dealing with a lease but offer letters which are akin to but do not meet the requirements of a lease. Therefore, the legal principles applicable to the lessees' occupation of the leased property are applicable subject to the provisions of the Land Acquisition Act. The offer ^H

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A letters were issued to the applicants inviting them to take occupation of the farm within 30 days. For that reason, they have made the acquiring authority the sixth respondent. The sixth respondent does not oppose the applicants' application. That, however, does not cede the sixth respondent's right to evict the first and second respondents as the applicants should have had legal capacity to evict when they filed the application and a proper cession is ^B necessary to give the applicants *locus standi*. The applicants only have a personal right against the acquiring authority as they have not yet been given vacant possession of the farm. They are in fact presently prohibited by a court order from entering the farm. As the applicants have not taken possession of Farnley Farm under the new offer letters, they cannot claim possession from ^C anyone else except the acquiring authority. They can, however, apply to be allowed to go back to the farm due to changed circumstances and in terms of ^S 8(2) of the Land Acquisition Act. In *Bodasingh's Estate v Suleman* 1960 (1) SA 288 N at 290H, referred to in *Pedzisa supra*, Fannin J said:

"Furthermore, a contract of lease (without delivery of possession) as clearly appears from this last case, does no more than entitle the lessee ^D to claim possession from the lessor (and those of his successors who had prior notice of the lease), and from no one else, (except under cession of action). It is only after he has been in possession that he can protect that possession against the whole world, and in particular against the lessor's successors. In that case, the lessee's rights can be described as real rights" (my emphasis).

^E Apart from not opposing the applicants' application and praying that the applicants' application be granted the acquiring authority has not ceded his right to evict to the applicants. He has also not personally applied for the first and second respondents' eviction. It therefore seems to me that the applicants have no *locus standi* to apply for the first and second respondents' eviction as they do not now have possession of the farm and the right to evict has not ^F been ceded to them. They however have *locus standi* to apply to this court for an order declaring their new offer letters to be valid and other consequential orders arising from the issuance of the new offer letters. They can also apply to be allowed to go back to the farm from which they had been evicted because they did not have valid offer letters. Section 8(2) of the Land Acquisition Act allows the acquiring authority to allocate land soon after the issuance of a ^G ^S 8(1) acquisition order.

EFFECT OF SECTION 16B(3) OF THE CONSTITUTIONAL AMENDMENT ACT

The applicant's counsel Mr *Matsunge* submitted that the applicants are ^H entitled to occupy the land as they now have valid offer letters and the

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Constitutional Amendment Act does not invalidate provisions of the law ^A which deal with the post acquisition position.

Mr *Masterson* for the first and second respondents submitted that ss 7, 8 and 9 have in their entirety been invalidated by ^S 16B(3) of the Constitutional Amendment Act.

Miss *Sweto* for the third to sixth respondents submitted that the provisions ^B of ss 8(2) and 9(1)(b) of the Land Acquisition Act were not invalidated by the coming into force of the Constitutional

Amendment Act.

A close examination of s 16B(3) of the Constitutional Amendment Act is necessary. The section provides as follows:

"(3) The provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, and the provisions of section 18(1) and (9), shall not apply in relation to land referred to in subsection (2)(a) except for the purposes of determining any question related to the payment of compensation referred to in subsection

(2)(b) *that is to say a person having any right or interest in the land:*

- (a) shall not apply to court to challenge the acquisition of the land by the State and no court shall entertain any such challenge;
- (b) may, in accordance with the provisions of any law referred to in s 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, challenge the amount of compensation payable for any improvements effected on the land before it was acquired" (my emphasis) E .

The meaning of s 16B(3)(a) and (b) can be ascertained from the language used and the provisions of ss 16(1) and 18(1) and (9) of the Constitution. The intention of the legislature can be ascertained from the plain meaning of the words it used and a section of a statute should be construed in conformity with the rest of the statute. In this case, the sections referred to in s 16B(3) are critical aids in interpreting s 16B(3). F

My understanding of s 16B(3) is that:

1. provisions of any law referred to in s 16(1) of the Constitution regulating the compulsory acquisition of land.
2. which were in force on the appointed day.
3. and the provisions of s 18(1) and (9) of the Constitution. G
4. shall not apply in relation to the land referred to in subs 2(a)
5. except for the purpose of determining any question related to the payment of compensation referred to in subs (2)(b).
6. The meaning is further clarified by the words "*that is to say, a person having any right or interest in the land*" – H

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- (a) *shall not apply to court to challenge the acquisition of the land by the State and no court shall entertain any such challenge.*

Paragraph (b) then provides for the exception which allows the right holder to challenge the quantum of compensation and the courts being allowed to entertain challenges over the quantum of compensation.

B The Acts and sections affected by s 16B(3) are not specified. They have to be identified by reference to their provisions. It is obvious that the Land Acquisition Act is being referred to in this case. As the sections of the Land Acquisition Act affected by s 16B(3) are not specified, it would be wrong to simply say ss 7, 8 & 9 have been invalidated as suggested by Mr *Masterson*. One has to look at the provisions of those sections and be satisfied that they C fall under the provisions of s 16B(3) of the Constitutional Amendment Act.

If the sections had been specifically identified then they would have been wholly invalidated.

In the case of s 16B(3), one has to look at the sections mentioned by Mr *Masterson* and determine whether or not they were wholly invalidated D from the appointed day.

Section 16B(3) clearly confines itself to provisions of the law emanating from s 16(1) of the Constitution and specifically providing for the compulsory acquisition of land and interest in land. In my view, it does not extend to what happens after acquisition. The provisions relating to post acquisition situations therefore remain valid, subject to how they were worded. Section 16(1)(a)-(f) E of the Constitution identifies the sections and provisions of the law which were invalidated. It provides as follows:

"16(1) Subject to section sixteen, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that — F

- (a) requires –

- (i) in the case of land or any interest or right therein, that the acquisition, is reasonably necessary for the utilization of that or any other land –
 - A ...
 - B ... G
 - C ...; and
- (b) requires the acquiring authority to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property or having any interest or right therein that would not be affected by such acquisition; and

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- (c) subject to the provisions of subsection (2), requires the acquiring authority to pay fair compensation for the acquisition before or within a reasonable time after acquiring the property; interest or right; and
- (d) requires the acquiring authority, if the acquisition is contested, to apply to the High Court or some other court before, or not later than thirty days after, the acquisition for an order confirming the acquisition; and B
- (e) enables any person whose property has been acquired to apply to the High Court or some other court for the prompt return of the property if the court does not confirm the acquisition, and to appeal to the Supreme Court; and
- (f) except where the property concerned is land or any interest or right therein, enables any claimant for compensation to apply to the High Court, or some other court for the determination of any question relating to compensation and to appeal to the Supreme Court.”

Section 16(1)(a) provides for the creation of a law to enable the acquiring authority to compulsorily acquire land. That is how the Land Acquisition Act can be identified as a law falling under s 16(1) of the Constitution. D

Section 16(1)(b) deals with the requirement for the acquiring authority to give reasonable notice of its intention to acquire. It therefore, cannot be disputed that provisions relating to the acquiring authority giving the owner or right holder reasonable notice were invalidated from the appointed day.

Section 16(1)(c) provides for payment of compensation. This too could have E been affected if it had not been saved by s 16B(3)(b).

Section 16(1)(d) provides for provisions entitling the expropriatee to challenge the compulsory acquisition in the High Court or some other court. This therefore affects the provisions on which the challenges to compulsory acquisition of land were being heard by the Administrative Court, High Court and Supreme Court. Provisions for a challenge in court of the compulsory F acquisition have been specifically invalidated by s 16B(3)(a) of the Constitutional Amendment Act. The owner or holder of interest in land can no longer challenge the compulsory acquisition in court and no court shall entertain such challenge.

Section 16(1)(e) provides for the law under which the expropriatee can apply G to the High Court or some other court for the prompt return of his property if the court does not confirm the acquisition of the property. This resulted in s 7(5) of the Land Acquisition Act [Chapter 20:10] being enacted. This would therefore affect the provisions of s 7(5) of the Land Acquisition Act and any provision for an appeal to the Supreme Court. H

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A Section 16(1)(f) enables the enactment of laws providing for the expropriatee to apply to the High Court or any other court for compensation. This needs not detain me as provisions relating to compensation have been saved by s 16B(3)(b) of the Constitutional Amendment Act.

The above analysis of the provisions of s 16(1)(a)-(f) of the Constitution exhausts the provisions of the laws which provide for compulsory acquisition B of land which are affected by s 16B(3). This clearly means provisions of the Land Acquisition Act which provide for what happens after acquisition has taken place are not affected by s 16B(3). This is because they are not referred to in s 16(1) of the Constitution. They therefore remain valid and operational.

Section 18(1) of the Constitution provides that, subject to the provisions of c the Constitution, every person is entitled to the protection of the law. That right can be enforced through the courts. This subsection is now subject to s 16B(3) of the Constitutional Amendment. The protection against compulsory acquisition of land required for agricultural resettlement purposes has therefore been removed.

Section 18(9) of the Constitution also referred to in s 16B(3) relates to the d expropriatee's right to be entitled to a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority. Again, this confines s 16B(3) to the provisions providing for reasonable notice before acquisition, the compulsory acquisition and the adjudication of cases of compulsory acquisition.

e I am therefore, satisfied that provisions of the law relating to aspects other than those on notice before acquisition, the acquisition and adjudication are not affected by s 16B(3).

Mr *Masterson* referred to s 16B(6) of the Constitutional Amendment Act as indicating that provisions relating to notice to vacate and eviction are affected f by s 16B(3). He says this is because Parliament is by s 16B(6) now expected to enact laws criminalizing the unlawful possession of State land. Counsel for the applicants and third to sixth respondents argued that the provisions of ss 8(2) and 9(1)(b) of the Land Acquisition Act were not affected by s 16(B)(3) of the Constitutional Amendment Act.

g Section 16(B)(6) provides as follows:

"An Act of Parliament may make it a criminal offence for any person, without lawful authority, to possess or occupy land referred to in this section or other State land."

This being a constitutional provision simply makes a law providing for the criminalisation of unauthorised possession or occupation of State land h constitutional. My understanding of s 16(B)(6) does not support

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Mr *Masterson's* submission that this refers to future laws still to be made by a Parliament. If Parliament in enacting s 16(B)(6) had in mind future laws it would simply have provided that Parliament may enact an Act making it a criminal offence to occupy or possess State land without lawful authority.

The fact that s 16B(6) refers to "An Act of Parliament" means this applies to existing and future enactments. b

I must now consider the effect of s 16B(6) on ss 8(2) and 9(1)(b) of the Land Acquisition Act. Miss *Sweto* for the third to sixth respondents said s 8(2) and 9(1)(b) are still in force. She further submitted that since the first and second respondents were served with a s 8(1) acquisition order on 29 July 2005 they are no longer entitled to be on the farm. She further submitted that the order setting aside the applicant's offer letters of 8 September 2005 was wrongly c granted as the Constitutional Amendment Act did not invalidate action which had been lawful taken towards the acquisition of Farnley Farm. She submitted that the first and second respondents were only held to be in lawful possession because applicant's offer letters had been invalidated.

Mr *Masterson* on the other hand submitted that the s 8(1) order of 29 July 2005 d was overtaken by the Constitutional Amendment. I understand him to mean that the order became of no force on 14 September 2005. I am inclined to avoid deciding this issue as it has already been decided by Patel J. I will only deal with aspects which have a bearing on the case before me.

Section 8(2)(b) of the Land Acquisition Act authorises the acquiring authority to demarcate survey and allocate the land immediately after he has made an e order in terms of s 8(1).

Section 8(2)(b) provides as follows:

"(2) Immediately after making an order in terms of subsection:

an acquiring authority may –

(a) ... f

(b) in relation to any agricultural land required for resettlement purposes, exercise *any right of ownership, including the right to survey, demarcate and allocate the land concerned for agricultural*

purposes without undue interference to the living quarters of the owner or occupier of that land" (my emphasis). ^G

This means that immediately after the acquisition order was issued on 29 July 2005 the acquiring authority was entitled to allocate the land to the applicants provided he and the persons allocated the land did not interfere with the former owners living quarters. The acquiring authority remained entitled to do so after the coming into force of the Constitutional Amendment Act. I have already found that provisions providing for situations other than the notice ^H

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^A acquisition and adjudication over compulsory acquisition were not affected by s 16B(3) of the Constitutional Amendment Act. The acquiring authority as owner of Farnley Farm is also entitled to exercise the owner's rights in terms of common law.

I am aware that Mr *Masterson* also submitted that the use of common law rights by the acquiring authority would have to be subject to s 3 of the Administrative ^B Justice Act No. 12 of 2004.

Miss *Sweto* for third to sixth respondents and Mr *Matsunge's* response was that this cannot be raised in opposing papers it has to be raised by way of an application for review.

I agree that the Minister's decision to allocate the farm can only be properly ^C looked at if an application for a review is made. I will therefore confine myself to a finding that he is entitled to allocate the land in terms of s 8(2) of the Land Acquisition Act and at common law.

I now proceed to determine whether or not the first and second respondents are entitled to remain on the farm after the expiry of 90 days from 29 July 2005 ^D the date when the s 8(1) order from which the acquisition in terms of the Constitutional Amendment Act took over was issued. Mr *Masterson* submitted that they are as s 9(1)(b) was invalidated by the Constitutional Amendment Act. Mr *Matsunge* and Miss *Sweto* submitted that they are not as the constitutional amendment did not affect s 9(1)(b) of the Land Acquisition Act.

^E Section 9(1)(b) provides as follows:

"1. The following provisions shall, subject to subsection (5) of section seven and subsections (2), (3), (4) and (7) of section 8, *apply to the vacation by the owner or occupier of Land acquired in terms of this Act –*

In relation to any agricultural land required for resettlement purposes, the making of an order in terms of subsection (1) of section eight shall ^F constitute notice in writing to the owner or occupier to cease to occupy, hold or use that land forty five days after the date of service of the order upon the owner or occupier, and if he fails to do so, he shall be guilty of an offence and liable to a fine not exceeding one hundred thousand dollars or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

^G Provided that:

- (i) The owner or occupier of that land, may remain in occupation of his living quarters on that land for a period of not more than ninety days after the date of serve of the order.
- (ii) The owner or occupier shall cease to occupy his living quarters after the period referred to in proviso (i) and if he fails to do so he shall be ^H guilty of an offence and liable to a fine not exceeding one hundred

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thousand dollars or to imprisonment for a period not exceeding two ^A years or to both such fine and such imprisonment." (my emphasis).

The provisions of s 9(1)(b) provides for a post acquisition position. They do not therefore form part of the notice acquisition and adjudication provisions which were invalidated by s 16B(3) of the Constitutional Amendment Act. The acquisition of 29 July 2005 was in terms of the Land Acquisition Act. It is ^B inconceivable to expect the legislature to have intended to invalidate acquisitions which had already taken place as its clear intention was to bring land acquisition to finality. The acquisition of 29 July 2005 was merely brought to finality by the Constitutional Amendment Act. Therefore, s 9(1)(b) still applies in situations where a valid s 8(1) acquisition order in terms of the Land Acquisition Act was in existence before the coming into effect of the ^C Constitutional Amendment Act.

This means when the first and second respondents were served with the s 8(1) acquisition order on 29 July 2005, they were served with notice to vacate Farnley Farm within 90 days from the date of notice (29 July 2005). This means they should have vacated Farnley Farm by 31 October 2005 as 29 and 30 October fall on a Saturday and Sunday. ^D

In my view, the coming into force of the Constitutional Amendment Act and its taking over from the s 8(1) order does not interrupt the notice period.

The first and second respondents should therefore have wound up their farming operations within 45 days of 29 July 2005, and vacated the farm by the 90th day after service of the s 8(1) Order. ^E

WAS THE FARM EVER ALLOCATED TO THE FIRST RESPONDENT?

Mr *Masterson's* alternative argument was that the first and second respondents were allocated the farm in 2002 so they are by virtue of that allocation entitled to remain on the farm. An examination of the first and second respondents' ^F opposing papers and annexures clearly reveal that this is not true. Several letters were written to the sixth respondent by the first and second respondents pleading that they be allocated part of the farm they referred to as the remaining extend. When I drew Mr *Masterson's* attention to this during submissions he conceded that the first and second respondents were never allocated land by ^G the acquiring authority. They merely made arrangements to down size with Chegutu District Land Committee. The first and second respondents even acknowledge that this arrangement was not approved by the third respondent who is the Chief Lands Officer for Mashonaland West.

The first and second respondent's position is clearly revealed by para 21 of their opposing affidavit in which Mr Sheriff who deposed the opposing ^H

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A affidavit on their behalf said:

"I had made earlier representations to the Minister about continued occupation of the downsized portion of Farnley Farm but I never received an acknowledgement or reply to any of these letters, (see Annexures II, III, IV, and V at pp 102-108 of the record in previous case). Such disregard of these letters was with respect unlawful, unreasonable and unfair."

^B Annexure II is first respondent's application to be allocated land addressed to the acquiring authority dated 28 August 2005. This demonstrates that the first and second respondents were prior to HC 3216/05 and this case clearly aware that they had not been allocated any land by the acquiring authority. They therefore, knew that their arrangements with the Chegutu District Land Committee was not a valid allocation and cannot claim rights under that ^C arrangement.

Annexure III was a letter by the first and second respondents to the Agricultural Land Settlement Board in which they sought to be allocated Farnley Farm and complained of Chirikure and Others being given offer letters and feared they could be issued with other offer letters. This again, demonstrates the first and ^D second respondents' knowledge of the fact that they had not been allocated the remaining extend of Farnley Farm by the acquiring authority.

In annexure 4A dated 29 May 2005, another letter to the sixth respondent, the first and second respondents' representative in para 14 said:

"While we would like to retain ownership of the downsized part of Farnley ^E already given us, we accept that all land may be nationalised and we are prepared to surrender the title deeds in return for a long lease. I am however most concerned about the prospect of being chased off by Chirikure and his companions as this seems to be an irregular private exercise by certain officials in the Ministry of Lands" (my emphasis).

