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ODENDAAL v INN ON THE RUPARARA 2006 (1) ZLR 1 (H)

Citation	2006 (1) ZLR 1 (H)
Case No	Judgment No. HH-14-06
Court	High Court, Harare
Judge	Bhunu J
Heard	30 November 2005
Judgment	3 January 2006
Counsel	*P C Paul,* for the plaintiff *J C Andersen SC,* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

C **Delict** — *animal — actio de pauperie — requirements for — defences available — normally docile horse reacting to external stimulus — not acting contra naturam sui generis — voluntary assumption of risk by plaintiff — such defence is also available to the defendant*

Practice and procedure — *parties — substitution of — application for the* D *substitution of one defendant to an action for another unrelated defendant — such application not competent — plaintiff should seek the joinder of the defendant or withdraw the proceedings altogether and start afresh, citing the correct defendant*

Headnote

The plaintiff was severely injured when the horse she hired bolted, having E been frightened, possibly by a wild animal. The horse allocated to the plaintiff was a docile, well behaved domesticated animal. She took it into an area which she knew was infested with dangerous animals, birds and snakes. She was aware that a wild animal had previously killed and eaten a foal in the paddock where the horses were kept.

F The horse which the plaintiff hired was actually owned, and the stables were run by, a separate and distinct company, not by the defendant. The cited defendant and the other company were complementary in offering accommodation and recreational facilities to tourists. The plaintiff sought an amendment to her pleadings, citing the correct defendant.

Held, that it is not competent for a plaintiff to seek the substitution of one G defendant to an action for another, unrelated, defendant. The plaintiff should rather seek the joinder of the other defendant or withdraw the proceedings altogether and start afresh, citing the correct defendant.

Held, further, this was a pauperian action, and for the plaintiff to succeed she had to establish that:

Bhunu J

- the defendant was the owner of the animal when the damage was A inflicted;
- the animal which inflicted the damage was a domestic animal;

- the plaintiff was lawfully present at the location where damage was inflicted;
- the animal acted *contra naturam sui generis,* that is to say, contrary B to its nature or class. From an objective point of view, the animal must have acted contrary to what may be expected of a decent and well behaved animal of its kind; and
- the animal must have caused the damage spontaneously from an inward excitement or vice.

The animal does not act contrary to its nature if it is reacting to external stimuli. C

Held, further, that the defences to a claim grounded on the pauperian action, that is an action based upon injury or harm done by a domesticated animal where no one is to blame, are as follows:

1. *vis major*; or
2. culpable conduct on the part of the injured person or a third person; or D
3. provocation by another animal.

These defences exclude liability because they establish that the animal did not act from inward excitement or vice and, therefore, did not act *contra naturam sui generis*. A defence of voluntary assumption of risk is also available to a defendant. E

Held, further, that the plaintiff must therefore have appreciated that that killing of the foal could have unsettled the horses and made them extremely nervous. She admitted that when the horse bolted it was reacting to external stimuli, either a wild animal or the scent of such animal. It was the nature of a horse to bolt when spooked, for the sake of self preservation, and no fault could be attributed to the owner. F

Case cited

O'Callaghan v Chaplin 1927 AD 310

Case information

P C Paul, for the plaintiff G

J C Andersen SC, for the defendant

Judgment

BHUNU J: The plaintiff issued summons against the defendant claiming damages in the sum of $900 679 549.87 arising from a horse riding accident on 5 November 2000. H

2006 (1) ZLR p3

Bhunu J

A The plaintiff sustained serious injuries of the head and torso. She is now confined to a wheel chair.

The facts leading to the terrible accident are however, not in dispute.

The undisputed facts are that the defendant runs a hotel in Juliasdale, Nyanga. A separate company, Rupurara Trout Farm (Pvt) Ltd, also runs a horse riding B club in the vicinity and environs of the hotel.

The two entities and businesses are separate and distinct save that they are complementary in offering accommodation and recreational facilities to tourists.

The plaintiff and her husband checked in at the defendant's hotel on 2 November 2000 and were due to depart on 5 November 2000.

Upon checking in into the hotel, the plaintiff's husband filed in a standard form C contract with a disclaimer clause which reads:

> "I AGREE TO THE FOLLOWING CONDITIONS:
>
> It is the express condition of your occupation of or visit to these premises that the proprietor is not responsible for loss or damage to property of any visitor which is or may be brought upon these premises arising from fire, theft or otherwise by whomsoever caused or arising negligence from or D wrongful act of any person in employ of the proprietor. Money, or valuables may be handed in to the proprietor for custody where a special receipt will be issued accordingly.

> Any activity is potentially hazardous and it is essential that all lawful directions and advice of management be followed. The hotel accepts no responsibility for any illness, accident or loss whatsoever incurred in the E course of the above activities or for any expense from such illness, accident or loss."

On the date of departure, being 5 November 2000, the plaintiff's husband, as fate would have it, went for trout fishing whereas the plaintiff proceeded for horse riding.

F Within the vicinity of the stables, there are prominent warning signs admonishing would be riders that horse riding is at own risk.

Although the plaintiff has no independent recollection of the signs, she acknowledged that there must have been such signs as this is standard practice and she must have read them.

At the stables, the plaintiff was assisted by Mr Saltau, the Estate Manager G Rupurara Trout Farm. Upon questioning, she assured Mr Saltau that she was an experienced horse rider. She had gone to a horse riding school and had horses on her farm.

She chose a horse by the name Fleck. She mounted the horse with competent dexterity, demonstrating that she had the necessary skill and experience in riding horses.

Bhunu J

Mr Saltau escorted her, riding a separate horse Merlin. The two then went out A horse riding in an area which to her knowledge was infested with wild animals. She had previously been told during casual talk that a leopard had eaten a foal somewhere in the paddock where the horses were kept.

In her own words, this is what she had to say:

> "The name of the horse was Fleck. The manager asked me if I had horse B riding experience. We set off at about 9.30-9.45 a.m. It was a physical horse. It always wanted to run and be in the front. I was fine. I had to keep wide awake and hold the reigns. I was quite nervous. Prior to this I had had no problem in controlling a horse.
>
> Mr Saltau was with me riding his own horse. He was the manager. A lot of the time was in front. C
>
> I was riding on a path. Mr Saltau was directly behind me. *From a walking pace the horse suddenly galloped. It bolted. I just could not control the horse.* At full gallop it turned a corner and I nearly fell off. It was also going towards a tree at the right side of the path. It shyed to the left a little bit. I hit my head against the tree and I fell.
>
> I think something must have frightened the horse. I didn't see anything D myself. It was said after the accident that Mr Saltau had seen a movement in the bushes. It was suggested it could have been a leopard though no animal was identified.
>
> There was definitely something that must have frightened the horse to just bolt, but I did not see anything.
>
> I had a spinal code injury. I broke two vertebrae. E
>
> I was never warned that it could be dangerous to go horse riding in that area where there were wild animals. I did not regard the mention of a leopard eating a foal as a warning. This was just mentioned in passing.
>
> The manager's horse also bolted. My horse bolted first."

Under cross-examination, the plaintiff agreed that she was familiar with the F terrain. She was aware that the area was infested with all sorts of wild animals, birds and snakes. She was aware of the presence of dangerous wild animals in the vicinity such that she needed no warning of their presence.

The questioning progressed as follows:

> "Q. You are familiar with the practice of hotels of disowning liability when G you sign in?
>
> A. Yes.
>
> Q. You are familiar with the effect that guests take the risk.
>
> A. Yes.
>
> Q. Confirm this document was signed by your husband (reads) H

Bhunu J A

> A. Yes confirmed (produced and marked exhibit 1)

Q. You admitted you were at risk, why bring this case?
A. Does it also cover the farm?
Q. *You were an experienced horse rider, you knew all these things, you took it upon yourself.* B
A. *I did.*
Q. Why are you suing, you have admitted that you must have seen the signs and read them.
A. It was a traumatic experience.
Q. *Whom are you suing? The Inn Group which has nothing to do with the control of the farm.* C
A. *Yes.*
Q. The horse was acquired from a farm in the area in 1998. It was so patient and gentle, a 3-year-old could ride it. The groom was employed in 1988, he was therefore experienced.
A. Yes. D
Q. Shows discipline.
A. Yes.
Q. Quiet and disciplined on the part of the horses.
A. Yes.
Q. Can you suggest any fault or negligence. E
A. No.
Q. *Have you ever made any such suggestion?*
A. No.
Q. You don't say they misled you.
A. No. F
Q. You are saying the horse is very frisky?
A. Yes.
Q. *Why should the horse have behaved differently with you*?
A. *Something definitely scared it.*
Q. What spooks a horse? G
A. When a log blocks its way. Something out of the ordinary.
Q. A horse does not do that out of perversity?
A. No.
Q. It might be the smell of an animal?
A. Yes, it might be the scent of a dangerous animal.

Bhunu J

Q. That is self preservation, a horse does not wait to find out? A
A. Yes.
Q. *You accept that the horse did not suffer from any perversity*?
A. *Yes.*
Q. *It was spooked or scared by some extraneous thing*?
A. *Yes.*" B

I have attempted to quote the plaintiff's evidence extensively so as to put her evidence in its correct and accurate perspective.

The plaintiff admitted that she cited the wrong defendant. This has prompted her to seek an amendment correcting the citation of the defendant. It is an established fact beyond question that the defendant Inn on the Rupurara is C a separate and distinct legal entity from Ruparara Trout Farm (Pvt) Ltd. The cited defendant does not own the horse in question, neither do they have any control over the horse. That being the case, they are not accountable for the horse's behaviour on the day in question.

Despite the plaintiff's acknowledgement that she has in error cited the wrong defendant, she has not seen it fit to withdraw her claim against the defendant D and proceed against the correct adversary.

In the circumstances of this case, I would agree with Mr *Paul* that what the plaintiff is seeking is a substitution of one defendant with another unrelated defendant and not an amendment. Such a

procedure is incompetent. In my view, the plaintiff should have sought joinder of the other defendant or E withdrawn the proceedings altogether and started afresh, citing the correct defendant.

The proposed amendment is prejudicial to the alleged correct defendant, Rupurara Farm (Pvt) Ltd, in that it took no part in the initial proceedings and pleadings. That being the case the application for an amendment cannot succeed. F

Just in case, I might be wrong in this regard, I proceed to determine the matter on the merits.

The plaintiff's claim is grounded in the pauparian action. That action is based on damage or harm done by a domesticated animal where no one is to blame. The nature and limits of the claim are summarized in the leading case of G *O' Callaghan* v *Chaplin* 1927 AD 310.

According to Neethling, Potgieter &Visser *Law of Delict* 2 ed pp 343-346, for the plaintiff to succeed she must establish that:

1. the defendant was the owner of the animal when damage was inflicted.
2. the animal which inflicted the damage is a domestic animal. H

2006 (1) ZLR p7

Bhunu J A

3. the plaintiff was lawfully present at the location where damage was inflicted.
4. the animal acted *contra naturam sui generis,* that is to say, contrary to its nature or class.
   From an objective point of view, the animal must have acted contrary to what may be expected of a decent and well behaved animal of its kind. B
5. the animal must have caused the damage spontaneously from an inward excitement or vice.

Having said that, the learned author makes it clear that the animal does not act contrary to its nature if it is reacting to an external stimulus.

C The defences open to the defendant can be summarized as follows:

1. *Vis major*
2. Culpable conduct on the part of the injured person or a third party
3. Provocation by another animal.

The above defences exclude liability, because they establish that the animal D did not act from inward excitement or vice and, therefore, did not act *contra naturam sui generis*

The defence of voluntary assumption of risk is also available to the defendant.

Now applying the law to the uncontested facts of this case as given by the plaintiff:

E The facts established that Fleck, the horse allocated to her, was a docile well- behaved domesticated animal. Right from the onset, she took a calculated risk. She appreciated and acknowledged that she was riding the horse at her own risk.

The plaintiff knew that the area where she went riding was infested with dangerous animals, birds and snakes, such that she needed no warning. She F was aware that a wild animal had previously killed and eaten a foal in the paddock where the horses are kept. She must, therefore, have appreciated that, that event could have unsettled the horses and made them extremely nervous.

Having noticed at some point that the horse was rather frisky and uncomfortable, she negligently did not relent but persisted with the ride.

G In her evidence, she was certain and adamant that the horse was reacting to external stimuli, either a wild animal or the scent of such animal. In her own words, the horse only bolted because it was "spooked".

She accepted that it was the nature of a horse to bolt when "spooked" for the sake of self preservation. Having said that, she was unable to attribute any H fault or negligence on the part of the horse owner.

2006 (1) ZLR p8

Bhunu J

It is therefore self evident that, although the plaintiff was seriously injured, A her evidence falls far too short of establishing any liability on the part of the horse's owner based on the pauparian action or fault attributable to the owner. That being the case there is no point in putting the defendant on its defence.

In the result, it is ordered:

1. that the application for amendment to incorporate Rupurara Trout Farm B (Pvt) Ltd as a party to these proceedings be and is hereby dismissed.
2. that the court hereby returns a verdict of absolution from the instance.
3. that the plaintiff shall bear the costs of suit.

Wintertons, plaintiff's legal practitioners C

Atherstone and Cook, defendant's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/WATERGATE (PVT) LTD v COMMERCIAL BANK OF ZIMBABWE 2006 (1) ZLR 9 (S)

WATERGATE (PVT) LTD v COMMERCIAL BANK OF ZIMBABWE 2006 (1) ZLR 9 (S)

Citation	2006 (1) ZLR 9 (S)
Case No	Judgment No. S-78-05
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA &Gwaunza JA
Heard	29 November 2005
Judgment	12 January 2006
Counsel	*R Y Phillips,* for the appellant *J B Colegrave,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

C **Contract** — *performance — impossibility — when party may plead impossibility – need to show that impossibility was not foreseen or was not fault of party*

Contract — *validity — contract providing that loan be repaid in foreign* D *currency — valid if party can show that judgment in foreign currency would most fully compensate for his loss*

Headnote

The appellant operated a farm. The proceeds of the farm were sold outside the country, generating foreign currency. The appellant had taken out a loan with the respondent bank. Due to the rising

interest rate, it E requested the bank to convert the loan into one in foreign currency, which attracted a much lower interest rate. The loan was to be repaid in foreign currency from the currency generated by the sales outside the country. The bank agreed to the request and the agreement was reduced to writing. A handwritten addendum provided that if the Reserve Bank did not permit the repayment of the loan in foreign currency, the F repayment date would be extended by a year. The Reserve Bank did not give its approval and the repayment date was accordingly extended. Before the repayment date, the appellant offered to repay the loan in local currency at the official rate of exchange. The bank rejected the offer and secured judgment against the appellant in the High Court for the G repayment in foreign currency. The questions for decision on appeal were whether the bank was entitled to payment in foreign currency and whether the appellant was prevented from repaying the loan in foreign currency by a supervening impossibility that it had not foreseen, or in respect of which it was not at fault.

Held, that a party is entitled to payment in a foreign currency if it can show H that a judgment in that currency would most truly express its loss and,

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Sandura JA

therefore, most fully compensate it for that loss. The agreement between A the parties provided that the bank would be paid in United States dollars, and did not provide for payment in local currency. Both parties stood to benefit from that agreement. As far as the bank was concerned, it was the repayment of the loan in foreign currency that was at the heart of the agreement. A judgment in foreign currency would most fully compensate the bank for that loss. B

Held, further, that impossibility of performance in general excuses the performance of a contract, but does not do so in all cases. The court must then look at the nature of the contract, the relationship between the parties, the circumstances of the case and the nature of the impossibility to see whether the general rule ought, in the particular circumstances of C the case, to be applied.

Held, further, that the first argument – that the appellant failed to repay the loan to the bank in foreign currency because the RBZ did not authorise the payment out of the foreign currency it earned from the sale of its products – was not valid, because the parties foresaw the possibility that the RBZ might not grant such authority, and made provision for that D eventuality. There must have been another source from which the appellant believed it would raise the foreign currency it had agreed to pay.

Held, further, that the second argument – that by the time the RBZ reversed its policy and allowed companies to use the foreign currency they earned to pay their foreign currency loans, the appellant had already pledged the E whole of its crop to another company in return for financial assistance – was also invalid, because it simply indicated that the appellant had only itself to blame for its inability to repay the loan to the bank in foreign currency. By pledging its crop to the other company, the appellant deliberately put it beyond its power to repay the loan in foreign currency. F The appellant was therefore not prevented from repaying the loan in foreign currency by a supervening impossibility that it had not foreseen, or in respect of which it was not at fault.

Cases cited

Bischofberger v van Eyk 1981 (2) SA 607 (W) G

Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe 1988 (2) ZLR 482 (SC)

Case information

R Y Phillips, for the appellant

J B Colegrave, for the respondent H

Sandura JA

Judgment

A **SANDURA JA:** This is an appeal against a judgment of the High Court in terms of which the appellant was ordered to pay to the respondent the sum of US$817 522.99, together with interest at the rate of 8.21 percent *per annum*. Alternative relief was granted in the event that the respondent was unable to recover payment in United States dollars.

The background facts in this matter are as follows. The appellant ("Watergate") B had three accounts with the respondent ("the Bank"), two being loan accounts and one being a foreign currency account. At the relevant time, Watergate was a farming company, which carried on farming operations at Checkers Farm ("the Farm") in Chipinge District, and grew tobacco and coffee that generated foreign currency.

C In 1998, the Bank provided Watergate with a short-term loan to finance its crop expenditure on the Farm. The loan, which was in local currency, was repayable from the proceeds of the crops, and was secured by mortgage bonds registered over the Farm. In addition, the loan was renewable on an annual basis. On 14 February 2000, Watergate wrote to the Bank expressing some concern about the viability of its farming operations, in view of the rising D interest rate on its overdraft with the Bank. Its total indebtedness to the Bank was then $31 500 000. In the circumstances, Watergate asked for a loan with a rate of interest lower than the rate that the Bank was then charging, which exceeded 80 percent *per annum*.

Subsequently, in March 2000, Mr Mark Muilder ("Muilder"), the Bank's E agricultural finance planner, visited the Farm in order to discuss Watergate's request. Muilder suggested to Watergate that one solution to its problems could be to convert its existing loan into a foreign currency denominated loan, which would be repaid from the foreign currency earned by Watergate from the sale of its coffee and tobacco. When Muilder was reminded that it was the Government's policy that although the tobacco and coffee were sold in United F States dollars, the farmer was paid in local currency, he said that the Reserve Bank of Zimbabwe ("the RBZ") had a discretion in the matter and could waive the general rule. He added that once the loan was converted into foreign currency, the interest rate charged by the Bank would be much less.

Thereafter, on 4 October 2000, Watergate wrote to the Bank requesting the Bank to convert its loan into a foreign currency loan. Following that request G and the exchange of further correspondence, the Bank finally agreed to have Watergate's loan converted into a foreign currency loan. On 9 January 2001, Watergate's loan, which was then about $56 000 000, was converted into United States dollars. Shortly thereafter, the sum of US$55 000, which was in Watergate's foreign currency account, was set off against the foreign currency loan, leaving a balance of US$817 522.99, with interest at 8.21 percent H *per annum*.

Sandura JA

Subsequently, on 10 July 2001, the agreement to convert Watergate's loan A into a foreign currency loan was reduced to writing. Clause 6.2 of the agreement provided that the loan was to be repaid in five monthly instalments of US$200 000, with the last instalment being paid on 31 December 2001. The parties later agreed to add an addendum ("the addendum") to clause 6.2 in longhand, which reads as follows: B

> "Depending on the Reserve Bank allowing 100 percent of coffee revenue being paid in US dollars to this loan. If not, to be extended to 31/12/2002 as agreed."

Following the above agreement, the Bank made an application to the RBZ on behalf of Watergate, requesting the RBZ to permit Watergate to use the foreign currency earned from the sale of its coffee to repay the foreign currency C loan to the Bank. That application was unsuccessful. In terms of the addendum, the loan repayment period was then automatically extended to 31 December 2002. Subsequently, on 10 July 2002, Watergate's lawyers wrote to the Bank acknowledging that the balance of the loan due and outstanding was US$817 522.99, but tendering payment in local currency in the sum of $44 963 764.45 in full and final settlement of Watergate's indebtedness to the D Bank. That sum was alleged to be the local currency equivalent of US$817 522.99 at the then prevailing exchange rate of US$1:Z$55.

On the same date, i.e. 10 July 2002, the Bank wrote to Watergate and rejected the offer to repay the loan in local currency. It insisted that the loan should be repaid in terms of the agreement, and threatened to institute legal proceedings E against Watergate if Watergate did not repay the loan as agreed. Thereafter, after the exchange of further correspondence between the parties, it was clear that the institution of legal proceedings in order to resolve the dispute was inevitable. Accordingly,

on 17 July 2003, the Bank filed a court application in the High Court seeking an order compelling Watergate to pay the sum of US$817 522.99 together with interest at the rate of 8.21 percent *per annum*. F

On 6 October 2004, the Bank's application was successful, and the High Court granted the following order:

> "In the result, it is ordered:
>
> 1(i) that judgment be and is hereby granted in favour of the applicant in the sum of US$817 522.99 together with interest thereon at the rate G of 8.21 percent *per annum* to the date of final payment.
>
> (ii) that in the event that for any reason whatsoever, the applicant is unable to recover payment in United States dollars, it shall be entitled to recover the full amount or part thereof in Zimbabwean dollars at the prevailing foreign exchange auction rate as at the date of repayment or enforcement." H

Sandura JA

A Aggrieved by that order, Watergate appealed to this court.

Two issues arise for determination by this court. The first is whether the Bank was entitled to payment in United States dollars. The second is whether Watergate was prevented from repaying the loan in United States dollars by a supervening impossibility that Watergate had not foreseen, or in respect of which it was not at fault. I shall deal with the two issues in turn.

B Dealing with the first issue, the legal position is that a party is entitled to payment in a foreign currency if it can show that a judgment in that currency would most truly express its loss and, therefore, most fully compensate it for that loss. That is what this court decided in *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC). In the present case, C I am satisfied that the Bank proved its entitlement to payment in United States dollars. The agreement between the parties provided that the Bank would be paid in United States dollars and did not provide for payment in local currency.

Both parties stood to benefit from that agreement. The Bank legitimately expected that the loan would be repaid in United States dollars, which it needed D and was entitled to hold in the ordinary course of its business. On the other hand, Watergate stood to benefit, in that the period within which the loan was to be repaid was extended to 31 December 2001, or 31 December 2002 if the RBZ did not allow Watergate to pay the Bank all the foreign currency it earned from the sale of its coffee. There was also the added advantage that the rate of interest charged by the Bank was low. However, as far as the Bank was E concerned, it was the repayment of the loan in foreign currency that was at the heart of the agreement. Without that, there would have been no reason for the Bank to enter into the agreement. The loss sustained by the Bank as a result of the breach of contract by Watergate must, therefore, be in United States dollars.

Consequently, it is a judgment in foreign currency, i.e. United States dollars, F which would most fully compensate the Bank for that loss. The learned judge in the court *a quo*, therefore, correctly granted the application.

The learned judge was fully aware of the possibility that the Bank might not be able to recover payment in United States dollars. He accordingly ordered that, in that event, the Bank would be entitled to recover the full amount or part G thereof in Zimbabwe dollars, applying the prevailing foreign exchange auction rate at the date of repayment or enforcement. The reasons for making such an order were set out by this court in *Makwindi*'s case *supra*. At 492E-F, Gubbay JA (as he then was) said:

> "Fluctuations in world currencies justify the acceptance of the rule not only that a court order may be expressed in units of foreign currency, but also H that the amount of the foreign currency is to be converted into local

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Sandura JA

> currency at the date when leave is given to enforce the judgment. Justice A requires that a plaintiff should not suffer by reason of a devaluation in the value of currency between the due date on which the defendant should have met his obligation and the date of actual payment or the date of enforcement of the judgment. Since execution cannot be levied in foreign currency, there must be a conversion into the

local currency for this limited purpose and the rate to be applied is that obtaining at the date of B enforcement."

I now wish to deal with the second issue, which is whether Watergate was prevented from repaying the loan in United States dollars by a supervening impossibility that it had not foreseen, or in respect of which it was not at fault. This issue is important because the general rule is that the impossibility of performance is an excuse for the non-performance of an obligation: *impossibilum* C *nulla obligatio est*. However, whether or not the general rule applies in a particular case would depend upon the circumstances of the case and the nature of the impossibility. In this regard, I can do no better than quote what Boshoff JP said in *Bischofberger* v *van Eyck* 1981 (2) SA 607 (W). At 611B-D, the learned Judge President said: D

"… when the court has to decide on the effect of impossibility of performance on a contract, the court should first have regard to the general rule that impossibility of performance does in general excuse the performance of a contract, but does not do so in all cases, and must then look to the nature of the contract, the relation of the parties, the circumstances of the case and the nature of the impossibility to see whether the general rule ought, E in the particular circumstances of the case, to be applied. In this connection, regard must be had not only to the nature of the contract, but also to the causes of the impossibility. If the causes were in the contemplation of the parties, they are generally speaking bound by the contract. If, on the contrary, they were such as no human foresight could have foreseen, the obligations under the contract are extinguished." F

I respectfully agree with the principles set out by the learned Judge President. Those are the principles that ought to be applied once the existence of the impossibility has been established. With those principles in mind, I now proceed to examine the arguments advanced on behalf of Watergate. They were two. The first argument was that Watergate failed to repay the loan to the Bank in United States dollars, because the RBZ did not authorise it to pay G to the Bank all the foreign currency it earned from the sale of its coffee. In my view, this is not a valid argument, because the parties foresaw the possibility that the RBZ might not grant such authority, and in fact made provision for that eventuality by adding the addendum to clause 6.2 of the agreement.

As already indicated, the addendum provided that the agreement to repay the H loan in full by 31 December 2001 was dependent upon the RBZ permitting

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Sandura JA

A Watergate to pay to the Bank all the foreign currency it earned from the sale of its coffee, and that if the RBZ did not grant such permission the final date of the repayment of the loan would be extended to 31 December 2002. There must, therefore, have been another source from which Watergate believed it would raise the foreign currency it had agreed to pay to the Bank, in the event that the RBZ did not permit it to pay to the Bank the foreign currency it received B from the sale of its coffee. Watergate does not say what that source was and why it did not obtain the required foreign currency from that other source and pay it to the Bank. It was common cause that the proceeds from the sale of tobacco were paid to the Bank in Zimbabwe dollars as the Bank held a registered stop order over the tobacco crop.

C The second argument advanced on behalf of Watergate was that by the time the RBZ reversed its policy in August 2002 and allowed companies to use the foreign currency they earned to pay their foreign currency loans, Watergate had already pledged the whole of its coffee crop to Zimbabwe Coffee Mill Ltd ("the Coffee Mill") in return for financial assistance, because the Bank had frozen its overdraft facilities. In my view, this is not a valid argument, because D it simply indicates that Watergate had only itself to blame for its inability to repay the loan to the Bank in United States dollars. By pledging its coffee crop to the Coffee Mill, Watergate deliberately put it beyond its power to repay the loan in United States dollars.

According to Watergate, the arrangement with the Coffee Mill was that the E Coffee Mill advanced working capital to Watergate in return for a pledge of the coffee crop, which was later sold through the Coffee Mill, and Watergate was paid, after the repayment of the initial loan, the net proceeds in local currency. If that averment is correct, it was the Coffee Mill that benefited in foreign currency and Watergate must have been aware of that. The second argument advanced on behalf of Watergate cannot, therefore, succeed.

F Watergate was, therefore, not prevented from repaying the loan in United States dollars by a supervening impossibility that it had not foreseen, or in respect of which it was not at fault. The

maxim *impossibilium nulla obligatio est* does not, therefore, apply.

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

ZIYAMBI JA &Gwaunza JA concurred.

Henning Lock Donagher & Winter, appellant's legal practitioners

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

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NGARU v CHIEF IMMIGRATION OFFICER & ANOR 2006 (1) ZLR 16 (S)

Citation	2006 (1) ZLR 16 (S)
Case No	Judgment No. S-64-05
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Ziyambi JA, Malaba JA & Gwaunza JA
Heard	14 March 2005; 31 May 2005
Judgment	9 January 2006
Counsel	*H Zhou*, for the applicant *C R Mudenda*, for the respondents
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 22(1) — right to freedom of movement — Zimbabwean citizen married to citizen of another country — foreign citizen declared prohibited immigrant — onus on citizen to show that interference with freedom of movement not reasonably justifiable — when onus may be discharged — failure by Minister to advance cogent reasons for his* D *decision*

Headnote

The applicant, a Zimbabwean citizen, was married to a citizen of Cameroun. She married him while he was working in Zimbabwe in terms of a work permit. When his work permit expired, the respondent Minister eventually E declared the husband to be a prohibited immigrant. The applicant alleged that her constitutional right to freedom of movement, guaranteed in terms of s 22(1) of the Constitution of Zimbabwe, had been violated by the respondents' denial to her husband of a residence permit. The Supreme Court gave the Minister the opportunity to give evidence *in camera* to justify his decision. F

Held, that the court could not be satisfied that the reasons the Minister gave carried sufficient weight to justify the interference with the applicant's right to freedom of movement. Although the applicant bore the onus of proving that the interference with her fundamental rights and freedoms that she alleged was not reasonably justifiable in a democratic society, the respondents' failure to advance cogent reasons for declaring the applicant's husband a prohibited immigrant, and given his evidence regarding his work in Zimbabwe (which evidence had not been controverted), the applicant had properly discharged the onus that she bore. H

Gwaunza JA

Cases cited A

Bhatti & Anor v Chief Immigration Officer & Anor 2001 (2) ZLR 114 (H)

Kenderjian v Chief Immigration Officer 2000 (1) ZLR 697 (S)

Legislation considered

Constitution of Zimbabwe 1980, ss 18(2) & 22(1)

Case information

B *H Zhou*, for the applicant

C R Mudenda, for the respondents

Judgment

GWAUNZA JA: This matter was first argued before this court in March 2004. C In a judgment handed down on 3 June 2004, the court noted that it could not, without hearing from the second respondent, determine whether his interference with the applicant's right to freedom of movement was "reasonably justifiable in a democratic society". The court then made the following order:

> "The Registrar of this court shall make arrangements for the second respondent to appear before this court on a suitable date and give D evidence *in camera* on why the applicant's husband, Leopold Alain Sitchet-Njanko, was deemed to be an undesirable inhabitant or visitor to Zimbabwe."

The matter came before this court again on 14 March 2005 when, in compliance with the order referred to, the second respondent, who is the Minister of Home Affairs ("the Minister), appeared before us to give the required evidence. As E the evidence of the Minister was given *in camera*, its content will not be disclosed in this judgment.

The full facts of the case are set out in the earlier judgment of this court * and there is no need to repeat them, save to say that the applicant is a citizen of Zimbabwe married to one Leopold Alain Sitchet-Njanko ("Njanko"), who is F a citizen of Cameroon.

The applicant alleges that her constitutional right to freedom of movement, guaranteed in terms of s 22(1) of the Constitution of Zimbabwe, has been violated by the respondents' denial to her husband of a residence permit. She accordingly seeks an order in these terms:

> "(1) The applicant's right to reside in this country with her non-citizen G husband be and is hereby recognised.
>
> (2) The respondents be and are hereby restrained from unduly interfering with the applicant's right to reside in this country with her spouse.

Gwaunza JA

> (3) The respondents to pay the costs of this application jointly and A severally, the one paying the other to be absolved."

In opposing the application, the respondents argue, firstly, that the applicant's husband was declared a prohibited immigrant in terms of s 14(1)(g) of the Immigration Act [*Chapter 4:02*] and, secondly, that the applicant's rights to reside with her husband have to be weighed against those of State security, B and that in these circumstances the applicant's rights cannot be deemed to be absolute.

Even though the Minister signed a certificate in terms of s 22(2) of the Immigration Act [*Chapter 4:02*] to the effect that it was not in the public interest for him to disclose the reasons why he deemed Njanko to be an undesirable inhabitant or visitor to Zimbabwe, the court was satisfied, on the C evidence before it, that this was a proper case for it to invoke s 18(12) of the Constitution. In terms of this provision, the court is authorised to make arrangements for evidence relating to the matter in terms of which a certificate has been issued by the Minister under s 22(2) of the Immigration Act, to be heard *in camera*. Hence, the order cited at the beginning of this judgment. D

The Minister explained his reasons for declaring Njanko an undesirable immigrant and a threat to State security. These reasons were expected to satisfy the court that the interference with the applicant's right to freedom of movement – manifested through the threatened deportation of her husband as a prohibited immigrant – was reasonably justifiable in a democratic society.

The applicant's husband, Njanko, was given an opportunity to lead evidence E in response to that given by the Minister. He denied all the allegations laid against him. He confirmed that, at the relevant time, he did work for a German organisation, WFD, and that he was attached to the Zimrights Office in Bulawayo as a project advisor to a specific project of Zimrights called "Reconciliation Activities in Matabeleland North". He explained that his role F in the project was to advise on effective ways of implementing the project, whose thrust was peace building and conflict resolutions. This included on the job training of trainers, organising workshops on these themes, and arranging cultural exchange visits. In terms of the latter, youths from Matabeleland, for example, would visit and interact with youths from Manicaland and vice versa. G

Njanko also explained that although he had since left Zimbabwe with his family, and was now working on contract in the Sudan, he regarded Zimbabwe as his home. He and his wife had two immovable properties in Bulawayo, and they, together with their two children, had been to Zimbabwe several times without him encountering any problems with immigration. He was unaware H

Gwaunza JA

A until the opposing affidavit of the respondents had been filed *in casu* that he had been declared a prohibited immigrant. He had not been served with any papers to that effect.

Although in the court's view, Njanko's account of his responsibilities as a project advisor to Zimrights was clear and straightforward in some respects, B while lacking precision in others, the court found that the Minister, in his testimony, had not placed before it any evidence to controvert Njanko's explanations. The reasons that the Minister gave for declaring Njanko a prohibited immigrant were subjected to close scrutiny through cross-examination of the Minister by the applicant's counsel, Mr *Zhou,* and questions put to him by the court. At the end of the Minister's evidence, the C court was not satisfied that the reasons he gave carried sufficient weight to justify the interference with the applicant's right to freedom of movement that she has alleged against the respondents.

As indicated in the earlier judgment of this court, a number of authorities have stressed that an applicant such as the one *in casu* bears the onus of proving D that the interference with her fundamental rights and freedoms that she alleges was not reasonably justifiable in a democratic society: see *Kenderjian* v *Chief Immigration Officer* 2000 (1) ZLR 697 (S) at 700B-C; *Bhatti & Anor* v *Chief Immigration Officer & Anor* 2001 (2) ZLR 114 (H).

In the light of the respondents' failure to advance cogent reasons for declaring Njanko a prohibited immigrant, and given Njanko's evidence regarding his E work with Zimrights (which evidence has not been controverted), the court finds that the applicant has properly discharged the onus that she bore. The interference by the respondents with the applicant's constitutionally guaranteed right to freedom of movement has, in the final result, not been shown to be reasonably justifiable in a democratic society.

F The applicant is therefore, entitled to the relief that she seeks.

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

CHIDYAUSIKU CJ, SANDURA JA, ZIYAMBI JA & MALABA JA concurred.

G *Kantor & Immerman*, applicant's legal practitioners

Attorney-General's Office, respondents' legal practitioners

* See *Ngaru* v *Chief Immigration Officer & Anor* 2004 (1) ZLR 501 (S) — *Editor*

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S v PARADZA 2006 (1) ZLR 20 (H)

Citation	2006 (1) ZLR 20 (H)
Case No	Judgment No. HH-7-06
Court	High Court, Harare
Judge	Mtambanengwe AJ and Assessors
Heard	22 August 2005; 26 August 2005
Judgment	10 January 2006
Counsel	*C L Phiri*, with *S Musona*, for the State *J J Gauntlet SC*, with him *E T Matinenga* and *S Hwacha*, for the accused
Case Type	Criminal trial
Annotations	Link to case annotations

Flynote

Criminal law — *statutory offences — Prevention of Corruption Act [Chapter* C *9:16] — s 4(a) — public officer acting contrary to duties for purpose of showing favour or disfavour — inciting a public officer to commit such offence — not necessary that any inducement be offered — judge urging fellow judge to act in a way that would result in favour being shown to himself or a business colleague* D

Headnote

The accused, a judge of the High Court, was charged with two counts of incitement to contravene s 4(a) of the Prevention of Corruption Act [*Chapter 9:16*]. The evidence accepted by the court after a lengthy trial was that he had, as alleged by the State, contacted two of his fellow judges and asked them to intercede to obtain the release of the passport of the accused's business partner. The man in question was on bail on E a charge of murder, one of the bail conditions being that he surrender his passport. The accused told his fellow judges that the man needed it to go outside the country on business and that he (the accused) stood to lose a lot of money if the man did not do so. No inducement was offered to the other judges to intercede. The court accepted that he approached the judges in his personal capacity, as a businessman. F

Held, that inducement or the offer of a reward was not an element of the offence of corruption in terms of s 4(a) of the Prevention of Corruption Act. The requirement of a benefit to be given or

promised is an essential element only of the common law crime of bribery. It would be sufficient if the accused's intention in approaching the two judges was that they, G contrary to their duties or inconsistent with their duties as public officers, did the accused's colleague a favour by releasing his passport, or did the accused the favour of releasing his colleague's passport. In terms of s 360(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:*07], it was irrelevant whether the accused himself was a public officer, or whether he approached the two judges in his private capacity. The H

Mtambanengwe AJ

A presumption in s 15(2)(e) of the Prevention of Corruption Act would oblige the accused to adduce evidence to satisfy the court on a balance of probability that his intention in approaching the two judges to exercise favour to him or to his colleague was an innocent one. On the evidence, the accused was seeking to get the judges to show favour to his business colleague and thereby to have a favour done to himself.

B *Held,* further, that incitement is not merely making a request: an element of persuasion or inducement is necessary. The decisive question was whether the accused reached and sought to influence the mind of the other judges toward the commission of a crime. The mere act by a judge who should know better, of approaching another judge to ask him to exercise his discretion in entertaining an application coming before him, C or arranging for him to entertain an application which is not before him, coupled with a statement or expression of what he stood to lose if an unfavourable or negative result should ensue, was no less than an urging or requesting for the other judge to exercise his discretion in a particular way; in other words, to do an act which is contrary to or inconsistent with his duties as such.

Cases cited D

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

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

S v de Lange 1983 (2) ZLR 9 (S); 1983 (4) SA 621 (S)

E *R v Herholdt & Ors (3)* 1956 (2) SA 722 (W)

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

R v Milne and Erleigh 1951 (1) SA 791 (A)

S v Nkosiyana & Anor 1996 (4) SA 655 (A)

R v R 1949 (2) SA 237 (T)

S v Schackell 2001 (4) SA 1 (SCA)

F *R v Zeelie* 1952 (1) SA 400 (A)

Legislation considered

Criminal Procedure and Evidence Act [*Chapter9:07*], s 360(2)(b)

Prevention of Corruption Act [*Chapter 9*:*16*], ss 4(a) & 15(2)(e) *

Case information

G *C L Phiri,* with *S Musona*, for the State

J J Gauntlet SC, with him *E T Matinenga* and *S Hwacha,* for the accused

Mtambanengwe AJ

Judgment

MTAMBANENGWE AJ: The accused, a judge of the High Court of Zimbabwe, A is arraigned before the court on two main counts and two alternative counts of incitement. The indictment states that the accused:

" is guilty of the crimes of:

1. Contravening s 4(a) of the Prevention of Corruption Act [*Chapter 9:16*] as read with s 360 (2) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (two counts)

Alternatively

2. attempting to defeat or obstruct the course of justice (two counts)

COUNT ONE

In that, on or about 15and 16 January 2003, and at Harare, the accused, being a public officer, that is to say a Judge of the High Court of Zimbabwe, in the course of his employment as such, *unlawfully and corruptly* incited Justice Maphios Cheda to do an act that was contrary to or inconsistent with his duties as a public officer for the purpose of showing favour or disfavour to another person, that is to say, the accused incited Mr Justice Mr Maphios Cheda to corruptly release the passport of Russell Wayne Labuschagne, who was facing murder allegations and whose passport was being held by the Registrar of the High Court Bulawayo as part of Labuschagne's bail conditions.

IN THE ALTERNATIVE

On or about 15 and 16 January 2003, and at Harare, *knowing that Russell Wayne Labuschagne was on bail on* murder allegations and that part of Labuschagne's bail conditions were that his Zimbabwean passport number ZL017923 was surrendered to the Registrar of the High Court Bulawayo *and that the course of justice would be defeated or obstructed if his passport was released to him, the accused* unlawfully and with intent to defeat or obstruct the course of justice, *incited Mr Justice Maphios Cheda* to exercise favour towards Labuschagne by releasing his passport in order to enable him to travel abroad to source customers for a hunting business in which the accused had an interest" (my emphasis).

Count 2, and the alternative thereto, are framed in the same words as count 1 and the alternative thereto, except for the dates and the name of the judge concerned.

When one looks at the particulars of the charges, it is clear that in essence the accused is charged with contravening s 360 (2)(b) of the Criminal Procedure and Evidence Act – that is with incitement in all instances; for clarity's sake therefore, the indictment should have read:

"accused is guilty of:

Mtambanengwe AJ

1. contravening s 360(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as read with s 4(a) of the Prevention of Corruption Act [*Chapter 9:16*] (two counts)
2. attempting to defeat or obstruct the course of justice (two counts)"

The way the indictment was framed was not, however, a fatal defect, but it had the effect that the State tried to prove, or appeared to be trying to prove the contravention by the accused of s 4(a) of *Chapter 9:16* which does not accord with the particulars of the charges, unless on the basis of the maxim *Qui facit per alium facit per se.*

The sections involved in this matter provide respectively as follows:

Section 360(2)(b) of *Chapter 9:07*:

" Any person who –

(a) …

(b) incites any other person to commit any offence, whether at common law or against any enactment, shall be guilty of an offence …"

Section 4(a) of [*Chapter 9:16*]:

" If a public officer, in the course of his employment as such:

(a) does anything that is contrary to or inconsistent with his duty as a public officer; or

(b) …

for the purpose of showing favour or disfavour to any person, he shall be guilty of an offence…"

Although the accused's counsel appreciated that in all instances the accused is charged with incitement, "an ancillary offence", as they put it, the way the indictment was framed and the way counsel for the State went about proving their case led to some untenable propositions from both sides.

It is clear that when the two main counts use the phrase "to corruptly release the passport of Russell Wayne Labuschagne," they refer to corruption as defined in s 4(a) of [*Chapter 9:16*] "namely, *a public officer, in the course of his employment as such doing anything contrary to or*

inconsistent with his duty as a public officer, for the purposes of showing favour or disfavour to any person."

G The State took the stance of trying to prove as regards the two main counts, the incitement in terms of s 360(2)(b) of *Chapter 9:07* and the doing of anything by the accused as a public officer and, in the course of his duties as such, for the purpose of showing favour to any person. They were entitled to try and do the latter following the words of the indictment, in which case H the State would have to prove that what it alleges the accused did, he did in

his capacity as a public officer, that he did so in the course of his employment A as such, and, of course, that he did so for the purpose of showing favour or disfavour to any person and in a manner contrary to or inconsistent with his duty as a public officer.

The defence, as a result of the way the indictment was framed, took the stance of emphasizing, first, that no inducement was offered to Mr Justice Cheda or B Mr Justice Chiweshe*,* maintaining that an inducement or offer of a reward was an element of the offence of corruption in terms of s 4(a) of *Chapter 9:16*. Properly understood, however, the accused did not have to offer any reward or inducement to the two judges; it would be sufficient if his intention in approaching them was that they, contrary to their duties or inconsistent with their duties as public officers, did Russell Wayne Labuschagne a favour by C releasing his passport, or did the accused the favour of releasing Labuschagne's passport. In terms of s 360(2)(b) of the Criminal Procedure and Evidence Act, it is irrelevant whether the accused himself was a public officer, or whether he approached the two judges in his private or official position as a judge.

In *S* v *Chogugudza* 1996 (1) ZLR 28 (S) at 34 D, Gubbay CJ pertinently D remarked:

> "Under s 4(a) of the Prevention of Corruption Act, an offence is committed when —
>
> (i) a public officer
>
> (ii) in the course of employment E
>
> (iii) does anything contrary to or inconsistent with his duty
>
> (iv) for the purpose of showing favour or disfavour to any person."

Only the common law crime of bribery requires a reward or inducement to be offered.

In the second place, the defence, also as a result of the way the indictment was F framed, or, perhaps, *per abuntante cautela,* emphasized the fact that the accused was acting in his private capacity as a businessman when he approached the two judges.

I now turn to briefly expand on our reasons for refusing the application for a discharge at the end of the case for the prosecution. The application was made G in terms of s 198(3) of the Criminal Procedure and Evidence Act (the Act). The defence argued that at that stage no case had been made out on which the court might convict the accused on any of the four counts he is facing. Mr *Matinenga* referred the court to *S* v *Kachipare* 1998 (2) ZLR 271 (S) at 271G H where it was held that:

> A "the wording of s 198(3) of the Criminal Procedure and Evidence Act made it clear that where, at the end of the State case there is no evidence upon which a reasonable court might convict, the court has no discretion: it must discharge the accused. The court may not exercise its discretion against the accused if it has reason to suppose that the inadequate State evidence might be bolstered by defence evidence." (Head note)

B It is sufficient to say that it must be accepted that the above is the correct statement of the law on the subject in Zimbabwe. In that case, the court (*per* Gubbay CJ) went on to say (at 276C-G):

> "Section 198(3) of the Criminal Procedure and Evidence Act provides that if, at the close of the case for the prosecution, the court considers that C there is *no evidence* that the accused committed the offence charged or any other offence of which he or she might be convicted thereon, it shall return a verdict of not guilty.
>
> 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 *A-G* v *Bvuma & Anor* 1987 (2) ZLR 96 (S) at 102F-G; D

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

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

E It is significant that s 198(3), unlike its precursor s 188(3) of *Chapter 59*, uses the word "shall" and not "may" – "it shall return a verdict of not guilty". The amendment was probably occasioned by the *dictum* in *A-G* v *Bvuma & Anor supra* at 102F that it is:

'not a judicious exercise of the court's discretion to put an accused on his defence in order to bolster the State case in a case which, standing F alone, cannot be proved'.

Hence, so far as the law in Zimbabwe is concerned, there is no longer any controversy as to whether a court may properly refrain from exercising its discretion in favour of the accused, if at the close of the case for the prosecution it has reason to suppose that the inadequate evidence adduced by the State might be supplemented by defence evidence."

G In dismissing the application, I gave brief reasons and said that I would expand on the reasons for coming to the conclusion that the accused had a case to answer. The application was based both on legal principles and on an analysis and evaluation of the evidence led by the State up to that stage.

2006 (1) ZLR p26

Mtambanengwe AJ

As regards Count 1 and Count 2 A

In support of the application, Mr *Matinenga,* in his written submissions and in oral argument, laid emphasis on the words *"to corruptly release the passport of Russell Wayne Labuschagne"* and submitted:

"in the first instance that the State has established no case such as the accused is required to answer as regards the essential requirement that B he must have acted 'corruptly'."

He went further to say:

"7. Mr Justice Cheda expressly conceded in cross-examination that the only discussion of any financial loss or gain was in relation to what Judge Paradza stood to lose. He expressly conceded that, in contrast with the approach made by Anand on 5 January 2003, *there was no* C *offer of money or any other inducement* by Judge Paradza to him.

8. 'Corruptly' requires a benefit unlawfully to be given as promised (see Joubert (ed) *Law of South Africa* vol 6 (1st re-issue 1966) para 411 at 444; Snyman *Criminal Law* (1984) 319; Milton *SA Criminal Law and Procedure Volume 2 Common Law Crimes* (3 ed 1996) 220.

9. On this basis alone, the State has failed to prove an essential element D of the offence and the accused is entitled to discharger on this count."

Suffice it to repeat that the requirement of a benefit to be given or promised is an essential element only of the common law crime of bribery, and that the corruption here involved is statutory corruption, and that requirement is not an essential element of the corruption charged, that is in terms of s 4(a) of the E Prevention of Corruption Act.

Bearing in mind that, as the charge is framed, the accused in this case is, himself, charged with contravening s 4(a) of the Prevention of Corruption Act and also of inciting others to that end, I refer to what Gubbay CJ said in *S* v *Chogugudza supra* at 34E-35C-D thus:

"… by virtue of s 15(2)(c) of the Act, if it is proved in any prosecution for F an offence in terms of s 4 that –

(i) a public officer;

(ii) in breach of his duty as such;

(iii) did anything to the favour or disfavour of any person 'it shall be presumed, *unless the contrary is proved*, that he did … the thing for the purpose of showing favour or disfavour, as the case may be, to that person'" (my emphasis);

And at 35C: "it is apparent, then, that before the State can rely on the presumptive proof of s 15(2)(c) of the Act, it must establish beyond a reasonable doubt the following factual premises: H

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(i) that the accused is a public officer;

(ii) that in the course of his employment and in breach of his duty

(iii) he did something which, objectively considered, showed favour or disfavour to another.

This leaves proof of the purpose of showing favour or disfavour to the accused to discharge. It is an element that may be described as: B

(a) a particular fact (a state of mind)

(b) a matter which he should know and can easily prove

(c) a mater difficult for the State to prove."

Applied to the facts of this case, the presumption in s 15(2)(c) of the Act would C oblige the accused to adduce evidence to satisfy the court on a balance of probability that his intention in approaching Mr Justice Cheda and Mr Justice Chiweshe to exercise favour to him or to Labuschagne was an innocent one. In my view, the mere fact that, unlike in *S* v *Choguguza,* the two judges are not the accused makes no difference in principle, the plain fact being that the accused was seeking to show favour to a business colleague and thereby to D have a favour done to himself. *Chapter 9:16* describes "public officer", *inter alia,* as "a person holding or acting in a paid office in the service of the State …", and says "in the course of his employment as such".

The other broad ground of principle on which the application was sought to be supported was that, what the accused did when he approached Mr Justice Cheda and Mr Justice Chiweshe was not incitement or did not amount to E incitement. In support of this argument, defence counsel heavily relied on *S* v *Nkosiyana & Anor* 1966 (4) SA 655 (A) where at 658H-659A, Holmes JA held that:

> "… in criminal law, an inciter is one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal F ingenuity being legion, the approach to the other's mind may take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, *inducement*, goading, or the arousal of cupidity. The list is not exhaustive. The means employed are of secondary importance; the decisive question in each case is whether the accused *reached and sought to influence the mind of the other person towards the commission of a crime."*

G Once again, in this regard counsel emphasized the word *"corruptly, that is, for the reason explained, against the offer of a benefit"*, to quote counsel's own words. As can be seen from the above passage from *S* v *Nkosiyana,* "inducement", which would encompass the offer of a benefit, is only one of the various ways Holmes JA listed in describing how the crime of incitement H may be committed, and, as the learned Judge of Appeal emphasized; the

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decisive question is the intention of the accused. In the present case the A presumption operates whether or not the accused is himself charged as contravening s 4(a) of [*Chapter 9:16*] or of influencing others to contravene that Act.

The third ground on which the discharge was sought was the nature of the evidence led so far on behalf of the State. That evidence included the transcript B of the conversation that took place between the accused and Mr Justice Cheda 16 January 2003. The submission was that the transcript provisionally then admitted as exhibit 16 was, quote, "so manifestly unreliable that no reasonable court could safely convict on it, and that on the reasoning in *S* v *Kachipare, supra,* the court was obliged to grant the discharge".

Justice Cheda was cross-examined extensively on the transcript. At the time C this application was made the defence said they no longer sought the exclusion of that evidence. I take this opportunity now to deal with Justice Cheda's evidence.

[*The learned judge then proceeded to describe the evidence and cross-examination in detail*] D

The only comment that can be made for present purposes is that Justice Cheda's evidence in chief and in cross-examination must be read in conjunction with the three passages from exhibit 16, which passages must be read in the context of the whole transcript, the gist of which, notwithstanding the gaps and the inaudibles in it, is clear.

In *A-G* v *Bvuma &Anor* 1987 (2) ZLR 96 (S) at 102D Dumbutshena CJ agreed E with the view expressed by Bekker J in *R* v *Herholdt & Ors (3)* 1956 (2) SA 722 (W), at p 723, namely:

> "I have no doubt that the discretion which is so vested in a court is to be exercised judicially; and that, as a general rule, but not apparently without exception, an accused person should be discharged if at the close

of its F case, the prosecution has failed to present evidence upon which he might be convicted. *It is, of course, beyond question that in a particular case the attendant circumstances, which I do not propose to circumscribe or to define, might be such that a failure of justice could possibly result if an accused person were to be discharged at the close of the case for the prosecution, and though it has failed to present a necessary degree of* G *evidence. But the attendant circumstances in such event should , in my opinion, at least be of such a nature as to afford the necessary grounds upon which that discretion could be judiciously exercised"* (my emphasis).

There are special circumstances in this case, of the nature indicated in the above passage, whatever criticism is made of Mr Justice Cheda's conduct and the shortcomings of the transcript, exhibit 16; they are the following: H

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(a) the conversation on 15 January leading to that of 16 January 2003 was at the initiative of the accused;

(b) when the approach was made to him, Mr Justice Cheda was not seized with the matter of the application for the alteration of Labuschagne's bail conditions (as indeed the accused was later to stress); B

(c) the request for Mr Justice Cheda to look at the matter and to exercise his discretion and to see if it was safe to relax these bail conditions by releasing the passport, was extraordinary, in the sense that the accused knew that the accused's legal representative Joseph James was going to file an application to that end and the accused had a personal interest in a favourable outcome of that application; C

(d) according to Mr Justice Cheda's uncontradicted evidence, the accused knew that Justice Cheda had given a negative judgment on an earlier application by Labuschagne to the same effect and that application was turned down on the ground that Labuschagne might abscond;

(e) when the accused approached Mr Justice Cheda, the latter had, three D weeks earlier, been approached by Anand with a clear and direct attempt to bribe him, and when, later he was approached by the accused, he felt, understandably, that he was being compromised — a feeling which he described — in cross-examination;

(f) Mr Justice Cheda first reported the accused's approach to him to the Judge President and also to two fellow judges; E

(g) There was before the court the evidence in the form of affidavits put in by consent. I refer in particular to Exhibits 13, 14 and 15 (these explain the process of Labuschagne's trial and the various efforts he made to secure the release of his passport from 18 December 2000 onwards (Exh. 13), the proper procedure in making bail applications (Exh. 14). And the fate of Labuschagne's application for alteration of his bail conditions before Mr F Justice Cheda (Exh. 15. [These affidavit were then reproduced verbatim]

(h) In his evidence, Mr Justice Chiweshe said the accused approached him by telephone on 24 January 2003 to say an application for the variation of Labuschagne's bail conditions would be placed before him that morning for the release of the passport. At the time he had no relevant G papers before him. He was surprised when later that day the papers came. The accused revealed that Labuschagne was his business partner and that he was standing trial for murder that had occurred along the Zambezi. He said he told the accused that he had dealt with a similar application in which Labuschagne sought to uplift his passport in order to attend a fishing convention in South Africa which applications he had refused (his H full evidence will be referred to again later in this judgment.)

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In my brief reasons for refusing the application, I also said I would expand on A the probabilities. It is trite law that the probabilities in any case have to be weighed in order to determine the truth of the stories told by witnesses. Georges JA in *S* v *de Lange* 1983 (2) ZLR 9 (S); 1983 (4) SA 621 (ZS) said at 624 H:

> "An appraisal of the probabilities inherent in the story given by a witness B is an essential part of the evaluation of the truth of that story."

And in *S* v *Schackell* 2001 (4) SA 1 (SCA) at 13 para 30 it was said:

> "… of course it is permissible to test the accused's versions against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be C true."

The probabilities in this case cannot be considered independently of the position and duties of a judge. See *R* v *Zeelie* 1952 (1) SA 400 (A) where at 402G, Schreiner JA observed:

> "The fact that Mariam Myburgh was a prostitute is a factor in assessing D her credibility and in weighing the probabilities of the case."

During his address on the question of a discharge, I asked Mr *Matinenga* if what the accused did in approaching Mr Justice Cheda and Mr Justice Chiweshe did not amount to asking for a favour, and in reply counsel said:

> "One needs to go further because one needs to ask whether that approach is being made corruptly." E

The proper question, in my view, is whether the approach was with the intention that they act corruptly, i.e. in terms as s 4(a) of *Chapter 9:16* prescribes.

My view then was, and still is, that the statutory corruption created by s 4(a) of the Prevention of Corruption Act contains no such element. See F *Chogugudza*'s case, *supra*, at p 34 D and 35C-D.

As Mr *Matinenga* later conceded:

> "The two judges were asked by Judge Paradza … to do a particular thing as a way of exercising their respective judicial discretions and one therefore cannot only look at that which they were asked to do in their judicial functions, without looking at the circumstances surrounding it." G

I agree.

The submission in respect of count two and the alternative thereto was on the same principles and argument as on count one and the alternative count of the same. H

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A That the taping of the conversation between the accused and Mr Justice Cheda on 16 January 2003 and the resultant transcript were of a poor quality is amply testified to by those who dealt with these matters. The court itself tried to listen to the tape and discontinued the attempt because of the poor quality of the recording. However, defence counsel did not in the end insist on the transcript being excluded, and, as said earlier, the court had ruled it provisionally B admissible. The main reason for the ultimate position taken by the defence *vis-à-vis* this evidence is that counsel could and did make use of parts of the transcript that reflected points counsel felt were in favour of the accused, and cross-examined Mr Justice Cheda on the same to great effect. So, in the final analysis the transcript, Exhibit 16 is part of the evidence the court took into C account at this stage, and has to take into account when, at the end, it comes to make an overall assessment of the evidence as a whole.

According to State counsel, Mr *Phiri,* the State had established the factual premises mentioned in *Chogugudza*'s case, *supra*, at p 35 for the presumption in s 15(2)(e) to kick in. Section 15(2)(e) of *Chapter 9:16* provides:

> "(2) If it is proved in any prosecution for an offence in terms of section D *three* or *four* that —
>
> (e) any public officer, in breach of his duty as such, did or omitted to do anything to the favour or prejudice of any person, it shall be presumed, unless the contrary is proved, that he did or omitted to do the thing for the purpose of showing favour or disfavour, as the case may be, to that person."

E In *Chogugudza*'s case, *supra*, at p 42, Gubbay CJ said:

> "The *actus reus* of the offence of contravening s 4(a) of the Prevention of Corruption Act having been proved by the State, it was for the appellant to displace the presumption by satisfying the trial court that his purpose of showing favour was legitimate; that in doing what he did, he had acted F with an innocent state of mind. It was not for him to establish that his evidence on this aspect was necessarily true – only that on a preponderance of probabilities it was true."

Mr *Phiri* submitted that it was now up to the accused to prove he had done what he did "with an innocent mind", i.e. with innocent intent. In the circumstances of this case, the intention would, in my view, refer to what the G accused intended the two judges to do when he approached them.

Mr *Matinenga* argued for the defence that *S* v *Chogugudza* did not apply to the facts of this case because, according to him, everything was already before the court, and everything pointed to the

accused not having committed an offence. He asked if the accused was being called upon to fill the gap in the H evidence of the State. He did not, however, expressly argue that the presumption

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in s 15(2)(e) of the Act did not apply, nor is there any such mention in the written A submissions he presented to the court at that stage, nor did he say so in his reply to Mr *Phiri*'s submissions.

The question of the accused's intention in asking Mr Justice Cheda and Mr Justice Chiweshe to entertain the application for the variation of Labuschagne's bail conditions, or, as he would have the court to believe, B to look at and assess the record in Labuschagne's matter, is a matter of inference in this case, in as much as is the alleged knowledge on his part that the ends of justice would be defeated or obstructed, if Labuschagne's passport were released. As was said in *S* v *Chogugudza* at p 35 "proof of the purpose of showing favour or disfavour … is an element that may be described as:

(a) a particular fact (state of mind); C

(b) a matter which he should know and can easily prove;

(c) a matter difficult for the State to prove."

It was on the consideration based on circumstances outlined above and the evidence so far led that the court exercised its discretion to the effect that the accused be put on his defence. D

THE ACCUSED'S EVIDENCE

It will be noticed that, in amplifying the court's reasons for the ruling on the application for the discharge of the accused at the end of the case for the prosecution, I have covered as much as possible the evidence of most of the main State witnesses. I will refer to that evidence where further reference to E it is necessary and in comparison with accused's evidence.

The accused was appointed a judge of the High Court in 2001. Before that, he had run a legal firm called Paradza and Partners. Prior to his appointment he, together with other ex-combatants of the liberation struggle, had been a beneficiary of a land redistribution exercise carried out by the Government; F they had been offered pieces of land in the Kwekwe Area called Circle G which is part of a conservancy called Midland Black Rhino Conservancy, the principal activity there being hunting. His involvement in that commercial enterprise was known to the Government when he was appointed as a judge, and it is common knowledge that other judges engage in and have business interests and carry on activities such as farming; judges discuss such G personal activities in the course of their work.

The accused said that Mr Justice Cheda was a close friend and that he phoned him on 15 January 2003 "primarily" in "a personal capacity," he did not hide his personal interest in Labuschagne's matter, he said.

When he phoned Mr Justice Cheda he had not done so in his "public office", H he was pursuing an interest which was purely personal, which had nothing

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A to do with "my functions as a judge". He was not seeking to do any favour or disfavour to Mr Justice Cheda; [*Portion of the evidence are ommitted here.*]

He said all he asked Mr Justice Cheda was to acquaint himself with the record before they could discuss anything further. Mr Justice Cheda was supposed to phone him back after that.

B [*The learned judge considered the evidence and continued.*]

I pause here to say if this part of his evidence is true it is very strange that Mr Justice Cheda would report the matter to the Judge President or to his fellow judges, let alone to the police, or that it would engender the alarm in Mr Justice Cheda that he was being trapped; the probabilities strongly suggest that that evidence by the accused is false.

C [*Following a verbatim transcript of the cross examination, the judgment continues*.]

In concluding his evidence in chief, the accused was asked a series of questions which led him to deny: D

(i) that he had sought to corrupt Mr Justice Chiweshe or Mr Justice Cheda;

(ii) that he had sought to influence Mr Justice Chiweshe to show favour or disfavour to any person;

(iii) that he had sought to have either judge to conduct himself in a manner that would have the effect of defeating or obstructing the course of justice.

E [*The judgment then detailed the defence outline and further cross-examination. The evidence given by the three judges who were state witnesses was included verbatim and discussed.*]

I now turn to consider the law. But before doing so, I would like to make some preliminary observations on various aspects of the evidence.

F The first point I would like to make is in the form of a question: What motivated Mr Justice Cheda to go to the police on 16 January 2003?

The answer to the question is, in my opinion, to be found in the evidence of the two judges, that is Mr Justice Cheda and Mr Justice Chiweshe.

The alarm Mr Justice Cheda felt would not be explicable in terms of the G accused's evidence, that he asked him to do two things only, on 15 January 2003:

(a) to check the record of the Labuschagne matter and to advise him how far the matter had gone, and what the charges were;

(b) to check the record and see what Labuschagne's chances of success were H if he should apply to have his bail conditions altered.

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These objectives of the accused when he approached Mr Justice Cheda on A 15 January 2003 would not cause any alarm in a friend; they are in themselves quite innocent objectives or enquiries by a friend and fellow judge, not worth reporting to the Judge President, let alone the Police. Mr Justice Cheda's evidence finds corroboration in Exhibit 16 which reflects in its imperfect way that it is a follow up to that first telephone conversation despite Mr Justice B Cheda's hazy recollection thereof. The Exhibit does not in anyway corroborate the accused's version of what he said transpired during that conversation. The probabilities as to where the truth lies in this connection are heavily weighted against the accused's version. And for a number of reasons, which I will detail later when I come to consider the probable value of Exhibit 16, I find that the accused's version cannot be accepted as reasonably possibly true: C I do not agree that, as defence counsel submitted, the transcript supports the accused's version. Justice Chiweshe's evidence read with the two exhibits 13 and 14 and Mr Justice Kamocha's evidence reveals such keen interest and persistence in the matter by the accused that it cannot be doubted he was bent on assuring a favourable outcome to Labuschagne's application. That inference is inescapable. D

The next preliminary point I would make is that when the application to exclude the transcript was made, it was after some evidence was led on behalf of the State. The defence did not renew the application to have the court rule the transcript inadmissible as evidence obtained illegally. I have already given the reason why and stated that the transcript is part of the evidence to be E considered in the totality of the evidence in this case at the end.

The point was made by defence counsel that Mr Justice Cheda's conduct in going to the Police was despicable in that, as a judge, he allowed himself to be used to trap a fellow judge instead of resolving the matter in-house with the Judge President. Rightly, in my view, Mr Justice Cheda described the suggested option that was put to him as viable if one took an armchair F approach to the situation he was in.

The defence placed a lot of emphasis on the concessions made by Mr Justice Cheda under cross-examination as to whether the two conversations supported the charges levelled against the accused, to argue, at the stage the application for a discharge was made, that if the principal State witness conceded that G much, how can there be proof beyond reasonable doubt. Though this submission was not repeated at the end i.e. in the defence's closing submissions, the fact is those concessions were hedged, briefly, to the effect that only if the said concessions are taken in

isolation can that be said to be the case. Mr Justice Cheda repeated that observation several times in cross-examination. H

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A **INCITEMENT**

It is true, as defence counsel submitted, that both the main counts and the alternative counts thereto are based on the allegation that the accused incited Mr Justice Cheda and Mr Justice Chiweshe to commit an offence. I have also indicated earlier in this judgment that, although the State tried to prove, apparently in accordance with the way the indictment was framed, that the B accused himself contravened s 4(a) of the Prevention of Corruption Act, the indictment, for clarity's sake, could have been framed as contravening s 360(2)(b) of the Criminal Procedure and Evidence Act as read with s 4(a) of the Prevention of Corruption Act, unless one applied the Latin maxim *qui facit per alium facit per se*.

C It is clear, however, that whichever way one looks at it, in essence the accused, in both the main and the alternative charges is charged with an ancillary offence of inciting. Thus:

IN COUNT 1 AND 2

The accused is charged with inciting Mr Justice Cheda and Mr Justice D Chiweshe respectively to commit an offence, namely that they (the two judges):

(i) as public officers;
(ii) in the course of their employment as such;
(iii) to release Labuschagne's passport; E
(iv) in a manner contrary to or inconsistent with their duties as public officers;
(v) for the purpose of showing favour or disfavour to Labuschagne or the accused.

(It makes no difference which as both had an interest in the release of the passport.)

The evidence of the accused is that he approached both Mr Justice Cheda and F Mr Justice Chiweshe in his personal capacity and not in his capacity as public officer. This much was emphasized in his evidence in chief and was repeated by him in cross-examination, and in the cross-examination of State witnesses, Mr Justice Cheda and Mr Justice Chiweshe in particular. Section 360(2)(b), however, provides:

> G "Any person who …
> (a) …
> (b) incites any other person to commit any offence, whether at common law or against any enactment, shall be guilty of an offence ..."

The issue therefore, is whether what the accused did in approaching either H judge amounts to incitement and whether what he requested each to do was for the purpose of showing favour or disfavour to Labuschagne or to the

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accused, and in a manner contrary to or inconsistent with their duties as public A officers, in other words, corruptly. I have said earlier in this judgment that "corruptly" in this context has nothing to do with any offering of a benefit. Any such notion is alien to the elements of statutory corruption as defined in the Prevention of Corruption Act. A public officer who in the course of his employment as such does anything that is contrary to or inconsistent with his B duty as a public officer acts corruptly if what he does is for the purpose of showing favour or disfavour.

Counsel for the accused referred the court to the *Law of South Africa First Reissue Vol 6 Criminal Law* where at p 443 – 444 the provisions of the South African Corruption Act of 1992 are discussed. Under para 411, the authors say:

> "Corruption is an offence under the Corruption Act. The Act has repealed C the common law relating to bribery as well as the Prevention of Corruption Act."

The Corruption Act provides that any person:

> "(a) who corruptly gives or agrees to give any benefit of whatever nature which is not legally due, to any person upon … will be guilty of an D offence."

The authors go on to say (at page 444):

> "The elements of this are: (a) unlawfulness; (b) the act; (c) the benefit; (d) the person in respect of whom corruption may be committed; and (e) the intent."

It will immediately be noticed that the benefit element is missing from our E Prevention of Corruption Act [*Chapter 9:16*]. It follows that the great emphasis laid by the defence on whether the accused offered or promised Mr Justice Cheda or Mr Justice Chiweshe any benefit is misplaced.

I have already quoted how Holmes JA described an inciter in *S* v *Nkosiyana supra* at 658 H-659 A. In *Rex* v *R* 1949 (2) SA 237 (T) at 239, Mullin J F considered the meaning of the word "incitement" and observed:

> "Mr *O'Hagan* has referred the court to a definition of the word "incitement" which was offered in the case of *Rex* v *Welcome* 1936 EDL 26 and which has been adopted in *Gardiner & Lansdown* at p 102 of the first volume of the present edition, and in the words there cited it was said that an ordinary request was not necessarily incitement but that there ought to G be proved some element of persuasion or inducement. Then Mr *O'Hagan* has referred the court to the *Shorter Oxford Dictionary* in which 'incitement' has been defined as 'The action of inciting or rousing to action; an urging, spurring, or setting on; instigation, stimulation,' 'Persuasion' or 'inducement' is not there mentioned.
>
> It is not necessary and, in fact, it would be undesirable to attempt to lay H

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> A down an exhaustive definition of what is meant by the word 'incite' or 'incitement' in the section. I shall assume with Mr *O'Hagan* that at any rate an element of persuasion or inducement is necessary. If that is so, I find that such elements are present on the evidence in this case. These women, according to the attitude adopted by them, were not willing to have intercourse with the appellant unless he offered some inducement. B When he proposed intercourse one of them said in effect 'that is all very well, but how much are you going to pay?' and he then offers 10s. she bargained and said 'you mean 10s. for each us?' and he said 'yes', and she remarked that the prices was satisfactory. He then asked if he could sleep with her that night and she answered that it was a little early. It seems to me that this contains the element which Mr *O'Hagan* says is necessary. C There is clearly persuasion and inducement, and the appellant by his conduct can rightly be said to have incited these women to commit a contravention of Act 5 of 1927."

Although in that case the learned judge assumed that the element of inducement was necessary, his remarks are consonant with Holmes JA's remarks in the passage referred to above at 658H from *S* v *Nkosiyana*, namely:

> D "The machinations of criminal ingenuity being legion, the approach to the other's mind may take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading or arousal of cupidity. The list is not exhaustive."

And, as Holmes JA went on to say:

> E "The means employed are of secondary importance; the decisive question in each case is whether the accused reached and sought to influence the mind of the other person toward the commission of a crime."

In *R* v *Zeelie* 1952 (1) SA 400 (A) at 402F, Schreiner JA considered 'an offer or proposal … the minimum requirement for an incitement'.

An article on the crime of incitement by Profession CR Snyman of the F University of South Africa was brought to my attention. Unfortunately it is in Afrikaans but the English summary contains the following useful indication of what the article discusses:

> " THE CRIME OF INCITEMENT
>
> The subject of this article is the crime of incitement. First, attention is G drawn to the *raison d'être* of the offence, namely to enable the authorities *to nip criminal activities in the bud at an early stage, before such activities can result in harm, as well as to dissuade people to influence others to commit a crime*. Thereafter, the act of incitement is discussed. The different ways in which it can be committed, such as by encouragement, persuasion and the making of a proposition, are considered. *The* H *requirement that the wording of the incitement must not be vague, but*

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be sufficiently concrete to enable the incitee to understand the import A *of the words, is examined. The inciter must describe the crime he or she wants the incitee to commit as well as the identity of the proposed* victim in sufficient detail for the incitee to understand what is expected of him or her" (my emphasis).

With these observations in mind, I proceed to examine the accused's conduct more closely in order to answer the question indicated above, namely: B

1. Did the accused's approach and request to Mr Justice Cheda and to Mr Justice Chiweshe amount to incitement to contravene s 4(a) of the Prevention of Corruption Act?
2. For this exercise, I accept that the accused approached both judges in a personal capacity as he insisted. This does not suggest of course that he C is divested of his position as a judge, merely that he was acting in his personal capacity as a judge conducting his legitimate business affairs.

The evidence established beyond reasonable doubt the following facts:

(A) IN THE CASE OF MR JUSTICE CHEDA:

(i) That Mr Justice Cheda was not seized with an application to alter D Labuschagne's bail conditions – a fact which the accused knew when he approached him by telephone on 15 and 16 January 2003.

(ii) According to the accused, the approach was to Mr Justice Cheda as a friend the accused was comfortable to approach.

(iii) At the time, the accused approached Mr Justice Cheda, Labuschagne's murder trial before Kamocha J had been postponed for judgment. E

(iv) What the accused said he asked Mr Justice Cheda to do on 15 January 2003 was not the same as he requested him to do in the taped telephone conversation on 16January 2003. The accused initiated the conversation on 15 January 2003.

(v) At the time, the approach was made, Mr Justice Kamocha, to the F knowledge of the accused, was stationed at the High Court in Harare next door to the accused. The accused had been told by Ralph Nkomo, Labuschagne's business partner, at least that Mr Justice Kamocha had been dealing with the Labuschagne matter. (See Exhibit 16 at pp 5 and 10)

(vi) At the time of approaching Mr Justice Chiweshe, the accused knew G Joseph James of the Bulawayo legal firm Moyo-Majwabu & Nyoni was representing Labuschagne.

(vii) In the taped conversation on 16 January 2003, Mr Justice Cheda twice asked accused:

"So what do you want me to do there. So what do you yourself want me H

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A to do now?" (pp 3 and 5, Exhibit 16)

His answer to the first question was:

B "He wanted his, I mean … passport so that at least he can prepare for the hunting, what do you call it, which is coming",

And to the second question was:

"You know, just to assess, you can assess and see whether do you think that it's safe maybe, to give him, just to give him for say some two or so months or just to enable him to sort out."

That means he requested the releasing of Labuschagne's passport, full stop.

(viii) According to Exhibit 16 on 16 January the accused was twice told by C Mr Justice Cheda that an Indian person had approached Mr Justice Cheda about Labuschagne's passport and offered him a bribe or suggested "there is money" (see p 3 & 8 of Exhibit 16), albeit on the second mention of the money the accused expressed some revulsion at the idea and said it was wrong.

(ix) In the taped conversation on 16 January, the accused mentioned that D Labuschagne and Ralph Nkomo were his business partners and that he stood to lose or gain US$60 000 if Labuschagne's passport was not released to enable him to travel abroad to scout for clients.

There is no doubt therefore that the accused was requesting Mr Justice Cheda to do him a favour or to do Labuschagne a favour by releasing Labuschagne's passport, notwithstanding that he indicated the application for the release of E the passport could be placed before another judge. In brief, the

accused was urging, requesting and suggesting that Mr Justice Cheda should release Labuschagne's passport by entertaining an application to that effect. Were that not the fact the talk about exercising discretion, which features a lot in exhibit 16, and in the cross-examination of both Mr Justice Cheda and Mr Justice Chiweshe would be completely meaningless, and both to no purpose.

F (b) In the case of Justice Chiweshe:

(i) The accused knew that Labuschagne was appearing before Justice Kamocha on a murder charge.

(ii) When he approached Justice Chiweshe the accused knew the application for the alteration of Labuschagne's bail conditions G (specifically for the release of his passport, was going to be placed before) Mr Justice Chiweshe that day. Mr Justice Chiweshe did not know that fact.

(iii) The accused did not directly deny Mr Justice Chiweshe's evidence that the accused requested him to release Labuschagne's passport, or exercise his (Mr Justice Chiweshe's) discretion to that end; he did H not deny the evidence either expressly or when counsel cross-

examined Mr Justice Chiweshe. A

(iv) The accused also told Mr Justice Chiweshe that he had an interest in the matter.

(v) The bail application was placed before Mr Justice Chiweshe as the accused had said. This means the accused was in the know regarding developments either from Ralph and Rusty or from Joseph James or B from the Registry officials at the High Court, Bulawayo: he could have found out what he wanted to know about the matter other than by going to Mr Justice Chiweshe if his intention was not to influence him.

I find that the accused's talk about the two judges exercising their discretion is a mere pretext because the accused, as a judge, would know that either judge as a judge would exercise his discretion – why then approach Mr Justice C Chiweshe when he got to know the application was coming before him, if not to seek a favourable outcome, in other words, to seek to influence the judge to rule in his favour? That inference is inescapable in both instances.

In determining whether the accused was activated by a guilty mind, regard must be had to the extent to which the accused's evidence was weakened, rather totally nullified by the cross-examination. This is so particularly in D regard to the accused's claim that all he asked of Mr Justice Cheda and Mr Justice Chiweshe was that they look at the record in the Labuschagne matter and advise him what the charges were and how far the matter had gone etc.

Looked at in this way, the court had no doubt whatever that the accused lied in that regard. That was a crucial aspect of his evidence, and if the accused E was prepared to lie in this regard, as the court finds he did, the inference that the accused was actuated by a guilty mind becomes completely inescapable.

If his evidence is to be believed, one finds most remarkable two other aspects of the accused's evidence. If his endeavours in approaching Mr Justice Cheda and Mr Justice Chiweshe were other than to influence them, he could easily have found out from Ralph Nkomo the day he was told of Labuschagne's need F (Labuschagne himself being present at his chambers), so why not hear from the horse's mouth? Alternatevely, he could have easily got that information from Mr Justice Kamocha next door after he was told that the matter was being postponed by Mr Justice Kamocha. This lack of enquiry is matched by his extraordinarily nonchalant attitude to the information that an "Indian chap" G had tried to bribe Mr Justice Cheda. According to him, he met and had coffee with Ralph and Labuschagne after 16 January and before the approach to Justice Chiweshe on the 24 January 2003; he gives the lame excuse that he could not discuss with the public the attempted bribery of Mr Justice Cheda. But Labuschagne and Ralph Nkomo were not the public in that sense; they were his business partners who had approached him on that very basis. If, as H

A he said, he thought of many things, the possibility that these people, Ralph and Rusty, might compromise him should have crossed his mind, and should have led him to at least verify if indeed

Labuschagne had sent Anand, the Indian, to do what Justice Cheda complained he did, and if his expression of revulsion when appraised of that particular incident during the conversation on 16 January was genuine, one would have expected him to mention it to B Labuschagne and Ralph Nkomo during the time he met them after 16 January 2003.

It was contended on the accused's behalf that:

(i) he was open to both Mr Justice Cheda and Mr Justice Chiweshe about his business interest involving Ralph Nkomo and Labuschagne;

C (ii) that he approached them in his personal capacity;

(iii) that the impropriety of his conduct was a matter for another forum, the Tribunal set up in terms of s 87 of the Constitution to investigate that conduct;

(iv) that the transcript of the tape recording of his conversation with D Mr Justice Cheda on 16 January 2003 was of such poor quality it could not be relied upon;

(v) that despite the three passages singled out from the conversation on 16 January, namely:

Page 5 para 7;

E Page 9 para 2; and

Page 10 para 4.

[*These were then quoted verbatim.*]

and despite pressure by Mr Justice Cheda, the accused refused to make the direct request suggested by Mr Justice Cheda, as Mr Justice Cheda F had to concede, that this cannot be incitement and that these three passages are evidence that the accused was consistent in the request that Mr Justice Cheda "considered the matter independently and report back to him";

(vi) that as regards the critical event of 16 January 2003 the court is left with a recording of very poor quality, such that it itself cannot verify what in G fact passed or also cannot rely exclusively on the evidence of persons like Mr Justice Cheda (because he says he has no independent recall outside the transcript) , the court is placed in an impossible position in this regard, and that there is — in relation to 16 January 2003 – no evidence which could form even a potentially reliable basis for a conviction.

H (vii) that to urge or encourage an official to carry out an act is not enough to

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constitute incitement in respect of statutory corruption because variation A by a judge of a bail condition is not a crime; the matter only becomes a crime if the State has proved beyond reasonable doubt that there was a request by the accused that the bail condition be changed by Mr Justice Cheda (or Mr Justice Chiweshe under Count 2) "for the purpose of showing favour or disfavour".

I turn to deal with these contentions one by one. B

That the accused was open about his business connections and interests was not disputed by Mr Justice Cheda or Mr Justice Chiweshe, but of course, that was the motivation behind his approach to the two judges. This point and the next point, namely, that he approached them in his personal capacity, were in the context of the incitement charged, only steps that led him to approach the C two judges. He was personally motivated by his business interests to approach them as he did because, as he said to both judges he stood to lose US$60 000 if the passport of Labuschagne was not released. To argue that any credit should be accorded him for his openness, in assessing his credibility would appear to be making virtue out of necessity. In any case s 360(2)(b) of the Criminal Procedure and Evidence Act talks of "any person" with no D reference to capacity or station of the person; it is all-embracing. The accused had to reveal his business interests in order to move or persuade the two judges to act in the manner he intended.

Whether the accused's approach to the two judges was improper merely in the sense that it did not amount to incitement, is a point that counsel for the accused highlighted throughout in cross-examining State witnesses like E Mr Justice Cheda or Mr Justice Chiweshe. That to the extent that this conduct does not amount to criminal incitement is a matter for the Tribunal to deal with goes without saying. This court is not constituted to judge acts of public officials that may be improper in that sense. However, this court is fully competent to adjudicate whether any such conduct amounts to an offence, F like the offence here charged. As appears from the charges levelled against the

accused that is essentially what this court has to decide. In *R* v *Milne and Erleigh (7)* 1951 (1) SA 791 (A), Centlivres CJ had the following to say at 822 C-D:

> "It would, I think, be straining the language of the legislature to hold that, when an inciter incites an incitee to do an act which to the knowledge of G the inciter would not be a crime on the part of the incitee on the ground that he had no *mens rea* but would be a crime on the part of the inciter, the latter is guilty of contravening the section. It is true that the inciter has a guilty mind and is morally culpable, but, speaking generally, the law is not concerned with punishing persons with guilty minds unless such persons do some act of a criminal nature. H

2006 (1) ZLR p43

Mtambanengwe AJ

> A It cannot, in my view, be said that the object that the Legislature had in mind when enacting s 15(2)(b) of Act 17 of 1914 was to punish in every case where an inciter has a guilty mind."

His Lordship was there dealing with s 5(2)(b) of Act 17 of 1914 which is in similar language to the language of s 360(2)(b) of *Chapter 9:07* providing:

> B "Any person who incites, instigates commands or procures any other person to commit any crime … shall be guilty of an offence."

In the present case, for the two judges to accede to the accused's request would constitute the offence created by s 4(a) of *Chapter 9:16*. It is common cause, or it cannot be disputed that the recording of the conversation between the accused and Mr Justice Cheda on 16 January is very poor; the transcript thereof C shows many gaps which even the accused could not fill; what was said in those places cannot be guessed. The point is, however, that despite those gaps the gist of it is clearly discernable from the rest. Both the defence and the State were able to cross-examine the concerned witnesses to great effect using those parts that came out clearly in the transcript. It is true, of course, that the court cannot rely on the transcript alone. This deals with points (iv), D (v) and (vi) above.

As to the three passages singled out (quoted above), to say that they show that the accused was under pressure from Mr Justice Cheda is an unwarranted exaggeration. Sight must not be lost of the fact that the conversation was a follow up the conversation on 15 January which the accused initiated. Also sight must not be lost of the fact that a fellow judge, a friend of the accused, E felt he was being trapped it was improbable and that he would report the approach on 15 January 2003 to anyone if that approach entailed nothing more than what the accused said it entailed.

It is true that the accused's request as reflected in those passages was not direct, it was hedged or guarded, nevertheless it was not as if Mr Justice Cheda F put words into the accused's mouth. Mr *Phiri* for the State remarked that the accused became suspicious. The cordial or close friendship that existed between accused and Mr Justice Cheda before 15 January 2003 was characterized by the accused describing Mr Justice Cheda as the man he was "comfortable" to talk to about the matter he approached him on: the reasonable inference to be drawn is that on 15 January accused indicated what he wanted G Mr Justice Cheda to do was clearly enough to alarm Mr Justice Cheda. Otherwise it is completely incomprehensible why Mr Justice Cheda would react the way he did and would go to the extent he did just because a friend and fellow judge had asked him to verify the contents of a file he was interested in. The above comments are merely meant to emphasise the point that the transcript must be understood or interpreted with proper regard to it as a whole H and to other evidence adduced in the matter, and of course to the probabilities inherent in the circumstances and otherwise.

2006 (1) ZLR p44

Mtambanengwe AJ

[The learned judge then discussed the concession made by Mr Justice Cheda A and concluded that they did not assist the defence case.]

To sum up, I find the accused's story, that all he asked either Mr Justice Cheda or Mr Justice Chiweshe was to look at the record of the Labuschagne matter to see what the charges he was facing were, how serious they were, and how far the matter had progressed; and that he never asked them to release B Labuschagne's passport, but to look at the record merely to assess Labuschagne's prospects of success if he should apply for the variation of his bail conditions, to be untrue beyond reasonable doubt.

The mere act by a judge, who should know better, of approaching another judge to ask him to exercise his discretion:

(a) in entertaining an application, coming before him, as in the case of C Mr Justice Chiweshe; or

(b) arranging for him to entertain an application which is not before him, as in Mr Justice Cheda's case, coupled with a statement or expression of what you stand to lose if an unfavourable or negative result should ensue, is no less than an urging or requesting for the other judge to exercise his D discretion in a particular way; in other words, to do an act which is contrary to or inconsistent with his duties as such.

I find that the accused was an evasive witness and that he contradicted himself in various material respects. These considerations lead me to reject his evidence as not reasonably possibly true, that is, where that evidence differs E from that of the main State witnesses.

To come back to the four counts, the State led no evidence whatsoever to show that if Labuschagne's passport were released to him he would abscond. I cannot draw any adverse inference from the fact that the trial of Labuschagne and his co-accused had reached a stage where Mr Justice Kamocha had postponed the matter apparently *sine die* for judgment, or that Labuschagne F had made two previous applications to have his bail conditions altered so he could have this passport and travel abroad. In the result, the accused is acquitted on both the alternative charges. The accused is found guilty on the two main counts. G

Attorney-General's Office, for the State

Dube, Manikai & Hwacha, accused's legal practitioners

* *Editor's note*: The sections of the Prevention of Corruption Act referred to were repealed by s 282 of, as read with the Sixth Schedule to, the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], with effect from 1 July 2006. The corresponding provisions appear in s 174(1) and (2) of the latter Act.

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S v DZVAIRO 2006 (1) ZLR 45 (S)

Citation	2006 (1) ZLR 45 (H)
Case No	Judgment No. HH-2-06
Court	High Court, Harare
Judge	Patel J
Heard	28 October 2005; 11 November 2005; 13 December 2005
Judgment	12 January 2006
Counsel	*S Hwacha,* for the applicants *M Nemadire*, for the respondent
Case Type	Bail application
Annotations	No case annotations to date

Flynote

C **Criminal law (statutory offences)** — *Official Secrets Act [Chapter 11:09] — s 4(1)(d)(i) — essence of the offence — unauthorized disclosure of information obtained by official — motive for disclosure and prejudice to the State — irrelevance of*

Criminal law (statutory offences) — *Official Secrets Act [Chapter 11:09] —* D *s 4(2) — communication of information prejudicial to Zimbabwe — communication of information which is already well known — such communication unlikely to prejudice the State — interest of the State as reflected in the policies of Government — anything which prejudices such policies is prejudicial to the State — "security of Zimbabwe" — meaning of — concept of very wide connotation — includes a broad* E *range of matters embracing not just physical security but also the political economic and financial well being of the country*

Criminal law (statutory offences) — *Official Secrets Act [Chapter 11:09] — s 11 — Attorney-General's authority to prosecute — purpose of — authority given in respect of a contravention of s 4(2) but accused* F *charged with contravening s 4(1) — whether proceedings vitiated — not every failure to comply with s 11 fatal*

Criminal procedure — *bail — application for bail after conviction — principles guiding such application — onus upon applicant to show why he should be granted bail — liberty of the individual must be balanced against the proper administration of justice.*

G **Criminal procedure** — *plea — guilty — application to alter such plea to one of not guilty — principles guiding such application — accused must provide a reasonable explanation for change of plea — court should allow such application unless the explanation is positively false*

Criminal procedure — *plea — guilty — explanation of essential elements —* H *consequences of failure to do so — whether failure grave enough to*

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invalidate trial — detailed and elaborate admissions made by the A *applicants in agreed statements of fact — failure to explain adequately the elements of the offences not vitiating proceedings*

Headnote

All the three applicants had been convicted upon their pleas of guilty to contravening different provisions of the Official Secrets Act [*Chapter* B *11:09*]. In canvassing with two of the applicants, the essential elements of the offence charged, the trial magistrate did not delve in any great detail into the security related nature of the information disclosed or the precise manner in which its disclosure was prejudicial to the safety or interests of the country. The State and the applicants had, however, agreed upon detailed and elaborate statements of facts dealing with these aspects. C

The first applicant was charged with contravening s 4(1)(d)(i) of the Act, the charge being that he unlawfully communicated information obtained through his position as a State official to unauthorised persons. The information allegedly divulged pertained to matters of a political and economic nature in the context of Zimbabwe's foreign relations. The Attorney-General had, however, in issuing his authority to prosecute in D terms of s 11 of the Act, authorized a prosecution on a charge of contravening s 4(2)(b) of the Act. He had not at any time thereafter amended his authority or issued a new one authorizing a prosecution for the former offence in respect of which the applicant had been convicted and sentenced. E

The second and third applicants, who were not public servants, were charged with contravening s 4(2) of the Act, which makes it an offence for any person who has in his possession any document or information which relates to the preservation of the security of Zimbabwe or the maintenance of law and order by the Police Force or any other State security body or organization to publish or communicate such document or information F to any person in any manner or for any purpose prejudicial to the safety or interests of Zimbabwe. The second applicant was employed by a financial institution and the third by the ruling party. The second applicant had supplied information to foreign agents on matters relating to Zimbabwe's economic and monetary affairs, bilateral relations with neighbouring states, and reports from Zimbabwe's foreign missions G located in specified African cities. The third applicant had supplied foreign agents with political and economic information relating to the internal politics and divisions within the ruling party, the conduct of domestic elections, as well as the land issue.

They were sentenced to terms of imprisonment. Subsequently, having H

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A appealed against their convictions and sentences, they sought bail pending their appeals. A number of arguments were advanced on their behalf. It was also argued on behalf of the first applicant that, because the Attorney-General had authorised a prosecution under a different provision from that with which the applicant was actually charged, the proceedings were flawed *ab initio* and his conviction and sentence had B to be set aside.

Held, that where bail after conviction is sought, the onus is on the applicant to show why justice requires that he should be granted bail. The proper approach is not that bail will be granted in the absence of positive grounds for refusal but that, in the absence of positive grounds for C granting bail, it will be refused. First and foremost, the applicant must show that there is a reasonable prospect of success on appeal. Even where there is a reasonable prospect of success, bail may be refused in serious cases, notwithstanding that there is little danger of the applicant absconding. The court must balance the liberty of the individual and the proper administration of justice, and where the applicant has already D been tried and sentenced, it is for him to tip the balance in his favour. It is also necessary to balance the likelihood of the applicant absconding as against the prospects of success, these two factors being interconnected because the less likely are the prospects of success, the more inducement there is to abscond. Where the prospect of success on appeal is weak, the length of the sentence imposed is a factor that weighs E against the granting of bail. Conversely, where the likely delay before the appeal can be heard is considerable, the right to liberty favours the granting of bail.

Held, further, that the essence of the offence under s 4(1)(d)(i) of the Official Secrets Act [*Chapter 11:09*], which is in the nature of an absolute F offence, is the unauthorized disclosure of information obtained by the accused as a State servant. It does not require that the information should be of a military or security nature, nor that such communication should involve any prejudice to Zimbabwe. The motive for the disclosure in question is irrelevant as is the question of prejudice to the State consequent upon such disclosure.

G *Held*, further, that except in a case where the act alleged in itself evinces prejudice to the safety or interests of the State, to secure a conviction for contravening s 4(2) of the Act it is essential to establish that the manner in which or the purpose for which the accused communicated the information was prejudicial to Zimbabwe. Where information communicated is already well known, its disclosure cannot normally H operate to the prejudice of the safety or interests of the State. In the

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context of s 4(2), the interests of the State A denote the interests of the State according to the policies laid down for it by its recognized organs of government and authority. Anything which prejudices those policies is "prejudicial to the interests or safety of Zimbabwe" within the meaning of the Act. Concerning the elements of s 4(2), "the security of Zimbabwe" is a concept of exceedingly wide connotation. Without attempting any detailed or exhaustive definition of the term, it includes a broad range of B matters embracing, not only physical security, but also the political, economic and financial well being of the country. Ostensibly, the matters divulged by the second and third applicants would not invariably and necessarily relate to State security under normal circumstances. However, the court must take judicial notice of the unquestionably abnormal C political and economic circumstances that presently applied to Zimbabwe, both domestically and internationally. In this context, and without succumbing to the excesses of political paranoia, it is not inconceivable that the information and reports transmitted by the applicants did relate to the preservation of State security and that their covert disclosure to the foreign agents concerned was effected in a manner prejudicial to the D safety or interests of Zimbabwe.

Held, further, that where an accused person seeks to alter his plea of guilty to that of not guilty, he must simply offer a reasonable explanation as to why he pleaded guilty in the first instance. If his explanation holds a reasonable possibility of truth, that is, unless the court is convinced

beyond reasonable doubt that his explanation is positively false, he E should be allowed to alter his plea.

Held, further, that, as far as the inadequacy of the magistrate's explanation of the essential elements of the offence charged was concerned, he had misdirected himself. However, the vital question was whether this misdirection was such as to invalidate the entire trial proceedings. F Having regard to the detailed and elaborate admissions in the agreed statement of facts, it could not be said that the magistrate's misdirection operated to vitiate the propriety of the trial proceedings.

Held, further, that while the purpose of s 11 of the Act is to require the Attorney-General to consider personally each case on its merits and to determine whether or not the matter should be prosecuted, it did not G follow that every conviction under the Act, which is otherwise competent and proper, should be nullified for failure to comply with the section.

Held, further, that on the facts, it could not be said the Attorney-General did not apply his mind to the case against the applicant. Failure to comply with the section would not have caused any material prejudice to the application nor did any miscarriage of justice eventuate. Accordingly, H

A his conviction was competent.

Held, further, that on the facts of the case the application for bail pending appeal by all applicants had to be dismissed.

Cases cited

Chandler v DPP [1964] AC 763

B *S v Harington* 1988 (2) ZLR 344 (S)

S v Marais 1971 (1) SA 844 (A)

S v Matare 1993 (2) ZLR 88 (S)

S v Niesewand (3) 1973 (1) RLR 216 (A)

S v Savory 1973 (2) RLR 51 (A)

C *S v Tengende & Ors* 1981 ZLR 445 (S)

S v Williams 1980 ZLR 466 (A)

Legislation considered

Courts and Adjudicating Authorities (Publicity Restriction) Act [*Chapter 7:04*], s 3(1)(a) and (d)

D Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 202(3) and 203

Official Secrets Act [*Chapter 11:09*], ss 4(1)(d)(i), 4(2) and 11

Case information

S Hwacha, for the applicants

M Nemadire, for the respondent

Judgment

E **PATEL J:** The three applicants in this matter are not directly connected to one another. The first applicant is aged 47 and employed by the Ministry of Foreign Affairs as Consul-General and was the Zimbabwean Ambassador designate to the Republic of Mozambique at the time of his arrest. The second applicant is aged 42 and was employed by the Metropolitan Bank of Zimbabwe Ltd as F Company Secretary until his retrenchment in December 2004. The third applicant is employed by ZANU-PF as a Deputy Director for External Relations.

All the three applicants were convicted on 24 December 2004 on their pleas of guilty to several charges of contravening s 4 of the Official Secrets Act [*Chapter 11:09*]. Thereafter, on 29 December

2004, they applied to alter their G pleas of guilty to pleas of not guilty. Their application was dismissed and they were sentenced on 8 February 2005. The first applicant was sentenced to a term of six years' imprisonment, while the second and third applicants were each sentenced to five years' imprisonment.

The applicants have appealed against their conviction and the sentences imposed upon them. Their appeal is pending and should be heard early next H year. The necessary transcripts and ancillary paperwork have already been

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processed, with substantial effort and resources contributed by the applicants' A legal practitioners. As indicated in a recent minute from the Criminal Registrar, the appeal could be heard in the last week of January 2006 if the matter is handled expeditiously.

All the three applicants have been in custody since their arrest in December 2004. They now seek bail pending appeal. B

Grounds for Bail

Mr *Hwacha*, for the applicants, argued very persuasively that their prospects of success on appeal were good. In particular, he submits that the proceedings before the regional magistrate in December 2004 were fraught with irregularities – as regards his acceptance of the applicants' pleas of guilty as well as his C refusal to allow the alteration of their pleas. Counsel further contends that the sentences imposed upon the applicants were not only arbitrary but also patently excessive. Given their prospects on appeal, it is argued that the applicants are not likely to abscond if granted bail, especially in view of their stable family and economic circumstances.

Mr *Nemadire*, for the State, submits that there was nothing significantly D irregular about the proceedings in the court below to warrant their being set aside. He further contends that the sentences imposed by that court were not excessive having regard to the moral culpability of the applicants and the maximum penalty of 20 years prescribed in respect of the offences that they were convicted of. He accordingly submits that the applicants have no E prospects of success on appeal and are therefore very likely to abscond if granted bail.

Application *In Limine*

At the inception of this matter, the State applied for the application to be heard *in camera*, in terms of s 3(1)(a) of the courts and Adjudicating Authorities F (Publicity Restriction) Act [*Chapter 7:04*], on the ground that the issues to be canvassed *in casu* touched upon State security and public order. It was conceded, however, that the issues before the court essentially pertained to the proceedings before the court below and the applicants' suitability for bail.

The court, therefore, took the view that these issues did not warrant the exclusion of the public from the entirety of the proceedings. The court G accordingly ruled that it would exercise its discretion, in terms of s 3(1)(a) or s 3(1)(d) of *Chapter 7:04*, either to exclude the public from or to order the non-publication of any part of the proceedings should they delve into any issues covered by those provisions. In the event, the need to exercise that discretion did not arise. H

Patel J

A **Other Cases**

As an additional point, it was argued by Mr *Hwacha* that in the case of the two other accused persons who were charged in similar circumstances, namely, Messrs Chiyangwa and Karidza, the former was released from remand while the latter was granted bail pending appeal. However, as was pointed out B by Mr *Nemadire*, these cases were treated differently because their circumstances were very different from those pertaining to the applicants. In *Chiyangwa*'s case, the precise nature of the information allegedly passed on to foreign agents could not be produced in court. More significantly, both Chiyangwa and Karidza had pleaded not guilty to the charges preferred against

them. Accordingly, I do not think that their cases are of any persuasive C relevance to the determination of the applications *in casu*.

Pleas of Guilty

The essence of the applicants' argument, as I understand it, is as follows:

(i) The facts set out in the charges and statements of agreed facts do not disclose that the applicants communicated information of a military or D security nature such as to constitute an offence under s 4 of the Official Secrets Act. In particular, the agreed statements encompass issues of a general nature and do not specifically elaborate any matters impinging upon national security.

(ii) The matters allegedly communicated by the applicants as per the E charges are substantially different from those communicated according to the agreed statements, and the charges were not altered to reconcile those differences.

(iii) At the trial stage, the magistrate did not adequately canvass the essential elements of the offences charged and, in particular, he did not specifically address issues of a military or security nature necessary to F establish the commission of those offences.

(iv) In the case of the first applicant, The court accepted his plea of guilty even though it was hesitant and conditional.

The First Applicant

The first applicant was charged with contravening s 4(1)(d)(i) of the Act in that, G from 1994 to 2004, he unlawfully communicated information obtained through his position as a State official to unauthorised persons. The information allegedly divulged pertains to matters of a political and economic nature in the context of Zimbabwe's foreign relations.

The statement of agreed facts indicates that the first applicant supplied H information of a political and economic nature to various named foreigners

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from 1994 onwards till he was arrested at the end of 2004. In return for the A information that he supplied, he was to be paid US$2 000 per month and did in fact receive a total of *circa* US$240 000 over the 10 year period. The statement sets out a detailed list of the information supplied by the first applicant as well as the years in which and the places where such information was supplied. The information listed relates to a wide range of matters covering Zimbabwe's internal affairs and external relations over the years in question. B

Following his plea of guilty, the first applicant stated that he had understood and agreed with the statement of agreed facts. He further stated that the facts outlined were drawn from the affidavits he himself had made and that none of them had been altered. The trial magistrate then canvassed the essential elements of the offence charged and the first applicant agreed to them without C demur. He then stated that he could not defend his offence and that he fell into a trap and did not intend to prejudice his country. He went on to declare that he had committed the offence and did not in any way detract from his plea of guilty. Ultimately, he acceded to a full admission of the facts and essential elements as explained to him. D

The offence with which the first applicant was charged entails simply that he divulged to unauthorised persons information obtained by him as a State servant. The offence does not require that the information so communicated should be of a military or security nature. Nor does it require that such communication should involve any prejudice to Zimbabwe. The essence of the offence under s 4(1)(d)(i) of the Act, which is in the nature of an absolute E offence, is the unauthorised disclosure of official information. The motive for the disclosure in question is irrelevant as is the question of prejudice to the State consequent upon such disclosure. See *S* v *Savory* 1973 (2) RLR 51 (A), *per* MacDonald JP at 59-61.

As regards the recital of the information concerned as it appears in the charge F and in the statement of agreed facts, the details set out in the latter are an elaboration of what is contained in the former. I am unable to discern any material difference in the two documents and regard them as being generally *ad idem*.

With respect to the essential elements of the offence charged, the first applicant clearly admitted to having supplied unauthorised persons with G information obtained by him in his official capacity. I take the view that the requisite elements of the offence were adequately canvassed by the trial magistrate, and that there was no irregularity in this respect.

As for the contention that the first applicant's plea of guilty was hesitant and conditional, I simply cannot agree with that argument. His statements *in fine* H are tantamount to a full and clear admission of guilt. His explanation that he

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Patel J

A had been trapped and did not intend to prejudice his country is of possibly mitigatory relevance only and does not in any way detract from his admission of guilt. I am therefore, satisfied that his plea of guilty was correctly and properly accepted by the trial magistrate.

The Second and Third Applicants

B The second and third applicants were charged with contravening s 4(2) of the Act in that they unlawfully communicated to other persons information in their possession, relating to military matters or the preservation of the security of Zimbabwe or the maintenance of law and order, in a manner or for a purpose prejudicial to the safety or interests of Zimbabwe. In the case of the second applicant, the information allegedly communicated pertains to Zimbabwe's C political and economic relations *vis-à-vis* countries within the region and specific western countries. As regards the third applicant, the information allegedly divulged centres primarily on Zimbabwe's internal political and electoral affairs and the land issue.

The statement of agreed facts for the second applicant indicates that he D operated in collusion with the first applicant and other State officials to supply regular reports to various foreign agents located in Malawi and South Africa from 1994 to 2004. In return for his services, he was paid a total sum of US$82 700 over the 10 year period in question. The information supplied by the second applicant encompassed matters relating to Zimbabwe's economic and monetary affairs, bilateral relations with neighbouring states, and reports E from Zimbabwe's foreign missions located in specified African cities.

The statement of agreed facts for the third applicant indicates that he supplied political and economic information pertaining to Zimbabwe to specific South African agents from 2001 until his arrest at the end of 2004. In return for this information, he received various payments totalling US$16 200, R7 000 and F Z$400 000. The information supplied by the third applicant covered matters relating to the internal politics and divisions within the ruling ZANU-PF party, the conduct of domestic elections, as well as the land issue.

After pleading guilty, the second applicant agreed with the statement of agreed facts and the essential elements constituting the charge as read to him. The trial magistrate then canvassed the essential elements of the offence G charged. The second applicant agreed that he had come into possession or control of information relating to the security or safety or interests of Zimbabwe and that he had unlawfully communicated such information to certain persons to the prejudice of the country. He further agreed that he had no right to do so and that he had no defence to offer.

Patel J

Similarly, after pleading guilty, the second applicant agreed with the statement A of agreed facts as read to him and stated that he had understood the charge against him. The trial magistrate went on to canvass the essential elements of the offence charged. The second applicant agreed that at the relevant time he was in possession of information or documents of a security nature or of particular interest to Zimbabwe and that he had unlawfully passed on such B information to certain persons to the prejudice of Zimbabwe. He further agreed that he had no right to do so and that he had no real defence to offer. He then admitted that he had committed the offence and made a mistake which he regretted and wished to reverse.

A contravention of s 4(2) of the Act requires that the document or information communicated by the accused should relate to a military matter or the C preservation of the security of Zimbabwe or the maintenance of law and order. It further requires that the accused should publish or communicate

such document or information to another person in a manner or for a purpose prejudicial to the safety or interests of Zimbabwe. Except in a case where the act averred in itself evinces prejudice to the safety or interests of the State, it is essential to establish that the manner in which or the purpose for which D the accused communicated the information was prejudicial to Zimbabwe. Where information communicated is already well known, its disclosure cannot normally operate to the prejudice of the safety or interests of the State. See *S* v *Niesewand (3)* 1973 (1) RLR 216 (A), *per* Beadle CJ at 222-223, citing *S* v *Marais* 1971 (1) SA 844 (A). E

In the context of s 4(2) of the Act, the interests of the State denote the interests of the State according to the policies laid down for it by its recognised organs of government and authority. Anything which prejudices those policies is "prejudicial to the interests or safety of Zimbabwe" within the meaning of the Act. See *Chandler* v *Director of Public Prosecutions* [1964] AC 763, cited by Dumbutshena CJ in *S* v *Harington* 1988 (2) ZLR 344 (S) at 358. F

As regards the content of the charge and the statement of agreed facts that pertain to the third applicant, I can see no material difference whatsoever in the information identified as having been communicated by him to other persons. However, with respect to the second applicant, the description of the information divulged is certainly not identical. There is some overlap insofar G as concerns Zimbabwe's relations with neighbouring SADC countries. The remaining matters mentioned in the charge are not specifically mentioned in the statement of agreed facts. Nevertheless, the matters so omitted are almost identical to those that were communicated by the first applicant. According to the third applicant's statement of agreed facts, a major part of his given assignments was to transmit the first applicant's reports to the foreign agents H

Patel J

A concerned. In the event, I do not consider the apparent divergence between the charge and the agreed statement to be of any critical consequence. This is particularly so because what was read out to and canvassed with the third applicant at the plea stage was not the original charge but his statement of agreed facts. In my view, the apparent discrepancy between the charge and B the agreed statement is one that falls within the ambit of ss 202(3) and 203 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The combined effect of these provisions is that a defective charge may be cured by relevant probative evidence adduced at the trial and the failure to amend the charge before judgment does not affect the validity of the proceedings thereunder.

Turning to the essential elements of the offence charged, "the security of C Zimbabwe" is a concept of exceedingly wide connotation. Without attempting any detailed or exhaustive definition of the term, I conceive it to include a broad range of matters embracing not only physical security but also the political, economic and financial well-being of the country.

In the present case, the information and matters communicated by the second D and third applicants related to, *inter alia*, Zimbabwe's economic and monetary affairs, bilateral relations with neighbouring states, reports from Zimbabwe's foreign missions, the internal politics and divisions within the ruling ZANU-PF party, the conduct of domestic elections, and the much-debated land issue. Ostensibly, these are matters which do not invariably and necessarily relate to State security under normal circumstances. However, the court cannot but E take judicial notice of the unquestionably abnormal political and economic circumstances that presently apply to Zimbabwe, both domestically and internationally. Given this context, and without succumbing to the excesses of political paranoia, it is not inconceivable that the information and reports transmitted by the applicants did relate to the preservation of State security and that their covert disclosure to the foreign agents concerned was effected F in a manner prejudicial to the safety or interests of Zimbabwe.

In canvassing the essential elements of the offence charged, the trial magistrate did not delve into any great detail as to the security-related nature of the information disclosed or the precise manner in which its disclosure was prejudicial to the safety or interests of the country. Ordinarily, these aspects G should have been properly canvassed and the magistrate's failure to do so constituted an obvious misdirection. The critical question, however, is whether or not this misdirection was such as to invalidate the entire trial proceedings. I am inclined to think not. The magistrate's omissions in this regard, though not entirely excusable, are nevertheless quite understandable in light of the very detailed and elaborate admissions contained in the H statements of agreed facts. These statements were acknowledged and endorsed

Patel J

by the applicants without any objection. As I read them, the facts set out in A the statements clearly evince the disclosure of information pertaining to State security as well as the manner in which such disclosure was prejudicial to the interests of Zimbabwe. Taking all the relevant circumstances into account, it cannot be said that the magistrate's misdirection operated to vitiate the propriety of the trial proceedings *in casu*. B

Authority to Prosecute

In terms of s 11 of the Official Secrets Act, no criminal proceedings may be instituted under the Act against any person unless the Attorney-General has authorised the prosecution of that person. *In casu,* the prosecution of all three applicants was authorised on charges of contravening s 4(2)(b) of the Act. C

I note in passing that para (b) of s 4(2) does not *per se,* create a complete offence without reference to para (a). The offence properly chargeable under subs (2) of s 4 is constituted by paras (a) and (b) as read and taken together. This anomaly, although not fatal, was not rectified at any stage of the proceedings under review.

The more serious anomaly arises from the fact that the first applicant was not D charged under s 4(2), as originally authorised, but under s 4(1)(d)(i) of the Act. The Attorney-General did not at any time amend his authorisation accordingly or issue a fresh authority to prosecute the first applicant for contravening s 4(1)(d)(i). In this respect, it is submitted by Mr *Hwacha* that the criminal proceedings against the first applicant were flawed *ab initio* and that his E consequent prosecution and conviction are incompetent and must be set aside.

There can be little doubt that the requirements of s 11 of the Act are couched in peremptory language and that compliance with that provision is mandatory. It is equally incontestable that the Attorney-General failed to strictly comply with those requirements in respect of the first applicant. That being so, the F question that must be answered is whether or not such non-compliance operates to nullify his subsequent prosecution and conviction under s 4(1)(d)(i).

In order to answer this question, it is necessary to examine the purpose underlying the statutory requirement under consideration. It is a requirement G that fully accords with the independence and autonomy conferred upon the Attorney-General by s 76 of the Constitution insofar as concerns the institution and discontinuance of criminal proceedings. As I understand it, the purpose of s 11 of the Act is to require the Attorney-General to personally consider each case on its merits and to determine whether or not the matter should in fact be prosecuted. This is so because of the very broad and wide-ranging nature H

Patel J

A of the offences created under the Act. The object of Parliament in enjoining the Attorney-General's personal attention to each case is to obviate the possibility of unnecessary or vexatious prosecutions at the instance of over zealous police officers or public prosecutors.

If my assessment of the purpose behind s 11 is correct, it cannot be said that B the failure to fulfil its requirements is fatal in each instance where there has been non-compliance. In my view, the legislature could not have intended that every conviction under the Act, which is otherwise competent and proper, should be visited with the sanction of nullity for failure to comply with the provisions of s 11.

In the present matter, it must be assumed on the basis of his certificate that C the Attorney-General did in fact consider the specific allegations against the first applicant. He then proceeded to authorise the latter's prosecution on those allegations, albeit erroneously under a different provision of the Act. Therefore, it cannot be said that he did not apply his mind to the case against the first applicant. Nor can it be said that the intention of Parliament was wholly D frustrated in that regard.

E In any event, the actual charge against the first applicant was properly framed in terms of s 4(1)(d)(i) of the Act. The charge that was subsequently put to him at his trial and to which he pleaded

guilty was that of having contravened s 4(1)(d)(i). Equally importantly, his statement of agreed facts, as accepted and endorsed by him, related to an offence under s 4(1)(d)(i).

In the above circumstances, I cannot see that non-compliance with s 11 of the Act would have occasioned any material prejudice to the first applicant or entailed any miscarriage of justice in his eventual conviction and sentence. I accordingly take the view that the first applicant's conviction under s 4(1)(d)(i) was competent and valid notwithstanding the failure to authorise his prosecution under that specific provision in strict compliance with s 11 of F the Act.

Alteration of Pleas

Where an accused person seeks to alter his plea of guilty to that of not guilty, he must simply offer a reasonable explanation as to why he pleaded guilty in G the first instance. If his explanation holds a reasonable possibility of truth, *viz.,* unless The court is convinced beyond reasonable doubt that his explanation is positively false, he should be allowed to alter his plea. See *S* v *Matare* 1993 (2) ZLR 88 (S) *per* Gubbay CJ at 97C and 100B.

In casu, it is submitted on behalf of the applicants that after having been illegally detained they were subjected to various forms of coercion and were H brought into court after hours. These factors coupled with the fact that they

were not legally represented at that time induced their statements of agreed A facts and their pleas of guilty at the trial. It is further submitted that at the change of plea stage the magistrate applied the wrong test in that he kept probing as to the guilt of the applicants as opposed to evaluating the reasonableness of the explanations proffered by them.

The evidence given by the State witnesses at the change of plea proceedings B indicates that the applicants were initially unlawfully detained in insalubrious conditions with inadequate toilet and ablution facilities. It was also conceded that the first applicant was denied cigarettes in order to break him down psychologically. However, it was denied or certainly not admitted that the applicants had been hooded and kept in solitary confinement.

In his ruling, the magistrate declared that what he had to determine was C whether there was a reasonable possibility that the applicants were innocent and whether their application for change of plea was *bona fide*. The issue, as he saw it, was whether the plea in each case was "voluntary and understandingly and correctly made".

The magistrate then proceeded to note the applicants' academic qualifications D and professional backgrounds on the basis of which he was unable to accept that they did not understand the effect of their admissions in criminal proceedings. He also noted that the applicants had not been denied legal representation at the initial hearing as alleged. Finally, he took into account the evidence and explanations given by the State witnesses as to the conduct of their investigations and the preparation of the applicants' statements. E

After analysing all the evidence, the magistrate found that "there was nothing to show that the accused were unduly influenced to plead as they did". Moreover, he was satisfied that "the plea of guilty by each accused was not brought about by fear, fraud, coercion, mistake or any other form of undue influence". He concluded that "the application does not only lack *bona fides* F but is also unreasonable" and accordingly dismissed the application.

Having regard to the proceedings as a whole, I am not at all convinced that the magistrate focused on irrelevant considerations and accordingly applied the wrong test in making his ruling. Whilst he might have take into account the applicants' guilt or innocence as an incidental factor, his principal concern appears to have been the genuineness of the applicants' original pleas and G the reasonableness of their applications for change of plea. On the basis of the evidence presented to him, he obviously rejected as being false their explanations of having been coerced or unduly influenced into pleading guilty. I am accordingly satisfied that he did not misdirect himself in this regard and that there is no justification for reversing his ruling on the matter. H

Propriety of Sentences

As stated at the outset, the first applicant was sentenced to a term of six years' imprisonment, while the second and third applicants were each sentenced to five years' imprisonment.

In sentencing the first applicant, the trial magistrate accepted that there was some doubt as to "the level of information" that he had divulged. He therefore found that "most probably minimal harm befell or minimal prejudice befell the country". Nevertheless, he assessed the first applicant's moral blameworthiness as being "considerably high" in light of the long period of ten years over which he had abused his official position in return for "substantial remuneration" and the fact that he had recruited others to convey information on his behalf.

As regards the second applicant, the magistrate was again constrained to accept that "the amount of damage or prejudice to Zimbabwe [was] very minimal". However, he noted that the second applicant had committed his "morally reprehensible" crime knowingly and willingly over a long period of time and for considerable monetary reward.

As for the third applicant, the magistrate observed that he "may not have seen or felt the harm he was causing or had caused". However, the magistrate declined to impose a fine by dint of the fact that the third applicant had also received payment for his wrongdoing. In his view, a mere fine "would be like encouraging others in a similar situation [who] may believe they could get away by paying from the very proceeds of the offence".

Taking all of the above considerations into account, the magistrate decided that a deterrent custodial sentence was warranted in the case of each applicant.

I fully concur with the magistrate insofar as concerns the moral culpability of all three applicants. Their conduct over the years in question was unquestionably reprehensible. Moreover, their offences were significantly exacerbated by their acceptance of large sums of money in return for their nefarious activities. I also agree that the imposition of monetary fines for the offences committed would have been patently inappropriate and would have clearly trivialised those offences. Having regard to the personal circumstances of the applicants on the one hand and the seriousness of their offences and the interests of society on the other, I have no doubt that a custodial sentence is the only form of punishment that befits the offenders and their crimes *in casu*.

Notwithstanding the position that I have taken, the difficulty that remains arises from the magistrate's avowed failure to adequately address the extent

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of the prejudice occasioned by the applicants' conduct. In the case of the first applicant, the question of prejudice is immaterial as it is not a relevant component of the offence with which he was charged and eventually convicted. However, as regards the second and third applicants, the extent to which their conduct was prejudicial to the interests of Zimbabwe is an essential feature that must be reckoned with in assessing the sentences to be imposed upon them. The clumsy attempt to circumvent this aspect at the sentencing stage constitutes a clear misdirection which renders questionable the respective periods of imprisonment arbitrarily fixed by the magistrate. This arbitrariness is further compounded by the fact that the same sentence was imposed upon the second and third applicants despite the obvious differences in the gravity of their offences. As appears from their statements of agreed facts, the second applicant purveyed the reports and information concerned over a considerably longer period of time and for greater reward than did the third applicant.

Given this misdirection, I am of the view that the sentences imposed upon the second and third applicants are likely to be set aside on appeal. The matter should either be remitted to the magistrate's court for a proper evaluation of the extent of prejudice occasioned or be revisited in that respect by the appellate court itself.

Bail Pending Appeal

The principles governing bail pending appeal were very lucidly articulated in *S* v *Williams* 1980 ZLR 466 (A) at 468E-H *per* Fieldsend CJ and in *S* v *Tengende & Ors* 1981 ZLR 445 (S) at 448A-E and 449F-H *per* Baron JA. I paraphrase the principles enunciated in these cases as follows.

Where bail after conviction is sought, the onus is on the applicant to show why justice requires that he should be granted bail. The proper approach is not that bail will be granted in the absence of positive grounds for refusal but that in the absence of positive grounds for granting bail it will be refused. First F and foremost, the applicant must show that there is a reasonable prospect of success on appeal. Even where there is a reasonable prospect of success, bail may be refused in serious cases, notwithstanding that there is little danger of the applicant absconding. The court must balance the liberty of the individual and the proper administration of justice, and where the applicant has already been tried and sentenced it is for him to tip the balance in his favour. It is also G necessary to balance the likelihood of the applicant absconding as against the prospects of success, these two factors being interconnected because the less likely are the prospects of success the more inducement there is to abscond. Where the prospect of success on appeal is weak, the length of the sentence imposed is a factor that weighs against the granting of bail. H

Patel J

A Conversely, where the likely delay before the appeal can be heard is considerable, the right to liberty favours the granting of bail.

Conclusion

As regards the first applicant, I am satisfied that he has no reasonable prospect of success on appeal, either against his conviction or in respect of the B sentence imposed upon him. His conviction was proper notwithstanding the initial blunder occasioned by the failure to authorise his prosecution for contravening the specific statutory provision that he was actually charged under. Moreover, in light of the nature and circumstances of his offence, the sentence of six years' imprisonment imposed upon him does not induce a C sense of shock and cannot be said to be excessive.

Whatever his prospect of success on appeal, the likelihood that the first applicant will abscond if granted bail is quite considerable. He obviously has well-established contacts with the foreign agents that he dealt with over the past decade. He also retains access to the huge amount of convertible currency that he illegally amassed during that period. (Presumably these D moneys have not as yet been confiscated or otherwise dealt with as proceeds of crime). These factors, coupled with the long term of imprisonment that he still has to serve, render the first applicant an extremely unsuitable candidate for bail.

As for the second and third applicants, I do not think that they have any E reasonable prospects of success against their conviction. However, the sentences imposed upon them are likely to be set aside for the reasons that I have detailed above. Nevertheless, I remain convinced that custodial sentences, of such duration as is deemed commensurate after due inquiry, are appropriate and unavoidable in the case of both applicants. It is therefore highly probable that they will continue to be incarcerated, even if their original F sentences were to be set aside on appeal and properly substituted thereafter.

Apart from the fact that the second and third applicants face the prospect of continued detention in custody, there are other pointers towards the possibility of their abscondment whilst on bail. As already observed *vis-à-vis* the first applicant, the second and third applicants have ready access to foreign agents G and convertible currency, the combination of which greatly enhances the opportunity as well as the incentive for them to flee this jurisdiction. Moreover, I cannot ignore the fact that their appeal is likely to be heard in the very near future. In my view, all of these factors taken together militate against the granting of bail to the second and third applicants.

Patel J

In the result, the application of all three applicants for bail pending appeal is A dismissed.

Dube, Manikai & Hwacha, the applicant's legal practitioners

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

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MARONDERA RURAL DISTRICT COUNCIL v MORRIS & ORS 2006 (1) ZLR 63 (S)

Citation	2006 (1) ZLR 63 (S)
Case No	Judgment No. S-76-05
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA & Malaba JA
Heard	18 October 2005
Judgment	16 January 2006
Counsel	*T Batasara,* for the appellant *L Uriri,* for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — *strike — action by employer — employer not obliged to seek show cause order — entitled to application for authority to terminate striking workers' employment*

Headnote

D The respondents, employees of the appellant council, threatened to strike on a stated date if demands for increased wages were not met. A meeting was held at which the employees agreed to call off the planned strike. The respondents arrived for work for a few hours on the stated date, then went on strike. The council suspended the respondents and applied to a E labour relations officer for permission to terminate their services and was successful. The main ground relied upon in the letter of suspension and in the application for authority to dismiss the employees was that they were guilty of an act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of their contracts of employment, in that, having given an undertaking to the Council that they would call off F the proposed collective job action, they subsequently reneged on that agreement for no good reason. The Labour Court, on appeal, found for the respondents. On appeal to the Supreme Court:

Held, that under the then provisions of the Labour Relations Act, a strike was unlawful if the employees did not seek redress in respect of the dispute concerned in terms of Part XII of the Act. As the respondents had not G sought such redress, the collective job action was clearly unlawful.

Held, further, that the fact that the application for authority to dismiss the employees relied upon additional grounds, such as wilful disobedience to a lawful order and absence from work for five or more working days without reasonable excuse, which were not in the letter of suspension, made no difference. Although the application for authority to dismiss the

Sandura JA

employees included grounds not set out in the letter of suspension, the A main ground relied upon in the letter of suspension was the same as the main ground relied upon in the application.

Held, further, that the council was not obliged to apply for a show cause order under s 106(1) of the Act. It was entitled, instead, to apply for authority to dismiss the striking workers. B

Cases cited

Cargo Carriers (Pvt) Ltd v Zambezi & Ors 1996 (1) ZLR 613 (S)

Cole v Union Govt 1910 AD 263

Standard Chartered Bank v Matsika 1996 (1) ZLR 123 (S) C

Case information

T Batasara, for the appellant

L Uriri, for the respondents

Judgment

SANDURA JA: This appeal arose out of a labour dispute which was decided by the Labour Court in favour of the respondents. D

The relevant facts are as follows. The respondents ("the employees") were employed by the appellant ("the Council"). On 6 March 2000, the employees acting in terms of s 104(2) of the then Labour Relations Act [*Chapter 28:01*] ("the Act"), gave to the Council fourteen days' written notice of their intention to resort to collective job action if their grievances were not addressed.

The notice specified four grievances, as follows: E

"* Employees want 100 percent year 2000 salary increment …

* Employees who were underpaid January to March 1994 need their back pay …

* The four days' pay that was withheld after exaggeration that employees went on industrial action must be refunded … F

* House Rents – employees are not satisfied with criteria used in dictating (*sic*) $30 per room from all employees …"

In an attempt to address the above grievances, the Council held meetings with the employees' representatives on 10 and 16 March 2000, and with all the employees on 18 March 2000. The minutes of the meeting held on 10 March 2000 G are not part of the record in this appeal, but the minutes of the other two meetings are. However, the accuracy of the minutes of the meeting held on 18 March 2000 was in dispute.

According to the Council's minutes, which for some unknown reason were not signed by the person who chaired the meeting on 18 March 2000, the parties reached an agreement in terms of which the employees undertook not H

Sandura JA

A to go ahead with the proposed collective job action on 20 March 2000. The relevant part of the minutes reads:

> "After a lengthy debate the workers agreed to the Council's request that the already awarded 30 percent salary increase by Council form part of a further salary increase to be discussed in June 2000 and be paid out in July backdated to January 2000. It was agreed that in view of the above B agreement, the intended strike on 20 March 2000 be terminated."

However, according to the minutes prepared by the employees, no agreement was reached by the parties at the meeting held on 18 March 2000. The relevant part of the minutes reads as follows:

> "The Council Vice Chairman told the house that after the review of (the) C budget in June 2000, if Council managed to have a surplus of ten dollars that ten dollars shall be shared equally among Council employees.

The Council Chairman refused to promise employees the percentage which they are expecting the Council to award employees after the review of the budget in June 2000.

The employees raised their hands to ask, hence the Council Chairman D declared the meeting closed without any agreement signed between Council and its employees.

The meeting ended unceremoniously closed at 1.30 p.m."

In passing, it is pertinent to note that the only issue that was discussed at the three meetings was the salary increment demanded by the employees. That E was obviously the most important of all the issues.

Subsequently, on 20 March 2000, the employees turned up for work. However, after working for a few hours, and having been addressed by a Mr Nyadenga ("Nyadenga"), an official of the Zimbabwe Rural District Councils Workers' Union ("the Union"), the employees commenced their collective job action. They locked up all the gates to the Council's offices and turned away many F ratepayers who wanted to settle their accounts with the Council.

Thereafter, the Council wrote to all the employees informing them that their grievances were still being considered, and appealing to them to resume their duties by 7 April 2000. Only seven employees turned up for work as a result of that plea, but the rest stayed away.

G Consequently, on 10 April 2000, the Council wrote to the striking workers as follows:

"Dear Sir,

RE: SUSPENSION FROM DUTY PENDING DISMISSAL

Sandura JA

In terms of SI 371/1985, s 3(a), please be advised that Council has A suspended you from duty pending dismissal with immediate effect. The grounds upon which the suspension are based (*sic*) are as follows:

(a) On 18 March 2000, Council held a meeting with all the workers so as to discuss on the year 2000 wage and salary increments. At this meeting, all the workers agreed with Council that the 30 percent wage and salary increment awarded by Council in January 2000 be regarded B as the negotiated wage for (the) year 2000 on condition Council was going to consider further wage and salary increases which will be backdated to January 2000. As a result of this agreement you had also agreed and promised Council that you were no longer going to go on a collective job action on 20 March 2000 as intended. However, on Monday 20 March 2000, instead of reporting for duty, you chose to C go on strike and thereby disrupted Council operations. Council invited you to have this matter discussed further through the Labour Office but you refused. Further to that Council wrote to you appealing that you report for duty by 7 April at 0800 hours and again you did not turn up. As a result, Council is now left with no option but to suspend you from duty pending dismissal. D

(b) During the period of suspension you shall not be entitled to any remuneration and/or allowance."

On the same day, i.e. 10 April 2000, the Council wrote to the Principal Labour Officer, Mashonaland East, seeking the authority to dismiss all the employees on strike. The letter, in relevant part, reads as follows:

"Council would like to apply for authority to terminate contracts of E employment of all employees participating in the ongoing collective job action in terms of SI 371 of 1985, Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations of 1985 s 3 subsections (a), (b) and (f) (*sic*).

Council would like to dismiss the following employees (see attached list) F since we believed that they are guilty of acts and or conducts (*sic*) inconsistent with the fulfilment of the express or implied conditions of their contracts as follows:

(i) … the employees and Council had agreed to terminate the strike … On Monday 20 March 2000, all employees briefly reported for duty and acting under the influence of their Union representative, Mr G Nyadenga, decided to go ahead with their intention to go on strike. The employees' conduct clearly shows that at a meeting held on 18 March they failed to negotiate in good faith and as such we feel they are guilty of an offence under s 3(a).

(ii) … By refusing to holding (*sic*) further negotiations in the absence of their Unionist the workers showed no respect of their employer whom H

Sandura JA

A they have entered into contracts of employment with and not the Union. Hence, we believe they are also guilty of an offence by breaching s 3(a) in that they acted in a manner inconsistent with the fulfilment of the express or implied conditions of their contracts of employment. B

(iii) … the workers … locked all entrance gates to the Council Offices in order to prevent management from attending to clients coming to Council … They also turned away numerous ratepayers who had intended to settle their accounts with Council. This resulted in Council losing substantial sums of revenue … As a result of this action, we also believe these employees are guilty of an offence under s 3(a). C

(iv) Council wrote to all striking workers appealing to them to report for duty by 7 April 2000 …

A total of seven employees responded to the plea by Council and the rest of the employees decided to continue with the strike … We believe these workers (who continued with the strike) are also guilty of an offence under s 3(b) since they wilfully disobeyed to follow to D a lawful order (*sic*) given to them by Council.

(v) By failing to report for duty for a period of more than five days without a reasonable excuse, we believe the workers are also guilty of an offence under s 3(f) …"

Subsequently, the Council's application for the authority to dismiss the E employees was heard by a labour relations officer on 15 June, 13 July and 10 August 2000. And on 29 September 2000 the application was granted. In granting the application, the labour relations officer said:

"It was not disputed in (at) the hearing by (the) respondents that an agreement had been reached on 18 March 2000 to call off the intended strike of 20 March 2000. It was also not disputed by (the) respondents that F they briefly reported for duty on 20 March 2000 and then downed tools. It seems to (me) that the parties had reached an agreement which was going to lead to the final settlement of the dispute after further review in June 2000. That agreement was binding on the parties and failure to honour the agreement amounted to conduct or omission inconsistent with the express or implied conditions of the respondents' contract(s) …

G It does not make sense for (the) respondents to say that they downed tools on 20 March 2000 because their grievances had not yet been resolved when they had entered into an agreement with Council on 18 March 2000 and agreed to call off the intended strike …"

Following the determination by the labour relations officer, the matter was referred to a senior labour relations officer who dismissed the appeal. The

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employees then appealed to the Labour Relations Tribunal (now the Labour A Court) and were successful.

The Labour Court held that the employees had embarked upon a lawful collective job action as they had given the requisite notice to the Council in terms of s 104(2) of the Act. It also held that the Council should not have proceeded in terms of the Labour Relations (General Conditions of Service) B (Termination of Employment) Regulations, 1985, published in SI 371 of 1985 ("the Regulations") (now repealed), but should have applied for an order in terms of s 106(1) of the Act, calling upon the employees to show cause why a disposal order should not be made in terms of s 107 of the Act.

Aggrieved by that decision, the council appealed to this court.

In my view, there are four main issues to be determined by this court. The first C is whether, at the meeting held on 18 March 2000, the parties reached an agreement in terms of which the employees agreed to call off the collective job action planned for 20 March 2000.

The second is whether the collective job action was lawful.

The third is whether the grounds on which the dismissal of the employees was D sought were different from the grounds on which the employees had been suspended.

And the fourth is whether, instead of dealing with the employees in terms of the Regulations, the Council should have applied to the Minister of Public Service, Labour and Social Welfare for an order in terms of s 106(1) of the Act, E calling upon the employees to show cause why a disposal order should not be made in relation to the collective job action.

I shall deal with the four issues in turn.

DID THE EMPLOYEES AGREE TO CALL OFF THE COLLECTIVE JOB ACTION? F

As already stated, the council's minutes of the meeting held on 18 March 2000 clearly indicate that the employees agreed to call off the collective job action which had been planned for 20 March 2000.

On the other hand, the minutes prepared by the employees indicate that no such agreement was reached, and that the meeting in question ended unceremoniously. G

However, it is clear from what the labour relations officer said in her determination that when the parties appeared before her the employees did not dispute the fact that on the day in question they had agreed to call off the collective job action. The relevant part of the determination reads as follows: H

2006 (1) ZLR p69

Sandura JA

> A "It was not disputed in (at) the hearing by (the) respondents that an agreement had been reached on 18 March 2000 to call off the intended strike of 20 March 2000. It was also not disputed by (the) respondents that they briefly reported for duty on 20 March 2000 and then downed tools."

In the circumstances, the question posed above is answered in the affirmative.

B WAS THE COLLECTIVE JOB ACTION LAWFUL?

I have no doubt in my mind that it was not. I say so because s 104(3)(a)(ii) of the Act, which was in force at the relevant time, but which was repealed by the Labour Relations Amendment Act No. 17 of 2002, which came into operation on 7 March 2003, provided as follows:

> C "Subject to subsection (4), no collective job action may be threatened, recommended or engaged in by –
>
> (a) any employees, workers committee or trade union –
>
> (i) …
>
> (ii) unless redress in respect of the dispute concerned has been sought in terms of Part XII; or …"

D Subsection (4) of s 104 of the Act is irrelevant to the collective job action in which the employees participated.

At the relevant time, Part XII of the Act consisted of ss 93 to 101, and dealt with the determination of disputes and unfair labour practices by labour relations officers, senior labour relations officers and the Labour Relations E Tribunal.

In the present case, it is clear that before resorting to the collective job action on 20 March 2000 the employees did not seek redress in respect of the dispute concerned in terms of Part XII of the Act. That being the case, the inescapable conclusion is that the collective job action was clearly unlawful.

F While it is correct that the council did not rely upon the provisions of s 104(3)(a)(ii) of the Act in the court *a quo*, it was entitled to raise the point for the first time on appeal. The general rule is that a point of law may be raised for the first time on appeal provided that it is covered by the pleadings and its consideration would not be unfair to the other party.

As Innes J (as he then was) said in *Cole* v *Union Government* 1910 AD 263 at G 272:

> "The duty of an appellate tribunal is to ascertain whether the court below came to a correct conclusion on the case submitted to it. And the mere fact that a point of law brought to its notice was not taken at an earlier stage is not in itself a sufficient reason for refusing to give effect to it. If the point is covered by the pleadings, and if its consideration on appeal involves H no unfairness to the party against whom it is directed, the court is bound

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2006 (1) ZLR p70

Sandura JA

> to deal with it. And no such unfairness can exist if the facts upon which A the legal point depends are common cause, or if they are clear beyond doubt upon the record, and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset."

In the present case, as already stated, it is clear beyond doubt that before resorting to collective job action the employees did not seek redress in respect B of the dispute between them and the council in terms of Part XII of the Act. In addition, there is no basis for thinking that further

evidence would have been produced by the employees had the point of law been raised in the court below.

WERE THE GROUNDS ON WHICH THE DISMISSAL OF THE C EMPLOYEES WAS SOUGHT DIFFERENT FROM THE GROUNDS ON WHICH THE EMPLOYEES HAD BEEN SUSPENDED?

This issue is important because in *Standard Chartered Bank Zimbabwe* v *Matsika* 1996 (1) ZLR 123 (S), this court held that where an application for an order terminating a contract of employment is made forthwith after the D suspension of the employee, the ground on which the application is based should not be different from the ground on which the employee was suspended.

In the present case, the letter of suspension and the application for authority to dismiss the employees, setting out the grounds relied upon, have already been set out in this judgment.

Although both documents were not as elegantly worded as they might have E been if they had been prepared by a legal practitioner, a perusal of both documents indicates that the essence of the main ground relied upon in the letter of suspension and in the application for the authority to dismiss the employees was the allegation that the employees were guilty, in terms of s 3(a) of the Regulations, of an act, conduct or omission inconsistent with the F fulfilment of the express or implied conditions of their contracts of employment, in that, having given an undertaking to the council that they would call off the proposed collective job action, they subsequently reneged on that agreement for no good reason.

In my view, the fact that the application for the authority to dismiss the employees relied upon additional grounds, such as wilful disobedience to a G lawful order and absence from work for five or more working days without reasonable excuse, which were not in the letter of suspension, makes no difference.

In any event, the main ground on which the labour relations officer authorised the dismissal of the employees was the fact that they had reneged on their H

Sandura JA

A undertaking to the council that they would call off the collective job action. The labour relations officer concluded that such conduct was inconsistent with the fulfilment of the express or implied conditions of the employees' contracts of employment. I entirely agree with that conclusion.

In the circumstances, although the application for the authority to dismiss the B employees included grounds not set out in the letter of suspension, the main ground relied upon in the letter of suspension was the same as the main ground relied upon in the application.

WAS THE COUNCIL OBLIGED TO APPLY FOR A SHOW CAUSE ORDER IN TERMS OF S 106(1) OF THE ACT?

C I have no doubt in my mind that the answer to this question is in the negative. A similar question was considered by this court in *Cargo Carriers (Pvt) Ltd* v *Zambezi & Ors* 1996 (1) ZLR 613 (S), and the court concluded that the employer in that case could have applied for a show cause order in terms of s 106(1) of the Act or, alternatively, it could have proceeded in terms of the Regulations and applied to a labour relations officer for the authority to D dismiss the workers. At 619D-G, Gubbay CJ said the following:

> "In considering the applicability of the code of conduct to the mass collective job action resorted to by 322 employees …, it is clear to me that the provisions of the Labour Relations Act, headed 'collective job action', were designed to deal with precisely the situation that confronted the appellant. It should have waited for the issue of a show cause order. If the E Minister had refused to grant it, the appellant, as a person aggrieved, could have appealed to the Labour Relations Tribunal pursuant to s 110(1)(a) of the Act. Had the Minister issued it, the appropriate authority on the return day would have been empowered to dismiss as many of the 322 employees as found warranted.
>
> Alternatively, it was open to the appellant … to have suspended the 322 F employees without pay on the ground specified in either subs (a) or (b) of s 3 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985), and applied to a labour relations officer for an order or determination terminating the contract of employment of each of them."

In the circumstances, the Labour Court seriously misdirected itself when it G determined that the council should have applied for an order in terms of s 106(1) of the Act, calling upon the employees to show cause why a disposal order should not be made in relation to the collective job action, instead of proceeding in terms of the Regulations.

In addition, the Labour Court erred when it concluded that the collective job H action was lawful. As already indicated, the collective job action was

Sandura JA

undoubtedly unlawful. In my view, participating in an unlawful collective job A action constitutes conduct inconsistent with the express or implied conditions of the contract of employment.

In the circumstances, the following order is made:

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

"The appeal is dismissed with costs."

CHIDYAUSIKU CJ & MALABA JA concurred. C

Madanhi & Associates, appellant's legal practitioners

Honey & Blanckenberg, respondents' legal practitioners

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Source:
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FIRST MUTUAL LIFE ASSURANCE SOCIETY OF ZIMBABWE v INTERMARKET HOLDINGS LTD & ORS 2006 (1) ZLR 73 (H)

Citation	2006 (1) ZLR 73 (H)
Case No	Judgment No. HH-8-06
Court	High Court, Harare
Judge	Hlatshwayo J
Heard	17 January 2006
Judgment	17 January 2006
Counsel	*J C Andersen SC,* for the applicant *P Mashamba,* for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

C **Intellectual property** — *trade marks — concept of similarity — use of designs — should not be construed so widely as to create an unacceptable monopoly*

Intellectual property — *trade mark — registered trade mark — infringement —* D *similarity likely to lead to confusion — test — normal, average person*

Headnote

The applicant and the respondent groups of companies were both operating in the financial sector, although the applicant had been in business longer. The applicant was the proprietor of a registered trade mark, the design of which was based on triangles, with one inverted triangle being E contained within another triangle. The respondent's logo was also based on the use of triangles, but arranged in a different manner. Where colour was used, the internal triangles in the two logos were different. The applicant contended that the respondent's logo infringed the applicant's registered trade mark.

Held, that the test as to whether there has been an infringement depends F essentially on whether there is a sufficient similarity which is likely to lead to confusion. The test as to deception or confusion is that of the normal, average person. The concept of similarity should not be construed so widely as to create an unacceptable monopoly in the use of designs, in this case incorporating the use of triangles. Registered trade marks do not create monopolies in relation to concepts or ideas. The word "similar" G had to have its ordinary meaning, that is, a "marked resemblance or likeness", "marked" meaning "easy to recognize". Applying those considerations, the logo used by the respondents was not identical with or so nearly resembling the registered mark of the applicant as to be likely to deceive or cause confusion, as required by s 8(1) of the Trade Marks H Act [*Chapter 26:04*].

2006 (1) ZLR p74

Hlatshwayo J

Cases cited A

American Chicle Co v Gower NO & American Chewing Products Corp 1947 SR 87; 1947 (4) SA 49 (SR)

Bata Ltd v Face Fashions CC & Anor 2001 (1) SA 844 (S)

Cowbell AG v ICS Holdings Ltd 2001 (3) SA 941 (SCA)

Kellogg Co v Cairns Foods Ltd 1997 (2) ZLR 230 (S)

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

National Brands Ltd v Blue Line Manufacturing (Pvt) Ltd 2001 (3) SA 563 (SCA)

Saville Perfumery Ltd v June Perfect Ltd & Anor [1941] 58 RPC 147 C

Legislation considered

Trade Marks Act [*Chapter 26:04*], s 8(1)(a)

Case information

J C Andersen SC, for the applicant

P Mashamba, for the respondents D

Judgment

HLATSHWAYO J: The applicant, First Mutual Life Assurance Society of Zimbabwe (hereinafter "FML" or "the applicant"), a mutual society and body corporate registered in terms of the Insurance Act [*Chapter 24:07*] was established in January 1990 following the merger of the local interests of Prudential Assurance Company of Zimbabwe (Pvt) Ltd, Colonial Mutual Life E Assurance Society and Norwich Union Life Assurance Society all three of which had operated in Zimbabwe for a number of years prior to the merger. The principal business of the applicant is life assurance and group pensions. Other services offered by the applicant include short-term insurance, unit trust services and asset fund management. F

The first respondent is Intermarket Holdings Limited, a holding company for the various companies in the Intermarket Group, some of which are cited as respondents in this application, *viz*; Intermarket Reinsurance Limited (second respondent), Southampton Assurance Company of Zimbabwe (third respondent), a registered life assurance company which became a subsidiary of first respondent in 1998 and applied in 2001 to change its name to Intermarket G Life Assurance Ltd, Intermarket Discount House (fourth respondent), Intermarket Unit Trusts Ltd (fifth respondent), offering unit trusts and fund management services, Intermarket Stockbrokers (sixth respondent) and Intermarket Managers (Pvt) Ltd (seventh respondent). On 31 October 2001, the Intermarket Group changed its corporate identity and adopted a new logo and corporate image. It is this logo, which is the subject of this application. H

Hlatshwayo J

A The applicant is the proprietor of Zimbabwean trade mark registration nos. 61/1990 and 62/1990 TRIANGLE DEVICE in classes 35 and 36 and 667/99 TRIANGLE DEVICE in class 36 (hereinafter referred to as "the trade marks"). The applicant's trade marks are registered in respect of services in Class 35 and Class 36 which include insurance, financial and monetary services. The applicant has been using the trade marks in Zimbabwe in respect of these B services since January 1990 when the merger mentioned above occurred. The use of the triangle device as the applicant's logo represented the merger of the three bodies: Prudential Assurance Company of Zimbabwe (Pvt) Ltd, Colonial Life Assurance Society and Norwich Union Life Assurance Society.