This letter proves that the remaining extent was never allocated to the first ^F respondent. It remained its property until it was acquired on 29 July 2005. It does not make sense to allege that the first respondent was allocated its own farm before it was acquired. It seems to me all that the Chegutu District Lands Committee had agreed to do was to recommend to the acquiring authority that the first respondent be allowed to keep the downsized portion as his own property. They could not have allocated him a property which was not to be ^G acquired. Infact, they had no authority to allocate land. This annexure also makes it clear that the applicants were the acquiring authority's preferred settlers and still are. They already posed a threat of taking over the farm before it was

acquired on 29 July 2005. The sixth respondent was informed of what first and second respondents thought were irregularities by Ministry of Lands ^H officials. After being so informed, he issued them with offer letters dated 8

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September 2005 which were set aside by Patel J. He again issued them with ^A new offer letters dated 26 September 2005. This makes it clear that the sixth respondent has made up his mind that the applicants be settled on Farnley Farm. The first and second respondents' allegations against the third respondent are therefore, not factually correct. In annexure 4A, the first respondent was objecting to the acquisition of the farm by the sixth respondent ^B yet he says he was not receiving responses from the Minister. The notice of intention to acquire and the subsequent acquisition must have been a clear message to the first and second respondents. The s 8(1) order also saved as a notice to them in terms of s 9(1)(b) of the Land Acquisition Act. If the first and second respondents continued to operate on the land ignoring the effect of the s 8(1) order then they took a risk against the clear provisions of the law. ^C

In annexure 4(b) dated 23 June 2005, the first respondent again wrote to the Minister of Lands the sixth respondent. In the letter, Mr Sheriff said:

"I have already filed an objection to the first listing in which I suggest that Farnley be taken, if I can be allowed to continue to farm the downsized part of the property as allocated to me by the Government officials in 2002. I am prepared to accept a long lease and understand that this will be granted ^D in return for my title deeds.

I repeat that offer and ask you (*sic*) please clarify where I stand for the coming season because the District Administrator Chegutu, Minister Shamu and my MP Deputy Minister Nguni and others all tell me I must keep on farming."

This letter again confuses being allowed to downsize and being allocated land. ^E When one downsizes and the land is not acquired he does not lose ownership of it and it cannot be allocated to him as it remains his property. The letter further points to first respondent's realization that it is only the sixth respondent who allocates land, hence his pleas that the sixth respondent clarifies his position for the coming season in spite of his being urged to farm on by officials ^F and named Ministers and politicians. It would seem that the first and second respondents' persistence in farming on against the clear provisions of s 9(1)(b) of the Land Acquisition Act as they were prior to the coming into effect of the Constitutional Amendment Act and as they continue to provide thereafter, as I have already found above, is due to their being given a sympathetic ear by other officials. However, the law clearly gives the ^G responsibility to allocate land to the sixth respondent and no one else and the letter makes it clear that the first and second respondents were aware of this hence their plea to the sixth respondent.

In Annexure 4C which is the first and second respondent's other letter to the sixth respondent dated 23 June 2005 in para 3, the first respondent said: ^H

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^A "On 2 July 2002, we received the letter from Arex Office in Chegutu, copy attached, verifying that the Lands Committee of Chegutu had confirmed the demarcation of Farnley Farm for compliance purposes."

Again, this letter demonstrates that the Minister never agreed to the local arrangements and that the local arrangement was for demarcation. The letter thereafter sates some Lands Officials where scouting for land for the first ^B applicant. I have already said the sixth respondent has long demonstrated his insistence on allocating Farnley Farm to the applicants.

In Annexure 4D dated 16 August 2005, the first and second respondents' further letter to the sixth respondent Mr Sheriff wrote:

"On 23 June this year, I wrote to you seeking clarification of my position ^C on this farm which was subject to a long series of section 5 notices in the *Gazette* and the Press commencing 20 May this year. Since then, and in the absence of any response from your offices a court order has been issued requiring three settlers Messrs Ngoni Andrew Chirikure, Solomon Gwashavanhu and Davis Changunda to vacate the farm."

On p 2 of the letter, he said:

" ^D But I need to know where I stand and I need to know now.

My concern is this:

May I continue to farm on Farnley or must I get off ...”

The quest to know would have been quenched if the first and second respondents had taken care to consider the legal implications of s 9(1)(b) of the Land Acquisition Act. It spells out that they had 45 days to wind up farming operations and a further 45 days to vacate the property. The first and second respondents made these pleas before the Constitutional Amendment Act came into force after the s 8(1) Acquisition Order which is also a notice to vacate had been served on them. They cannot therefore hide behind the Constitutional Amendment as the law was then clear and I have already found it remains so today. The answer they wanted was in the law explained above and that had been triggered by their receipt of the s 8(1) order of 29 July 2005 issued by their addressee, the sixth respondent. In *Airfield Investments v Minister of Lands & Ors* 2004 (1) ZLR 511 (S) at p 13, Malaba JA, commenting on the conduct of a farmer who continued farming after being served with a s 8(1) acquisition order, said:

“Similarly, the court *a quo* was being asked by the appellant to sanction the continued illegal farming operations and occupation of the living quarters on the land despite the clear and unambiguous language of the Act to the effect that failure to cease occupation or use of the land at the end of forty five days from the date of service of the order of acquisition

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and of the living quarters at the end of ninety days from the date of service of the order of acquisition constituted a criminal offence.”

It is therefore clear that when first and second respondents wrote Annexure 4D their position at law was quite clear. They had to wind up farming operations within 45 days of the 29 July 2005 and vacate the farm’s living quarters within 90 days of that date.

On the facts before, as demonstrated by the first and second respondents’ own letters to the Minister, the sixth respondent, Mr *Masterson’s* submission that the first and second respondents were in lawful occupation cannot be correct, unless it is confined to the time that remained to vacate Farnley farm within 90 days. That time has now lapsed and they are now illegally occupying that farm. What they had were residual rights to wind up farming operations within 45 days and vacate the farm within 90 days. As already indicated, those residual rights have now been terminated by the lapse of the stipulated periods.

Mr Masterson had sought an order that the applicants be allowed to stay on the farm, pending review of the Minister’s decision to issue offer letters to the applicants. That request cannot be granted because the first and second respondents’ interests in Farnley Farm were terminated on 31 October 2005. They no longer have the *locus standi* to challenge the Minister’s decision to offer the land to the applicants. The sixth respondent as the new owner of Farnley Farm can offer it to anyone he pleases.

I refer to *Airfields Investments supra* where Malaba JA said:

“The argument advanced by Mr *Matinenga* does not help the appellant because at the time it made the application for interim relief the statutory periods marking the duration of the existence of the rights it could have claimed had long expired. The appellant was no longer a member of the class of people intended by Parliament to benefit from the provisions of s 9 (1)(b) of the Act.”

In this case, the intended application for review will be made by persons who no longer have any rights or interest in Farnley Farm. Infact, their continued occupation of Farnley Farm is illegal. The courts cannot assist them to pursue their illegal occupation of the farm.

JOINDER

On the issue of joinder, Mr *Masterson* for the first and second respondents submitted that the first and second respondents should not have been joined with the third to sixth respondents as their interests in this matter are conflicting. He suggests that the third to sixth respondents should have been made co-applicants.

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A The third to the fifth respondents did not file opposing papers, so even if there was a misjoinder, it did not cause the first and second respondents any prejudice. In the case of the fourth and fifth respondents, they were ordered by Patel J in para 4 to ensure that the applicants do not breach the order granted in favour of the first and second respondents against the applicants. They were therefore properly joined as respondents, as any order altering or B confirming the previous order must be brought to their attention. There is in fact no conflict of interest between the fourth and fifth respondents and the first and second respondents.

In the case of the sixth respondent, Miss Sweto submitted that the Minister was properly made a respondent because the offer letters issued to the applicants require them to occupy the allocated land within 30 days, failing C which they may lose the land. She submitted that that makes the Minister a proper respondent.

Rule 85 of the High Court Rules provides as follows:

"Subject to rule 86, two or more persons may be joined together in one action as plaintiff's or defendants whether in convention or in reconvention D where –

- (a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions; and all rights to relief in the action
- (b) whether they are joint, several or alternative, are in respect of or arise out of the same transaction or series of transactions."

E In the present case, the applicants can enforce their right to the allocated land by either suing the Minister to grant vacant possession or the first and second respondents for the redefining of their rights in view of the changed circumstances. The questions of law and facts as to whether or not the first and second respondents can be evicted would arise in both cases.

F The rights to the relief claimed arise out of the same series of transactions. The series arise from the acquisition of Farnley Farm and its allocation to the applicants by the sixth respondent. The sixth respondent has brought about conflicting interests in Farnley Farm between the applicants and the first and second respondents. It is, therefore, my view that the sixth respondent was properly joined as a respondent.

G If I am wrong in this finding, then R 87(1) would be applicable.

It provides as follows:

"(1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and H interests of persons who are parties to the cause or matter."

2005 (2) ZLR p392

Uchena J

The rule clearly entitles the court to determine the cited parties' rights in spite A of misjoinder, though in terms of R 87(2) the court may order an improperly cited party to cease to be a party or a person who should have been joined to be joined, though a person cannot be ordered to be joined as a plaintiff (applicant) without his consent, signified in writing or any other manner acceptable to the court. This factor usually determines whether or not a necessary party can be joined as a co-applicant or a respondent. B

As indicated earlier, I am of the view that the applicants are entitled to join the sixth respondent as a co-respondent to the first and second respondents. The fact that their interests are not in harmony is no bar to their joinder.

VALIDITY OF THE OFFER LETTERS OF 26 September 2005

Mr Masterson submitted that the Minister had no authority to issue offer C letters as he did not comply with S 9 of the Agricultural Land Resettlement Act. Miss Tsveto's response was that S 9 of the Agricultural Land Settlement Act applies to leases and an offer letter is not a lease.

I agree with Miss Sweto that an offer letter is not a lease. This was clearly stated by Ziyambi JA in *Airport Game Park (Pvt) Ltd & Anor v Karidza & Anor* D 2004 (1) ZLR 391 (S), where she said:

"Although the duration of the lease need not be specified for a lease to be constituted, the same cannot be said of the quantum of the rental and when it should be paid. In the absence of any provision setting out the rental, the letter cannot be said to constitute a lease.

Accordingly, no lease having been granted, the provisions of s 9 of the *Ε* Agricultural Land Resettlement Act did not apply and cannot avail the appellants as a basis on which to impugn the validity of the letter of offer.”

In view of this finding by the Supreme Court, it cannot be said that the sixth respondent did not have authority to issue offer letters to the applicants. The offer letters issued to the applicants on the 26 September 2005 are therefore *Ε* valid.

THE ORDER TO BE GRANTED

The applicants’ draft order was styled after the orders granted under HC 3216/05. There is no need for me to deal with orders already granted under the clear understanding that, if there was a change of circumstances, the affected party could approach this court to seek such order or relief as may *Γ* be appropriate, unless the order is relevant to the changed circumstances and correctly reflects the legal positions as discussed in this judgment.

I will therefore only grant orders sought under paras 4, 5, 6, 7, 8, 9 and 10 of the draft order. The orders sought will be amended to make them legally correct and to remove grammatical inaccuracies. *Η*

2005 (2) ZLR p393

Uchena J

Α It is, therefore, ordered that:

1. The letters of offer issued to the first, second and third applicants by the sixth respondent on 26 September 2005 are hereby declared to be valid and of legal force and effect.
2. The first and second respondents were served with notices to vacate *Β* Farnley Farm on 29 July 2005 when the s 8(1) acquisition order was served on them.
3. The first and second respondents’ notice period lapsed on 31 October 2005. They are no longer entitled to possess or occupy subdivisions 1, 2 and 3 of Farnley Farm. They are therefore ordered not to interfere with the applicants’ use of subdivisions 1, 2 and 3 of Farnley farm. They are *Γ* only entitled to remain in the farm house pending their eviction by the acquiring *Δ* authority.
4. The first, second and third applicants are now entitled to re-enter and occupy subdivisions 1, 2 and 3 of Farnley Farm except the farm house pending the eviction of the first and second respondents by the acquiring authority.
5. The first and second respondents or their agents shall not in any way interfere with the first, second and third applicants’ farming operations on subdivisions 1, 2 and 3 of Farnley Farm.
6. In the event of any inconsistencies between this order and any previous orders in this case, this order shall prevail over any such orders.

Ε The first and second respondents shall pay the costs of this application.

Mutezo & Partners, applicant’s legal practitioners

Coghlan, Welsh & Guest, first and second respondent’s legal practitioners

Ε *Civil Division of the Attorney-General’s Office*, third to sixth respondent’s legal practitioners

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Source:

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KHUPHE v OFFICER-IN-CHARGE, LAW AND ORDER SECTION, ZRP, BULAWAYO Central & Ors 2005 (2) ZLR 394 (H)

2005 (2) ZLR p394

Citation	2005 (2) ZLR 394 (H)
Case No	Judgment No. S-79-05
Court	Supreme Court, Bulawayo
Judge	Cheda JA, Malaba JA and Bere AJA
Heard	28 November 2005
Judgment	28 November 2005
Counsel	<i>J Sibanda</i> , for the appellant <i>B Ndove</i> , for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Practice and procedure — *application — declaratur — when may c be granted — subject-matter pending before another court — application refused — subject matter common cause — declaratur pointless*

Headnote

Before the general elections of March 2005, the appellant, who was a duly elected member of Parliament, held a meeting of about 80 of her constituents at her restaurant. The meeting was broken up when the police arrived at the restaurant and arrested the appellant. She was charged with contravening s 24(6) of the Public Order and Security Act [*Chapter 11:17*] on the ground that she was holding a public meeting ^Ε without first having notified the regulating authority for the area. The appellant claimed that the meeting was a private one. Pending trial, she was placed on remand. She thereupon sought a *declaratur* in the High Court to the effect that the organizer or convenor of a meeting was not obliged to notify the regulating authority of a meeting or gathering if such meeting or gathering was a private one. At her hearing, however, her legal practitioner urged the court not to dismiss her application, while at the same time declining to make the *declaratur*. The court duly declined to grant the *declaratur* and ordered the appellant to pay the costs of the application. Notwithstanding the attitude adopted by her legal practitioner at the hearing, the appellant appealed against the order of ^Γ the High Court.

Held, that the main issue to be decided at the trial was whether the gathering was a public one or a private one. This was a matter neither for the High Court nor the Supreme Court to determine. It was a question of interpretation and depended mainly on the evidence to be led at the trial. Until it was determined, it was not for an appellate court to interfere. ^Η

2005 (2) ZLR p395

Cheda JA

^A *Held*, further, that in any event there was no point in issuing a *declaratur* concerning private meetings, because that was common cause. To do so would simply repeat to the police what they already know. In the circumstances, the appeal was devoid of merit and should be dismissed with costs.

Legislation considered ^B

Public Order and Security Act [*Chapter 11:17*], s 24(6)

Case information

J Sibanda, for the appellant

c B Ndove, for the respondents

Judgment

CHEDA JA: After hearing the appellant's counsel, we dismissed this appeal with costs and indicated that the reasons would follow. These are they.

The appellant was a duly elected Member of Parliament for the Makokoba Constituency in Bulawayo at the time of the incident that led to this appeal. ^d She represented the Movement for Democratic Change, an opposition political party in Zimbabwe.

In January 2005, new constituency boundaries were announced in preparation for the general elections that were to take place in March 2005.

On 23 January 2005, the appellant called for a meeting of her constituents at her restaurant, which is along Leopold Takawira Avenue in Bulawayo. More ^e than eighty people from various wards of her constituency attended the meeting. Members of the Zimbabwe Republic Police arrived, broke up the meeting and arrested the appellant.

The appellant was charged with contravening s 24(6) of the Public Order and Security Act [*Chapter 11:17*] ("the Act") (also known as "POSA") – holding ^f a public meeting without notifying the authority concerned. She was then placed on remand by the magistrates court and at the time of the hearing of this appeal she was still on remand in respect of that charge.

The appellant, being of the view that the meeting she had called was a private one and did not fall under the type of meetings or gatherings prohibited by s 24 of the Act, approached the High Court seeking a declaration in the ^g following terms:

- "1. That it is hereby declared that s 24 of the Public Order and Security Act [*Chapter 11:17*], as read with s 2 thereof, does not oblige the organiser or convenor of a meeting to notify the regulating authority concerned, if such meeting or gathering be a private meeting or ^h gathering.

2005 (2) ZLR p396

Cheda JA

2. For the avoidance of doubt, the organiser of such meeting as is ^A referred to in (a), above, shall not be held to have contravened s 24 of POSA, as read with s 2 thereof, where the meeting or gathering concerned is not a public meeting or gathering.
3. The respondents pay the costs of this application jointly and severally, the one paying to absolve the others."

The appellant also sought the following interim relief: ^B

"Pending confirmation or the discharge of the order, that this order shall operate as a temporary order –

1. Restraining the second respondent, through his officers, from disrupting, breaking up or in any way interfering with the holding of any private meeting held by the applicant, whether such meeting be ^C held in a private place or other place.
2. Restraining the second respondent, through his officers, from causing the arrest of the applicant for holding such meetings."

The High Court declined to grant the *declaratur* and ordered the appellant to pay the costs.

The appellant appealed against this refusal by the High Court to grant the ^D *declaratur* sought.

I find the appellant's position to be difficult and confused, unless there is an error in the typed judgment of the High Court. In his judgment, the judge of the High Court stated:

"Mr *Sibanda* urged me not to dismiss the application but instead to decline ^E to make the *declaratur*."

At the end of his judgment, the judge stated:

"Accordingly, I decline to grant the *declarator* sought, with the applicant paying the costs of the application."

It is not clear why the appellant, having asked the court to decline to grant the ^F *declaratur* and the court having done exactly that, now appeals to this court against that order.