It is common cause that the respondents are involved in the provision of C services either in the insurance, financial or monetary fields, the same field of business in respect of which the applicant has been operating in Zimbabwe using the trade mark. The applicant's contention is that the use of the logo in question by the respondents is confusingly similar to its registered trade mark and constitutes an infringement of it. The registered trade mark and logo are shown in the papers both with and without the addition of colour.

D It is also common cause that the applicant's trade mark was registered in 1990 both with and without colour since when it has been extensively used, and that the respondents only came to use their logo relatively recently. It is also not disputed that considerable expenditure has been made on and goodwill derived from the trade mark and that the parties carry on very substantial E business in similar fields.

Section 8(1)(a) of the Trade Marks Act [*Chapter 26:04*] states:

> "(1) Subject to this section and sections ten and eleven, the rights acquired by registration of a trade mark in Part A and Part B of the Register shall be infringed by — F
>
> (a) unauthorized use as a trade mark in relation to goods or services in respect of which the trade mark is registered, of a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion; or
>
> (b) …"

Thus, the test as to whether there has been an infringement depends G essentially on whether there is a sufficient similarity which is likely to lead to confusion: See *Kellogg Co* v *Cairns Foods Ltd* 1997 (2) ZLR 230 (S), *American Chicle Co* v *Gower NO & American Chewing Products Corp* 1947 SR 87; 1947 (4) SA 49 (SR).

According to the applicant, both logos are based on the use of two triangles with one placed upside down in relation to the other. The applicant's H registered trade mark consists of one triangle within another resulting in four

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Hlatshwayo J

triangles within the shape of a triangle as a whole. The respondent's trade mark A has one triangle upside down over the other. A bisecting line drawn where the sides cross achieves an identical result of four triangles within each of the two triangles. It was submitted on behalf of the applicant that the external shape made by the outside lines is dominated by the shapes of the two triangles and triangles within them with the resultant similarity of concept and design with B the applicant's registered trade mark.

On the other hand, the respondents contended that the shape of their logo, unlike a triangle, is solid like a star or a trapezoid, consisting of six triangles, arranged in an irregular pattern, accompanied by the name "Intermarket". The logo of the applicant, as seen by the respondents, consists of four triangles, with three shown on their base pointing C upwards and one on its apex pointing downwards. The four triangles are organized so as to form a single triangle, through which run three white lines, and in colour the middle triangle is presented in red. According to the respondents, the dominant features of the applicant's logo are a representation of a triangle, with a red triangle in the middle thereof, superimposed on the outline of a white triangle, and it is this feature "which strikes the eye and fixes itself in the recollection". See *Saville* D *Perfumery Ltd* v *June Perfect Ltd & Anor* [1941] 58 RPC 147 at 162.

While the respondents' submission that their logo, unlike a triangle, is solid like a star or trapezoid does not bear much scrutiny as it is patently not so, there is merit in their contention that as opposed to the single triangle concept of the applicant's mark, with its dominant features of a middle red triangle E bounded in white lines, the mark used by the respondents gives the impression of an irregular collection of triangles in gold and black together with the name. In my considered view, these differences are not mere distinguishing additions to an otherwise infringing trade mark, but are essential features which set the two logos apart.

The test as to deception or confusion is that of the normal, average person: F *Mobil Oil Zimbabwe (Pvt) Ltd* v *Travel Forum (Pvt) Ltd* 1990 (1) ZLR 67 (H) at 76. Significantly, the applicant could produce only one specific instance of such confusion, without any information as to the type of person who claimed to be confused. The bisecting of the triangles to achieve the striking similarity is an exercise unlikely ordinarily to be carried out by the normal average G person. I do not find, therefore, that there is a likelihood of deception or confusion. The two logos viewed together are distinctive and easily distinguished.

I am strengthened in my conclusion by the view that the concept of similarity should not be construed so widely as to create unacceptable monopoly in the use of designs, in this case incorporating the use of triangles. See *Bata Ltd* H

Hlatshwayo J

A v *Face Fashions cc & Anor* 2001 (1) SA 844 (SCA) pp 851-852. Registered trade marks do not create monopolies in relation to concepts or ideas. See the comments by Harms JA in *Cowbell AG* v *ICS Holdings Ltd* 2001 (3) SA 941 (SCA) at 948. Likewise, in *National Brands Ltd* v *Blue Line Manufacturing (Pty) Ltd* 2001 (3) SA 563 (SCA) at p 570, the court held that the word "similar" had to have its ordinary meaning, that is a "marked resemblance or likeness", B and "marked" meant "easy to recognize".

For the reasons set out above, I have come to the conclusion that the logo used by the respondents is not identical with or so nearly resembling the registered mark of the applicant as likely to deceive or cause confusion as required by s 8(1) of the Trade Marks Act. In other words, the logo of the respondents does C not offend the registered rights of the applicant and the applicant is not entitled to prevent the respondents from using their logo. As far as costs are concerned, I found no reasons to depart from the general rule that costs follow the outcome.

This application is dismissed with costs.

D *Gill, Godlonton & Gerrans*, applicant's legal practitioners

Dube, Manikai & Hwacha, first to seventh respondents' legal practitioners

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Source:
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S v MUTIZWA 2006 (1) ZLR 78 (H)

Citation	2006 (1) ZLR 78 (H)
Case No	Judgment No. HB-4-06
Court	High Court, Bulawayo
Judge	Ndou J
Heard	19 January 2006
Judgment	19 January 2006
Counsel	Details Not supplied
Case Type	Criminal review
Annotations	Link to case annotations

Flynote

Criminal procedure — *indictment — amendment — Criminal Procedure and Evidence Act [Chapter 9:07] — s 202 — section designed to correct* C *errors in the indictment — should not be applied where it is prejudicial to accused*

Criminal procedure — *judicial officer — applications for recusal — approach to be adopted — not to be treated as a personal affront — recusal bought on the basis of a reputation for imposing heavy sentences — not a proper basis for recusal* D

Criminal procedure — *plea — plea of guilty — questioning by magistrate in terms of s 271(2)(b) of Criminal Procedure and Evidence Act [Chapter 9:07] — responses by accused not amounting to irrevocable admission of essential elements of offence — plea of not guilty should be recorded*

Criminal procedure — *recusal of judicial officer — circumstances where* E *duty of recusal arises — likelihood of bias on the part of the judicial officer — matter must be regarded from the point view of the reasonable litigant — test is objective*

Headnote

A judicial officer should not unduly take a recusal application as a personal affront, for it is in the general interest of the judiciary for an individual F officer to recuse himself where a reasonable apprehension of bias is perceived. At the same time, a judicial officer's duty is to sit where he is not disqualified.

Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable G ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he may not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important. H

Ndou J

A An application for the recusal of the magistrate on the basis that he was known for imposing severe sentences is not a proper basis for recusal. Severe sentences are not indicative of bias and neither are lenient sentences indicative of fairness or lack of bias. It is the competence of the sentence that matters, and the judicial officer has a wide discretion on the question of punishment.

B Where the responses proffered by an accused as a result of an inquiry conducted in terms of s 271(2)(b)(ii) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] do not amount to an irrevocable admission of the essential elements of the offence, a plea of guilty should not be entered.

Where there is uncertainty as to what an accused is admitting to, the court C must probe further and satisfy itself that all the essential elements of the offence have been admitted. Where the court has any doubts or the accused raises a defence, the court is obliged to alter the plea to that of not guilty and order that a trial be held to determine the contentious issues.

The object of s 202 of the Criminal Procedure and Evidence Act is to correct D technical errors in the charge or a situation where more particulars emerge from the evidence than those given in the original charge. Any such amendment made in terms of s 202 should not, however, be one that prejudices the accused in his defence.

Cases cited E

Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor v Diamond Ins Co (Pvt) Ltd 2001 (1) ZLR 226 (H)

Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd 1994 (1) ZLR 255 (S)

President of the Republic of SA & Ors v SA Rugby Football Union & Ors F 1999 (4) SA 147 (CC)

S v Burns 1988 (3) SA 366 (C)

S v Herbst 1980 (3) SA 1026 (C)

S v Malindi 1990 (1) SA 962 (A)

S v Maseko 1990 (1) SACR 107 (A)

S v Matanhire HH-18-02

G *S v Mavhundura* 2002 (1) ZLR 598 (H)

S v Mudindo & Ors HH-25-02

S v Ndhlovu 2003 (1) ZLR 634 (H)

S v Ndhlovu & Ors 1979 RLR 236 (G)

R v Ngcobo 1957 (1) SA 377 (N)

S v Ramushu & Ors S-25-93

H *S v Smith* 1975 (2) RLR 77 (A)

Ndou J

S v van Wyk en Andere 1994 (1) SACR 183 (NC) A

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 202(1) & 271(2)(b)

Judgment

NDOU J: The accused person was convicted by a Bulawayo regional magistrate B of theft of a motor vehicle and two counts of extortion. In respect of count 1, he was sentenced to ten years' imprisonment and three years for each of the extortion charges. At the commencement of the trial, without much sophistication and articulation, the accused applied for the recusal of the trial magistrate. He felt, rightly or wrongly, that he would not be subjected to a fair trial. He gave his reasons. In short, the basis of the application is that there C is a perception that the regional magistrate imposes very stiff sentences. It appears that the perception is among accused persons but certainly not among the magistrate's peers. The fear is premised on "prison talk", so to speak. There was nothing concrete placed before the magistrate by the accused and she summarily dismissed the application. D

I queried the propriety of the conviction in the theft charge. The accused, had, in answer to a question by the trial magistrate indicated that he did not intend to deprive the owner permanently of the vehicle. The magistrate did not seem to accept this defence and embarked on further questioning of the accused. Still the accused gave the impression that he was sticking to the said defence.

Further, the extortion charges were formulated in court during the course of E the trial.

I referred the matter to the Attorney-General specifically to get an opinion on the propriety of the theft charge.

I am indebted to Ms C Moyo who responded on behalf of the Attorney-General. Her response is the following: F

"A. APPLICATION FOR RECUSAL

It is a trite rule of law that no person who has an interest in or harbours any prejudice in respect of the matter to be tried should adjudicate on such matter. It was held in *S* v *Herbst* 1980 (3) SA 1026 (E) that the principle involved in an application for recusal is that 'no reasonable man should, by reason of the situation or action of a judicial officer, have grounds for G suspecting that justice will not be administered in an impartial and unbiased manner'.

S v *Malindi* 1990 (1) SA 962 A at 969G-I further fortifies the argument above. In that case, it was held that the fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important. H

Ndou J

A In *S* v *Maseko* 1990 (1) SACR 107 (A), it is propounded that the criterion for recusal is an objective one *i.e.* whether the presiding officer's conduct leaves a right thinking observer or litigant the impression that the accused did not receive a fair trial.

In the cases cited above, the requirements of the test for the presence of judicial bias have been laid down as: B

1. There must be a suspicion that the judicial officer *might be, not would be, biased* (emphasis is mine).
2. The suspicion must be that of a reasonable person in the position of the accused.
3. The suspicion must be based on reasonable grounds C
4. The suspicion is on which the reasonable person referred to *would,* not might, have (emphasis is mine).

It is argued therefore that if the application conforms to the requirements as stated above the magistrate or judicial officer ought to recuse himself/herself. Should a judicial officer refuse to recuse him/herself in a case where he/she should properly have done so, his/her refusal would create D a good ground for review of the case: S v *Burns* 1988 (3) SA 366 (C).

Coming closer home, in *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor* v *Diamond Insurance Co (Pvt) Ltd* 2001 (1) ZLR 226 (H), Hlatswayo J, after considering a plethora of case authorities from both Zimbabwe and South Africa, held that a judicial officer should not unduly take a recusal application as a personal affront, for it is in the general E interest of the judiciary for an individual judicial officer to recuse himself where a reasonable apprehension of bias is perceived. At the same time, a judicial officer's duty to sit where he is not disqualified is as compelling as the duty not to sit where disqualified. The test for bias was propounded in the same case as the one stated in the case of *Leopard Rock Hotel Co (Pvt) Ltd & Anor* v *Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S); F namely, whether there exist circumstances which may engender a belief in the mind of a reasonable litigant that in the proceedings concerned he would be at a disadvantage. The test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Can it be argued then, that in the case under consideration G the accused harboured a reasonable misapprehension that the magistrate would be biased in dealing with his case? And that the accused was reasonable in harbouring such a misapprehension? And that the magistrate acted unreasonably in dismissing the application? Whilst it can be argued that the magistrate erred in summarily dismissing the accused's application without proffering cogent reasons for having so done and putting such reasons clearly on record; the end result cannot be said to have been H improper considering the reasons advanced by the accused person for

Ndou J

not wanting to be tried by that court (fear for a possible harsh or severe A sentence *i.e.*, the trial magistrate is perceived to impose heavy sentences). It is trite law that issues of sentence are discretionary and may vary from court to court. Harsh sentences by a court do not necessarily portray bias on the part of that court. The sentence may be harsh but competent on considering the merits of the case and the accused person's personal circumstances. It is, therefore, submitted that accused's application was B without any merit or substance. It does not conform to the test for bias laid down in the cases cited above. It is further submitted that the magistrate was completely in order in dismissing the application though the procedure adopted can be faulted.

B. DEFENCE RAISED IN RESPECT OF THE THEFT CHARGE

It is trite law that during plea proceedings under s 271(2)(b) of the Criminal C Procedure and Evidence Act [*Chapter 9:07*] the magistrate must in terms of subpara (ii):

'Inquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of acts or omissions stated in the charge by the prosecutor.' D

It is, therefore, submitted that the responses proffered by an accused as a result of the inquiry conducted in terms of the cited section, should amount to an irrevocable admission of the essential elements of the offence as preferred. Where there is uncertainty as to what the accused is admitting to, the court must probe further and satisfy itself that all the essential elements of the offence have been admitted to. Where the court E has any doubts or the accused raises a defence the court is obliged to alter the plea to that of not guilty and order that a trial be held to determine the contentious issues.

In the present case, the accused categorically indicated that 'he did not intend to deprive the owner permanently' of his motor vehicle and explained how he would have made it certain that the owner recovered his F motor vehicle. The magistrate should have stopped there. She should have simply altered the plea to that of not guilty and ordered that a trial be held. The element of appropriation is very critical in establishing permanent deprivation of an owner, which is one of the essential elements of theft. The magistrate did not do that but instead proceeded to ask a long winded and confusing question to which the accused answered 'No your G Worship'. It is, however, not clear what the accused was saying 'No' to. Because the accused had in no uncertain terms indicated to the court that he had not intended to deprive the owner permanently, the court should have been placed on its guard and should have sought to verify what the accused meant by his later response, which was at variance with the previous expressly stated intention. H

2006 (1) ZLR p83

Ndou J

A In view of the foregoing, it is submitted that the conviction on count one, on the basis of accused's plea of guilty, cannot stand. The plea of guilty in question cannot be said to have been irrevocable. It was vitiated by the accused's intimation of lack of intention to deprive the owner permanently. The accused's vacillation debased the plea of guilty which he had initially tendered. It was liable to alteration to that of not guilty at that stage. The B conviction on count one on the basis of accused's plea of guilty cannot be supported.

C. FORMULATION OF CHARGES IN COURT

As regards the formulation of charges in court, it is submitted that, that instance is covered by the provisions of *s 202(1) up to and including subs (3) of the Criminal Procedure and Evidence Act*. There was no C prejudice caused to the accused person.

Subsection (1) of s 202 provides that:

'Where on the trial of any indictment, summons or charge there appears to be any variance between the statement therein and the evidence offered in proof of such statement, or if it appears that any words or D particulars that ought to have been inserted in the indictment, summons or charge have been omitted or any words or particulars that ought to have been omitted have been inserted or that there is any other error in the indictment, summons or charge, *the court may at any time before judgment*, if it considers that the making of the indictment or summons or charge will not prejudice the accused in his defence, order that the indictment, summons or charge, *whether or not it discloses an offence* E be amended … ' (the emphasis is mine).

After the amendment, the essential elements were properly put to the accused person, which he admitted. That conviction, it is respectfully submitted, cannot be faulted.

If his Lordship agrees with my submissions he may quash the proceedings F in respect of count one and have the sentence set aside and remit the matter for a trial *de novo* before a different magistrate in respect of count one."

I agree *in toto* with the above observations. On recusal, it is trite that an impartial judicial officer is a fundamental prerequisite for the fair trial and a judicial office should not hesitate to recuse herself

or himself if there are G reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial: *President of the Republic of South Africa & Ors* v *South African Rugby FootballUnion & Ors* 1999 (4) SA 147 (CC).

According to Corbett CJ in the *Malindi* case, *supra,* at 969G-L, the duty of H recusal arises as follows:

2006 (1) ZLR p84

Ndou J

> "The common law basis of the duty of the judicial officer in certain A circumstances to recuse himself was fully examined in the cases of *S* v *Radebe* 1973 (1) SA 796 (A) and *South African Motor Acceptance Corporation (Edms) Bpk* v *Oberholzer* 1974 (4) SA 808 (T). Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the B judicial officer: that is, that he may not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer, was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important."

See also *Council of Review, SA Defence Force* v *Monning* 1992 (3) SA 482 C (A); *Silwana* v *Magistrate for District of Piketberg* [2003] 2 All SA 350 (C); *Sager* v *Smith* 2001 (3) SA 1004 (SCA) and *S* v *Basson* 2005 (1) SA 171 (CC). In other words, not only actual bias but also the appearance or apprehension of bias disqualifies a judicial officer from presiding or continuing to preside over judicial proceedings: *Sager* v *Smith, supra* at 1009, *Southern Commercial Catering and Allied Workers Union & Ors* v *Irvin & Johnson Ltd (Seafood* D *Division Fish Processing)* 2000 (3) SA 705 (CC) and *S* v *Roberts* 1999 (4) SA 915 (SCA) at 923."

In casu, it is common cause that the issue of actual bias does not arise. But has the accused established an appearance or apprehension of bias? Even from his own statement in court he has not. The basis for the application is E that the trial magistrate is known for imposing severe sentences. He, in other words, seeks recusal so that he can be tried by a magistrate who is perceived to impose lenient sentence. This "fishing" for judges or judicial officers is not what this principle is intended to achieve. Severe sentences are not indicative of bias and neither are lenient sentences indicative of fairness or lack of bias. It is the competence of the sentence that matters, and the judicial officer has F wide discretion on the question of punishment: *S* v *Ramushu & Ors* S-25-93; *S* v *Matanhire* HH-18-02; *S* v *Mavhundura* HH-91-02; *S* v *Mudindo & Ors* HH-25-02 and *S* v *Ndlovu* HB-66-03. From the foregoing, there is no reasonable appearance or apprehension on the part of the accused.

On count one, I agree that since the accused raised a lawful defence, his plea G of guilty should have been altered to that of not guilty: J Reid Rowland *Criminal Procedure in Zimbabwe* at 17-10.

As far as the amendment of the charge in court, I agree that s 202, *supra* is applicable. The object of s 202 is to correct technical errors in the charge or a situation where more particulars emerge from the evidence than those given in the original charge: *S* v *Ndlovu & Ors* 1979 RLR 236 (G). But such amendment H

2006 (1) ZLR p85

Ndou J

A should not be one that prejudices the accused in his defence. Prejudice must relate to the accused's defence: *S* v *Smith* 1975 (2) RLR 77 (A) and *S* v *van Wyk en Andere* 1994 (1) SACR 183 (NC). See also *R* v *Ngcobo* 1957 (1) SA 377 (N). The accused is not prejudiced by the amendment as he has admitted all the essential elements of extortion.

B In the circumstances, I order as follows:

Count 1	–	The conviction is hereby quashed and the sentence of 10 years' imprisonment is set aside. A fresh trial is ordered before a different magistrate.
Count 2	–	The conviction and sentence of three years' imprisonment are confirmed.
C Count 3	–	The conviction and the sentence of three years' imprisonment are confirmed.

Of the total sentence of six years' imprisonment, two years is suspended for a period of three years on condition the accused in that period does not commit an offence of extortion and for which he is convicted and sentenced to D imprisonment without the option of a fine.

Bere J concurrs.

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CITY OF HARARE v RUSVINGO 2006 (1) ZLR 86 (H)

Citation	2006 (1) ZLR 86 (H)
Case No	Judgment No. S-73-05
Court	Supreme Court, Harare
Judge	Sandura JA, Malaba JA &Gwaunza JA
Heard	5 May 2005
Judgment	25 January 2006
Counsel	*L Uriri*, for the appellant *H Simpson*, for the respondent
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

Employment — *contract — termination — application for authority to* C *dismiss — application containing additional grounds to those set out in letter of suspension — main ground identical – application valid*

Employment — *contract — termination — employee of urban council — allegation of misconduct — no requirement that employee be suspended before inquiry into allegation may take place* D

Headnote

The respondent, an employee of the appellant council, was charged with conduct unbecoming of an employee after he had used coarse and insulting language in reply to a letter of reprimand. After investigation, he was found guilty and reduced in grade and transferred. An application to the High Court to set aside the proceedings on review succeeded, on E the grounds that the Executive Committee had conducted the inquiry into the allegations of misconduct levelled against the respondent without him having been first suspended from duty by the head of department, as required by s 141(4) of the Urban Councils Act [*Chapter 29:15*].

Held, that suspension is not required in a case where the employee's head F of department does not consider that the employee was guilty of such conduct that it is desirable that the employee should not be permitted to carry on his work. The council may proceed in terms of s 141(2)(b) of the Act. The fact that the subsection provides for summary dismissal where allegations of misconduct are of a serious nature, does not exclude the G holding of an inquiry, considering the applicability of the principles of natural justice to decisions of public bodies such as the appellant. There was nothing procedurally irregular in the appellant having an inquiry carried out into the allegations of misconduct levelled against the respondent without him having been suspended by the head of the department and, after discovering that the degree of seriousness of the H

A misconduct did not justify summary discharge, imposing some other appropriate penalty.

Cases cited

Kimbini & Ors v City of Mutare HH-116-2000

Mudziri v City of Harare HH-83-2001

B *Chinhoyi Municipality v Mupandira* S-146-96

Case information

L Uriri, for the appellant

H Simpson, for the respondent

Judgment

C **MALABA JA:** On 19 July 2002, the respondent, who was employed by the appellant as a principal administrative officer (finance) in the Department of Housing and Community Services, was found guilty of conduct unbecoming of an employee under clause 18(c) of the Collective Agreement of the Harare Municipality Undertaking (General Conditions of Service), SI 66 of 1992 ("the Code"). The penalty imposed on him was that he be demoted from Grade 5 to D Grade 7, transferred to another department and issued with a final warning.

On 30 June 2004, the High Court set aside the decision of the appellant's Review Board and ordered that the respondent be reinstated into his position as a principal administrative officer (finance). Each party was ordered to pay its own costs. This appeal is against the judgment of the High Court.

E The facts of the case are these. On 22 November 2000, the respondent was summoned to attend a meeting with the Director and acting Deputy Director of Housing and Community Services. At the meeting, the acting Deputy Director complained of the respondent's lack of commitment to duty. The allegations against him were that he had absented himself from work on 15 November 2000 and failed to attend a meeting with the Finance Committee. It F was also alleged that on 20 November 2000, the respondent had failed to attend a meeting with the director.

After the meeting, the Director wrote a letter of reprimand to the respondent on 23 November 2000. The letter read:

> "LACK OF COMMITMENT TO DUTY
>
> G I refer to the meeting held in my office on 22 November 2000, and wish to reiterate the concerns raised regarding your apparent lack of commitment to duty.
>
> On 15 November 2000, I had to send your junior to attend the Finance Committee meeting which you were supposed to attend, because you were not available.

> On 20 November 2000, you were absent from duty for no valid reason. You A were asked to attend a pre-meeting on 22 November 2000 with me, to prepare for the Finance Committee meeting which was to be held the same day. You did not attend that pre-meeting, instead you attended to your private business.
>
> It appeared that when I spoke to you about your lack of commitment to B your duties, you did not show any remorse. You, as a senior person in the Department, I expect you to set a good example to your subordinates.

If you do not improve in your work performance, disciplinary action will be taken against you."

On 27 November 2000, the respondent dismissed the reprimand in a letter written in language that was intentionally insulting to, and disrespectful of, C his superiors at work. He described the presentation of the complaint of lack of commitment to duty made against him to the Director by the acting Deputy Director as "ranting and raving" and "barking like a dog". He poured scorn on the decision by the Director to reprimand him. As a result of the coarse invectives used by the respondent in his letter, he was charged with the offence of conduct unbecoming of an employee under clause 18(c) of the code. D

On 7 August 2001, he appeared before the Inquiries Committee, which heard evidence from the department's representative and the respondent and determined that the language used in the letter of 27 November 2000 was insulting to, and disrespectful of, the respondent's superiors and constituted conduct unbecoming of an employee. The Inquiries Committee made its report E to the Executive Committee and recommended, as a possible penalty, that the respondent be demoted from Grade 5 to Grade 7, transferred to another department and given a final warning. After consideration of the report of the Inquiries Committee on the findings of fact and recommendations on the possible penalty, the Executive Committee also came to the conclusion that the respondent was guilty of conduct unbecoming of an employee in using F insulting and disrespectful language addressed to his superiors at work. It imposed the penalty recommended by the Inquiries Committee. A Board which reviewed the respondent's case on 9 June 2002 also came to the same conclusion.

On 29 November 2002, the respondent took the decision of the appellant to G the High Court on review. The learned judge who heard the application for review also found as a fact that the language used by the respondent in the letter of 27 November 2000 was insulting to, and disrespectful of, his superiors. She also found as a fact that his use of such language constituted conduct unbecoming of an employee. She, however, set aside the decision on the ground of gross procedural irregularities, in that the Executive Committee had H

Malaba JA

A conducted an inquiry into the allegations of misconduct levelled against the respondent without him having been first suspended from duty by the head of department, as required by s 141(4) of the Urban Councils Act [*Chapter 29:15*] ("the Act").

It is common cause that the respondent was not suspended from duty when B the disciplinary proceedings were instituted against him. Mr *Uriri*, for the appellant, argued on appeal that the learned judge nonetheless misdirected herself because the procedure adopted by the appellant is provided for under s 141(2)(b) of the Act. Sections 141(2), 141(4), 141(5) and 141(6) of the Act provide as follows:

> "141(2) Subject to the conditions of service of the employee concerned, C a council or, in the case of a municipal council, the executive committee of the council may at any time discharge an employee other than a senior official –
>
> (a) upon notice of not less than three months; or
>
> (b) summarily on the ground of misconduct, dishonesty, negligence or any other ground that would in law justify discharge without notice.
>
> D (3) …
>
> (4) If it appears to a head of department that any employee of the council who is not a senior official has been guilty of such conduct that it is desirable that that employee should not be permitted to carry on his work, he – E
>
> (a) may suspend the employee from office and require him forthwith to leave his place of work; and
>
> (b) shall forthwith notify the town clerk or secretary of the council, as the case may be, in writing, of such suspension.
>
> (5) Upon receipt of a notification of suspension in terms of subsection (4), the town clerk or secretary, as the case may be, shall cause the F suspension to be reported at the first opportunity to –
>
> (a) the executive committee of the council in the case of a municipality; or
>
> (b) the council, in any other case.
>
> (6) Where an executive committee or a council has received a report of G a suspension in terms of subsection (5), the executive committee or the council shall without delay –

(a) conduct an inquiry or cause an inquiry to be conducted into the circumstances of the suspension; and

(b) after considering the results of the inquiry, decide whether or not: H

(i) to lift the suspension; or

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Malaba JA

(ii) to do any one or more of the following – A

A. reprimand the employee concerned;

B. reduce the salary or any allowance payable to the employee concerned;

C. transfer the employee concerned to another post or grade, the salary of which is less than that received by him at the B date of the imposition of the penalty;

D. impose a fine not exceeding three thousand dollars or three months salary, which fine may be recovered by deductions from the salary of the employee concerned;

E. subject to subsection (3), discharge the employee concerned." C

It is clear that two different procedures for dealing with allegations of misconduct levelled against the employee are envisaged under ss 141(2)(b) and 141(4) of the Act. Although the procedure under s 141(2)(b) of the Act involves summary discharge of an employee where allegations of misconduct are of a serious nature, it does not exclude the holding of an inquiry, considering the applicability of the principles of natural justice to decisions D of public bodies such as the appellant. There was nothing procedurally irregular in the appellant having an inquiry carried out into the allegations of misconduct levelled against the respondent without him having been suspended by the head of the department and, after discovering that the degree of seriousness of the misconduct did not justify summary discharge, imposing some other appropriate penalty. The fact that the respondent was E not suspended suggests that the head of the department did not consider that he was guilty of such conduct that it was desirable that he should not be permitted to carry on his work.

In *Municipality of Chinhoyi* v *Mupandira* S-146-96, the employee was not suspended pending an inquiry into the allegations of misconduct levelled F against him. Referring to ss 90(10) and 90(13), which are predecessors to ss 141(2) and 141(4), of the Act, McNally JA, at pp 5-6 of the cyclostyled judgment, said:

> "Where an employee was suspended *pending an enquiry* then the decision to suspend must be that of the relevant senior official not that of the Council. And that suspension must be followed by the enquiry G required by subs (13).
>
> …
>
> In the present case, there was no question of the employee being suspended pending an enquiry. The enquiry was conducted and concluded without his being suspended.
>
> … H

2006 (1) ZLR p91

Malaba JA

> A A full scale enquiry was launched. He was called in by a committee of senior officials and given an opportunity to explain his conduct. The officials were not satisfied with his explanation. They recommended to the Municipality on 26 October 1994 that he be summarily dismissed 'in terms of paragraph (b) of subsection (7) of section 90 of the Urban Councils Act'.
>
> The Municipality resolved on 1 November 1994 to dismiss him summarily. B Up to that point everything was being done correctly in terms of s 90(7)" (my emphasis).

The only difference between *Mupandira*'s case *supra* and that of the respondent is that, instead of recommending that he be summarily dismissed, the Inquiries Committee recommended the imposition of a less severe penalty C on the ground that the misconduct the respondent was guilty of was not so serious as to justify dismissal. The Executive Committee has a discretion under s 141(2) not to dismiss the respondent from employment for the misconduct it found him guilty of. The respondent relied on two decisions of the High Court in *Kimbini & Ors* v *City of Mutare* HH-116-00 and *Mudziri* v *City of Harare* HH-83-01. The decisions in both cases do not advance his case D because the appellants in those cases had been properly suspended from work by heads of departments.

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

"The application is dismissed with costs".

E SANDURA JA &Gwaunza JA concurred.

Honey & Blanckenberg, appellant's legal practitioners

Manase & Manase, respondent's legal practitioners

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Source:
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NYATHI v TAGARIRA BROTHERS (PVT) LTD & ORS 2006 (1) ZLR 92 (S)

Citation	2006 (1) ZLR 92 (S)
Case No	Judgment No. S-74-05
Court	Supreme Court, Bulawayo
Judge	Sandura JA, Malaba JA & Cheda AJA
Heard	25 July 2005
Judgment	25 January 2006
Counsel	*J C Andersen SC*, for the appellant *V Majoko*, for the first respondent No appearance for the second and third respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Company — *liquidation — provisional liquidation — sale of assets —* C *creditors of company — no power in creditors to agree to sell assets*

Headnote

Creditors have no power to enter into an agreement of sale of assets of a company under liquidation by a court. It can only be the provisional liquidator or the liquidator, with the authority of the Master or the court, D who can sell, deliver or transfer assets of a company under liquidation by a court.

Case information

J C Andersen SC, for the appellant

V Majoko, for the first respondent

No appearance for the second and third respondents E

Judgment

MALABA JA: This is an appeal against the judgment of the High Court granted on 27 November 2003 declaring the first respondent the purchaser of Sukasihambe Special Express (Pvt) Ltd as a going concern, together with its movable and immovable assets for the sum of $7 200 000, and directing the second respondent to transfer ownership of the said assets to the first F respondent and sign all documents necessary to effect the transfer.

Sukasihambe Special Express (Pvt) Ltd is a company incorporated in accordance with the laws of Zimbabwe. The appellant was one of its directors. The company was placed under provisional liquidation in terms of an order granted on 6 April 2001. Its assets comprised two industrial stands, eight buses, four G of which were non-runners, a Mazda B2500 truck, one safe, one compressor motor, spares and a 20 000 litre underground fuel tank. The provisional order directed the second respondent to appoint the third respondent as the provisional liquidator. She could not perform the duties of a provisional liquidator until 11 October 2002 because she had failed to furnish the security required under s 274 of the Companies Act [*Chapter 24:03*] ("the Act"). H

Malaba JA

A On 26 September 2002, the court *a quo* reviewed the progress made towards the final liquidation of the company and made an order in these terms:

> "1. This matter be and is hereby postponed to 7 November 2002, and the rule *nisi* is extended to that date.
>
> 2. The Assistant Master be and is hereby directed to convene a meeting B of the creditors and shareholders and the provisional liquidator of the applicant before 24 October 2002 for the express purpose of trying to settle this matter, but it shall also be for the purpose of –
>
> (a) allowing all creditors of the applicant to prove their claims;
>
> (b) allowing I Nyathi to make proposals to the creditors to discharge the debts owed to them by the applicant; and C
>
> (c) allowing the provisional liquidator to present proposals by any other buyers interested in purchasing the applicant's shares.
>
> 3. The provisional liquidator shall cause a notice of the aforesaid meeting to be published in a Friday edition of a local newspaper at least seven days before the proposed meeting.
>
> 4. The costs are costs in liquidation."

D The meeting of creditors convened by the second respondent in terms of the court order took place on 11 October 2002. Before the meeting, the third respondent furnished the required security for the due performance of her duties as a provisional liquidator. It was on that day that she was given letters of appointment that restricted her powers to the performance of acts specified E in s 221(2) (a) to (g) of the Act, excluding the power to "sell, deliver or transfer the movable and immovable property of the company" contained in subpara (h).

At the meeting of the creditors on 11 October 2002, the first respondent made the highest offer to purchase the company as a going concern at a price of $7 200 000, which was sufficient to pay all the creditors. The creditors F instructed the legal practitioners, who also represented the provisional liquidator, to apply for a final order of liquidation on the return day, have the third respondent appointed as the liquidator and accept the sum of $7 200 000 offered by the first respondent as the purchase price of the company's assets.

On 28 October 2002, the appellant's legal practitioners wrote to the provisional liquidator's legal practitioners, saying that she had raised the sum of $7 200 000. G They indicated that they were holding the money in trust for payment to the creditors after the discharge of the provisional order of liquidation on the return day. They disclosed that the money had been advanced to the appellant in terms of agreements with third parties, which required that some of the movable assets of the company be delivered to them after its removal from H provisional liquidation.

Malaba JA

On 7 November 2002, the provisional liquidation order against the company A was discharged by consent and the sum of $7 200 000 paid to the creditors. It is important to note that the provisional liquidator and the creditors, through their legal practitioners, consented to the discharge of the order.

On 6 December 2002, having changed lawyers and when she was no longer a provisional liquidator, the third respondent purported to enter into an B agreement with the first respondent to sell the movable and immovable assets of the company at the price of $7 200 000. Notwithstanding the fact that the provisional order of liquidation had been discharged on 11 November 2002, the third respondent described herself as the "liquidator".

On 17 December 2002, the first respondent made an application to the High Court for the order that is the subject of this appeal. C

A number of points were taken by Mr *Andersen* on behalf of the appellant. They show that the learned judge misdirected himself in granting the order to the first respondent.

The first point was that the company was not cited as a party in the application before the court *a quo*. It was improper for the learned judge to make an order D against it. It was common cause at the hearing before the court *a quo* that the company had been removed from provisional liquidation at the time the application was instituted. As such, it could not be represented by the third respondent in the proceedings because she was no longer a provisional liquidator. E

The second point was that the effect of the discharge of the provisional order of liquidation on 11 November 2002 was that ownership and control of the movable and immovable assets of the company reverted to the shareholders and directors of the company. At the time, the court *a quo* made the order on 27 November 2003 neither the second respondent nor the third respondent had possession of the assets to transfer to the first respondent. F

The third point was that the first respondent had not purchased the assets of the company. The first respondent could only have purchased the assets of the company if the third respondent, in her capacity as a provisional liquidator, had the power to sell them. Only the second respondent or the court could give her that power. It is clear from the letters of appointment that the second G respondent did not give the third respondent in her capacity as the provisional liquidator of the company the power to sell its assets. The power to sell, deliver or transfer the company's assets, contained in s 221(2)(h) of the Act, was excluded from the list of powers given to the third respondent. She was being told in no uncertain terms by the second respondent that she could not sell, deliver or transfer the assets of the company without the leave of the court. H

Malaba JA

A It was suggested in argument on behalf of the first respondent that the leave of the court to sell the assets of the company was given to the third respondent in the order of 26 September 2002. That order made no reference to the sale of the assets of the company. It provided for the provisional liquidator being allowed to present "proposals by any other buyers interested in purchasing the applicant's shares". Whilst there was reference to the purchase of B "*shares*" of the company, there was no reference to the selling of its assets. The construction of the terms of the order shows that no leave was given to the third respondent, acting as the provisional liquidator of the company at the time, to sell its movable and immovable assets. One must assume that the court granted the order in the terms it did because it was aware that leave to C exercise the powers listed under s 221(2)(h) of the Act is ordinarily granted to a liquidator after a final winding-up order has been made by it.

The learned judge found as a fact that there was a *sale* of the movable and immovable property of the company at the meeting of 11 October 2002. He found that the creditors accepted the offer by the first respondent to purchase the assets of the company at the price of $7 200 000.

D Assuming for a moment that the factual finding made by the learned judge was correct, it could not support the conclusion that there was a sale of the company's assets in terms of the law because creditors have no power to enter into an agreement of sale of assets of a company under liquidation by a court. It would be the provisional liquidator or the liquidator, with the authority of E the Master or the court, who would sell, deliver or transfer assets of a company under liquidation by a court.

I would accordingly, allow the appeal with costs, set aside the judgment of the court *a quo* and substitute in its place the following:

"The application is dismissed with costs."

F SANDURA JA & CHEDA AJA concurred.

Webb, Low & Barry, appellant's legal practitioners

Majoko & Majoko, first respondent's legal practitioners

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Source:
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STANBIC BANK ZIMBABWE LTD v CHARAMBA 2006 (1) ZLR 96 (S)

Citation	2006 (1) ZLR 96 (S)
Case No	Judgment No. S-77-05
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA & Cheda JA
Heard	14 November 2005
Judgment	30 January 2006
Counsel	*E T Matinenga,* for the applicant *S V Hwacha,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — *contract — termination — retrenchment — failure to comply* C *with peremptory requirements of relevant regulations — retrenchment invalid — retrenchment committee — role in retrenchment process — must play an active role in securing agreement between parties*

Headnote

The appellant bank proposed to make the respondent redundant, having D undergone a restructuring exercise, which abolished his post. The respondent disagreed that retrenchment was justified. As at the relevant time, the Bank did not have a works council or an employment council which catered for managerial employees, the Bank, acting in terms of the proviso to s 3(1) of the Labour Relations (Retrenchment) Regulations E 1990 (SI 404 of 1990), sent the notice of its intention to retrench the respondent to the retrenchment committee. About five weeks later, the retrenchment committee held a meeting, at which the parties made their submissions. After hearing the submissions, the committee adjourned the meeting and directed the parties to go and negotiate and try to reach a settlement. Four months later, the parties having failed to reach an F

agreement, the committee held another meeting. It decided that retrenchment was justified and two months later recommended to the Minister of Labour that the respondent be retrenched on the basis of a certain severance package. About a month after that, the Minister in due course approved the retrenchment. The Labour Court, on appeal by the respondent, set aside the retrenchment on the grounds that the peremptory G provisions of the Regulations had not been complied with.

Held, that the retrenchment committee did not appreciate that when it received the notice it, or a person authorised by it, or the Minister, was obliged to undertake the functions of an authority in terms of s 3(1) of the Regulations, because the Bank did not have a works council or an employment council which catered for managerial employees. H

Sandura JA

A *Held,* further, that after receiving the notice the retrenchment committee, acting as the authority in terms of s 3(1), was obliged to "forthwith" attempt to secure agreement between the Bank and the respondent as to whether or not he should be retrenched and, if he was, the terms and conditions on which he was to be retrenched. The authority is obliged to play an active role, not a passive one, in attempting to secure an B agreement between the parties concerned. Its role is that of a mediator. The committee failed to do this. The committee did not act "forthwith", not doing anything for 37 days after it had the notice. The retrenchment committee was obliged to attempt to secure agreement on the possibility of implementing measures to avoid the respondent's retrenchment. It C failed to do so. It also failed to have regard to the factors referred to in s 7 of the Regulations when attempting to secure an agreement on whether or not the respondent was to be retrenched. It failed to keep proper minutes of its meetings.

Held, further, that after receiving the notice the retrenchment committee had only one month within which to secure an agreement between the parties. D If it failed to secure an agreement within that period, it had only another two weeks within which to recommend to the Minister whether or not the retrenchment should be permitted and, if so, the terms and conditions on which it was to be effected. The committee took nearly 6 months to make its recommendations.

Held, further, that the Minister was obliged to consider, without delay, any E recommendation on retrenchment submitted to him and, within two weeks, to approve or refuse to approve the proposed retrenchment. He took over a month to reach a decision.

Held, further, that the respondent's retrenchment was thus not carried out in terms of the Regulations and was of no effect whatsoever.

Cases cited F

Standard Chartered Bank Zimbabwe Ltd v Matsika 1996 (1) ZLR 123 (S)

Legislation considered

G Labour Relations (Retrenchment) Regulations 1990 (SI 404 of 1990), ss 3(1) (2) (3)(4) and (6), 5(1)(2) and (3), 6, 7, 8A and 10

Case information

E T Matinenga, for the applicant

S V Hwacha, for the respondent

Sandura JA

Judgment

SANDURA JA: This appeal arose out of a labour dispute which was decided A by the Labour Court in favour of the respondent on 13 May 2005.

The background facts in the matter may be tabulated conveniently as follows:

1. The respondent ("Charamba") joined the appellant ("the Bank") as a junior employee on 1 August 1988, and thereafter rose through the ranks to the position of assistant general manager, strategic planning. B

2. On 28 February 2002, the Bank's managing director, Mr G R Brackenridge ("Brackenridge"), wrote to Charamba as follows:

   "Following on from the restructuring of the Bank to meet the challenges of competing in the marketplace, I regret to advise you that your post has become redundant with effect from 28 February 2002. The Bank is not in a position to offer you alternative employment and Human C Resources Department will be contacting you during the week ending 8 March 2002 to negotiate your package."

3. On 5 March 2002, Charamba wrote to Brackenridge as follows:

   "I acknowledge receipt of your letter dated 28th February 2002, and note your unilateral decision to retrench me and to offer me an exit D package.

   Regrettably, I must advise that it is not lawful for you to purport to have terminated my employment with *effect from the 28th of February 2002*. The retrenchment regulations provide that a retrenchment is *void* if not in accordance with the regulations as set out.

   In the event, I remain an employee of the Bank and entitled to all salary, E benefits and or other allowances until the matter is determined. I reserve all rights in this regard.

   Besides, I wish to place on record that your decision to retrench me is not justified …"

4. On 21March 2002, Mr S Z Kazhanje ("Kazhanje"), the assistant general F manager, human resources, wrote to Charamba giving him the details of the proposed severance package.

5. On 2 April 2002, Charamba wrote to Brackenridge. In that letter he referred to the letter he had received from Kazhanje, and reiterated that the retrenchment was void because it was not in accordance with the provisions of the Labour Relations (Retrenchment) Regulations, 1990 G (404 of 1990) ("the Regulations") (now repealed). In addition, he made counter proposals in respect of the severance package, in the event that the retrenchment became compulsory. As Brackenridge was no longer the Bank's managing director, Charamba's letter was placed before the new managing director, Ms P Nyandoro ("Nyandoro"), who immediately wrote H

Sandura JA

A to Charamba informing him that she would respond to his letter in due course.

6. On 24 June 2002, Nyandoro, having obviously realised that Brackenridge had not complied with the Regulations when he purported to retrench Charamba on 28 February 2002, wrote to Charamba as follows:

   B "Please be advised that having examined previous correspondence with regard to your situation, I now advise that based on the provisions of 404 of 1990, subsections 2 and 3 (*sic*) and SI 252 of 1992, subsection 3(ii)(a) (*sic*), the Bank gives one month's notice of its intention to retrench you. The retrenchment will be with effect from 31 July 2002.

   C As a continuous process, the Bank re-examined its structures and re-organised its operations to meet the challenges of competing in a shrinking market with increasing players. Consequently, the post of Assistant General Manager, Strategic Planning, could not be accommodated in the new structure and thus became redundant. The Bank examined all possible areas for re-deployment within the Bank, D in particular marketing at Corporate and Personal Banking levels and Risk Management. It is unfortunate that the Bank concluded that you could not be re-deployed elsewhere in the Bank. It is therefore on the basis of abolition of post that the Bank seeks to retrench you.

   As required by the above-mentioned legislation, by copy of this letter the Bank has notified the Secretary of the Retrenchment Committee E of its intention. Appendix I, attached, gives the Bank's separation package for discussion and agreement, after which the agreement will be submitted to the Retrenchment Committee for approval as soon as possible. It is the Bank's wish that such negotiations be expeditiously and amicably concluded."

7. On 4 July 2002, Charamba responded to Nyandoro's letter and stated that F he did not believe that there was a genuine need for retrenching him. He added, however, that he was prepared to discuss the matter further with her.

8. On 9 July 2002, the Bank held a meeting with Charamba to discuss the Bank's offer in respect of the severance package. Charamba rejected the offer out of hand. G

9. On 16 July 2002, Nyandoro wrote to the secretary of the retrenchment committee as follows:

   "… The Bank, having issued the requisite notice, a meeting was convened on 9 July 2002 to discuss the Bank's offer with Mr Charamba who strongly felt that the offer was derisory and, therefore, H unacceptable.

Sandura JA

The Bank is, therefore, left with no choice but to seek that the A Retrenchment Committee adjudicate on the package and finalise the matter."

10. On 1 August 2002, the retrenchment committee held a meeting, which was attended by the parties, and at which the parties made their submissions. No minutes of that meeting were kept. However, after hearing B the submissions made by the parties, the retrenchment committee was of the view that the parties had not spent enough time negotiating and trying to reach a settlement on the matter. Accordingly, it adjourned the meeting and directed the parties to go and negotiate and try to reach a settlement.

11. On 5 December 2002, the retrenchment committee held another meeting with the parties after the parties had failed to reach a settlement. The relevant C part of the minutes of that meeting reads as follows:

"The parties appeared before the Retrenchment Committee in an earlier meeting and made submissions. It was clear at that moment that the parties had not given enough time to negotiations. They agreed to go back to the negotiating table. They however came back to the Committee after failing to reach an agreement … D

He (i.e. Charamba) is not in total agreement with the idea of the retrenchment, so the Committee needs to decide whether or not retrenchment is necessary and, if it is necessary, the size of the package.

On the first issue the Committee observed that Charamba has made E proposals on the retrenchment, and he must have realised that retrenchment was inevitable … The Committee also observed from the record that the relationship between the parties had deteriorated to a point where working together would be impossible. The Committee decided that retrenchment should go ahead… The Committee decided to recommend the following package …"

12. On 30 January 2003, the retrenchment committee wrote to the Minister of F Public Service, Labour and Social Welfare ("the Minister") recommending that Charamba be retrenched on the basis of a certain severance package.

13. On 4 March 2003, the Minister approved Charamba's retrenchment, but made some alterations to the severance package, in favour of Charamba.

14. On 17 March 2003, the Bank noted an appeal to the Labour Court against G the severance package, whose value the Bank considered to be excessively high. A few days later, Charamba filed a cross-appeal against the retrenchment and the terms and conditions on which he had been retrenched. H

Sandura JA A

15. On 7 February 2005, when the parties appeared in the Labour Court for the hearing of the appeal and cross-appeal, the Bank withdrew its appeal stating, *inter alia*, that as the full severance package had already been paid to Charamba there was no longer any need for challenging it. However, Charamba persisted in his cross-appeal. The matter was then argued, and the Labour Court reserved its judgement. B

16. On 13 May 2005, the Labour Court set aside Charamba's retrenchment on the ground that the retrenchment had not been carried out in accordance with the Regulations. In its judgement the Labour Court made it clear that if the Bank still intended retrenching Charamba it should do so in accordance with the Regulations.

C Aggrieved by that result, the Bank appealed to this Court.

In my view, the Labour Court's decision was undoubtedly correct. An examination of the relevant provisions of the Regulations will indicate that, that is so. I shall set out the provisions in question *in extensio*. They are ss 3, 5, 6, 7, 8A and 10 which, in relevant part, read as follows:

D "3.(1) An employer who wishes to retrench any employee shall –

(a) give written notice of his intention:

(i) to the works council established for his undertaking; or

(ii) if there is no works council established for his undertaking or if a majority of the employees concerned agree to such a course, to the employment council established for his E undertaking or industry; and

(b) provide the authority referred to in subparagraph (i) or (ii) of paragraph (a) with details of every employee whom he wishes to retrench and detailed reasons for the proposed retrenchment; and F

(c) send a copy of the notice to the retrenchment committee.

Provided that, if there is no works council or employment council established for the undertaking concerned –

(a) the employer shall give written notice of his intention to retrench the employees concerned to the retrenchment committee; and G

(b) the retrenchment committee, or a person authorised thereto by the retrenchment committee or the Minister, shall undertake the functions of an authority in terms of this section;

and this subsection and subsections (2) to (6) shall apply, *mutatis mutandis*, accordingly.

(2) An authority to which notice has been given in terms of subsection (1) H shall forthwith attempt to secure agreement between the employer and

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Sandura JA

employees concerned, or their representatives, as to whether or not the A employees should be retrenched and, if they are to be retrenched, the terms and conditions on which they may be retrenched.

(2a) Without derogation from the generality of subsection (2), an authority shall attempt to secure agreement on the following matters –

(a) the possibility of implementing measures to avoid the retrenchment of employees … B

(3) An authority shall have regard to the factors referred to in section 7 when attempting to secure an agreement on the matters referred C to in subsection (2).

(4) An authority shall keep proper minutes of its proceedings and deliberations in attempting to secure an agreement on the matters referred to in subsection (2).

(5) …

(6) If, within one month after receiving a notice in terms of subsection (1), an authority has failed to secure an agreement between the employer and employees concerned, or their representatives, on the matters referred to in subsection(2), the authority shall refer the matter to the retrenchment D committee by sending the retrenchment committee written notice … together with copies of all documents which the employer and employees concerned may have submitted to the authority, and copies of the minutes of (the) authority's proceedings and deliberations.

4. (1) to (9) …

5. (1) The retrenchment committee shall consider any matter referred E to it in terms of subsection (6) of section 3 and, having regard to the factors referred to in section 7, shall, within two weeks of the matter being referred to it, recommend to the Minister in writing whether or not the proposed retrenchment should be permitted and, if so, the terms and conditions upon which it should be effected. F

(2) …

(3) If the retrenchment committee fails to make a recommendation in regard to any retrenchment within the two-week period prescribed in subsection (1), the Minister shall require the committee to send him all the documents in the matter, and shall give his decision in the matter as if the committee had made a recommendation in terms of subsection(1). G

6. The Minister shall consider without delay any recommendation submitted to him by the retrenchment committee in terms of subsection (1) of section 5 and, having regard to the factors referred to in section 7, shall within two weeks –

(a) approve the proposed retrenchment, subject to such terms and conditions as he may consider necessary or desirable to impose; H

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Sandura JA

A or

(b) refuse to approve the proposed retrenchment;

and shall cause the retrenchment committee, the authority, the employer and the employees concerned to be notified in writing … of his decision in the matter.

B 7. In deciding whether or not to approve the retrenchment of employee(s) in terms of these regulations, an authority, the retrenchment committee and the Minister shall pay due regard to the following general considerations –

(a) that the retrenchment of employees should be avoided so far as possible, where this can be done without prejudicing the efficient C operation of the undertaking in which the employees concerned are employed;

(b) that the consequences of retrenchment to employees should be mitigated as far as possible;

and, in particular cases, they shall have regard to –

(i) the reasons put forward for the proposed retrenchment; D and

(ii) the effect of the proposed retrenchment upon the employees involved, including –

A. their prospects of finding alternative employment; and

B. the terminal benefits to which they will become entitled.

E 8. …

8A. Notwithstanding any agreement to the contrary, no employer shall retrench any employee unless he has given the employee not less than one month's notice of the retrenchment.

9. (1) to (3)…

F 10. For the avoidance of doubt, it is declared that any purported retrenchment of an employee which is carried out otherwise than in accordance with an approval granted in terms of these regulations, shall be of no effect whatsoever."

Before indicating in what respects the Regulations were not complied with, I wish to state that it appeared to be common cause that at the relevant time G the Bank did not have a works council or an employment council which catered for managerial employees, and that the Bank, acting in terms of the proviso to s 3(1) of the Regulations, properly sent the notice of its intention to retrench Charamba dated 24 June 2002 ("the notice") to the retrenchment committee.

Having said that, I proceed to deal with the failure to comply with the peremptory provisions of the Regulations. There were a number of respects H in which the Regulations were completely ignored.

Sandura JA

In the first place, the retrenchment committee did not appreciate that when it A received the notice the retrenchment committee, or a person authorised thereto by the retrenchment committee or the Minister, was obliged to undertake the functions of an authority in terms of s 3(1) of the Regulations, because the Bank did not have a works council or an employment council which catered for managerial employees.

In terms of s 3(2) of the Regulations, after receiving the notice the retrenchment B committee, acting as the authority in terms of s 3(1) of the Regulations, was obliged to "forthwith attempt to secure agreement" between the Bank and Charamba, as to whether or not Charamba should be retrenched and, if he was to be retrenched, the terms and conditions on which he was to be retrenched.

In my view, it is clear from the wording of s 3(2) of the Regulations that the C authority is obliged to play an active role, and not a passive one, in attempting to secure an agreement between the parties concerned. Its role is that of a mediator, i.e. a person who tries to get an agreement between parties disagreeing with each other.

As already stated, the minutes of the meeting of the retrenchment committee held D on 5 December 2002 indicate that when the retrenchment committee held its first meeting with the parties on 1 August 2002, the retrenchment committee formed the opinion that the parties required more time to negotiate a settlement, and therefore directed them "to go back to the negotiating table". There is no evidence in the minutes which shows that the retrenchment committee attempted to secure an agreement between the parties on the issues in E question. The same applies to the meeting held on 5 December 2002.

In the circumstances, the retrenchment committee, acting as the authority in terms of s 3(1) of the Regulations, did not do what it was obliged to do in terms of s 3(2) of the Regulations.

Secondly, after receiving the notice, the retrenchment committee was obliged to act forthwith. In *Standard Chartered Bank Zimbabwe Ltd* v *Matsika* 1996 (1) ZLR 123 (S), F this court considered the meaning of the word "forthwith". At 131C-E, Gubbay CJ said:

> "It seems to me beyond question that having suspended Matsika without pay and other benefits on 3 August 1992, the Bank, either by design or oversight, failed to apply *forthwith* to a labour relations officer. The word G 'forthwith', though not as peremptory as 'immediately', means 'as soon as is reasonably

possible in the circumstances'. See *R* v *West & Wild* 1953 SR 199, 1953 (2) SA 677 (SR) at 677-678; *Sleightholme Farms (Pvt) Ltd* v *National Farmers' Union Mutual Ins Soc Ltd* 1966 RLR 467 (G) at 471H-I; *Zulu* v *Sterling Products International Ltd* 1988 (2) ZLR 110 (H) at 114 *in fine* – 115A. The delay of six weeks between the suspension and the H application rendered the suspension inoperative."

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Sandura JA

A In the present case, assuming that the notice was received by the retrenchment committee on 24 June 2002, the retrenchment committee delayed for about thirty-seven days before holding its first meeting with the parties on 1 August 2002. In my view, and applying the meaning of the word "forthwith" set out in the *Standard Chartered Bank* case *supra*, the retrenchment committee did not act forthwith as it was obliged to do in terms of s 3(2) of the Regulations.

B Thirdly, in terms of s 3(2a) of the Regulations the retrenchment committee, acting as the authority in terms of s 3(1) of the Regulations, was obliged to attempt to secure agreement on the possibility of implementing measures to avoid Charamba's retrenchment. There is nothing in the minutes of the meeting held on 5 December 2002 indicating that this peremptory provision C was complied with.

Fourthly, in terms of s 3(3) of the Regulations the retrenchment committee, acting as the authority in terms of s 3(1) of the Regulations, was obliged to have regard to the factors referred to in s 7 of the Regulations when attempting to secure an agreement on whether or not Charamba was to be retrenched. Once again, there is nothing in the minutes of the meeting held on 5 December D 2002 which indicates that the retrenchment committee complied with this peremptory provision.

Fifthly, in terms of s 3(4) of the Regulations the retrenchment committee, acting as the authority in terms of s 3(1) of the Regulations, was obliged to keep proper minutes of its proceedings and deliberations in attempting to secure E an agreement on whether Charamba was to be retrenched and, if so, the terms and conditions on which he was to be retrenched. It was common cause that no such minutes were kept in respect of the meeting held on 1 August 2002.

Sixthly, in terms of s 3(6) of the Regulations, after receiving the notice the retrenchment committee had only one month within which to secure an F agreement between the parties. If it failed to secure an agreement within that period, it had another two weeks, in terms of s 5(1) of the Regulations, within which to recommend to the Minister in writing whether or not Charamba's retrenchment should be permitted and, if so, the terms and conditions on which it was to be effected.

The retrenchment committee, therefore, had a total of six weeks before G recommending to the Minister whether or not Charamba should be retrenched and, if he was to be retrenched, the terms and conditions of such retrenchment.

Assuming that the retrenchment committee received the notice on 24 June 2002, the last day on which the retrenchment committee could have recommended to the Minister in writing whether or not the proposed H retrenchment of Charamba should be permitted was 5 August 2002. The

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2006 (1) ZLR p106

Sandura JA

appeal record indicates that the retrenchment committee did not meet that A deadline. Instead, it was on 30 January 2003, nearly six months after the deadline, that the retrenchment committee recommended to the Minister that the proposed retrenchment should be permitted. The peremptory provision in s 5(1) of the Regulations was not, therefore, complied with.

Seventhly, in terms of s 5(2) of the Regulations, if the retrenchment committee B failed to make a recommendation to the Minister on the proposed retrenchment of Charamba within the two week period already referred to, the Minister was obliged to require the retrenchment committee to send him all the documents in the matter in order for him to determine whether or not the proposed retrenchment should be permitted. Once again, this peremptory provision was not complied with. C

Finally, in terms of s 6 of the Regulations the Minister is obliged to consider, without delay, any recommendation on retrenchment submitted to him and, within two weeks, to approve or refuse to approve the proposed retrenchment. According to the record before this Court, the recommendation made to the Minister on 30 January 2003 was approved by the Minister on 4 March 2003, D long after the expiration of the two week period.

There were, therefore, many respects in which the peremptory provisions of the Regulations were completely ignored. It follows that Charamba's retrenchment was not carried out in terms of the Regulations, and that in terms of s 10 of the Regulations the purported retrenchment is of no effect whatsoever.

In the circumstances, the appeal is dismissed with costs. E

CHIDYAUSIKU CJ & CHEDA JA concurred.

Atherstone & Cook, appellant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners F

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/NATIONAL UNIVERSITY OF SCIENCE AND TECHNOLOGY v NATIONAL UNIVERSITY OF SCIENCE AND TECHNOLOGY ACADEMIC STAFF & ORS 2006 (1) ZLR 107 (H)

NATIONAL UNIVERSITY OF SCIENCE AND TECHNOLOGY v NATIONAL UNIVERSITY OF SCIENCE AND TECHNOLOGY ACADEMIC STAFF & ORS 2006 (1) ZLR 107 (H)

Citation	2006 (1) ZLR 107 (H)
Case No	Judgment No. HB-07-06
Court	High Court, Bulawayo
Judge	Cheda J
Heard	23 June 2005
Judgment	3 February 2006
Counsel	*P Dube*, for the applicant *B Ndlovu,* for the respondents
Case Type	Civil review
Annotations	Link to case annotations

Flynote

Contract — *performance — impossibility — temporary or final — distinction between — temporary impossibility — obligation to perform may be suspended but not extinguished*

D **Costs** — *dishonest conduct and behaviour by applicant — respondents not to be put out of pocket — award of costs on the higher scale*

Headnote

The applicant, a university which received its funding from the State through the third respondent (the Minister of Education), and the first and second respondents were involved in a salary dispute which was settled by E arbitration in favour of the two respondents. Although the

arbitrator's award was final and binding, the applicant brought the matter on review, arguing that it had no financial capacity to honour the determination since the third respondent was responsible for funding it.

Held, that it is only where impossibility of performance is final (e.g. if the party required to perform dies or there has been intervention by a *vis major* or F *actus Dei)* that a party to a contract in exempted or excused from performance. If the impossibility of performance is only temporary, the obligation may, according to the nature of the contract, only be suspended and not extinguished. On the facts, the applicant had failed to prove on a balance of probabilities that the impossibility of performance was anything more than temporary. It could be cured by subsequent budgetary G allocations.

Held, further, that where an applicant's conduct and behaviour is one of dishonesty which causes unnecessary financial expense to the respondents, justice dictates that they should not be put out of pocket because of limitations inherent in the usual party and party costs. In such circumstances, it is appropriate to award costs against the applicant on H the scale of attorney and client.

2006 (1) ZLR p108

Cheda J

Cases cited A

Engineering Mgmt Svcs v South Cape Corp 1979 (3) SA 1341 (W)

Peters Flamman & Co v Kokstad Municipality 1919 AD 427

Case information

P Dube, for the applicant

B Ndlovu, for the respondents B

Judgment

CHEDA J: The applicant seeks a declaration in the following terms:

"It is ordered that:

1. The award of the arbitrators by necessary implication was conditional upon the adequate funding by the third respondent being provided to the applicant to finance the salary increases as provided for in the C award.
2. The arbitration award is unenforceable against the applicant.
3. The respondents be ordered jointly and severally to pay the costs of this application only if they oppose it."

The applicant is a *universitas* established by a university charter. The first respondent is an association of academic staff of the applicant. The second D respondent is an association of the applicant's non-academic staff while the third respondent is the Minister of Education, who is responsible for the running of the applicant and who funds it as well.

The historical background of this matter is that the applicant and first and second respondents were involved in a salary dispute which ended up at E the Labour Court wherein a disposal order by consent was issued. The terms of the said order were, among others, that the parties should go for voluntary arbitration which they did on 24 November 2003. The arbitrators determined in favour of the first and second respondents. The applicant is not happy with that determination.

Firstly, it is clear that the determination is final and binding on the parties. The F applicant therefore has decided to bring this matter on review on the grounds that it has no financial capacity to honour the determination since the third respondent is responsible for funding it.

It is trite law that a review process is designed to check proceedings of inferior courts and tribunals for irregularities. *In casu,* the applicant's contention is G the perceived incapability of the third respondent in complying with the arbitrators' order. The applicant is not satisfied with the determination of the arbitrators for the reason that the third respondent, who is responsible for their finances is unable to pay, because the increase in salaries is neither sustainable nor affordable. In other words, the grant allocated to the applicant is inadequate. H

Cheda J

A The parties are in a contractual relationship and each party has a duty to fulfil that contract unless it is impossible to do so.

In casu, the applicant's position is that it has been inadequately funded. The question then is, is this a legal reason enough to excuse it from fulfilling its part of the bargain? The impossibility envisaged in law can either be temporary B or final. In my view, it is only where the impossibility is final that the other party is exempted or excused from performance e.g., if the other party required to perform dies or there has been intervention by a *vis major* or *actus Dei*. But where the impossibility is temporary the offending party can not and should not be excused. This is the correct legal position. See *Peters Flamman & Co* v *Kokstad Municipality* 1919 AD 427. In Wessels *The Law of Contract* C Vol 2 p 714 para 2634, the learned author stated:

> "If the impossibility of performance is not final but only temporary the obligation may according to the nature of the contract only be suspended and not extinguished."

In casu, the applicant has not proved on a balance of probabilities that the D impossibility of performance is final, therefore it can only be construed that it is temporary. I hold the view that as it is temporary it can therefore be cured by subsequent budgetary allocations.

Legal contracts should be performed and should not be breached at the mere convenience of the other party. If the courts allow this, then it means that contracts will never be fulfilled at all.

E With regards to costs, I find that the applicant lacked *bona fides* in this matter. Firstly, they were aware that the third respondent is responsible for their funding but did not join it in the proceedings earlier on. Secondly, they agreed that the decision of the arbitrators was final but have now chosen to ignore it. The applicant's conduct and behaviour has been therefore one of dishonesty. F In acting in this manner, they have no doubt put the first and second respondents in unnecessary financial expenses of which justice dictates that they should not be put out of pocket because of limitations inherent in the usual party and party costs. See *Engineering Management Services* v *South Cape Corp* 1979 (3) SA 1341(W).

This application is accordingly dismissed, with costs on the attorney and G client scale.

Lazarus & Sarif, the applicant's legal practitioners

T Hara & Partners, the respondent's legal practitioners

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Source:
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KAWONDERA v MANDEBVU 2006 (1) ZLR 110 (S)

Citation	2006 (1) ZLR 110 (S)
Case No	Judgment No. S-12-06
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Malaba JA
Heard	4 February 2006
Judgment	4 February 2006

Counsel *P Machaya,* for the appellant
O Mushuma, for the respondent

Case Type Civil appeal

Annotations No case annotations to date

Flynote

Legal practitioner — *conduct and ethics — diligence expected of counsel* C *— references made by opposing party — authorities should not be accepted at their face value — failure to check references for accuracy could amount to a disservice to the client*

Legal practitioner — *conduct and ethics — duty of counsel to the court — authority which is against counsel's case — counsel is obliged to disclose it to the court* D

Practice and procedure — *res judicata — based on judgment in personam — requirements for plea — person not a party to original action — when bound by earlier decision — party to previous action — includes person allowing matter to be fought by party professing to act in his interests* E

Headnote

The requisites for a successful plea of *res judicata* based on a judgment *in personam* are threefold, namely that the prior action must have:

(i) been between the same parties or their privies;

(ii) concerned the same subject matter; and

(iii) been founded on the same cause of action. F

For the purposes of estoppel *per rem judicatam,* a party means not only a person named as such but also one who intervenes and takes part in the proceedings, after lawful citation, in whatever character he is cited to appear, or who, though not *nominatim* a party, insists on being made so, and obtains leave of the court for that purpose or who, being cognizant of the proceedings and of the fact that a party thereto is professing to G act in his interests, allows his battle to be fought by that party, intending to take the benefit of his championship in the event of success.

The ethics of the profession demand that if there is an authority which is against his client, counsel is obliged to disclose it to the court. Not to do so but to attempt to hoodwink the court is improper conduct. Further, a H high degree of diligence is expected of a legal practitioner in the exercise

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Ziyambi JA

A of his duty to his client. Every reference made by the opposing party must be checked for its accuracy and for the purpose of ascertaining whether that authority truly supports the opposition's case and, if it does not, to so advise the court with the appropriate submissions. It is certainly not in the interests of one's client and indeed could amount to a disservice, B to accept quotations and case references at face value without checking their accuracy and whether there is, arising from that quotation, an argument in favour of one's client.

Cases cited

Registrar-General v Chirwa 1993 (1) ZLR 291 (S)

C *Towers v Chitapa* 1996 (2) ZLR 261 (H)

Case information

P Machaya, for the appellant

O Mushuma, for the respondent

Judgment

D **ZIYAMBI JA:** The appellant in this matter is a member of Zvakatanga Sekuseka Housing Co-operative ('the Co-operative') which is the registered owner of stand 1195 ('the stand'), Hatcliffe, Borrowdale, Harare.

It appears that on 29 September 1999, the stand was allocated to the appellant. Sometime in 2001, the respondent brought proceedings in the High Court, E (Case No. HC 7800/01), against the Co-operative challenging the manner in which the stand had been allocated. The exact circumstances are unclear on the record but on 15 July 2002, Blackie J issued an order by consent in the following terms:

> "It is ordered by consent that:
>
> 1. Mr Kuwandira be and is hereby joined as a party to these proceedings. F
> 2. The applicant be and is hereby ordered to serve Mr Kuwandira with a copy of the court application.
> 3. Mr Kuwandira be and is hereby ordered to file his notice of opposition within ten days after the date on which the court application is served upon him."

G In response to that order, the appellant filed an "opposing affidavit", in para 9 of which she alleged as follows:

> "It was not necessary to cite me as a party. It is clear that whatever decision that the court grant (*sic*) against the Co-operative will automatically bind me. I do not own the stand. It is for the Co-operative to decide what to do with this stand."

Ziyambi JA

In due course, the matter came before Makarau J for hearing and the Co- A operative was ordered to transfer the stand to the respondent, the learned judge having found the allocation of the stand to the appellant to have been irregular. No appeal was lodged against the order of Makarau J.

On 18 November 2004, the appellant filed a court application in the High Court averring that the stand was lawfully hers and seeking a declaration to that B effect as well as an order for the eviction of the respondent from the stand. Hungwe J, who heard the application, dismissed it on the grounds that the matter was *res judicata*. It is against this order that the appellant now appeals.

The issue which I must now determine is whether or not the finding by Hungwe J that the application before him was *res judicata* is correct in law.

The requisites for a successful plea of *res judicata* based on a judgment *in* C *personam* are threefold, namely, that the prior action:

- must have been between the same parties or their privies;
- must have concerned the same subject matter; and
- must have been founded on the same cause of action. D

See *Beck's Theory and Principles of Pleading in Civil Actions* 5 ed at p 165; *Towers* v *Chitapa* 1996 (2) ZLR 261 (H) at 271A.

The parties are agreed that the issue can be narrowed to whether or not the appellant was a party or a privy to one of the parties to the earlier proceedings between the respondent and the Co-operative, it being common cause that the remaining two requirements are satisfied. E

In this regard it was submitted that the judgment, being one *in personam*, was binding only on the respondent, the Co-operative, and any others who were privy to it and, accordingly, a plea of *res judicata* could only succeed if the appellant was a privy of the Co-operative. See *Registrar-General* v *Chirwa* 1993 (1) ZLR 291 (S); Spencer-Bower & Turner *Res Judicata* at p 126. Thus, F since the appellant was not cited as a party to the earlier proceedings before Makarau J, and since she was not a privy to any of the parties, the court *a quo* was wrong in concluding that she was a party to the proceedings and therefore bound by the judgment of Makarau J. For this proposition, the appellant relied on the following passage taken from Spencer-Bower and Turner *loc cit* para 197: G

> "For the purposes of *estoppel per rem judicatam*, a 'party' means not only a person named as such, but also one who intervenes and takes part in the proceedings, after lawful citation, in whatever character he is cited to appear, or who, though not *nominatim* a party, insists on being made so, and obtains leave of the court for that purpose …" H

Ziyambi JA

A The appellant, it was claimed, did not fit into any of the categories mentioned in that passage.

However, what counsel did not advise the court is that the passage quoted is incomplete and that if the full passage were to be quoted the appellant's case would be defeated. The passage continues:

> B "or who, being cognizant of the proceedings, and of the fact that a party thereto is professing to act in his interests, allows his battle to be fought by that party, intending to take the benefit of his championship in the event of success."

There is no doubt that the appellant was cognizant of the proceedings in case No. HC 7800/01 and allowed her battle to be fought by the Co-operative. She C intervened in the litigation between the respondent and the Co-operative by filing an affidavit in which she not only stated that the stand did not belong to her but agreed to be bound by whatever decision the court would make "against the Co-operative". In so doing, she made herself a privy to the Co-operative in that litigation and is therefore bound by the decision in that suit. She cannot now be heard to say, as she did in her founding affidavit, that the D proceedings went on "without my knowledge or participation ... The Co-operative was acting in its own capacity and was not representing myself."

It was for the above reasons that, after hearing Mr *Machaya*, we dismissed the appeal with costs, being of the view that it was unnecessary to hear Mr *Mushuma*.

E Before concluding this judgment, it seems to me to that some comment on the conduct of the appeal by the legal practitioners is necessary. As I mentioned above, counsel for the appellant failed to bring to the court's attention the part of the quoted passage which tended to defeat his client's case. The ethics of the profession demand that if there is an authority which is against his client, counsel is obliged to disclose it to the court. Not to do so but to attempt to F hoodwink the court is improper conduct.

The conduct of the respondent's legal practitioner is also worthy of censure. The passage referred to by counsel for the appellant was contained in the appellant's heads of argument which were filed twelve days before the respondent's heads of argument were filed. Yet the omission to quote the G passage in full or the fact that the rest of the passage tended to support the respondent's case was not mentioned in the respondent's heads of argument, which is an indication that it was not detected by respondent's counsel. This is indicative of a lack of the high degree of diligence which is expected of a legal practitioner in the exercise of his duty to his client. Every reference made by H the opposing party, must be checked for its accuracy and for the purpose of

Ziyambi JA

ascertaining whether that authority truly supports the opposition's case and, A if it does not, to so advise the court with the appropriate submissions. It is certainly not in the interests of one's client, and indeed could amount to a disservice, to accept quotations and case references at face value without checking their accuracy and whether there is, arising from that quotation, an argument in favour of one's client. B

I need only remind the legal profession that ethics is one of the pillars on which the profession stands. The court relies on the assistance given to it by counsel in order to arrive at a correct decision. In this respect, legal practitioners are considered to be officers of the court and they are expected to display honesty and a high degree of diligence and integrity when appearing before the courts. C

CHIDYAUSIKU CJ and MALABA JA concurred.

Mtombeni, Mukwesha, Muzawazi & Associates, appellant's legal practitioners

Mavhunga & Associates, respondent's legal practitioners D

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Source:
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SAGITTARIAN (PVT) LTD v WORKERS' COMMITTEE, SAGITTARIAN (PVT) LTD 2006 (1) ZLR 115 (S)

Citation	2006 (1) ZLR 115 (S)
Case No	Judgment No. S-83-05
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA &Gwaunza JA
Heard	1 November 2005
Judgment	6 February 2006
Counsel	Miss *E Mushore,* for the appellant *J Mambara,* for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Appeal — *appeal to Labour Court — appeal from arbitral award made under substituted s 98 of Labour Relations Act — not governed by provisions of s 97 of the Act as substituted*

D **Employment** — *labour dispute — compulsory arbitration under substituted s 98 of Labour Relations Act — not governed by provisions of substituted s 97 of the Act*

Interpretation of statutes — *interpretation of a subsection — subsection apparently of general application — must be interpreted in the context of the section of which it is a part*

Headnote

E The appellant noted an appeal to the Labour Court against an arbitral award made in terms of s 98 of the Labour Relations Act [*Chapter 28:01*]. The respondent applied for the enforcement of the arbitral award, in terms of the old s 97(4) of the Act. The Labour Court made an order for the partial F payment of the award to the respondent. The appellant argued that subs (4) referred only to an appeal filed in terms of s 97(1), which set out the context in which certain specific appeals to the Labour Court were to be prosecuted. The arbitral award had been made in terms of s 98 of the Act and therefore fell outside the ambit of subs (4). The respondent contended that subs (4), which did not refer to subs (1), therefore referred G to all appeals filed with the Labour Court under the Act and not only those filed under subs (1).

Held, that the matter did not fall to be determined solely on the simple grammatical meaning of the words employed in subs (4), which were, on the face of them, of general application. The character of the provision in question, being a subsection as opposed to a section, raised the need H to consider other "non-linguistic" aids in order to ascertain the true

Gwaunza JA

intention of the legislature. A subsection is part of a section and, in A interpreting a subsection, the court must, first of all, read it in the context of the section. If the interpretation placed on the subsection is in contextual harmony with the rest of the section and does not offend against or contradict any other provisions of the statute it should be accorded that interpretation. Restricting subs (4) of s 97 to appeals made in terms of subs (1) of the same section would have been in perfect B harmony with the other subsections of s 97 and would not have led to any absurdity. Separate subsections must all have some relevance to the central theme which characterises the section. The central theme characterising s 97 were the appeals specified in subs (1), so subs (4) fell to be interpreted in such a way that it had relevance to this theme. The C purpose of s 97 was to set out the context in which certain specific appeals to the Labour Court were to be prosecuted. The legislature did not intend subs (4) to be given an interpretation that embraced situations falling outside of this context. Appeals filed with the Labour Court in terms of s 98 of the Act, as was the one *in casu*, clearly fell outside the context set out in s 97. D

Case cited

Director of Education (Transvaal) v McCagie & Ors 1918 AD 616

Legislation considered E

Labour Relations Act [*Chapter 28:01*], s 97(4)

Case information

Miss *E Mushore,* for the appellant

J Mambara, for the respondent

Judgment

GWAUNZA JA: The appellant noted an appeal to the Labour Court against F an arbitral award made in favour of the respondent. Pending the determination of the appeal, the respondent sought interim relief in the form of an order for the enforcement of the arbitral award, in terms of the old s 97(4) of Labour Relations Act [*Chapter 28:01*]. The court *a quo* made an order for the partial payment of the award to the respondent. G

The appellant was dissatisfied with the order and has now appealed to this court.

The appellant gives three grounds of appeal, namely, that the Labour Court erred in holding:

(i) that it had jurisdiction to hear the application for interim relief; H

Gwaunza JA A

(ii) that the balance of convenience favoured the granting of the interim relief sought by the respondent; and

(iii) that the appellant did not have good prospects of success on appeal.

In relation to the first ground of appeal, the appellant contends, and is not seriously challenged by the respondents, that its appeal to the Labour Court had the effect of suspending the enforcement of the arbitral award. The B respondent's application for interim relief pending the determination of the appeal to the Labour Court, is in effect evidence of its acceptance of this principle.

The real dispute between the parties concerns the interpretation of s 97(4) of the Labour Relations Act which, albeit now repealed, was then applicable to C the case. It is pertinent to note that even though s 97 of the Act was entitled "Appeals to Labour Court" it listed in its subs (1) four specific instances in which an aggrieved person could appeal to the Labour Court under that section. Its subs (2) outlined the powers of the Labour Court when considering an appeal filed in terms of subs (1). Subsection (3) of s 97 specifically provided that an appeal filed in terms of subs (1) would not have the effect of suspending D the determination or decision appealed against.

Subsection 4 made no reference to subs (1) and read as follows:

> " (4) Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires."

The appellant's argument is that subs (4) referred only to an appeal filed E in terms of s 97. The arbitral award, the appellant contends, was made in terms of s 98 of the Act and therefore fell outside the ambit of subs (4) of s 97.

The respondent is of a different view, it being its contention that subs (4) of s 97 referred to all appeals filed with the Labour Court under the Act and not only those filed under its sub s (1). The President of the Labour Court was F persuaded by the respondent's argument. Relying on a simple reading of the same subsection, the learned President expressed the view that had the legislature intended subs (4) of s 97 to apply restrictively, it would have specifically indicated so by referring to "an appeal in terms of subsection (1)". She gave another reason for her conclusion, as follows:

> "The provisions of s 2A (of the Act) give the purpose of the Act as the G advancement of social justice and democracy in the workplace. It is thus inconceivable that the Labour Court could be given power to make interim determinations as the justice of the case requires in cases where appeals do not suspend decisions appealed against and not in any other case, where the decisions appealed against are suspended by the noting of an appeal."

Gwaunza JA

On the face of it, the reasoning of the court *a quo* points to an apparent A legislative ambiguity in that care seems to have been taken to specifically restrict the operation of some of the subsections of s 97 to appeals outlined in its subs (1), while no such care was taken with subs (4). It was thus not unreasonable under such circumstances to conclude that subs (4) was not meant to apply restrictively to appeals in terms of subs (1) of s 97. B

The matter, however does not fall to be determined solely on what the court *a quo* referred to as "the simple grammatical meaning" of the words employed in subs (4). There is, in my view, merit in the appellant's contention that the character of the provision in question, that is a subsection as opposed to a section, raises the need to consider what are referred to as other "non-linguistic aids" in order to ascertain the true intention of the legislature. C

The one aid that is more often referred to is the context in which the words to be interpreted, are used. The appellant, in my view correctly, contends thus in its heads of argument:

> "A subsection is part of a section. It is submitted that in interpreting a subsection the court must read same in the context, first of all, of the D section. If the interpretation placed on the subsection is in contextual harmony with the rest of the section and does not offend against or contradict any other provisions of the statute it should be accorded that interpretation."

I am in this respect persuaded by the appellant's contention that restricting subs (4) of s 97 to appeals made in terms of subs (1) of the same section would E have been in perfect harmony with the other subsections of s 97 and would not have led to any absurdity.

Other authorities emphasise the same point, in different words. In Thornton's *Legislative Drafting* 2 ed at p 60, it is stated:

> "A section, of whatever length, must have a unity of purpose. It may F consist of one sentence or more; but if it consists of more than one sentence, the general rule is that each should be placed in a separate numbered subsection. Separate subsections must all have some relevance to the central theme which characterises the section."

Applied to the facts of the case before us, it is evident that the central theme characterising s 97 of the Act were the appeals specified in subs (1). G Subsection (4), therefore, fell to be interpreted in such a way that it had relevance to this theme.

Many years earlier, in *Director of Education (Transvaal*) v *McCagie & Ors* 1918 AD 616, Innes CJ appropriately put the same argument thus:

> "Where general words have a wide meaning, their interpretation must be H

Gwaunza JA

> A affected by what precedes them; general words following upon and connected with specific words are more restricted in their operation than if they stood alone … *They are coloured by their context* and their meaning is cut down so as to comprehend only things of the same kind as those designated by specific words – unless there is something to show that a wider sense was intended" (my emphasis).

B *In casu*, the words in subs (4) of s 97 can appropriately be referred to as general words. Following upon the reasoning of Innes CJ, above, the words are and must be "coloured" by their context, such context being appeals in terms of subs (1) of s 79.

I am satisfied this interpretation accords with the intention of the legislature C and that such intention influenced the arrangement of the words in a subsection, rather than a "stand alone" section.

Further authority for the proposition that words alone are not always decisive in ascertaining the intention of the legislature is to be found in *Principles of Legal Interpretation – Statutes, Contracts and Wills* at p 178 where it is stated:

> "In South Africa, the courts generally follow the theory (referred to as the D subjective or *will* theory) that behind every enactment there is a purpose or intention (*Regelsberger Pandekten* 143 sqq) and principles have evolved as to how to determine that intention. Account is taken, *inter alia*, of the meaning of the language, but it is not always decisive. Non-linguistic indications of meaning such as the *context* in which the language is used, the surrounding circumstances and the meaning at the E date of the enactment, are considered as aids to interpretation. Indeed, Grotius says:
>
> 'The non-linguistic indications of the purpose of the legislation may be so lucid that they should be preferred to the literal meaning of the language used'" (my emphasis).

F This *dictum*, too, can appropriately be applied to the circumstances of this case. There is little doubt that the purpose of s 97 was to set out the context in which certain specific appeals to the Labour Court were to be prosecuted. I am satisfied the legislature did not intend subs (4) to be given an interpretation that embraced situations falling outside of this context. Appeals filed with the Labour Court in terms of s 98 of the Act, as was the one *in casu*, clearly fell G outside the context set out in s 97. It follows that the Labour Court did not have the authority to hear an application for interim relief in terms of s 97(4), pending its determination of an appeal filed in terms of s 98.

One other matter that calls for comment. The learned President of the Labour Court found it inconceivable that the court could, in terms of the Act, be given H power to make interim determinations where appeals did not suspend decisions

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Gwaunza JA

appealed against and not in any other case where decisions appealed against A were suspended by the noting of an appeal.

This argument, in my view, flows from the presumption that the only interim determinations envisaged under subs (4) of s 97 were those to do with enforcement of the order appealed against. That clearly cannot be the case. Appeals filed in terms of s 97 did not have the effect of suspending the B determination appealed against. Considering, as I have found, that subs (4) was restricted to appeals specified in s 97 (1), it can be assumed that the legislature must have envisaged other types of interim relief "as the justice of the cases required", for it to have framed subs (4) of s 97 in the way it did. I am not persuaded there was anything "inconceivable" about the powers given to the court under that provision. C

All in all, I am satisfied there is merit in the appeal, which therefore succeeds.

The determination on the appellant's first ground of appeal makes it unnecessary for me to consider the other two grounds of appeal.

In the result, it is ordered as follows:

1. The appeal succeeds with costs. D
2. The decision of the Labour Court is set aside and substituted with the following:

   "The application be and is hereby dismissed." E

SANDURA JA & CHEDA JA concurred.

Wintertons, appellant's legal practitioners

Kwenda & Associates, respondent's legal practitioners F

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Source:
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NYANDORO v TIZIRAI 2006 (1) ZLR 121 (H)

Citation	2006 (1) ZLR 121 (H)
Case No	Judgment No. HH-12-06
Court	High Court, Harare
Judge	Kudya J
Heard	28 September 2005; 29 September 2005; 25 September 2005, 26 September 2005; 27 October 2005
Judgment	8 February 2006
Counsel	*L Uriri*, for the plaintiff *G C Chikumbirike*, for the defendant
Case Type	Civil action
Annotations	No case annotations to date

Flynote

C **Damages** — *delict — adultery committed with plaintiff's wife — loss of consortium — damages for loss of consortium not awardable where marriage subsists and adultery has been condoned — contumelia — damages for — factors to take into account*

D **Delict** — *actio injuriarum — adultery — committed with plaintiff's wife — loss of consortium — damages for loss of consortium not awardable where marriage subsists and adultery has been condoned — contumelia — damages for — factors to take into account*

Headnote

The plaintiff claimed damages from the defendant for *contumelia* and E disruption of *consortium* due to the adultery committed by the defendant with the plaintiff's wife. The marriage still subsisted in spite of the adultery.

Held, that no damages could be awarded for loss of *consortium*. Where there is no loss of *consortium* due to the plaintiff's condonation of the adultery F by the respondent, adultery damages are awarded only for *contumelia* and not for both *contumelia* and loss of *consortium*. In assessing the damages for *contumelia*, the court should take into account: (a) the character of the woman/man involved; (b) the social economic status of the plaintiff and the defendant; (c) whether the defendant has shown contrition and has apologized; (d) the need for deterrent measures G against the adulterer to protect the innocent spouse against contracting HIV from the errant spouse; and (e) the level of awards in similar cases.

Cases cited

Biti v Minister of State Security 1999 (1) ZLR 165 (S)

Chinamasa v Jongwe P & P Co (Pvt) Ltd & Anor 1994 (1) ZLR 133 (H)

H *Karimazondo & Anor v Min of Home Affairs* 2001 (2) ZLR 363 (H)

Kudya J

Katsumbe v Buyanga 1991 (2) ZLR 256 (H) A

Khumalo v Mandishona 1996 (1) ZLR 434 (H)

Misho v Sithole 1992 (1) ZLR 291 (S)

Nyakudya v Washaya 2000 (1) ZLR 653 (H)

Smit v Arthur 1976 (3) SA 378 (A)

Takadini v Maimba 1996 (2) ZLR 737 (S) B

Case information

L Uriri, for the plaintiff

G C Chikumbirike, for the defendant

Judgment

KUDYA J: The plaintiff, Nyandoro, issued summons out of this court against the defendant on 13 May 2004 claiming $350 million in damages for *contumelia* C and the loss of comfort, society and services following the defendant's adultery with his wife; interest from the date of summons until payment in full and costs of suit.

In his declaration, the plaintiff alleged that "on divers occasions between May 2003 and March 2004 and at places, particulars of which are not known to the D plaintiff and in breach of the trust the plaintiff deposed in him and in flagrant abuse of his office as the plaintiff's spouses' superior the defendant and the plaintiff's spouse have committed adultery, which adultery the plaintiff's spouse has admitted".

The defendant pleaded to the declaration without seeking further particulars E from the plaintiff on where the acts of adultery took place in the light of the averment that plaintiff's wife had admitted to the adultery, but was content to deny committing adultery with her.

[*The learned judge then dealt, at length, with the facts which are not relevant to this report. He continued thus.*]

The second issue essentially refers to the amount of damages due to the F plaintiff.

It was common cause between the parties that the plaintiff is bound by his claim in the pleadings. If he genuinely desired a higher figure he ought to have moved for an amendment. He did not do so.

It seems to me that the manner in which the second issue is worded betrays G a recognition by the plaintiff though that he may have pitched his claim for damages a little higher than normal.

However, I do not share Mr *Chikumbirike*'s outrage and conclusion that the plaintiff was driven by greed to claim the sum he seeks. The plaintiff himself explained his feelings of hurt both in his person, reputation, self-esteem, H business and in the disruption to his *consortium*.

Kudya J

A In his testimony, I understood him to say that though he remains circumscribed by his declaration to $350 million, taking into account the ravages of inflation on the date he testified, an equivalent of $350 million then would run into billions.

In the final analysis Mr *Chikumbirike* conceded that once the court finds that adultery was committed, the plaintiff is entitled to damages.

B Both counsel referred to a variety of cases which would assist me to arrive at the appropriate amount of damages. The cases that were referred to were:

1. *Katsumbe* v *Buyanga* 1991 (2) ZLR 256 (H)
2. *Khumalo* v *Mandishona* 1996 (1) ZLR 434 (H) C

3. *Nyakudya* v *Washaya* 2000 (1) ZLR 653 (H)
4. *Karimazondo & Anor* v *Minister of Home Affairs* 2001 (2) ZLR 363
5. *Takadini* v *Maimba* 1996 (2) ZLR 737 (S)

The plaintiff in his declaration sought $250 million for *contumelia* and $100 million for disruption of *consortium.*

D **DISRUPTION OF CONSORTIUM**

In *Washaya*'s case *supra*, at p 655G, Smith J referred to *Misho* v *Sithole* 1992 (1) ZLR 291 (S) where Korsah JA held that the loss of *consortium* is the main element in the estimation of damages. "The loss will be less where the plaintiff has condoned the adultery and the marriage still subsists."

E Mr *Chikumbirke* used these sentiments to show that the plaintiff's claim was distorted as he seeks more for *contumelia* than for *consortium*. Mr *Uriri* on the other hand submitted that the plaintiff is not claiming loss of *consortium* but its disruption. He used the same sentiments to show that condonation lessens the claim for *consortium*.

F It seems to me that Mr *Uriri* did not appreciate the sentiments attributed by Smith J to Korsah JA in *Misho*'s case. Smith J did not point out that it lessened *consortium* but that it lessened the overall adultery damages. Indeed, references to *Misho*'s case *supra* indicates that Korsah JA at 298A-B stated as follows:

> "But in my view, the trial court misdirected itself in its assessment of G damages by overlooking the all important fact that the marriage still subsists and that the appellant's intrusion was not an unusual and disturbing element to the stability of the union between the respondent and her husband. This court is therefore at large to consider the question of damages afresh taking into account the factors considered above. Thus viewed, there remains only the claim for sentimental damages due H to the injury or *contumelia* inflicted upon the respondent by the appellant."

Kudya J

A reading of *Misho*'s case demonstrates that the adultery damages were A awarded only for *contumelia* and not for both *contumelia* and loss of *consortium,* as there was no loss of *consortium* due to the condonation of the adultery by the respondent.

In *Katsumbe*'s case (also reported as HH-248-91 at p 15 of the cyclostyled judgment) Robinson J at 258B stated: B

> "Next, it is crucial to note that, in this action, there is no question of damages being awarded to the plaintiff for the loss of his wife's *consortium,* that is to say, for the loss of the comfort, society and services of his wife as a result of the defendant's adultery with the plaintiff's wife since the plaintiff elected to condone his wife's acts of adultery and to remain married to her to the extent of having two further children with her." C

See also Malaba J's sentiments in *Khumalo* v *Mandishona supra* at p 448G. The most important factor under this head is that there should be proof of actual loss of *consortium.* In other words, "the wife should be shown to have left the matrimonial home as a result of the adultery".

Even in *Nyakudya*'s case *supra,* there was an actual loss of *consortium*. D

I therefore agree with the submissions made by Mr *Chikumbirike* that no claim can be awarded to the plaintiff under this head.
CONTUMELIA

It seems to me that this is the only head on which the plaintiff is entitled to receive an award of damages. E

Contumelia involves the infringement of the plaintiff's right to privacy, dignity and reputation. I prefer the definition in *Katsumbe supra* at p 258C:

> "Injury, hurt, insult and indignity inflicted upon the plaintiff by the defendant as a result of the latter's adultery with the plaintiff's wife."

The quantum of damages is a factor which is eminently in the discretion of the F court. The court is however guided by a variety of factors.

Mr *Uriri* made reference to the eleven criteria highlighted by PJ Visser and J M Potgieter *Law of Damages* from p 421.

I prefer the factors outlined in *Khumalo's case supra,* that is:

(a) the character of the woman/man involved G
(b) the social and economic status of the plaintiff and the defendant
(c) whether the defendant has shown contrition and has apologized
(d) the need for deterrent measures against the adulterer to protect the innocent spouse against contracting HIV from the errant spouse; and
(e) the level of awards in similar cases. H

2006 (1) ZLR p125

Kudya J

A *In casu,* the plaintiff's wife was a woman of virtue until she fell therefrom at the wiles, blandishments and charms of the defendant. She enjoyed a happy and loving relationship with her husband. The defendant intruded into a strong marriage institution. I find this conduct aggravating.

The plaintiff is a self-employed business man while defendant was a senior B executive in a private corporation. The two were friends and relatives. The defendant was also in charge of the plaintiff's wife who was his secretary. He abused the trust reposed in him by the plaintiff. His conduct was therefore insensitive and reprehensible. The defendant was also 20 years older than the plaintiff's wife and paid scant regard to the effect of his actions on the plaintiff's young family. The defendant had all but raised his own family with C the youngest child in university in South Africa.

The defendant did not apologise for his conduct. Instead he cast various aspersions on the integrity of the plaintiff and his wife. He was brazen and unfeeling in the conduct of his defence to the extent of accusing the plaintiff and his spouse of collusion and extortion. His conduct was therefore contemptuous of the plaintiff and had the effect of enhancing his hurt.

D The mental anguish the plaintiff experienced is obvious. While he produced no medical proof, his blood pressure and his health were affected by the adultery.

All the above factors are aggravating and would favour the imposition of punitive damages.

E The only mitigating feature advanced was the condonation of the adultery. The other is the modern recognition that while the institution of marriage serves a social good, and should be protected, women should no longer be regarded as chattels but as equals who are able to exercise their own minds independent of men.

F The most important consideration in my view, is the level of awards in similar cases. This head is replete with pitfalls for the judicial officer especially in our economic environment where inflation has officially been declared by the Minister of Finance and the Governor of the Reserve Bank of Zimbabwe as the number one enemy. It becomes well nigh impossible to use awards that were granted in cases decided five years ago in order to come up with an G appropriate figure.

The guiding principles as regards the consideration of the fall in the concomitant purchasing power relate to the use of the consumer price index as applied by McNally JA in *Biti* v *Minister of State Security* 1999 (1) ZLR 165 (S) at 171 and referred to in *Karimazondo & Anor* v *Minister of Home Affairs supra* H at 371G.

2006 (1) ZLR p126

Kudya J

While the amount awarded should not be regarded as a road to riches, it should A be such as to persuade and satisfy the plaintiff that it was worth his while not to take the law into his own hands.

In *Nyakudya*'s case, an award of $7 000 was granted for *contumelia.* This was in July 2000. The facts are distinguishable from the present case. In *Khumalo*'s case*,* the facts are almost similar to the present case, save that in *Khumalo*'s B case his marriage was unstable. In the present case, it was stable and rock solid. *Khumalo* was awarded $4 000 for *contumelia* (it was actually higher than for the loss of *consortium*). This was in April 1996.

Inflation as measured by the consumer price index rose by almost 23 000% from April 1996 to January 2006, while it rose by about 21 000 percent from June 2000 to January 2006. C

I am alive to the caution raised by Bartlett J in *Chinamasa* v *Jongwe Printing and Publishing Co (Pvt) Ltd & Anor* 1994 (1) ZLR 133 at 170F that courts should not reduce the awards to an exact mathematical calculation. It is, however, interesting to convert the local currency awards in *Washaya and Nyakudya*'s case *supra* into their equivalent values in US dollars at the time. D In 1996, 9 Zimbabwean dollars were equivalent to 1 US dollar, while in 2000, 38 Zimbabwean dollars were equivalent to US$1. At the date of this judgment, $100 000 Zimbabwe dollars are equivalent to 1 US dollar. It is however not the intention of my judgment to seek to dollarise adultery damages awards as these must always, I believe, be related to the capacity of the economy to absorb them. E

Taking into account the circumstances of this case, the range of damages awarded in other cases referred to, after factoring in inflation, I estimate the quantum in this case at $100 million for *contumelia* as being fair and adequate recompense to the plaintiff.

COSTS F

The defendant contended that because the plaintiff sought an outrageous award even if the court found that he was a fit and proper candidate for recompense, he be deprived of an award of costs.

The plaintiff, on the other hand, initially sought costs on the ordinary scale but prayed for punitive costs if the court upheld the plaintiff's claim on the G first issue notwithstanding that the award granted would be less than the upper limit sought in the pleadings. His attitude was that the defendant should be punished for declining to make admissions at the pre-trial conference and for his unrepentant attitude.

In my view, costs are within the discretion of the court. The defendant suggested an upper limit of less than $1 million be awarded to recompense the H

Kudya J

A plaintiff. The fact that he eventually obtained an award on the lesser side than his maximum claim is no reason to deprive him of his costs. There is no reason why the defendant should be punished on the higher scale as he was within his rights to test plaintiff's evidence. In any event, the plaintiff did not succeed in getting an award on the upper limit.

B In the premises, judgment is granted to the plaintiff and it is ordered that the defendant pay the plaintiff the sum of $100 million as damages for adultery with interest thereon at the prescribed rate from 14 May 2004 to the date of full payment. The defendant is to pay the costs of suit.

Honey & Blanckenberg, plaintiff's legal practitioners

C *Chikumbirike and Associates,* defendant's legal practitioners

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ASSOCIATED NEWSPAPERS OF ZIMBABWE v MEDIA & INFORMATION COMMISSION 2006 (1) ZLR 128 (H)

Citation 2006 (1) ZLR 128 (H)

Case No Judgment No. HH-15-06

Court High Court, Harare

Judge	Makarau J
Heard	28 November 2005
Judgment	8 February 2006
Counsel	*A P de Bourbon SC,* for the applicant *M V Chizodza* for the respondent
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Administrative law — *review — grounds for — perceived bias — tribunal hearing matter — should be reconstituted*

Practice and procedure — *affidavits — filing — party seeking to file further affidavit after answering affidavit filed — leave required — when leave may be granted* D

Headnote

The applicant company, which owned a newspaper, had applied to the respondent for registration as a media service provider. The application was rejected. An appeal by the applicant to the Administrative Court resulted in the respondent's decision being overturned. The Supreme E Court, when the respondent appealed, set aside the Administrative Court's decision but ordered that the matter be heard by the respondent *de novo*. It found that the respondent's Chairman had made remarks which were likely to create apprehension that the applicant would not receive a fair hearing. At the new hearing, the applicant's application for registration was again refused. F

The applicant brought the matter on review, alleging procedural irregularities and bias on the part of the Chairman. The respondent sought to introduce a further affidavit contrary to the rules of court, and the applicant sought to introduce an affidavit in reply.

Held, that leave to file additional affidavits cannot be had just for the asking. The court will insist on the observance of its rules regarding the G sequencing of affidavits to be filed in an application, for uniformity of practice and certainty in the system, unless, in the view of the court, justice will miscarry. In particular, the court will not readily grant leave to file an additional affidavit to deal with facts that were available to the parties at the time the permitted affidavits were drawn up and deposed to. The court will not readily grant leave to file additional affidavits that H

Makarau J

A seek to bring in a new cause of action or defence, where the facts giving rise to such were available to the parties at the time of the filing of the traditionally recognized affidavits.

Held, further, that as the Supreme Court had voided the decision of the respondent on the basis of perceived bias, there was merit in the applicant's submission that the commission, as presently constituted, B was disabled from validly considering the applicant's application as its decisions would be tainted by the bias of the Chairman. However, the court did not have the power to order the appointment of a new commission as neither the issue nor the appointing authority was before the court.

Cases cited C

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

Case information

A P de Bourbon SC, for the applicant

M V Chizodza for the respondent

Judgment

D **MAKARAU J:** On 28 July 2005, the applicant filed a court application in terms of Order 33 of the High Court Rules 1971. The application was for a review of the proceedings and decision of the respondent, handed down on 18 July 2005, denying the applicant registration as a media service provider in terms of the Access to Information and Protection of Privacy Act [*Chapter 10:27*]. E The grounds given in the application for the review were procedural irregularity and bias on the part of the chairperson of the respondent.

The application was opposed, with the alleged procedural irregularities denied and bias on the part of the chairperson of the respondent particularly denied.

F **BACKGROUND**

The dispute between the parties has a drawn out history before these courts. In September 2003, the applicant applied to the respondent for registration as a media service provider. The application was declined. An appeal against the decision declining registration was noted to the Administrative Court, which G ruled against the respondent and gave certain directions in its order. The respondent in turn appealed to the Supreme Court against the decision of the Administrative Court. After considering the appeal, the Supreme Court set aside the decision of the Administrative Court as well as the refusal by the respondent to register the applicant as a mass media service provider. In its order, the Supreme Court ordered the respondent to consider *de novo* the H application for registration by the applicant. In arriving at its decision to remit

the application to the respondent for consideration *de novo,* the Supreme A Court made a specific finding that the proceedings of the respondent were "voidable" (void?), on the grounds of bias on the part of the chairperson of the respondent. It was the Supreme Court's finding that the chairperson of the respondent had made certain utterances and remarks about the applicant that were likely to make the applicant and all reasonable men apprehensive that the applicant would not receive a fair hearing from a commission chaired by him. B

THE ISSUE

The dispute between the parties has regrettably been clouded by allegations of political machinations on the part of the respondent. The history of the litigation between the parties, the use of unfortunate language where the respondent alleges that it considered the applicant's application whilst still C smarting from certain allegations levelled against by the applicant, all raise unnecessary dust that tends to cloud the real dispute between the parties. Matters have not been helped by the manner in which the parties have proceeded to file papers in this matter, an issue that I shall revert to in detail shortly. The impression created by the litigation between the parties D is that they are locked in a deadly legal battle in which no party will take prisoners. Shorn of the extraneous matters, the issue that falls for determination in this application is, in my view, relatively simple. It is whether, after the specific finding by the Supreme Court that the chairperson of the respondent was biased against the applicant, the decision taken by the respondent under the guidance of its chairperson, denying the applicant registration, avoids the E stain of his bias or is tainted by the same.

LEAVE TO FILE ADDITIONAL AFFIDAVITS

Before dealing with the merits of the manner, as indicated above, I must rule on the applications by both parties to have admitted additional affidavits that were filed after the answering affidavit. Rule 235 of the High Court Rules F specifically provides that, after an answering affidavit has been filed, no further affidavits may be filed without the leave of a court or a judge. Notwithstanding this clear pronouncement in the rules, the respondent filed, on 9 October 2005, without prior leave, a supplementary affidavit deposed to by its chairperson, introducing an averment that it alleged its erstwhile legal practitioners had omitted in the founding papers for no apparent reason. It was G averred in the affidavit that the applicant had noted an appeal against the decision of the respondent

of 18 July 2005 to the Administrative Court and, as such, it was prematurely bringing the same decision under review in this court. In turn, the applicant responded to this supplementary affidavit by filing its own supplementary affidavit, again without leave having been sought or granted. In the supplementary affidavit, the applicant denies that the filing of H

A the appeal precluded it from approaching this court on review. For good measure, the applicant filed an affidavit by one Jonathan Maphenduka without any preamble or explanation. Jonathan Maphenduka was apparently a member of the respondent at the time the decision to deny the applicant registration was made. He has since tendered a letter in which he resigns from the respondent. The purport of his affidavit was to suggest that during the B proceedings of the respondent concerning the applicant's application for registration, members of the respondent were initially of the view that there was no basis for denying the application. The respondent altered its position later to deny the application after persuasion by one of the commissioners; it is suggested in the affidavit.

C Leave to admit the above three affidavits was applied for at the commencement of the hearing. I shall deal with each of the affidavits in turn. Regarding the respondent's supplementary affidavit, no explanation is given for the omission of the averment made in the affidavit from the opposing affidavit. The respondent alleges that its erstwhile legal practitioners omitted the averment for no reason. No affidavit has been filed from the retiring legal practitioners D explaining the alleged default. Further, there is no explanation by the respondent's chairperson as to why he did not observe the omission at the time he deposed to the answering affidavit.

Leave to file additional affidavits cannot be had for the asking. The court will insist on the observance of its rules regarding the sequencing of affidavits to E be filed in an application, for uniformity of practice and certainty in the system, unless in the view of the court, justice will miscarry. In particular, the court will not readily grant leave to file an additional affidavit to deal with facts that were available to the parties at the time the permitted affidavits were drawn up and deposed to. Again, the court will not readily grant leave to file additional affidavits that seek to bring in a new cause of action or defence where the facts F giving rise to such were available to the parties at the time of the filing of the traditionally recognized affidavits. The reason given by the respondent for leave to file the supplementary affidavit is far from impressive. The alleged omission, by its retiring legal practitioners, may have carried weight with me if some prejudice would be occasioned the respondent if the facts in the supplementary affidavit were not before me.

G It is my view that the respondent will not be prejudiced by the exclusion of the supplementary affidavit as *lis pendens*, or more correctly, the obligation to exhaust domestic remedies that it seeks to raise in the affidavit is not an ouster of this court's jurisdiction. The common law position recognizing that this court has inherent jurisdiction to withhold or exercise its jurisdiction where the H matter is pending before another tribunal is restated in s 7 of the

Administration of Justice Act [*Chapter 10:28*]. The factors taken into A account by this court in withholding its jurisdiction to allow domestic remedies to expend themselves have been discussed by this court in several cases. A number of authorities discussing the issue are to be found in the judgment by Gillespie J in *Zikiti* v *United Bottlers* 1998 (1) ZLR 389 (H), which judgment I find clearest on the issue to date. B

In casu, in view of the long drawn out litigation between the parties, and the fact that the application is in essence not opposed on the merits, it appears to me remiss of this court to entertain withholding its jurisdiction merely because some other relief is available to the parties. That was not presented to me to be the basis upon which this court has in previous decisions withheld jurisdiction. Thus, it is my finding that even if I had admitted the respondent's C supplementary affidavit, I would not have withheld my jurisdiction in the circumstances of this matter. In my view, insufficient grounds have been laid for the admission of the supplementary affidavit by the respondent and further, that the exclusion of the facts raised therein will not occasion any prejudice to the respondent due to my explained attitude to the issue of jurisdiction in this matter. D

The supplementary affidavit filed by the applicant meets the same fate as the respondent's supplementary affidavit since it was filed to respond to issues raised by the respondent after the answering affidavit. The affidavit by Jonathan Maphenduka is not relevant to the issue before me. To his credit, Mr *de Bourbon*, who appeared for the applicant, did not push for the E admission of the affidavit nor did he seek to rely on the allegations raised in it. I will accordingly refuse leave to have it filed.

AD **THE MERITS**

It is common cause that the Supreme Court did find that the chairperson of the respondent made utterances and remarks that were likely to raise reasonable F apprehension that the applicant would not receive a fair hearing from the respondent with the participation of the chairperson in its proceedings. Thus, the Supreme Court did not find actual bias on the part of the respondent's chairperson but voided the decision of the respondent on the basis of perceived bias. That a finding of perceived bias is sufficient at law to void a decision taken by the affected legal *persona,* is not open to debate in this court, G not only because the Supreme Court made a pronouncement on it but because it is the correct position at law and is unassailable in any forum.

The above, in my view, ends the inquiry before me. The finding by the Supreme Court on the question of bias is not open to further debate or argument in this court or in any other court. Both parties to the dispute are issue estopped by H

Makarau J

A the pronouncement of the Supreme Court on the issue. This is trite. Ms *Chizodza*, for the respondent, conceded the point and, in my view, her concession was well made. Her concession in this regard had the effect of withdrawing the opposition to the application on the merits and, as observed elsewhere above, the application in essence becomes unopposed on the B merits. Thus, the only conclusion I can come to in the circumstances of this matter is that the decision of the respondent cannot stand, as it was rendered void by the participation of the chairperson in its making after he had been found to be biased against the applicant for the purposes of the law.

It must be set aside.

In view of the decision I have come to above, and especially in light of the C properly made concession by Ms *Chizodza*, it appears to me unnecessary that I deal with the other two grounds of review raised by the applicant. The applicant, however, submitted in addition that, in view of the fact that the chairperson of the respondent sat and considered the applicant's application with the other members of the respondent, I must order that the commission D as presently constituted is now disabled from validly considering the applicant's application as their decision will be tainted by the bias of the chairperson as found by the Supreme Court. There is merit in the submission of the applicant in this regard. The respondent is well advised to take this on board when next dealing with the applicant's application. I, however, do not have the power to order the appointment of a new commission as that issue is not before me and the appointing authority E is not before me. I cannot make an order binding a party that is not before me, without first affording that party the right to be heard. I further decline to give directions to any panel that will be put in place to determine the application, as this will, in my view, amount to judicial interference in an administrative function.

In the result, I make the following orders: F

1. The decision by the respondent of 18 July 2005 is hereby set aside.
2. The respondent is to consider the applicant's application *de novo.*
3. The respondent is to bear the applicant's costs.

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

M V Chizodza-Chinounye, respondent's legal practitioners

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Source:
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KUMIRAI v KUMIRAI 2006 (1) ZLR 134 (H)

Citation	2006 (1) ZLR 134 (H)
Case No	Judgment No. HH-17-06
Court	High Court, Harare
Judge	Makarau J
Heard	30 November 2005; 30 January 2006
Judgment	9 February 2006
Counsel	Ms *R T Hove*, for the plaintiff *T D Muskwe*, for the defendant
Case Type	Matrimonial action
Annotations	Link to case annotations

Flynote

Family law — *child — access to by non-custodian parent — not to be so* C *restricted that it stultifies nurturing of meaningful relationship between parent and child*

Family law — *husband and wife — divorce — grounds for — only ground is irretrievable breakdown — one party not desiring divorce — relevance of — need to show that parties reconciled — judicial separation — may* D *no longer be granted*

Headnote

Since 1985, the sole grounds for the grant of a divorce are irretrievable breakdown and/or mental illness or continuous unconsciousness. The irretrievable breakdown of a marriage is objectively assessed by the court. Invariably, where the plaintiff persists on the day of the trial that E he or she is no longer desirous of continuing in the relationship, the court cannot order the parties to remain married even if the defendant still holds some affection for the plaintiff. To satisfy the court that the marriage still has some life in it, the party has to adduce evidence to the effect that, after the filing of the summons, the parties have reconciled and are living after the manner of husband and wife. In changing the law thus, the legislature F also effectively took away the power of the court to order judicial separation for a given period. If the court is satisfied on the evidence that the marriage can be restored, it will simply decline to grant the divorce. The court cannot, however, order judicial separation in the sense the term used to be known, to give the marriage a chance, failing which the G innocent spouse will be granted the divorce. That practice is inconsistent with the irretrievable breakdown principle.

Where a non-custodian parent is granted right of access to a minor child following divorce, access should not, in the absence of good reason, be confined to such an extent that it stultifies the nurturing of a meaningful relationship between the child and the non-custodian parent. Good H

Makarau J

A reasons would include evidence that the non-custodian parent posed a danger to the life, health or morals of the child.

Cases cited

Marais v Marais 1960 (1) SA 844 (C)

N v N 1999 (1) ZLR 458 (H)

B *Ncube v Ncube* 1993 (1) ZLR 39 (S)

Takafuma v Takafuma 1994 (2) ZLR 103 (S)

Legislation considered

Matrimonial Causes Act [*Chapter 5:13*], s 5

Case information

C Ms *R T Hove*, for the plaintiff

T D Muskwe, for the defendant

Judgment

MAKARAU J: The plaintiff and the defendant were married in Harare on 25 April 1998. Their marriage was solemnized in terms of the Marriages Act D [*Chapter 5:11*], then Chapter 37 of 1974. Prior to that, the parties were in a customary union, the rituals of which were performed in or about October 1997. The parties have one minor child, a son, Tanatswa, born in April 1998.

Certain differences emerged in the parties' relationship, culminating in the plaintiff issuing summons out of this court, claiming a decree of divorce and E ancillary relief. Immediately after issuing summons, the plaintiff moved out of the matrimonial home in October 2004 and set up home elsewhere in rented accommodation, where he remains. Appearance to defend was entered against the summons, with the defendant claiming that the relationship was capable of mending. In the alternative, the defendant claimed certain ancillary relief that I shall detail later.

F Thus, before I proceed to deal with the ancillary relief claimed by both parties, it appears to me unavoidable that I determine whether or not the plaintiff is entitled to the relief he claims in the main.

DIVORCE

In 1985, there was fundamental change to the matrimonial laws of this country G that saw the basis of granting divorces shift radically from the fault system to one where the court would acknowledge the breakdown in a marital relationship even where none of the parties was appreciably to blame for the breakdown. So fundamental was the change that even the "guilty" party can set up his or her fault to have the marriage dissolved, a position that was H untenable under the old law. In changing the law thus, the legislators limited

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the court to granting divorce on the sole grounds of irretrievable breakdown A and or mental illness or continuous unconsciousness.

Irretrievable breakdown of a marriage is not defined in the Matrimonial Causes Act [*Chapter 5:13*]. A few factors that the court may take into account in considering whether there is irretrievable breakdown have been laid out in s5 of the Act. These are not exhaustive. B

In view of the fact that the breakdown of a marriage irretrievably, is objectively assessed by the court, invariably, where the plaintiff insists on the day of the trial that he or she is no longer desirous of continuing in the relationship, the court cannot order the parties to remain married even if the defendant still holds some affection for the plaintiff. Evidence by the plaintiff that he or she no longer wishes to be bound by the marriage oath, having lost all love and C affection for the defendant, has been accepted by this court as evidence of breakdown of the relationship since the

promulgation of the Matrimonial Causes Act in 1985. So trite has the position become that one hardly finds authority for it.

To satisfy the court that the marriage still has some life in it, one has to adduce D evidence to the effect that after the filing of the summons, the parties have reconciled and are living after the manner of husband and wife. In my view, evidence that on one occasion after the service of summons, the parties took a holiday together and afforded each other conjugal rights, as was led in this trial, is insufficient on its own to show that the marriage has prospects of mending. If anything, it goes to show that despite attempts to rekindle the fires, E the parties failed to reconcile.

In changing the law thus, the legislators also effectively took away the power of the court to order the parties to go on judicial separation for a given period. Thus, if the court is satisfied on the evidence adduced before it that the marriage can be restored, it will simply decline to grant the divorce. The court F cannot, however, order judicial separation in the sense the term was judicially interpreted, to give the marriage a chance, failing which the innocent spouse will be granted the divorce. That practice is inconsistent with the irretrievable breakdown principle.

I raise this point specifically at this stage because that was the defendant's prayer in defending the plaintiff's claim. She also prayed that the plaintiff be G ordered to undergo counseling to try and save the marriage.

It was the plaintiff's evidence that he is no longer desirous of remaining married to the defendant. In my view, that is adequate for this court to grant a decree of divorce in the matter. It is, in my further view, unnecessary that I detail the evidence upon which he based his claim or the evidence of the H

Makarau J

A defendant in rebuttal thereof. The exercise before me is not to establish who was to blame for the breakdown of the marriage, but to establish whether in fact it has broken down. It is my further view, that to repeat the evidence led by each of the parties against each other will not assist in the disposition of this matter, but may simply act to embarrass both parties, which is not the primary objective of divorce proceedings.

B I have taken the liberty of explaining in detail a trite position at law in view of the fact that the defendant was allowed to proceed beyond the pre-trial conference stage of the trial, in the belief that she could pray for judicial separation in defence of the divorce proceedings. During trial, the plaintiff was cross examined on the possibility of reconciling with the defendant and C despite his unchanged position that he no longer had that desire, the defendant was led in detail on the matter when she testified in chief. I have since been addressed in detail on the issue on behalf of the defendant. I have been urged to find that the plaintiff was the recalcitrant party in the relationship and so is not entitled to the relief that he seeks. Several allegations of unbecoming behaviour have been in turn made against the plaintiff, yet his D alleged embarrassing conduct should be regarded as a "storm in a tea-cup" that should be disregarded and the divorce be denied.

The above gave me the impression that the concept of irretrievable breakdown of a marriage, the governing principle in our law on divorce, may be misunderstood in some quarters. It is my view that the issue of divorce should E not have proceeded beyond the pre-trial conference of the matter.

On the basis of the forgoing, a decree of divorce shall issue.

MAINTENANCE

At the trial of the matter, the parties were agreed that it is in the best interests of Tanatswa, the minor child of the marriage, that his custody be awarded to F the defendant, his mother. I am satisfied that the agreement between the parties was made in the best interests of the minor child.

The issue of the quantum of maintenance that the plaintiff should pay as the non-custodian parent was referred to trial.

Evidence was led that the minor child currently requires the sum of $37450000 G per month. These expenses, which the plaintiff accepted as reasonable taking into account the parties' lifestyles and the standard of living the minor child was used to, do not include the child's school fees, the cost of his uniforms, his medical expenses and the amount needed to replenish and replace his wardrobe at

the beginning of each season. The parties, however, accepted equal responsibility to maintain the minor child. While the plaintiff adduced H into evidence his earnings, the defendant did not feel this was necessary.

Makarau J

Despite this, I am satisfied that she is capable of maintaining the minor child A at a level that mirrors the plaintiff's contribution.

I am handicapped from arriving at the exact figure that will constitute equal proportions of maintaining the minor child per month as I do not have his monthly needs for the items referred to above. Rather than refer the matter to the matter to further evidence in this or to the Maintenance Court for proper B quantification of the monthly needs of the minor child, I will be guided by the parties' agreement in principle that they will contribute in equal terms to the maintenance of the child. I will therefore order that the plaintiff pays a certain amount to the defendant as an equal proportion of the known expenses and that the parties bear the remaining expenses in equal proportions. C

ACCESS

The plaintiff claims reasonable access to the minor child as the non- custodian parent. The defendant concedes that the plaintiff is entitled to access but wishes the court to restrict such access to supervised access only.

It is trite that access, in the absence of good reason, is not to be confined to such an extent that it stultifies the nurturing of a meaningful relationship D between the child and the non-custodian parent. See *Marais* v *Marais* 1960 (1) SA 844 (C) and *N* v *N* 1999 (1) ZLR 458 (H).

Nothing that has been said by the defendant in her evidence satisfies me that there is good reason to stultify the nurturing of a meaningful relationship between the plaintiff and Tanatswa. E

The defendant has testified that the plaintiff never used to spend much time with the minor child during the subsistence of the marriage, that he would rather spend time with his friends and their children and that during the subsistence of the marriage, he never spent time alone with the minor child in her absence. She has also complained that the plaintiff has never assisted the child with his homework and has only bought the child five items of clothing. F

With respect, the defendant was not properly advised as to what evidence would persuade the court to deny a natural parent the right of unsupervised access to his or her child. The plaintiff is not a stranger to the child whose unsupervised introduction into the child's life may traumatize the child. It was not shown that the plaintiff has been violent or abusive towards the child (see G *N v N supra)*, or that his social life or domestic arrangements are such that exposure to them will injure the best interests of the minor child. It was attempted to show that the plaintiff on one occasion told the minor child the name of his current girl-friend and that he is therefore not suitable to have unsupervised access of his child on this account. That the plaintiff will have other women in his life now he is divorced from the defendant cannot be H

Makarau J

A avoided. The minor child will have to know of and be acquainted with his father's friends sooner rather than later. That cannot be avoided and cannot be used as a ground for denying the father access to his child, as long as contact with his father's female friend or friends is tastefully handled. There has been no suggestion *in casu* that the introduction of the minor child to his father's friend was not tastefully done or that it was done in a manner likely B to injure the best interests of the minor child.

In conclusion, it is my finding that the plaintiff poses no danger to the life, health or morals of the minor child and as such, his access to the minor child shall not be rendered illusory by the imposition of any restrictions other than what is reasonable and in the best interests of the child. His access to the child C shall not be supervised.

IMMOVABLE PROPERTY

Two issues arise for determination under this head. Firstly, I have to consider what constitutes the matrimonial estate and, thereafter, what would constitute an equitable distribution thereof.

D It is common cause that the defendant arranged, through her employer, to purchase a property in Msasa Park called stand No. 2041, Chadcombe Township of stand No. 1257, Chadcombe Township. The defendant's employer paid for the property in full and also paid the cost of having the property developed. The defendant remained indebted to her employer and repayments E for the loan were deducted from the defendant's salary at source from the date of purchase to some two years ago when the defendant paid off the loan to her employer.

The property is registered in the name of the defendant. It was transferred to the defendant in June 1998. The defendant alleges that since she entered into the arrangement to purchase the property prior to her marriage to the plaintiff, F the property should be excluded from distribution. I am unaware of any law that provides that an asset acquired by any of the spouses just before the marriage and is paid for during the subsistence of the marriage shall be excluded from the matrimonial estate that falls for distribution at the dissolution of the marriage. Section 7(3) of the Matrimonial Causes Act only excludes those assets that were acquired before or during the marriage by way of G inheritance or in terms of a custom that excludes it from joint ownership or in a manner sentimental to the owner. It appears quite clearly to me that none of these exclusionary qualities attach to the property. The property was not inherited nor was acquired in terms of any customary law. No evidence was led that it was acquired in a sentimental manner as to exclude it from the joint H estate. It was an investment, just like the acquisition of the matrimonial home.

Makarau J

A further attempt was made during the trial to allege that the property was A donated to the defendant's parents and no longer belongs to the defendant. I am not satisfied that the defendant donated the property to her parents. No deed of donation was produced. No evidence was led from the defendant's parents that they regard the property as their own. Transfer has not yet been effected in their favour to evidence the donation and its acceptance by them. B If anything, there is evidence that the property is tenanted and that the plaintiff and the defendant used to lease out the property for their benefit. Rentals accruing from the property were regarded as part of the income accruing to the family each month and were part of the family's budget. The lease agreements to the property were entered into by the plaintiff and defendants as the landlords and not as agents of the defendant's parents. C

The evidence led by the defendant on the alleged donation to her parents was not credible and I reject it. It is my finding that the Msasa Park property is part of the assets to be distributed between the parties.

I now turn to the second issue.

It is common cause that the parties had two properties, one registered in each D of their names. They purchased the two properties in similar fashion, each obtaining assistance from their employer and the loan being deducted from their respective salaries. The parties hold similar qualifications, left university together after pursuing the same degree programme, and were at one time employed at the same level by the same employer. I have yet to come across any other case of such equality between spouses for the purposes of s 7 of E the Matrimonial Causes Act. I cannot think of any of the factors listed in subs (4) of the section that will tilt the scales in favour of any one of them.

I will thus make an order that will reflect their equal status by awarding to each as their sole and absolute property, the property registered in their names and allowing a cash adjustment to the defendant whose property does not F command as much value as the property registered in the plaintiff's name. In taking this approach, I am heavily influenced by the approach taken by the Supreme Court in *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S) and in *Ncube* v *Ncube* 1993 (1) ZLR 39 (S). I have acknowledged the equality of the spouses in all respects and have thus started from a position where they own the matrimonial estate in equal shares. I have searched and find no reason in equity G to move from that position.

SHARES IN TWO COMPANIES

The parties incorporated two companies, namely, Tanatswa Construction Company and Simukai Enterprises (Pvt) Ltd. The plaintiff is the major shareholder in both companies, with other directors

whose identities are not H

Makarau J

A necessary for the purposes of this trial. The plaintiff has conceded that the defendant is entitled to 50 percent of his shareholding in each of the companies. Again, I find no reason in equity to disturb this position. The award of 50 percent to the defendant in the plaintiff's shareholding does not ignore the fact that the two companies are separate legal *personae* from the B directors. The award simply makes the defendant entitled to 50 percent of the plaintiff's shares in the companies without affecting the shareholding or the operations of the company. The award does not seek to impose the defendant as a shareholder in the company, in which event it would have been imperative to bring the company before the court for it to be heard on the issue.

COSTS

C As a general rule, the approach of this court in matrimonial matters has been to make no award of costs. This is in line with the irretrievable breakdown principle that does not seek to apportion fault to the divorcing parties. Where a marriage has irretrievably broken down, none of the parties are in the main successful, as a decree of divorce will be issued to both the parties. Thus, the D general principle that costs follow the cause is not of general application in matrimonial matters. It may however be applied in the discretion of the court in the event that the defence to the divorce and to the ancillary relief was grossly unreasonable and amounts to vexing the party approaching the court for divorce. I see no reason for departing from the general approach *in casu*.

DISPOSITION

E In the result, I make the following order:

1. A decree of divorce is issued.
2. Custody of Tanatswa Kumirai (born 9 April 1999) is awarded to the defendant. F
3. The plaintiff shall contribute towards the maintenance of Tanatswa in the sum of $18 million per month with effect from 28 February 2006. In addition, the parties shall jointly contribute towards Tanatswa's school fees, school uniforms, clothing and medical expenses.
4. The plaintiff shall have access to Tanatswa every alternate weekend, every alternate public holiday and one half of each school holiday. G
5. The plaintiff is awarded as his sole property the immovable property whose street address is No. 50 Garlands Ride, Mount Pleasant, Harare.
6. The defendant is awarded as her sole property, stand No. 2041, Chadcombe Township of stand No. 1257, Chadcombe Township.
7. The two properties referred to above shall be valued within 30 days of this H order, by an evaluator agreed to by both parties, and failing such

Makarau J

agreement, by one appointed by the Registrar of this court to establish A the net value of each. The plaintiff shall within 30 days of the evaluation pay to the defendant a sum of money (if any) requisite to bring the value of stand No. 2041, Chadcombe Township of stand No. 1257, Chadcombe Township to 50 percent of the net value of the two properties combined.

8. The cost of the evaluations referred to above are to be borne by both B parties in equal shares.
9. The plaintiff's shareholding in Tanatswa Construction Company (Pvt) Ltd and Simukai Enterprises (Pvt) Ltd shall, within 30 days of this order be evaluated by an accountant to be agreed upon between the parties and failing such agreement, to be nominated by the Registrar of this court. Within 90 days of the evaluation, the plaintiff is to pay the defendant a C sum equivalent to 50 percent of the net value of such equity. The cost of the evaluation shall be borne by both parties in equal shares.
10. Each party shall bear its own costs.

Hove & Associates, plaintiff's legal practitioners D

Muskwe & Associates, defendant's legal practioners

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TEL-ONE (PVT) LTD v COMMUNICATION & ALLIED SERVICES WORKERS' UNION OF ZIMBABWE 2006 (1) ZLR 143 (S)

Citation	2006 (1) ZLR 143 (S)
Case No	Judgment No. S-1-06
Court	Supreme Court, Harare
Judge	Gwaunza JA (in chambers)
Heard	7 February 2006
Judgment	9 February 2006
Counsel	*A K Maguchu,* for the applicant *L T Biti,* for the respondent
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

C **Appeal** — *record — deposit with Registrar of estimated cost — undertaking of payment of cost made in lieu of deposit — appellant preparing record at its own expense — failure to file letter of undertaking for payment of costs — effect*

Headnote

D The applicant sought the reinstatement of an appeal it had noted. The applicant had failed to file with the Registrar of the High Court a letter of undertaking for the payment of the cost of the preparation of the appeal record. The applicant had, however, undertaken the preparation of the record at its own expense, in order to avoid the delays that were occurring E in the Registrar's office due to lack of the relevant stationery and equipment. The record had duly been completed, and copies thereof had already been made and submitted to the Registrar. The applicant accepted that it had not technically complied with r 34 of the High Court Rules but argued that in these circumstances the requirement of the letter of undertaking had in effect become a formality.

F *Held,* that the explanation tendered by the applicant for not submitting the letter of undertaking was reasonable. By taking upon itself the task of preparing the record, and not leaving it to the Registrar's Office, with all its constraints in this respect, the applicant had literally rendered r 34 irrelevant in the processing of its appeal. This did not mean that G appellants should, at will, enjoy the licence of usurping the Registrar's responsibilities and then proceed to disregard the rules with impunity. The applicant's legal practitioner, being aware of the provisions of r 34,

should have informed the Registrar that, rather than pay the cost of preparing the record, the applicant was itself and at its expense, going to prepare the record in question. However, even though the applicant H defied a mandatory provision of the rules, the effect of this default was

Gwaunza JA

greatly mitigated by the fact that its action fulfilled and promoted the A basic purpose of the rule in question.

Cases cited

Apostolic Faith Mission in Zimbabwe & Ors v Murefu S-28-03 B

Legislation considered

High Court (General) Rules 1971 [RGN 1047 of 1971], r 34

Case information

A K Maguchu, for the applicant

L T Biti, for the respondent C

Judgment

GWAUNZA JA: In Chambers, in terms of r 34(5) of the Supreme Court Rules.

This is an application for the reinstatement of an appeal following the applicant's failure to file, with the Registrar of the High Court, a letter of undertaking for the payment of the cost of the preparation of the appeal record. D The application is opposed by the respondent.

The applicant concedes it did not submit the written undertaking to the Registrar of the High Court. It is, however, submitted on behalf of the applicant that this default was not an indication that the applicant did not wish to pursue the appeal. To the contrary, it is contended, the applicant's counsel had timeously filed the notice and grounds of appeal and had, immediately and E with the applicant's cooperation, seen to it that the record of the appeal was prepared at the applicant's cost.

The applicant submits and has not been challenged by the respondent, that preparation of the record had duly been completed, and that copies thereof had already been made and submitted to the Registrar. The Registrar's letter F notifying of the lapsing of the appeal had, it is submitted, been received while this process was under way. It is argued for the applicant that in view of this development, the requirement of the letter of undertaking had in effect become a formality. This however, the applicant asserts, was not to say the requirement was to be ignored. The point was stressed that, to the extent that r 34 was intended to expedite the process of an appeal, what the applicant had done G was in fact to ensure that this occurred. The applicant's action, it is submitted, had been prompted by delays due to lack of the relevant stationery and equipment, currently being experienced at the office of the Registrar in the preparation of appeal records.

In opposing the application, the respondent argues that r 34 was mandatory in its terms and should have been complied with regardless of the fact that the H

Gwaunza JA

A applicant had taken upon itself the task of preparing the record. It is argued further for the respondent that in addition to not sending the written undertaking to the Registrar, the applicant had taken too long, i.e. three months, to prepare the record in question. It was noted that the preparation in question simply involved the photocopying of the various documents that had constituted the application in the court *a quo.*

B The respondent argued further that the failure of the applicant's legal practitioner to submit the written undertaking in question should appropriately be visited on the client, i.e. the applicant. For this the respondent relied on the decision of this court in the case of *Apostolic Faith Mission & Ors* v *Murefu* S-28-03.

C Essentially, in an application of this nature, the applicant must satisfy the court firstly, that he has a reasonable explanation for the delay in question and secondly that his prospects of success on appeal are good.

I am satisfied, and I find, that the explanation tendered by the applicant for not submitting the letter of undertaking on the payment of the cost of preparing the record, is reasonable. It can be said that by taking upon itself the task of D preparing the record, and not leaving it to the Registrar's Office, with all its constraints in this respect, the applicant had literally rendered r 34 irrelevant in the processing of its appeal.

This, however, should not be taken to mean that applicants should, at will, enjoy the licence of usurping the Registrar's responsibilities and then proceed E to disregard the rules with impunity. The rule is still in existence and can only cease to operate if repealed according to laid down procedures.

Once it had been decided that the applicant would take it upon itself to prepare the record, the applicant's legal practitioner, being aware, as he must have been, of the provisions of r 34, should have informed the Registrar that, rather than pay the cost of preparing the record, the applicant was itself and at its F expense, going to prepare the record in question.

There is in my view no reason why the applicant's legal practitioner, preoccupied though he might have been with preparing the record, could not have paused long enough to submit a note to that effect to the Registrar. That said, it cannot be denied that the applicant's action in preparing the appeal G record did have the effect of facilitating the speedy processing of the appeal in question. Even though the applicant defied a mandatory provision of the rules of this court, I find that the effect of this default is greatly mitigated by the fact that its action fulfilled and promoted the basic purpose of the rule in question.

I am persuaded by the applicant's contention that the circumstances of this H case are distinguishable from those in *Apostolic Faith Mission in Zimbabwe*

Gwaunza JA

& Ors v *Murefu*, supra. In the latter case, the legal practitioner concerned did A nothing to expedite the appeal, beyond filing the notice and grounds of appeal. Ziyambi JA, who heard the matter, at p 9 commented correctly on the legal practitioner's conduct in not submitting the undertaking in terms of r 34:

> "Procrastination is different from inadvertence.
>
> It involves putting off what one knows one has to do. The legal practitioner B was at all times aware of his responsibility in terms of the Rules but kept on postponing it."

In casu, the applicant's legal practitioner was not idle. He took what he saw as the necessary steps to ensure that the record of the appeal was prepared without delay and submitted to the court. He did not postpone complying with the rule, in the sense meant by the learned judge in the case cited. C

In any case, my determination that the default in question has been greatly mitigated by the effect of what the applicant's legal practitioner set out to do, and did, leaves little or no "sin" to be visited on the applicant.

Nor am I persuaded that there was an unreasonable delay in preparing the record, as alleged by the respondent. While the task could have been D completed sooner than it was, it certainly did not take as long as the three months alleged by the respondent. This application, is however, concerned about the applicant's default in submitting the written undertaking, not in preparing the record of the appeal.

All in all, I am satisfied that the explanation given by the applicant for the delay in question, is reasonable. E

I will turn now to the applicant's prospects of success on appeal.

The applicant has given eight grounds of appeal against the decision of the court *a quo*. It takes issue with the finding of the court *a quo* that the respondent had *locus standi* and sufficient interest in the dispute between Tel One and its individual employees, to interpose itself as a party to the F proceedings. The applicant also charges that the court *a quo* erred in the exercise of its discretion in

deciding to entertain a labour dispute when more effective domestic remedies were available under the Labour Act. Lastly, the applicant challenges the finding of the court *a quo*, without evidence on the issue, that all employees had taken part in the collective job action. It is the G applicant's assertion that there is undisputed evidence that not all employees went on collective job action.

The respondent, in opposing this application, filed no papers in support of such opposition. In his argument before me, counsel for the respondent expressed no serious challenge to the applicant's detailed grounds of appeal. No argument was tendered in respect of the charge concerning the exhaustion H

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Gwaunza JA

A of domestic remedies, a charge that, if proved, may lead to the applicant succeeding in its appeal. Nor was there any argument directed at the applicant's assertion that not all employees had gone on the collective job action concerned. A finding that the applicant is correct in this assertion may result in a different ruling on appeal. In the light of this lack of any challenge to the applicant's grounds of appeal, I am unable to make a definitive finding that B the applicant has no prospects of success on appeal. The contrary is, in effect, indicated.

The applicant is therefore entitled to the order sought.

It is in the premises ordered as follows:

1. The appeal in S-337-05 be and is hereby reinstated. C
2. There shall be no order as to costs.

Dube, Manikai & Hwacha, applicants legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

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Source:
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TSVANGIRAI v MUGABE & ANOR 2006 (1) ZLR 148 (S)

2006 (1) ZLR p148

Citation	2006 (1) ZLR 148 (S)
Case No	Judgment No. S-84-05
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Cheda JA, Ziyambi JA and Malaba JA
Heard	17 November 2005
Judgment	14 February 2006
Counsel	*J J Gauntlett SC,* with him *A P de Bourbon SC* and *E T Matinenga,* for the applicant *T Hussein*, for the first respondent *G C Chikumbirike* for the second respondent
Case Type	Constitutional application
Annotations	Link to case annotations

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — s 24(2) —* C *application for referral of an alleged contravention of Declaration of Rights to the Supreme Court — question arising during course of "proceedings" in High Court — meaning — when proceedings are pending — requirement to comply with provisions of s 24(2) — need to apply for referral to judge seized of the matter — procedure to be* D *followed when court not actually sitting — complaint about delays caused by the judge — application resulting in judge being judge in his own cause — mandatory requirements of s 24(2) must be followed notwithstanding — incorrect finding by judge that such application is frivolous or vexatious — right of applicant in such event to apply to Supreme Court for redress* E

Words and phrases — *"proceedings in the High Court" — Constitution of Zimbabwe 1980 — s 24(2) — means proceedings, which have been instituted in the High Court — proceedings in being from commencement of the action until termination of the matter in dispute* F

Headnote

The words "in any proceedings in the High Court," in s 24(2) of the Constitution of Zimbabwe 1980, mean proceedings that have come to be or have been instituted in the High Court. They are proceedings that have found existence in the High Court, in the sense that the court has been called upon, through a method prescribed by law, to exercise the judicial functions of the State over the matter in dispute between the parties and G it is in control of the conduct and progress of the proceedings.

There are proceedings in being in the High Court from the moment an action is commenced or an application made until termination of the matter in dispute or withdrawal of the action or application.

Consequent upon the Presidential election of March 2002, the applicant, who was the unsuccessful candidate, brought an election petition seeking to H

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Malaba JA

A set aside the election in which the first respondent emerged the winner. Among the grounds on which the petition was based was the allegation that s 158 of the Electoral Act [*Chapter 2:01*] and the regulations and orders made there-under, in terms of which the election was conducted, were constitutionally invalid.

At the pre-trial conference, it was agreed between the parties that the petition B should deal firstly with the question of the constitutional validity of s 158 of the Act and the regulations and orders made under authority. Accordingly the matter was referred to a judge on this point alone. He heard full argument and then reserved judgment, on the preliminary issue, on 3 November 2003. In spite of letters being written to his clerk C enquiring when judgment would be handed down, it was not until 10 June 2004 that the judge's order was handed down. He dismissed the applicant's argument on the preliminary issue but intimated that full reasons for his order would be given in two weeks time. He did not do so. By consent of the parties, however, the continuance of the trial was set down on a date in September 2004.

D Before the date of the resumption, the applicant requested a postponement "¼before proceeding further with the election petition" so as to inspect the ballot papers. The request was granted. Meanwhile, in a series of letters to the judge's clerk for the purposes of considering an appeal, the applicant unsuccessfully sought the judge's reasons for his order of 10 June 2004. Finally, on 11 July 2005, the applicant made application to the E Supreme Court for redress in terms of s 24(1) of the Constitution, alleging that his rights to protection of the law and to a fair hearing within a reasonable time guaranteed to him under s 18 of the Constitution had been contravened because of the delays in determining the petition.

The respondents opposed the application. *Inter alia,* they argued that as the F applicant had failed to seek a referral to the Supreme Court in the proceedings before the High Court, he had failed to comply with the procedure set out in s 24(2) of the Constitution. In response thereto, it was argued on behalf of the applicant that there were no proceedings before the High Court at which any such referral application could be made. The only proceedings before the High Court, which

had taken G place, occurred on 3 November 2003 and had come to an end on the day when judgment on the preliminary issue was reserved.

The applicant also argued that, in any event that as the judge was being accused of being the principal cause of the delay, a referral application to him would involve him becoming a judge in his own cause, Finally, it was urged that no application could be made to a judge who was *functus* H *officio*.

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Malaba JA

Held, that compliance with the procedure prescribed in s 24(2) of the A Constitution was mandatory. The provision applies when there is a question relating to a contravention of the Declaration of Rights arising in the course of "proceedings" in the High Court. The word "proceedings" in s 24(2) is a general term, referring to the action or application itself and the formal and significant steps taken by the parties in compliance with procedures laid down by the law for the purpose of arriving at a final B judgment on the matter in dispute. There are proceedings in being in the High Court from the moment an action is commenced or an application made until termination of the matter in dispute or withdrawal of the action or application. There was no need to limit the very general words of s 24(2) by saying that the question as to the contravention of the Declaration C of Rights arises only when the court is actually sitting. Until the question whether the first respondent was duly elected or not had been determined, proceedings were still pending in the High Court.

Held, further, that whilst the request for the reference of the question to the Supreme Court must be made to the judge whilst he is actually sitting in court, the question itself does not have to arise when the court is sitting. D It may arise on the pleadings or from the circumstances of the case. The applicant should have had the application for reference of the question set down for hearing by the judge. Thus, once the question of a contravention of the Declaration of Rights arose the applicant was obliged to make an application, in open court to the judge seized of the E matter, for the question to be referred to the Supreme Court. This he could have done by notice in writing served on the other parties to the proceedings and having the matter set down for hearing before the judge.

Held, further, that in view of the fact that the procedure prescribed in s 24(2) of the Constitution was mandatory, it was no answer to make the point that the judge would have been a judge in his own cause, had the F application for referral been made. Had the judge, in bad faith, held that the application for referral was frivolous or vexatious, the applicant could have applied to the Supreme Court for redress in terms of s 24(1) of the Constitution. He would have discharged his duty to comply with the procedure prescribed in s 24(2).

Held, further, that until the judge had decided whether or not the first G respondent had been duly elected, he was not *functus officio*.

Held, further, that the application should be dismissed but with no order as to costs. H

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Malaba JA

Cases cited A

Re *Appleton, French & Scrafton Ltd* [1905] 1 ChD 749

Barclay Davit Co Ltd v Samuel Taylor & Sons Ltd [1946] 2 All ER 41 (ChD)

J B Brooks & Co Ltd v Lycett's Saddle & Motor Accessory Co Ltd [1904] 1 ChD 512

B *Bull v Min of Home Affairs* 1986 (1) ZLR 202 (S)

Cheney v Spooner (1929) 41 CLR 532

Granger v Minister of State 1984 (1) ZLR 194 (S)

Jesse v Attorney-General 1999 (1) ZLR 121 (S)

Mandirwhe v Min of State 1986 (1) ZLR 1 (A)

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

Mundy v The Butterley Co Ltd [1932] 2 ChD 227

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

Zinyemba v Minister of the Public Service & Anor 1989 (3) ZLR 351 (S)

Legislation considered

D Constitution of Zimbabwe 1980, ss 18(1), 24(1), 24(2), and 24(3)

Case information

J J Gauntlett SC, with him *A P de Bourbon SC* and *E T Matinenga,* for the applicant

T Hussein, for the first respondent

G C Chikumbirike for the second respondent

Judgment

E **MALABA JA:** On 9, 10 and 11 March 2002, an election to the office of President was held in Zimbabwe. The applicant, who is the leader of the opposition political party, the Movement for Democratic Change ("the MDC"), stood for that party as a candidate for election as President. The first respondent, who is the leader of the ruling political party, the Zimbabwe African National Union F – Patriotic Front ("ZANU-PF"), also stood for his party as candidate for election as President.

On 13 March 2002, the first respondent was declared the winner of the election and is the President of Zimbabwe.

The second respondent is a body established in terms of s 61 of the G Constitution of Zimbabwe ("the Constitution"). Its functions, at the time, included the supervision of the registration of voters and the conduct of the election.

On 12 April 2002, the applicant presented to the High Court, in terms of the procedure prescribed in s 102(1) of the Electoral Act [*Chapter 2:01*] ("the Act"), an election petition complaining of the undue election of the first H respondent to the office of President by reason of a number of alleged causes.

Malaba JA

Amongst the grounds on which the petition was based was the allegation that A s 158 of the Act and statutory instruments enacted thereunder, particularly the Electoral Act (Modification) Notice 2002, SI 41D of 2002, in terms of which the election was conducted, were constitutionally invalid. The election petition prayed the High Court to make an order in terms of s 102(2)(b) of the Act declaring that the President was not duly elected. B

Section 136(1) of the Act required the High Court to determine the question of the alleged undue election of the first respondent as President on a trial of the election petition in open court. Section 18(9) of the Constitution guaranteed to the applicant as the petitioner the right to a fair hearing and determination of the election petition within a reasonable time.