Turning now to the merits, s 24 of the Act reads as follows:

"24 (1) Subject to subsection (5), the organiser of a public gathering shall give at least four clear days' written notice of the holding of the ^g gathering to the regulating authority for the area in which the gathering is to be held:

Provided that ..."

The main issue raised by the appellant is whether the meeting that she called was a public or a private meeting ^h.

2005 (2) ZLR p397

Cheda JA

^a The appellant is currently on remand. The main issue to be determined at her trial is clearly whether her gathering was a public one or a private one. If it was not a public meeting, as she submits, she will be acquitted. If the gathering was a private one as opposed to a public one, that is a defence that is still available to her, which could lead to an acquittal if proved. If it was not, the trial court will make an appropriate finding.

^b This issue is therefore one to be determined by the trial court, after hearing evidence. It is neither for the High Court to take on itself to determine, nor for this court to do so on appeal. It is a question of interpretation, and depends mainly on the evidence that will be led at the trial. Until then, this court is not in a position to interfere. This is a court of appeal. The appellant can only come ^c on appeal against the determination of the magistrates court once the matter has been determined in a manner that she considers to be incorrect.

I find that the High Court was correct in declining to grant the *declaratur*, as the application for it had no merit. In any event, there is no point in issuing a *declaratur* concerning private meetings because that is common cause. To do so would be simply to repeat to the police what they already know. The ^d police, in their request for remand, said the appellant organised a public, not a private, gathering.

The appeal to this court has no merit either and that is why we ordered it dismissed with costs.

^e MALABA JA & BERE AJA concurred.

Job Sibanda & Associates, appellant's legal practitioners ^f

^f *T Hara & Partners*, respondents' legal practitioners ^g

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Source:

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TSVANGIRAI v MUGABE & ANOR 2005 (2) ZLR 398 (H)

2005 (2) ZLR p398

Citation	2005 (2) ZLR 398 (H)
Case No	Judgment No. HH-109-05
Court	High Court, Harare
Judge	Hlatshwayo J
Heard	28 November 2005
Judgment	28 November 2005
Counsel	<i>J Gauntlett SC, A P de Bourbon SC and H Zhou</i> for the petitioner

T Hussein, for the first respondent
G Chikumbirike, for the second respondent

Case Type	Election petition
Annotations	Link to case annotations

Flynote

Elections — *election petition — parties to petition — whether proper to cite the Electoral Supervisory Commission c*

Elections — *Electoral Supervisory Commission — Constitution of Zimbabwe 1980 — s 114(3a) and (3b) does not preclude challenge to legality of its actions — constitution of — whether appointment of members must be notified in Gazette — number of members required to form a quorum*

Statutes — *Electoral Act [Chapter 2:01] — s 149 — meaning of — amendment by Law Reviser — amendment D ultra vires — correct interpretation of section*

Statutes — *Revised Edition of the Laws — powers of the Law Reviser — interpretation of statute where revised edition differs from original statute passed by Parliament*

Headnote

The petitioner challenged the outcome of the 2002 Presidential election. ^ε Among the respondents cited was the Electoral Supervisory Commission (ESC). The ESC objected to being joined, on the grounds, *inter alia*, that the manner in which it conducts its election was a matter beyond the court's jurisdiction, its independence being established by s 61(6) of the Constitution. The applicant argued that the ESC was not properly ^ε constituted, the appointment of its members not having been published in the *Gazette* and there being only four members instead of the stipulated five. He argued that the election was thereby invalidated. In the petition, the applicant challenged the constitutionality of s 158 of the Electoral Act [Chapter 2:01], but three days after the expiry of the time for lodging a petition, a further draft order was submitted. The petitioner argued that ^g it was necessary for him to show either that the election was not conducted in accordance with the principles laid down in the Electoral Act or that the failure affected the results. The respondents argued that in terms of s 149 of the Act, both elements had to be shown. ^h

2005 (2) ZLR p399

^a *Held*, that our law recognizes two classes of parties that must or may be joined: necessary and convenient parties and then substantive and nominal parties. While necessary parties are generally substantive and must be joined and are affected by an order of costs, convenient parties may be substantive but are usually just nominal, their joinder is typically discretionary and may not be affected by an order of costs as they, more ^b often than not, remain neutral and abide by the decision of the court. The joinder of ESC as a convenient party, whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, was quite proper.

^c *Held*, further, that the entrenchment of the independence of a body or person is a well-established constitutional device which does not then put such body or person above the law. Their actions are still subject to legal review. The kind of protection that the Constitution extends to the ESC is independence in the conduct of its duties of monitoring elections. But if the grievance is that the ESC was not properly constituted, acted ^d illegally or failed to discharge its duties altogether, such a challenge cannot be answered by reference to the provision which constitutionally entrenches the independence of the ESC.

Held, further, that there is no factual basis for finding that only four members had been appointed to the ESC. Assuming it had been properly constituted, a quorum consisted of three members. Publication of the ^e names in the *Gazette* was not mandatory, being merely evidentiary.

Held, further, that strict adherence to procedure is necessary in election petitions and for that reason the further draft would be disregarded.

Held, further, that the original version of s 149 of the Electoral Act had the two elements separated by the word "or". This had been changed by the Law Reviser, in compiling the Revised Edition of

the Statutes, to “and”. ^F It was possible to speculate on the reasons for the change, but the change was *ultra vires*. Examination of the history of the provision showed that the legislature perceived two types of non-compliance with the provisions of the Act; one involving principles enshrined in the Act and the other involving ordinary provisions, and to separate the two the ^G conjunction “or”, rather than “and”, would be appropriate. Provisions which form the bedrock of the concept of democratic elections, of free, fair and unimpeded choice, like universal suffrage and the secrecy of the ballot, will constitute principles, while administrative and certain ^H procedural provisions can be regarded as ordinary provisions.

2005 (2) ZLR p400

Hlatshwayo J

Cases cited ^A

Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)

Charan Lal Sahu v Ors v Singh [1985] LRC (Const.) 1

Diamond Insurance Co (Pvt) Ltd v ANZ & Anor 2001 (1) ZLR 243 (H)

Keyser v Conroy 1917 CPD 353

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

Mberengwa West Election Petition 2002 (1) ZLR 233 (H)

Mitilesh Kumah v Venkataraman & Ors [1989] LRC (Const.) 1

Nicholson v van Niekerk 1915 TPD 581

Pio v Smith 1986 (2) ZLR 120 (S)

S v Mpofu 1978 RLR 435 (G)

S v Tekere & Ors (1) 1980 ZLR 441 (A)

Zimbabwe Teachers Association & Ors v Minister of Education and Culture 1990 (2) ZLR 48 (H) ^C

Legislation considered

Constitution of Zimbabwe 1980, ss 61(6) and 114(3)

Electoral Act [Chapter 2:01], ss 102, 149 and 158

High Court Rules 1971 (RGN 1047 of 1971), rr 85, 86 and 87 ^D

Interpretation Act [Chapter 1:01], s 31(2)

Case information

J Gauntlett SC, A P de Bourbon SC and H Zhou for the petitioner

T Hussein, for the first respondent

G Chikumbirike, for the second respondent ^E

Judgment

HLATSHWAYO J: This is the judgment in the first part of an application in which the petitioner seeks the setting aside of the first respondent’s victory in the 2002 Presidential election. The petition has been approached in two stages; the first being the challenge on preliminary matters which I dismissed in my ruling of 10 June 2004, the reasons for which dismissal appear herein, ^F and the second stage is the trial itself, which has not yet commenced as the petitioner is still gathering and/or analyzing further evidence. The second and third respondents, the Registrar-General and the Minister of Justice, Legal and Parliamentary Affairs, were removed as respondents, but shall be referred to as the second and third respondents in this judgment as they were in the pleadings to avoid confusion. Similarly, the fourth respondent, the Electoral ^G Supervisory Commission (“the ESC”), now appearing as the second respondent after unsuccessfully objecting to its joinder, shall continue to be referred to as the fourth respondent. ^H

2005 (2) ZLR p401

Hlatshwayo J

A BACKGROUND

The background to this judgment is that the petitioner has approached the Supreme Court for certain relief and, on 17 November 2005, the Supreme Court reserved judgment in the matter in which the petitioner seeks the nullification of the order of this court of 10 June 2002. Although I was the presiding judge in the matter, I was not cited as a party and therefore I could not formally place before the superior court my own view of the matter.

The first point I make pertains to what, at law, this court is entitled or required to do concerning its role in the petition process in general and the reserved reasons for judgment specifically, in the light of the constitutional challenge now before the Supreme Court. Once a matter has been filed with a higher court, the lower court has to be extremely circumspect in how it continues to deal with the same matter. My respectful view is that, from the moment the petitioner filed his application with the superior court, the proceedings of this court were immediately stayed or frozen pending the finalization of the constitutional challenge. No issues in dispute before the higher court could be entertained by this court, either *mero motu* or at the instance of any party. Specifically, in my considered view, this court could not proceed to hand down the reasons for the ruling until the Supreme Court had concluded its proceedings. All it could do was stand ready to do so on the turn if so required by the higher court. For the challenge before the Supreme Court, as I understand it, is not a *mandamus* for the handing down of reasons for judgment where it would have been quite proper to comply without waiting for the ruling of the Supreme Court. To have proceeded to hand out reasons down judgment after the petitioner had filed a complaint in this regard would have been tantamount to foisting a judgment on a party which had clearly chosen a route of seeking satisfaction first from the Supreme Court, with the real danger that such a party could, with justification, consider itself not bound to accept or act upon the judgment, including the necessary concomitants of the release of the judgment, such as the fixing of the time limits relating, for example, to appeals.

On the other hand, the above approach would have led to further delays. Since the impugned order has already been issued and the Supreme Court is still to decide on the challenge, it would appear that the reasons for judgment could similarly be released and the higher court will then deal with both the order and the reasons therefor.

Faced with this dilemma, I called the legal representatives of parties to my chambers on 25 November, and put before them the two competing positions, and they all agreed that the reasons should be handed down. Mr Zhou opined that since the operative part of the judgment had already been issued, it was proper to release the reasons therefor, the pendency of the matter before the

2005 (2) ZLR p402

Hlatshwayo J

Supreme Court notwithstanding. All the lawyers further agreed that the reasons be handed down in open court on 28 November at 10.00 a.m.

The second point I raise relates to my own perspective of the development of the dispute, now before the Supreme Court. On 10 June 2004, I issued the following order in this matter:

"I hereby order as follows: 1.

1. Dismiss with costs the fourth respondent's objection that it was not properly cited as a party to these proceedings.
2. Dismiss with costs the relief sought by the petitioner as to the constitutional validity of s 158 of the Electoral Act [Chapter 2:01] and the Electoral Act (Modification) Notice 2002 (SI 41D of 2002) and the declaration sought that all orders made and directions given and acts done in terms of the Electoral Act (Modification) Notice 2002, SI 41D of 2002, are void.
3. Dismiss with costs the preliminary points raised by the petitioner in that none of them on its own nor all of them collectively suffice at this stage to invalidate the election" (my emphasis).

The terms of the above order, especially as highlighted in the emphasised part, clearly show that this was a preliminary or interlocutory ruling, pending the full ventilation of the issues in the second or trial stage of the petition.

On 16 July 2004, I called the parties into my chambers in order to discuss with them the set down of the second phase of the petition, which had been scheduled on the court roll for the first part of the last term of court. It is noteworthy that at that stage the petitioner had not indicated any intention to appeal or to apply for leave to do so, and was already well out of the time limits for noting an appeal. The reason for the petitioner's failure to note an appeal, in my opinion, was the commonly held view that this ruling was interlocutory and the petitioner would take a position upon the conclusion of the second phase. I did not understand the situation to be that the petitioner had waived his right to appeal. At any rate, I would assume, the petitioner's lawyers must have had at the back of their minds the firm position that the Supreme Court is loath to consider piecemeal appeals. See *S v Tekere & Ors* (1) 1980 ZLR 441 (A), *Masedza & Ors v Magistrate, Rusape & Anor* 1998 (1) ZLR 36 (H), *Diamond Insurance Co (Pvt) Ltd v Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor* 2001 (1) ZLR 243 (H). ^g

Nonetheless, cognizant of the need for the parties to be informed of the court's position on the preliminary issues for their benefit in the second phase of the proceedings, but while emphasizing at the same time that I considered the preliminary issues and ruling as interlocutory, I undertook to endeavour to produce the reasons for the ruling before the commencement of the second phase of the petition, which phase has not commenced as already noted.

2005 (2) ZLR p403

Hlatshwayo J

^a After the preliminary points were dismissed in June 2004 as indicated above, the main matter was set down for a hearing in September. However, before the matter could commence, the petitioner wrote to indicate that he was not ready to proceed before accessing and studying certain documents he wished to discover and in connection with which he had filed a separate application.

^b In a letter to the hearing judge's clerk by the petitioner's lawyers, dated 3 August 2004, it is stated, *inter alia*:

"Because of the great importance of the election material, we respectfully submit that it is essential that we are given an adequate opportunity to inspect and analyse it prior to the commencement of Phase 2 of the Election Petition, case No. HC 3616/2002."

^c The petitioner, in that letter, concludes:

"The election material has a fundamental bearing on many of the general issues contained in the pre-trial conference minute and we consider that it is essential that it is inspected and analysed before proceeding further with election petition."

The inspection of the election material is currently on-going, and the petitioner ^d has not indicated when the analysis would be concluded and when he would be ready to proceed to Phase 2 of the petition. When Phase 2 of the petition was stayed at the instance of the petitioner, the hearing judge was, understandably, assigned other duties. He has never been reassigned exclusively to the petition and has only been able to work intermittently on the judgment. In retrospect, the delay in the handing down of the reasons for ^e the order could have been avoided had I indicated, and secured, on the court roll the time necessary to conclude the matter. However, a desire not to unduly interfere with the court roll deterred me from doing so, especially given that a longer set down to deal with Phase 2 of the petition appeared imminent.

To that extent, I take full responsibility and deeply regret the delay caused up ^f to that stage. Ironically, it was precisely at this stage when the necessary arrangements had been made with the judge president to expedite the conclusion of the matter, that the petitioner, without the basic courtesy of a notice to the presiding judge, approached the Supreme Court, with the consequences already noted above.

^g It must also be noted that the absence of reasons for the 10 June 2004 order could not stop the petitioner from proceeding with Phase 2 of the petition. What prevented the commencement of Phase 2 was the petitioner's desire to gather further evidence and, I understand, the petitioner is still in the process of collecting and analyzing further evidence to present to the court.

^h My reasons for the above order follow.

2005 (2) ZLR p404

Hlatshwayo J

ISSUES RELATING TO THE FOURTH RESPONDENT ^A

There are basically two issues relating to the fourth respondent:

1. should the fourth respondent be a party to these proceedings?
2. did the composition of the fourth respondent at the time of the elections comply with the Constitution, and if not, does that in any way bear upon ^B the validity of the election?

I will deal with these issues in the above order.

PROPRIETY OF JOINING THE FOURTH RESPONDENT

Contrary to the assertion by the petitioner in his heads of argument that the endeavour to remove the fourth respondent as a party was belated, the fourth respondent objected to its inclusion as a substantive party at the earliest ^C possible opportunity in its notice of opposition. The opposing affidavit filed by the then Chairman of the ESC, Sobusa Gula-Ndebele, is cogent and clear in this regard. The application for the removal of the fourth respondent as a party was brought in terms of Order 13 r 87(2), which states:

"At any stage of the proceedings in any cause or matter, the court may, on ^D such terms as it thinks just and either of its own motion or on application –

- (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
- (b) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in ^E dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party."

It was submitted on behalf of the petitioner that s 102 of the Electoral Act does not stipulate who must be cited as a party in election petition proceedings, and that therefore the common law rule applies. The common law rule is that a ^F person with a direct and substantial interest in the subject matter of the petition must be joined: see *Zimbabwe Teachers Assn v Minister of Education and Culture* 1990 (2) ZLR 48 (H) at 52-53; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659. Another way of testing whether a person would be joined is whether he should be affected by the order the court is asked to make. Mr *Chikumbirike*, for the fourth respondent, preferred ^G to state the common law position negatively, thus: parties without a "direct and substantial interest" in the subject matter of litigation should not be joined; if they are made parties, then it is a case of misjoinder. However, there is only a difference of emphasis in the manner in which the respective counsel have preferred to state the common law. The common law rules on joinder of ^H

2005 (2) ZLR p405

Hlatshwayo ^J

^A parties have now been codified and extended in our rules of court: Order 13 rr 85, 86 and 87.

Rule 85 states the classic common law position. Rule 86 grants the court, on its own motion or upon application by a party or with the consent of the parties, a wide discretion to join parties on the basis of convenience and/or to order separation of trials. Rule 87(2)(b) expands more on the concept of a convenient ^B party, by requiring to be joined any party "whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon". Therefore, it appears to me that our law recognizes two classes of parties that must or may be joined: necessary and convenient parties and then substantive and ^C nominal parties. While necessary parties are generally substantive and must be joined and are affected by an order of costs, convenient parties may be substantive but are usually just nominal; their joinder is typically discretionary and may not be affected by an order of costs as they, more often than not, remain neutral and abide by the decision of the court.

Applying the above general summation of the rules of joinder to the case ^D before me, the capacity in which the fourth respondent is joined is not apparent on the record as the petitioner merely states: "The fourth respondent is the Electoral Supervisory Commission established in terms of s 61 of the Constitution of Zimbabwe." However, when one examines the duties of the ESC and the matters before the court in this case, the conclusion becomes ^E inescapable that the fourth respondent should be viewed at the very least as a convenient party "whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon".