After the presentation of the election petition to the High Court, there was C no indication as to when the trial would commence. Letters were written by the applicant's legal practitioners to the registrar of the High Court ("the registrar") enquiring as to when the hearing of the election petition would take place.

On 18 November and 2 December 2002, the parties, represented by their legal practitioners, held a pre-trial conference before the Judge President. The pre-trial conference minute issued in Chambers on 2 December 2002, shows D that the parties agreed that the trial of the election petition would deal first with submissions and argument on the constitutional validity of s 158 of the Act and the statutory instruments and orders made under its authority. The applicant believed that these grounds of the alleged undue election of the first respondent as President were so weighty that a favourable ruling on them E would be dispositive of the election petition.

Notwithstanding the fact that the pre-trial conference minute directed the registrar to set down the election petition for trial as soon as possible, the applicant had to apply to the High Court on 9 May 2003 for a *mandamus* compelling the registrar to set down the election petition for trial.

The trial commenced in the High Court before Hlatshwayo J on 3 November F 2003. The learned judge heard submissions and argument on the validity of s 158 of the Act and the statutory instruments and orders made under its authority. He then reserved judgment on these preliminary issues.

A long time passed without the judgment being delivered. The applicant's legal practitioners wrote letters to the judge's clerk, enquiring as to when G judgment would be handed down. No satisfactory answer was forthcoming. The matter was brought to the attention of the Judge President. It appears from the papers that the Judge President discussed the issue of the delayed delivery of the judgment with the learned Judge, who indicated that the delay was due to the fact that the issues raised for determination were complex, requiring more time for research and reflection on his part. H

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Malaba JA

A On 10 June 2004, that is to say, about seven months after judgment was reserved, the learned judge issued a written order. Its effect was that the contentions advanced on behalf of the applicant on the alleged constitutional invalidity of s 158 of the Act and the statutory instruments and orders made under it were dismissed. The terms of the order were stated as follows:

> B "I hereby order as follows:
>
> 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 (Modification) Notice 2002, SI 41D of 2002, and the declaration that all orders made C 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."

The learned judge intimated that reasons for the order would be given in two D weeks' time. He failed to keep the promise. There was no appeal noted by the applicant against the order within fifteen days of the date it was given, as required by r 30 of the Rules of the Supreme Court, 1964.

On 16 July 2004, with the consent of all the parties to the proceedings, the continuance of the trial of the election petition was set down on a date in September 2004.

E On 3 August 2004, the applicant wrote to the learned judge's clerk, indicating that he was not ready to proceed with the trial until after the inspection of ballot papers and other election material ordered by the High Court, in terms of s 78(5) of the Act. He requested that the resumption of the trial be postponed to a date after the inspection. The reason given for the postponement was that the F information expected to be gathered from the inspection of ballot papers had a direct and material bearing on the establishment of the grounds of the relief sought in the election petition.

The letter reads as follows:

> "Because of the great importance of the election material, we respectfully submit that it is essential that we are given an adequate opportunity to G inspect and analyse it prior to the commencement of Phase 2 of the Election Petition, case No. HC 3616/2002.
>
> 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* H *with (the) Election Petition*" (emphasis is mine).

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Malaba JA

Not only is the letter couched in the language of a formal application for a A postponement of the continuation of the trial of the election petition, it also makes clear to the learned Judge that the deferment of the hearing of the matter to a date after the inspection of the ballot papers and other election material was so necessary that refusal to grant it would amount to injustice to the applicant. B

The trial of the election petition was not continued with in September 2004.

Meanwhile, letters were written to the learned judge's clerk on behalf of the applicant by his legal practitioners on 5 July, 13 August and 14 September 2004, enquiring as to when reasons for the order issued on 10 June 2004 would be given. In these letters, the applicant did not indicate that he needed the reasons for purposes of appealing the order. It was in the letter written on 2 C February 2005, seven months after the order was issued, that the applicant complained that he was unable to decide whether or not to appeal the order without the reasons for the decision.

The Judge President discussed with the learned judge the need to give reasons for the order. It appears from the letter dated 11 February 2005 that D the learned judge once again told the Judge President that the matter involved complicated legal issues. He promised to give the reasons during the Easter vacation. He once again failed to keep his promise.

On 11 July 2005, the applicant made the application to the Supreme Court for redress in terms of s 24(1) of the Constitution, alleging that the rights to protection of the law and to a fair hearing within a reasonable time, guaranteed E to him and protected against infringement under ss 18(1) and 18(9) of the Constitution respectively, had been contravened by the High Court. The allegation was that the length of the delay in hearing and determining the election petition by the High Court in the exercise of the judicial functions of the State had exceeded the bounds of reasonable time within which the matter F ought to have been disposed of. He cited as the causes of the cumulative delay, the failure to set down the case for hearing before 3 November 2003, inability by the learned judge to give judgment on the preliminary issues, and his failure to give reasons for the order issued on 10 June 2004.

The relief sought by the applicant for the alleged contravention of the Declaration of Rights was an order declaring that: G

> "1. The delay of the High Court of Zimbabwe in failing to adjudicate upon and finalise the Election Petition in case No. HC 3616/2002 constitutes a breach of the right of the applicant in terms of ss 18(1) and 18(9) of the Constitution of Zimbabwe.
>
> Accordingly, it is ordered that: H

Malaba JA A

> 2. The order of the High Court issued in the Election Petition in case No. HC 3616/2002 given on 10 June 2004 be and is hereby set aside.
> 3. The preliminary issues raised in the Election Petition in case No. HC 3616/2002 and argued before the High Court in November 2003 be heard and argued before this Honourable Court as presently constituted. B
> 4. The first respondent shall pay the costs of this application."

The day the application was made to the Supreme Court was also the day when the inspection of ballot papers and other election material commenced at the High Court.

The respondents opposed the application. Their contention was that the C delay in the hearing and determination of the election petition was caused by the applicant when he had the continuation of the trial postponed to a date after the inspection of the ballot papers. They said that the failure by the learned judge, in the circumstances, to give reasons for the order issued on 10 June 2004 was not a factor at all in the causation of the delay on which the alleged infringement of the Declaration of Rights was based.

D More importantly, the first respondent took a point *in limine*. It was to the effect that the application could not lie to the Supreme Court in view of the provisions of s 24(3) of the Constitution. The argument advanced on behalf of the first respondent was that the question as to the contravention of the Declaration of Rights, on which the application to the Supreme Court was E based in terms of s 24(1), arose in the proceedings on the election petition in the High Court and as such the applicant was obliged to comply with the procedure prescribed in terms of s 24(2) of the Constitution if he wanted the question determined by the Supreme Court.

Section 24(3) of the Constitution provides that where a question as to the F contravention of the Declaration of Rights has arisen in any proceedings in the High Court and the judge presiding in that court has not been requested to refer it to the Supreme Court for determination, no application shall lie to the Supreme Court in terms of s 24(1) of the Constitution.

The gist of the response on the point *in limine* was that the question as to the contravention of the Declaration of Rights forming the subject-matter of the G application did not arise on the election

petition. The contention was that there were no proceedings in the High Court at the time the question arose, which was when the application to the Supreme Court was made. It was said that the only proceedings took place on 3 November 2003 and came to an end on that day. There were no further proceedings thereafter up to the time the application was made to the Supreme Court in terms of s 24(1) of the Constitution. It was H submitted that the applicant was not obliged to request the learned Judge in

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the court *a quo* to refer the question as to the contravention of the Declaration A of Rights to the Supreme Court in terms of s 24(2) of the Constitution.

Mr *Gauntlett* also argued on behalf of the applicant that the learned judge was being accused of being the principal cause of the delay in the hearing and determination of the election petition by failing to give reasons for the order issued on 10 June 2004. It was submitted that he would have become a judge B in his own cause (*iudex in causa sua*) in breach of the rule of natural justice had the application been made to him to refer the question as to the contravention of the Declaration of Rights to the Supreme Court for determination.

It was also submitted that the learned judge had become *functus officio*. C

Before determining the question whether this application is in contravention of s 24(3) of the Constitution, I set out the relevant provisions of s 24. They read as follows:

> "24 **Enforcement of protective provisions**
>
> (1) If any person alleges that the Declaration of Rights has been, is being, or is likely to be contravened in relation to him (or, in the case of a person D who is detained, if any other person alleges such a contravention in relation to the detained person) then without prejudice to any other action with respect to the same matter which is lawfully available that person (or that other person) may, *subject to the provisions of subsection (3)*, apply to the Supreme Court for redress.
>
> (2) If *in any proceedings in the High Court* or in any court subordinate E 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.
>
> (3) Where in any proceedings such as are mentioned in subsection (2) F any such question as is therein mentioned is not referred to the Supreme Court then without prejudice to the right to raise that question on any appeal from the determination of the court in those proceedings, no application for the determination of that question shall lie to the Supreme Court under subsection (1)" (emphasis is mine).

Section 24 is to be found in Chapter III of the Constitution, which contains the G declaration and entrenchment of the fundamental human rights and freedoms. In subs (4), it confers upon the Supreme Court original jurisdiction to hear and determine applications alleging violation of the Declaration of Rights unless in its opinion they are merely frivolous or vexatious and to determine the questions as to the contravention of the Declaration of Rights referred to it in terms of s 24(2). It is clear that s 24 guarantees to a person in relation to whom H

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A a fundamental right has been infringed, the right of access to the Supreme Court to seek redress of the contravention and *ipso facto* enforcement of the right.

There are, however, two separate procedures prescribed in ss 24(1) and 24(2) of the Constitution by which redress of a contravention of the Declaration of B Rights may be sought from the Supreme Court. In this case, the question is whether the applicant ought to have used the procedure prescribed in terms of s 24(2) for the enforcement of the protection of the rights he claimed were contravened in relation to him.

In *Mandirwhe* v *Minister of State* 1986 (1) ZLR 1 (S), Baron JA said that compliance with the procedure prescribed in s 24(2) of the Constitution was C mandatory where there was litigation in progress and the determination of the question as to the contravention of the Declaration of Rights by the Supreme Court had a bearing on the decision by the High Court or the court subordinate to it on the matter in dispute in the proceedings in that court.

The learned Judge of Appeal said at 7F-8D:

D "The purpose of s 24 is to provide, in a proper case, speedy access to the final court in the land. The issue will always be whether there has been an infringement of an individual's fundamental rights or freedoms, and frequently will involve the liberty of the individual; constitutional issues of this kind usually find their way to this court, but a favourable judgment obtained at the conclusion of the normal, and sometimes very lengthy E judicial process, could well be of little value. And even where speed is not of the essence there are obvious advantages to the litigants and to the public to have an important constitutional issue decided directly by the Appellate Division [now the Supreme Court] without protracted litigation.

Subsection (1) contemplates the situation in which it is clear from the outset that the existence of a remedy depends on whether there has been F (or is likely to be) a contravention of the Declaration of Rights, when the person alleging to be aggrieved is given the right to go direct to the Appellate Division.

Subsection (2) deals with a different situation; it contemplates that proceedings have been commenced in the General Division [now the High Court] or in a subordinate court in circumstances in which it was not G anticipated that the question of a contravention of the Declaration of Rights would necessarily arise, since otherwise one expects subs (1) to be invoked. The question having arisen, the subsection provides a speedy procedure for the determination by the Appellate Division of, in effect, a constitutional point of law without the necessity first to conclude the trial in the court of first instance and to come to this court by way of H appeal. When the question is referred to this court, the proceedings are

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merely interrupted; this court answers the question but the matter must A be concluded in the court *a quo*. The subsection does not authorise the proceedings to be transferred to this court."

Section 24(2) of the Constitution only applies when there is a question arising in the proceedings in the High Court or in the court subordinate to the High Court. We are concerned here with proceedings in the High Court. There is B no doubt that the question as to whether the delay in hearing and determining the election petition by the High Court contravened the Declaration of Rights guaranteed to the applicant in ss 18(1) and 18(9) of the Constitution arose in his mind when he had already commenced litigation. The application made to the Supreme Court on 11 July 2005 is evidence of the fact that the question as to the contravention of the Declaration of Rights arose in his mind. The question had a bearing on the matter in dispute, in that it alleged failure on the C part of the High Court to discharge the judicial functions of the State in determining that matter within a reasonable time.

The question is whether there were proceedings in the High Court at the time that question as to a contravention of the Declaration of Rights arose. My view of the facts is that I must answer the question in the affirmative. The words D "in any proceedings in the High Court" mean proceedings that have come to be or have been instituted in the High Court. They are proceedings that have found existence in the High Court, in the sense that that court has been called upon, through a method prescribed by law, to exercise the judicial functions of the State over the matter in dispute between the parties and it is in control of the conduct and progress of the proceedings. E

The word "proceedings" has a wider meaning in s 24(2) of the Constitution than "goings-on" in court. There are no proceedings without an action or case. Proceedings ordinarily progress in steps. The word is, therefore, a general term, referring to the action or application itself and the formal and significant steps taken by the parties in compliance with procedures laid down by the law for the purpose of arriving at a final judgment on the matter in dispute. There F are proceedings in being in the High Court from the moment an action is commenced or an application made until termination of the matter in dispute or withdrawal of the action or application. See Re *Appleton French & Scrafton Ltd* [1905] 1 ChD 749 at 753; *Mundy* v *The Butterley Co Ltd* [1932] 2 ChD 227 at 233; *Muzuva* v *United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S) at 219.

There is, therefore, no need to limit the very general words of s 24(2) of the G Constitution and say that the question as to the contravention of the Declaration of Rights arises only when the court is actually sitting. The words "if in any proceedings in the High Court any question arises as to the contravention of the Declaration of Rights" imply that proceedings may take place in the High Court without any such question arising. H

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A In this case, the proceedings commenced in the High Court on 12 April 2002 when the election petition was presented. The election petition, as the special procedure required by the statute to be

used, defined the stages of the proceedings in the High Court in that it set out the relief sought and the grounds for it. Until the question whether the President was duly elected or not duly elected was determined, the proceedings were pending in the High B Court.

It is also clear that the trial was the procedure by which the proceedings were advanced. When it began on 3 November 2003 before Hlatshwayo J, the whole election petition was at issue and not parts of the grounds on which it was based. The proceedings were not terminated on that day because the C trial was not concluded. They were continued by the order of the High Court issued on 10 June 2004. The learned Judge remained seized with the matter and under the duty to determine the matter in dispute, which was whether the President was duly elected or not duly elected.

The parties accepted the fact that the effect of the order was that the D proceedings in the High Court were pending. The trial had been set down for continuation in September 2004. The letter written on 3 August 2004 on behalf of the applicant seeking postponement of the continuation of the trial of the election petition to a date after the inspection of the ballot papers was a formal and significant step in the proceedings. The applicant, having taken such a step, cannot probate and reprobate it. The letter of 3 August 2004 shows that there were active proceedings that had not been allowed to go to sleep.

E For these reasons, I find as a fact that there were proceedings in the High Court at the time the question as to the contravention of the Declaration of Rights arose and that the question arose in those proceedings: see *J B Brooks & Co Ltd* v *Lycett's Saddle and Motor Accessory Co Ltd* [1904] 1 ChD 512 at 516-517; *Cheney* v *Spooner* (1929) 41 CLR 532 at 536-537; *Barclay Davit* F *Co Ltd* v *Samuel Taylor and Sons Ltd* [1946] 2 All ER 41 (ChD) at 45.

Once the question as to the contravention of the Declaration of Rights has arisen in the proceedings in the High Court, there is a further condition to be satisfied. It is that the party wishing to have the question determined by the Supreme Court must request the judge presiding in that court to refer it to the G Supreme Court for determination. The making of the request for reference to the Supreme Court is a mandatory step to be taken in order to obtain the determination of the question as to the contravention of the Declaration of Rights by the Supreme Court. As it is a necessary act required to be done by a party to the proceedings, the request must be made to the Judge in court.

It is clear from the provisions of s 24(2) that, whilst the request for the reference H of the question to the Supreme Court for determination must be made to the

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judge whilst he or she is actually sitting in court, the question itself does not A have to arise when the court is sitting. It may arise on the pleadings. See *Granger* v *Minister of State* 1984 (1) ZLR 194 (S) at 199H, or from the circumstances of the case, as happened in *Mandirwhe*'s case *supra*, and *Zinyemba* v *Minister of Public Service & Anor* 1989 (3) ZLR 351 (S), provided that the existence of the remedy sought in the proceedings depends on the determination of the question as to the contravention of the Declaration of B Rights by the Supreme Court. Raising a question, the determination of which has no bearing on the relief sought in the proceedings, amounts to an abuse of the process of the Supreme Court.

The Supreme Court is able to prevent abuse of its own process when the application for the determination of the alleged contravention of the Declaration C of Rights is properly made directly to it in terms of s 24(1) of the Constitution by ensuring that it is not merely frivolous or vexatious. Section 24(2) places the duty to ensure that the process of the Supreme Court is not abused on the judge presiding in the High Court, who is enjoined to refuse a request for a reference of the question as to the contravention of the Declaration of Rights to the Supreme Court for determination if in his opinion the raising of the D question is merely frivolous or vexatious.

It is clear that once the question as to the contravention of the Declaration of Rights in relation to him arose in the proceedings as demonstrated, the applicant was obliged to ensure that he made an application in open court to the learned Judge who was seized with the matter for the question to be referred E to the Supreme Court for determination.

I do not accept as valid the suggestion that as the question arose when the court was not actually sitting, he could avoid the procedure prescribed in terms of s 24(2) of the Constitution and approach the Supreme Court directly on an application in terms of s 24(1). By a notice in writing, served on the other parties to the proceedings, the applicant should have had the application for F reference of

the question as to the contravention of the Declaration of Rights set down for hearing by the learned judge.

Mr *Hussein*, for the first respondent, relied on the case of *Jesse* v *Attorney-General* 1999 (1) ZLR 121 (S) for the authority that the applicant could not approach the Supreme Court directly on an application in terms of s 24(1) of G the Constitution. The applicant in that case was on trial in the regional court on charges of: (1) kidnapping; (2) contravening s 7(1) of the Children's Protection and Adoption Act [*Chapter 5:06*]; and (3) contravening s 4(4)(a) of the Firearms Act [*Chapter 10:09*]. He made an application to the Supreme Court in terms of s 24(1) of the Constitution, alleging that the provisions of both s 7(1) of *Chapter 5:06* and s 4(4)(a) of *Chapter 10:09* fell foul of the H

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A presumption of innocence guaranteed by s 18(3)(a) of the Declaration of Rights in the Constitution and therefore should be declared invalid.

At the time, the application was made, the trial before the regional magistrate had reached the closure of the prosecution case. The applicant did not apply to the trial court under s 24(2) of the Constitution for the referral of the question as to the contravention of the Declaration of Rights to the Supreme Court for B determination.

Dismissing the application with costs for contravening s 24(3) of the Constitution, Gubbay CJ said at 122C-D:

> "At the inception of this hearing, a preliminary procedural point was raised by the court. It was whether the applicant was entitled to have recourse C to s 24(1) of the Constitution since he had omitted to request the regional magistrate to refer the alleged constitutional questions to the Supreme Court in terms of s 24(1). Put differently, whether an applicant may, during the course of proceedings in the High Court, or in any court subordinate to it, simply ignore the provisions of s 24(2) and utilise the procedure laid down in s 24(1). I entertain not the slightest doubt that the resort by the applicant to s 24(1) of the Constitution was impermissible."

D It is the duty of the party who wants a question as to the contravention of the Declaration of Rights arising in the proceedings in the High Court, or in a court subordinate to it, referred to the Supreme Court for determination to ensure compliance with the provisions of s 24(2). The requirement to comply with the E procedure prescribed thereunder is made mandatory by the provisions of s 24(3).

Mr *Gauntlett*, for the applicant, sought to distinguish *Jesse*'s case *supra* from the present one. He argued that in *Jesse*'s case *supra* the applicant made the application to the Supreme Court in terms of s 24(1) in the middle of proceedings in the regional court. *Jesse*'s case *supra* is, in my view, not distinguishable F from the present case.

In both cases, the application in terms of s 24(1) of the Constitution was made to the Supreme Court after the commencement of the proceedings and when the trial of the matter was continuing. In *Jesse*'s case *supra*, the application was made soon after the question as to the contravention of the Declaration of G Rights arose in the mind of the applicant. So was the application in this case. There is no evidence that in *Jesse*'s case *supra*, the court was actually sitting when the question arose in the proceedings. It is clear that it did not really matter to the applicant in that case whether the court was sitting or not. There was, however, a regional magistrate who was seized with the matter. Similarly, the application in this case was made to the Supreme Court in terms of s 24(1) H of the Constitution when there was a judge who was seized with the duty of

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deciding whether the President was duly elected or not duly elected. He was A not given the opportunity to decide whether the determination of the question as to the contravention of the Declaration of Rights was relevant to the determination by him of the matter in dispute in the proceedings or whether the raising of the question by the applicant was merely frivolous or vexatious.

The argument that the learned judge would have become a judge in his own cause in breach of the rule of natural justice that no-one shall be a judge in his own B cause (*nemo iudex in causa sua*) had

the request been made of him to refer the question as to the contravention of the Declaration of Rights to the Supreme Court for determination, ignores the fact that compliance with the procedure prescribed in s 24(2) of the Constitution is mandatory.

If the learned judge had, purely out of selfish interest and in bad faith, held C that the raising of the question as to the contravention of the Declaration of Rights by the applicant was merely frivolous or vexatious he would have infringed the applicant's right to the protection of the law guaranteed under s 18(1) of the Constitution. On the authority of *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S) at 157G-158A, the applicant would have been entitled to apply to the Supreme Court for redress in terms of s 24(1) of the Constitution. D He would in that event have discharged his duty to comply with the procedure prescribed in s 24(2) of the Constitution.

I do not, therefore, find merit in the argument advanced on behalf of the applicant.

It was also argued that the learned judge had become *functus officio*. In my E view, this argument also has no merit. The question the learned judge was called upon to decide in the proceedings was whether the President was duly elected or not duly elected. He had not made a decision on that matter. In any event, the learned judge would have been called upon to decide whether the raising of the question as to the contravention of the Declaration of Rights F was merely frivolous or vexatious. I fail to understand how he could be said to have become *functus officio* over a matter that had not been placed before him for decision.

In my opinion, the application should be dismissed for contravening s 24(3) of the Constitution.

On the question of costs, I have taken the view that the answer to the question G raised by the application, as to whether a party in litigation when the question as to the contravention of the Declaration of Rights arises when the court is not actually sitting is nonetheless obliged to comply with the procedure prescribed by s 24(2) of the Constitution, was not self-evident. Despite the failure of the application, I propose to apply the principle set out in *Bull* v H

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A *Minister of Home Affairs* 1986 (1) ZLR 202 (S) at 203G-H and not penalise the applicant in costs.

Accordingly, the application is dismissed. There is to be no order as to costs.

CHIDYAUSIKU CJ, SANDURA JA, CHEDA JA & ZIYAMBI JA concurred.

B *Coghlan, Welsh & Guest*, applicant's legal practitioners

Hussein, Ranchhod & Co, first respondent's legal practitioners

Chikumbirike & Partners, second respondent's legal practitioners

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MUJURU NO & ORS v MUJURU & ANOR 2006 (1) ZLR 164 (S)

Citation	2006 (1) ZLR 164 (S)
Case No	Judgment No. HH-22-06
Court	High Court, Harare
Judge	Gowora J

Heard 25 November 2005; 16 January2006; 17 January2006

Judgment 15 February 2006

Counsel *G Gapu,* for the applicants
T K Hove, for the first respondent
No appearance for the second respondent

Case Type Urgent chamber application

Annotations No case annotations to date

Flynote

Administration of estates — *executor — duties of — dispute over validity of* C *will — not a reason for executor not to proceed with his duties of collecting assets of estate — joint executors — duty to act jointly — failure or refusal by joint executor to participate in administration — courses open to other executor* D

Headnote

The first respondent, the widow of the testator, was appointed *curator bonis* of his estate pending acceptance of a will he drew up. The will sought to dispossess her in favour of the deceased's two sons from previous relationships. The Master refused to uphold the will and ruled that the estate should be administered and distributed as intestate. The first applicant and the first respondent were appointed joint executors dative. E The applicants (the two others being the deceased's sons) took the Master's decision on review, but in the meantime the first respondent, acting on her own and without the participation of the first applicant, took steps to wind up the estate. She also sought the eviction of the second applicant from the house he occupied, the house being part of the estate. F The applicants sought an order to interdict the first respondent and the Master from proceeding with the administration of the estate pending the finalization of the application to have the Master's decision set aside and have the will accepted as being valid.

Held, that under ss 38 and 42 of the Administration of Estates Acts [*Chapter 6:01*], the primary duty of an executor is to finalize as quickly as possible G the administration of the estate. To that end, it is imperative that the executor take control of all the assets of the estate, and realize as many assets as is necessary to meet the liabilities of the estate before distributing the residue to the beneficiaries. The actions of the first respondent were consistent with her duties under the Act. The fact that the validity of the will was still to be determined did not justify inaction on the part of the H

Gowora J

A executors in winding up the estate. Unless and until the will was upheld, the two executors had a duty in terms of the Act to do such acts as are prescribed by the Act to ensure a proper administration of the estate. Both executors had been appointed as executors to the estate. Until and unless set aside by the court, such appointments remained valid. To stop the first respondent from collecting the assets of the estate would run B foul of s 42 of the Act. It was, however, proper to hold that the disposal and distribution of the assets of the estate should wait the determination of the application, but the process of winding up and collection of assets and debts due to the estate should proceed.

Held, further, that the position of executor is one of trust and his actions must C be justifiable in terms of the indivisibility of the assets and the wishes of the heirs. The guiding principle which an executor should observe in the administration of a deceased estate is that he occupies a position of trust and his actions should be dictated by considerations which will serve best the interests of the beneficiaries. If he does not discharge those duties properly then he may be removed. It is

not however the D appropriate remedy to seek an interdict against the discharge by the executor of his duties as defined in the Act.

Held, further, that where more than one executor is appointed in an estate, they are required to act jointly. Their liability for the administration of the estate is joint and several. In the absence of consent or agreement on the E part of the first applicant, the first respondent did not have the right to act as a sole executor and institute proceedings against the second applicant in the name of the estate. She should also have acted with his consent and jointly with him in all the other actions taken on behalf of the estate, as she was not invested with the functions of a sole executor. In the event of an executor refusing to participate in the administration, F the other executor(s) may apply to court to compel him to act, to dispense with his concurrence or have him removed from office.

Cases cited

Baard v Est Baard 1928 CPD 505

Hodgson v du Preez (1894) 11 SC 335

G *Hofmeyr v le Grange & Ors* 1921 CPD 532

Kuvarega v Registrar-General & Anor 1998 (1) ZLR 188 (H)

Legislation considered

Administration of Estates Act [*Chapter 6:01*], ss 38 & 42

Gowora J

Case information

G Gapu, for the applicants A

T K Hove, for the first respondent

No appearance for the second respondent

Judgment

GOWORA J: The first respondent is the surviving spouse and widow of Josiah Tungamirai who died in South Africa on 25 August 2005. Pending the acceptance of a will that the deceased had drawn up prior to his death, the first B respondent was appointed Curator Bonis of his estate. The second and third applicants are the sons of the deceased from unions with other women, although they were brought up by the first respondent and the deceased. The second respondent, hereinafter referred to as the Master, refused to uphold the will, and held that the estate be administered and distributed as intestate. C The first applicant and the first respondent were, as a consequence of that decision, appointed joint executors dative on 12October 2005. The applicants then took the Master's decision on review, which application is yet to be determined.

In the meantime, the first respondent has put in motion the process of winding up the estate. She has advertised for debtors and creditors to the estate. She D is also in the process of compiling an inventory of the assets of the estate. It is common cause that all this was done by the first respondent acting on her own and without the participation of the first applicant. The first respondent has issued summons to have the second applicant evicted from 8A Lynchgate Road, Kambanji. Together with herself, she has cited the first applicant as the E plaintiff. It is common cause that the first applicant did not consent to the litigation nor did he give instructions to the legal practitioners who brought the proceedings to court on behalf of the first respondent to also act on his behalf. It is as a result of the actions of the first respondent in acting independently of the first applicant in winding up the estate that the applicants have brought this matter to court as an urgent chamber application for a F temporary interdict.

The draft order filed with the chamber application has the same relief in the interim and final relief. I will revert to the draft order later on in this judgment. In the draft order, the following relief is being sought:

1. Pending the determination of the application in case No. 5635/05, the first G respondent is hereby interdicted from dispossessing the applicants or any one of them of any movable or immovable property belonging to the estate of the late Josiah Tungamirai.
2. Pending the determination of the application in case No. 5635/05, the first respondent shall not institute any action or process for the recovery of any property belonging to the estate of the late Josiah Tungamirai from H

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A any third party or debtor, or use or dispose of any property movable or immovable belonging to the estate without the written consent of the first applicant in his capacity as joint executor of the estate which consent shall not be unreasonably withheld.

3. The first and second respondents shall not distribute the assets of the B estate late Josiah Tungamirai who passed away on 25 August 2005 until the appeal over his "Will" in case No. HC 5635/05 has been determined.

In the final relief being sought, an order for costs is sought against the first respondent. When the parties appeared before me initially it appeared from submissions by counsel that there was in fact no dispute and that an order binding all the parties could be obtained by consent. I then postponed the C matter sine die to enable the parties to negotiate a settlement. During the December vacation, the legal practitioners for the applicants wrote to the Registrar and advised that the parties had been unable to achieve settlement. The matter was thereafter set down before me for argument on the merits. After hearing counsel, I requested written heads of argument on the duties of executors and the rights and obligations of joint executors. I am indebted to D both counsel for their submissions in this regard.

As a point *in limine*, the first respondent took issue with the applicants having brought the matter to court on a certificate of urgency. She queried whether or not the matter was urgent. She also questioned the *locus standi* of the first applicant based on the ground that, despite having been appointed as joint E executor on 12 October 2005, the first applicant had not, by the time she deposed to the opposing affidavit, signed his acceptance to being appointed joint executor to the estate. She mentions further that it would not augur well for the estate not to have a substantive executor pending the resolution of the dispute on the validity or otherwise of the "will" and that it would not be in the interests of anyone for there to be a vacuum and submitted that for that F reason the matter was not urgent.

The first respondent is an interested party in the distribution of the estate in that she is the surviving spouse of the deceased. The "will" that was rejected by the Master sought to dispossess her in favour of the two sons of the deceased. If she proceeds to wind up the estate and distribute the assets G thereof in the absence of the participation of the first applicant, it is very possible that the second and third applicants' rights under the purported will might be prejudiced and that irreparable harm might be occasioned to the applicants. She has instituted an action for the eviction of the second applicant without reference to the first applicant even though he has been cited as a plaintiff. In the event of the second applicant being successful in H this action, the costs against the estate would as a natural course follow to

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the prejudice of the estate. This would ultimately prejudice beneficiaries A especially as the other executor would not have been consulted and has not consented to the suit. Her actions, in acting as a sole executor were such that, in view of the potential prejudice to them, the applicants would have been entitled to approach the court on an urgent basis.

I turn now to the merits of the application. In the first instance, the applicants B seek to interdict the first respondent and the Master from proceeding with the administration of the estate pending the finalization of the application to have the Master's decision set aside and have the will accepted as being valid. The first port of call naturally would be the statutory provisions regulating the administration of deceased estates.

An executor to a deceased estate is obligated, in terms of s 38 of the C Administration of Estates Acts [*Chapter 6:01*], the Act, as soon as possible after being granted Letters of Administration, to

make an inventory showing the value of property, movable and immovable, which forms part of the estate. The inventory shall, in terms of the Act, be transmitted to the Master as soon as possible. In terms of s 42 of the Act, if any person who is not the Executor D of an estate has in his possession property belonging to the estate, such person shall forthwith deliver such assets or property to the executor or report the particulars thereof to the Master. An executor is further obliged, in terms of s 43, to forthwith cause a notice to be published in the *Government Gazette* and some other newspaper circulating within the district, calling upon all creditors and debtors to the estate to lodge claims with such executor. E

What therefore emerges from a perusal of the sections referred to above is that the primary duty of an executor is to finalise as quickly as possible the administration of the estate. To this end, it is imperative that the executor take control of all the assets of the estate, and realise as many assets as is necessary to meet the liabilities of the estate before distributing the residue to the beneficiaries. An executor should therefore consult the beneficiaries, heirs F and legatees in any decision involving the administration of the estate. An executor, in administering the estate should not dispose of more assets than are absolutely necessary to meet the obligations of the estate.

The complaints against the first respondent, as enumerated by the first applicant are that she has started taking action to wind up the estate. She is G in the process of compiling an inventory of the assets belonging to the estate. She has also advertised in the *Government Gazette* calling upon creditors and debtors to submit their claims. She has, in addition, issued summons against the second applicant claiming an order for his eviction from 8A Lynchgate Road, Kambanji, Glen Lorne which is part of the estate. Apart from the issue of the summons, which I will consider later in the judgment, there can be no H

A suggestion that the actions of the first respondent are contrary to what her duties as provided for in the Act entail. If anything, her actions show that she is very much alive to the duties and obligations that go with the position of being an executor of a deceased estate. She has realized the need to gather and safeguard the assets of the estate including collecting debts and receiving B claims against the estate. The validity or otherwise of the "will" is still to be determined by this court. That fact alone does not justify inaction on the part of the executors in winding up the estate. In my view, unless and until the will is upheld the two executors have a duty in terms of the Act to do such acts as are prescribed by the same to ensure a proper administration of the estate. Both have been appointed as executors to the estate and until and unless set C aside by the court, such appointments remain valid. The proposal by the first applicant and his legal practitioners that the administration of the estate be put in abeyance until the determination of the application regarding the validity of the will seems to me to be impracticable and not in the best interests of the beneficiaries and the estate. I am more amenable to a suggestion from them, as now appears in the amended draft order, that the disposal and D distribution of the assets of the estate wait the determination of the application. However, the process of winding up and collection of assets and debts due to the estate should proceed. It is, in my view, more prejudicial to the beneficiaries for the entire process to be stayed as there is no indication as to when the application may be determined. In the meantime, if the assets are not brought under the control of the executors they may be dissipated E destroyed or disposed of to the detriment of the creditors and beneficiaries alike.

The interdict to stop the first respondent from collecting the assets of the estate would run foul of s 42 of the Act. As beneficiaries under the "will", the entitlement of the second and third applicants to possess and hold onto the F property of the estate would only come into force on the will being held to be valid. For the purposes of the administration of the estate, the executors would have, in accordance with the provisions of the Act the right and duty to have such property in their possession. In so far as the second and third applicants are concerned, until such time as the decision of the Master is set aside and the will is held to be valid, the first respondent has, together with the first G applicant or with his consent, the right in terms of the Act in her capacity as an executor to demand delivery to her of any asset that belongs to the estate. The second and third applicants have a corresponding duty to deliver any asset in their possession to the executors appointed by the Master. If, as suggested by the second applicant, the first respondent has been abusing her H position as curator prior to her being appointed as joint executor with the first applicant, the right course of action would be to lodge a complaint with the

Gowora J

Master and seek her removal. The position of executor is one of trust and his A actions must be justifiable in terms of the indivisibility of the assets and the wishes of the heirs. The guiding principle which an executor should observe in the administration of a deceased estate is that he or she occupies a position of trust and his or her actions should be dictated by considerations which will serve best the interests of the beneficiaries. If he or she does not discharge those duties properly then such executor may be removed. It is not however B the appropriate remedy to seek an interdict against the discharge by the executor of his duties as defined in the Act. To do so, would be in violation of the clear provisions of the Act. There is nothing before me to suggest that there is need to bypass the provisions of the Act. There is no indication that any of the applicants lodged a complaint with the Master about the first C respondent having abused her position as curator and used money from the estate for her own benefit. The applicants have as a result not shown that this court is obliged to grant them an order authorising the retention by them of property vesting in the estate contrary to the provisions of s 42 of the Act. In the event the interdict sought in the first paragraph of the draft order fails.

Where more than one executor is appointed in an estate, they are required to D act jointly. See *Hofmeyr* v *le Grange & Ors* 1921 CPD 532. Their liability for the administration of the estate is joint and several. See *Hodgson* v *du Preez* (1894) 11 SC 335. In the instant case, it is common cause that the first respondent had summons for the eviction of the second applicant from 8A Lynchgate Road issued out without the consent of the first applicant. Not only E did she not have the consent of the first applicant to institute the proceedings in the name of the estate, she had the temerity to join him to the proceedings as the plaintiff in their capacities as joint executors. Although she alleges that he has not formally accepted his mandate by signing thereto, it is not part of her case that she has sought his consent to her actions and that he had withheld such consent. There is therefore no reason why she would have cited F him as plaintiff in the action against the second applicant. In the event, her actions in citing him on the process in the absence of consent on his part was wrong. Equally, in the absence of consent or agreement on the part of the first applicant, the first respondent did not have the right to act as a sole executor and institute proceedings against the second applicant in the name of the estate. She should also have acted with his consent and jointly with him in all G the other actions taken on behalf of the estate as she is not invested with the functions of a sole executor. However, it appears that the first applicant is disinclined to perform his functions under the letters of administration granted him until the appeal against the Master's decision would have been determined. In his affidavit he says that it is improper for the first respondent to proceed H with the administration and winding up of the estate before the application

Gowora J

A pertaining to the validity of the deceased's will has been determined. The proposal by his legal practitioners to the first respondent's legal practitioners was that all actions pertaining to the deceased estate be put in abeyance pending the determination of the application by this court. The first applicant, just like the first respondent, is responsible for the administration of the estate. B He can refuse to allow the first respondent to act on her own, but he cannot refuse to participate in the administration of the estate. In the event of an executor refusing to participate in the administration, the other executor(s) may apply to court to compel him to act, to dispense with his concurrence or have him removed from office. See *Baard* v *Estate Baard* 1928 CPD 505. The application for review or appeal filed by the applicants does not, in my view, C suspend the appointment of the first applicant and first respondent as joint executors and there is no compelling reason that has been advanced for an order to stop the first respondent, in conjunction with her co-executor from administering the estate.

The first respondent is wearing two hats. First and foremost, she is the widow and surviving spouse of the late Josiah Tungamirai. As such, she has an D interest in the estate and may have claims against the estate. The order sought against her is to stop her from instituting process for the recovery of any property belonging to the estate without the written consent of the first applicant. The order is so wide in its terms that were I to grant it as framed, then, the first respondent would not be in a position to claim any property that she E would be entitled as of right as a surviving spouse unless she had the written consent of the first applicant. The applicants seek also to stop the first respondent from using or disposing of any property, movable or immovable without the written

consent of the first applicant. Again as surviving spouse there are or may be certain items that she would be entitled to use which form part of the estate. The pertinent question is whether or not the applicants have F the right as matters stand to demand that she not be entitled to the use of the same. They have not made out a case for the order being sought. Despite their having been named in a will, such will has been held to be invalid and the estate must at least be administered as intestate until such time as the will is upheld. The applicants are therefore not entitled to claim rights in terms of that will, which clearly they are intent on doing. They claim a greater entitlement to the G assets of the estate than the first respondent on the basis of the rejected will. In my view they are mistaken. They have to conduct themselves in accordance with the ruling of the Master until a court has validated their entitlement under the will.

As far as the first applicant is concerned, it is obvious that he would rather H the winding up be delayed until the application on the validity of the will is

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determined. He would rather that when the will is validated he be the sole A executor. It would in his view be taxing to unravel the winding up process started by the first applicant. In the meantime, he would recommend that the whole process be put in abeyance. The first respondent has indicated in her opposing affidavit that the first applicant has not accepted his appointment as joint executor dative together with herself. This is also manifest in his refusal to do anything with the winding up process. He is not inclined to work together B with the first respondent under the letters of administration issued to him by the Master. I must say that this attitude on his part then makes it rather difficult to accept that in seeking that the first respondent only act with his written consent the first applicant would be acting in the interest of the beneficiaries and nor the estate. The view I take is that he is obstructing the process of C having the estate wound up. Equally, the first respondent is investing herself with powers she does not have as joint executor to the estate. It is necessary therefore that an order be granted that would enjoin her not to act without the consent of the applicant. I will assume that as a result of this application, the first applicant would be fully aware of his responsibilities as an executor and the likely consequences of a failure on his part to perform the duties demanded D of him in terms of the Act. It is therefore expected that it will not be necessary for the first respondent to approach her co-executor for written consent to administer the estate and that both parties will co-operate. As the issue of the will is still *sub-judice*, it is necessary that the process of administration not proceed beyond the collection and payment of debts and the securing of estate property. Distribution, in my view, must await the conclusion of the E application.

The draft order was the same in terms of the interim and final relief sought. These courts have stressed that the practice of applying for a provisional order where the terms of interim relief and final relief are the same is undesirable. The effect of such draft orders is that the applicant, on the basis of placing F before the court a *prima facie* case, obtains an order which is final in its terms See *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188 (H). In the instant case, the applicant required a temporary interdict to be issued pending the determination of the application to review the Master's decision. It is possible in my view, to issue a provisional order that would have relief that is substantially dissimilar in the interim and final relief sought by the applicants G so as not to offend against the practice of this court. To do so would not, in my view, unduly prejudice the respondents as the amendments do not go to the substance of the relief being sought.

I will therefore, issue a provisional order as follows: H

A **TERMS OF THE ORDER SOUGHT**

Pending the determination of the appeal by the applicants against the decision of the Master in holding the will of the late Josiah Tungamirai who died on 25 August 2005 as invalid the applicants are granted the following relief:

1. The first and second respondents shall not dispose of or distribute or B otherwise alienate the assets in the estate of the late Josiah Tungamirai until the appeal over the will of the said Josiah Tungamirai shall have been determined.

2. That the costs of this application shall be borne by the first respondent.

TERMS OF INTERIM RELIEF GRANTED

C Pending the determination of this application the applicant is granted the following relief:

It is ordered that the first respondent be and is hereby interdicted from instituting any action or process (in her capacity as joint executor of the estate of the late Josiah Tungamirai) for the recovery of any property D belonging to the estate from any third party or debtor or from disposing of any such property, whether movable or immovable, without first obtaining the written consent of the first applicant, which consent shall not be unreasonably withheld.

SERVICE OF THE PROVISIONAL ORDER

The applicants' legal practitioners be and are hereby granted leave to serve E this order on the respondents or their legal practitioners.

Scanlen & Holderness, applicants' legal practitioners

T K Hove & Partners, first respondent's legal practitioners

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Source:
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GOLD MINING & MINERALS DEVELOPMENT TRUST v ZIMBABWE MINERS' FEDERATION 2006 (1) ZLR 174 (H)

Citation	2006 (1) ZLR 174 (H)
Case No	Judgment No. HH-24-06
Court	High Court, Harare
Judge	Makarau J
Heard	6 July 2005; 15 December 2005
Judgment	22 February 2006
Counsel	*Chihambakwe Mutizwa & Associates*, plaintiff's legal practitioners
Case Type	Unopposed application
Annotations	Link to case annotations

Flynote

Delict — *actio injuriarum — defamation — plaintiff — trust — trust not a legal person and cannot be defamed — damages claimed by trustees collectively or individually — damages for injured fama can be claimed*

Trust — *nature of — whether a legal persona separate from its trustees*

Headnote

A trust, in the wide sense, is any legal arrangement by which one person is D to administer property, whether as an officer holder or not, for another or for some impersonal object. In the narrow sense, a "trust" exists when the creator of the trust hands over or is bound to hand over the control of an asset which, is to be administered by another for the benefit of some person other than the trustee or for some impersonal object. It is a legal E relationship, not a separate legal entity such as a corporation or *universitas,* even though the trustees may together form a board akin to a board of a company or of a voluntary association. Our law of trusts has not sufficiently grown to recognize a limited separate personality of a trust, even though some trusts operate more or less on the same lines as a voluntary organization of incorporated company. In such cases, the F trust has evolved a personality of sorts that appears separate from the personality of the trustees. A trust is not a legal person and therefore cannot be defamed, although the trustees themselves retain the capacity to sue for damages for their injured *fama,* collectively or individually.

Quaere, whether there is a need for the law of defamation to develop and take G into account the emergence of a new structure that is a trust that operates as if it is a *universitas* or a body corporate.

Cases cited

Matabeleland Zambezi Water Development Trust v Zimbabwe Newspapers (1980) Ltd & Anor 2002 (1) ZLR 12 (H) H

Makarau J

Judgment

A **MAKARAU J:** The above matter came before me on the unopposed roll. I raised certain issues with the plaintiff's legal practitioners and requested for a supplementary affidavit and heads of argument to be filed in the matter. This has since been done.

The plaintiff is a trust, whose trustees at the time of the institution of the above B action were given in the declaration. The nature of the trust and whether it is a non-profit making trust were not disclosed in the papers before me. I also overlooked directing the plaintiff to deal with this issue in its supplementary papers.

On 11 November 2003, a letter was written to chief executivee officer of the national broadcasting corporation. In the letter were certain words defamatory C of the Cold Mining and Minerals Development Trust. The letter was read out on air by one of the national broadcasters. Incensed by the publication of the defamatory words, the plaintiff issued summons out of this court claiming damages in the sum of $10 million.

The action was undefended.

D When the matter was called, I raised two issues with the plaintiff's legal practitioners. Firstly, I inquired as to who in particular had penned the offensive letter on behalf of the defendant. Secondly, I raised the legal issue of whether the plaintiff as a trust has a legal *persona* that can be defamed.

Regarding the first issue, it has been submitted in a supplementary affidavit E that the offending letter was on the letterhead of the defendant but was not signed. It was further averred that since the letter was on the letterhead of the defendant, it clearly originated from that office. I am not persuaded that the unsigned letter on the defendant's letterhead constitutes sufficient evidence upon which the defendant can be held liable for the defamatory words in the letter. It is common cause that the defendant is a *universitas* with a corpus and F a structure. For any valid acts to be performed by the defendant, it is trite that such acts must be by an authorized official of the defendant. An unsigned letter presents us with insurmountable challenges regarding authority and the binding nature of the act.

On the above basis alone, I would dismiss the plaintiff's claim.

G The second issue that I directed the plaintiff's legal practitioners to address me on has exercised my mind to some extent and even though I can dispose of the application for default judgment on

the basis of insufficient evidence as detailed above, I wish to make brief remarks on the second issue. It is whether the plaintiff, as a trust can be defamed or whether the damages claimed are due to the trustees of the plaintiff whose names were given in the H declaration.

2006 (1) ZLR p176

Makarau J

In *Matebeleland Zambezi Water Development Trust* v *Zimbabwe Newspapers* A *(1980) Ltd & Anor*2002 (1) ZLR 12 (H), Malaba J (as he then was), made passing reference to the plaintiff in that matter, a trust, as not seeking to sue the defendants in defamation. Without debating the issue as it was not before him, the learned judge referred to the defamation suit in the nature of restating the plaintiff's claim. These are his words at p 15:

> "In the founding affidavit deposed to by the secretary to the board of B Trustees, MZWT accused the respondent of injuring its reputation. It averred, however, that it had no intention of bringing action for defamation against the respondents. It said it required the information in the possession of the defendants for the purposes of deciding whether or not to set up an independent investigation into the allegations of fraud and corruption C contained in the articles they had published."

Thus, in my view, the above case, the only one I have managed to come across in this jurisdiction mentioning a trust and a possible defamation suit, cannot be used as authority for the position that a defamation suit is competent at the instance of a trust.

It is trite that at law, a trust is not a juristic person. A M Honoré in *The South* D *African Law of Trusts* 3 ed defines a trust in the first chapter of his text. He gives the wide meaning of the term as:

> "any legal arrangement by which one person is to administer property, whether as an officer holder or not, for another or for some impersonal object." E

The author then proceeds to refer to some cases in which the term was defined in this wide sense. In the narrow sense, "trust" exists when the creator of the trust hands over or is bound to hand over the control of an asset which, is to be administered by another for the benefit of some person other than the trustee or for some impersonal object.

It appears to me clearly that in either sense, the author views a "trust" as a legal F relationship and not as a separate legal entity as a corporation or *universitas* even though the trustees may together form a board akin to a board of a company or of a voluntary association.

The view by Prof Honoré above was accepted by the South African Law Development Commission in its report of June 1987on the review of the law G of trusts of June 1987 as the correct position at law and as the position confirmed by the South African Appellate Division. In view of the accepted position that a trust is not a legal *persona,* the Commission desisted from recommending that a trust be clothed with legal personality by way of legislation. H

2006 (1) ZLR p177

Makarau J

A Also commenting on the topic, Dr D S Ribbens in "The Hague Convention on the law applicable to trusts and on their recognition" 1985 *Modern Business Law* remarked that:

> "In truth a trust is as much a legal person as a mere sum of money standing to the credit of a ledger account in some bank. To imagine otherwise is, in the opinion of this commentator, to rave with the mob about the B unattired Royal's magnificent attire. In essence a trust is a set of legal relationships. Viewed from the point of view of the relationship between the trust property and the trustees, it is a proprietary relationship; and viewed from the relationship between the *cestui qui* trust or trust beneficiary and the trustee, it is a vertical fiduciary relationship".

C Again, Elliot and Banwell in *The South African Notary* 5 ed, at p 79 write that a trust is not a separate legal persona capable of rights and duties as an individual or legal *persona*. I must confess with respect that reference to the case the authors cite in support of this statement has not satisfied me that this case is actually authority for the position. Despite this, I am in agreement with the authors on their statement that a trust is not a legal *persona.*

D It is trite that defamation is the law that seeks to redress injury to personality. It therefore relates to persons with consciousness and feelings that can be outraged in the first place and in the second, it has been extended to apply to corporations and some non-profit organizations that have a reputation to protect. Thus trading corporations and *universitates* such as universities have been held to possess such reputations that the law can protect.

E The issue that falls for determination in this suit is whether the delict can be extended to such non-legal persons as trusts. I have searched and find no authority where the delict has been so extended. The plaintiff's legal practitioners have not referred me to any.

In my view, our law of trust has not sufficiently grown to recognize a limited F separate personality of the trust, even though some of them operate more or less on the same lines as a voluntary organization of incorporated company. In such cases, the trust has evolved a personality of sorts that appears separate from the personality of the trustees. An example of such is afforded by the Matebeleland Zambezi Water Trust that appeared before Malaba J G in the case cited above. Such a trust is to be contrasted from a trust set up in terms of a will, for instance, which is clearly a set of relationships as described by Dr D S Ribbens. There is therefore need for the law to develop and take into account the emergence of a new structure that is a trust that operates as if it is a *universitas* or a body corporate.

Makarau J

As the law currently stands, a trust is not a legal person and therefore cannot A be defamed. The trustees themselves retain the capacity to sue for damages for their injured *fama* collectively or individually.

In casu, I accept that in terms of the rules of this court, trustees may issue out process in the name of the trust *.The permission granted by the rules to use the name of the association where associates sue or are sued is merely for B convenience and does not change the legal status of the association. Rule 8D clearly provides that the provisions of the order should not be construed as affecting the liability or the non-liability of the associations for the conduct of their associations or associates. Thus the liability of the defendant is to be tested in terms of the accepted principles of the delict of defamation and the legal characterization of trusts. C

In the result, I make the following order:

1. The plaintiff's claim is dismissed.
2. There shall be no order as to costs.

Chihambakwe Mutizwa & Associates, plaintiff's legal practitioners D

* See also *WLSA & Ors* v *Mandaza* 2003 (1) ZLR 500 (H) — *Editor*
* Order 2A rule 8 of the High Court Rules 1971.

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Source:
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S v MZANYWA & ORS 2006 (1) ZLR 179 (H)

Citation	2006 (1) ZLR 179 (H)
Case No	Judgment No. HB-09-06
Court	High Court, Bulawayo
Judge	Ndou J
Heard	23 February 2006

Judgment 23 February 2006

Counsel Details not supplied

Case Type Criminal review

Annotations Link to case annotations

Flynote

Criminal procedure (sentence) — *statutory offences — stock theft — penalties applicable — person committing offence before but being* C *convicted after penalties increased — Stock Theft Act [Chapter 9:18] — s 12 — whether higher penalties applicable*

Interpretation of statutes — *retrospectivity — no retrospection operation unless clearly stated or by necessary implication*

Headnote

D It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in terms of the act or arises by necessary and distinct implication.

Section 4 of the Stock Theft Amendment Act (No. 6 of 2004), which came into operation on 27 August 2004, inserted a new s 12 into the Stock Theft Act [*Chapter 9:18*]. In terms of the new s 12(1) *, any person "… who is E convicted of the theft or attempted theft …" of an equine or bovine shall, in the absence of special circumstances, be liable to at least a minimum sentence of nine years' imprisonment. In respect of a number of matters placed before the judge on review, the accused persons had committed acts of stock theft well before Act No. 6 of 2004 had come into operation. F The crisp point was whether the new s 12 of the Stock Theft Act [*Chapter 9:18*] had any application to these matters.

2006 (1) ZLR p180

Ndou J

Held, that by using the phrase "who is convicted" as opposed to " who has A committed", the legislature clearly intended that s 12 of the Act should have retroactive operation. The date of conviction is the decisive date. The date of the commission of the offence is rendered irrelevant.

Cases cited

Re *Athlumney* [1898] 2 QB 547 B

Carson v Carson & Anor [1964] 1 All ER 681; [1964] 1 WLR 511 (PDA)

DPP v Lamb [1941] 2 KB 89; [1941] 2 All ER 499 (KBD)

Lek v Estate Agents Bd 1978 (3) SA 160 (C)

S v Fazzie & Ors 1964 (4) SA 673 (A) C

Legislation considered

Stock Theft Act [*Chapter 9:18*], s 12

Judgment

NDOU J: These matters were dealt with by different trial magistrates in the Midlands Province. I have dealt with them in this judgment because I am concerned by a problem common to all of them. D

The common feature is that in all these matters the accused were convicted of stock theft, *viz.,* bovines. In all cases, the convictions were after the Stock Theft Amendment Act [No. 6 of 2004]

came into operation. The Act came into operation with effect from 27 August 2004. In all these matters, the offences were committed well before the promulgation of the Act. In all these matters, the trial magistrates held the view that the provisions of the amended s 12 (i.e. the provision which creates the minimum mandatory sentence of nine years) do not apply. Section 12 (as inserted by s 4 of Act 6 or 2004) provides:

> "(1) Any person *who is convicted* of the theft or attempted theft of any equine or bovine animal or receiving knowing it to have been stolen or inciting or conspiring with any other person to commit any of the foregoing offences shall, if there are no special circumstances in the particular case as provided in subsection (2), be liable to imprisonment for a period of not less than nine years or more than twenty-five years" (emphasis added).

The issue here is whether the provisions of s 12 apply retrospectively in respect of offences committed before it came into operation where the accused is only convicted after its promulgation? It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clear in the terms of the Act or arises by necessary and distinct implication: *Carson* v *Carson & Anor* [1964] 1 WLR 511 at 516; *DPP* v *Lamb* [1941] 2 KB 89; Maxwell on *Interpretation of Statutes* 12 ed at 226-7. The operation of this presumption is difficult because the distinction

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Ndou J

between statutes that operate retrospectively for the purpose of the presumption and those which do not is hard to draw: *Cross Statutory Interpretation* 2 ed at pp 184-6 and *Re Athlumney* [1898] 2 QB 547 at 551. This presumption against retrospectivity is rebutted by a statutory provision or Act either expressly or by necessary implication: *S* v *Fazzie & Ors* 1964 (4) SA 673 (A) and *Lek* v *Estate Agents Board* 1978 (3) SA 160 (C).

By using the phrase "who is convicted" as opposed to "who has committed", the legislature clearly intended that s 12 should have retroactive operation. The date of conviction is the decisive date from the wording of s 12. The date of the commission of the offence is rendered irrelevant.

Accordingly, I confirm the convictions. However, all the sentences imposed on all these matters be and are hereby set aside. These matters are referred to the respective trial magistrates for fresh sentencing with due regard to the provisions of s 12 of the Act.

Bere J concurs.

* *Editor's note:* s 12 of the Stock Theft Act was repealed and replaced by s 114(3) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], with effect from 1 July 2006. See also, in this connection, *S* v *Ndlovu & Anor* HH-70-06, a judgment of KAMOCHA J (GARWE JP concurring), which will be reported in 2006 (2) ZLR. In that case, a contrary conclusion was reached. Finally, see s 18(5) of the Constitution, which states that "... no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed."

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Source:
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MOBIL OIL ZIMBABWE (PVT) LTD v MASHOKO 2006 (1) ZLR 182 (S)

Citation 2006 (1) ZLR 182 (S)

Case No Judgment No. S-86-05

Court	High Court, Bulawayo
Judge	Gwaunza JA, Ziyambi JA & Malaba JA
Heard	24 November 2005
Judgment	27 February 2006
Counsel	*R M Fitches,* for the appellant *N Madya,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Contract — *breach — liability for — employees of party — employees* C *performing acts in breach of contract — when party can be said to have breached contract — vicarious liability — not a basis for liability for breach of contract — party failing to exercise proper controls over actions of employees — such failure constituting breach of agreement*

Headnote

The appellant * entered into a lease agreement with the respondent, in D pursuance of which the latter leased a service station belonging to the appellant. It was a condition of the lease agreement that the respondent would acquire all its fuel, lubricants and related products from the appellant and sell only these from the leased premises. In direct violation of this condition, the respondent's senior employees clandestinely E bought fuel from a third party and arranged for it to be delivered at the leased premises in question. Their intention was to sell it later without the knowledge of either the appellant or the respondent. A representative of the appellant was alerted to this plan and caught the respondent's employees red-handed, while they were taking delivery of the fuel in the middle of the night. Money paid by the employees to the third party for F the fuel had been stolen from the respondent.

The appellant attributed the conduct of the respondent's employees to lack of control over them by the respondent and purported to cancel the agreement of lease, prompting the respondent to have recourse to the High Court. The appellant's papers imputed "vicarious liability" to the respondent, the main ground therefor being that he had failed to exercise G adequate control over the conduct of his employees. Since he had contracted to be wholly responsible for the control and conduct of his

Gwaunza JA

A employees, as specified in the lease agreement, the appellant contended that he had breached a material term of the agreement. The thrust of the respondent's defence was his denial of any vicarious liability – in the sense that the term is usually understood in delict – for the actions taken by his employees.

Held, that the appellant's case against the respondent was actually not one B of vicarious liability in contract, but rather that he had failed to control the conduct of his employees as he had contracted to do. The parties' intention, as shown in the lease agreement, was to make the respondent responsible for the control and conduct of his employees at the premises. To suggest otherwise would mean that the respondent could engage the C services of the various employees he needed to run the business effectively, and then leave them to do whatever they liked without any control from him. The essence of the lease agreement was that only the appellant's products were to be sold at the premises, 24 hours a day. It followed that the control that the respondent

contracted to exercise over the conduct of his employees had to be continuous, day and night. D Whatever measures the respondent might have put in place in this respect clearly were not adequate. It was difficult to escape the conclusion that there was an obvious laxity in whatever controls the respondent may have put in place to supervise the conduct of his employees. That laxity constituted a breach of a very material term of the lease agreement and the appellant was within its rights to cancel the lease agreement.

Cases cited E

Goodman Bros (Pty) Ltd v Rennies Group Ltd 1997 (4) SA 91(W)

Hotels, Inns & Resorts SA v Underwriters at Lloyds 1998 (4) SA 466 (C)

Case information

F *R M Fitches,* for the appellant

N Madya, for the respondent

Judgment

GWAUNZA JA: This is an appeal against the judgment of the High Court, in terms of which the appellant's cancellation of a lease agreement between the parties was set aside. In the same judgment, the court *a quo* also dismissed G the appellant's counter-application for an order confirming the cancellation of the lease agreement.

The facts of the matter are largely not in dispute. The appellant, which is a well known oil company in Zimbabwe, entered into a lease agreement with the respondent, in pursuance of which the latter leased a service station belonging to the appellant. It was a condition of the lease agreement that the respondent H would acquire all its fuel, lubricants and related products from the appellant

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and sell only these from the leased premises. In an action that directly violated A this condition, the respondent's senior employees clandestinely bought fuel from a third party and arranged for it to be delivered at the leased premises in question. There seems to be no dispute that their intention was to sell it later without the knowledge of either the appellant or the respondent. A representative of the appellant was alerted to this plan and literally caught the B respondent's employees red-handed, while they were taking delivery of the fuel in the middle of the night.

It is not in dispute that a deposit of $7 million dollars paid by the employees to the third party for the fuel had been stolen from the respondent; in effect, taken from the day's takings at the service station. The appellant took a dim view of the conduct of the respondent's employees, which it attributed to lack C of control over them by the respondent, and purported to cancel the agreement of lease, prompting the respondent to have recourse to the High Court.

The appellant's main ground of appeal is that as the respondent had bound himself contractually to be wholly responsible for the control and conduct of all persons employed at the service station, the court *a quo* erred in allowing D the application, especially since there was an admitted breach of an express and material term of the agreement, albeit the respondent attributed it to his employees. The appellant claim further that the court *a quo* misdirected itself in not having regard to the fact that at least two of the respondent's employees were senior managers and that what they did was sufficiently closely linked to their employment so as to render the respondent liable. E

It is clear from a reading of the appellant's papers that it imputed what it termed "vicarious liability" to the respondent, on the main ground that he had failed to exercise adequate control over the conduct of his employees, thereby making it possible for them to commit the offence in question. Since the respondent had contracted to be wholly responsible for the control and conduct of his employees, as specified in clause 18.5.2 of the Third Schedule F to the lease agreement, it was the appellant's contention that the respondent had breached a material term of the contract.

In my view, the use of the words "vicarious liability" by the appellant was misleading, in as much as it tended to disguise the true basis of the appellant's claim. It is no wonder that the thrust of the respondent's defence was his denial G of any vicarious liability – in the sense that the term is usually understood in the area of delict – for actions taken by his employees behind his back. He made

much of the theft from him of $7 million, the fact that the fuel clandestinely bought from the third party would have been sold ahead of his own fuel stored at the same premises and that he had not authorized the conduct complained of. The respondent did not directly address his mind to the charge that he had H

A been remiss in exercising control over the conduct of his employees, thus breaching a term of the lease agreement. His response to the charge was that the clause in question, that is 18.2.5, was of no force or effect since it made reference to a provision that did not exist in the lease agreement. I will revert to this argument later.

B Having, as I am persuaded he did, misread or misconstrued the basis of the appellant's charge, the respondent correctly contends that if he was to be held to have been in breach of the lease agreement, it would only be on some recognizable ground that "fixes" him with the responsibility for his employees' conduct in the circumstances described. My view is that such other "recognizable ground" did exist and is contained in clause 18.5.2 of the lease C agreement.

In her judgment, the learned trial judge, in my view, fell into the same error as the respondent. She noted that the issue that fell for determination in this matter was somewhat *res nova*, it being whether the doctrine of vicarious liability applied in contract law to terminate a valid contract on the basis that the breach complained of was occasioned by the employees of the respondent. D As already indicated, the appellant's case against the respondent was not one of vicarious liability in contract, rather that he had failed to control the conduct of his employees as he had contracted to do, leading to the conduct complained of.

The failure by the learned trial judge, and for that matter the appellant's E counsel, to find any authorities on the doctrine of vicarious liability in contract is hardly surprising. The fact that all the authorities cited by both the appellant and the learned trial judge dealt with situations that appropriately fell within the domain of delict law is clear testimony that such authorities (on vicarious liability in contract) do not exist. See *Goodman Bros (Pty) Ltd* v *Rennies Group Ltd* 1997 (4) SA 91 (W); *Hotels, Inns & Resort SA* v *Underwriters at* F *Lloyds* 1998 (4) SA 466 (C) and & Zimmerman's *Law of Obligations* at pp 1120, 397-399.The learned trial judge was therefore correct in concluding as follows in her judgment:

> "I would venture to hold that the doctrine of vicarious liability has no equal application in the law of contract (as in delict)."

G Like the respondent, the learned trial judge proceeded on the basis that the appellant's case against the respondent was premised solely on the issue of vicarious liability in contract. She did not consider the appellant's argument that respondent's breach of the lease agreement was based on his violation of the clause requiring him to exercise control over the conduct of his employees. Since this argument was clear on the papers, I find that the court H *a quo* clearly misdirected itself in this respect. The clause of the lease

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agreement relied on by the appellant in its first ground of appeal is contained A in a section of the agreement entitled "Lessee's Obligations".

It reads as follows:

> "18.5.2 To be wholly responsible for the control and conduct of all persons engaged and employed at the service station in terms of Clause 4.8.1 above and to bear all losses or expenses arising out of B
>
> 18.5.3 …
>
> 18.5.4 …(not relevant)."

The respondent argues that clause 18.5.2 of the lease agreement is of no force or effect since the provision it makes reference to, i.e. 4.8.1, does not exist in the agreement. I am not persuaded there is merit in this argument. Both the C appellant and the respondent signed the lease agreement. The service station was to be run as a business. It must have been understood between the parties that the respondent would employ a number of people to help him run that business. It is not unusual in any business to expect the employer to exercise control over the conduct of his

employees at the business. Consequently, I find it unlikely that the parties' intention was for clause 18.5.2 to be entirely D without application. Read in context, the clause refers to the employees that the respondent would employ to help him run the business. Reference in it to a non-existent provision does not and should not, in my view, nullify the whole clause. That reference can properly be expunged or ignored without doing harm to the parties' intention, which was to make the respondent responsible for the control and conduct of his employees at the premises. This is an E interpretation which I am satisfied is in harmony with the section entitled "Lessee's Obligations". A contrary interpretation would suggest a situation where the respondent could engage the services of the various employees he needed to run the business effectively, and then leave such employees to do whatever they liked without any control from him. Since that would not make good business sense, it is unlikely to have been the parties' intention. F

Having determined that the respondent did contract to be responsible for the control and conduct of his employees working at the premises concerned, the question to be determined is did he or did he not discharge this obligation? The appellant's case is that he did not. It made this very clear in its letter dated 9 March 2004, where the appellant's Cluster Retail Manager, a Mr Goodmore G Chatora, charged as follows:

> "This decision (to terminate the lease) has been taken in light of the fact that we hold you wholly responsible for the control and conduct of all persons engaged and employed at the service station (clause 18.5.2) …
>
> Mobil is very concerned about the lapse in controls and accountability on your part leading ultimately to the alleged offences by your employees." H

Gwaunza JA

A The effect of these remarks is that the conduct in question, albeit carried out in the manner it was by the respondent's employees, was a manifestation, or direct consequence, of the respondent's breach of clause 18.2.5 to wit, his failure to exercise control over their conduct. In order to determine whether or not the respondent breached the lease agreement in such a manner as to warrant its cancellation by the appellant, a consideration of the nature and B purpose of the contract is pertinent. Clause 2.2 of the lease agreement provides as follows:

> "2.2 The purpose for which this Lease is granted is to enable the Lessee as principal and for the Lessee's own account to carry on upon the premises: C
>
> 2.2.1 The business of selling (subject as hereinafter provided) Mobil's motor fuel, lubricants and other petroleum products in accordance with the provisions of the Fifth Schedule hereto;
>
> 2.2.2 The business of rendering the supplying (subject as hereinafter provided) of such services and commodities as are commonly rendered and sold at petrol filling and service stations. D
>
> 2.3 During the continuance of this Lease and subject to the provisions of paragraph 6 of the Fifth Schedule hereto Mobil shall supply or procure to be supplied to the Lessee and the Lessee shall purchase from Mobil the whole of the Lessee's requirements of motor spirits and automotive diesel fuel for sale at or from the premises."

The purpose of the contract is therefore clear. Only Mobil's products were to E be sold at the service station. According to the definitions section of the agreement, the service station was to be operated day and night, that is, 24 hours a day. If the conduct of the respondent's employees is to be viewed against this background, it is evident that they brought onto the appellant's premises and into its fuel tanks, fuel that had been bought from a third party. F Their intention was then to surreptitiously sell the fuel from the premises, during times that, according to the contract, they would have been required to sell products sourced from Mobil Oil. If it is to be accepted that the service station was to operate for 24 hours a day, it follows that the said employees took illicit delivery of the fuel during working hours.

The thrust of the appellant's case against the respondent is that had he G exercised control over his employees, this action, which constituted a breach going to the root of the agreement between the parties, would not have happened. There is merit in this argument. The very essence of the agreement between the parties was that only the appellant's products were to be sold at the premises, 24 hours a day. It follows that the control that the respondent contracted to exercise over the conduct of his employees had to be continuous, H day and night. Whatever measures the respondent might have put in place

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in this respect clearly were not adequate, as evidenced by the fact that, but A for the appellant's intervention, the culprits would have made good on their conduct. All in all, the conclusion that is difficult to escape is that there was an obvious laxity in whatever controls the respondent may have put in place to supervise the conduct of his employees. In other words, the respondent created the basic environment in which the conduct in question took place. B That being the case, little doubt remains that the respondent's laxity constituted a breach of a very material term of the lease agreement. I am satisfied the appellant was within its rights to cancel the lease agreement.

The appellant's main ground of appeal is accordingly upheld and the appeal must succeed. I do not consider it necessary to consider the appellant's other grounds of appeal. The appellant sought costs on the higher scale. I am not C persuaded a case has been made for such an order. The appellant, as has been observed above, must take part of the blame for using the term "vicarious liability" in the wrong context and to an extent misleading the respondent as to the case that he was facing. An ordinary order for costs would, in my view, be appropriate.

It is in the result, ordered as follows: D

1. The appeal be and is hereby allowed.
2. The decision of the court *a quo* is set aside and substituted with the following:
   "1. The application be and is hereby dismissed with costs.
   2. The respondent's counter application be and is hereby granted." E

ZIYAMBI JA & MALABA JA concurred.

Honey & Blanckenberg, appellant's legal practitioners

Wintertons, respondent's legal practitioners F

* [*Note*: the judgment appealed against was *Mashoko* v *Mobil Oil Zimbabwe (Pvt) Ltd* HH-51-05 (a judgment of MAKARAU J, delivered 15 June 2005). — *Editor.*]

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Source:
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GWESHE v MINISTER OF DEFENCE 2006 (1) ZLR 189 (H)

Citation	2006 (1) ZLR 189 (H)
Case No	Judgment No. HH-28-06
Court	High Court, Harare
Judge	Makarau J
Heard	1 February 2006
Judgment	1 March 2006
Counsel	Ms *S Mutambaseke*, for the plaintiff Ms *K Makurira*, for the defendant

Case Type Civil action

Annotations No case annotations to date

Flynote

C **Practice and procedure** — *parties — citation of — Minister of Defence — should be cited when sued for actions of soldiers seconded to police*

Statutes — *Public Order and Security Act [Chapter 11:17] — s 37 — members of the Defence Forces deployed in support of the police — delicts committed by — Minister responsible for police not vicariously liable*

Headnote

D The plaintiff claimed damages from the Minister of Defence for assaults on her by members of the Army. Units of the Army had been deployed in the high-density suburbs of Harare in support of the police, in terms of s 37 of the Public Order and Security Act [*Chapter 11:17*]. It was argued that the Minister was wrongly cited and that the Minister of Home Affairs, who was responsible for the police, should have been cited as E defendant.

Held, that s 37(2)(b), which makes provision for the powers and responsibilities of soldiers seconded to the police, puts soldiers on secondment on the same footing as members of the police in as far as powers, responsibilities and discipline are concerned. It makes no further provision as to the liability of the requesting authority (the police) for the delicts of soldiers F while on secondment and does not expressly hold the requesting authority liable for delicts committed by members of the Defence Forces while acting under the command of the requesting authority. If that was the intention of Parliament, it would have said so.