Some of the duties of the ESC are to “supervise the registration of voters and the conduct of elections” and to make reports to the President concerning the F matters under its supervision, including reports on any draft bill or statutory instrument that is referred to it. The issues before the court include challenges to the composition of the ESC, the conduct of the election, the constitutionality of laws and regulations used in the registration of voters and the management of the election. In para 119 of his affidavit, the petitioner criticizes the fourth G respondent directly concerning its conduct at most polling stations, thus:

“The Electoral Supervisory Commission monitors took a passive role in the proceedings and were not seen to be closely involved in monitoring the process of voting. Very rarely did independent observers witness Electoral Supervisory Commission monitors challenging or intervening in any part of the voting, especially on occasions when people were turned away for H not being on the electoral register. In most cases, the Electoral Supervisory

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Commission monitors seemed to limit themselves to sitting in their A designated places at polling stations and taking notes, interacting very little with presiding and polling officers.”

Granted, there is no specific remedy prayed for as against the ESC in the draft order, but how is a respondent whose victory in an election is impugned supposed to defend himself or herself without the joinder of the ESC against B allegations that the ESC was not properly constituted or failed to discharge its constitutional duties, thus rendering the election void? Put differently, a challenge of the validity of an election such as the one mounted by the petitioner in this case should be of such interest to a body set up to supervise elections that, if not joined, such a body would demand to be made a party, if only to better assist the court in understanding the role it played and C providing that independent and disinterested view of the matter.

The fourth respondent goes on to mount a final startling argument against its inclusion in this petition, viz., that the manner it conducts its election supervision is a matter beyond this court’s jurisdiction and therefore cannot be raised before it and may not be questioned by any court of law. This remarkable submission is ostensibly based on s 61(6) of the Constitution, D which provides thus:

“The Electoral Supervisory Commission shall not in the exercise of its functions in terms of subsection (3) or (5) be subject to the direction or control of any person or authority.”

Now, the entrenchment of the independence of a body or person in the above E terms is a well-established constitutional device, which does not then put such body or person above the law. The actions of such bodies or persons are still subject to legal review. For example, in s 79B of the Constitution the independence of the judiciary is entrenched in exactly the same terms, but it would be quite a novel proposition to interpret that entrenchment as removing from legal review the conduct of the judiciary in the exercise of its functions. F The kind of protection that the constitutional provision extends to the ESC is independence in the conduct of its duties of monitoring, for example, the criticism of how its officials discharged their duties quoted at length above is completely inappropriate. No court can interfere or inquire into the manner in which the ESC conducts its duties, no court can order that ESC officials be more active in the discharge of their duties, etc. But if the grievance is that the G ESC was not properly constituted, acted illegally or failed to discharge its duties altogether, such a challenge cannot be answered by reference to the provision which constitutionally entrenches the independence of the Commission. H

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A All in all, therefore, I came to the conclusion that the fourth respondent was properly cited as an essential party to these proceedings. In dismissing the fourth respondent’s objection to its inclusion as a party, I also awarded costs against it because of the inflexible stance it had taken of demanding to be removed completely when it was self-evident that its “presence before the court is necessary to ensure that all matters in dispute in the cause or matter B may be effectually and completely determined and adjudicated upon”. Had the fourth respondent’s request been that it desired to be considered merely as a nominal party, I would have taken a different view regarding costs. However, the question of costs, if any, payable by the fourth respondent will still have to be reviewed at the conclusion of the first and final parts of the petition, depending on the position the ESC would have taken on various issues.

c WAS THE FOURTH RESPONDENT VALIDLY CONSTITUTED?

The petitioner submits that at the time of the Presidential election in March 2002, the ESC had only four members, whose appointment had not been published in the *Gazette*, whereas the full complement, according to the Constitution, is five. The petitioner then concludes that the alleged failure by **d** the first respondent to appoint a properly constituted ESC invalidates the whole electoral process. It is very difficult to follow this line of reasoning because one has to make too many assumptions to sustain it. It is not stated what had led to the vacancy or whether, when the ESC was set up, insufficient members were appointed to it. The petitioner admits that he does not have **e** sufficient information in this regard. He complains that the first respondent refused to disclose the date on which he appointed members of the ESC.

If it cannot be established whether the initial appointment was proper, it cannot be assumed that just because at the time of the election there happened to be a vacancy, therefore the composition of the commission is invalid. As to whether the four members could validly discharge the duties of the ESC, **f** s 114(3) of the Constitution speaks clearly on this, thus:

- "(a) A body established by or in terms of this Constitution may act notwithstanding any vacancy in its membership if the members of the body who authorize or perform the act concerned constitute a quorum of the membership of that body. **g**
- (b) Except as otherwise provided in this Constitution or in any law or rule regulating the proceedings of the body concerned, one half of the membership of any body established by or in terms of this Constitution shall constitute a quorum of the membership of that body."

It is common cause that at the time of the election, the fourth respondent had four members. The minimum required to form a quorum is at least three **h** members. Therefore, in terms of the above provisions of the Constitution, the

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fourth respondent could act notwithstanding the absence of one member. **a**

Regarding the publication in the *Gazette*, I am in agreement with the fourth respondent's submission that such publication is not mandatory but discretionary as shown by the use of the word "may"; it is evidentiary and not constitutive. Section 31(2) of the Interpretation Act [*Chapter 1:01*] reads:

- "(2) When any act, matter or thing is by an enactment directed to be done **b** by the President or by any Minister, notification that such act, matter or thing has been done *may*, unless a specified instrument or method is by that enactment prescribed for the notification, be by notice published in the *Gazette* which shall for all purposes whatsoever be *prima facie* proof that such act, matter or thing has been done."(my emphasis) **c**

Finally, the petitioner complains that the first respondent directed that the staff of the ESC would be assigned to the ESC by a Minister (s 3 of the Electoral Act (Modification) Notice 2002, SI 41D/2002), this notwithstanding s 11 of the Electoral Act, which provides:

"11 Staff of Commission

- (1) *At the request of the Commission*, the Minister may assign to the **d** Commission *such members of the Public Service Commission employed in his Ministry* as may be necessary to perform secretarial and administrative functions for the Commission.
- (2) The person for the time being performing the functions of secretary of the Commission may attend meetings of the **e** Commission but shall not vote on any question before the Commission."

According to the petitioner, assignment now no longer depended on a request from the ESC, and no longer necessarily came from the Public Service, thus undermining the independence of the ESC. In response, it has been argued that the Constitution did not specifically prohibit the employment by the **f** fourth respondent of any other persons. The Electoral Act merely provided the fourth respondent with an option: if it wants to, it can request the Minister for secretarial and administrative personnel. Once more, I must say I do not find merit in the petitioner's submission on this score and at this stage. Perhaps, at the trial stage, the petitioner will be able to prove that specific persons at a sufficiently high administrative level were foisted on the ESC with **g** a view to advantage the first respondent and injure the petitioner's chances of winning, and that the ESC's role was thereby so severely compromised as to warrant the setting aside of the election. **h**

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A **CONSTITUTIONAL CHALLENGES**

The petitioner has sought to challenge the constitutionality of s 158 of the Electoral Act [*Chapter 2:01*] and the validity of electoral notices on the basis that they are *ultra vires*. These issues are generally captured in the pre-trial conference minute as follows:

1. B Should the challenge to the constitutionality of s 158 of the Electoral Act [*Chapter 2:01*] be heard together with the petition?
2. Does the petitioner have *locus standi* to challenge the constitutionality of s 158 of the Electoral Act?
3. Can the declaration sought on electoral legislation be properly brought together with an election petition?

c I shall deal with the above issues in reverse order:

DECLARATION ON ELECTORAL LEGISLATION

The declaration on electoral legislation is an additional draft order filed by the petitioner days after the last day allowed for filing the petition. The first D respondent's heads of argument put the issues in this regard very clearly and what follows draws closely upon them.

The petition was filed on 12 April 2002, the last day for filing of the petition, and the draft order attached to the petition prayed for the following relief:

"IT IS DECLARED:

1. That the first respondent was not duly elected as President of E Zimbabwe as a result of the Presidential Election held on 9-11 March 2002.
2. That the General Notice 116E of 2002 published by the third respondent in a Government *Gazette Extraordinary* dated 19 March 2002 and General Notice 118B of 2002 published by the Acting Secretary for Justice, Legal and Parliamentary Affairs in a Government *Gazette F Extraordinary* dated 28 March 2002 be and are hereby set aside.

ACCORDINGLY, IT IS ORDERED:

1. That in accordance with s 102(2)(b) of the Electoral Act [*Chapter 2:02*] the Registrar of this Honourable Court shall forthwith give notice of the declaration set out in paras 1 and 2 above to the second G respondent who shall forthwith publish a notice in the Government *Gazette* stating the effect of the order of this Honourable Court.
2. That the costs of this application shall be paid by the respondents, jointly and severally, the one paying the others to be absolved."

According to s 21 of the Electoral (Applications, Appeals and Petitions) Rules, H 1995, an election petition shall be in the form of a court application and shall

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state, *inter alia*, "the exact relief sought by the petitioner". On 15 April 2002, A that is three days after the statutorily prescribed period for filing a petition, the petitioner's legal practitioners wrote to the third respondent as follows:

"We refer to the court application filed and served on you in this matter on 12 April 2002.

In the draft order attached to our court application, we are seeking a B declaration and order in relation to the result of the recent Presidential Elections.

We *now* attach hereto *an additional* draft order seeking a declaration and order in relation to s 158 of the Electoral Act" (my emphasis).

The above letter states clearly that three days after the petition was presented, the petitioner was "now" seeking a further declaration and order in relation C to s 158 of the Electoral Act. The additional draft order sought the following:

"IT IS DECLARED:

That s 158 of the Electoral Act [*Chapter 2:01*] is invalid and of no legal force.

Accordingly: That section 158 of the Electoral Act (Modification) Notice D 2002 published in SI 41D of 2002 on 5 March 2002 was invalid and of no legal force.

Alternatively: That the Electoral Act (Modification) Notice 2002, published in SI 41D of 2002 on 5 March 2002 was invalid and of no legal force.

IT IS ORDERED:

1. That all orders made, directions given and acts done in terms of the ^Esaid Electoral (Modification) Notice 2002, published in SI 41D of 5 March 2002 purportedly in accordance with s 158 of the Electoral Act [*Chapter 2:02*] are null and void.
2. That the respondents pay the costs of this application, jointly and severally, the one paying, the others to be absolved."

Counsel for the first respondent then submitted that because of the peremptory ^Fprovisions of electoral legislation, no additional relief may be sought after the prescribed 30 day period for filing the petition. This submission finds support in case law from our jurisdiction and beyond as I observed in the case of *Hove v Mberengwa West Election Petition* 2002 (1) ZLR 233 (H):

"My brother Devittie in the *Mutoko South Election Petition* 2001 (1) ZLR 308 (H), ^G emphasized this point as follows:

'Procedure lies at the heart of the law. Its aim is to guarantee precision in order that the ends of justice may be achieved and unnecessary time and expense avoided. These ideals are placed in jeopardy where lack of precision leads to the person accused not knowing with sufficient clarity the case he has to meet. Much time and expense is wasted by the failure ^H

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^A to set forth succinctly and according to law the charge raised and the particulars relied upon."

In the same vein, Chandrachud CJ observed in the Indian case of *Charan Lal Sahu & Ors v Singh* [1985] LRC (Const) 31 thus:

"The importance of specific pleading in these matters can be appreciated only if it is realized that the absence of a specific plea puts the respondent ^B at a great disadvantage. He must know what case he has to meet. He cannot be kept guessing whether the petitioner means what he says, 'connivance' here, or whether the petitioner has used that expression as meaning, 'consent'. It is remarkable that, in their petition, the petitioners have furnished no particulars of the alleged consent, if what is meant by the use of the word connivance is consent. They cannot be allowed to ^C keep their options open until the trial and adduce such evidence of the consent as seems convenient and comes handy. That is the importance of precision in pleadings, particularly in election petitions. Accordingly, it is impermissible to substitute the word 'consent' for the word 'connivance' which occurs in the pleading of the petitioners. At p 42."

Again, in *Mitilesh Kumah v Venkataraman & Ors* [1989] LRC (Const) 1, the ^D petitioner had failed to set out in a succinct and clear narrative form all the facts necessary to enable the respondents and the court to understand the petitioner's case. There was neither an allegation that the first respondent had committed an act of undue influence nor that others had committed it with the consent of the first respondent. The petition was dismissed as disclosing no ^E cause of action.

In both judgments, the Indian Supreme Court also took the opportunity to warn against possible political abuse of election petitions if specificity of pleas is not insisted upon. In *Charan Lal Sahu's* case, the warning was that "every kind of fanciful doubt or frivolous dispute under the sun will have to be inquired into by this court and election petitions will become a fertile ground ^F for fighting political battles".

In *Keyser v Conroy* 1917 CPD 353, it was held that the court would not allow an amendment to an election petition, in circumstances where the amendment contains additional charges. In *Nicholson v van Niekerk* 1915 TPD 581, it was held that where the court, on application, allows an inspection of ballot papers, ^G each party may only make use of and produce before the court the particular papers complained of by him, and is confined to the terms of the order of court allowing the inspection. The court will not, after the inspection has taken place, allow an amendment of the petition or the replying affidavit, in order to rely upon the defective ballot papers discovered at the inspection.

In the event, therefore, this court declines the relief sought as to the ^H constitutional validity of s 158 of the Electoral Act and the validity of the

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Electoral Act (Modification) Notice, 2002, SI 41D of 2002, and dismisses the ^a belated relief sought that all orders made, directions given and acts done in terms of the Electoral Act (Modification) Notice, 2002, published in SI 41D on 5 March 2002 are void.

In the light of the above decision, it is unnecessary to consider the other two related issues noted earlier, for, even though the petitioner does mention in ^b his founding affidavit his unhappiness with s 158 of the Electoral Act, the absence of any specific relief sought with regard to the impugned section makes it unnecessary for this court to inquire into the constitutionality of this section and the validity of the regulations made under it. In passing, one cannot avoid noting that the failure of the petitioner in this challenge illustrates the inadvisability of combining an electoral petition with a ^c constitutional challenge. At any rate, even if s 158 was found to be unconstitutional, it would appear that in terms of subss (5), (6) and (7) of s 24 of the Constitution, unconstitutionality was intended to operate *ex nunc* and not *ex tunc* or that an order of court may be made in such a way as to mitigate the unconstitutionality.

Also affected by this ruling are the issues pertaining to the High Court's ^d jurisdiction in matters relating to the Declaration of Rights. Specifically, cluster headings B, C, D and E, pp 10-93, of the petitioner's heads of argument fall away with this ruling.

INTERPRETATION OF S 149 OF THE ELECTORAL ACT

The next issue is well set out in the petitioner's heads of argument and I will ^e adopt the petitioner's formulation thereof. The issue pertains to the question whether, as the respondents contend, an election challenge in our law requires a petitioner not merely to establish that, as a fact,

the election was not conducted in accordance with the principles laid down in the Electoral Act, but, *in addition*, that the failure affected the results. The issue in the PTC ^f Minute reads:

"Should s 149 of the Electoral Act [*Chapter 2:01*] be properly read and interpreted as though the word 'and' separating subparas (a) and (b) should read 'or'?"

In the current edition of the revised statutes, issued in terms of the Statute Law ^g Compilation and Revision Act [*Chapter 1:03*], s 149 of the Electoral Act [*Chapter 2:01*] reads as follows:

"149 When non-compliance with this Act invalidates election"

An election shall be set aside by the High Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the High Court that — ^h

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- (a) the election was not conducted in accordance with the principles laid down in this Act; *and*
- (b) such mistake or non-compliance did affect the result of the election" (my emphasis).

The current Electoral Act was enacted as the Electoral Act, 1990 (Act 7 of 1990). ^b In its original form, the present s 149 appeared as s 142 and read as follows:

"142. An election shall be set aside by the High Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the High Court that —

- (a) the election was not conducted in accordance with the principles laid down in this Act; *or* ^c
- (b) such mistake or non-compliance did affect the result of the election" (my emphasis).

The difference between the two versions is the conjunction which separates paras (a) and (b). In preparing the revised edition of 1996, the word "or" was changed to "and". Section 53(1) of the Constitution provides:

"As soon as may be after an Act of Parliament has been assented to by the ^d President, the Clerk of Parliament shall cause a fair copy of the Act, duly authenticated by the signature of the President and the public seal, to be enrolled on record in the office of the Registrar of the High Court and such copy shall be conclusive evidence of the provisions of such Act."

The copy of the Electoral Act signed by the President on 30 March 1990, which ^e is deposited with the Registrar of the High Court, shows that, as enacted, s 142 of the Act used the preposition "or" between the two paragraphs. However, although the Electoral Act 1990 has been amended on various occasions, Parliament has not effected any amendment to s 142, as it was originally numbered, nor to s 149, as it is now numbered. The change from the disjunctive "or" to the conjunctive "and" was made by the Law Reviser when ^f the Revised Edition of the Statutes was published in 1996. There is merit in the petitioner's submission that the Law Reviser had no power

to make or allow such a fundamental change to the law, that power being reserved for the President and Parliament by s 51(4) of the Constitution.

The Law Reviser is appointed in terms of s 9 of the Statute Law Compilation and Revision Act [Chapter 1:03], as a functionary of the State and not as a ^G delegated authority to make laws. His or her functions are set out in s 10 of the Act. What emerges therefrom is that the power of the Law Reviser to "alter" statutes is strictly limited to matters of form and what may be termed "cosmetic" changes. He or she may not change the meaning and/or the substance of a statutory provision: see in particular para (f), as read with ^H paras (h) and (l), of s 10(2).

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The decision of Gubbay J, as he then was, in *S v Mpofo* 1978 RLR 435 (G) is ^A clear authority for the proposition that a court will read a statute in a revised edition as it should be read, and not merely as it is printed. Whilst in that case the revised edition had omitted aspects of the legislation as originally enacted, and the present matter involves a change of wording, the effect of the judgment is that the court will apply the true statute so as not to cause a ^B manifest injustice to any person and to ensure that the true legislative provisions made by Parliament are applied. The learned judge held that the omissions were clearly *ultra vires* the powers of the compiler of the revised edition, and were due to an erroneous reproduction of the schedule in question.