Cases cited

G *Biti v Minister of State Security* 1999 (1) ZLR 165 (S)

Legislation considered

Public Order and Security Act [*Chapter 11:17*], s 37(1) & (2)

Case information

Ms *S Mutambaseke*, for the plaintiff

H Ms *K Makurira*, for the defendant

Makarau J

Judgment

MAKARAU J: On 5 November 2006, the plaintiff issued summons out of this A court, claiming the sum of $50 million as damages for an assault allegedly perpetrated upon her by members of the Zimbabwe National Army. The claim was resisted and the matter was referred to trial to determine whether the plaintiff was assaulted by members of the national army and if so, whether she is entitled to the amount of damages claimed. B

The plaintiff led evidence in support of her claim. Her evidence was as follows:

She resides in Glen View, Harare. In the early hours of 3 June 2003, while she and her husband were in bed, she heard the sound of running engines. She peeped outside her bedroom window and saw three vehicles that had stopped outside their property. These were a Mazda 323 sedan, a Mazda pickup truck and a lorry in the green colours of the army. She saw four armed men jump over C the fence into the property. Two of the men broke the screen and door latches to the main house while the other two went to a room with an outside door where some young men were sleeping. Two soldiers entered the house and ordered that the lights be switched on. Thereafter, they disconnected

the telephone line. The two were in army uniform and red berets. They asked for the keys D to the gate and when these were handed over, one of the soldiers left to open the gate while the remaining soldier started to assault the plaintiff and her husband with booted feet and a baton stick. Other soldiers came into the house and joined in the assault. At one stage, she was kicked in the chest and fell against a door. She and her husband were made to lie prone on the floor and were then beaten on the buttocks. One of the soldiers got hold of a chair, E intending to hit her with it. She blocked the blow with her arm, which fractured in the process. One of the soldiers poked her mouth with a firearm demanding money. She then managed to run out of the house. She met more soldiers by the gate. They were in a uniform similar to the one worn by the soldiers who had entered her house. At the gate, she was ordered to lie down together with her husband. Both were then severely assaulted. The assailants were using F baton sticks and booted feet. She was assaulted until she felt numb with pain. A man in civilian clothes came out of the small car and made and the soldiers desist from assaulting her. She was later ferried to hospital and to a recuperating centre or clinic. Her broken arm was set and put in plaster of Paris for three weeks. G

The plaintiff then produced a medical affidavit deposed to by Mr Milos Coric an othorpaedic surgeon who attended to her fractured ulna.

The witness was detailed in her evidence. She testified as to a severe assault whilst she was inside the house. She testified as to a severe assault while she was lying prone and to another severe assault while she was standing. She H

Makarau J

A testified as to yet another severe assault while lying prone at the gate and while standing at the gate. She was subjected to the most perfunctory of cross-examination that did not contradict her evidence. I however, gained the impression that this witness exaggerates and abused the meaning of the word "severe" during her testimony. She testified as to a most brutal assault at the hands of the soldiers yet the medical report adduced did not substantiate the B "severe" assault save for the broken ulna, which the doctor described as typical of a "defense injury". No evidence of bruises and cuts to her body typical of a brutal assault were adduced, even though these had been mentioned in her summary of evidence. I also noted that while the plaintiff was hospitalized at Dandaro Clinic, run by Dr Lovemore of Amani Trust for 11 days after the assault, no evidence of her injuries or the nature of the treatment she C received at Dandaro was given either by the plaintiff herself or by the personnel that attended to her. At the close of the trial, the plaintiff's counsel confirmed that the plaintiff was relying on the injury to her arm only as evidence of the severe assault perpetrated on her.

On the basis of the above, while not rejecting her evidence *in toto*, I am not D persuaded that the plaintiff was as severely assaulted as she alleges.

The plaintiff called Pretty Gweshe, her niece, as a witness. Pretty was in the house when the soldiers visited the residence on the date in question. She was ordered by the plaintiffs to hide under the bed as the soldiers approached. She saw two soldiers assaulting the plaintiff while they were inside the house. The E soldiers used batons. She also saw one soldier lift up a chair intending to strike the plaintiff with it. The plaintiff blocked the blow with her arm. She and the other girl in her company were ordered to go into the plaintiff's bedroom to sleep. Whilst in that bedroom, she saw the plaintiff being assaulted whilst at the gate.

Although the witness was confused as to the dates when the assault took F place, her evidence was, in the main, credible and was corroborative of the evidence of the plaintiff as to how plaintiff sustained the injury to her arm.

The plaintiff also called Rutendo Munengami. She was in one of the vehicles that drove to the plaintiff's residence on the night in question. She had been picked up by the soldiers earlier on from her own residence. A man in a mask, G riding in the same car with her, directed the vehicles to the plaintiff's residence. She saw the plaintiff and her husband come out of their house being assaulted by the soldiers who had gone into the property.

The witness was credible and her evidence also corroborated that of the plaintiff in the main as to the identity of the plaintiff's assailants.

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The defendant called Lt Colonel Paradzai Marovanidze who has been in the A National Army for the past 25 years. He has seen records that detail how, during the period in question, the National Army seconded personnel to the police. He was not in office during his period but has had access to such records.

The evidence of this witness was not seriously challenged as it was largely B common cause.

Next to testify on behalf of the defendant was Major Munyengeri. He has been with the Zimbabwe National Army for the past 11 years. In March – July 2003, when the army was called in to assist the police during the political unrest immediately prior to the planned demonstration code named "Final Push" that was scheduled for 6 June, he was seconded to assist the police in Harare South C as officer commanding. He and his men were not given police uniforms but retained their army uniforms and weaponry. He was deployed at Southerton Traffic Section, which covered the plaintiff's residence in its area of policing. His men were in green helmets and he is not aware that the plaintiff was assaulted on the day alleged. He did not get a report to this effect before he D left for duty in the Democratic Republic of Congo. His men did not go to the plaintiff's residence on the date in question.

The witness gave his evidence well and I have no reason to disbelieve him.

After this witness, the defendant closed his case.

On the basis of the above evidence, it is my finding on a balance of probabilities E that the plaintiff was assaulted on the day in question by members of the Zimbabwe National Army. The plaintiff's evidence to this effect was not challenged by the defendant.

I further find that the soldiers who assaulted the plaintiff wore red berets on the day in question. In my view, these soldiers most probably did not come from the contingent that was under Major Munyengeri as he did not deploy F his men into the area on the morning in question and in any event, his men were in their combat fighting equipment order which included green helmets and not red berets. This finding on my part does not detract from my finding that the plaintiff was assaulted by member of the National Army. It simply serves to explain why after I have found Major Munyengeri a credible witness, I proceed to find that the plaintiff was assaulted by members of the G National Army.

I further find that as a result of that assault, the plaintiff broke her right ulna that had to be set in a cast for three weeks. I have above discounted the plaintiff's evidence that she was severely assaulted but accept that some force was applied to her person unlawfully and as a result, she broke her arm. The H

Makarau J

A content of the medical affidavit by Mr Coric, which supports this finding, was not challenged.

Now turning to the legal issue that arises from these facts, it was argued on behalf of the plaintiff that the defendant is vicariously liable for damages for the assault perpetrated on the plaintiff by the soldiers. I find this submission unassailable. A group of soldiers unlawfully assaulted the plaintiff on the date B in question. Their employer cannot escape liability for the delict.

The defendant in turn argued that he is not liable as, when the assault was perpetrated, the soldiers had been seconded to the Ministry of Home Affairs, who should be the proper defendant in these proceedings.

Firstly, it is my finding in this matter that on a balance of probabilities, the C soldiers that assaulted the plaintiff were not from Major Munyengeri's contingent. It is common cause that the soldiers that had been seconded to the police were under the command of Major Munyengeri. The men under Major Munyengeri did not perpetrate the assault. Some other group did. If it had been proven that it was part of Major Munyegeri's contingent that D perpetrated the assault, the argument may have been tenable but not even then, as I shall demonstrate.

In my view, even if the group of soldiers that assaulted the plaintiff had been seconded to the police under the Public Order and Security Act [*Chapter 11:17*] (POSA), that would not have absolved the defendant from liability.

E On a factual level, I cannot better the language of Major Munyengeri in his testimony as to the identity of the soldiers that were seconded to assist the police. He testified in a manner that to me smacked of professional pride when he said soldiers retained their identities as soldiers and they wanted the populace to feel and know of their presence. Elsewhere in his evidence, the F major was quite clear that the soldiers were not only deployed to disperse crowds, protect life and property but also to show strength of force by driving around in their amoured vehicles and in their uniforms. Thus, they had to retain their identity as soldiers for this purpose as well. The major also testified that while the command of the operations was under the police, he was responsible for his men and retained control of them.

G It presents itself clearly to me that, on a factual basis, the soldiers that were deployed under the operation never switched identities to become temporary policemen. They wore their uniforms and reported to their army superior, who was under the command of the police. They did not at any stage terminate their employment with the army to take up temporary employment with the police. The fact that the police were directing operations did not, in my view, affect

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the employment status of the soldiers in any manner. They remained soldiers A who had been seconded to beef up the strength of the police.

What remains is for me to investigate whether there is any legal provision that may have varied the factual position.

Section 37 of POSA, under which the soldiers were seconded to the police provides that: B

> "(1) If, upon a request made by the Commissioner of Police, the Minister is satisfied that any regulating authority requires the assistance of the Defence Forces for the purpose of suppressing any civil commotion or disturbance in any police district, he may request the Minister responsible for defence to authorize the Defence Forces to assist the police in the exercise of their functions under this Act in C the police district concerned.
>
> (2) Where authority is given under subsection (1) for the Defence Forces to assist police –
>
> (a) every member of the Defence Forces who has been detailed to assist the police in any police district in the exercise of their function under this Act shall be under the command of the D regulating authority concerned; and
>
> (b) a member of the Defence Forces who is assisting a police officer in the exercise of his functions under this Act shall have the same powers, functions and authority, and be subject to the responsibilities, discipline and penalties, as a member of the E Police Force, and liable in respect of acts done or omitted to be done to the same extent as he would have been liable in the same circumstances as if he were a member of the Police force, and shall have the benefit of any indemnity to which a member of the Police Force would in the same circumstances be entitled."

Subsection (2)(b) makes express provision for the powers and responsibilities F of soldiers seconded to the police under the Act. The import of the subsection, in my view, is to put the soldiers on secondment on the same footing as members of the police in as far as powers, responsibilities and discipline are concerned. The subsection makes no further provision as to the liability of the requesting authority for the delicts of the soldiers while on secondment. The subsection does not expressly hold the requesting authority liable for the G delicts committed by members of the Defence Forces while acting under the command of the requesting authority. If that was the intention of Parliament, it would have said so. Parliament expresses its intentions through the use of language. By failing to make express provision in this regard, Parliament cannot be taken to have intended to change the existing provision at common law that the employer of the Defence Forces is vicariously liable for the delicts H

A committed by members of the forces. It is not for the court to impose vicarious liability on the requesting authority for the delicts of the members of the Defence Forces detailed to assist the requesting authority when Parliament did not say so.

It is therefore, my finding that the defendant is vicariously liable for the assault B perpetrated by members of the Defence Forces on the plaintiff on 3 June 2003 because the soldiers that assaulted

the plaintiff were not deployed in terms of s 37 of POSA and, even if they were, the defendant remains vicariously liable for the delicts of members of the Defence Forces so deployed.

Regarding the quantum of damages, I have not been able to come up with a recent case where an award was made for assault damages in similar C circumstances and for similar injuries. The challenges I face in assessing a suitable amount is the ever deprecating value of money in this jurisdiction due to inflation and the shrinking size of the economy where more and more of the populace are being pushed into poverty with little or no disposable funds. The double challenge that presents itself to me is that while money has lost its buying power, it has become increasingly difficult to come by due to the D increasing levels of poverty. Thus, the inflated value of an award made 10 years ago may be sadly out of step with the realities of the economy today: see *Biti* v *Minister of State Security* 1999 (1) ZLR 165 (S). It is my view that, for some time to come, judicial officers have to use the discretion vested in them to award general damages without the aid of awards made in comparable E cases. A direct reference to awards made in comparable cases, even allowing for inflation, may spiral awards into unprecedented amounts that are not in tandem with the shrinking economy.

In assessing the damages due to the plaintiff, I have taken into account the nature and seriousness of the injury sustained by the plaintiff, the fact that the assaulted was perpetrated by members of the Defence Forces against an F unarmed citizen and the fear that the assault must have created in the plaintiff. Taking all these into account, I award the plaintiff the sum of $10 million.

In the result, I make the following order:

1. The defendant shall pay the plaintiff the sum of $10 million.
2. The defendant shall pay the plaintiff's costs.

G *Zimbabwe Human Rights NGO Forum*, plaintiff's legal practitioners

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

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Source:
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MUCHAPONDWA v MADAKE & ORS 2006 (1) ZLR 196 (H)

Citation	2006 (1) ZLR 196 (H)
Case No	Judgment No. HH-32-06
Court	High Court, Harare
Judge	Karwi J
Heard	24 February 2006
Judgment	6 March 2006
Counsel	*H Zhou,* for the applicant *T Magwaliba,* for the first respondent *N Bvekwa,* for the third respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Appeal — *validity — magistrates court — appeal noted without requesting* C *written reasons for decision — such appeal valid*

Headnote

The applicant's house was ordered to be sold and the proceeds split between himself and the first defendant, his former lover, who had never owned or lived in the house. The magistrate gave no reasons for his decision. D The applicant's legal practitioners filed a notice of appeal against that judgment. In response the first respondent filed an application for leave to execute the judgment pending the appeal, which application was granted. The order granting the application was not accompanied by any reasons. The applicant lodged a notice of appeal against the order. He also applied to the High Court for a stay of execution. The defendant E argued that as the notices of appeal did not request and obtain the magistrate's reasons in terms of Order 31 r 1(1) of the Magistrates Court (Civil) Rules 1980, they were a nullity.

Held, that the notices of appeal were valid. When a matter is opposed and the issues have been argued it is unacceptable for a court to make an order without giving any reasons for it, since the litigants are entitled to be F informed of the reasons for the decision.

Held, further, that, an appeal is noted not against the reason for a judgment but against the judgment or order itself. There can be an appeal only against the substantive order made by a court, not against the reasons for judgment. Once the applicant had filed his notice of appeal, the G magistrate was enjoined in terms of Order 31 r 3 to furnish the written reasons for the judgment. It was the notice of appeal, not the written request, which should have triggered the provision of the written reasons for judgment by the magistrate. There would be irreparable harm to the applicant if the first respondent were allowed to execute the judgment and transfer to the third respondent were to take place. H

2006 (1) ZLR p197

Karwi J

Cases cited A

Administrator, Cape & Anor v Ntshwaqela & Ors 1990 (1) SA 705 (A)

Bay Passenger Transport Ltd v Franzen 1975 (1) SA 269 (A)

Botes & Anor v Nedbank Ltd 1983 (3) SA 27 (A)

Chidyausiku v Nyakabambo 1987 (2) ZLR 119 (S)

Chioza v Independent Property Development (Pvt) Ltd & Anor HH-76-94

B*Fox & Carney (Pvt) Ltd v Sibindi* 1989 (2) ZLR 173 (S)

Kanengoni v Zimbabwe Spinners & Weavers (Pvt) Ltd 1995 (2) ZLR 348 (S)

Murimbechi v Townsend HH-185-90

S v Makawa & Anor 1991 (1) ZLR 142 (S)

Shereni v Moyo 1989 (2) ZLR 148 (S)

C *Strime v Strime* 1983 (4) SA 850 (C)

Legislation considered

Magistrates Court (Civil) Rules, 1980, Order 31 rr 1(1) 2 and 3

Case information

D *H Zhou,* for the applicant

T Magwaliba, for the first respondent

N Bvekwa, for the third respondent

Judgment

KARWI J: This is an urgent chamber application. The applicant is seeking the following interim relief; E

"1. The second, fourth and fifth respondent are hereby interdicted from transferring the immovable property known as No. 1110 South View, Uplands, Waterfalls, Harare to the third respondent.

2. The first respondent shall not enforce the orders granted by this Honourable Court in case No. HC 6626/05 and by the magistrate in case No. 11317/05. F

3. This provisional order shall remain in operation notwithstanding the noting of the appeal against it."

The facts which give rise to this application are as a result of a relationship which went sour. The facts which are basically undisputed are disclosed by the applicant in his founding affidavit as follows: The applicant and the G defendant were lovers. They had not married and did not live together. They had their different lovers and would visit each other. They had no common estate. The immovable property, stand No. 1110 South View, Uplands, Waterfalls, Harare, which is the subject of this dispute, belonged to the applicant. He had purchased it alone in October 1999 before he even met the first respondent.

Karwi J

When the relationship went sour, the first respondent issued summons out A of the magistrates court under case No. 11317/05 in which she alleged that the two were married and therefore, claimed a division of the applicant's property. Notwithstanding his apportion, the magistrates court entered judgment in favour of the first respondent *inter alia* as follows:

"… House No. 1110 South View, Uplands, Waterfalls, Harare to be sold and B the plaintiff (first respondent in this case) to get 40 *per centum* of the proceeds and the respondent (the applicant in this case) 60 *per centum* of proceeds."

The order was not accompanied by any reasons. The applicant was not legally represented in the matter. On 16 May 2005, the applicant's legal practitioners filed a notice of appeal against that judgment. In response, the first respondent C filed an application for leave to execute the judgment pending the appeal, which application was granted. The order was granted on 18 July 2005 and was also not accompanied by any reasons.

On 30 August 2005, the applicant's legal practitioner filed an appeal against the judgment of the magistrate court granting the first respondent leave to execute pending appeal. D

On 14 October 2005, the applicant's Waterfalls property was advertised for sale in a newspaper. On 17 October 2005, the applicant filed an urgent chamber application in this court seeking to prevent the sale of his property under case No. HC 5273/05.The application was dismissed by this court.

On 5 November, 2005, the applicant through his legal practitioners wrote to E the provincial magistrate stating that he had listed appeals against both judgments of the magistrates court, and that the reasons in both cases had not been provided despite numerous requests for them. In response, the provincial magistrate indicated that she had given an instruction to stop the sale. She also indicated that the magistrate who had given the judgments F against the applicant had resigned and that the reasons for the judgments could therefore not be given.

On 22 November 2005, the applicant through his legal practitioners wrote to the provincial magistrate stating, *inter alia,* that in view of the failure by the presiding magistrate to give reasons for his orders, an application was being made to this court for these judgments to be set aside.In her response, the G provincial magistrate reiterated that the reasons for the judgments could not be provided, and that the applicant could proceed to apply to this court for those proceedings to be set aside.

On 29 November 2005, an application to have the two orders by the magistrate set aside was filed with this court by the applicant under case No. HC 6252/05. H That application is still pending.

Karwi J

A On 19 December 2005, the first respondent filed a chamber application in case No. HC 6626/05 which is now the subject of a Supreme Court appeal. The applicant filed opposing papers in that application. The application was granted by this court. No reasons were given. The order granted was along the following terms:

> "1. The first respondent, shall upon service of this order by the Deputy B Sheriff confirm sale in execution in this matter forthwith.
> 2. The fourth respondent proceeds with distribution plan and transferring property to third respondent forthwith.
> 3. The second respondent shall pay the costs of the application."

Following the granting of the above order, the provincial magistrate confirmedthe C sale of the property in dispute to the third respondent. The sale was confirmed on 9 February 2006.

Mr *Zhou* argued on behalf of the applicant that for the purposes of this application for stay of execution, all that this court must be satisfied with is that:

> "Real and substantial justice requires such a stay or, put otherwise, an injustice would otherwise be done."

D See *Strime* v *Strime* 1983 (4) SA 850 (C) at 852A, *Chioza* v *Independent Property Development (Pvt) Ltd & Anor* HH-76-94 at p 3, *Murimbechi* v *Townsend* HH-185-90.

He submitted that there was an appeal pending against the judgment which the first respondent seeks to enforce. If the appeal succeeds after the judgment E has been executed, and after the applicant's property has been transferred to the third respondent, the damage would be irreparable.

Mr *Magwaliba,* for the first respondent, urged for the dismissal of the application on the basis that the appeals noted in this matter did not comply with Order 31 r 1(1) of the Magistrates Court (Civil) Rules, which provides that:

> F "Upon a request in writing by any party made within seven days after judgment and before noting an appeal and upon payment by such party of a fee of $10 000 the magistrate shall within fourteen days deliver to the clerk of court a written judgment which shall form part of the record showing:
> (a) the facts found to be proved; and G
> (b) his reasons for judgment."

It was submitted that the first request for written reasons for judgment was made in November 2005 and therefore, did not comply with the rules.

It was further submitted that in terms of Order 31 r 2, an appellant may file his appeal within twenty-one days of the judgment appealed against or fourteen H days of the delivery to the clerk of court by the magistrate of the written

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reasons for judgment in terms of r 1(1), whichever period is longer. It is A peremptory that an appellant requests the reasons, and the reckoning of time within which to appeal then commences from the date when the reasons for judgment are furnished to the clerk of court.

Mr *Magwaliba* further submitted that a notice of appeal which is filed without an appellant having requested in writing for reasons is a nullity.He cited the B following case authority as having decided the issue. *Shereni* v *Moyo* 1989 (2) ZLR 148 (S) at 149B-C, *Fox & Carney (Pvt) Ltd* v *Sibindi* 1989 (2) ZLR 173 (S) at 178B-181B and *Kanengoni* v *Zimbabwe Spinners & Weavers (Pvt) Ltd* 1995 (2) ZLR 348 (S) at 350F.

It was also submitted that the appeals having been noted without judgment cannot be sustained. A magistrate, in addition to having provided written C reasons for judgment, may be required to comment on matters of fact in terms of Order 31 r 3.That does not take away the obligation of a litigant to request reasons for judgment before noting an appeal in terms of Order 31 r 1.

The issue to be decided is whether or not an appeal is invalid if it is noted without the appellant having requested in writing and being furnished with D the reasons for a judgment or order. I do not agree with the submission by Mr *Magwaliba* that such an appeal is nullity. I equally do not agree with Mr *Magwaliba*'s assertion that a judicial officer is not under obligation to provide reasons for his judgment or order. It is settled that:

> "When a matter is opposed and the issues have been argued it is unacceptable for a court to make an order without giving any reasons for E it, since the litigants are entitled to be informed of the reasons for

the decision."

See Herbstein and Van Winsen *Civil Practice of the Supreme Court of South Africa* Vol 1 4 ed p 679.

The rationale for the above was set out in *Botes & Anor* v *Nedbank Ltd* F 1983 (3) SA 27 (A) at 27H:

> "The first is that the judge who heard the exception and application to out made orders dismissing the exception and allowing, in part, the motion to out without giving any reasons. In my view, this represents an unacceptable procedure. In a case such as this, where the matter is opposed and the issues have been argued, the litigants are entitled to be informed of the G reasons for the judge's decision. Moreover, a reasoned judgment may well discourage an appeal by the loser. The failure to state reasons may have the opposite effect. In addition, should the matter be taken on appeal, as has happened in this case, the court of appeal has a similar interest in knowing why the judge who heard the matter made the order which he did." H

Karwi J

A In *S* v *Makawa & Anor* 1991 (1) ZLR 142 (S) at 146D-E, it was held that:

> "Although there are indications in this case that the magistrate may have considered the case, a large portion of those considerations remained shared in his mind instead of being committed to paper. In the circumstances, this amounts to an omission to consider and give reasons. See *R* v *Jokonya* 1964 RLR 236 (G)."

B I agree with Mr *Zhou*'s submission that an appeal is noted not against the reason for a judgment but against the judgment or order itself. There can be an appeal only against the substantive order made by a court, not against the reasons for judgment.

See *Administrator, Cape & Anor* v *Ntshwaqela & Ors* 1990 (1) SA 705 (A) C at 714J-715D; Herbstein & Van Winsen *op cit* p 679 and *Bay Passenger Transport Ltd* v *Franzen* 1975 (1) SA 269 (A) at 278 A-E. In *Chidyausiku* v *Nyakabambo* 1987 (2) ZLR 119 (S) at 124C, it was held that:

> "In order to be valid, a notice of appeal must be directed to the whole or part of the order made by the court *a quo* and not to its reasons for making the order in question.It must be lodged against the substantive order."

D Contrary to what Mr *Magwaliba* stated in his submissions on the validity of an appeal which is noted in the absence of reasons for a judgment, Order 31 r 1 of the Magistrates Court (Civil) Rules deals with applications for reasons for judgment. It seems to me that the rule is meant to regulate the *dies indiciae* for the request for reasons and their provisions by the magistrate. The rule E clearly applies where there has been a written request for written reasons before an appeal has been noted. It does not apply in a situation where an appeal has already been noted. Order 31 r 2 does not even apply in this case. Order 31 r 3 applies where a notice of appeal has been filed in the absence of reasons for a judgment,

It seems to me therefore that the absence of reasons does not affect the validity F of an appeal. I also agree with Mr *Zhou* that in the circumstances of this case, once an applicant filed his notice of appeal, the magistrate is enjoined in terms of Order 31 r 3 to furnish the written reasons for the judgment. It is the notice of appeal, and not the written request, which should have triggered the provision of the written reasons for judgment by the magistrate,

G Consequently, I am satisfied that real and substantial justice requires that a stay of execution of the judgment appealed against be granted. The appeals which are pending are not a nullity. They are indeed valid. I find in favour of the arguments by the applicant that there would be irreparable harm if the first respondent is allowed to execute the judgment and transfer to the third respondent takes place. In any case, there is no prejudice to the first H respondent if the execution is stayed to allow the applicant to prosecute his

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Karwi J

appeals. The only material prejudice which was pointed out by the first A respondent was that passage of time would erode the value of her 40 percent *per annum* share in the property due to inflation. While it is true that this is the case, the situation applies to both the applicant and the first respondent.

In the result, the application is granted in terms of the draft as follows:

That, pending determination of this matter, the applicant is granted the following interim relief:

1. The second, fourth and fifth respondents are hereby interdicted from transferring the immovable property known as No. 1110 South View, Uplands, Waterfalls, Harare to the third respondent.
2. The first respondent should not enforce the orders granted by this court in case No. HC 6626/05 and by the magistrate in case No. HC 11317/05.
3. This provisional order shall remain in operation notwithstanding the noting of an appeal against it.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/OLIVINE INDUSTRIES (PVT) LTD v NHARARA 2006 (1) ZLR 203 (S)

OLIVINE INDUSTRIES (PVT) LTD v NHARARA 2006 (1) ZLR 203 (S)

Citation	2006 (1) ZLR 203 (S)
Case No	Judgment No. S-88-05
Court	Supreme Court, Harare
Judge	Cheda JA, Malaba JA and Gwaunza JA
Heard	12 September 2005
Judgment	7 March 2006
Counsel	Ms *N Moyo*, for the appellant The respondent in person
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — *wrongful dismissal — damages for — how to be assessed — relevance of back-pay in assessing damages — rate of compensation — rate should be that applicable at the time — time taken to obtain alternative employment — other sources of income — need for evidence*

Employment — *wrongful dismissal — remedies — reinstatement — circumstances where reinstatement is no longer desirable — damages payable instead of reinstatement*

Headnote

The Labour Relations Tribunal made an order for the reinstatement of the respondent to his employment by the appellant. Part of the order provided that if reinstatement was no longer an option the respondent was hereby ordered to pay the appellant damages in lieu of reinstatement. If the parties failed to agree on the quantum, they could approach the Tribunal for quantification. The appellant paid back pay. After the parties failed to agree on damages, the Tribunal ordered

payment of back-pay and benefits plus interest, and in addition 18 months' pay at "today's F rates".

Held, that where an employee is found to have been wrongfully dismissed, reinstatement is normally ordered. Taking into account that in some cases reinstatement is found to be no longer desirable if relations between the parties have soured, provision is made for damages to be paid to the employee instead of reinstatement.

G *Held*, further, that if an employee is reinstated, he will normally be awarded back-pay. If he succeeds in proving wrongful dismissal, but is not reinstated, he will be entitled to damages, a major element of which will be back-pay. The back-pay will be limited to a period from the date of wrongful dismissal to a date by which he could, with reasonable diligence, have obtained alternative employment *(Leopard Rock Hotel Co (Pvt)*

Cheda JA

Ltd v *van Beek* 2000 (1) ZLR 251 (S) followed). The back-pay and benefits A should represent what the employee should have received had he not been wrongfully dismissed. The award should take into account the period he should have taken to obtain alternative employment and other sources of income the employee might have. On these points evidence is required. The employee can only be compensated by an amount that should be calculated at the rates applicable at the time and not at "today's B rates" or some future unknown rates.

Cases cited

BHP Minerals Zimbabwe (Pvt) Ltd v Takawira 1999 (2) ZLR 77 (S)

Chegutu Municipality v Manyora 1996 (1) ZLR 262 C

Gauntlet Security Services (Pvt) Ltd v Leonard 1997 (1) ZLR 583 (S)

Leopard Rock Hotel Co (Pvt) Ltd v van Beek 2000 (1) ZLR 251 (S)

Case information

Ms *N Moyo*, for the appellant

The respondent in person D

Judgment

CHEDA JA: In the judgment No. LRT/H/238/2002, dated 26 September 2002, the Labour Relations Tribunal (now the Labour Court) made an order for the reinstatement of the respondent to his employment by the appellant. Part of the order read:

> "In the event that reinstatement is no longer an option, the respondent be E and is hereby ordered to pay the appellant damages in lieu of reinstatement, (the) *quantum* of which the parties may agree, on failure of which the parties may approach the Tribunal for quantification. (The) appellant (is) granted costs of suit and interest at the prescribed rate."

The parties met as directed, but failed to agree on the *quantum* and returned to the Tribunal once more. Mr Sithole, a trade unionist, represented the then F appellant (now the respondent). Part of his address to the Tribunal reads as follows:

> "… the issue of Nharara was partly implemented as per the court order. The judgment No. LRT/H/238/2002, in that judgment, Your Honour, it was ordered that the respondent, being Olivine Industries, was ordered to reinstate the appellant without loss of salary and benefits. And what G Olivine did, Your Honour, was simple (*sic*) to back-pay and they said the issue of reinstatement was a non-starter. We tried our level best, Your Honour, to reason with the respondent but to no avail. The respondent has his (*sic*) own interpretation of that court order. The respondent was of the opinion that because the relationship was sour, they (*sic*) could not entertain the issue of reinstating Mr Nharara as per the court order. At the H

Cheda JA

> A same time they where (*sic*) not prepared to pay damages in lieu of reinstatement. And there was a bit of confusion until we had to write back in terms of the spirit of the court order we should refer it back to the

> Honourable Court, and that is exactly what we did on 11 July 2003. And in our referral to this Honourable Court, we wrote that we could not agree. Olivine Industries decided to pay only back-pay. Other benefits and B damages they refused, hence our application for a set-down for this matter."

The above shows that the parties returned to the Tribunal because of the disagreement on the *quantum* of damages the appellant should have paid the respondent. The appellant had obviously paid the respondent his back-pay as per part of the order made by the Tribunal.

C After hearing both sides, the Tribunal proceeded to make the following order:

> "1. The applicant is awarded back-pay from 4 July 1997 to 11 October 2001, together with all the benefits he would have been entitled to had he remained in the respondent's employ during that period.
>
> 2. That the respondent pays interest at the prescribed rate on the back- D pay calculated from 11 October 2001 to the final date of payment.
>
> 3. That the respondent pays the applicant eighteen months' salary at today's rates as damages for the applicant's premature loss of his job, together with interest at the prescribed rate calculated from the date of this judgment to the date of payment in full.
>
> 4. That from the back-pay, an amount of $1 052 010 (one million and fifty E two thousand and ten dollars) be subtracted since the applicant has already received this amount.
>
> 5. That each party bears its own costs."

The main grounds of appeal to this court are that:

(a) the court *a quo* erred at law in awarding two remedies of back-pay and F damages, thus over-compensating him;

(b) the court *a quo* made a vague award of damages at "today's rates"; and

(c) the court *a quo* made an award that was neither asked for nor supported by either of the parties.

The appellant prays that this court either reassess an appropriate award of G damages from the evidence on record or remit the matter to the court *a quo* with directions to make a proper assessment of an award of damages.

There are several cases that provide guidance in cases similar to this one. Where an employee is found to have been wrongfully dismissed, reinstatement is normally ordered. Taking into account that in some cases reinstatement is found to be no longer desirable if relations between the parties have soured,

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Cheda JA

provision was made for damages to be paid to the employee instead of A reinstatement. See *Gauntlett Security Services (Pvt) Ltd* v *Leonard* 1997 (1) ZLR 583 (S); *Chegutu Municipality* v *Manyora* 1996 (1) ZLR 262; *BHP Minerals Zimbabwe (Pvt) Ltd* v *Takawira* S-81-99 (not reported); and *Leopard Rock Hotel Co (Pvt) Ltd* v *van Beek* S-6-00 (not reported).

In *Leopard Rock Hotel Co (Pvt) Ltd* v *van Beek supra*, this court stated as B follows:

> "'Back-pay' is thus a concept associated with reinstatement. If an employee is reinstated she will normally be awarded back-pay. If she succeeds in proving wrongful dismissal, but is not reinstated, she will be entitled to 'damages', a major element of which will be back-pay. Perhaps more correctly, one should say the damages will be assessed by reference to C the back-pay lost. But here the back-pay will be limited to a period from the date of wrongful dismissal to a date by which she could, with reasonable diligence, have obtained alternative employment. See *Ambali supra* and *Myers supra*."

In this case, it had been argued that back-pay should be paid only up to the time the respondent could have been expected to have found, with reasonable D diligence, alternative employment. What remained in dispute was when the payment of salary and benefits should cease.

It was, therefore, correct to order that the respondent be awarded back-pay from 4 July 1997, together with interest. The back-pay and benefits would represent what the respondent should have received had he not been E wrongfully dismissed.

In additional damages, the award should take into account the period he should have taken to obtain alternative employment. No evidence was led on that issue.

It was also submitted that the respondent earned money repairing cellphones and selling tomatoes. This, too, should have been taken into account. No F details were given.

While this court would have liked to see this matter finalised by making an order, such order cannot be made without evidence on the amounts earned by the respondent during that period.

The respondent can only be compensated by an amount that should be G calculated at the rates applicable at the time and not at today's rates or some future unknown rates. An order for payment "at today's rates" is vague and inappropriate in the circumstances. Today's rates will obviously be very different from the rates that prevailed at the time.

In the previous judgment No. LRT/H/238/2002, wherein the respondent had H

Cheda JA

A succeeded, he was granted costs. No reason was given for changing the award for costs in judgment No. LC/H/55/2004. No appeal was lodged against the order of costs either. Ms *Moyo*, for the appellant, conceded that there was no reason for the Labour Court to change the order for costs.

Accordingly, the appeal succeeds to the extent that: B

1. Paragraph 3 of judgment No. LC/H/55/2004 is set aside.
2. The order for costs is set aside.
3. The matter is referred back to the court *a quo* to hear evidence on the period the respondent would have been reasonably expected, with due diligence, to obtain alternative employment, and the amount that he earned from repairing cellphones and selling tomatoes; C
4. The court *a quo* is ordered to award damages at the rates prevailing at that time and not at today's rates; and
5. There shall be no order as to costs.

D MALABA JA &Gwaunza JA concurred.

Coghlan, Welsh & Guest, appellant's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/S v THEBE 2006 (1) ZLR 208 (H)

S v THEBE 2006 (1) ZLR 208 (H)

Citation	2006 (1) ZLR 208 (H)
Case No	Judgment No. HB-16-06
Court	High Court, Bulawayo
Judge	Cheda J
Heard	7 March 2006
Judgment	7 March 2006
Counsel	Details not supplied
Case Type	Criminal review

Annotations Link to case annotations

Flynote

Criminal procedure — *prosecutor — dominus litis — limits to — court's* C *inherent power to ensure suitable charges are preferred — court's power to prevent State from proceeding on a lesser charge where justice clearly requires otherwise*

Headnote

While it is part of our criminal procedure that the State is *dominus litis,* this rule is not absolute. The trial court, as a trier of facts whose main object D is to do justice between man and man, therefore has inherent powers to ensure that suitable charges are preferred against those who appear before it. It is therefore, within its power to prevent the State from proceeding with a prosecution on a lesser charge where justice clearly requires a more serious one *. E

Judgment

CHEDA J: This is a review judgment. The accused, a man of 30 years was charged with arson to which charge he pleaded guilty, was duly convicted and sentenced to 24 months' imprisonment of which six months' imprisonment was suspended for five years on the usual conditions.

The brief facts of the matter are that accused and the complainant's wife were F in love but later fell out.

The complainant's wife later decided to break the relationship. This did not go down well with the accused who then decided to set on fire the hut where the complainant and her family were sleeping.

Before setting the hut on fire, he made sure that the complainants were asleep. G

The accused's conduct of ensuring that complainant and her family were asleep, in my view, has all the ingredients of the mental element (*mens rea*) of

A murder. However, the fact that he did not kill anyone, the correct charge therefore should have been that of attempted murder.

While it is part of our criminal procedure that the State is *dominus litis*, this rule is not absolute. The trial court is a trier of facts whose main object is to do justice between man and man. It therefore has inherent powers to ensure that suitable charges are preferred against those who appear before it. It is, B therefore, within its power to prevent the State from proceeding with the prosecution on a lesser charge where justice clearly requires a more serious one.

The reason is simply that where the State fails to prove the serious charge, the court in most cases, where provided, can always convict on a lesser charge.

C It is therefore, the duty of every judicial officer to guard against the pitfalls of being misled by a prosecutor who opts for a lesser charge thereby avoiding the rigours of engaging in a fully fledged trial.

In casu, the charge of arson where the facts point to the contrary is clearly incompetent.

D In this regard, I am therefore unable to certify these proceedings as being in accordance with true and substantial justice. I withhold my certificate.

* *Editor's note*: See *S* v *Chidodo & Anor* 1988 (1) ZLR 299 (H), where it was held that the judge's powers are limited to withholding his certificate on review.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/ZIMBABWE BANKING CORPORATION v TRUSTFIN FINANCE LTD 2006 (1) ZLR 210 (H)

ZIMBABWE BANKING CORPORATION v TRUSTFIN FINANCE LTD 2006 (1) ZLR 210 (H)

Citation	2006 (1) ZLR 210 (H)
Case No	Judgment No. HH-27-06
Court	High Court, Harare
Judge	Kamocha J
Heard	6 March 2006
Judgment	8 March 2006
Counsel	*R Y Phillips*, for the plaintiff/excipient *A Moyo*, with him *U Sakhe,* for the defendant/respondent
Case Type	Exception
Annotations	No case annotations to date

Flynote

Bills of exchange and negotiable instruments — *promissory note — whether must be presented for payment on date of maturity — note made payable at a particular place — note stated to be payable on presentation to the payer — when such statement regarded as being on the body of the note* D

Headnote

Negotiable certificates of deposit were issued by the defendant. They matured approximately 2 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. In its plea, the defendant raised the defence that the promissory notes sued on had not been presented on the date of maturity. In so doing, the defendant relied on the decision by Uchena J in *Zimbank* v *Trust Finance Ltd* 2005 (2) ZLR 302 (H).

The plaintiff excepted to this plea, arguing that under s 93(1) of the Bills of Exchange Act [*Chapter 14:*02], the promissory notes did not have to be F presented at any particular place in order to render the maker liable. The defendant argued that the two certificates were stated to be "payable on maturity upon presentation to [the defendant]" and so presentation was expressly required by the certificates themselves.

Held, that s 44, which relates to presentment of bills for payment, also applies *mutatis mutandis* to promissory notes. Presentment of such notes must G be made on the days they fall due. The words "payable on maturity upon presentation to [the defendant]" were in the body of the notes,

being above the authorised signatures. Presentment was thus necessary in order to render the maker liable.

2006 (1) ZLR p211

Kamocha J

Cases cited A

Breitenbach v Immerman's Konstruksie (Edms) Bpk 1970 (3) SA 507 (T)

Masters v Baretto (1849) 19 LJ CP 50

Trecothick v Edwin (1816) 1 Starky 468

Veritas International Promotions (Pty) Ltd v Trustees, Langad Trust & Anor 1985 (3) SA 945 (C)

B *Zimbank v Trust Finance Ltd* 2005 (2) ZLR 302 (H)

Legislation considered

Bills of Exchange Act [*Chapter 14:02*], ss 44 & 93(1)

Case information

C *R Y Phillips*, for the plaintiff/excipient

A Moyo, with him *U Sakhe,* for the defendant/respondent

Judgment

KAMOCHA J: The plaintiff in this matter excepted to the defendant's plea in which it raised a defence that the promissory notes sued on had not been presented on the date of maturity as had been found to be necessary by D Uchena J. It based its exception on the ground that in terms of s 93(1) of the Bills of Exchange Act [*Chapter 14:02*], the "Act" the promissory notes did not have to be presented in order to render the maker liable.

The plaintiff submitted that it saw no reason why it should not be entitled to except and seek the reconsideration of the validity of the judgment of Uchena J on the point since the learned judge was alleged not to have referred E to s 93(1) of the Act which recites thus:

> "Where a note is in the body of the note payable at a particular place, it must be presented for payment at that place in order to render the maker liable, unless a particular place mentioned is the place of business of the payee and the note remains in his hands. *In any other case, presentment for* F *payment is not necessary in order to render the maker liable*" (emphasis added).

In the light of the above, the plaintiff concluded that there was no requirement for the notes *in casu* to be presented at any particular place and in the result the provisions of the Act which provide for presentment to be at the date of maturity did not apply. Accordingly, the plaintiff prayed that para 2 of the G defendant's plea be struck out with costs.

In its reply to the plaintiff's exception, the defendant had this to say. It stated that this court, in this very same matter had found that the two negotiable certificates of deposit indicated "Trustfin's logo, address and certificate number. Trustfin's authorised signatories then signed the negotiable H certificates of deposit".

2006 (1) ZLR p212

Kamocha J

It went on to state that the two negotiable certificates of deposit were "payable A on maturity upon presentation to Trustfin" and therefore presentation was expressly required by the certificates themselves. In the result, the defendant claimed to be entitled to rely on the provisions of s 44(1) of the Act and concluded that the plaintiff's exception was devoid of any merit on that basis.

On the second prong, the defendant submitted that the same issue taken in B the exception was raised in the plaintiff's heads of argument and was disposed of by the court's findings referred to *supra* and was *ipso facto res judicata* as between the parties.

The defendant further alleged that the plaintiff was estopped from taking the point by exception, more so in light of the fact that it had voluntarily purported to present the negotiable certificates of

deposit. If no place of presentation C was indicated on the certificates, the plaintiff would not have known such place and would not have presented them as alleged, so the defendant's submission went.

Furthermore, it was the defendant's contention that as appears *ex facie* the exception, the plaintiff had only excepted to the second defence of the D defendant. Thus, the matter had still to proceed to trial in respect of the first defence.

In the defendant's view, the relief sought in the exception was the same relief that this court had refused to grant when it ordered the case to stand over for trial in terms of r 34 of the Rules of this court.

The defendant concluded that the exception was not only ill-conceived but E was also another frivolous attempt to avoid going to trial whereat all its defences could be explored and ventilated by *viva voce* evidence. In the result, it prayed for the dismissal of the exception with costs on a punitive scale of attorney and client.

The brief facts giving rise to these proceedings are that plaintiff was a bearer F of two negotiable certificates of deposit "NCD" issued by the defendant on 11 December 2003 and 20 January 2004. Their maturity dates were 2 January 2004 and 3 February 2004, respectively.

It is common ground that the plaintiff did not present the negotiable certificates of deposit on the due dates. Instead, the plaintiff alleged that it had presented G them on 5 April 2004 but there was no payment to it as the bearer thereof. This was, however, denied by the defendant which alleged that the first communication it received from plaintiff was a letter of demand of 12 May 2004.

The defendant's denial prompted the plaintiff to issue summons for provisional sentence which was refused by this court, which ordered the case to stand over for trial. H

Kamocha J

A The defendant then filed its plea in the following terms:

> "The defendant pleads to the plaintiff's claim as follows:
>
> 1. The plaintiff is not a holder in due course and is therefore not entitled to sue on the negotiable certificates of deposit.
> 2. It being common cause that: B
>
> (i) The maturity and/or due dates of the instruments relied upon by the plaintiff were 2 January 2004 and 3 February 2004, respectively;
>
> (ii) The plaintiff itself alleges (which the defendant denies) that it presented the instruments for payment on 5 April 2004;
>
> (iii) The 5 April is not the maturity or due date for any of the negotiable certificates of deposit. It is long after the maturity C dates for the negotiable certificates of deposit;
>
> The defendant pleads that it is discharged from all and any liability based on the negotiable certificates of deposit in accordance with s 44(1) of the Bills of Exchange Act [*Chapter 14:02*]."

This exception relates to para 2 *supra*. The plaintiff alleged that the defendant's D plea was bad in law and disclosed no defence in that:

1. A negotiable certificate of deposit was not a bill of exchange but a promissory note.
2. In terms of s 93(1) of the Bills of Exchange Act [*Chapter 14:02*], a promissory note which is not payable at a particular place, as is the case here, does not have to be presented in order to render the maker liable.

E The plaintiff appears to be contradicting itself when it states that the notes *in casu* do not have to be presented in order to render the maker liable because in its summons it stated that: "The amount claimed by the plaintiff had become due and payable to it because on presentation of the bills to defendant on 5 April 2004, they were not paid to the plaintiff as the bearer thereof."

F In its written submissions, the plaintiff admitted that the negotiable certificates of deposit were promissory notes, *sui generis* and were governed by the provisions of part IV of the Act. According to the plaintiff, the said notes had to be presented within a reasonable time as provided for in s 92 and since they were allegedly presented for payment on 5 April 2004 that was sufficient. It was submitted that, moreover, the place for payment was not specified in the G body of the notes as stipulated by s 93(1) *supra*.

In order for the court to establish whether or not it was imperative for the notes *in casu* to be presented on their due dates in order to render the defendants liable or whether they only needed to be presented within a reasonable time, the court has to examine the relevant provisions of the Act.

Kamocha J

Part II of the Act in which s 44 is to be found deals with Bills of Exchange while A promissory notes are found in Part IV which contains ss 92, 93 and 95.

Section 44 lays down the rules of presentment for payment of Bills of Exchange and it provides thus:

> "44(1) 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 B bill is duly presented in accordance with the following rules –
>
> (a) where the bill is not payable on demand, presentment must be made on the day it falls due.
>
> (b) …
>
> (c) …
>
> (d) …" C

The plaintiff contended that the above provisions do not apply to promissory notes. Instead, it submitted that it was s 92(1) which was applicable which provided that:

> "92(1) When a note payable on demand has been endorsed, it must be presented for payment within a reasonable time of the endorsement. If it D not so presented the endorser is discharged."

The contention by the plaintiff that the provisions of Part II which relate to Bills of Exchange are not applicable is without foundation as it purports to ignore what is contained in s 95(1) which provides thus:

> "95 *Application of Part II to notes* E
>
> (1) Subject to this part and except as by this section provided, the provisions of this Act relating to bills apply, with the necessary modification, to notes."

In essence, s 44 *supra* which relates to presentment of bills for payment also applies to notes *mutatis mutandis*. Presentment of such notes must be made on the days they fall due. There is no controversy *in casu* that the notes were F not presented on their due dates.

The issue that this court must determine is whether or not each note in its body was made payable at a particular place so that it could be presented for payment at that place in order to render the defendant liable in terms of s 93(1) *supra* or could it be said the place of payment was there merely by way of G memorandum.

It is important to mention at this stage that the two promissory notes are couched in an identical format which is set out below.

Kamocha J

A **NEGOTIABLE CERTIFICATE OF DEPOSIT**

SETTLEMENT DATE: **11 DECEMBER 2003**

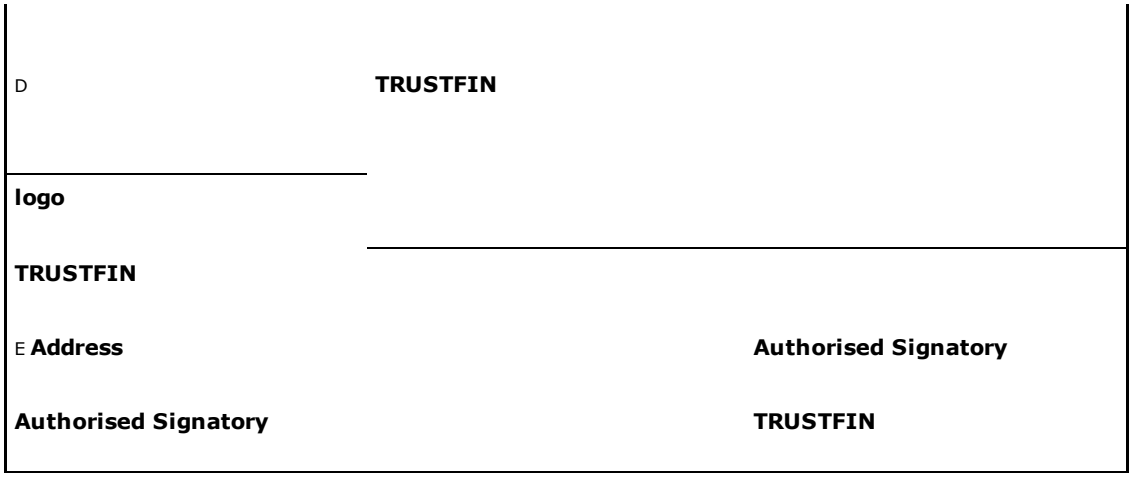
MATURITY DATE: **02 JANUARY 2004**

B **AT: 22 (TWENTY TWO) DAYS AFTER SIGHT PAY TO THE ORDER OF BEARER $1 000 000 000.00**

AMOUNT IN WORDS: ONE BILLION DOLLARS ONLY

C **FOR VALUE RECEIVED: PAYABLE ON MATURITY DATE UPON PRESENTATION OF THIS CERTIFICATE TO TRUSTFIN**

_____ **Per Pro**



F In the above diagram, the place of payment is the one reflected as "For value Received: Payable on maturity date upon presentation of this certificate to TrustFin".

This, in my view, is specified in the body of the note. It is above both authorised signatories and the TrustFin logo and address. It is also above the per pro TrustFin phrase printed in a box. The place of payment is printed along with G the rest of the note. In *Trecothick* v *Edwin* (1816) 1 Starky 468, Lord Ellenborough held that such a place of payment must be regarded as being in the body of the note.

In *Masters* v *Baretto* (1849) 19 LJCP 50 where the direction to pay at a certain place appeared below the signature of the maker, it was held not to be in the body of the note. However, in the South African case of *Breitenbach* v

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Kamocha J

Immelman's Konstruksie (Edms) Bpk 1970 (3) SA 507 (T), it was held that, A because the line specifying the place of payment was carried through above the signature of the maker, presentation was necessary.

The case law was summarised as follows by Burger J in *Veritas International Promotions* v *Trustees, Langad Trust* 1985 (3) SA 945 (C) at 948A-E.

> "There are a number of cases where it was decided that a place of payment B specified in the lower left hand corner of a promissory note is not in the body of the note. In the various cases, the place of payment was either on the same line as the signature of the maker, in some cases, it started on the line above and continued on the same line and bracketed together. *In none of the cases except one was the line in which the place of payment was specified continued through to the right above the signature.* These C cases were *Curtis* v *Rattray* 1913 WLD 181; *Harvey and Co Ltd* v *Dougherty* 1914 TPD 665; *Brazil* v *Henderson and Henderson* 1946 WLD 270; *Botha & Booysens (Pty) Ltd* v *du Plessis* 1957 (4) SA 72 (O); *Competent Distributors (Pty) Ltd* v *Monarch Cabinet Works (Pty) Ltd & Anor* 1958 (1) SA 161 (D); *Laztex (Pty) Ltd* v *Telemetry Equipment (Pty) Ltd* (1) 1976 (1) SA 71 (W) and *New York Shipping Co (Pty) Ltd* v *E M M I Equipment (Pty) Ltd* 1968 (1) SA 355 (SWA). D
>
> The exception is the decision in *Breitenbach* v *Immelman's Konstruksie (Edms) Bpk* 1970 (3) SA 507 (T), where it was held that because the line specifying the place of payment was carried through above the signature of the maker, presentation was necessary. In the present case, the part of the note specifying payment is in the left hand corner, starts above the E signature and, if one takes the account number as part of the place of payment, it is carried on below. It seems to me that the account number is part of the place of payment as it specifies in greater detail where at the place of payment the money is to be found. Looking at the note as a whole, I am satisfied that it was not intended to incorporate the place of payment into the body of the note" (my emphasis).

In casu, the line in which the place of payment was specified was carried F through well above the authorised signatures in the body of the note from left to right just as in the *Breitenbach* v *Immelman*'s case. It, therefore, follows that presentment was necessary in order to render the maker liable.

This same conclusion was arrived at by Uchena J but the plaintiff has brought up this matter again seeking the reconsideration of the validity of the judgment G of Uchena J on that same point. This, in

my view, is improper since that same point had been adjudicated upon by a judge of this court who concluded that presentment of the negotiable certificates of deposit on their maturity dates was necessary. It is difficult to understand why the plaintiff contended that that point was not *res judicata*. H

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Kamocha J

A The defendant had submitted that the plaintiff should be ordered to pay costs on an attorney and client scale on the ground that the plaintiff should not have excepted at all as it felt that the exception was devoid of any merit and in any event the point raised was infact *res judicata.* I cannot accede to that request. Exceptions when well taken can dispose of a case without the need to go through a trial.

B In the result, I would order as follows:

It is ordered that:

(a) the exception be and is hereby dismissed; and

(b) the plaintiff pays costs on a party and party scale.

C *Gill, Godlonton & Gerrans,* plaintiff's legal practitioners

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Kantor and Immerman, defendant's legal practitioners A

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BENNETT v MNANGAGWA NO & ORS 2006 (1) ZLR 218 (S)

2006 (1) ZLR p218

Citation	2006 (1) ZLR 218 (S)
Case No	Judgment No. S-75-05
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Cheda JA, Malaba JA & Gwaunza JA
Heard	26 May 2005
Judgment	9 March 2006
Counsel	*J J Gauntlett SC,* with him *A P de Bourbon SC,* for the applicant *S J Chihambakwe,* with him *J Mhlanga,* for the first, second, third and fourth respondents Mrs *R Gatsi,* for the seventh respondent (intervener)
Case Type	Constitutional application
Annotations	Link to case annotations

Flynote

Constitutional law — *Constitution of Zimbabwe, 1980 — s 15(1) — inhuman or degrading punishment — imposition of a sentence which is grossly disproportionate to the transgression — violation of s 15(1) because it is inhuman or degrading — member of Parliament being imprisoned for serious instance of contempt of Parliament — punishment not close to maximum permissible — not grossly disproportionate* E

Constitutional law — *Constitution of Zimbabwe, 1980 — s 18 — entitlement to a fair hearing by an independent and impartial court — provisions do not apply to Parliament sitting as a curt*

Constitutional law — *Constitution of Zimbabwe, 1980 — s 23 — Parliament sitting as a court — inference of racism by a witness — not to be* F *attributed to Parliament itself or any committee thereof*

Constitutional law — *Constitution of Zimbabwe, 1980 — ss 49 and 13(2) and (6) — Parliament authorised to make laws which provide for past acts of contempt of Parliament*

Constitutional law — *Parliament — Parliament sitting as a court to* G *adjudicate on matter of privilege or contempt — not sitting as court of law and not bound to follow procedures of court of law — sentence passed by Parliament — imposition of custodial sentence — common assault — fifteen months' imprisonment of which three months suspended on conditions — whether such a sentence is grossly disproportionate to the offence — factors to be taken into account in a consideration* H

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Chidyausiku CJ

A *thereof*

Statutes — *Privileges, Immunities and Powers of Parliament Act [Chapter 2:08] — not ultra vires the Constitution*

Headnote

When Parliament sits as a court, it is not sitting as a court of law or an B adjudicating authority. It is a court of its own kind, created by law, namely the Constitution itself, and s 18 thereof does not apply to its proceedings when sitting as a court.

The applicant was a white member of Parliament and a member of the minority party therein. He had been a farmer until he was unlawfully forced off his farm. This followed a long period of harassment and other unlawful C actions by state agencies, the police and military forces, as well as others. Legal proceedings brought no relief, and no action was taken against any of the perpetrators. During a debate on an amendment to the Stock Theft Act, on which the applicant had made a contribution, the Minister of Justice, Patrick Chinamasa, made a series of insulting remarks about white farmers, which implied that they were thieves who had stolen the D land, and said that he would ensure that the applicant would never set foot on his farm again. The applicant was goaded by these remarks into going to the table where the Minister was addressing the House and shoving him to the ground. He also pushed another minister who intervened. As a result thereof, a committee of Parliament was set up to conduct an enquiry into the incident and to make recommendations to E Parliament. The committee consisted of five members of Parliament, three of whom were from the majority party, as was Chinamasa, and two were from the minority party. After hearing evidence from the applicant and from others, including Chinamasa, the committee unanimously found that the applicant was guilty of contempt of Parliament. By a majority of F three to two, the vote being along party lines, the committee recommended that the applicant be imprisoned for a period of fifteen months of which three months were to be suspended on certain conditions. This recommendation was accepted by a majority of the members of Parliament, the vote again being along party lines. The applicant thereupon brought an application before the Supreme Court.

G Although a number of points were to be raised upon his behalf at the hearing, at the commencement of argument, the legal practitioner representing the Attorney-General (the seventh respondent) stated that she abided by her heads of argument, in which she conceded that the sentence which had been imposed upon the applicant contravened s 15(1) of the Constitution. This provision prohibits the imposition of punishments

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Chidyausiku CJ

which are inhuman or degrading. Counsel for the applicant thereupon A submitted that there was no need to hear full argument. He submitted that the court should simply declare the sentence to have contravened s 15(1) of the constitution and to order applicant's release from prison. By a majority, the court declined to adopt this course and asked for full argument on all constitutional

arguments raised by the applicant. Upon B the resumption of the hearing the seventh respondent's legal practitioner informed the court that she had been instructed by the Director of the Civil Division of the Attorney-General's Office to withdraw the concession she had previously made concerning s 15(1) of the Constitution. She proffered no reasons of the withdrawal to the concession.

Thereafter, it was argued on behalf of the applicant, *inter alia*, that in the light C of certain remarks by Chinamasa, he had been discriminated against on grounds of race and political opinion contrary to the provisions of s 23 of the Constitution. It was also submitted on his behalf that s 16 of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*] in terms of which Parliament had imposed the custodial punishment on him, was *ultra vires* the Constitution, in particular s 49 thereof. In this regard, D it was urged upon the court that it should give effect to the doctrine of the separation of powers and deny Parliament any punitive power so as to reconcile Chapter VIII of the Constitution which vests judicial authority in the courts and s 49 & 13(2)(b) of the Constitution which vests some judicial authority in Parliament. Finally, and in any event, it was submitted E upon Applicant's behalf that the custodial sentence was inhuman or degrading and violated his fundamental right which was protected under s 15(1) of the Constitution. The point had originally been conceded by the legal practitioner representing the Attorney-General.

Held, that although the remarks of Chinamasa could give rise to an inference of racism, such remarks would only reflect his views or attitude. They F could not be ascribed to or attributed to either the members of the Committee or to Parliament.

Held, further, that ss 49 and 13(2)(b) of the Constitution authorise Parliament to make laws that provide for the punishment of past acts of contempt of Parliament and s 16 of the Privileges Immunities and Powers of Parliament Act [*Chapter 2:08*] is a law authorised by those two provisions G of the Constitution. There was no conflict between those two provisions and Chapter VIII of the Constitution which required conciliation by resorting to the doctrine of separation of powers.

Semble, that in any event as s 3 of the Privileges, Immunities and Powers of Parliament Act [*Chapter2:08*] has not been impugned and remains operative, it conferred on the Zimbabwean Parliament identical powers H

Chidyausiku CJ

A enjoyed by the United Kingdom Parliament, which powers include punitive powers for contempt of Parliament.

Held, further, that a punishment that is ''grossly disproportionate'' to the transgression constitutes a violation of s 15 (1) of the Constitution, that is to say, it is inhuman or degrading.

Held, further (*per* Chidyausiku CJ, with Cheda JA, Malaba JA & B Gwaunza JA concurring) that, on the facts of the case, the punishment which was imposed upon the applicant, although severe, was not grossly disproportionate to the transgression. In coming to this conclusion, regard was paid to the fact that the assault was perpetrated upon a Minister of the Government and the leader of the House during the C course of Parliamentary proceedings. It was akin to assaulting a judge during court proceedings and must rank among the worst case of contempt of Parliament. The applicant was not contrite and indeed bragged and boasted about what he had done.

Held, further (*per* Chidyausiku CJ, with Cheda JA, Malaba JA &Gwaunza JA concurring) that it was not the degree of force that was D used in the assault that was critical in determining the appropriate punishment but the circumstances thereof. Rather, it was the occasion, the status of the assailant and the assaulted, and the gross violation and the dignity of Parliament which were the important factors.

Held, further (*per* Sandura JA) that regard had to be paid to the applicant's founding affidavit, the contents of which were not seriously challenged, E in determining whether the sentence was grossly disproportionate to the seriousness of his offence. His affidavit set out the degree and the extent to which he had been harassed by employees of the State over a considerable period of time. He had been unlawfully driven off his farm and his property stolen. Court orders had been ignored and two of his employees murdered by employees of the State.

F *Held,* further (*per* Sandura JA) that regard had to be paid to the fact that the applicant was guilty of what, essentially, was no more than common assault. Imprisonment is a rigorous and severe form punishment which should be resorted to only when absolutely necessary (*dicta per* Reynolds J in *S* v *Ngombe* HH-504-87 followed).

G *Held,* further (*per* Sandura JA) that the failure of the legal practitioner representing the Attorney-General to advance any valid reason for the withdrawal of her concession inevitably had to lead to the conclusion that no such reason existed.

Held, further (*per* Sandura JA) that on the facts of the case there could be no doubt that the sentence was grossly disproportionate to the

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Chidyausiku CJ

seriousness of the offence. Any term of imprisonment would have been A a sentence which was so excessive as to shock or outrage contemporary standards of decency.

Held, further (*per* Chidyausiku CJ, Cheda JA, Malaba JA &Gwaunza JA, with Sandura JA dissenting) that the application must be dismissed but with no order as to costs. B

Cases cited

Gundu & Anor v Sheriff of Southern Rhodesia & Anor 1965 RLR 301 (AD)

Kielly v Carson (1842) 13 SCR 158

Landers v Woodworth (1878) 2 SCR 158

Mutasa v Makombe NO 1997 (1) ZLR 330 (S); 1998 (1) SA 397 (ZS) C

S v Gorogodo 1988 (2) ZLR 378

S v Ncube & Ors 1987 (2) ZLR 246 (S); 1998 (2) SA 702 (ZS)

S v Ngombe HH-504-87

R v Richards, ex p Fitzpatrick & Browne (1954-55) 92 CLR 157

R v Runyowa 1966 RLR 42 (PC); [1966] 1 All ER 633 (PC); 1966 (2) SA 495 (R) D

Legislation considered

Constitution of Zimbabwe 1980, ss 13(2)(b), 15(1), 18(2), 18(9), 23, 24 & 49

Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*], ss 3, 16 & 21 E

Case information

J J Gauntlett SC, with him *A P de Bourbon SC,* for the applicant

S J Chihambakwe, with him *J Mhlanga,* for the first, second, third and fourth respondents

Mrs *R Gatsi,* for the seventh respondent (intervener) F

Judgment

CHIDYAUSIKU CJ: This application is brought in terms of s 24 of the Constitution of Zimbabwe. Section 24 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 may apply to the Supreme Court for redress. The applicant, who was at the relevant time a Member of Parliament, G assaulted Mr Patrick Chinamasa, MP, Minister of Justice, Legal and Parliamentary Affairs, and Leader of the House (hereinafter referred to as "Chinamasa"). The assault took place in Parliament while it was in session. He was charged with, and found guilty of, contempt of Parliament. He was sentenced, by Parliament, to fifteen months' imprisonment of which three months' imprisonment was suspended on certain conditions. H

Chidyausiku CJ

A The applicant challenges that conviction and punishment on the following four grounds:

1. The proceedings violated his constitutional and fundamental right to a fair hearing by an independent and impartial court or other adjudicating body protected by s 18(1), (2) and (9) of the Constitution of Zimbabwe ("the Constitution"). B
2. He was discriminated against on grounds of race and political opinion contrary to the provisions of s 23 of the Constitution.
3. The punishment imposed on him was inhuman or degrading and violated his fundamental right protected under by s 15(1) of the Constitution; and C
4. That s 16 of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*] ("the Act"), in terms of which Parliament imposed the custodial punishment on the applicant is, *ultra vires* the Constitution, in particular s 49 of the Constitution.

The following are the facts of the case.

On 18 May 2004 and in the Parliament of Zimbabwe, while Parliament was D sitting, the applicant (hereinafter referred to as "Bennett") assaulted Chinamasa while he was addressing Parliament by felling him to the floor.

Shortly after the incident, a motion raising the question of privilege on the conduct of Bennett was moved in Parliament. The motion was as follows:

> "Following the unfortunate events of this afternoon, whereby during a E debate on the adverse report of the Parliamentary Legal Committee on the Stock Theft Amendment Bill, Honourable Bennett rose from his seat without leave of the Chairperson of the House, proceeded to the table where the Leader of the House Honourable Chinamasa was addressing the House and violently shoved him to the ground together with Honourable Mutasa who had risen to render assistance to Honourable Chinamasa thereby assaulting them. I move that a Privileges Committee F be constituted to investigate the conduct of Honourable Bennett on allegations of contempt of Parliament as envisaged by section 21 of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*] as read with paragraph 16 of the Schedule."

The motion was carried and a Committee consisting of five Members of G Parliament was appointed to enquire into the matter. The Parliamentary Committee (hereinafter referred to as the Committee) consisted of three members of the ruling party ZANU (PF) and two members of the MDC, the opposition party, and the party to which Bennett belongs.

The Committee was to conduct an enquiry and make recommendations to Parliament in accordance with the Act on whether or not the conduct of

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Chidyausiku CJ

Bennett amounted to contempt of Parliament in terms of s 21 of the Act. A

The Committee decided to conduct its proceedings in an inquisitorial as opposed to an accusatorial manner. The Committee first viewed the video extract of the events of 18 May 2004 and perused the *Hansard* of that day. The Committee also considered the following:

(a) the video clip of the events of 18 May 2004; B
(b) the *Hansard* Report of 13 and 18 May 2004;
(c) the transcript of the Voice of America radio interview of the Honourable D Mutasa ("Mutasa") on 20 May 2004;
(d) the Parliamentary Debate of 20 May 2004;
(e) the Committee directed that there be presented a full transcript of the video clip. C The transcript was prepared and duly considered by the Committee;

The Committee was further supplied with and considered the following documents and video clips:

(i) an extract from *The Standard Newspaper* of 23May 2004 entitled "Bennett Speaks Out"; D
(ii) a bunch of documents on Charlesworth Farm and Delport Farm with attachments submitted by Bennett;
(iii) a video clip of Zimbabwe Broadcasting Corporation News Bulletins flighted after 18 May 2004;
(iv) a video clip of a speech by His Excellency The President on 23 June 2003; E and
(v) a transcript of The Voice of America radio interview of Mutasa.

As a matter of guidance to itself the Committee decided that it would seek to establish the following:

(a) whether Bennett did assault Chinamasa and Mutasa; F

(b) whether Bennett caused a disturbance in Parliament;

(c) whether Bennett willfully interrupted the orderly conduct of the business of the House;

(d) if any of the above was established, whether Bennett's conduct amounted to contempt of Parliament; and G

(e) whether there was any defence available to Bennett.

At the commencement of the enquiry Bennett raised a number of legal objections and made certain submissions, namely:

(i) Bennett indicated that he wished to be represented by a legal practitioner of his choice and the Committee resolved that Bennett could be H

Chidyausiku CJ

A accompanied by his legal representative who could give him advice and that the legal representative could lead him when he gave evidence to the Committee.

(ii) Bennett enquired whether the proceedings were going to be adversarial or inquisitorial and was advised that the enquiry would be inquisitorial but the Committee would avail to him all the evidence received by it, B including the transcripts of *viva voce* evidence from witnesses.

(iii) Bennett also raised the issue that he was being discriminated against because he alone was being summoned before the Committee while both Chinamasa and Mutasa, who conducted themselves in a manner contemptuous of Parliament, were not being called upon to appear. The C Committee overruled this objection and concluded that there was no breach of Bennett's constitutional rights.

(iv) Bennett also requested the recusal of the Chairperson of the Committee on the grounds that he had moved the motion for the establishment of the Committee on Privileges on this matter and therefore had an interest or was biased against him. The Committee ruled that no grounds of bias or D conflict of interest had been established to warrant the Chairperson recusing himself from the proceedings.

(v) Bennett also raised the issue of the stay of the Committee's proceedings pending the finalization of an application he had filed with the High Court to review Parliament's decision to appoint the Committee. This request E was turned down.

(vi) Bennett further requested that his wife be in attendance, which request was granted.

(vii) He further requested that a journalist from *Agence France Press* be present and the Committee advised that the journalist should make F application to the Committee, which application was never made and the matter fell by the wayside.

The Committee heard oral evidence from three witnesses — The Honourable D Mutasa MP, (hereinafter referred to as Mutasa), Bennett and Chinamasa, in that order. The evidence of these witnesses was to the following effect:

G Mutasa stated that he witnessed the incident of 18 May 2004. He saw Bennett move from his seat and confront Chinamasa after he appeared to have been offended by what Chinamasa was saying about him. Bennett assaulted Chinamasa by violently shoving and pushing him to the ground. He observed the Minister of Home Affairs trying to restrain Bennett who intended to further assault Chinamasa while he was lying on the floor. At that stage, he kicked H Bennett from behind in order to divert his attention away from Chinamasa and

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Chidyausiku CJ

in the process stop any further assault on Chinamasa. Bennett tried to assault A him, but he dodged by sitting down and kicking out at him. At no stage did Bennett connect a blow on Mutasa's body. He alleged he kicked Bennett in defence of the assault on Chinamasa. The Committee accepted this evidence. The Committee's acceptance of this evidence is not challenged.

The next witness to give evidence to the Committee was Bennett. He produced B to the Committee bundles of documents on Charlesworth Farm and Delport Farm. He produced these documents in support of his contention that he underwent trials and tribulations at the hands of the State and its agents when his farm Charlesworth in Chimanimani was acquired by the Government. He also stated that he was harassed by the State at Delport Farm in Ruwa.

Bennett stated that he had not intended to be disrespectful to the House and C that the incident occurred when he reacted to insults from Chinamasa and the years of harassment he had endured at the hands of the State. He admitted pushing, thus assaulting, Chinamasa, who had provoked him.

In respect of Mutasa he admitted pushing him in self-defence. Bennett admitted causing a disturbance in the House, but denied that he did so willfully. D

Bennett also gave evidence of his background and his response to Chinamasa's remarks. His evidence in this regard was summarised by the Committee as being to the following effect:

"(i) He did not inherit any farm from his parents or forefathers but bought them through his own efforts after obtaining certificates of no present E interest from the State.

(ii) He had an altercation with Chinamasa and the Honourable J Made at one meeting of the Portfolio Committee on Lands, Land Reform, Rural Resources and Water Development.

(iii) He had been subject(ed) to persistent harassment from the members F of the Defence Forces, State Security, and ruling party operatives since 2000 when he stood as a parliamentary candidate for the opposition MDC.

(iv) He had taken up the matter of his harassment with the Speaker and Vice President Msika but to no avail.

(v) He referred the Committee to the dossiers on Charlesworth and G Delport Farms to sustain his defence of persistent harassment.

(vi) He invited the Committee to view a video clip of a speech by His Excellency the President (in June 2003), which speech he alleged His Excellency incited people to continue to harass the Honourable Bennett and his family.

(vii) Honourable Bennett showed the Committee clips of News Bulletins H

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A shown after the 18th May 2004 and the demonstrations held against him at Parliament and elsewhere in the country after this incident.