The passage by Beck JA in *Pio v Smith* 1986 (2) ZLR 120 (S) at 130 is very ^C helpful in highlighting the history of the provision. It would appear, and here I am merely speculating, that the "error" made by the reviser stemmed from the change from a negative formulation pertaining to the setting aside of elections contained in earlier Acts to the positive formulation in the current Act. For example, s 156 of the Electoral Act (the forerunner of the current s 149) was ^D formulated negatively, thus:

"No election shall be set aside by the High Court by reason of any mistake or non-compliance with the provisions of this Act if it appears to the High Court that the election was conducted in accordance with the principles laid down in this Act *and* that such mistake or non-compliance did not affect the results of the election" (my emphasis).

Therefore, it appears to me that the conjunctive "and" is appropriate in a ^E negatively formulated, and not in a positively formulated, election invalidation clause. For a positive formulation, the disjunctive "or" is appropriate. In fact, the positively formulated provision with a conjunctive "and" is repetitive, and tautology is to be avoided in statutory interpretation.

To illustrate this, one needs to analyse the provision closely. Ironically, the ^F meaning of the provision is clearer in the negative formulation. Elections must not be set aside by reason of a (simple) mistake or non-compliance with (ordinary provisions not amounting to principles) of the Act unless such mistake or non-compliance did affect the results of the election. In other words, non-compliance with the principles of the Act will nullify an election ^G automatically without the need to inquire into its effect on the results, whereas mistake or non-compliance with "ordinary" or "non-principle" provisions of the Act will not.

Therefore, s 149 can then be rendered with better clarity with the help of italicized explanatory remarks in brackets, thus ^H

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^A " s 149 can then be rendered with better clarity with the help of italicized explanatory remarks in brackets, thus:

"149 *When non-compliance with this Act (through mistake or non-compliance with provisions) invalidates election.*

An election shall be set aside by the High Court by reason of any mistake or non-compliance with the 'ordinary' or 'non-principle' provisions of this Act if, and only if, it appears to the High Court that –

- (a) the election was not conducted in accordance with the principles ^B laid down in this Act; or
- (b) such mistake or non-compliance with the 'ordinary', or 'non-principle' provisions) did affect the result of the election."

It is clear, therefore, that if the conjunctive “and” was used between the two paragraphs, non-compliance with the provisions of the Act would feature in c both subparagraphs, thus making para (a) redundant. The logical interpretation of the section is therefore that the legislature perceived two types of non-compliance with the provisions of the Act; one involving principles enshrined in the Act and the other involving ordinary provisions, and to separate the two the conjunction “or” and not “and” would be appropriate.

The Electoral Act does not set out specifically what should be regarded as d “principles”; there is no part or section of the Act entitled “Principles” and no definition of “principles” in the definition section. However, principles of an election should not be difficult to identify. The Act itself has codified some of them, though negatively. For example, it is a principle of elections that they should be free of corrupt and illegal practices and the Act specifically provides not only for the nullification of elections tainted with corruption or illegality e without the need to prove that the results were thereby affected (s 124), but also for the criminal prosecution of perpetrators.

Thus, provisions which form the bedrock of the concept of democratic elections, of free, fair and unimpeded choice, like universal suffrage and the secrecy of the ballot will constitute principles, while administrative and certain f procedural provisions can be regarded as ordinary provisions.

However, an aggrieved party will have to prove that the impugned election was not conducted in accordance with principles laid down in the Act. This may include the need to conduct a trial to prove that the violation did occur, if this is disputed, and that the non-compliance constituted a departure from g the principles laid down in the Act. It does not follow that in every case of an alleged violation of a principle, there would be no need for a trial, as the petitioner seems to suggest in his heads of argument. All that para (a) does is to relieve the petitioner of the need to prove that such departure did affect the result of the election. In fact, seeking to invalidate an election on the basis of non-compliance with principles laid down in the Act might entail arguing h the violation of a combination of principles, which must be shown to have been

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contravened in the official conduct of an election so that the actual finding a of nullity is almost akin to a finding that the election was not free and fair.

In conclusion, therefore, I have come to the firm view, and hereby rule, that the substitution of “and” for “or” in s 149 of the Electoral Act [Chapter 2:01] by the Law Reviser was *ultra vires* s 10 of the Statute Law Compilation and Revision Act [Chapter 1:03], and accordingly declare that s 149 of the said Electoral Act is to be read as if the word “or” and not the word “and” occurs b between paras (a) and (b).

ALLEGED “THIRD DAY” FAILURES

The issues under this sub-heading are stated as follows in the PTC Minute:

- “(16) Was the failure to have polling in all polling stations throughout the c country on 11 March 2000 lawful and in accordance with the principles of the Electoral Law, and/or did this affect the manner in which the election was conducted and the outcome of the election to the extent that the election can be set aside?
- (18) Did the failure to have all the polling stations in Harare and Chitungwiza open for the requisite period and during the stipulated d hours on Monday, 11 March 2002 affect the outcome of the election to the extent that the result of the election can be set aside?”

The following facts are common cause:

- (a) When the dates of the Presidential Election were initially promulgated (see the Electoral (Presidential Election) Notice, 2002, SI 3A of 2002) a poll e was to be taken on Saturday 9 March 2002 and Sunday 10 March 2002.
- (b) Because of the slowness of the processing of voters, the petitioner made application to this court in case No. HC 2800/2002 on 10 March 2002. Although the court was inclined to grant an extension in respect of Harare and Chitungwiza, the third respondent insisted, for administrative reasons, on an extension applying to the whole country and such an order was f made.
- (c) In conformity with the order, the first respondent issued the Electoral Act (Modification) (No. 3) Notice 2002 (SI 42E of 2002) on 11 March 2002. The notice authorized the Registrar-General to

extend the poll for the election to 7 p.m. on Monday 11 March 2002.

- (d) Polling stations did not open at all in any other areas outside Harare and G Chitungwiza on Monday 11 March 2002.

The above facts are what may be taken as common cause. The rest may fairly be open to dispute and the details may vary for different constituencies and polling stations. For example, the petitioner submits that polling stations in Harare and Chitungwiza only opened around noon and were closed precisely H

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A at 7 p.m. The first respondent has submitted, with justification in my view, that these and related issues can only be determined at the trial of the petition with full-scale examination of the evidence. Purely based on the facts, which are common cause and without the benefit of additional evidence, which can only be led at the trial of this petition, I am inclined to take the view that there was substantial compliance with the order under very difficult circumstances, B where the order for extension had to be communicated to a myriad of administrators already implementing complex activities consequent upon the closure of polling. That the extension was implemented at all and carried out without compromising the security of the ballot is testimony to the poll administrators' commendable efforts to comply with the order. At any rate, the C petitioner had an opportunity to have the alleged third day failures judicially reviewed in an application for a further extension, which was dismissed by the High Court, the very next day.

SIMULTANEOUS HOLDING OF PRESIDENTIAL AND LOCAL GOVERNMENT ELECTIONS

D The issues in this respect are presented thus:

- (s) Were the elections for the Mayor and councillors of Harare and for the Mayor of Chitungwiza lawfully held at the same time as the election for President?
- (t) Was this in accordance with the principles of the Electoral Law and/or did this materially affect the outcome of the election to the detriment of the E petitioner?

The points made in the submissions are that:

1. The simultaneous holding of Presidential and local government elections in the two municipalities led to delay in the voting and prevented many people from casting their vote. It was precisely in appreciation of this F difficulty that the third voting day was granted in these municipalities by a High Court order and implemented by the respondents, although there is a difference of opinion as to the degree of compliance. This issue has already been addressed in the previous subheading on "Alleged Third Day Failures".
2. The ward and constituency boundaries did not coincide, thus leading to G uncertainty as to where a person is entitled to vote. The magnitude and significance of this alleged breach of the electoral law is a matter that requires additional evidence to properly assess, but also appears to have been addressed in part by the extension of the voting period.
3. Local government politics and elections render them totally unsuited to H be conducted at the same time as an election for the office of the President.

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The petitioner does not point to any legal provision allegedly violated by A holding a two- or three-in-one election and in verbal presentations counsel for the first respondent pointed out that the petitioner had, in fact, won and accepted the results in the municipalities concerned. From the court's point of view, there is no legal dispute to resolve in this regard, with the parties merely trading political and policy preferences. B

POSTAL VOTING AND REGISTRATON OF VOTERS

The issues posed in this regard are the following:

- (a) Did the failure to permit postal voting, other than for the Police, members of the Defence Forces and diplomats, constitute such non-compliance with the principles of the Electoral Law

as to amount to the election not being conducted in accordance with the principles laid down in the Act, thereby resulting in the setting aside of the election?

- (b) Was it lawful to extend the period for the registration of voters retrospectively?
- (c) Was it lawful to compile a supplementary list of additional voters and were those persons entitled to vote?
- (d) Was it in accordance with the principles of the electoral law for the law and rules relating to the Presidential election to be changed after the nomination process was complete and did this materially affect the outcome of the election?

The first respondent has submitted that the laws that were enacted to govern the above matters, their timing and scope, must be seen in the light of the striking down on procedural grounds of the General Laws Amendment Act, 2002, which then left many gaps which had to be filled to provide the necessary legal framework for the conduct of the elections. And if those laws had not been nullified, the electoral authorities were perfectly entitled to use and rely on them for their actions. The petitioner has pointed out in detail how the use of the Electoral Act (Modification), Notice 2002 (SI 41D of 2002) had impacted on postal voting and registration of voters. I have already ruled that the attack on the constitutionality of s 158 of the Electoral Act and the validity of SI 41D of 2002 cannot be sustained in this petition. I am also of the view that when the Electoral Act penalizes non-compliance with "principles laid down in this Act", it is referring to extant laws, rather than ones that are otherwise desirable. Furthermore, these are some of the cluster of issues which require additional evidence to be given in order for them to be properly considered, and this is due to be done in Phase 2 of this petition. Accordingly, I do not find these issues, individually or in combination, to be sufficient at this stage to nullify the election.

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Hlatshwayo J

A ALLEGED IRREGULARITIES RELATING TO POLLING STATIONS

The issues in this connection pertain to the alleged delay in the announcement of the number and location of polling stations. The second respondent, who is no longer a party to these proceedings, allegedly made the disclosure three days before polling commenced, although the petitioner does concede that s 51 of the Electoral Act does not specify a time period when the constituency registrar must establish polling stations and that, according to the petitioner, "the number of polling stations in rural areas, where the first respondent had the most support, was increased substantially, while those in urban areas, where the petitioner had his support, were reduced substantially".

Apart from the observation made above, that the second respondent, to whom most of the allegations in this cluster of sub-issues is directed, is no longer a party to these proceedings, the allegations themselves require the leading of evidence for substantiation, the examination and cross-examination of the officials responsible for the impugned decisions in order to assess whether the decisions made were rational or reasonable and the extent to which they could have affected the outcome. According to the petitioner, the second respondent acted unreasonably, arbitrarily and in bad faith and his conduct affected the outcome of the election, but in law these remain allegations until supportive evidence is produced and tested. The petitioner's stance of relying solely on analysis of the legislative provisions, some of which, as he rightly concedes, are silent on the points in issue, is, in my considered view, ill-advised. The same criticism can be leveled at the petitioner's attack on the Registrar-General's discretionary determination of the number of polling stations. There could be many valid reasons why it could be justified to increase the number of polling stations in rural areas as against urban areas: the sheer geographical size of rural constituencies would require a greater concentration of polling stations to reduce walking distances, rural communities have severely limited means of transportation and such amenities as lighting and roads that urbanites take for granted are luxuries to rural folk. If the petitioner wants to raise the matter to even the level of unconstitutional discrimination of urbanites in preference to rural folks, he must back up his assertions with appropriate factual and expert evidence and not expect the court to accept the allegations at face value.

G CONCLUSION AND COSTS

I am in agreement with the petitioner that costs should follow the result and that the test of substantial success should apply, so that if a party succeeds substantially in respect of the relief sought on any one or more of the bases argued, costs should follow. The fourth respondent was unsuccessful in its ^H bid to be removed as a party to these proceedings. However, the costs

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Hlatshwayo J

awarded against it in this regard are cancelled out by the costs it is entitled ^A to for its substantial success on the issues of the composition of the ESC and assignment of employees, so that as between the petitioner and the fourth respondent no costs will be due from one party to the other.

The petitioner has been successful in the interpretation of s 149 that it urged, but the first respondent has been the more substantially successful party in ^B resisting the relief sought by the petitioner on several bases and is therefore entitled to its costs.

Accordingly, I hereby record and confirm the dismissal of this application on preliminary issues, with the petitioner to pay the first respondent's costs.

Finally, and for ease of reference, I herein list the essential orders and ^C declarations made in this application:

1. Dismiss with costs the fourth respondent's objection that it was not properly cited as a party to these proceedings.
2. Dismiss with costs the relief sought by the petitioner as to the constitutional validity of s 158 of the Electoral Act [*Chapter 2:01*] and the Electoral Act (Modification) Notice 2002, SI 41D of 2002, and the declaration sought ^D that all orders made and directions given and acts done in terms of the Electoral Act (Modification) Notice 2002, SI 41D are void.
3. Dismiss with costs the preliminary points raised by the petitioner, in that none of them on its own nor all of them collectively suffice at this stage to invalidate the election. ^E

In addition, I rule that the substitution of "and" for "or" in s 149 of the Electoral Act [*Chapter 2:01*] by the Law Reviser was *ultra vires* section 10 of the Statute Law Compilation and Revision Act [*Chapter 1:03*], and accordingly declare that s 149 of the said Electoral Act is to be read as if the word "or" and not the word "and" occurs between subparas (a) and (b). ^F

Gill, Godlonton & Gerrans, the applicant's legal practitioners

Hussein Ranchod & Co, the first respondent's legal practitioners

Civil Division of the Attorney-General's Office, the second respondent's legal practitioners ^H

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Source:

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OLIVINE INDUSTRIES (PVT) LTD v GWEKWERERE 2005 (2) ZLR 421 (H)

2005 (2) ZLR p421

Citation	2005 (2) ZLR 421 (H)
Case No	Judgment No. S-63-05
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Gwaunza JA
Heard	16 May 2005

Judgment	29 November 2005
Counsel	<i>H Zhou</i> , for the appellant <i>H Simpson</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Administrative law — review — evidence — record of proceedings of tribunal being brought on review — incomplete record submitted — review not possible

Employment — dismissal — claim for reinstatement — need to claim alternative order for payment of damages — effect of failure to do so

Headnote

- The respondent, an employee of the appellant company, was the subject of a disciplinary hearing. He refused to attend the hearing on the grounds that he was not allowed to be legally represented and because he considered representation by a member of the workers' committee was inappropriate. He was found guilty and discharged. After a discouraging ^ε letter from his head of department, he did not appeal to the disciplinary committee as provided by the code of conduct. Instead, an application for review was brought in the High Court, in which the respondent sought reinstatement. Damages in lieu of reinstatement were not claimed. The High Court granted the respondent's application and the company appealed.
- ⊞ *Held*, that the appeal procedure in the appellant's code of conduct would have allowed both a review and rehearing of the matter at the disciplinary committee stage, an appeal to the head of business and thereafter to the Labour Court. It would thus have afforded the respondent effective redress against what he perceived as an unlawful termination of his employment. The respondent had abandoned his domestic remedies for ^g no valid reason. The High Court should have declined to hear the application.
- Held*, further, that although the appellant had failed to comply with ^r 260 of the High Court Rules, requiring the lodging with the Registrar of the original record, and had submitted only a partial record, it was open to ^h the judge to direct that the full record be made available, in the meantime

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Gwaunza JA

postponing the hearing of the matter. The respondent would have been ^a within his rights to demand the full record before the matter could be heard. Neither chose to exercise these options, and the court was accordingly not in a position to properly review the decision of the head of department.

Held, further, that an order for reinstatement must be accompanied with an ^b alternative order for the payment of damages in lieu of reinstatement, where reinstatement is not appropriate. The respondent did not consider, argue for, nor, therefore, claim, an alternative order for the payment of damages and the judge should have dismissed the claim, leaving it to the respondent, if so advised, to pursue a claim for damages by way of fresh proceedings. ^c

Cases referred to

Girjac Services (Pvt) Ltd v Mudzingwa 1999 (1) ZLR 243 (S)

Hama v NRZ 1996 (1) ZLR 664 (S)

Muringi v Air Zimbabwe Corp & Anor 1997 (2) ZLR 488 (S)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 260

Case information

H Zhou, for the appellant E

H Simpson, for the respondent

Judgment

GWAUNZA JA: The respondent was employed by the appellant as manager of its Mutare branch. On 25 June 2002, a Mr G Good (hereinafter referred to as "Mr Good"), who was the director responsible for sales and marketing, addressed a letter to the respondent, suspending him from duty with immediate F effect without pay and benefits.

The suspension followed an investigation conducted, at the instance of the appellant, into the offences allegedly committed by the respondent. The offences essentially were dishonesty, theft of company property and gross dereliction of duty. Mr Good had considered both the findings of the G investigation and the respondent's response to them, before suspending him. The letter of suspension referred to invited the respondent to report to the appellant's Mutare Branch for a disciplinary hearing on 3 July 2002. The hearing was to be held in terms of Step 2 of the "Disciplinary Structure and Levels of Authority" part of the appellant's code of conduct. H

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Gwaunza JA

A A day before that date, the respondent's legal practitioner addressed a letter to the appellant:

- (a) requesting a postponement of the hearing to 12 July 2002;
- (b) asking for confirmation that the respondent would be entitled to legal representation at the hearing; and
- (c) B objecting to the respondent being represented at the hearing by a member of the workers' committee on the ground that, as a branch manager, he did not "belong" to the workers' committee. Also that, in any case, most of the allegations he was facing stemmed from his subordinates.

It would appear from the record that the request for legal representation of the C respondent at the hearing, which was postponed to 10 July 2002, was denied.

The respondent's legal practitioners wrote again to the appellant on 9 July 2002, reiterating their argument that the respondent could not be represented by the workers' committee at the disciplinary hearing. In the same letter, the legal practitioners pointed out as follows:

"If indeed, the idea of his being legal (*sic*) represented at the hearing is D disagreeable, then we suggest that a mutually agreed managerial representative be appointed to represent him or, alternatively, the matter should be referred to the Ministry of Labour for adjudication.

Please note that under our advice Mr Gwekwerere will not be attending the hearing set for Wednesday, 10 July and will only attend a hearing which meets the minimum requirements of justice and fair play."

E The disciplinary hearing was duly held, in the absence of the respondent, on 10 July 2002. He was found guilty as charged and dismissed from his employment.

After what I view as a half-hearted attempt to appeal to the disciplinary committee of the appellant, the respondent then applied to the High Court for F a review of the proceedings leading to the decision to dismiss him. He cited two grounds of review, namely, that the procedure used in dismissing him was such as to deny him a fair opportunity to be heard, and that no fair hearing was convened in terms of the code of conduct.

The court *a quo* found in favour of the respondent and ordered the appellant to reinstate him to his former employment without loss of salary or benefits. G Dissatisfied with the decision of the High Court, the appellant now appeals to this court.

The appellant's main ground of appeal is that the court *a quo* erred in hearing ^h the matter considering:

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Gwaunza JA

- (a) that the respondent had not exhausted the domestic remedies provided ⁿ ^a in the code of conduct; and
- (b) that the appellant had, indeed, not furnished the court *a quo* with a full record of the disciplinary proceedings.

It is argued, in this latter respect, that the decision of the court *a quo* can therefore not be a review of such proceedings, since the regularity or ^b otherwise of the proceedings can only appear from the record.

Another ground of appeal is that the court *a quo* should have, as is the norm, ordered payment of damages in lieu of reinstatement.

I will consider these grounds in the light of the evidence before me.

EXHAUSTION OF DOMESTIC REMEDIES ^c

It is not in dispute that the respondent was called to attend a disciplinary hearing in accordance with Step 2 of the "Disciplinary Structure and Levels of Authority" of the appellant's code of conduct. Through his lawyers, the respondent expressed misgivings about the composition of the hearing panel, as already explained. He also set certain conditions for his attending, but, in ^d the end, and as earlier threatened by him, refrained from attending the hearing, which went ahead without him. Witnesses' evidence was recorded and considered against the respondent's written responses to the various charges levelled against him. The hearing was conducted by the Head of Department, Mr Good, in the presence of an accountant, a Mr Marshall, whose role at the hearing was not explained. ^e

The determination to dismiss the respondent was communicated to him on 22 July 2002. The respondent, through his lawyers, then wrote to Mr Good on 2 September 2002, indicating his intention to appeal to the disciplinary committee of the appellant.

The letter went on to say: ^f

"Strictly speaking, and in our respectful view, our client has not been accorded a hearing at all. This could be rectified by following any of our suggestions proffered in our letter of 9 July 2002. Please let us hear from yourselves within 7 days of this letter. In the event that you fail to accede to our suggestions within 7 days of this letter, we have to advise that it is our client's intention to apply to the High Court for similar relief ..." ^g

In the event, and despite giving notice to appeal, the respondent filed review proceedings in the High Court. His reason for not pursuing the appeal to the disciplinary committee was that the appellant, through Mr Good, had "thwarted" his attempt to exhaust local remedies. This was in reference to a letter written by Mr Good in response to the respondent's letter of 2 September 2002. In that ^h

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Gwaunza JA

^a letter, Mr Good had implied that the respondent's appeal would be out of time and that he still stood dismissed.

Having considered the appeal process as outlined in the appellant's code of conduct, I am persuaded by the appellant's contention that the respondent abandoned his domestic remedies for no valid reason. According to the code of conduct, the respondent was obliged, which he in fact did, to notify the ^b Head of Department of his intention to appeal to the disciplinary committee. Nowhere, however, does it say that the Head of Department must then give his leave for the aggrieved employee to so appeal. Indeed, Mr Good's letter of 6 September 2002, while it may not have been encouraging, did not purport to forbid the respondent from appealing to the disciplinary committee. In any ^c case, the letter itself was unnecessary and certainly did not stand in the way of the respondent's appealing to the disciplinary committee, had he so wished. The evidence before the court suggests the respondent did not wish to do so. Therefore, the real reason for him to take the

matter to the High Court, as threatened in the letter of 2 September 2002, was that the appellant refused to take up his lawyers' suggestions as expressed in their letter of 9 July 2002.

▷ In the High Court, the respondent sought a review of the decision of his Head of Department, the same relief that, according to the appellant's code of conduct, he could have more speedily obtained from the disciplinary committee had he taken his appeal to it. The argument is, therefore, correctly made on behalf of the appellant that the disciplinary committee, which had powers of review, could have afforded the respondent effective redress against what he perceived to be an unlawful termination of his employment.

Clause 5.2.2 of the code of conduct reads as follows:

"The appellant shall submit his appeal in writing, stating his reasons for appeal. The disciplinary committee shall allow the appellant an opportunity to expand on his appeal then review the disciplinary record, proceedings and documentary evidence to arrive at its decision" (my emphasis).

Thus, in addition to considering an appellant's reasons for appeal, the disciplinary committee, by allowing the appellant an opportunity to "expand" his appeal before reviewing the proceedings and other evidence, would in effect have re-heard the matter. The implication of such a re-hearing *vis-à-vis* the first hearing was clearly explained by Smith J in *Musandu v Chairperson, of Cresta Lodge Disciplinary & Grievance Cttee* HH-115-94 as follows:

"The appeals provided for are a rehearing of the matter in the fullest sense of the word in which the matter will be fully considered by the Disciplinary and Grievance Appeals Committee and then by the Labour Relations Tribunal if there is a further appeal. In my view, this court should not be prepared to review the decision of a domestic tribunal merely because the

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Gwaunza JA

aggrieved person has decided to apply to court rather than to proceed by way of the domestic remedies provided. The factors mentioned by Mtambanengwe J in *Tutani's case supra* should be carefully considered before a decision is made. A litigant should exhaust his domestic remedies before approaching the courts unless there are good reasons for approaching the court earlier."

In *Girjac Services (Pvt) Ltd v Mudzingwa* 1999 (1) ZLR 243 (S) at 249E-F, Gubbay CJ restated the same principle in different words:

"In this matter, the procedure under s 6 of the code of conduct, and the availability of an appeal to the Labour Relations Tribunal, was capable of affording the respondent effective redress against the unlawful termination of his employment. Furthermore, the unlawfulness had not been undermined by such domestic remedies, for the grievance procedure had not been resorted to. Finally, no special circumstances or good reasons were advanced by the respondent for approaching the High Court. He maintained silence.

It follows that I can find no warrant for not enforcing the requirement that the respondent ought to have exhausted the remedies available to him under the domestic legislation. It is on this ground that the appeal ▷ succeeds."

These *dicta*, I find, can properly be applied to the circumstances of this case. The appeal procedure, as outlined in the appellant's code of conduct, would have allowed both a review and rehearing of the matter at the disciplinary committee stage, an appeal to the head of business and thereafter to the labour court. It would, in short, have afforded the respondent effective redress against what he perceived as an unlawful termination of his employment.

There is, besides this, no evidence to suggest, nor has the respondent made the allegation, that the perceived unlawfulness had been undermined by the said domestic remedies. This is particularly so, given the fact that the disciplinary committee, according to the code of conduct, was composed of the personnel manager, the chairman and secretary of the workers' committee, two other heads of departments and the appellant's head of department, *if required*. Thus, Mr Good, against whom the respondent alleged bias and ill will towards him, would necessarily not have been required to sit on the committee. ◊

Finally, as already indicated and despite the finding by the learned judge *a quo*, the respondent did not, in my view, advance any special reasons for by-passing the domestic remedies and approaching the High Court. The reason that he gave was, in my opinion, both feeble and untruthful H .

2005 (2) ZLR p427

Gwaunza JA

A It is clear on the evidence before the court that the respondent had an obvious disdain for the domestic remedies contained in the appellant's code of conduct. He made no serious attempt to invoke them.

In the final result, I find that the court *a quo* should, for the reasons outlined, have declined to hear the application. The appellant's ground of appeal in this B respect is therefore upheld.

INCOMPLETE RECORD OF PROCEEDINGS FOR WHICH A REVIEW WAS SOUGHT

The court *a quo* observed correctly that the appellant had failed to comply with r 260 of the High Court Rules requiring the lodging with the Registrar of the C original record. The rule is expressed in peremptory terms and reads as follows:

"(1) The clerk of the inferior court whose proceedings are being brought on review, or the tribunal, board or officer whose proceedings are being brought on review, *shall* within twelve days of the date of service of the application for review, lodge with the registrar the original record, together with two typed copies, which copies shall be certified as true and correct copies. The parties to the review D requiring copies of the record for their own use shall obtain them from the official who prepared the record" (my emphasis).

There is no dispute that the appellant failed to provide the full record to the Registrar and therefore, the court *a quo*. Reference in the Head of Department's lengthy determination is made to no less than twenty annexures. The annexures, E it is indicated, contained evidence substantiating the various charges brought against the respondent. Such evidence would have been relevant to a consideration of the merits of the case against the respondent.

As noted earlier, the learned judge *a quo* was alive to the shortcomings in the record submitted by the appellant. The respondent, too, could not have failed to appreciate the same. It was, no doubt, open to the learned trial judge to direct F that the full record be made available, in the meantime postponing the hearing of the matter. The respondent, in his turn, would have been within his rights to demand the full record before the matter could be heard. However, neither the learned trial judge nor the respondent chose to exercise these options.

Even though it was through its default that the full record was not provided, G the appellant nevertheless in my view is justified in its argument that the court *a quo* was not in a position to properly review the decision of the Head of Department without the full record of proceedings. In her judgment, the learned judge *a quo* literally conceded the cogency of this argument. After commenting on the incompleteness of the record, she noted as follows on p 7 H of the judgment:

2005 (2) ZLR p428

Gwaunza JA

"... It is thus not possible in the absence of such documents for the court A to make a finding whether or not the decision reached in the determination (by Good) was reasonable."

Therefore, having decided, in its discretion, to hear the matter despite the disregard by the respondent of the domestic remedies as outlined in the code of conduct, my view is that the court *a quo* should have felt the necessity to B ensure that the matter was determined on the basis of a full record of the proceedings whose review was being sought.

Since the court *a quo* proceeded to hear the matter in the face of these two serious shortcomings, that is, the disregard of the domestic remedies, and the incomplete record, I am satisfied that there is merit in the appellant's main ground of appeal as already outlined. C

DAMAGES IN LIEU OF REINSTATEMENT

The court *a quo* set aside the dismissal of the applicant "without loss of salary and benefits". The appellant contends, correctly, that the effect of the order was for the appellant to reinstate the respondent. It is contended, also, that the order of the court *a quo* did not take into account the possibility that the D working relationship between the parties might have irretrievably broken down due to mutual loss of confidence and trust between them. In that case, it is further contended, an alternative order for the payment of damages would have been more appropriate.¹

I find there is substance in this contention. *In casu*, the respondent charged ^ε that Mr Good had exhibited ill will towards him, while the appellant fully believed the respondent was guilty of dishonesty and gross dereliction of duty. In these circumstances, it is more probable than not that a normal working relationship would not have been capable of restoration had the appellant been forced to take the respondent back.

The appellant has cited *Girjac's case supra* as authority for the proposition ^ϕ that where the reinstatement of an employee could not be tolerable to both parties, an alternative order for the payment of damages in lieu of reinstatement would be appropriate. It is, in any case, now accepted that an order for reinstatement must be accompanied with an alternative order for the payment of damages in lieu of reinstatement: see *Hama v National Railways of* ^ς *Zimbabwe* 1996 (1) ZLR 664 (S). ^η

2005 (2) ZLR p429

Gwaunza JA

^α An applicant must, however, make and argue a case for such alternative relief.

In the court *a quo*, the respondent sought an order, simply, that his dismissal be set aside without loss of salary and benefits. To his detriment, he did not consider, argue for, nor, therefore, claim, an alternative order for the payment of damages in lieu of reinstatement.

^β In *Girjac's case supra* at 250C-D, this court considered that very point and determined as follows:

“Since the issue of damages had not been argued, let alone raised in the papers, the learned judge (deciding, as he must have, that the court’s intervention was properly sought) ought to have dismissed the application on the ground that the nature of the relief claimed was misconceived; ^c leaving it to the respondent, if so advised, to pursue a claim for damages by way of fresh proceedings.”

Thus on the authority of this *dictum*, the learned judge *a quo* should, on the same basis, have dismissed the respondent’s application.

All in all, the appeal has merit and must therefore succeed.

In the result, it is ordered as follows:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is set aside and is substituted with the following:
“The application be and is hereby dismissed with costs.”

SANDURA JA & CHEDA JA concurred.

Coghlan Welsh & Guest, appellant’s legal practitioners

Manase and Manase, respondent’s legal practitioners

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Source:

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CHIKWENENGERE v CHIKWENENGERE 2005 (2) ZLR 430 (H)

2005 (2) ZLR p430

Citation	2005 (2) ZLR 430 (H)
Case No	Judgment No. HH-103-05
Court	High Court, Harare
Judge	Makarau J

Heard	9 November 2005
Judgment	30 November 2005
Counsel	<i>C Warara</i> , for the plaintiff <i>A Muchadehama</i> , for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Family law — divorce — husband — domicile — when domicile can be said to have changed

Headnote

Domicile is not the same as residence. As distinct from residence, domicile does not only involve a physical element. There is also a mental element consisting of an intention to settle in a certain country. The acquisition ^D of a domicile of choice is proved on a balance of probabilities. It is not subjectively tested and while the averments by the parties as to what they regard as the husband's permanent home are to be taken into account, they are not the sole determining factor. Even clear expressions of intention cannot prevail against conduct inconsistent therewith and leading to an opposite inference. To acquire a new domicile, it is essential ^E to show that the person concerned has abandoned his former domicile *animo et facto*. The state of mind that is required is one that does not require an absolute intention to reside permanently in the country of chosen domicile but evinces at least, an intention to stay there for an indefinite period. ^F

Cases cited

Chivhiya v Chivhiya 1995 (1) ZLR 210 (H)
de Jager v de Jager 1998 (2) ZLR 419 (H)
Howard v Howard 1966 RLR 182 (G)
Re Liddell-Grainger's Will Trusts [1936] 3 All ER 173 (Ch) ^G
Smith v Smith 1962 R & N 469; 1962 (3) SA 930 (FS)

Case information

C Warara, for the plaintiff
A Muchadehama, for the defendant ^H

2005 (2) ZLR p431

Makarau J

Judgment

^A **MAKARAU J:** The parties were married at Hwange on 12 January 1990. The marriage still subsists. There are two minor children of the marriage, namely Ngoni Rutendo, a daughter aged thirteen, and Kudzaishe Anesu, a son, aged 10. Certain differences have crept into the relationship between the plaintiff and the defendant, resulting in the plaintiff instructing her legal practitioners to issue summons out of this court, claiming a decree of divorce, an order ^B granting her custody of Ngoni and Kudzaishe, maintenance for the minor children and an award of the assets of the matrimony under s 7 of the Matrimonial Causes Act [*Chapter 5:13*].

The plaintiff's claim was resisted by the defendant who counter-claimed for a decree of divorce, custody of the children in his favour and a different ^C distribution of the matrimonial estate together

with an order that the plaintiff contributes towards his costs.

At the pre-trial conference of this matter, the plaintiff was not in attendance as she is currently working and residing in the United Kingdom.

At the call out of the matter on Monday 7 November 2005, the plaintiff was again not in attendance. This was amid allegations by the defendant that she ^D was illegally residing in the United Kingdom and was afraid that if she came to Zimbabwe for the trial, she would not be allowed back into that country. I stood the matter down to Wednesday, 9 November 2005 to enable Mr *Warara* to take instructions from his client as to whether she would appear for trial and if so, when she hoped to do so. On the resumption of the hearing, the plaintiff ^E was not in attendance and Mr *Warara* withdrew her claim and tendered costs.

The defendant gave evidence in support of his counter-claim for divorce. It was during his testimony that the issue of jurisdiction of this court arose. The relevant evidence led from the defendant in this regard is as follows:

He is a Zimbabwean citizen by birth. He is currently working and studying in ^F the United Kingdom. He entered that country in 2002, together with the minor children of the marriage. He was following the plaintiff who had entered the United Kingdom in 2001. He has a visa allowing him to work in the United Kingdom. The current visa is valid up to 2007. Even though his visa is valid up to 2007, he can apply for indefinite leave to remain in the United Kingdom. It is the law in the United Kingdom that after establishing a presence in that ^G country for a period of 47 months, a resident can apply for citizenship. He has already filed such an application with the relevant authorities. If granted custody of the children, he will be able to look after them and it is not his intention to remove them to Zimbabwe in the near future. He has purchased an immovable property in the United Kingdom where he is employed at a salary ^H of £4 000 per month. This is his second purchase and it is larger than the first.

2005 (2) ZLR p432

Makarau J

His elder son from another union, aged 20, is also in the United Kingdom and ^A can assist him in looking after the minor children if granted custody.

On the basis of the above evidence, I entertained some misgivings as to whether I have jurisdiction in the matter and requested the parties' legal practitioners to file heads of argument on the issue by the 13 November 2005. Mr *Muchadehama* has since done that for which I commend him. Mr *Warara*, ^B up to the date of drafting this judgment, had not filed his despite reminders to that effect by the Registrar.

It is trite that this court has jurisdiction to grant divorce in matters where, at the time of the institution of the action, the husband is domiciled in Zimbabwe.¹

The divorce summons in this matter was issued on 15 February 2005. From the plaintiff's declaration, it is evident that the defendant was by then residing in ^C the United Kingdom as his address on the summons is given as 54 Thorn Hill, Northampton NN4 85N England. The issue that falls for determination then is whether at the time, the defendant was domiciled in England or in Zimbabwe.