(viii) He was praised and held with honour by his supporters in Mutare and Kuwadzana after he assaulted the Honourable Chinamasa.

(ix) On the day he assaulted Honourable Chinamasa he had acted on impulse in reaction to the insults. He felt that the Chairman of the B Committee of the whole House had not protected him during the time he alleges the Honourable Chinamasa was insulting him.

(x) He admitted that he had not sought the protection of the Chairman before assaulting Honourable Chinamasa.

(xi) He had not apologised to Honourable Chinamasa or to the Speaker on his conduct on the 18th May 2004."

C The Committee heard evidence from Chinamasa, which it summarised as follows:

"(i) That Parliament was an institution where members enjoyed freedom of expression and this was evidenced by robust debates including trading of harsh words and sometimes insults. In instances where it D was perceived that the insults had overstepped the mark, the offended member had a right to seek the protection of the Speaker or Chairperson of a Parliamentary session. The Speaker will always protect the offended member in appropriate circumstances.

(ii) That as Leader of the House he expected to be accorded the respect and dignity befitting his status by all Honourable Members of E Parliament.

(iii) That the utterances he made in relation to Honourable Bennett on 18th May 2004 were not any different from those made in any democratic Parliament. He then referred the Committee to the utterances made on 13th May 2004, relating to him by Honourable Job Sikhala in which he was alleged to be a thief. When those words were uttered F by Honourable Sikhala, Honourable Chinamasa sought the protection of the Speaker and the matter was resolved.

(iii) That what he said on that day was a factual statement of history that land was stolen from the indigenous people of Zimbabwe by white colonialists. That Honourable Bennett like all offsprings (offspring) of colonialists was a beneficiary of this evil system of colonialism. G That the government

of Zimbabwe was determined to correct the wrongs of the past through the acquisition of hitherto white owned land including Charlesworth Farm owned by Honourable Bennett and redistribute this land to the black majority. That such utterances did not amount to provocating the assault.

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(iv) That in order to preserve the dignity of the House if a member felt A verbally insulted, he or she should respond verbally and not physically.

(v) That whites in Zimbabwe still believe that they were superior to blacks and this explained why he was assaulted by Honourable Bennett during a Parliamentary session notwithstanding that he is Leader of the House and a Cabinet Minister. B

(vi) That Honourable Bennett appeared on a British Broadcasting Corporation interview boasting over the incident and saying that he had no apologies to make. That a rally had been held in Kuwadzana by the MDC with the participation of Honourable Bennett to celebrate the assault.

(vii) That the MDC leadership in Parliament had apologised to Honourable C Chinamasa for the unfortunate incident but Bennett had not apologised even as Honourable Chinamasa gave evidence to the Committee."

After hearing the evidence the Committee made the following factual findings:

"(a) Honourable Chinamasa made robust submissions regarding the D history of colonialism and that Honourable Bennett had benefited out of his privileged relationship with those who colonized this country.

(b) That Honourable Bennett felt offended by Honourable Chinamasa's remarks during those submissions.

(c) That Honourable Bennett did not seek the protection of the Chair E when he felt offended by the remarks of Honourable Chinamasa.

(d) That Honourable Bennett without leave of the Chair stood up from his position, used threatening language as he moved towards Honourable Chinamasa, got to where Honourable Chinamasa was standing and with considerable force pushed him to the ground thereby felling him. F

(e) A number of Members of Parliament intervened and restrained Honourable Bennett.

(f) The Committee observed movements from Honourable Mutasa towards Honourable Bennett during the scuffle. At that stage it was not clear if Honourable Mutasa had kicked Honourable Bennett or if G Honourable Bennett had indeed pushed Honourable Mutasa to the ground or if he had connected a blow to the body of Honourable Mutasa.

(g) The Committee observed from the video clip that indeed there was a disturbance in the House and the business of the House was interrupted. There was disorder in the House with a lot of confusion H

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A and commotion until Honourable Bennett was taken out of the House by the Sergeant at Arms. Order was eventually restored after the intervention of the Deputy Speaker."

The factual findings of the Committee are not challenged. On the basis of these facts the Committee concluded that Bennett was guilty of contempt of Parliament. Their reasoning in coming to that conclusion was as follows:

B "Decision of the Committee on culpability

From the reading of these debates it was clear that during the debate on the Adverse Report on the Parliamentary Legal Committee:

(i) There was use of robust and sometimes offensive language by Members of Parliament from both sides of the House. C

(ii) At one stage, Honourable Chinamasa had to seek the protection of the Chair after he felt that he was being called a thief by Honourable Sikhala.

(iii) It was still not clear if Honourable Bennett had indeed assaulted Honourable Mutasa or if it was Honourable Mutasa who had kicked Honourable Bennett.

D The Committee analysed the submissions made by Adv *Matinenga* on behalf of Bennett on the defence of provocation. The Committee came to the following conclusion that:

The defence of provocation was not sustainable in this case. The legal authorities in this country do not support a defence of provocation on a charge of contempt.

E In any event, evidence brought before the Committee does not support the defence of provocation.

The language used by Honourable Chinamasa was robust but that was expected in Parliamentary debates. If Honourable Bennett had felt offended by the language he should have sought the protection of the Chair. In this F instance he did not seek the protection of the Chair. He rose from his seat without the permission of the Chair, advanced towards Honourable Chinamasa, attacked him and pushed Honourable Chinamasa thereby causing him to fall.

Regarding an assault on Honourable Mutasa, the Committee found that from the evidence brought before it, Honourable Bennett had not assaulted G Honourable Mutasa.

The Committee accepted that Honourable Bennett was guilty of a single act of contempt which manifested itself in a number of events in Parliament that afternoon.

Honourable Bennett rose from his seat without permission from the Chair and assaulted Honourable Chinamasa. It was that assault on Honourable H Chinamasa which invited the reaction of Honourable Mutasa. It was that

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assault which led to a commotion in Parliament with Members of Parliament A reacting to the unusual event. Some managed to restrain Honourable Bennett after he had floored Honourable Chinamasa with others rising from their seats and Honourable Mutasa kicking Honourable Bennett."

As already stated after examining all the evidence, the Committee unanimously found Bennett guilty of contempt of Parliament. B

The evidence of contempt of Parliament by Bennett is overwhelming. A verdict of guilty of contempt of Parliament was inevitable. That verdict was unanimous and is not challenged on the basis that the evidence does not support the verdict reached by the Committee.

Having found Bennett guilty of contempt of Parliament, the Committee recommended that Bennett be imprisoned for a period of fifteen months of C which three months' imprisonment be suspended on certain conditions. The minority members of the Committee felt a custodial sentence was inappropriate and suggested community service or a fine coupled with a suspended custodial sentence. I shall revert to the reasons for sentence later on in this judgment. D

On 26, 27 and 28 May 2004, the report of the Committee was tabled before the Parliament of Zimbabwe and duly debated. The recommendation of the Committee was accepted by Parliament through a majority vote. The ruling party's Members of Parliament voted in support of the Committee's recommendation, while the opposition Members of Parliament voted against the report. The applicant was found guilty and duly punished. E

The facts outlined above, in my view, reveal that the proceedings of the Committee were thorough and conducted in an eminently fair and impartial manner. Indeed, Bennett did not criticize the manner in which the proceedings were conducted. His complaint related to the composition of the Committee and the composition of Parliament itself, the contention being that the F Committee and Parliament were judges in their own cause and therefore biased.

I now turn to deal with the four grounds of challenge.

WAS THE APPLICANT'S RIGHT OR ENTITLEMENT TO A FAIR HEARING BY AN INDEPENDENT AND IMPARTIAL COURT OR OTHER ADJUDICATING AUTHORITY, AS GUARANTEED BY G S 18 OF THE CONSTITUTION, VIOLATED?

The main submission in this regard is that the majority members of the Committee were members of the ruling party, ZANU (PF), whilst only two members of the Committee were members of the MDC, the opposition party to which Bennett belonged. It was argued for the applicant that the majority H

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A of the Committee members were judges in their own cause as ZANU (PF) was the aggrieved party. It was also argued that Parliament consisting of a majority of ZANU (PF) Members of Parliament was equally a judge in its own cause. In short it was argued that both the Committee and Parliament could not adjudicate in this matter without violating the principle of natural justice that nobody should be judge in his own cause.

B Mr *Chihambakwe*, for the first respondent, on the other hand, argued that the complainant in this case was Parliament and not ZANU (PF). The offence Bennett was charged with was contempt of Parliament and not contempt of ZANU (PF). On this basis, he submitted, that Members of Parliament belonging to the ZANU (PF) party were competent to adjudicate upon a matter of C contempt of Parliament by the applicant. He submitted that there was no conflict of interest.

There is substance in Mr *Chihambakwe*'s submission. The applicant was charged with contempt of Parliament and Parliament is a separate and distinct entity from ZANU (PF). In fact, if the applicant's contention were correct, then Members of Parliament from his own party could not adjudicate as they, on D the applicant's argument, would be the committers of the contempt. The MDC Members of Parliament, on Bennett's argument, are the assailants and ZANU (PF) Members of Parliament the assaulted, accordingly both ZANU (PF) and MDC Members of Parliament would have a conflict of interest. This argument, in my view, is absurd. I do not accept that the appointment of three out of five E members of the Committee from ZANU (PF) to enquire into the alleged contempt of Parliament by the applicant *per se* constitutes a violation of the rules of natural justice that nobody should be a judge in his own cause.

In considering the issue of a fair hearing in this case, it has to be borne in mind that when Parliament sits as a court it is not sitting as a court of law or an adjudicating authority. It is a court of its own kind, created by law, namely F by the Constitution itself. See *Mutasa* v *Makombe NO* 1997 (1) ZLR 330 (5); 1998 (1) SA 397 (S) at 402E-G wherein it was stated:

> "A finding of guilt by Parliament on a contempt offence is not a crime in the conventional sense. When dealing with these contempt offences Parliament, though sitting as a court, does not sit as a court of law. Its proceedings are not in the nature of a public criminal trial as envisaged G in s 18(2) of the Constitution; for Parliament is not 'an independent and impartial court established by law'. It exercises its own jurisdiction and powers conferred upon it by the Privileges, Immunities and Powers of Parliament Act. That it does so is recognised in the Constitution. Section 13(2)(b) thereof provides that no person shall be deprived of his personal liberty save, *inter alia*, as may be authorised by law 'in execution of the

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> order of a court punishing him for contempt of that court or of another A court or tribunal or *in the execution of the order of Parliament punishing him for a contempt*."

Consequently, failure by Parliament, when sitting as a court, to follow certain procedures that are followed in a court of law does not necessarily mean that such hearing is not fair or impartial. The procedures in the two courts are B fundamentally different. In a court of law, the court hears evidence, evaluates the evidence, and makes findings of fact. Thereafter a court of law applies the law to the facts it finds established by the evidence. The outcome of that process constitutes the determination of the court of law. Failure to follow this procedure by a court of law is an irregularity constituting a violation of the right protected by s 18 of the Constitution. In the court of Parliament, the procedure C is fundamentally and totally different. In the court of Parliament due process is satisfied by the mere moving of a motion setting out the allegation, debate and voting on the motion. At the end of the debate the question of a verdict and punishment is determined by a majority vote of the Members of Parliament. More often than not, either by design or otherwise, the vote to determine the outcome of any debate is along party or partisan lines. This court, in *Mutasa's* D case, *supra*, held that s 18(2) and s 18(9) of the Constitution do not apply to a trial by Parliament.

The facts of the *Mutasa*'s case *supra* are as follows: Upon a motion being passed and carried in the Zimbabwe Parliament, Mutasa had been ordered to attend the House, stand in his place and be reprimanded by the Speaker. The E reprimand was given for certain remarks which Mutasa had made outside Parliament which had been adjudged to be in contempt of Parliament. Mutasa thereupon brought proceedings in the High Court of Zimbabwe for an order setting aside the finding that he was guilty of contempt of Parliament, alleging that the procedure which had been adopted by the Select Committee of Parliament, which had been appointed to investigate the utterances made by F Mutasa outside Parliament, had violated Mutasa's fundamental right under s 18 of the Constitution to be afforded a fair hearing. He also contended that the utterances he had made outside Parliament were protected by his right to the enjoyment of freedom of expression as enshrined in s 20 of the Constitution. Mutasa also complained that his entitlement to a fair hearing by an independent and impartial court was violated by the Committee's refusal to allow him to be G legally represented at the hearing. Mutasa's contentions were dismissed.

Gubbay CJ, delivering the judgment of the full bench of this court, had this to say at p 402I-403A:

"The line drawn in the Constitution between punishment for contempt under an order of court or tribunal, and that imposed by Parliament, is H

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A significant and important. It indicates plainly, to my mind, that, in utilizing its powers under the Privileges, Immunities and Powers of Parliament Act in dealing with contempt offences, Parliament is not exercising a criminal or civil jurisdiction. Rather one *sui generis*, being the jurisdiction expressly authorised by law.

Thus, in respect of contempt offences s 18(2) of the Constitution, which B stipulates that every person charged with a *criminal offence* is to be afforded a fair hearing by an independent and impartial court, is of no application. Nor is s 18(9). It concerns the determination of the existence of civil rights and obligations and provides that in respect thereto every person is entitled to be afforded a fair hearing by an *independent andimpartial* court or other adjudicating authority. Parliament is *not* such a C court or authority."

The facts of *Mutasa*'s case, *supra*, may not be identical to the facts of this case but they are sufficiently similar to make *Mutasa*'s case applicable, with equal force to this case. In both cases the applicants complained that their right to a fair hearing protected under s 18 of the Constitution had been violated. In the *Mutasa* case, *supra*, by reason of him having been denied legal D representation, and in the present case, by the violation of the principle that no man should be a judge in his own case. The principle enunciated in *Mutasa*'s case, *supra*, that when Parliament sits as a court it is not an adjudicating body but court *sui generis* established by the law, the Constitution and, consequently s 18 of the Constitution is not applicable applies to this case. The applicant has not argued that *Mutasa*'s case *supra,* was wrongly E decided. It was argued for the applicant that *Mutasa*'s case, *supra*, is distinguishable. Counsel for the applicant's submissions in this regard are found in paras 15-18 of his heads of argument:

"15. It must be recognised immediately that Gubbay CJ in *Mutasa supra* suggested that s 18(2) and s 18(9) of the Constitution did not apply when Parliament found a member guilty of contempt. Whether this F approach was correct is, with respect, open to significant doubt. However, for purposes of this case, it is not necessary to decide whether Mutasa was correctly decided.

16. This is because Mutasa did not involve the deprivation of liberty – it involved a suspension from Parliament. In contrast, the present case involves a severe deprivation of liberty – a sentence of fifteen G months in jail (three months suspended).

17. Because the present case involves the deprivation of liberty, s 18 of the Constitution must be read in the light of the guarantee of individual liberty, which is contained in s 13 of the Constitution. Whatever the correctness of the decision in Mutasa, we submit that any deprivation of liberty may take place only as a consequence of H a procedurally fair hearing in accordance with natural justice. The

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matter must therefore be approached differently to Mutasa. Indeed, A in his decision, Gubbay CJ recognised that the circumstances of a particular case of contempt could nevertheless produce a violation of constitutional rights:

'Of course, in Zimbabwe … [contempt] jurisdiction must be exercised in a manner not inconsistent with or offensive to the Declaration of Rights in the Constitution. For instance, the B courts would not tolerate a situation in which the Speaker decreed that a member guilty of a contempt was to stand before the House chained and gagged to receive his punishment.'

18. Moreover, *Mutasa* is additionally distinguishable on the grounds that the applicant in that matter expressly abandoned his allegations of bias on the part of the committee which enquired into his contempt C (see Mutasa at 404A). Had these allegations been persisted in, and found as a fact by the Court, the logical corollary would have been that the proceedings were nullified, because bias (or the reasonable perception of bias) in law has that effect (*per* Corbett CJ in *Council of Review, SADF* v *Monnig* 1992 (3) SA 482 (A) at 495 B-D). In this regard, moreover, it is inconceivable that the Constitution could D countenance the deprivation of liberty through a process which did not meet the requirements of natural justice. By way of comparison, the South African Constitutional Court has two inter-related constitutional aspects:

'… the State may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives its citizens of freedom E for acceptable reasons, may it do so in a manner which is procedurally unfair.'

De Lange v *Smuts NO & Ors* 1998 (3) SA 785 (CC) at para 18; *S* v *Coetzee & Ors* 1997 (3) SA 527 (CC) at para 159.

Crucially, this holding of the Constitutional Court was sustained under both the 1993 and 1996 Constitutions, despite the fact that F neither section which protected liberty expressly referred to the notion of procedural fairness. The Court described the right to procedural fairness as being 'implicit' in the constitutional guarantee of freedom.

'[T]he requirement of "fairness" or "due process" or "natural justice" … however one wishes to label it, is implicit in this right.' G

Nel v *Le Roux NO & Ors* 1996 (3) SA (CC) at para 12. See also *de Lange supra* at para 22."

While I accept as I have already stated that the facts of *Mutasa*'s case, *supra*, are not identical to the facts of this case they are sufficiently similar to make *Mutasa*'s case, *supra* applicable to this case with equal force. The basis upon H

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A which we are urged to make a distinction has no substance. *Mutasa*'s case, *supra*, clearly states that s 18 of the Constitution does not apply to proceedings of Parliament when sitting as a court. The proceedings being impugned herein are of Parliament sitting as a court, accordingly s 18 of the Constitution has no application.

B In the result, I am satisfied that, on the authority of *Mutasa*'s case *supra*, this ground of challenge cannot succeed.

WAS THE APPLICANT DISCRIMINATED AGAINST ON THE GROUNDS OF RACE OR POLITICAL OPINION CONTRARY TO THE PROVISIONS OF S 23 OF THE CONSTITUTION?

C The Constitution in s 23 prohibits discrimination on the grounds of race or political opinion. The relevant part of s 23 provides as follows:

"23 **Protection from discrimination on the grounds of race, etc**

(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 D

(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."

The applicant's contention that he was discriminated against on the grounds E of race and political opinion seems to be based upon the following allegations:

1. That Chinamasa made remarks to the effect that if Bennett were a black person he would have been ready to forgive and forget; and
2. That Chinamasa and Mutasa also committed contempt of Parliament but because they were black and belonged to the ruling party, ZANU (PF), no action was taken against them.

F I am not satisfied on the record that Bennett was discriminated on the basis of race or political opinion.

Whilst the remarks of Chinamasa could give rise to an inference of racism, those remarks can only reflect the views or attitude of Chinamasa. They cannot be ascribed to or attributed to either members of the Committee or to G Parliament. The Committee and Parliament adjudicated in this matter, not Chinamasa. There is no evidence on the record to suggest that the views of Chinamasa were shared by or, in any way, influenced the Committee or Parliament in their determination of this matter.

This allegation cannot, in my view, form the basis of a violation of the H applicant's right, as guaranteed under s 23 of the Constitution.

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The second basis of the allegation of discrimination is that both Chinamasa A and Mutasa committed contempt of Parliament but no action was taken against them. The Committee was appointed in terms of a motion passed by Parliament. The terms of reference of that motion specifically directed the Committee to investigate the allegation of contempt of Parliament by Bennett. The motion which

constituted the terms of reference of the Committee did not B authorise an investigation of either Chinamasa or Mutasa. The Committee had no mandate to enquire into the question of whether Chinamasa or Mutasa committed contempt of Parliament. Indeed, if Bennett or his colleagues in the MDC wanted an inquiry into the conduct of Chinamasa and Mutasa with a view to establishing whether or not they too had committed contempt of Parliament, then Bennett or his colleagues should have moved for an amendment C to the motion that established the Committee to widen its mandate to include an inquiry into the conduct of Chinamasa and Mutasa. In the absence of any attempt to get Parliament to determine the issue of Chinamasa and Mutasa's conduct an accusation of discrimination on this basis is not sustainable.

It is on this basis that I am satisfied that the second ground of challenge also fails. D

DOES THE PUNISHMENT IMPOSED ON BENNETT CONSTITUTE INHUMAN OR DEGRADING PUNISHMENT, PROHIBITED BY S 15(1) OF THE CONSTITUTION?

Section 15 of the Constitution prohibits the imposition of inhuman or degrading punishment. The relevant part of s 15 of the Constitution provides as follows: E

"**15 Protection from inhuman treatment**

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

Bennett contends that the punishment imposed upon him was inhuman or degrading and is prohibited by s 15 of the Constitution. The issue that falls F for determination is what constitutes inhuman or degrading punishment and whether the punishment imposed on Bennett constitutes inhuman or degrading punishment.

I pause here to point out that the Attorney-General, in his written heads of argument, submitted that the punishment in this case was inhuman or G degrading. That submission was, however, withdrawn by the Attorney-General before the Attorney-General was called to address the court. The court is not privy to the reasons for the withdrawal. I will, therefore, proceed on the basis that no such concession was made.

The issue of what constitutes inhuman or degrading punishment was considered by this court in the case of *S* v *Ncube; S* v *Tshuma; S* v *Ndhlovu* H

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A 1988 (2) SA 702 (ZS); 1987 (2) ZLR 246 (S). In that case, this court departed from the concept that inhuman or degrading punishment is primarily aimed at the quality or the nature of the punishment. Hitherto, it had been held in *Gundu* v *Sheriff of Southern Rhodesia* 1965 RLR 301 (A) and *R* v *Runyowa* 1966 RLR 42 (PC); 1966 (2) SA 495, that the words "inhuman or degrading punishment" were to be restricted to the modes and types of punishment which were in B themselves inhuman or degrading.

This court, following a line of American cases, departed from the above limited concept of what constitutes inhuman or degrading punishment. Gubbay JA (as he then was) at 715I-716E expressed the unanimous view of this court in the following terms:

> C "There are many decisions of the Federal Supreme Court of the United States which lay down unequivocally that, under the protection afforded the individual by the Eighth Amendment to the Constitution, any punishment imposed upon him by the State must be graduated and proportionate to the crime he has committed. His constitutional right will have been infringed if, having regard to the nature and quality of the D offence committed, the sentence is so unfit as to be grossly disproportionate. In other words, although the State may impose punishment the effect of that punishment must not be grossly disproportionate to what would have been appropriate. See, for instance, *Weemes* v *United States* 217 US 349 at 367 (54 L Ed 793 at 799); *Gregg* v *State of Georgia* 428 US 153 at 173 (49 L Ed 2d 859 at 875); *Ingraham* v E *Wright* 430 US 651 at 667 (51 L Ed 2d 711 at 727-8); *Hutto* v *Finey* 437 US 678 at 685 (57 L Ed 2d 522 at 531); *Solem* v *Helm* 463 US 277 at 284 (77 L Ed 2d 637 at 645).
>
> In citing these authorities in support of the principle of proportion in punishment, I am aware of its rejection in *Gundu & Anor* v *Sheriff of Southern Rhodesia & Anor* 1965 RLR 301 (A) and *R* v *Runyowa* 1966 (2) SA 495 (PC); F 1966 RLR 42 (PC); [1966] 1 All ER 633.
>
> In both these cases, it was held that the words 'inhuman or degrading punishment' are to be restricted to modes or types of punishment which are in themselves inhuman or degrading and are not to be construed

in the wider sense of including punishment which, though not necessarily inhuman or degrading *per se*, may become so when it is excessive in G relation to the offence for which it is prescribed.

With due deference, that to me is an unjustifiably narrow interpretation of a fundamental right. I do not regard it as unreasonable to suggest that the inhumanity or degrading nature of a punishment may well depend on the context in which, and the reasons why, it is imposed. Albeit, capital punishment is not *per se* unconstitutional (see s 12(1)). It would be H inhuman or degrading if arbitrarily imposed for, say, theft, fraud, or

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indecent assault. A good example of the working of this principle is A afforded in the case of *Rummel* v *Estelle* 445 US 263 (63 L Ed 2d 382). See also Corwin and Peltason's *Understanding the Constitution* 10 ed at 213-14."

I respectfully agree with the view that a punishment that is "grossly disproportionate" to the transgression constitutes a violation of s 15(1) of the Constitution, that is to say, is inhuman or degrading. B

In my view, it makes no difference whether the punishment is imposed by a court of law or by Parliament. As long as it is grossly disproportionate to the offence, it is prohibited by s 15(1) of the Constitution.

In arriving at the punishment that the Committee considered appropriate to recommend to Parliament, the Committee reasoned as follows: C

" **SENTENCE**

In terms of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*] s 21, Parliament has power to either impose a level seven fine or imprisonment up to two years. In terms of s 16(1) of this Act, as read with s 3 of (the) same, to impose any penalty which was not inconsistent D with sentences which the House of Commons of the Parliament of the United Kingdom could impose on 18 April 1980.

In the light of the above the Committee considered the appropriate punishment. The majority of the members of the Committee felt that:

(a) Honourable Bennett's conduct was the worst attack on the dignity of Parliament known in the history of Parliament. E

(b) Assaulting another Member of Parliament, worse still a Cabinet Minister, who is also Leader of the House, could not be tolerated at all and Parliament has to express its displeasure by imposing a deterrent sentence.

(c) The speech by Honourable Chinamasa cannot be said to have provoked Honourable Bennett as to morally justify his conduct on F that particular day. The Land Reform Programme has been going on for four years. Whatever happened on Honourable Bennett's farms (if it is true) cannot be used as justification for the morally reprehensible conduct he displayed towards Honourable Chinamasa and Parliament itself.

(d) Honourable Bennett did not show any remorse or even attempt to G apologise to both the Speaker and Honourable Chinamasa. The Committee was not favoured with any reasonable excuse for that failure. Honourable Bennett held himself out as a hero after the event from the Press statement he made thereafter and even from his testimony to the Committee. H

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(e) The appropriate sentence should send a clear message to would-be offenders that Parliament shall never be used as a boxing arena but a chamber for debates. Any member who feels offended by the statements of another member or the conduct of another member should seek the protection of the Chair or the Speaker. Only a custodial sentence would meet the justice of this matter. The minority B members of the Committee felt that the moral blameworthiness of Honourable Bennett was not so high as to warrant a custodial sentence. Community service was suggested. A level seven fine coupled with a suspended sentence was suggested.

The Committee voted on the appropriate penalty. **The majority voted in favour of a custodial sentence of fifteen months with three months** C **suspended on condition of good behaviour**.

The other two members voted against the custodial sentence, being in favour of the other lesser forms of punishment.

Committee's Recommendation

> That Honourable Bennett, having been found guilty of contempt, be sentenced to fifteen months' imprisonment with labour of which three D months are suspended on conditions (condition?) that he does not commit a similar offence within five years and for which he is sentenced to imprisonment."

It is quite clear from the above that, in arriving at an appropriate punishment, the Committee took into account all the relevant factors, that is, the mitigating E and the aggravating factors. The reasoning process of the Committee cannot be faulted. Despite that correct approach the majority of members of the Committee differed with the minority as to what was an appropriate punishment. The majority voted for the punishment imposed while the minority thought a much more lenient punishment set out above was appropriate. Whether the aggravating features, as weighed against the mitigating features, justify the F harsh punishment recommended by the majority members of the Committee or should have led to the imposition of the overly lenient punishment recommended by the minority members of the Committee is, to a large extent, a matter of value judgment.

It admits very little doubt that the punishment imposed on Bennett is severe even when one takes into account as did both the Committee and Parliament G that this was the worst case of contempt of Parliament in the history of Zimbabwe and that there was need for deterrence of such conduct. It certainly is not a punishment that this court would have imposed on the facts of this case. However, it is not a question of what this court considers to be an appropriate punishment. This court can only set aside a punishment imposed H by Parliament if such punishment is "grossly disproportionate" to the

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contempt of Parliament committed. In my view, the punishment imposed in this A case, though severe, is not grossly disproportionate to the offence.

Parliament can impose a maximum punishment of two years' imprisonment for contempt of Parliament. That is its maximum jurisdiction in terms of the Act. The punishment imposed in this case, which Parliament considered the worst case of contempt of Parliament in the history of Zimbabwe, is way below the B maximum penalty permissible under the law.

In coming to the conclusion that the punishment imposed in this case is not grossly disproportionate, I have taken into account all the factors that Parliament took into account both mitigating and aggravating, and, in particular, the fact that an assault on a Minister of Government and the Leader of the House during Parliamentary proceedings must rank amongst the worst cases C of contempt of Parliament. It is akin to assaulting a judge during court proceedings. It is not the degree of force used in the assault that is critical in determining an appropriate punishment but the circumstances of the assault. In this case, it is the occasion, the status of the assailant and the assaulted and the gross violation of the dignity of Parliament. Bennett is not contrite. D He never apologised for his appalling conduct. Evidence on record suggests that he bragged and boasted about what he had done. This, in my view, is totally unacceptable.

I am also mindful of the fact that there was an element of provocation in this case but in assessing what weight is to be attached to this provocation, I have borne in mind the unchallenged evidence that allegations of land thefts by the E descendants of settlers and colonialists was nothing new and had been traded between and amongst politicians for quite a while before this incident. These allegations could not have come as a surprise to Bennett. It is quite clear that if Bennett had sought protection from the Chair against Chinamasa such protection would have been readily afforded. F

In the result I am satisfied that the punishment imposed on Bennett, while severe, was not grossly disproportionate punishment for the contempt of Parliament which he committed.

Consequently his right protected by s 15(1) of the Constitution was not violated. G

IS S 16 OF THE PRIVILEGES, IMMUNITIES AND POWERS OF PARLIAMENT ACT [*CHAPTER 2:08***] *ULTRA VIRES* THE CONSTITUTION?**

The fourth and last ground on which the applicant challenges the proceedings is that s 16 of the Act is *ultra vires* the Constitution. H

A Chidyausiku CJ

Section 16 of the Act provides as follows:

> **"16 Jurisdiction of Parliament**
>
> (1) It is declared for the avoidance of doubt that Parliament has all such powers and jurisdiction as may be necessary for inquiring into, judging and pronouncing upon the commission of any act, matter or thing in this Part declared to be an offence without derogation from the powers and B jurisdiction exercisable by Parliament by virtue of paragraph (b) of section three with respect to the commission of any act, matter or thing, whether or not in this Part declared to be an offence, which is or may be adjudged by Parliament to be a contempt.
>
> (2) Parliament shall have power to award and execute the punishments provided by this Part for the commission of any act, matter or thing which C in this Part is declared to be an offence.
>
> (3) Subsection (2) shall not be construed as precluding Parliament from awarding and executing any punishment for the commission of any act, matter or thing referred to in that subsection which Parliament has power and jurisdiction to award and execute by virtue of paragraph (b) of section three in addition to or instead of any punishment provided by this Part D for the commission of that act, matter or thing.
>
> (4) Parliament sitting as a court shall have all such rights and privileges of a court of record as may be necessary for the purpose of summarily inquiring into and punishing the commission of any act, matter or thing which in this Part is declared to be an offence."

E Section 16 of the Act quite clearly confers upon Parliament power to impose the punishment it imposed in this case.

I did not understand the applicant to take issue with this, consequently once it is established that s 16 of the Act is *intra vires* the matter ends there.

It was argued that s 16 of the Act is *ultra vires* the Constitution because the Constitution of Zimbabwe does not confer on the Zimbabwean Parliament the F power to make a law providing for punishment for past misconduct such as contempt of Parliament. It was argued that only the Parliament of the United Kingdom has such punitive powers, or power to punish for past misconduct such as contempt of Parliament. All other Parliaments do not have such power. It was argued that Parliaments other than the United Kingdom Parliament can G only impose custodial punishment to prevent disruption of Parliamentary proceedings. They have no power to punish past misconduct such as contempt of Parliament. They have preventive as opposed to punitive powers to punish for contempt of Parliament.

It was further submitted that the punitive powers of the United Kingdom Parliament are derived from the historical incident that it once upon a time was

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the High Court of Parliament. The punitive jurisdiction is peculiar to the A Parliament of the United Kingdom because of this historical fact. It is a jurisdiction derived from common law.

In support of this proposition, we were referred to Erskine May, who describes this power as follows:

> "The power to punish for contempt has been judicially considered to be B inherent in each House of Parliament not as a necessary incident of the authority and function of a legislature (as might be argued in respect of certain privileges) but by virtue of their descent from the undivided High Court of Parliament and in right of the *lex et consuetudo parliamenti*. In this, the position of the United Kingdom Parliament differs from that of independent Commonwealth or colonial legislatures." C

See Erskine May's *Treatise on The Law, Privileges, Proceedings and Usage of Parliament* 21 ed at p 69-70.

Counsel for the applicant also cited a number of cases in support of this proposition. In particular he cited the case of *Kielley* v *Carson* [1842] 13 ER 255 wherein their Lordships had this to say at p 253: D

> "Their Lordships see no reason to think that in the principle of the common law, any other powers are given (colonial legislatures) than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its establishment … In conformity to this principle, we feel no doubt that such an assembly has the right of protecting itself from all impediments to the due course of its proceedings To the full extent of E every measure which it may be really necessary to adopt, to secure the free exercise of their legislative functions, they are justified in acting by the principle of common law. But the power of punishing anyone for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the

measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of F a very different character, and by no means essentially necessary for the exercise of its functions by a local legislature, whether representative or not. All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insult and interruptions …

It is said, however, that this power belongs to the House of Commons in G England; and this, it is contended, affords an authority for holding that it belongs as a legal incident, by the common law, to an assembly with analogous functions. But the reason why the House of Commons has this power, is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo parliamenti*, which forms part of the common law of the land, and H

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A according to which the High Court of Parliament, before its division and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one."

Reliance was also placed on the Canadian Supreme Court case of *Landers* v *Woodworth* (1878) 2 SCR 158 (S) wherein Ritchie J said:

"I think a series of authorities, binding on this court, clearly establish that B the House of Assembly of Nova Scotia has no power to punish for any offence not an immediate obstruction to the due course of its proceedings and the proper exercise of its functions, such power not being an essential attribute, nor essentially necessary, for the exercise of its functions by a local legislature, and not belonging to it as a necessary to legal incident …"

C I accept the above cases are authority for the proposition that the United Kingdom Parliament derives its jurisdiction to punish past contempts of Parliament from its unique historical position of having been at one time the High Court of Parliament of the United Kingdom. That jurisdiction is clearly derived from common law.

D I do not accept, however, that these cases are authority for the proposition that Parliaments in jurisdictions other than the United Kingdom cannot have punitive jurisdiction conferred on them by their own Constitutions and/or domestic legislation. I have no doubt that Parliaments other than the United Kingdom Parliament can derive power to punish past misconduct such as contempt of Parliament conferred on them by the Constitutions or domestic E statutes of their own countries. The issue therefore is whether the Constitution of Zimbabwe and/or Zimbabwean legislation confers such power on the Zimbabwean Parliament.

In fact, I did not understand the applicant to argue that the Constitutions and domestic statutes of a country cannot, as a matter of law, confer on a Parliament punitive jurisdiction for contempt of Parliament. Indeed the applicant's F submission on the relevance of the authorities he cited is set out in para 96 of the heads of argument wherein it is submitted:

"For present purposes, the importance of this line of authority lies, not in what is said about the inherent powers of representative legislatures, but in the basis upon which it does so. An elected legislature has to have protective powers to defend itself against disruption and obstruction of G its proceedings. But punitive powers are not necessary for the proper performance of its functions. This is why Chapter V111 of the Constitution can best be reconciled with sections 49 and 13(2)(b) by recognizing that a protective parliamentary contempt jurisdiction is consistent with the constitutional separation of powers but a punitive parliamentary jurisdiction is not. See *Speaker of the National Assembly* v *De Lille* 1999 (4) SA 863 H (SCA) at para 17."

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The applicant's argument in this regard therefore seems to be that the court A should give effect to the doctrine of separation of powers and deny the Zimbabwean Parliament punitive power in order to reconcile Chapter VIII of the Constitution which vests judicial authority in the courts and ss 49 and 13(2)(b) of the Constitution which vests some judicial authority in Parliament.

I am not persuaded by this argument for the simple reason that I see no conflict B in between Chapter VIII of the Constitution and ss 49 and 13(2)(b) of the Constitution. Section 79 clearly vests judicial power in the courts. Sections 49 and 13(2)(b) clearly vests some very limited judicial power in Parliament. In a way one could say ss 49 and 13(2)(b) vests concurrent judicial power on Parliament in respect of contempt of Parliament. This clearly was the intention of Parliament when it enacted the Constitutional provisions in question. C

I accept that the Constitution provides for the doctrine of separation of powers. I do not accept, however, that that doctrine should be used as a basis for overriding the explicit language of s 49 and s 13(2)(b) of the Constitution. I find support for this approach in the case of *The Queen* v *Richards* Ex p *Fitzpatrick and Browne* (1954-55) 92 CLR 157. In that case, the Australian D High Court was seized with the issue of the meaning that should be ascribed to s 49 of the Australian Constitution. An argument almost identical to applicant's counsel in this case was proffered to the Australian High Court. Dixon CJ dismissed that argument in the following terms:

> "Then it was argued that this is a constitution which adopts the theory of the separation of powers and places the judicial power theory of the E separation of powers and places the judicial power exclusively in the judicature as established under the Constitution, the executive power in the executive, and restricts the legislature to legislative powers. It is said that the power exercised by resolving upon the imprisonment of two men and issuing a warrant to carry it into effect belonged to the judicial power and ought therefore not to be conceded under the words of s 49 to either F House of the Parliament. It is correct that the Constitution is based in its structure upon the separation of powers. It is true that the judicial power of the Commonwealth is reposed exclusively in the courts contemplated by Chap III. It is further correct that it is a general principle of construction that the legislative powers should not be interpreted as allowing of the creation of judicial powers of authorities in any body except the courts G which are described by Chap III ties in any body except the courts which are described by Chap III of the Constitution. Accordingly, it is argued that a strong presumption exists against construing s 49 in a sense which would enable the particular power we have before us to be exercised by the Senate or the House of Representatives. It was pointed out that in the case of the Inter-State Commission s 101 had received a construction which made it impossible to invest the Inter-State Commission with the H

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> A character of a court and confide to it judicial functions, because it was not a body which fell within Chap. III. That was relied upon as an instance or example of the kind of construction or interpretation which we were urged to adopt in the case of s 49.
>
> The consideration we have already mentioned is of necessity an answer to this contention, namely, that in unequivocal terms the powers of the B House of Commons have been bestowed upon the House of Representatives. It should be added to that very simple statement that throughout the course of English history there has been a tendency to regard those powers as not strictly judicial but as belonging to the legislature, rather as something essential or, at any rate, proper for its protection. This is not the occasion to discuss the historical grounds C upon which these powers and privileges attached to the House of Commons. It is sufficient to say that they were regarded by many authorities as proper incidents of the legislative function, notwithstanding the fact that considered more theoretically – perhaps one might even say, scientifically – they belong to the judicial sphere. *But our decision is based upon the ground that a general view of the Constitution and the separation of powers is not a sufficient reason for giving to these words,* D *which appear to us to be so clear, a restrictive or secondary meaning which they do not properly bear"* (emphasis is mine).

Richards case, *supra,* is clear authority for the proposition that the language of the statute is the critical consideration in determining whether Parliament has punitive jurisdiction or not.

E The issue in this case therefore is what meaning is to be ascribed to s 49 and s 13(2)(b) of the Constitution. Do these sections confer on the Parliament of Zimbabwe power to make laws that provide for the punishment of past misconduct such as contempt of Parliament?

Section 49 of the Constitution provides as follows:

> F "49 **Privileges of Parliament and members and officers thereof**
>
> Subject to the provisions of this Constitution, an Act of Parliament may make provision to determine and regulate the privileges, immunities and powers of Parliament and the members and officers thereof, including the Speaker, and to provide penalties for a person who sits or votes in Parliament knowing or having reasonable grounds for knowing that he is G not entitled to do so."

Section 13(1), (2)(a) and (b) of the Constitution provides as follows:

> "13 Protection of right to personal liberty
>
> (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the cases specified in subsection (2).
>
> H (2) The cases referred to in subsection (1) are where a person is deprived of his personal liberty as may be authorized by law –

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(a) in consequence of his unfitness to plead to a criminal charge or in A execution of the sentence or order of a court, whether in Zimbabwe or elsewhere, in respect of a criminal offence of which he has been convicted;

(b) in execution of the order of a court punishing him for contempt of *that court* or another *court* or *tribunal* or in execution of the order of Parliament *punishing him for a contempt*;". B

Section 49 of the Constitution is an enabling provision. It gives power to Parliament to make laws that determine and regulate the privileges, immunities and powers of Parliament. This power is conferred on Parliament in the first segment of s 49 up to the word "Speaker". I see nothing in the wording of that first segment of s 49 that limits the power of Parliament to provide for a C punishment. The power to make laws and regulations includes the power to provide for punishment in the laws and regulations.

There is nothing in the language of s 49 that prohibits Parliament either expressly or by implication from making a law providing for punitive punishment for contempt of Parliament. If there is any doubt lingering in this regard it is put to rest by the explicit language of s 13(2)(b). Section 13(1) of the D Constitution guarantees the individual's right to liberty. Section 13(2)(b) is derogation of that right. It provides for the deprivation of liberty in execution of an order of Parliament punishing a person for contempt of Parliament. There is nothing equivocal in s 13(2)(b). It explicitly states that Parliament can issue an order for imprisonment as punishment for contempt of Parliament which is precisely what was done in this case. E

There is nothing in the language of s 13 which suggests that the punishment referred in s 13(2)(b) of the Constitution is preventive and not punitive. If anything, the context points in the opposite direction. The section authorises the derogation on the right to liberty in execution of an order of a court punishing a person for contempt of that court or tribunal. There is no doubt F that the punishment referred to in respect of the court or tribunal is punitive and relates to past conduct which constitutes contempt.

The same language is used in respect of the contempt of Parliament. On what possible basis can it be said that the word "punishment" in respect of contempt of court or tribunal means one thing while the word "punishment" G in respect of contempt of Parliament means another thing, namely punitive, in respect of the Court and preventive in respect of Parliament.

I do not see any conflict between Chapter VIII and ss 49 and 13(2)(b) of the Constitution that requires conciliation by resorting to the doctrine of separation of powers as contended for by the applicant.

Sections 49 and 13(2)(b) clearly authorise Parliament to make laws that provide H

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A for the punishment of past acts of contempt of Parliament and s 16 of the Act is a law authorised by s 49 and 13(2)(b) of the Constitution. On this basis the fourth ground of challenge cannot succeed.

There is the further point of law which is very relevant to this case but was not raised on the papers or in argument. I simply raise it but it is not the basis of any conclusion I have reached in this case.

B Section 3 of the Act provides as follows:

"**3. Privileges, immunities and powers generally**

Parliament and members and officers of Parliament shall hold, exercise and enjoy:

(a) the privileges, immunities and powers conferred upon Parliament C respectively, by this Act or any other law; and

(b) all such other privileges, immunities and powers, not inconsistent with the privileges, immunities and powers referred to in paragraph (a), as were applicable in the case of the House of Commons of the Parliament of the United Kingdom, its members and officers, respectively, on the 18th April 1980."

D The constitutionality of s 3 has not been challenged. In the case of *Richards, supra*, the Australian High Court considered the meaning of s 49 of the Australian Constitution which provides:

"The powers, privileges and immunities of the Senate and the House of Representatives and of Members and the Committees of each House, E shall be such as are declared by the Parliament, and until declared

shall be those of the Commons House of Parliament of the United Kingdom and its members and Committees, at the establishment of the Commonwealth."

The Australian High Court concluded that the above s 49 of the Australian Constitution transferred to the Australian Parliament identical powers enjoyed by the United Kingdom Parliament on a particular date. There is a striking F resemblance between the two provisions.

Similarly, I have no hesitation in concluding that as of 18 April 1980 the privileges, immunities and powers of the Parliament of the United Kingdom including the punitive power to punish for contempt were conferred on the Zimbabwean Parliament by s 3 of the Act.

G As I have already stated, s 3 of the Act has not been impugned and remains operative until successfully impugned. In the result, and for the foregoing reasons, s 3 conferred on the Zimbabwean Parliament identical powers enjoyed by the United Kingdom Parliament, which include punitive powers for contempt of Parliament.

H In the result, the application fails on all the four grounds raised and is,

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accordingly dismissed. As has become the practice of this court in these A matters there will be no order as to costs.

Cheda JA, Malaba JA andGwaunza JA concurred.

Judgment

SANDURA JA: I have read the judgment prepared by Chidyausku CJ, but respectfully disagree with it. Although a number of issues were argued by B counsel, this application may be disposed of on the basis of a determination of the main issue, which was whether the sentence imposed on Bennett contravened s 15(1) of the Constitution.

In my view, there can be no doubt that the sentence was grossly disproportionate to the seriousness of the offence committed by Bennett and was, therefore, C unconstitutional in terms of s 15(1) of the Constitution.

In order to facilitate an appreciation of the disproportionality of the sentence I shall set out the relevant background facts in the matter. They are found in paras 4, 5, D 6 and 7 of Bennett's founding affidavit, and were not seriously challenged by the respondents. Because of the relevance of the background facts in the assessment of the appropriate sentence I shall set out paras 4, 5, 6 and 7 *in extenso.* They read as follows:

"4.1 I was elected as a Member of Parliament for the Chimanimani Constituency during the general elections of 2000. I have therefore been in Parliament since that time and from the time that I entered Parliament, I have had to endure the kind of torment and abuse from members of the ruling party that I believed was impossible before I E entered Parliament. As a Member of Parliament belonging to the opposition Movement for Democratic Change, I am able to say that there exists incredible acrimony between the ruling party and members of the opposition and this has been particularly heightened against me as I represent a rural constituency where the ruling party is deemed to be generally strong and as a white Member of Parliament coming F from a rural constituency, I have generally been treated with disdain and outright animosity by members of the ruling party.

4.2 Despite being a Member of Parliament, and despite being a representative of my constituency, I have been treated as though I have no right to live in this country and all my attempts to assert these rights have been met with abuse, intimidation, threats and infractions G of the law that one can only imagine.

4.3 I am a commercial farmer that operated Charleswood Estate which farm has been targeted for compulsory acquisition for quite some time and has been taken over before the process of lawful acquisition has been exhausted in the courts where the matter remains pending. Senior members of the ruling party have stated over and over again H

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A that I should not be allowed to remain on the farm and I confirm that even before incarceration, I had been forced out of the farm through various unlawful acts.

4.4 The police, army and Central Intelligence Officers have invaded my farm illegally on numerous occasions and some of them still unlawfully remain on the farm to date. During such illegal invasions these State B agents have committed numerous crimes on the farm against my employees and myself and property has also been looted to an extent where my own personal clothes and effects have been stolen.

4.5 Many of these incidents have been reported to the police but regrettably as the local police are part and parcel of these illegalities, I have had no joy at all in having my rights protected by the law. Some C of my employees who have been beaten up, tortured and generally harassed have also not received any joy at all as and when they have reported these abuses to the local police.

4.6 In addition, these operatives and government agents have also unlawfully removed farm equipment from the farm and some of my livestock on the farm has been killed, sold or rebranded or subjected D to other forms of cruelty by these government agents. Some of the produce such as the coffee that I had grown at the farm has since been sold through the government owned ARDA despite the fact that this had been presold to overseas buyers who have since instituted proceedings against me for non-delivery.

4.7 To demonstrate the seriousness of these incidents which have E caused me immense pain, suffering, heartache and a sense of powerlessness have been the extra judicial execution of two of my employees being Stephen Tonera who was executed in May 2003 and Shanie Manyenyeka who was executed in February 2004. Stephen Tonera was beaten to death by an operative from the President's Office while Manyenyeka was shot to death at point blank range in F cold blood by a member of the defence forces at the farm. The two perpetrators of these heinous extra judicial executions are well known but regrettably, the police have not even arrested one of them.

4.8 In an endeavour to assert my rights and to stop these unlawful activities, I have approached the High Court on a number of occasions and obtained court orders but such court orders have been wantonly G ignored and defied by the State and I give the following examples:

(a) On 25 February 2004, the High Court granted me a provisional order which gave my company leave to remain and carry on business on Charleswood Estate and that all State functionaries and operatives were interdicted from interfering in any way with the farming and business operations at Charleswood Estate and that all those State agents and functionaries who were unlawfully H

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occupying the farm at the instance of the State were to vacate the A farm immediately. Although this order was served on the State, the concerned State operatives have completely disregarded it.

(b) On the 18th November 2003 the magistrates court at Mutare issued a provisional order against the functionaries of the State led by Sergeant Nasho and the Agricultural Rural Development Authority interdicting them from setting foot or entering B Charleswood Estate, from harassing or assaulting the employees at Charleswood Estate, and directing that those State functionaries who were in occupation of the farm vacate it forthwith and again this order has been defied and ignored by the State.

(c) On 8 April 2003, the High Court once again granted an order by C consent which provided that the State and its functionaries be interdicted from threatening, abusing, intimidating, harassing, assaulting or communicating with myself or other directors that operate Charleswood Estate, its employees and their family members and that the directors, their families and all employees were restored to their homes on the farm and again this order has D been ignored.

(d) In May 2002, the High Court at Harare issued an order that barred the State from acquiring Charleswood Estate but needless to say, this has continued to be ignored and to be defied by the State.

5. On 9 April 2004 at approximately 0400 hours, members of the Zimbabwe National Army, the Zimbabwe Republic Police and the Support Unit E once again invaded and surrounded Charleswood Estate despite the many court orders I have already referred to. The invading forces were under the leadership of one Dzapasi who was accompanied by a Major Zimbango of the Army and an Inspector Manyama of the police. The officers alleged that they were acting on instructions of the Provincial Governor of Manicaland, retired Major General Michael F Nyambuya and His Excellency the State President Robert G Mugabe and that these were the only two people from whom they would accept instructions to stop their activities. The army of invaders thereafter forcibly took possession of the keys to the properties on the farm including keys to my house and vehicles and helped themselves to such consumables as fuel that was being used for G faming operations on the farm. After assembling the workers, the invaders demanded that those who wanted to continue working for me

had to pack their bags and leave the farm immediately after which they recorded the identity details of the workers before ordering the farm management consisting of six people who were requested to vacate the farm forever. These six together with other farm workers H

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A who have subsequently been kicked out of the farm are now living as internally displaced persons. In effect, the army, police and the CIO were able to evict persons without recourse to the law and such persons have now been reduced to being refugees in their own country. What this has done of course is to stop the farming operations on Charleswood Estate as the members of management B who were able to oversee the farming operations have been unlawfully evicted from the farm as I had been before them.

6. As a direct result of the said harassment, my family was effectively unlawfully evicted from our home despite the courts having asserted our rights over and over again. Following this unlawful eviction, I thereafter leased a farm in Ruwa and regrettably the same ruling party C supporters, CIO members, army personnel and the police continued with the harassment whereby my rented home was raided on a regular basis with farming operations being disrupted to a point where it was pointless to continue. My landlord was also equally harassed for leasing the farm to me and I was once again forced to seek refuge elsewhere. D

6.1 As it became apparent that I would not be able to farm at all in Zimbabwe, I resigned myself to a life where I have to consider starting a new profession altogether as I cannot farm even on leased premises as is clear from the incident on the Ruwa farm. Neither can I be employed as a farm manager as all landowners or lessors are aware that if I am seen on their land, they risk losing it through the various methods that were used to dispossess me of my farms and the farm E I leased in Ruwa. It was with this background that the events that caused my being imprisoned occurred where I found myself in middle age, with a family to support but with no means of livelihood as farming had been my only means of livelihood. The fact that I have had to try and find a means of livelihood when I have been dispossessed of all my assets including equipment, livestock, produce with virtually F nothing as I could not even raise capital by selling the movable assets has put me under severe stress particularly as the law has failed to protect me despite orders having been granted in my favour.

7. On 18 May 2004, I was at Parliament when debate ensued on the Stock Theft Amendment Bill. During the debate I made a contribution chronicling the experiences that I have had particularly with the theft G of livestock by known persons who have not been arrested and queried the rationale of making very tight stock theft laws when in fact these laws were not being implemented by the police as they have allowed stock thieves to go scot-free after stealing my livestock.

7.1 Instead of dealing with my contributions to the debate, the Honourable Patrick Chinamasa instead launched into a tirade of abuse towards H me and my forefathers alleging that we were the thieves. He then went

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on to assure the nation and myself that notwithstanding the existence A of court orders in my favour he would ensure that I never set foot on Charleswood Estate again. I was absolutely amazed at such threats coming as they did from the Minister responsible for Justice in the country who ought to be in the forefront in ensuring that the justice system works for the benefit of all Zimbabweans. As Minister of Justice, I expected the Honourable Chinamasa to commiserate with B me and to reassure me that as Minister of Justice, he would do everything to ensure that the court orders were obeyed and that I was given the protection that every citizen is entitled to. Although I do not remember precisely what happened and only really saw the events that followed thereafter from the video clip that I later viewed, I believe that Honourable Chinamasa's words emphasizing the C hopelessness of my position must have so blinded me that I reacted as I did under what was clear extreme provocation in circumstances where I had been under stress for quite some time."

As already stated, the above averments were not seriously challenged by the respondents. That is clear from the opposing affidavit deposed to by the first respondent with the authority of the second, third and fourth respondents. D

Paras 6 to 10 of the opposing affidavit deal with the averments made by Bennett in paras 4,5,6 and 7 of his founding affidavit already set out in this judgment, and read as follows:

"6. *Ad paras 4,4.1,4.2,4.3,4.4,4.5,4.6 and 4.7 of the Affidavit of Roy Leslie Bennett* E

Save to say that the applicant was a white farmer and a white Member of Parliament representing Chimanimani, I have no knowledge of the rest of the allegations, I do not admit the same and I put the applicant to the proof thereof.

7. *Ad paras 4.8(a), (b), (c) and (d) of the Affidavit of Roy Leslie Bennett*

I have no knowledge of these allegations, I do not admit the same and F I put the applicant to the proof thereof.

8. *Ad paras 5,6 & 6.1 of the Affidavit of Roy Leslie Bennett*

I have no knowledge of these allegations, I do not admit the same and I put the applicant to the proof thereof.

9. *Ad para 7 of the Affidavit of Roy Leslie Bennett* G

These allegations call for no comment.

10. *Ad para 7.1 of the Affidavit of Roy Leslie Bennett*

(a) I deny that Hon Chinamasa's utterances in this respect amounted to extreme provocation of applicant as such language is not unusual in the context of parliamentary debate. H

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(b) In any event, even if applicant had felt provoked by Hon. Chinamasa's utterances, he, as an honourable member, should have utilized the procedures and rules of Parliament that are available to any member who might feel that another member's contribution amounts to abuse.

(c) Further, given the apparently purposeful approach of applicant B in this incident, I find it difficult to believe his assertion that he cannot remember carrying out the assault of Hon Chinamasa."

In my view, the opposing affidavit does not seriously challenge the averments made by Bennett. In spite of the fact that Bennett mentioned the names of various government officials who allegedly perpetrated numerous illegal acts on his farm, no affidavits from the officials in question were filed denying the C very serious allegations made by Bennett.

In the circumstances, the sentence imposed on Bennett has to be examined on the basis that the allegations made by him in paras 4, 5, 6 and 7 of his founding affidavit are true.

In addition, it has to be borne in mind that the offence committed by Bennett D was essentially a common assault. Bennett pushed Chinamasa who, as a result, lost his balance and fell.

The principles to be applied in determining whether a sentence contravenes s 15(1) of the Constitution were set out by this court in *S* v *Ncube; S* v *Tshuma; S* v *Ndhlovu* 1988 (2) SA 702 (ZS) at 715G-I, where Gubbay JA (as he then was) said:

> E "But s 15(1) is not confined to punishments which are in their nature inhuman or degrading. It also extends to punishments which are 'grossly disproportionate'; those which are inhuman or degrading in their disproportionality to the seriousness of the offence, in that no one could possibly have thought that the particular offence would have attracted such a penalty – the punishment being so excessive as to shock or outrage F contemporary standards of decency."

Applying those principles to the facts of the present case, there can be no doubt that the sentence of 15 months' imprisonment with labour of which three months' imprisonment with labour was conditionally suspended, is grossly disproportionate to the seriousness of the offence committed by Bennett.

G In my view, no one could possibly have thought that the offence committed by Bennett, which was essentially a common assault, deserved a term of imprisonment. Any term of imprisonment imposed for such an offence would be a sentence which is "so excessive as to shock or outrage contemporary standards of decency".

It must be remembered that the sentence of imprisonment is a rigorous and H severe form of punishment which should be resorted to only when it is

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Sandura JA

absolutely necessary to do so. As Reynolds J said in *S* v *Ngombe* HH-504-87 A (unreported) at p 2 of the cyclostyled judgment:

> "It has been repeatedly stressed that a sentence of imprisonment is a rigorous and severe form of punishment, often bearing drastic and destructive consequences for the accused and the members of his immediate family. This form of penalty should be resorted to only if absolutely essential in the circumstances of the case, and only if no other B available form of punishment would be preferable and appropriate."

In the present case, Parliament, by imposing an effective prison sentence, when other forms of punishment would have been preferable and appropriate, failed to guard against an excessive devotion to the cause of deterrence. In that regard it erred. C

As Gubbay JA (as he then was) said in *S* v *Gorogodo* 1988 (2) ZLR 378 (S) at 382H-383A:

> "What is to be guarded against is such an excessive devotion to the cause of deterrence as may so obscure other relevant considerations as to lead to a punishment which is disparate to the offender's deserts. I cannot conceive of any principle which can justify, for the sake of deterrence and D public indignation, the imposition of a sentence grossly in excess of what, having regard to the crime and to the degree of the offender's moral reprehensibility, would be a fair and just punishment."

In addition, in assessing the appropriate sentence, Parliament must have overlooked or ignored what Bennett had experienced on the farm as already E set out in this judgment, and the fact that on the day in question Bennett acted in the heat of the moment and in response to severe provocation, factors which greatly reduced Bennett's moral blameworthiness. Had Parliament taken these factors into account and accorded them due weight it would have appreciated that any effective prison sentence imposed on Bennett would be grossly disproportionate to the offence committed by him. F

In the circumstances, it was not surprising that in the heads of argument filed on behalf of the Attorney-General the concession was made that the sentence imposed on Bennett was grossly disproportionate to the offence committed by him. The relevant paragraph of the heads of argument reads as follows:

> "It is submitted that although Parliament is entitled to commit its members G for contempt, the sentence it pronounced herein is disproportionate to the offence committed, considering it was committed in the heat of the moment. See also *S* v *Musa* 1997 (2) ZLR 149 (H) where the court held that committal for 60 days for contempt of court was retributive and not acceptable."

In addition to that concession, it was conceded in the heads of argument filed H on behalf of the Attorney-General that when Parliament imposed the prison

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Sandura JA

A sentence on Bennett it had voted on party political lines to impose that sentence. The relevant part of the heads of argument reads as follows:

> "Parliament was supposed to exercise its jurisdiction to deal with contempt in a manner that is not inconsistent with or offensive to the Declaration of Rights. It is submitted that the Speaker of Parliament should have made it clear to Parliament in general that they were sitting as a court of record B and were supposed to decide the matter taking into consideration (the) Applicant's rights, and that they should put politics aside and objectively look into the matter. This was not done and clearly Parliament voted along party lines … The only injustice, if any, that occurred was when the question of sentence was raised … The proceedings of the first to (the) sixth respondent(s) should be declared null in as far as sentence only is C concerned."

In view of the above concessions made on behalf of the Attorney-General, at the commencement of the hearing of this application Mr *Gauntlett*, who appeared for Bennett, submitted that it was no longer necessary for this court to determine all the other constitutional issues raised by Bennett, and that this court should simply declare that the sentence imposed on Bennett contravened D s 15(1) of the Constitution, and order that Bennett be released from prison.

Mr *Chihambakwe*, who appeared for the first, second, third and fourth respondents disagreed and submitted that the sentence imposed on Bennett was fair.

Mrs *Gatsi*, who appeared for the Attorney-General, informed the court that E she was abiding by the heads of argument she had filed on behalf of the Attorney-General. As already stated, it was conceded in those heads of argument that the sentence imposed on Bennett contravened s 15(1) of the Constitution.

The court then adjourned in order to consider the submissions made by F counsel. Regrettably, the decision of the majority of the members of this court was that the court should hear argument on all

the constitutional issues raised by Bennett.

The hearing of the application was then resumed in the afternoon. After Mr *Gauntlett* and Mr *de Bourbon* had made full submissions on behalf of Bennett, Mrs *Gatsi* informed the court that she was withdrawing the G concessions she had made in the heads of argument she had filed on behalf of the Attorney-General. She stated that she had been instructed to do so by the Director of the Civil Division of the Attorney-General's Office ("the Director"), who had previously authorised her to make the concessions. No reason whatsoever was given for the Director's instruction. In the circumstances no valid reason was given to justify the withdrawal of the concessions.

H In my view, and without determining whether a concession made by a legal

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Sandura JA

practitioner in his/her heads of argument may be withdrawn, the failure by Mrs A *Gatsi* to advance any valid reason for the withdrawal of the concessions must inevitably lead to the conclusion that no valid reason justifying the withdrawal of the concessions existed. That conclusion greatly strengthens the submission made by Mr *Gauntlett* that the sentence imposed on Bennett contravened s 15(1) of the Constitution. B

In the circumstances, I would have granted the application on the basis that the sentence imposed on Bennett contravened s 15(1) of the Constitution, and ordered that Bennett be released from prison on the day the application was heard, without hearing submissions on the other constitutional issues raised by him. C

Kantor & Immerman, appellant's legal practitioners

Chihambakwe Mutizwa & Partners, first, second, third and fourth respondents' legal practitioners

Coghlan Welsh & Guest, fifth respondent's legal practitioners

Honey & Blanckenberg, sixth respondent's legal practitioners

Civil Division of the Attorney General's Office, other seventh respondent's D legal practitioners

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Source:
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MOYO v FRASER NO & ANOR 2006 (1) ZLR 257 (S)

Citation	2006 (1) ZLR 257 (S)
Case No	Judgment No. S-5-06
Court	Supreme Court, Bulawayo
Judge	Chidyausiku CJ, Ziyambi JA and Gwaunza JA
Heard	29 November 2004
Judgment	9 March 2006*
Counsel	Appellant in person Mrs *P Dube*, for the first respondent *N Mathonsi*, for the second respondent

Case Type Civil appeal

Annotations No case annotations to date

Flynote

C **Costs** — *filing of voluminous and unnecessary documents in a court application — such practice normally punished by an appropriate order as to costs*

Insolvency — *sequestration — rights of creditors — purchaser of land — transfer not effected before sequestration — no right to claim transfer* D *of land*

Land — *ownership — land sold by instalments — instalment agreement not registered — rights of buyer — seller's estate being sequestrated before full payment made –buyer having no right to transfer of land*

Headnote

E The seller, the registered owner of a certain property, which was a sub-division of a larger portion of land owned by him, sold the property to the appellant. The purchase price was paid in full, by way of instalments. The seller became insolvent before performing the personal obligation of transferring the immovable property to the appellant. The first respondent, the liquidator and trustee, then sold property belonging to F the insolvent estate, including the property in question, to various purchasers. The property in question was not sold to the appellant but to a third party. The appellant sought an order compelling the trustee to transfer the land to him.

Held, that a purchaser of land on instalments who has not registered the agreement of sale in terms of s 64 of the Deeds Registries Act [*Chapter* G *20:05*] cannot interdict the trustee of an insolvent estate from selling such land to a third party. Had an endorsement been made in terms of that section and all the other requirements prescribed thereunder met, the

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Chidyausiku CJ

appellant would have had a statutory right to take transfer of the land, A subject to the payment of the outstanding balance under the prior real right secured by the registered mortgage bond. His failure to register the agreement meant that he had only a personal claim against the seller and could not interdict the trustee of an insolvent estate from selling such land to a third party.

Held, further, that in a court application it is not permissible to file voluminous B documents, which are not necessary for the determination thereof. Such practice should normally be punished by an appropriate order as to costs.

Cases cited

Ex p *Singleton* 1963 R & N 1 (SR) C

Harris v Buissinne's Trustee (1840) 2 Menz 105

Legislation considered

Deeds Registries Act [*Chapter 20:05*], s 64 D

Case information

Appellant in person

Mrs *P Dube*, for the first respondent

N Mathonsi, for the second respondent

Judgment

CHIDYAUSIKU CJ: There is only one legal point involved in this appeal. It E is whether the purchaser of land on installments who has not registered the agreement of sale in terms of s 64 of

the Deeds Registries Act [*Chapter 20:05*] can interdict the trustee of an insolvent estate from selling such land to a third party.

The facts of this matter are set out in some detail by the court *a quo* in judgment F No. HC-1065-99. Repeating them in this judgment will not serve any useful purpose I will only set out the salient facts which are as follows.

Mr J M Ngwenya ("Ngwenya") was the registered owner of a certain property I shall refer to hereinafter as "Lot 4". Lot 4 was a sub-division of a larger portion of land owned by Ngwenya. The purchase price was $25 000 payable in installments. The purchase price was paid in full to Ngwenya. The purchase G price was paid by way of installments.

It is not disputed that this was a sale of land on installments. Ngwenya's estate was placed under sequestration by an order of the High Court sitting in Bulawayo and Malcolm Fraser, the first respondent was appointed the liquidator and trustee. I shall refer to him as "the trustee". The trustee then sold H

Chidyausiku CJ

A property belonging to the insolvent estate of Ngwenya including Lot 4 to various purchasers.

It is contended by the appellant and not disputed by the respondents that Lot 4 was only one of a number of sub-divisions sold by Ngwenya to various individuals before he became insolvent. The trustee, for reasons which are not clear from the record, sold the sub-divisions to the same purchasers but denied B the appellant the same opportunity to buy Lot 4. The trustee instead sold Lot 4 to a third party. It is apparent, however, from the record that the appellant at one time received $7 000 without prejudice as his *pro rata* claim against the insolvent's estate in respect of monies he had paid as the purchase price of Lot 4. It is also apparent from the record that the appellant offered to pay for C Lot 4 in an amount in excess of the purchase price agreed to by the third party. This offer was turned down. From a legal point of view, the trustee could not accept this offer if he had already sold Lot 4 to a third party. The appellant was aggrieved by this turn of events. The trustee instructed the second respondent to effect transfer of Lot 4 to the third party.

The appellant objected to the sale and transference of Lot 4 to the third party. D He applied for and was granted a *rule nisi* calling upon the trustee to show cause why a final order should not be made interdicting transfer of Lot 4 to a third party and directing that it be transferred to him. The interim relief was granted to the appellant pending the confirmation or discharge of the *rule nisi*. The application was opposed and on the return date the *rule nisi* was E discharged. The appellant now appeals against the judgment discharging the *rule nisi*.

In discharging the *rule nisi,* the learned judge had this to say:

> "The point involved in the application is a short one. It is, whether the applicant has a right to the transfer of Lot 4 into his name. He entered into a contract of sale with a person who became insolvent before performing F the personal obligation of transferring the immovable property to him.
>
> At the time, the insolvent's estate was sequestrated, the applicant had no real rights in the land. The *dominium* of the land lay with the insolvent. The applicant only had a personal right to claim transfer of the land from the insolvent."

G Later on in his judgment, the learned judge reasoned as follows:

> "The trustee was vested with the ownership of the immovable property registered in the insolvent's name by virtue of the sequestration order. He took over the *dominium* of the land for the benefit of all creditors of the insolvent estate. Unlike the insolvent whose duties towards the applicant were governed by the terms of the contract of sale entered into H personally the right and duties of the trustee were governed by the

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Chidyausiku CJ

> Insolvency Act [*Chapter 6:04*]. His obligations were not of a personal A nature as were those assumed by the insolvent under the contract of sale. He took over the ownership of the immovable property registered in the name of the insolvent in an official capacity and had to deal with it in the best interests of all creditors.
>
> The position of a purchaser of land who paid the purchase price but had not received transfer of the property at the date of sequestration of the B seller's estate is that he has no right at common law to the

transfer of the land. The purchaser is not entitled to prevent the trustee in an insolvent estate from transferring the property to a third party if that is in the best interests of creditors: Ex p *Singleton* 1963 R & N (SR) 1.

In *Harris* v *Buissinne's Trustee* (1850) 2 Menzies 105 the plaintiff entered into a contract of sale with Buissinne in terms of which he bought the C latter's house for £1 050, £400 of which it was stipulated should be paid immediately in cash, and for the balance of £650 the plaintiff agreed to pass a mortgage bond in favour of the directors of a Savings Bank. On the same date, the plaintiff paid Buissinne the £400 he took possession of the house. Buissinne was unable to give the plaintiff transfer of the house so that he might perform his obligation to execute a mortgage in favour of the D Savings Bank. The plaintiff took out summons against Buissinne who surrendered his estate as insolvent and it was placed under sequestration. In an action in which the plaintiff prayed for an order condemning Buissinne to give him a legal transfer, the trustee of the insolvent estate pleaded that he was not liable to give transfer to plaintiff.

Giving judgment for the trustee of the insolvent estate the court said at E pp 107-108:

'By the law of Holland, the *dominium* or *jus in re* of immovable property can only be conveyed by transfer made *coram lege loci* and this species of transfer is as essential to divest the seller of and invest the buyer with the *dominium* or *jus in re* of immovable property as actual tradition is to convey the *dominium* of movables and that the delivery of the actual F possession of immovable property has no force or legal effect whatever in transferring its *dominium*.

Consequently, the agreement of sale between Harris and Buissinne *a*nd the delivery of the possession of the house by Buissinneto Harris, gave Harris nothing more than a *jus ad rem* and a personal claim against Buissinne to convey the *jus in re* to him by transfer *coram lege loci*. And, G therefore, on the day on which Buissinne's estate was placed under sequestration the *dominium* of the house in question was still vested in Buissinne and then formed part of his estate and that by the order placing his estate under sequestration this house became instantly and wholly vested in the Master and ultimately in the trustee for behoof (benefit) of the creditors of Buissinne. H

Chidyausiku CJ

A On these grounds, it followed that Harris had only a personal claim against Buissinne's estate for the damage which he has sustained by the non-fulfillment of his undertaking to perfect the sale by making legal transfer of the house to Harris and for restitution of that part of the price which he has paid, and in respect of this personal claim, he has no preference on the house in question, or on any other part of the estate, B and is only entitled to be ranked concurrently with the other personal creditors of Buissinne.'

As pointed out above, there was no endorsement on the title deed that the piece of land sold to the applicant by the insolvent was subject to a contract of sale by installments. Had such an endorsement been made in terms of s 64 of the Deeds Registries Act [*Chapter 20:05*] and all the other C requirements prescribed thereunder met, the applicant would have had a statutory right to take transfer of the land subject to the payment of the outstanding balance under the prior real right secured by the registered mortgage bond.

Without the protection provided by an endorsement on the title deed in terms of s 64 of the Act, the applicant had no right to demand transfer of D the land into his name once the trustee decided that the transfer of the immovable property to him was not in the best interests of all the creditors of the insolvent estate and elected to sell the property to a third party. The court has no power in the circumstances to impose on the trustee a duty which the law says he does not owe the applicant.

In proving his claim for $25 000 against the insolvent estate and receiving E a dividend of $7 500 on that claim, the applicant pursued the remedy consonant with his position as a concurrent creditor of the insolvent estate. He had no legal basis however upon which to demand transfer of Lot 4 of subdivision L of Stand No. 178 from the trustee. He also had no right to prevent the trustee from transferring the property to a third party.

The provisional order granted on 12 March 1999 is therefore, discharged F with costs.'"