As correctly submitted by Mr *Muchadehama* in his heads, domicile is a question of fact. GARWE J discussed the meaning of domicile in *de Jager v D de Jager supra* at p 421D in the following terms:

"A person is to be domiciled in that country which the law regards as his permanent home. This is frequently also the country in which he in fact lives permanently, though it may also be a country in which he has never dwelt or which he has never heard of. The latter possibility arises in the ^E case domiciles of origin and of dependence."

He proceeds to observe that:

"It is important to stress that domicile is not the same as residence. As distinct from residence, domicile does not only involve a physical element. There is also a mental element consisting of an intention to settle in a certain country."^F

The acquisition of a domicile of choice is proved on a balance of probabilities.² It is not subjectively tested and while the averments by the parties as to what they regard as the husband's permanent home are to be taken into account, they are not the sole determining factor. Even clear expressions

of intention cannot prevail against conduct inconsistent therewith and leading to an opposite inference. ^g 3

2005 (2) ZLR p433

Makarau J

^A The law relating to the change of domicile holds that to acquire a new domicile, it is essential to show that the person concerned has abandoned his former domicile *animo et facto*. The state of mind that is required is one that does not require an absolute intention to reside permanently in the country of chosen domicile but evinces at least, an intention to stay there for an indefinite period.⁴

That the defendant before me is ordinarily resident in the United Kingdom is ^B not in dispute. It is his intention in taking up that residence that I must determine from the evidence that has been placed before me.

Firstly, the defendant has testified that although his current work permit is valid up to the year 2007, he is eligible to renew it and apply for indefinite leave to stay in the United Kingdom. If he is granted custody of the children, he will ^C perforce have to apply to extend his stay indefinitely in the United Kingdom. This in my view evinces an intention to remain in the United Kingdom for an indefinite time as stipulated in *Smith v Smith supra*.

Secondly, the defendant has testified that he is now eligible to apply for citizenship in the United Kingdom and has already put in his application. Again, in my view, this is yet further evidence of an intention to remain in the ^D United Kingdom for an indefinite period. A man does not, in my view, apply to take up the citizenship of a country that he has not decided to settle in especially in view of the fact that by taking up that citizenship, he will automatically lose his citizenship by birth in Zimbabwe.

Thirdly, the defendant testified that he does not intend to disrupt the ^E educational environment of the children and will keep them in school in the United Kingdom if granted custody, unlike the plaintiff, their mother, who is in England illegally and is liable to deportation, thereby disrupting the education of the children. The younger child is aged 10 and has at least 8 more years of pre-university schooling. It therefore, goes without saying that the defendant is of necessity contemplating remaining in the United Kingdom for ^F an indefinite period to cater for the education of the children.

Fourthly, the defendant testified that he purchased a bigger house in the United Kingdom that will be sufficient for his and the minor children's accommodation. In my view, the purchasing of a piece of immovable property to reside in evinces an intention to settle for some time, for an indefinite period, ^G and is not an investment made by one simply on study sojourn or fleetingly in a country. It connotes some degree of permanence that is consistent with ^H an intention to settle for an indefinite period.

2005 (2) ZLR p434

Makarau J

Mr *Muchadehama* has submitted that the defendant has not expressed any ^A intention to acquire domicile in the United Kingdom. I am not persuaded by this submission. On a balance of probabilities, the factors that I have enumerated above, taken singly and collectively are, in my view, conduct on the part of the defendant leading to the inference that he has left Zimbabwe with the intention of settling in the United Kingdom for an indefinite period. ^B I am therefore, of the view that, I do not have jurisdiction in the matter.

In coming to the above conclusion, I am aware that this court guards its jurisdiction jealously and will afford access to its justice to all persons approaching it for relief unless to do so will fly in the face of an established position at law. I am of the further view that to hold that I have jurisdiction in this matter simply for the purposes of expediency and convenience to the ^C parties will fly in the face of an established position at law, that of granting jurisdiction to the country where the husband of the marriage is domiciled at the time the divorce proceedings are brought. The defendant, whilst a citizen of this country by birth, was domiciled in the United Kingdom in February 2005 when the plaintiff issued summons commencing this action. The courts of the United Kingdom have jurisdiction to divorce the parties and to grant them any ^D necessary ancillary relief. While not a consideration in declining jurisdiction in this matter, it appears to me eminently proper that the courts in the United Kingdom determine the issue of the custody of the children of the marriage as

such children are within their jurisdiction and they can mount a proper inquiry into the best interests of the children, including an inquiry into their ϵ living conditions and domestic arrangements, issues that I am ill-equipped to deal with due to the absence of the children from the jurisdiction.

In the result, I make the following order:

1. The defendant's counter-claim is dismissed for want of jurisdiction.
2. Each party shall bear its own costs $\mathcal{F}$.

Warara & Associates, plaintiff's legal practitioners

Mbidzo Muchadehama & Makoni, defendant's legal practitioners $\mathcal{G}$

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/NYAHUMA v BARCLAYS BANK (PVT) LTD 2005 (2) ZLR 435 (S)

NYAHUMA v BARCLAYS BANK (PVT) LTD 2005 (2) ZLR 435 (S)

2005 (2) ZLR p435

Citation	2005 (2) ZLR 435 (S)
Case No	Judgment No. S-67-05
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA and Gwaunza JA
Heard	4 July 2005
Judgment	1 December 2005
Counsel	Appellant in person <i>G V Mamvura</i> , for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

$\mathcal{C}$ **Administrative law** — irregularities — when can vitiate proceedings — disciplinary proceedings — procedural irregularities therein — do not necessarily vitiate proceedings — need to show that party concerned was prejudiced by the irregularity

Appeal — grounds — procedural irregularities — when may be relied on $\mathcal{D}$ to set aside proceedings — need to show that appellant prejudiced by irregularity

Employment — code of conduct — disciplinary proceedings under — code providing for dismissal for gross negligence causing serious loss — what constitutes gross negligence — value judgment by court, based on $\mathcal{E}$ facts

Headnote

The appellant was employed by the respondent bank as a teller. He was charged with misconduct when there was a substantial shortfall in his takings for the day. The bank alleged gross

negligence causing serious loss to the bank, by overpaying a customer. He was found guilty by a disciplinary committee and dismissed. He noted an appeal to the appeals committee, alleging that he should have been convicted of negligence causing a substantial loss, for which a lower penalty was provided. The appeals committee could not reach a decision and instead of holding another meeting within 3 days, as provided by the code of conduct, asked the management to appoint another appeals committee. The second committee dismissed the appeal. The appellant further appealed to the appeals board of the employment council, which upheld the appeal on the grounds that the time limits had not been complied with. The Labour Court upheld an appeal by the bank. On appeal to the Supreme Court:

Held, that it is not all procedural irregularities in disciplinary proceedings relating to employment which vitiate such proceedings. In order to

2005 (2) ZLR p436

Sandura JA

succeed in having the proceedings set aside on the basis of the procedural irregularity, it must be shown that the party concerned was prejudiced by the irregularity. The short delay in convening the meeting of the first committee did not in any way prejudice the appellant in the presentation of his case to the committee.

Held, further, that the provisions of the code of conduct were not complied with when a second committee was set up to consider the matter. The code did not provide for such a procedure, and the irregularity was a serious one that vitiated the proceedings of the second committee.

However, the irregularity committed by the committee did not have any effect on the determination of the matter by the Labour Court, which considered the matter on its merits.

Held, further, that it is not possible to give a universally suitable definition of the term "gross negligence." The words must be construed in the context in which they are used because they may have different meanings in different contexts. The decision as to whether negligence is gross or ordinary must be a value judgement based on an assessment of the facts of each case.

Held, further, that the appellant's conduct in counting such a large amount of money and handing it to a customer twice, instead of doing so only once, without realising the error at the time of the transaction or shortly thereafter, was indicative of a very serious dereliction of duty on his part, amounting to gross negligence.

Cases cited

Bickle v Joint Ministers of Law and Order 1980 (2) SA 764 (R)

Jockey Club of South Africa & Ors v Feldman 1942 AD 340

Rajah & Rajah (Pty) Ltd v Ventersdorp Municipality & Ors 1977 (2) SA 324 (A)

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

Case information

Appellant in person

G V Mamvura, for the respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the Labour Court, which allowed the respondent's appeal against the decision of the appeals board of the Employment Council for the Banking Undertaking.

2005 (2) ZLR p437

Sandura JA

The relevant facts, which were common cause, are as follows. The appellant ("Nyahuma") was employed by the respondent ("the bank") as a teller. On 24 May 2001, Nyahuma could not account for the sum of \$150 207 ("the shortfall"), which was supposed to be in his possession.

When he was called upon to explain how the shortfall had occurred, Nyahuma wrote a letter to the chief cashier on 30 May 2001, the relevant part of which ^b reads as follows:

"At the end of the day, I attempted to balance my cash and that is when I detected the above stated discrepancy.

SUSPICIONS

I am at a loss to understand how the discrepancy occurred.

^c What may have happened is that I could have been disturbed while in the middle of a transaction by a colleague or a 'phone (call),' resulting in me paying the same customer twice.

I have thought long and hard trying to reflect on whom (*sic*) I could have overpaid, but to no avail."

^d Having decided to charge Nyahuma with an act of misconduct, the bank wrote to him on 7 June 2001 as follows:

"You are hereby put on notice that it is the Bank's intention to take disciplinary measures against you in terms of the Code of Conduct contained in SI 201 of 1995: Collective Bargaining Agreement (Banking Undertaking) for:

^e Contravening Category D Section 11 Subsection 15 of the said Code, that is, Gross Negligence causing serious loss to the Bank by overpaying a customer \$150 207 which could not be recovered.

The Bank views the above stated offence in the most serious light. Kindly respond to the allegations as soon as practical but within three working days.

^f A hearing of this matter will be held within seven working days."

In his response, dated 11 June 2001, Nyahuma stated that he stood by the explanation that he had given in his letter dated 30 May 2001.

Thereafter, on 18 June 2001, a disciplinary hearing was held. Nyahuma was found guilty as charged and was dismissed.

^g Three days later, on 21 June 2001, Nyahuma noted an appeal to the grievance and disciplinary committee. In his grounds of appeal, he indicated that he should not have been found guilty of gross negligence causing serious loss to the bank, but should, instead, have been found guilty of negligence causing a substantial loss to the bank, a Category C offence in respect of which the ^h penalty for a first offender was a severe warning.

2005 (2) ZLR p438

Sandura JA

The grievance and disciplinary committee subsequently met on 13 July 2001 ^a to determine the appeal, but reached a deadlock. Thereafter, instead of holding another meeting after three working days, as provided by the code of conduct ("the code"), the committee referred the matter to the human resources department with the request that another grievance and disciplinary committee be set up to determine the appeal.

After the second grievance and disciplinary committee had been set up, it met ^b on 30 July 2001. After considering the appeal, the committee found it devoid of merit and dismissed it.

Subsequently, on 6 August 2001, Nyahuma noted an appeal to the appeals board of the Employment Council for the Banking Undertaking ("the appeals board"). The appeals board met on 5 September 2001 and allowed the appeal. ^c The main reason for that decision was that the bank, in convening the grievance and disciplinary committee, had not adhered to the time limits specified in the code.

Dissatisfied with the decision of the appeals board, the bank appealed to the Labour Court, which allowed the appeal and set aside the decision of the ^d appeals board. The Labour Court's decision meant that Nyahuma's dismissal had been upheld. Aggrieved by that decision, Nyahuma appealed to this court.

There are two main issues for determination by this court. The first is whether the irregularities in the disciplinary proceedings vitiated the proceedings; and the second is whether, on the basis of the facts admitted by him, Nyahuma was ^e guilty of negligence causing a substantial loss to the bank, or gross negligence causing serious loss to the bank. I shall deal with the two issues in turn.

Before dealing with the procedural irregularities alleged by Nyahuma, I wish to state that it is not all procedural irregularities which vitiate proceedings. In order to succeed in having the proceedings set aside on the basis of a ^f procedural irregularity, it must be shown that the party concerned was prejudiced by the irregularity.

This point was made by Tindall JA in *Jockey Club of South Africa & Ors v Feldman* 1942 AD 340 at 359 as follows:

"I am not prepared to accept, as a rule applicable to all cases of irregularity ^g in the proceedings of private tribunals, the proposition that an irregularity which is calculated to prejudice a party entitles him to have the proceedings set aside. No doubt such irregularity *prima facie* gives him such right, but if it is clear that in the particular case the irregularity caused such party no prejudice, in my judgment he is not so entitled." ^h

2005 (2) ZLR p439

Sandura JA

^a The same view was expressed by Holmes JA in *Rajah & Rajah (Pty) Ltd & Ors v Ventersdorp Municipality & Ors* 1961 (4) SA 402 (A) at 407H to 408B as follows:

"Now I think it is clear that the court will not interfere on review with the decision of a quasi-judicial tribunal where there has been an irregularity, if satisfied that the complaining party has suffered no prejudice: See *v Jockey Club of South Africa & Ors v Feldman* 1942 AD 340 at p 359; *Larson & Ors v Northern Zululand Rural Licensing Board* 1943 NPD 40. In principle, it seems to me that the court should likewise not interfere in the present case at the instance of the Council, whatever the precise nature of the present proceedings, since it is clear that there has been no prejudice to the public interest which the Council represents. The ^c underlying principle is that the court is disinterested in academic situations."

With those principles in mind, I now turn to the procedural irregularities alleged by Nyahuma. There were two. The first was that the meeting of the grievance and disciplinary committee ("the committee") was not convened ^d within the period specified in clause 6(2) of the code, which reads as follows:

"Upon receipt of a notice of appeal, the chairman of the grievance and disciplinary committee shall recover the record of the proceedings and all reports from the hearing officer and convene a meeting of the committee within seven working days."

As already stated, Nyahuma noted his appeal to the committee on 21 June ^e 2001. The committee was notified of that appeal on 28 June 2001. In terms of clause 6(2) of the code, the meeting of the committee should have been convened within seven working days after that date. The last day on which the meeting should have been held was, therefore, Monday 9 July 2001.

However, as already indicated, the committee held its meeting on 13 July 2001, i.e. four days after the last day on which the meeting should have been held.

^f In my view, the short delay in convening the meeting of the committee did not in any way prejudice Nyahuma in the presentation of his case to the committee. Indeed, Nyahuma did not establish any prejudice on his part which had been caused by the delay. That being the case, the proceedings of the committee were not vitiated by the delay in convening the meeting.

^g The second irregularity alleged by Nyahuma was that when the committee reached a deadlock it remitted the matter to the human resources department with the request that another committee be set up to consider the appeal, instead of the committee itself holding a further meeting in terms of clause 6(5) ^h of the Code which, in relevant part, reads as follows:

2005 (2) ZLR p440

Sandura JA

"Should the grievance and disciplinary committee fail to reach (a) consensus, ^a a further meeting shall be convened after not less than three working days and not more than seven working days after the first deadlock, to determine whether the committee is able to reach a consensus. Should the committee fail to reach a consensus the second time, the secretary of the committee shall forward a written record of (the) proceedings within a further seven working days, to the appeals board for consideration. The ^b appeals board shall determine the matter on the papers. An appeal from this decision shall in terms of clause 6(10) lie to the Tribunal (now the Labour Court)."

Quite clearly, the provisions of clause 6(5) of the Code were not complied with when a second committee was set up to consider the matter. The code did not provide for such a procedure, and the irregularity was, therefore, a serious one ^c that vitiated the proceedings of the second committee.

Fortunately, the matter was taken on appeal to the appeals board, and then to the Labour Court where it was determined on the merits. In the circumstances, the irregularity committed by the committee did not have any effect on the determination of the matter by the Labour Court. ^d

There were other irregularities alleged by Nyahuma in his heads of argument, but as they were not covered by his grounds of appeal this court will not consider them. The only procedural irregularities put in issue by the grounds of appeal were those concerned with the failure to comply with the provisions of the code.

I now wish to deal with the main issue in this appeal, which is whether the facts ^ε in this case established gross negligence causing a serious loss to the bank, as alleged by the bank, or negligence causing a substantial loss to the bank, as admitted by Nyahuma.

It is clear from decided cases that it is not possible to give a universally suitable definition of the term "gross negligence". ^ϕ

Thus, in *Government of the Republic of South Africa (Department of Industries) v Fibre Spinners & Weavers (Pty) Ltd* 1977 (2) SA 324 (D), Didcott J said the following at 335D-E:

"Gross negligence is not, of course, an exact concept lending itself to a neat and universally apt definition. The degree of negligence which is called ^ϑ gross for one purpose may not necessarily be thought such for another."

In our own jurisdiction, similar views were expressed by Beadle AJ, who had been the Chief Justice of this country for many years and became an Acting Judge of the High Court after his retirement, in *Bickle v Joint Ministers of Law and Order* 1980 (2) SA 764 (R). At 770B-D, the learned judge said:
H

2005 (2) ZLR p441

Sandura JA

A "I start by examining the meaning to be given to the words 'gross negligence' in the agreement. The words must be construed in the context in which they are used because the words may have different meanings in different contexts ... in their context, therefore, the words 'gross negligence' must be construed as something different from wilful. They must mean precisely what they say, ordinary negligence of an aggravated ^β form which falls short of wilfulness.

How aggravated must negligence be before it can be characterised as 'gross'? All the books are agreed that the words 'gross negligence' are incapable of precise definition ..."

And at 771H, the learned judge continued:

"I find, therefore, that the plaintiff was guilty of negligence in relation to ^c the damage suffered. But was his negligence gross or ordinary? That is the next question. Here again (of necessity), the court must make a value judgment."

I respectfully agree with those comments. The decision as to whether the negligence was gross or ordinary must be a value judgment based on an ^δ assessment of the facts of each case.

In the present case, Nyahuma admitted that he was negligent. What remains to be determined is whether the admitted facts and the explanation given by Nyahuma established gross or ordinary negligence.

As already indicated, in his letter to the bank, dated 30 May 2001, Nyahuma said he could have been disturbed while he was in the middle of a transaction ^ε by a colleague or by a telephone call and that, as a result, he could have given a customer the sum of \$150 207 twice. He could not, however, recall the customer concerned. At the disciplinary hearing, he said that the sum of \$150 207 would have been in 100 dollar notes.

Assuming that the sum of \$150 207, which Nyahuma counted and handed to ^ϕ the customer, was in bundles of \$10 000 (i.e. one hundred one hundred dollar notes), he would have handed to the customer fifteen bundles and \$207. If the notes were new, each bundle would have been about 1.1 centimetres thick. If he gave the customer the sum of \$150 207 twice, he would have handed to the customer thirty bundles of \$10 000 and \$414.

Similarly, if the money was in bundles of \$50 000 (i.e. five hundred one hundred ^ϑ dollar notes), Nyahuma would have handed to the customer three large bundles, each being about 5.5 centimetres thick, and \$207. And if he gave the money to the customer twice, he would have handed to the customer six large ^η bundles, each being about 5.5 centimetres thick and \$414.

2005 (2) ZLR p442

Sandura JA

Whether Nyahuma handed the money to the customer in bundles of \$10 000 ^A or \$50 000, if he gave him/her \$150 207 twice, the total number of one hundred dollar notes which he would have handed to him/her is three thousand and four, a very large number of notes indeed. Whether one looks at the number of bundles of notes or the number of notes handed to the customer, it is quite clear that Nyahuma would have counted and handed to the customer a very ^B large number of notes.

As far as the value of the money was concerned, \$150 207 was a very large amount of money in 2001. Nyahuma, who had about eight years' experience as a teller, should, therefore, have exercised great care in counting the money and making sure that the correct amount of cash was handed to the customer. A teller is required to do that at all times, especially when handling very large ^C amounts of money.

Instead, when he counted the money, and handed it to the customer, Nyahuma was not concentrating on what he was doing. His mind must have been wandering elsewhere. He was inattentive to the matter in hand.

In my view, Nyahuma's conduct in counting such a large amount of money ^D and handing it to a customer twice, instead of doing so once, without realising the error at the time of the transaction or shortly thereafter, was indicative of a very serious dereliction of duty on his part. Bearing in mind the very large amount of money handed to the customer twice, the very large number of notes involved, as well as the facts which were common cause, and making a value judgment, I am satisfied that Nyahuma's conduct on the day in question was ^E nothing less than gross negligence. That negligence caused a serious loss to the bank.

In the circumstances, the appeal is dismissed with costs.

ZIYAMBI JA and GWAUNZA JA concurred ^F.

Scanlen & Holderness, the respondent's legal practitioners ^G

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/MTSHINGWE v MOYO 2005 (2) ZLR 443 (H)

MTSHINGWE v MOYO 2005 (2) ZLR 443 (H)

2005 (2) ZLR p443

Citation	2005 (2) ZLR 443 (H)
Case No	Judgment No. HB-120-05
Court	High Court, Bulawayo
Judge	Cheda J
Heard	24 November 2005
Judgment	15 December 2005
Counsel	Miss <i>N Dube</i> , for the applicant Respondent in person
Case Type	Civil application
Annotations	No case annotations to date

Flynote

c **Family law** — child — paternity — dispute as to paternity — court entitled to order child to undergo blood test if satisfied that such would be in child's best interests

Headnote

▫ The applicant was married under customary law. A child was born during the subsistence of the marriage and the birth registered. Shortly after the child's birth, the marriage broke up. The wife left, taking the child with her. She then entered into a customary law union with the respondent. Another birth certificate was obtained in respect of the child, but this one showed that the respondent was the father. The wife died and the applicant sought the custody of the child from the respondent. Both men *ε* claimed paternity of the child, each claiming that he had the opportunity to father the child at the relevant time.

Held, that the real natural father could not be determined from the mere facts presented before the court. As both men claimed fatherhood, the determination of paternity required the aid of scientific methods. It was now possible to determine the issue of paternity accurately without the mother, by analysing the blood of the child and alleged father. While any infliction of wound or prick on an individual is *per se* an assault and an interference with personal liberty and rights, the courts should adopt a robust approach in dealing with such matters, particularly when minors are concerned. Both parties agreed to undergo blood tests themselves. *g* As far as the child was concerned, the courts will always relax their rules and practice in the interests of the children. Where two men each claimed to be natural father of the child, it was in the child's best interests that its correct biological father be determined and on that basis the court *h* could order that the child also undergo a blood test.

2005 (2) ZLR p444

Cheda J

Case referred to ^A

Genn v Genn 1948 (4) SA 430 (C)

Sopher v Sopher 1957 (1) SA 598 (W)

W v W [1963] 2 All ER 841 (CA)

Case information

Miss *N Dube*, for the applicant ^B

Respondent in person

Judgment

CHEDA J: This is an application for the delivery of a minor child currently in the custody of the respondent.

The applicant was married to Eustina Nyika (herein referred to as Eustina) ^c under customary law. According to him, a child, Diana Mtshingwe, was born on 5 November 1997 and a birth certificate number was obtained by both the applicant and Eustina on 20 January 1998. Their union was, however, fraught with problems resulting in its mutual dissolution in 1998. On her departure from the matrimonial home, she successfully applied for maintenance contributions from the applicant. ^d

Eustina found a new relationship with the respondent, whom she eventually settled with as his wife under customary law. She took Diana with her.

During her marriage to the respondent, she, together with him, obtained another birth certificate for Diana on 23 March 2004. Eustina, however, died in July 2005. ^e

Upon her death, the applicant approached the respondent with a view to taking custody of Diana. It is at this stage that he was advised by the respondent that, in fact, Diana was not his daughter but the respondent's.

An attempt to settle this dispute failed resulting in this application.

The applicant stated that he had always believed that Diana was his daughter ^F as Eustina had never mentioned the respondent as a possible father. He further stated that he had never heard of him as anything else other than the fact that he was customarily married to Eustina.

On the other hand, the respondent is of the firm view that Diana is his daughter as he was in love with Eustina, apparently at the same time as the applicant. He also had never heard of the applicant until after Eustina's death. That is ^G the reason why he did not ask him about Diana's custodianship after Eustina's death. It is quite possible that the respondent had sexual relations with Eustina at the relevant time.

We have a situation where both parties claim fatherhood of the child. The real natural father cannot be determined from the mere facts presented before the ^H

2005 (2) ZLR p445

Cheda J

A court in the present matter. The courts indeed on many occasions determine paternity on the basis of presumption based on the facts where the dispute is between the mother and the father. However, where both men claim fatherhood, the presumption is not enough, as the determination of paternity then requires the aid of scientific methods.

It is, however, clear that fraud was committed by Eustina by obtaining two ^B different birth certificates, registering both parties as natural fathers of this child. It is unfortunate that she has since passed away leaving this problem which is not easy to disentangle.

The certainty of paternity is beyond legal principles and therefore can only be determined by scientific analysis of the child's blood after matching it with ^C that of the natural mother and the disputed father(s).

Our courts have always accepted and ordered that the parties involved submit themselves for blood group tests. The court's understanding is that the procedure has always required the mother's blood sample too, however, due to the advancement of medical technology it is now possible to determine the issue of paternity accurately without the mother, by analysing the blood of ^D the child and father.

The analysis is based on set laws of heredity which cannot be changed: see David Harley *Medico-Legal Blood Group Determination: Theory Technique Practice* (Heinemann, 1944) at p 29 where the learned author states:

"The application of blood group tests in medico-legal problems involving ^E disputed blood relationship is based on the fact that the blood group of her parents in accordance with the laws of heredity discussed above (Chapter II and III), hence if the blood group of individuals alleged to be blood relations are at variance with the laws, the alleged relationship is disproved."

The *courts*, therefore, have no alternative but to rely on medical evidence to ^F establish parenthood.

Questions as to the correctness of ordering the child to submit itself for blood tests has been raised in some instances. Those who are against this procedure argue that the child should not be subjected to this procedure as it is an assault on the individual's privacy. In fact, in *W v W* [1963] 2 All ER 841 (CA) at 845, ^G Danckwerts LJ stated:

"To compel persons to submit to a blood test without their consent seems to me a very serious interference with personal liberty and rights. *Very convincing reasons would have to be shown before I could conclude that such a power was within the inherent jurisdiction of the court*" ^H (my emphasis).

2005 (2) ZLR p446

Cheda J

While accepting that any infliction of wound or prick on an individual is *per A* se an assault, I am of the view that the courts should adopt a robust approach in dealing with such matters, particularly when minors are concerned. It is trite that the courts will always relax its rules and practice in the interest of the children.

The respondent has suggested that all parties should submit to a paternity ^B blood test. The applicant is agreeable to this suggestion, save that he wants costs of such tests to be borne by the respondent

as he is the one who is seeking to establish paternity. Consent in relation to the blood tests, therefore, is not an issue for the two parties.

The question, therefore, is that of the minor child. I am of the view that, in as much as it can be said that an infliction of a wound, even though forensically ^c small is an assault on an individual, there has to be a distinction in as far as children are concerned, for two reasons.

Firstly, the courts will do all they can in the furtherance of the interest of a minor child. Where two men both claim to be natural fathers of the child, it is in the child's best interest that its correct biological father be determined. ^d

Secondly, given the fact that these courts are upper guardians of minors, it stands to reason that they have an inherent authority to order that such a child be subjected to a blood test which necessitates an infliction of its body as long as it is in its best interests.

COSTS ^E

The applicant firmly believes that the respondent should bear the costs of this application on an attorney and client scale. Costs on this scale are punitive. This is a matrimonial matter. These courts are not keen to award such costs unless the respondent's defence has been dishonest or unreasonable. The list is inexhaustive. An award of costs as between attorney and client is unusual in matrimonial cases: see *Genn v Genn* 1948 (4) SA 430 (C) at 432 and *F Sopher v Sopher* 1957 (1) SA 598 (W) at 601. The respondent also firmly believes that the child is his. Both parties were deceived by Eustina and therefore, in my opinion, it would be unfair to penalise the respondent when his belief was reasonable.

This court does not possess the knowledge, expertise and equipment of ^g determining the question of paternity. Such is possessed by medical personnel. The applicant has an earlier birth certificate obtained in 1998, while the respondent obtained his in 2004. *Prima facie*, the respondent's birth certificate was obtained fraudulently, at least by Eustina. In my view, the respondent has the onus of proving on a balance of probabilities that Diana is his child. In any ^h

2005 (2) ZLR p447

Cheda J

^A event, he has already stated that he would like the parties to undergo blood tests. He should therefore be saddled with the costs of this medical procedure.

The following order is therefore made:

1. The applicant, respondent and the minor child Diana (date of birth 5 November 1997) are and hereby ordered to undergo blood tests to ^B establish the fatherhood of either the applicant or the respondent.
2. Each party to pay its own costs.
3. The respondent to pay the costs of all the blood tests in this matter.

^c *Marondedze & Partners*, applicant's legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2005/Volume 2/SIKAZWE & ORS v MCHADA & ORS 2005 (2) ZLR 448 (H)

SIKAZWE & ORS v MCHADA & ORS 2005 (2) ZLR 448 (H)

2005 (2) ZLR p448

Citation

2005 (2) ZLR 448 (H)

Case No	Judgment No. HB-121-05
Court	High Court, Bulawayo
Judge	Cheda J
Heard	15 December 2005
Judgment	15 December 2005
Counsel	<i>S K M Sibanda</i> , for the applicants
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Costs — *de bonis propriis* — against police officer — when appropriate c

Headnote

Police officers work under very difficult circumstances in an attempt to maintain law and order.

There is, therefore, a need for the courts to adopt a robust approach when scrutinising their behaviour in the conduct of their duty. In an environment where the police are being accused of corruption, the courts should do everything they can to avoid **d** unnecessary condemnation of their otherwise genuine actions. Such condemnation can easily dampen the spirit of honest police officers in the execution of their duties. However, the courts cannot support unlawful and wrongful police actions where this has been proved to have taken place. Police officers are enjoined to execute their duties within the **e** confines of the law. Police officers, being human like all of us, do make errors in their duties, which errors at times need not to be condemned without just cause. It is against both public policy and the interest of justice for the courts to punish police officers who in the execution of their duties make genuine errors in the mistaken belief of the law of by reason of error of judgment. The consequences of such impetuous **f** orders will discourage the police from fighting crimes in society.

Cases referred to

Byala v Durban City Council & Anor 1936 NPD 174

Grobbelaar v Grobbelaar 1959 (4) SA 719 (A)

Kruger Bros & Wasserman v Ruskin 1918 AD 63 **g**

Levben Product (Pvt) Ltd v Alexander Films (SA) (Pty) Ltd 1957 R & N 575; 1957 (4) SA 225 (SR)

Watkins v Kingsburgh Town Council 1956 (2) SA 47 (N)

Case information

S K M Sibanda, for the applicants **h**

2005 (2) ZLR p449

Cheda J

Judgment

A CHEDA J: This is an application for a provisional order in which the applicant sought the following relief:

1. The return of the applicants' passports.

2. The release of the applicants' motor vehicles, being a Toyota Hiace registration ACG 6198, and the documents relating to it. ^b
3. The release of the first applicant's pair of shoes; and
4. That first respondent pays costs of this application at an attorney and client scale.

The historical background of this matter is that the applicants are Zambian nationals who entered Zimbabwe on 24 March 2005 through the Plumtree Border Post en route to Zambia. They were arrested on 5 April 2005, together ^c with one Bobby Tizirai Tapera, on allegations of armed robbery. During the investigations of this matter, there was a lot of discussion between the investigating officer and the applicants' legal practitioners, which led to charges against the applicants being withdrawn on 21 July 2005. They asked for the release of their passports, but the first respondent refused on the ^d understanding that the Attorney-General's office was taking the matter to trial on 22 July 2005. This, in fact, turned out that this was a bail application in relation to Bobby Tapera and not a trial.

Wide discussions between the investigating officer, the first respondent and officers from the Attorney-General on behalf of the respondents and applicants' legal practitioners were held. There seemed to be some disagreements as to ^e the release of the applicants' passports.

The applicants had raised various alibis. In addition, the applicants had information that certain members of the police force were working in collusion with criminals involved in this matter in an attempt to ensure the escape of a key witness. It is only fair, in my view, to say that this matter was fraught with ^f difficulties on the part of investigating officers, in particular the first respondent.

The first respondent, in my view, was probably one of the few genuine investigators in this matter. Other police officers involved seem to have had other ideas which were frustrating his investigations.

After perusal of this urgent chamber application, I ordered that the applicants ^g serve this application on the respondents which they did and the matter was set down for hearing on 21 November 2005.

On the day of the hearing, the parties to this application had reached an out-of-court settlement, in that it had been agreed that the items being held by the respondents be released to the applicants. The only contentious issue was ^h the question of costs, which Mr *Sibanda* insisted be paid personally by the

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first respondent on an attorney and client scale. This was on the basis that ^a despite the fact that charges against the applicants had been withdrawn, the first respondent refused to release the said various items.

An award of costs on the attorney and client scale, though regarded as punitive, is intended to indemnify the successful party for the expenses which he has been put in through unnecessarily initiating or defending litigation. ^b

The general rule is that all costs, unless expressly otherwise enacted, are in the discretion of the judge: *Kruger Bros and Wasserman v Ruskin* 1918 AD 63. Such discretion must, however, be judicially exercised: *Levben Product (Pvt) Ltd v Alexander Films (SA) (Pvt) Ltd* 1957 R & N 575; 1957 (4) SA 225 (SR).

In casu, the principle that costs follow the event is no doubt applicable. The ^c only issue which fall for determination by this court is whether such costs should be visited upon the first respondent in his personal capacity. These costs are *de bonis propriis*, which costs are applicable where a person acts or litigates in a representative capacity: *Byala v Durban City Council & Anor* 1936 NPD 174 and *Watkins v Kingsburgh Town Council* 1956 (2) SA 47 (N). ^d

In order for such an order to be made, a good reason should be given, such as improper or unreasonable conduct or lack of *bona fides* on the other party. In other words, the successful party must proffer a good reason to convince the court that such costs are justified.

The first respondent is a police officer who at all material times was acting in ^e that capacity. As pointed out *supra*, this case had sucked in a lot of people both visible and invisible. In my view, the first respondent stood out as a police officer who was keen to unravel the armed robbery syndicate

which had engulfed the country in general and the city of Bulawayo and its environs in particular. His efforts were being frustrated by some of his colleagues and others. ^F

After the charges had been withdrawn, it is clear, however, that there was no lawful ground for holding on to the property, etc, but his fervent belief that there was still a need to investigate this matter further cannot be said to have been unreasonable in the circumstances. His refusal to release the said items cannot, in my view, be said to lack *bona fides*. Lack of *bona fides* is one of the reasons which can result in the court awarding costs *de bonis propriis*: ^G *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A).

Police officers work under very difficult circumstances in an attempt to maintain law and order. There is, therefore, a need for the courts to adopt a robust approach when scrutinising their behaviour in the conduct of their ^H

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^A duty. In an environment where the police are being accused of corruption, the courts should do everything they can to avoid unnecessary condemnation of their otherwise genuine actions.

Such condemnation can easily dampen the spirit of honest police officers in the execution of their duties. Having so said, I should not be misunderstood that I support unlawful and wrongful police actions where this has been ^B proved to have taken place. Police officers are, on the contrary, enjoined to execute their duties within the confines of our laws. Police officers, being human like all of us, do make errors in their duties, which errors at times need not to be condemned without just cause. It is, in my opinion, against both public policy and the interest of justice for the courts to punish police officers ^C who, in the execution of their duties, make genuine errors in the mistaken belief of the law or by reason of error of judgment. The consequences of such impetuous orders will discourage the police from fighting crimes in society.

In the use of my judicial discretion, the respondents are ordered to pay costs on an attorney and client scale jointly and severally, each party paying, the ^D others to be absolved.

^E *S K M Sibanda & Partners*, applicants' legal practitioners

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