I entirely agree with the reasoning and the conclusion of the learned judge in the court *a quo*. The appellant has no leg to stand on. In the notice of appeal and heads of argument the appellant sought to rely on the provisions of the Contractual Penalties Act [*Chapter 8:04*]. A perusal of that Act clearly shows that it has no relevance to the issue that was before the court. That Act deals G with contractual rights terminated by way of breach of contract and not by insolvency as *in casu*. The appellant also sought to rely on the South African Sale of Land on Installments Act 72/71. That Act only applies to agreements of sale in South Africa and has no application in Zimbabwe. The numerous South African cases cited by the appellant deal with the interpretation of the H South African Act. The cases are totally irrelevant and no useful purpose will

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be served by discussing them in this judgment. In Zimbabwe, the rights of the A parties in a contract of sale of land by installments is regulated by the Deeds Registries Act [*Chapter 20:05*] ("the Act"). Section 64 of the Act provides as follows:

> "64 **Sale of land on installments**
>
> (1) Where land is sold in terms of a written contract whereby the B purchase price is payable in three or more installments, the registrar shall, upon the lodging with him in terms of this section of the written consent of the registered owner and the purchaser, endorse on the title deed of the land concerned that such land is subject to the contract.
>
> (2) The endorsement in terms of subsection (1) against the title deed of any land shall confer on the purchaser of the land concerned subject to C this section and to any prior real rights attaching to the land, the following rights –
>
> (a) in the event of the insolvency, assignment or liquidation of the seller's estate or the vesting of the seller's estate in a trustee or assignee in terms of the law relating to insolvency or a proposed sale in execution of the land, and D upon him notifying his election thereof within three months of the insolvency assignment, liquidation or attachment of the land, as the case may be, to the trustee, assignee, liquidator or officer charged with the sale of the land, either –
>
> (i) a charge over the land in favour of the purchaser for the E amount of any installments and deposit paid by him to the seller and for the value of any improvements effected upon the land by the purchaser and valued in terms of subsection (4) less the amount, if any, referred to in paragraph (d) of subsection (5); or
>
> (ii) a right to take transfer of the land subject to the payment F of the outstanding balance of the purchase price under the contract or, if the land is encumbered under a prior real right securing a monetary obligation, to the payment of the outstanding balance under the prior real right whichever is the greater:
>
> Provided that where the land sold under the contract is a portion G of land the whole of which is subject to such a prior real right, the purchaser shall be entitled to take transfer of the land upon payment of the sum referred to in subsection (3) or the balance of the purchase price under the contract, whichever is the greater;

> (b) where the provisions of paragraph (a) do not apply or he has not made an election in terms of that paragraph, the right enforceable against all person whatsoever to abide by the contract and to take transfer of the land upon fulfillment of the conditions of the contract."

The above section stipulates that the rights conferred by s 64 only accrue B upon the registration of the agreement of sale with the Registrar of Deeds. Failure to register the agreement is fatal to the accrual of the rights. The agreement of sale between the appellant and Ngwenya suggests the parties were aware of the need to register the agreement. Clause 6 of the agreement provides for the payment of costs of such registration. The reference to s 62 of the Act in clause 6 appears to be erroneous as it appears that the intention C was to refer to s 64 of the Act. The agreement of sale between the appellant and Ngwenya was never registered in terms of s 64 of the Act. This is fatal to the appellant's case and is the source of the appellant's problems.

While the appellant's sense of grievance is understandable, namely, that purchasers of the other sub-divisions of the same stand from Ngwenya in D similar circumstances were allowed by the trustee to conclude their agreements, while he was not, the fact of the matter is that the appellant was the author of his own misfortune. He should have registered his agreement of sale with Ngwenya in terms of s 64 of the Act. Finally, I wish to comment on the voluminous documents filed by the appellant. This is not permissible and should be punished by an appropriate order as to costs. The court, however, E notes that the appellant is a self actor and is prepared to allow him some latitude. Also, the appellant's remarks about the presiding judge are simply unacceptable and border on contempt of court which calls for an appropriate sanction. However, the court again decided to err on the side of leniency because of the apparent injustice that the appellant received at the hands of the trustee. Let the appellant be warned that in future, he will not get away with F impunity for such deplorable conduct.

In the result the appeal is dismissed with costs.

ZIYAMBI JA and Gwaunza JA concurred.

G *Coghlan & Welsh,* first and second respondents' legal practitioners

* *Note*: the judgment appealed from was reported as *Moyo* v *Fraser NO & Anor* 2000 (1) ZLR 142 (H), a judgment of MALABA J (as he then was) — *Editor*.

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Source:
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NYAMHOKA & ORS v OFFICER COMMANDING ZRP, MANICALAND PROVINCE & ORS 2006 (1) ZLR 264 (H)

Citation	2006 (1) ZLR 264 (H)
Case No	Judgment No. HH-37-06
Court	High Court, Mutare
Judge	Hungwe J
Heard	13 March 2006
Judgment	14 March 2006
Counsel	*T Maanda,* for the first, second and third applicants *L Chibwe & T R Mugabe,* for the fourth applicant *L Chikafu,* for the respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Criminal procedure — *arrest — detention beyond period of 48 hours after arrest — unlawful without warrant for further detention — need for warrant to be produced*

Headnote

The applicants were arrested by the police on allegations of committing D offences under the Public Order and Security Act. They were maltreated while in custody and denied access to their legal practitioners. State counsel who tried to intercede were threatened by the police and had to flee the district. The applicants sought a declaratur that their detention, which had been for more than 48 hours, was unlawful, as well as an order for the return of property taken from them. No warrant for further E detention was shown to the court.

Held, that where an applicant has been held beyond the 48 hour period, it is competent to declare the whole detention period illegal. Even assuming in favour of the respondents that, somewhere

in their offices, warrants for further detention lay unattended, the facts before the court require that the detention be declared illegal. F

Cases cited

S v Makwakwa 1997 (2) ZLR 298 (H)

S v Woods & Ors 1993 (2) ZLR 258 (S)

Legislation considered G

Constitution of Zimbabwe 1980, s 13(3)

Case information

T Maanda, for the first, second and third applicants

L Chibwe & T R Mugabe, for the fourth applicant

L Chikafu, for the respondents H

Hungwe J

Judgment

A **HUNGWE J:** In this application, the applicants seek the following relief:

"TERMS OF THE FINAL ORDER SOUGHT

That the respondents show cause, if any, why a final order should not be granted in the following terms:

1. The arrest and detention of the applicants be and is hereby declared B wrongful and unlawful.
2. Should the respondents wish to prosecute the applicants, the respondents shall not arrest and detain the applicants in respect of the allegations raised in this matter and are hereby directed to proceed against the applicants by way of summons.
3. The respondents shall pay the applicants' costs on a legal practitioner C and client scale.

TERMS OF THE INTERIM RELIEF GRANTED

Pending the resolution of this matter it is ordered that:

1. The arrest and detention of the applicants be and is hereby declared wrongful and unlawful. D
2. The respondents and all those acting through them or under their control be and are hereby ordered to immediately release the applicants from their custody or alternatively forthwith bring them before a court of law.
3. The respondents are hereby ordered to return forthwith to the third applicant possession and control of the property listed in Trust E Maanda's affidavit.
4. The respondents are hereby ordered to return forthwith to the fourth applicants, possession and control of the property listed in annexure "B" to the Supporting Affidavit of Tafadzwa Ralph Mugabe.
5. The respondents pay the applicants' costs on a legal practitioner client scale."

F This application was filed at 4 o'clock on 10 March 2006 on an urgent basis and placed before me by the Registrar while I was on the Mutare circuit. I directed that the papers be served on the respondents' attorney, who is the Attorney-General, at Harare. Further, I also directed that upon service the matter be set down for hearing at 10 o'clock on 13 March 2006 in view of the G fact that an infringement of the Bill of Rights was being alleged by citizens against the State.

On 13 March 2006, Mr *Maanda* indicated that his clients, the first, second and fourth applicants, had been brought to court on Saturday 11 March 2006. The third applicant had been released without charge. As such, no *mandamus* was being sought in this respect. However, as the applicants had been held H detained in excess of the statutory 48 hours, they still seek a *declaratur* in

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Hungwe J

respect of the detention. They also seek *mandament van spolie* in respect of A the property seized from the third and fourth applicants. Mr *Chibwe* indicated that, due to the changed circumstances, they will now seek a final, rather than an interim order. Mr *Chikafu* sought a postponement to

accommodate his superiors who were travelling from Harare for this hearing. By consent, the matter was postponed to the afternoon. B

At the resumed hearing, Mr *Chikafu* still appeared alone. He indicated that he did not oppose the order sought in respect of the release of the property confiscated from the third and fourth applicants, but that his superiors from Harare were in the process of persuading the police to retrieve the same from the members of the Central Intelligence Organisation who had the physical possession of the property in question. In respect of the *declaratur,* C Mr *Chikafu* made the submission that as his office had not been made privy to the warrants relied upon by the respondents in detaining the applicants beyond the legal limit of 48 hours, the legality or otherwise of the detention complained of could only be confirmed once he has had access to the papers relied upon by the police. He needed more time to peruse the further detention warrants the police relied on, which they were not keen to release to him. His D superiors would hopefully succeed in persuading the police to release the same. Another application for a postponement was sought by Mr *Chikafu* to allow further submissions after efforts to establish the true facts have been made. The application was granted. I also directed that senior law officers, in the persons of Mr Jagada and Mrs Ziyambi, being present in Mutare, appear E at the resumed hearing. Mr *Chikafu* undertook to advise both counsel of the directive.

On the following day, 14 March 2006, serious developments in the matter were brought to the attention of the court by Mr *Chikafu*. According to him, Mr Jagada and Mrs Ziyambi went to Mutare Rural Police Station where the applicants were being held, in order to assess the evidence against them. He F later joined them. The defence team was allowed access to their clients and they proceeded to conduct interviews. The respondents, on their accord, left the room where the interviews were conducted. As a result of threats offered to the senior State counsel, the situation got tense. In fear of their liberty, both senior State counsel left for Harare. Present at the police station were members G of the defence team, which included Mr *Chibwe*, Mr *Maanda*, Mr *Mugabe*, Mr *Makombe*, Mr *Ndlovu* and Mr *Mutungura.* Mr *Chibwe* took up the sequence of the unfolding drama. According to him, on being interviewed, the first applicant made the following revelations.

Soon after his arrest, he was subjected to torture, beatings and other abuse, including having a fire-arm pressed against his temple. He was interrogated H

A for many hours without rest. He was enticed, by the promise for his release on bail, to sign a prepared affidavit in which he implicates the fourth applicant and one Roy Bennett in clandestine activities connected with an armed insurrection. He would thereafter, be treated as a State witness, as has now been the case with one Peter Hitschman. He was released to go and think it over in his cell around 3 a.m. on Saturday 11 March 2006. Later that morning, B he had decided to sign the affidavit. When they were taken to court, he was remanded in custody. Nothing was said about his release on bail. Senior State counsel asked whether he was prepared to give another statement in view of what he had said. The first applicant flatly refused the offer, explaining that if he did so he would be back in police custody to suffer even worse consequences.

C Eventually, Mr *Chibwe* said, they were interviewing the fourth applicant. It was then announced that the Attorney-General had telephoned. They should discontinue the interviews, appeared to be the message from the Attorney-General. They were, as counsel, asked to leave. They complied with the request. All this time, all the respondents were present at the station, as was D the ZRP Officer Commanding District, Chief Superintendent Makoni, CIO Officer Commanding District, a Mr Tapfuma, and the CIO Officer Commanding Manicaland Province, Mr Chibaya. They all went to ZRP Mutare Central which is the provincial headquarters of the police. The senior State counsel went into conference with the security agencies. Mr *Chibwe* says he later heard the first respondent shout at counsel accusing them of behaving as if they were E defence counsel. The atmosphere was tense. No-one shouted anything back at the first respondent. Later, according to Mr *Chibwe*, State counsel emerged from this office. They appeared shaken and subdued. He could not say anything further to them except to wish the two travelling to Harare a safe journey. They all dispersed. Mr *Chikafu*, fearful of the threats made by the enraged State agents, did not sleep at his usual place of abode that night.

F This update is certainly a shocking development. It, however, should not distract us from what the real issues in this case are. After this submission by counsel, who wished this to be on record, I

asked Mr *Chikafu* to state the case for the respondents, his clients. He stated that in view of this absolutely unlawful behaviour by his clients, he could hardly make any meaningful G submissions. He pointed out, however, that, as indicated in the previous hearing yesterday, his superiors had eventually convinced the police to hand back the property belonging to the third and fourth applicants which had been unlawfully seized by them. As for the other relief, he conceded that the subsequent re-detention of the applicants at the Mutare Rural Police Station was illegal in view of the fact that they were now expected to be in prison H custody.

2006 (1) ZLR p268

Hungwe J

Counsel for the applicants prayed that the court issues an amended order that A should reflect the amendments as suggested during the hearing. The order now sought did not seek the release of the applicants, as that point had been dealt with in the magistrates court on 11 March 2006. In that hearing, the applicants had sought and had obtained an order of the court that required the police to ensure that subsequent interviews of the applicants were B conducted in counsel's presence. Police had ignored this order and taken the applicants to Mutare Rural for further interrogation without advising counsel. They had kept the applicants at a police station instead of the remand prison. This was in a clear breach of the court order and therefore in contempt of that court's order. He asked that this court declares the subsequent detention of the applicants in police custody unlawful, unconstitutional and therefore C illegal. He sought a declaration in that respect.

In this application, the respondents, through counsel, conceded the fact that the continued detention of the applicants beyond the statutory 48 hours constituted an unlawful detention where it could not be shown that this detention in excess of the period was properly authorized. Section 13(1) of the Constitution of Zimbabwe provides that no person shall be deprived of his D personal liberty save as may be authorized by law in any of the cases specified in subsection (2). Subsection (2) enumerates nine instances where a person's liberty may be properly curtailed by operation of law. The instances include holding a person following his conviction of a criminal offence; in execution of an order of court punishing him for contempt of that court or other court or of Parliament; in execution of an order for civil imprisonment; for the purpose of bringing him to court or to Parliament for the purpose of executing the order of that court E or of Parliament; upon reasonable suspicion that he has committed a criminal offence; for the purpose of complying with an order for committal to an institution of skills training until he attains the age of 21; for the purpose of preventing the spread of an infectious or contagious disease; F or for the purposes of preventing unlawful entry into Zimbabwe or for the purpose of facilitating his expulsion from Zimbabwe. Subsection (3) of s 13 sets out the parameters within which any such arrest would remain legal. It states:

> "Any person who is arrested or detained shall be informed as soon as G 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."

This important provision for the protection of personal liberties has been commented upon by the Supreme Court on several occasions. In *S* v *Woods & Ors* 1993 (2) ZLR 258 (S), Gubbay CJ stated: H

2006 (1) ZLR p269

Hungwe J

> A "The failure to accord to the first and second respondents their constitutional right to proper and meaningful access to a legal practitioner was a serious violation. It was deliberate, and motivated by an apprehension that the consequences of such access might possibly hinder the progress of the investigations, or might even cause these two appellants to become unco-operative. There is no question of the breach being of a technical nature, B being committed in good faith, or due to inadvertence. And what makes it all the more reprehensible was the grave nature of the charges for which the two appellants had been arrested and the magnitude of their criminal liability if convicted.
>
> The importance that attaches to the fundamental right granted by s 13(3) of the Constitution of Zimbabwe, 'to obtain and instruct without delay a C legal representative of his own choice and hold communication with him', was recognized at an early stage in a number of decisions by the courts of this country. See *Minister of Home Affairs & Ors* v *Dabengwa & Anor* 1982 (1) ZLR 236 (S) at 242B; *S* v *Slatter & Ors* 1983 (2) ZLR 144 (H) at 152H-155D; *S* v *Sibanda* 1989 (2) ZLR 329 (H) at 333G-334F."

I find the above comments by his Lordship quite apposite in this case. The D applicants were held, by the State's own admission, beyond the 48 hour period. The weak suggestion that there were

warrants for further detention authorizing this was not persisted with as these were not produced in court or shown to Mr *Chikafu*. He remained seriously handicapped to persist with this unsubstantiated defence. If the warrants for further detention issued by a Police Superintendent existed, it would have been the easiest of tasks for the E respondents to furnish these to the court or at least to their counsel. They have neither made Mr *Chikafu* nor his superiors privy to those documents. The only inference to be drawn is that they do not exist. For, if they exist, then the respondents are clearly exhibiting an unacceptably high degree of lack of co-operation with the office of the Attorney-General. If that is the case, it is to be F deprecated.

Not only have the respondents unlawfully curtailed the liberty of the applicants, they have also improperly denied them access to counsel of their choice. These are such violations of their rights as cannot go uncondemned.

The papers reveal that the first and second applicants were arrested on 6 March 2006. They were taken to court on 11 March 2006. The applicant was G arrested on and detained from 8 March 2006. He was released without charge on 11 March 2006. The fourth applicant was arrested on 8 March 2006. He appeared in court on 11 March 2006 facing charges under the Public Order and Security Act [*Chapter 11:17*]. The applicants have demonstrated that by the time they were taken to court, they had been subjected to varying periods of H illegal detention.

Hungwe J

The point that arises is whether, where an applicant has been held beyond the A 48 hour period, it is competent to declare the whole detention period illegal. This point was discussed by Gillespie J in *S* v *Makwakwa* 1997 (2) ZLR 298 (H). Although the court there was dealing with the question whether a person illegally held could be competently charged with escape from lawful custody, in my view, the principle set out therein applies here, *mutatis mutandis*. Even B assuming in favour of the respondents that somewhere in their high offices the warrants for further detention lie unattended, the facts before me require that I pronounce as illegal that detention. The court cannot refuse an order when an applicant has made out a clear case, not on the basis of an unsubstantiated assumption. Mr *Chikafu* did not ask the court to proceed on that basis either. The court has to explore the legal point arising from the facts C before it. It must then make its finding.

In the present case, the respondents do not put forward any opposition to the order sought. I assume this is a realization that in acting in the manner they have done so far, they acted unlawfully. This behaviour deserves of the highest possible censure. It cannot be justified in a democratic society. One cannot simply condone such a blatant refusal of access by the police. This D is the type of conduct that brings the administration of justice into disrepute.

An application for an interdict must establish a clear right, an injury actually committed or reasonably apprehended and that there is no other satisfactory remedy available to the applicant. This is trite. The applicants' rights are clearly established by reference to the Constitution. The infringement of those E rights has been conceded by the State. I do not envisage what other remedy could possibly be available to the applicants. I am therefore satisfied that the applicants meet the requirements for a final interdict. As the real cause for the application has been removed, and only a declaration of rights is now being sought, the applicants are entitled to the *declaratur.*

In the event, the following order is issued: F

(1) The detention of the first, second and fourth applicants in police custody after 11 March 2006 be and is hereby declared unlawful.

(2) The confiscation of property belonging to the third and fourth applicants be and is hereby declared unlawful.

(3) The interrogation of the applicants by the police in the absence of counsel G of their choice and contrary to an order of court be and is hereby declared unlawful.

(4) The respondents pay the applicants' costs on a legal practitioner and client scale.

Hungwe J

A *Zimbabwe Lawyers for Human Rights*, first, second and third applicants' legal practitioners

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

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Source:
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PONDORO (PVT) LTD & ANOR v MINISTER OF STATE FOR LANDS & ANOR 2006 (1) ZLR 272 (H)

Citation	2006 (1) ZLR 272 (H)
Case No	Judgment No. HH-33-06
Court	High Court, Harare
Judge	Kudya J
Heard	22 November 2005;, 28 November 2005; 30 November 2005
Judgment	15 March 2006
Counsel	*P C Paul,* for the applicants Ms *E M Mwatse*, for the respondents
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Land — *acquisition — agricultural land compulsorily acquired under s 8(1) of Land Acquisition Act [Chapter 20:10] – former owner continuing to occupy farm — 17th amendment to Constitution — effect — valid acquisition orders previously issued not affected*

Headnote

The applicants had continued to occupy their farm after the issue of an acquisition order in terms of s 8 of the Land Acquisition Act [*Chapter 20:10*], due to political intervention in their favour by the Vice President. Some three years after the issue of the order, the Acting Chief Land Officer of the Province requested the police to evict the applicants from the farm. The applicants sought an interdict preventing the police from E evicting them. It was argued that, since the State had become owner of all agricultural land by virtue of the 17th amendment to the Constitution, the farm was only acquired on the date on which the amendment came into effect. Consequently, no law was yet in place governing the removal of the former owner from the property which relates to the period of F adequate notice for such removal, nor was there any law in place to criminalize these former owners who remain on the property after the appointed day.

Held, that the applicants' continued stay on the farm became illegal on the expiry of the periods stated in the acquisition order. The Constitutional amendment did not strike down valid orders issued under s 8(1) of the G Act before the appointed day. All it did was remove judicial oversight of the process of acquisition.

Cases cited

Airfield Invstms (Pvt) Ltd v Min of Lands 2004 (1) ZLR 511 (S)

Kudya J

Legislation considered A

Constitution of Zimbabwe 1980, s 16B

Land Acquisition Act [*Chapter 20:10*], s 8(1)

Case information

P C Paul, for the applicants

Ms *E M Mwatse*, for the respondents

Judgment

B **KUDYA J:** The applicant seeks the following provisional order:

"TERMS OF FINAL ORDER SOUGHT

1. That in the absence of legislation or a court order, the first respondent is not entitled to take the law into his own hands and bring about an C eviction of the applicants.
2. That respondents pay the costs of suit.

INTERIM RELIEF SOUGHT

Pending the determination of this matter, applicant is granted the following relief: D

1. That respondents are interdicted from:
   (a) Evicting applicants from Subdivision A of Athens.
   (b) Interfering with the first and second applicants' peaceful and undisturbed possession of the property.
   (c) Interfering with applicant's farming activities on the property."

E **THE FACTS**

It was common cause that a notice in terms of s 5(1) of the Land Acquisition Act [*Chapter 20:10*] was issued in respect of the property on 25 January 2002. An acquisition order under s 8(1) was made on 31 July 2002. Mr *Paul* for the applicants indicated in his oral submissions that an application for confirmation was made with the Administrative Court timeously in terms of s 7(1) of the Land F Acquisition Act.

It was also common cause that until 14 September 2005, when the Constitutional Amendment Act No. 17 of 2005 came into effect, the applicants were still occupying and utilizing the immovable property in question. The applicants have been so disposed due to political intervention in their favour by the Vice G President of the Republic of Zimbabwe's minute of 4 July 2002.

Sometime in 2004, the second applicant was arraigned at Chinhoyi magistrates court for contravening s 9 of the Land Acquisition Act (*supra*), a charge which is still extant.

On 17 November 2005, the applicants came into the possession of Exhibit C, H a letter to the police in Mashonaland West from the Acting Chief Land Officer

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Kudya J

of the same province, requesting that the applicants be evicted from the A immovable property in question. The second respondent instructed the Officer-in-charge Rural to effect the eviction by 18 November 2005. There is no court order to that effect, hence the launch of this application on an urgent basis on 18 November 2005.

The matter was set down for hearing on the day it was filed, for 22 November B 2005, but was postponed to 28 November 2005 to enable the applicants to effect service on the respondents.

On 28 November 2005, the respondents were represented by Ms *Mwatse* who did not raise any argument against the urgency of the matter. It was accordingly treated as urgent.

The only issue for determination is whether or not the applicants can succeed C in the provisional order that they seek, bearing in mind that the immovable property in question belongs to the first respondent.

Mr *Paul,* for the applicants, submitted that the effect of the 17th amendment to the Constitution, introduced by Act 5 of 2005, was to cancel all previous s 8(1) orders under s 8(1), which were substituted by the acquisition process D enumerated in the Constitutional Amendment Act. He therefore, averred that a necessary consequence of this was that the present immovable property was only acquired on the appointed day, 14 September 2005. In the result, he opined, no law was yet in place governing the removal of the former owner from the property which relates to the period of adequate notice for such removal, E nor was there any law in place to criminalize these former owners who remain on the property after the appointed day. That one is contemplated is clear from s 16B of the Constitution, introduced by Act 5 of 2005.

Ms *Mwatse* did not agree that the Constitutional Amendment Act wiped off the acquiring authority's rights obtained before 14 September 2005. I agree with Ms *Mwatse* on that score. F

The effect of the provisions of s 8(1) of Land Acquisition Act *supra* were dealt with authoritatively in *Airfield Investments (Pvt) Ltd* v *Minister of Lands & Ors* 2004 (1) ZLR 511 (S). Malaba JA stated at p 514:

> "Subsection (1) of s 8 of the Act gives the power to the acquiring authority to make an order not less than 30 days after the date of publication of the G preliminary notice acquiring the land the nature and extent of which would be described therein … Upon service of the order of acquisition upon the owner or occupier of the land, rights of ownership are *immediately* taken and vested in the acquiring authority" (my emphasis).

Section 8(3) immediately vested those rights to the acquiring authority and these are irrevocable after six months of the acquisition order made in terms H

Kudya J

A of s 8(1). The Vice-President's minute of 2 July 2002, did not *in casu* revoke the s 8(1) order as it was in any event written before s 8(1) came into force. The s 8(1) order became irrevocable after 31 January 2003.

On 31 July 2002, the applicants received 45 days' notice to cease all agricultural operations and 90 days to vacate the residences. They had until 14 August 2002 to wind up farming operations and 29 October 2002 to vacate the B residences. Their continued stay at the immovable property after these days became illegal. As Malaba JA stated at pp 515-516 in the *Airfield Investments* case:

> "At the end of the maximum period of 90 days from the date of service of the order of acquisition, the rights of the former owner or occupier cease C to exist and by operation of law he must leave the land or be evicted by order of court …
>
> It is also clear from the provisions of subsection (5) of s 7 that the acquisition of land required for resettlement purposes can take place and the acquiring authority can exercise all the rights of such ownership such as allocation of it notwithstanding the fact that the application is pending D before the Administrative Court. The obligation imposed on the acquiring authority is to make the application for confirmation of the acquisition to the Administrative Court not later than 30 days from the date of service of the order of acquisition and bear in mind that should the Administrative Court refuse to confirm the acquisition it will be ordered to return the land to the former owner or occupier.
>
> E Once the acquiring authority submits its decision to compulsorily acquire the land for resettlement purposes and the process of judicial review by the Administrative Court, it could be prohibited by a court from exercising rights of ownership of the acquired land on the ground that confirmation proceedings are still pending before the Administrative Court."

The last quoted paragraph puts paid the submission by Mr *Paul* that the s 8(1) F did not vest the acquiring authority with full rights of ownership.

My reading of the constitutional amendment is that it does not strike down valid s 5(1) and s 8(1) orders issued before the appointed day. All it does is that it removes judicial oversight of the process of acquisition, be it of confirmation or the right to a fair hearing on matters concerning land acquisition. G The only thing it did for applicants *in casu* was that it removed the necessity of the Administrative Court to decide whether or not to confirm the acquisition. The computation of the 45

days and 90 days were never based on confirmation proceedings, but on the service of s 8(1) order. To submit that, for the s 8(1) orders which were valid, computation should start on 14 September 2005 in my view, does not accord with either the letter or spirit of the constitutional H amendment Act.

Kudya J

A consequence of my finding is therefore that the applicants by operation of A law ceased to have authority to use agricultural land for agricultural purposes by 14 April 2002 and the residences by 29 October 2002. The court cannot condone, sanction or be an accomplice to their continued defiance of the law.

In the result, their application for a provisional order is dismissed with costs. B

Wintertons, applicants' legal practitioners

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

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Source:
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GASELA v MADUBEKO (GWERU RURAL ELECTION PETITION) 2006 (1) ZLR 277 (H)

Citation	2006 (1) ZLR 277 (H)
Case No	Judgment No. HB-113-05
Court	High Court, Bulawayo
Judge	Cheda J
Heard	16 March 2006
Judgment	16 March 2006*
Counsel	*N Mathonsi,* for the applicant *M Makonese,* for the respondent
Case Type	Election petition
Annotations	No case annotations to date

Flynote

Customary law — *headmen — vacation of position — how headman should convey his resignation* C

Headnote

There is no provision in the Traditional Leaders Act [*Chapter 29:17*] for the steps a traditional leader should take to vacate his traditional position. A headman is nominated by the chief and is

appointed by the Minister D in terms of s 8 of the Act. In the absence of any provision stipulating the method of resignation, he is expected to merely notify the chief of his resignation. He is enjoined to do so because the position in question is a traditional position and logically it must first be handled traditionally.

Cases cited E

Drogheda Election Petition (1869) 21 LT 402; O'M&H 252

Hove v Gumbo (Mberengwa West Election Petition Appeal) 2005 (2) ZLR 85 (S)

Mangoma v Mutasa EP-12-05

F *Marimo & Anor v Min of Justice & Ors* S-160-05

North Durham Election Petition (1874) 3 LT 383

Pio v Smith 1986 (2) ZLR 120 (S)

Taunton Election Petition (1874) 30 LT 125

Legislation considered

G Traditional Leaders Act [*Chapter 29:17*], s 45(1) & (2)

Case information

N Mathonsi, for the applicant

M Makonese, for the respondent

Cheda J

Judgment

CHEDA J: This is an election petition seeking to challenge the result of the A election in the Gweru Rural Constituency held on 31 March 2005. The applicant's desire to nullify the result of the said election result was on three grounds, *viz:*

1. That the respondent did not qualify to stand as a candidate in the March 2005 election and that the nomination court should not have accepted his B nomination papers;
2. That in the run up to the elections, there were serious corrupt practices perpetrated by the respondent, his agent and his political party, which resulted in undue influence being brought to bear upon the electorate, thereby unduly benefiting the respondent;
3. That there were illegal practices committed by or on behalf of the C respondent which affected the outcome of the poll.

After hearing evidence from both the petitioner and respondent together with submissions by both counsel, I dismissed the petition and said that my reasons would follow. These are my reasons for that judgment.

In his opening remarks Mr *Mathonsi* for the petitioner stated that the D petitioner had previously challenged the appointment of judges of this court, which challenge was dismissed by this court. The petitioner then appealed that decision, but, subsequently withdrew the appeal pending the decision of the Supreme Court in the matter of *Marimo* v *Min of Justice, Legal & Parliamentary Affairs & Ors* S-160-05. E

To the court's knowledge the notice of withdrawal filed with the Supreme Court on 29 August 2005 was an unconditional withdrawal and will be treated as such by this court. The petitioner is a member of the Movement for Democratic Change (herein after referred to as "MDC") and was its candidate during the March 2005 parliamentary elections while respondent represented Zimbabwe African National Union-Patriotic Front (herein after referred to as F "ZANU (PF)"). After the counting of votes, the respondent was duly declared the Member of Parliament which declaration has led to the petitioner instituting these proceedings.

(A) PETITIONER'S CASE – RENSON GASELA

The petitioner opened his case by leading evidence as follows: G

1. Respondent's nomination

The petitioner contended that the respondent was a headman at the time the nomination court sat on 18 February 2005, thus ineligible for nomination in terms of s 45(1) and (2) of the Traditional Leaders Act [*Chapter 29:17*] which reads: H

Cheda J

A "45. **Election of chief, headman or village head to political office**

(1) No chief, headman or village head shall be eligible for election as –

(a) President; or

(b) a member of Parliament in terms of paragraph (a) of subsection (1) of section 38 of the Constitution; or B

(c) a councillor in any local government elections;

whilst still holding office as chief, headman or village head.

(2) No chief, headman or village head shall canvass, serve as an election agent or manager for any candidate, or nominate any candidate for election as State President, member of Parliament or councillor in any local authority:

C Provided that the chief, headman or village head may exercise his right to vote in any national or local government elections or referendum."

He is of the opinion that the respondent did not qualify to stand as a candidate for the parliamentary elections as he believes that he was still a headman and as such his nomination should have been rejected by the nomination court D sitting at Gweru on 18 February 2005. The basis of his belief is on the understanding that the respondent should have relinquished his post before the nomination day. He further argued that the letter of 18 January 2005 allegedly written by Chief Bunina marked "To whom it may concern", another written by himself on the 4 February 2005 and that by the Minister written on 11 March 2005 were all manufactured *ex post facto* and that the respondent E had never relinquished his post of headman at the time the nomination court sat on 18 February 2005.

2. Corrupt practices

It was his evidence that ZANU (PF) for which the respondent was candidate, politicised food distribution to people in the rural areas. The set up was such F that food distribution committees were set up headed by a councillor. Members of the committee in the ward, in addition to the councillor, were members of ZANU (PF) leadership and war veterans, and these people were always present at every distribution and/or selling point. Villagers wishing to purchase food were being asked to produce ZANU (PF) cards. Village heads compiled a list of all those people who were eligible to purchase food under G a ZANU (PF) ticket. The councillor would source food from the Grain Marketing Board (herein after referred to as GMB) which was then delivered to the ward for distribution under the village head. Further, it was his evidence that all village heads have been made district chairpersons of ZANU (PF) and those who refused to do so have been dethroned.

Cheda J

3. Illegal practices A

The respondent stated that at one time he was due to hold a rally on 20 October 2004 and was advised by the police a day before, that, he should cancel the said rally as it then clashed with a ZANU (PF) rally pencilled in to be held on the same date and time. The following day in the company of Inspector Mamombe he proceeded to the appointed venue under a Mukuna tree to B cancel the said rally. At the same venue, he met one Dumisani Khona a war veteran and Youth Development Officer in the Youth Service Department under the Ministry of Youth Development and Employment Creation who asked him not to have a rally under the Mukuna tree as it belonged to ZANU (PF). When his supporters saw Dumisani Khona, they started dispersing.

On 22 December 2004, he held two rallies, one at Dwaleni and one at C Mankunzane. The rally at Dwaleni was held without any incident but one at Mankuzane was interrupted by members of the Central Intelligence Organisation (herein after referred to as "CIO" who asked him to cancel the rally with one officer threatening to throw tear gas into the crowd. He further stated that in the previous rallies there were always one or two members of the D Police Internal Security Intelligence (herein after referred to as "PISI" but on this day there was a contingent of riot police.

He also said that ZANU (PF) always called meetings ostensibly for food distribution, which meetings were later converted to ZANU (PF) campaign rallies. One such meeting was at Makepesi where people were told that the meeting was for ZANU (PF) not a GMB maize distribution meeting. This E angered one Oliver Nyathi an MDC support (later appointed the petitioner's Chief Election Agent) who uttered words to the effect that the whole thing was rubbish or nonsense or words to that effect.

On 7 March 2005, he held a rally at Mangwande ward where the respondent is the headman. The rally was 50 metres away from the shops. At that rally, F one Another Sibanda and Thomson Ncube both members of ZANU (PF) threatened people with violence. These incidents were reported to the police and Chief Superintendent Sibanda warned both the petitioner and the respondent against such violence.

It is also his evidence that, on polling day, his election agents were prevented from entering the polling station without producing the advertisement showing G that they were indeed appointed as such. This delay, he stated, prejudiced him, as, for a time, they did not see how the voting process was being conducted. This problem was, however, resolved and they were allowed to participate. This was the same case at Guinea Fowl where he produced proof the following day. H

Cheda J

A At a place called Zaloba, he observed that there were about 20 youths, two of whom told him that they had come to attend his rally and he therefore believed that the rest were members of the militia, whose presence was to intimidate his supporters from attending his rally. The same applied to Somabhula where people had expressed an interest in attending his rally, but did not do so; this he believes was as a result of the arrival of 13 to 5 youths B who had come to make sure that a rally was not held.

Between 10-11 March 2005, one of his supporters, a youth, was stabbed 5 or 6 times by ZANU (PF) youth members at Maboleni. The matter was reported to the police but no arrests were made.

He also stated that it had been agreed that polling stations had to be set up C only where there were existing structures such as schools. At a place called Sunrise, a tent was pitched on the basis that there were lots of people. This was as a result of directives from the Zimbabwe Electoral Commission (herein after referred to as ZEC). Only 439 people cast their votes and only 86 voted for him.

D He also stated that youth militias were allowed to vote in areas where they did not live.

He further stated that on 24 March 2005, he came across a GMB truck carrying 600 bags of maize destined for North Shangani. On election day, it was found that over 1 000 people voted for the respondent when he believes that the area does not have such a population.

E On 24 March 2005 at 9.00 p.m., a CIO Land Rover was discovered to be carrying a box full of national identity cards. An audit which he carried out in 3 wards out of 16 wards revealed that there were 140 dead people on the voters roll, and he believes that those identity cards were used for voting. On the polling day, while one of his election agents was inside the polling station, the other F was outside 200 metres away. He complained, of this incident but it was later resolved. He visited other polling stations where he found that no radio message had been sent to correct this anomaly; it is for this reason that he believes that this was deliberate on the part of the Presiding Officer, designed to prejudice him.

He also stated that the village heads were sitting outside the polling stations G to make sure that their subjects voted as directed.

Inside the polling station, a sample of a ballot paper was marked against the respondent's name in order to guide the unsophisticated voters how to vote. He was not happy with the set up at the

command centre as he was of the view that it was run by the military as opposed to the Zimbabwe Electoral H Commission.

2006 (1) ZLR p282

Cheda J

He was further of the view that the election was rigged because the militia was A allowed to vote using dead people's identity cards. He however said there was no violence during and after the election.

The petitioner failed to prove that the election was run by the military and that all nomination court officials were against his candidacy. He failed to prove that the letters allegedly written by the acting Chief *Bunina* and all B correspondence subsequent to them were written *post facto.*

He further failed to prove that dead people were used to vote, by which I think he meant that dead people's identity cards were used in the voting process.

In addition to himself giving evidence the petitioner called the following witnesses: C

Sikhombigo Mpofu

He is a Headman for ward 6, Sikhombigo Village. His evidence was that people in his area were not allowed to buy maize sourced from GMB without producing a ZANU (PF) card and that whenever he called a village development meeting it turned into a ZANU (PF) political meeting. He also related an incident where he was confronted by certain people who threatened to kill him D resulting in him escaping and spending the night in the bush. It was also his evidence that towards the election the local councillor and one Thompson told him to gather his village heads, whereupon they were told to accompany their subjects when they went to cast their votes. On the polling day, he said they appeared lost as they were looking all over the place. He said the people did E not vote freely and voluntarily.

The witness is a seasoned politician. He gave his evidence very well and honestly. He did not seek to mislead the court. He acknowledged that the March 2005 elections were indeed more peaceful than the previous ones. He gave a long political history relating to what he perceived as the manipulation of the traditional leaders. He also dealt with the Gukurahundi era, a highly F emotional issue which, in my view, was being used as a political draw card with no relevant legal legitimacy for the purposes of this petition.

His evidence was largely based on his fight against members of ZANU (PF) but could not prove the existence of corrupt or illegal practices. His evidence did not take the court very far. It therefore cannot stand and is accordingly G rejected.

Elizabeth Sibanda

Her evidence was that during the campaign period leading to the disputed election she attended meetings called by village heads and another by one Another Sibanda. In both meetings people were advised that the meetings were for ZANU (PF) and all those who had put their names down were going H

2006 (1) ZLR p283

Cheda J

A to vote for ZANU (PF) and were therefore going to receive food. She refused to write her name as she belonged to MDC. In that meeting, she stated ,it was when Another Sibanda and Neville Ncube (both ZANU (PF) members) were selected as polling agents. It was at this stage that they were told that the ballot boxes were transparent therefore they would be able to see how people had voted. On the polling day, she noticed that a number of people pretended that B they could not write including one whom she knew to hold a secretarial position. Those people, who were unable to write were assisted. She also stated that there were no incidents of violence and no people were beaten up. She further stated that to her knowledge respondent was still a Headman as they have not been introduced to a new one. She is an MDC supporter.

C She stated that only ZANU (PF) members were being given food. For that reason it is quite possible that food was used to intimidate potential voters into voting for respondent without her

knowledge. She also stated that they were told that the ballot boxes were transparent. This evidence cannot be accepted as evidence which could have swayed a potential voter because it is a fact that the ballot boxes were translucent i.e opaque to a extent that one D could not see what was inside and not transparent. She was an evasive witness. For example, when cross examined by Mr *Makonese* for the respondent as to whether the March 2005 elections were marred by violence, she replied, "I am in the Chisadza ward, there was no violence, all violence was by action." Whatever she meant by that I do not know. She was therefore, a poor witness and her evidence is accordingly rejected.

E **Sitshengisiwe Ndlovu**

She was a polling agent at Mangwende. Her evidence was that at this polling station, initially, voters seemed happy in their voting but changed when Another Sibanda a polling agent for ZANU (PF) came. Another Sibanda is a councillor, and, therefore she was of the opinion that his presence deterred F would-be voters as they had been told that if they voted for MDC they would not get food. She further stated that up to 6 February 2005, respondent was still a headman as he tried a civil matter involving the Ngwenyas.

Although she stated that she attended the trial on 6 February 2005 where respondent presided she did not seem to understand what was going on. It G is possible that there was no trial which took place but that the Ngwenya brothers who were subject of the matter had attended merely to report a settlement. When pressed further about violence, conceding that people voted freely she held this notion that although they did, they were still afraid because of the threats. This notion she held to, despite lack of evidence to support her view. She was obviously a biased witness who was not prepared H to accept even a glaring truth. She however, could not point out any person

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who failed to vote due to intimidation or denial of food. Her evidence therefore A is rejected.

Idah Mbambo

She resides at Nsukamini village under Headman Mdubiwa. She is 75 years and her husband is 86 years of age. Her evidence was that they did not receive food as she is said to be an MDC supporter. Her evidence was about food B which corroborated other witnesses. She was truthful. But she was also unable to mention any person who failed to vote as a result of being denied food. Her evidence did not help the petitioner's case.

Josiah Mafiti

He is 69 years of age and resides at Nyamambi. His evidence was that ZANU C (PF) members denied him food as he is a ward chairman of MDC. It was also his evidence that whenever MDC held rallies or meetings, ZANU (PF) would also do so. He categorically stated that he did not know the activities of Thomson Ncube. He talked of violence in the year 2002 or 2004 where he stabbed some intruders at his home during the night but could not say whether these were ZANU (PF) members or not. D

His evidence in relation to food distribution is corroborated by other witnesses. However, when he was asked a simple question as to whether MDC won at Sikhanyiso, he said, he was not involved in the counting. When pressed further he attempted to dissuade Mr *Makonese* from asking that question, thereby diverting him to concentrate on the food and starvation. This witness E was extremely evasive and appeared to have a lot to hide from the court. He was, therefore, on overall a dishonesty witness and no reliance can be safely placed on his evidence.

Joseph Mabhena

He was a Chief's Assistant for seven years up to 24 March 2005 when a group F of about 30 people came singing political songs and demanded that he relinquish his post as Chief's Assistant. The reason for this was because he had been seen at MDC meetings. This was said by one Cathrine Mpofu who was in the company of Masotsha Ncube and Bigboy Ncube. He also told the court that whenever, CARE (a non governmental organisation)

called meetings for food distribution, such meetings were first addressed by G ZANU (PF) officials until CARE officials arrived.

He gave his evidence well. What I find astonishing is that, while he condemns the holding of a judicial office and becoming a politician at the same times as far as the respondent is concerned, he finds nothing wrong with him having done so before his removal. I find that he was not a credible witness therefore his evidence is of no probative value. H

Cheda J

A **Jane Moyo**

She resides at Makepesi Village under Bunina ward and had been a village head for 25 years but was removed by the District Administrator for attending MDC meetings. She was confronted by ZANU (PF) youths and she fainted. She further told the court that food distribution meetings were called which were later turned into political meetings for ZANU (PF). She also testified that B at one meeting she was told to remain standing until the meeting was over, this was because she had refused to chant ZANU (PF) slogans.

Her evidence indeed corroborated that of other witnesses in as far as the lower echelons of ZANU (PF) distribution of food were concerned. However, she could not say whether either respondent or his agent had knowledge of what C was going on. Her evidence therefore was not helpful.

Bernard Chakama

His evidence was that he was an election agent for MDC in the March 2005 election at Bambanani School polling station. His evidence was that he saw people from other areas e.g. Malani coming to vote at this polling station. This D surprised him as there was a polling station at Malani. When they were asked by the presiding officer and a policeman on duty why they had come there, they replied that they were told to vote where they had been settled. He also obseved that one ZANU (PF) election agent was greeting voters and he concluded that this was a strategy by ZANU (PF) to show that the voters had indeed voted for ZANU (PF).

E His conclusion that there was some intimidation emanating from the fact that he saw the respondent's election agent conversing with some voters at the polling station is not safe as the discussion which he did not hear could have been about something else. His evidence is therefore rejected.

Zenzo Bhebhe

F Bhebhe was an election agent for MDC during the relevant period at St Martins, Matshaya, in Lower Gweru. He stated that the voting process was carried out in a manner which was unsatisfactory to him, in that one Machaya brought in a group of people, this was after they had been told by village heads were to bring their own people. He further told the court that food distribution meetings were turned into ZANU (PF) rallies. He concluded that people voted G for ZANU (PF) because they were starving. He also stated that one Machaya remained within the prohibited zone inside the polling station. It is also his evidence that Machaya when confronted by himself and Susan Muchada about his actions, he threatened her with disappearance. This resulted in them keeping quite as ZANU (PF) was known for causing people to disappear.

H His evidence that people voted for ZANU (PF) because they were starving

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is not credible as a fairly large number of voters voted for MDC in that A constituency. Further, his evidence that Machaya was within the prohibited area was not corroborated. It is his evidence that he was with one Susan Machada but she was not called to give evidence and no explanation was given as to why she was not called to corroborate him on this crucial point. His evidence is therefore rejected. B

Tecla Mpofu

She was an MDC election agent and was positioned inside the polling station. It was her evidence that when she arrived with her colleagues from MDC they were denied entry into the polling station because they did not have accreditation cards. This requirement was demanded from them only but not from ZANU (PF). They were, however, later allowed inside after Oliver Nyathi C had explained that all polling stations he had visited, accreditation cards were not a pre-requisite for entry into the polling station. She said that she saw approximately three people reporting to Luke Sibanda, a ZANU (PF) election agent, and she queried this with the polling officer. The response from the ZANU (PF) election agent was that these people had come to advise him that D food was ready. She also observed that some people were voting using green identity cards waiting slips, yet they were supposed to produce either a metal identity card, drivers' licence or a valid passport. She also observed Alison Machaya sitting 1.5 metres away from the door of the polling station.

While her evidence about the accreditation cards is accepted as true, it can not be said that their denial into the polling state was deliberate. It therefore E lacks credibility in as far as the motive of their denial is concerned. It is therefore rejected.

Peter Nkomo

He told the court that to his knowledge respondent was still the Headman on 6 February 2005 as he was present when he adjudicated over three cases. He F further stated that to his knowledge Chief Bunina was only installed on 25 September 2005, a ceremony which he witnessed. His evidence was false as acting Chief Bunina had always been in existence as evidenced by his letter of 18 January 2005, it is therefore rejected.

Oliver Nyathi G

He resides under village head Ndayo under Headman Mkomba, Chief Bunina, He was the Chief Election Agent for the petitioner for the March 2005 elections. His evidence is that he was in charge of election strategies for the petitioner and he realised that respondent was at an advantage because of his position as headman he could easily talk to other headman, village heads, chiefs and villagers. The food distribution committees were composed of the councillor H

Cheda J

A (chairman), Headmen, ZANU (PF) chairmen, chairpersons for women's league, chairpersons of ZANU (PF) youth leagues and war veterans. This is what he found at a meeting at Makepesi on 27 January 2005. The meeting was supposed to discuss the issue of money which could not be accounted for, but, this meeting turned out to be a ZANU (PF) meeting. He was very cross with them and uttered words to the effect that it was "rubbish or nonsensical" B to use such a meeting for their own purposes. This led to his eviction from this meeting and he subsequently paid an admission of guilt fine for conduct likely to breach the peace. He also said that ZANU (PF) threatened voters with death or some harm and reference to the Gukurahundi era which would come in the form of the Border Gezi militia. Their rallies continued to be disturbed by ZANU (PF) who organised food meetings on the same day and time and venue when C they were due to hold rallies and/or meetings. He also stated that there was connivance between ZANU (PF) and police officers which therefore meant that the elections were not free and fair. In his capacity as the Chief Election Agent, he counter-certified all the returns in all polling station.

I found him to be a rude and ill tempered witness who insults people D irrespective of their ages. He was a highly emotional witness whose evidence cannot be relied upon and is therefore rejected. As a result of his emotional support of petitioner, there was a possibility of exaggeration.

(B) Respondent's case – Josphat Madubeko

He was the ZANU (PF) candidate in the March 2005 election. His evidence is E that he was headman Chisadza up to18 January 2005 when he together with Chief Bunina who is his relative sat down as a family and decided that he should relinquish his headmanship. It was agreed as a family that his second born son Justice hold fort as acting headman Chisadza pending the acceptance of this position by his eldest son Jabulani who is a Minister of Religion. Their decision was reduced into

writing by Chief Bunina on 18 January 2005 and on F 4 February 2005, they proceeded to the District Administrator's office who advised them that they should be another letter to the Chief. It is also his evidence that on 6 February 2005 he took acting Chief Bunina, headman Mukombo and Justice Madubeko, the acting headman, for introduction to people. He stated that Justice had to accompany them in order to be taught the work. He denied trying any case on that day and stated that the Ngwenya G brothers merely came to advise the clerk that they had resolved their dispute. He did not see Sitshengisiwe Ndlovu in that court on 6 February 2005.

According to his knowledge he vacated the office of headman on 4 February. He denied influencing village heads to call meetings which were intended for food but were later converted into ZANU (PF) meetings. It was his evidence H that food was sourced by the councillor. He also denied that he or his election

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Cheda J

agents went about threatening people with death if they did not vote for A ZANU (PF).

His explanation of his resignation is reasonable and is therefore accepted. He did not have personal knowledge of what was going on, on the ground. Whatever was being done by his supporters can not be directly attributed to him. He gave his evidence well and in a credible manner. His evidence is B therefore accepted.

Dumisani Khona

He is a youth development officer in the Ministry of Youth Development and Employment Creation. He is a member of ZANU (PF) although he has no post in that party. He was an election monitor under the Electoral Supervisory C Commission (hereinafter referred to as the "ESC",. He denied refusing the petitioner to hold a meeting under the mukuna tree.

Although he remembered the incident his explanation is that there was a misunderstanding as a result of both himself together with his team on one hand and petitioner with his supporters on the other regarding the venue, but the misunderstanding was resolved amicably. The incident was in 2003. He D denied that the 2005 election was run by the military as suggested by the petitioner but it was run by the ESC. He further told the court that the voters cast their votes secretly and in his view the voting process was conducted fairly and freely.

It is clear that he is a supporter of ZANU (PF) and is both hated and feared E by the petitioner and his supporters. As an election monitor he did not witness any illegal practices. I have no reason to disbelieve his evidence and it is accordingly accepted.

Another Sibanda

He is a ZANU (PF) district chairman and councillor and resides in the Mangwende area. He, as councillor, sourced food from GMB. It was his F evidence that he arrived at the polling station at the same time with Sitshengisiwe Ndlovu, and they were sitting on the same bench. He denied seeing headmen queuing with their subjects during voting. He further denied having a register of food beneficiaries where only ZANU (PF) members benefited in the food distribution. G

His function as councillor is to source food for his ward, whatever, was being done by the food distribution committee had nothing to do with him. He was therefore, a straight forward witness and was credible and his evidence is therefore accepted.

Cheda J

A **Facts found**

I find that the following facts were proved by the parties through the evidence presented by various witnesses.

(1) **Disqualification**

It is common cause that respondent had been a headman prior to the B election. A family meeting was held wherein he decided to resign and the acting Chief Bunina accepted his resignation as

evidenced by the letter he wrote on 18 January 2005. Further correspondence was made to the Ministry of Local Government and Housing. The petitioner, although he was of the view that the letters under discussion were *post facto*, failed to prove on a balance of probabilities that this was so. The respondent C was therefore not a headman after 18 January 2005. He was therefore, qualified as a parliamentary candidate for the March 2005 Parliamentary Elections.

(2) **Corrupt Practices**

Although there was evidence that there was intimidation in the form of D threats to deny petitioner's supporters food and reference to the possible return to the Gukurahundi era in the event that people did not vote for the respondent's party, the extent of such intimidation is questionable. However, the fact remains that there was no violence before, during or after the election. In fact, all witnesses confirmed that it was peaceful as compared to the previous elections.

E Despite the threat of denial of food by the respondent's supporters, there was no evidence led to show that there was starvation in that constituency or any other areas in Zimbabwe. The petitioner and his witnesses, therefore, were not being truthful in that respect. The disruption of the petitioner's rallies were not deliberate and cannot be said to have been F done with either the respondent's instructions or knowledge or that of his agents. Even if one of his supporters, Dumisani Khona, is said to have disrupted one such meeting under "the mukuna tree" it was not proved that it was deliberate as he was also scheduled to have his own youth training meeting at the same place and time. The petitioner alleged that dead peoples' identity cards were used in the election, but no proof was F presented that indeed this was the case.

3) **Illegal practices**

The allegations that Carison Machaya, a village head, was allowed to bring his subjects to vote under his guidance and to sit at the door was not proved by petitioner and/or his witnesses. Dumisani Kona was an H election monitor and is said to be a fearsome figure in that community and

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Cheda J

therefore, should not have been allowed to be inside the polling station A in general, let alone to be near the booth. It has, however, not been proved that there are voters who failed to freely exercise their vote for fear of his presence. These allegations are therefore rejected.The law with regards to the election of traditional leaders to a political office is dealt with by s 45 of the Traditional Leaders Act [*Chapter 29:17*] (No. 25/98) which reads: B

" 45 **Election of Chiefs, headman or village head to political office**

(1) No chief, headman or village head shall be eligible for elections as –

(a) President; or

(b) a member of Parliament in terms of paragraph (a) subsection (1) of section 38 f the Constitution; or C

(c) a councillor in any local government elections;

whilst still holding office as chief, headman or village head."

The petitioner argued that at the time of the presentation of his nomination papers, the respondent was still a headman mainly because the letters submitted before this court were written *ex post facto* and that he had been D seen trying cases on 6 February 2005. With regards to his resignation, there is no provision of what form a traditional leader should take to vacate his traditional position. I find that a headman is nominated by the Chief and is appointed by the Minister in terms of s 8 of the Traditional Leaders Act. It therefore follows, in my view, that in the absence of any provision stipulating his resignation, he is expected to merely notify the chief of his resignation. He E is enjoined to do so because the position in question is a traditional position and logically it must first be handled traditionally. Therefore I am of the view that the respondent took appropriate steps to relinquish his position as headman before the sitting of the nomination court. The petitioner was unable to prove that the said letters were written *ex post facto*, therefore, in the F absence of such proof the court can not be expected to base its conclusion on speculation and suspicion.

There were pockets of intimidation by the respondent's election agents and not by the petitioner. The definition of an agent for the purposes of the electoral law is that anyone who is set in motion by an election candidate to

conduct or canvass votes on his behalf is his agent: see *Makoni East Election* G *Petition* HH-4-03 and *Makoni East Election Petition* HH-181-03. My understanding of the legal position is that the candidate is responsible for all the misdeeds of his agent, committed within the scope of his authority.

The pertinent question then is, can it be said that the respondent was guilty of corrupt practices to an extent that his election as Member of Parliament H

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Cheda J

A should be vitiated as a result of undue influence perpetrated by himself or his election agent. The respondent did not commit any corrupt practice personally although there are some incidents where his election agents were involved.

Our current legal position with regards to the proof necessary to upset the results of an election is that such proof is now on the same level with criminal B matters, being that, he who alleges corrupt practices must prove such corrupt practices beyond reasonable doubt: see *Hove* v *Gumbo* 2005 (2) ZLR 85 (S), quoted with approval by Makarau J in *Mangoma* v *Mutasa* EP-12-05. In *Hove* v *Gumbo (supra)* Malaba JA stated:

> "An election dispute concerns the entire constituency. It is, therefore, of paramount importance in a parliamentary democracy that the electoral C 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 allegations made in an election petition against an elected candidate must be proved beyond reasonable doubt."

The onus of such proof rests with the petitioner, which, in my view, he has D failed to do.

There was general intimidation which can be attributed to the respondent's supporters. These were in the form of threats of violence and a reminder of the Gukurahundi era. This being the case, the matter does not end there. To constitute the type of intimidation for the purposes of our electoral law, it E should be so general and extensive in its operation that it cannot be said that the polling was a true and fair representation of the opinion of the constituency in which the intimidation took place. In the famous case of *Drogheda Election Petition* (1869) 21 LT 402; *O'M & H* 259, Keogh J held that the general intimidation will render an election void at common law but it must be spread over such an extent of ground and it must permeat the community to such an F extent that freedom of election has ceased to exist.

It is now accepted that common law is now part of the election process. Further to this reason in the case of *North Durham* (1874) 3 L T 383, the English courts, the decisions of which are indeed very persuasive on our courts, it was held that to set aside an election in the ground of general intimidation:

> G "there is a fact that must be established, and that is, that persons possessing the ordinary nerve and courage of men have been prevented from going to the poll to record their votes."

Despite the fact that there were sporadic pockets of general intimidation, in my view they were not so widespread and to such an extent as to prevent potential voters from casting their votes. In fact, all witnesses admitted that H they cast their votes freely inside the polling station.

2006 (1) ZLR p292

Cheda J

I note, however, that the petitioner's witnesses under cross examination, A when confronted with such questions tended to quickly qualify their responses by saying that "but people are starving". This evasiveness on their part, in my view, is typical of witnesses who were uncomfortable with the truth that would emerge, unavoidable as it were.

The importance of a national election cannot be over emphasised. The B majority vote must carry the day and our courts will not lightly invalidate such an election on grounds whose proof falls short of the high standard discussed above. Argument has been presented by the petitioner that he "lost" to respondent by a narrow margin as he polled 8 000+ votes while respondent polled 11 000 votes, a difference of approximately 3 000. This argument does not assist him at all because it is neither the large or small figure which makes C the difference but proof that the figure attained was improperly attained. This point was emphasised in *Pio* v *Smith* 1986 (2) ZLR 120 (S) at 131C where Beck JA stated:

> "An election conducted substantially in accordance with the principles of the Electoral Act, as this election was, ought not to be invalidated on the ground that a narrow majority in favour of the successful candidate D would not have been achieved if only a few eligible voters had not been discouraged from voting by encountering some modest degree of inconvenience that could have been avoided had better foresight been exercised by those responsible for the arrangements at the polling station. The situation is hardly any different from that of voters who arrive at a polling station only to find that the number of people already there has E resulted in queues and delays which could have been averted with better organisation."

It therefore stands to reason that the number of voters who cast their votes in favour of the petitioner was reasonable to an extent that it cannot be reasonably be said that the number of spoiled papers, those who were turned away for various reasons and those who felt threatened to vote for him would F amount to, 3000 thereby depriving him of a win vote.

The burden of proof rests with the petitioner. The court cannot act on suspicion. See *Tauton Election Petition* (1874) 30 LT 125 at 127 where Willes J had this to say:

> "No amount of evidence ought to finding a judicial tribunal to act upon G suspicion, or to imagine the existence of evidence which ought to have been given by the petitioner, but which he has not thought it to his interest actually to bring forward, and to act upon that evidence and not upon the evidence which really has been brought forward."

The court therefore cannot act on an inference that the petitioner would have H won.

2006 (1) ZLR p293

Cheda J

A With regards to the alleged illegal practices, I also find that the petitioner failed to prove the said allegations beyond reasonable doubt. As pointed out above, his witnesses' evidence can not be relied upon as they were very evasive. All they were interested in telling the court was about starvation and not about what the respondent and/or his election agents had done in the voting process.

B The following therefore is my order:

1. The respondent be and is hereby declared the duly elected Member of Parliament for the Gweru Rural Constituency.
2. This petition is dismissed with costs.

C *Coghlan & Welsh*, applicant's legal practitioners

Makonese & Partners, respondent's legal practitioners

* *Editor's note*: The date given on the judgment is 16 March 2005 but this must be an error.

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Source:
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S v MASUNDULWANE 2006 (1) ZLR 294 (H)

2006 (1) ZLR p294

Citation 2006 (1) ZLR 294 (H)

Case No Judgment No. HB-22-06

Court High Court, Bulawayo

Judge	Ndou J
Heard	16 March 2006
Judgment	16 March 2006
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure — *trial — address in mitigation — after sentence has* C *been passed accused should not be given a further opportunity to address in mitigation*

Criminal procedure — *verdict or sentence — alteration — when verdict or sentence may be altered by trial court — magistrate not entitled to alter his verdict or sentence other than in terms of s 201(2) of the Criminal Procedure and Evidence Act [Chapter 9:07] — verdict or sentence* D *delivered "by mistake" — meaning — correction of verdict or sentence must be done immediately on the same day*

Criminal procedure (sentence) — *imprisonment — suspension — single offence — not permissible to pass two sentences of imprisonment, each suspended on different conditions* E

Headnote

In passing sentence on a charge of theft, a magistrate sentenced the accused to one month's imprisonment, wholly suspended on appropriate conditions, plus a fine or in default a period of imprisonment. After sentence was passed, the accused asked to magistrate to consider F community service because he could not afford the fine, whereupon the magistrate purported to "convert" the fine to a period of community service. This he did by amending the sentence to delete the fine and impose a further 30 days' imprisonment suspended on condition that the accused undertake community service.

Held, that s 358(2) of the Criminal Procedure and Evidence Act [*Chapter* G *9:07*] does not enable a trial court to impose two sentences for one offence. The sentence for the offence remains one, which is either wholly or partially suspended on appropriate conditions.

Held, further, that a magistrate is not entitled to alter his verdict or sentence after it has been pronounced. The only exception is provided for in s 201(2) of the Criminal Procedure and Evidence Act, which gives the trial H

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Ndou J

A court the power in regard to a wrong verdict or sentence delivered "by mistake". That implies a misunderstanding or an inadvertency resulting in an order not intended, or also a wrong calculation. The correction must be done immediately on the same day, preferably before the magistrate leaves the bench. *In casu*, the sentence was not delivered by mistake: it was deliberately imposed.

B *Held,* further, that after imposing sentence, a magistrate should not allow the accused a further opportunity to make submissions in mitigation of sentence.

Cases cited

S v Chipxere HH-314-83

C *S v Danda* HB-21-83

S v Gwandu HB-133-04

S v Kangachepe HH-433-84

S v Moabi 1979 (2) SA 648 (BS)

S v Msakasa HH-302-83

D *S v Musakwa* HH-239-83

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 201(2) & 358(2)

Judgment

NDOU J: This matter was referred to me by a Gweru senior regional magistrate E who was seized with the matter on scrutiny. The accused was properly convicted on a charge of theft by conversion of a speaker. Nothing turns on the conviction.

The senior regional magistrate queried the propriety of the sentence(s). The sentence imposed by the learned trial magistrate is incomprehensible and F unclear. First, on the review case cover and an annexure to the charge sheet, the sentence endorsed is:

> "one month imprisonment with labour of which (not clear) months imprisonment with labour is suspended for (*sic*) years on condition accused does not within that period commit an offence of which theft is an element and for which upon conviction is sentenced to imprisonment with labour without the option of a fine. A further 30 days' imprisonment G with labour is suspended on condition accused completes 35 hours of community service at Batanai Old Peoples' Home …"

This on its own is an improper sentence since accused cannot be sentenced twice on the same matter *i.e.* one month plus 30 days. The trial court does not H have authority to pass two sentences for one offence. See s 358(2) of the

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Ndou J

Criminal Procedure and Evidence Act [*Chapter 9:07*]. This provision does not A enable the trial court to impose two sentences for one offence. The sentence for the offence remains one, which is either wholly or partially suspended on appropriate conditions. See *S* v *Musakwa* HH-239-83; *S* v *Msakasa* HH-302-83; *S* v *Chipxere* HH-314-83; *S* v *Kangachepe* HH-433-84; *S* v *Danda* HB 21-83 and *S* v *Gwandu* HB-133-04. In this case, the intended sentence that I can discern B from the record was one of two months' imprisonment, the whole of which was suspended partly on conditions of good behaviour [the magistrate forgot to state for how long] and partly on condition the accused performs 35 hours of community service. Were it not for what follows, I would have altered the sentence to reflect the correct formulation. But the record of proceedings reveals more confusion in that on the back of the charge sheet the trial C magistrate endorsed a sentence of $50 000 of 30 days' imprisonment with labour. Below that, he then wrote "converted to 35 hours community service", whatever that means. The scrutinising regional magistrate queried this obvious confusion. In his reply, the trial magistrate does not explain why he would have two different sentences imposed against the accused for the same offence. Instead, he purports to disown the former sentence and says the latter D sentence is the correct one. This prompted the scrutinising senior regional magistrate to probe further. The prosecutor who dealt with the matter stated that in fact the former sentence was the one pronounced by the trial magistrate in court. This is the sentence that he endorsed on his docket. I suspect that the latter sentence was doctored in the trial magistrate's chambers after the matter was finalised in court. E

Even assuming the latter sentence is the correct one imposed, it is still not properly couched to reflect what the trial magistrate now says was his intention. In his own words:

> "The accused was sentenced to $50 000 or 30 days' imprisonment with labour. However, the accused pleaded with the court to convert that F sentence into community service because he could not afford a fine. That request is recorded immediately under the sentence behind the charge sheet. The sentence of $50 000 or 30 days' imprisonment with labour therefore converted to 35 hours of community service."

It was not competent for the trial magistrate to "convert" the original sentence of $50 000 or 30 days to that of imprisonment suspended on conditions of G community service after the accused person's post sentence pleas. The general rule is that a magistrate is not entitled to alter either his

or her verdict or his or her sentence after it has been pronounced. The only exception is provided for in s 201(2) of the Criminal Procedure and Evidence Act *supra*. This subsection provides: H

Ndou J

A "When by mistake a wrong judgment or sentence is delivered, the court may, before or immediately after it is recorded, amend the judgment or sentence, and it shall stand as ultimately amended."

This subsection gives the trial court the power in regard to a wrong verdict or sentence delivered "by mistake". That implies a misunderstanding or an inadvertency resulting in an order not intended, or also a wrong calculation. B A verdict or sentence, however much open to criticism, cannot be altered if it was deliberately given or imposed. The correction must be done immediately on the same day, preferably before the magistrate leaves the bench: see *S* v *Moabi* 1979 (2) SA 648 (BS). The sentence here was not delivered by mistake. It was deliberately imposed. The trial court, after sentence was imposed, allowed the accused a further opportunity to make submissions in mitigation. C It is a result of these further submissions that he felt persuaded to impose a different sentence. It was not competent for the trial court to do so. This scenario is not what subs 201(2), *supra* provides for. There was no error when the first sentence was imposed. The latter sentence [the result of the said conversion] is incompetent.

D Accordingly, the conviction is confirmed and the sentence of $50 000 or 30 days (the original sentence) is to stand. The subsequent proceedings and sentence imposed are set aside. If the accused has already performed community service he will not be required to pay the fine or serve the alternative custodial sentence.

E Bere J concurs.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/KHAN v PROVINCIAL MAGISTRATE, HARARE & ORS 2006 (1) ZLR 298 (H)

KHAN v PROVINCIAL MAGISTRATE, HARARE & ORS 2006 (1) ZLR 298 (H)

Citation	2006 (1) ZLR 298 (H)
Case No	Judgment No. HH-39-06
Court	High Court, Harare
Judge	Makarau J
Heard	15 March 2006
Judgment	20 March 2006
Counsel	*E Matinenga,* for the applicant *M Nemadire,* for the respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Administrative law — *review — when appropriate — decision of magistrate* C *involving exercise of a discretion — review not correct procedure to challenge that decision*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 24(1) — application to High Court to have matter referred to Supreme Court — effect on proceedings which are subject matter of* D *application*

Practice and procedure — *exception — lis alibi pendens — not a complete bar — court's discretion as to whether to uphold the exception*

Headnote

In 1992, the applicant was sentenced by a magistrates court to a term of E imprisonment on a charge of theft. He was granted bail pending appeal by a judge of the High Court. The appeal was never prosecuted and neither the applicant nor the State took any steps to finalise the matter. In 2004, the applicant was appointed chairman of the football association. An application was brought by another person to have the appointment rescinded on the grounds of the applicant's conviction. Negotiations F and other legal steps were under way to reinstate the appeal. These included an application to the High Court have the matter referred to the Supreme Court on constitutional grounds, alternatively, to resuscitate the applicant's appeal and bail pending appeal. Before these steps were completed, the provincial magistrate issued a warrant of arrest and the G applicant was brought before the second respondent, a magistrate. After an inquiry conducted by the second respondent, the applicant was imprisoned. The applicant brought the magistrate's order on review on the grounds that, as an appeal was under way, the magistrate had no jurisdiction to issue the warrant. H

2006 (1) ZLR p299

Makarau J

A *Held*, that, on the facts, there was actually no appeal pending, no documents being found anywhere to indicate that an appeal had actually been noted.

Held, further, that even if an appeal had been properly noted, the applicant was setting up his own failure to prosecute his appeal timeously to have the matter referred to the Supreme Court for relief. It was only in the alternative that he sought to regularize his appeal by seeking to have his B bail recognized and his appeal deemed pending. These issues did not invalidate the sentence imposed upon him in 1992. The relief sought in the Supreme Court, if granted, might affect the sentence but until that occurred, the sentence remained valid and enforceable. The mere filing of the application with the High Court did not have the effect of stalling any proceedings to enforce the sentence imposed on the applicant.

C *Held*, further, that the exception of *lis pendens* is never a complete bar to further proceedings concerning the same dispute. It is a discretionary tool in the hands of the court used by the court to stay the latter proceedings, having regard to the equities and to the balance of convenience in the matter. The magistrate had a discretion in the matter; D if the applicant was dissatisfied with the manner in which she exercised that discretion, he should have appealed against the decision, not brought it on review.

Cases cited

D W Hattingh & Sons (Pvt) Ltd v Cole NO 1991 (2) ZLR 176 (S)

E *Mhungu v Mtindi* 1986 (2) ZLR 171 (S)

Case information

E Matinenga, for the applicant

M Nemadire, for the respondents

Judgment

F **MAKARAU J:** This is an urgent application to review the proceedings conducted by the respondents on 6 and 7 March 2006 that resulted in the imprisonment of the applicant for a sentence imposed upon him in April 1992.

The facts forming the backdrop to this application are largely common cause. They are as follows:

G The applicant was convicted of one count of theft from a motor vehicle by the magistrates court in April 1992. He was sentenced to three years' imprisonment with one year suspended on condition of good behaviour. Three days after sentence, the applicant applied for bail pending appeal and was released by an order of this court.

From April 1992 to January 2004, the appeal was not prosecuted as no steps H were taken to have the appeal set down and finalised. In January 2004, one

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2006 (1) ZLR p300

Makarau J

Aaron Munautsi approached this court by way of a court application, under A case No. HC 592/04, seeking an order rescinding the appointment of the applicant as Chairman of the Zimbabwe Football Association on the ground that he had been convicted of a criminal offence, thereby disqualifying him from holding a post in the Association by virtue of the provisions of the constitution of the association. Munautsi also prayed for an order directing B the Attorney-General to enforce the conviction and sentence imposed on the applicant. The applicant opposed the application while the Attorney-General indicated that he was not interested in the proceedings before the court but would independently inquire into the status of the applicant's appeal. When the matter was called before Gowora J on 12 November 2004, the applicant did not appear and the application was, on that basis, dismissed without any C determination on the merits of the matter.

Meanwhile, on 29 October 2004, the applicant had filed a chamber application for reinstatement of his appeal and for ancillary relief. In the main, the applicant prayed that the matter be referred to the Supreme Court in terms of s 24 of the Constitution for a determination of whether or not the non-prosecution of the appeal by the appellant did not contravene the applicant's right to a speedy D trial. In the alternative, the applicant prayed that his appeal be deemed to be operational and if a copy of the appeal was not found in the record, then a copy that he attached to the application be deemed to be the operational notice of appeal. The matter was placed before Makoni J, who queried the basis upon which the application was being made. The applicant responded to the query E and the matter is pending at that stage.

From the papers before me, it is clear that there was no activity in the matter until November 2005 when correspondence was exchanged between the applicant's legal practitioners and the third respondent's office with a view to bringing the applicant F to court to explain the status of his appeal. An agreement had been reached between these two parties that the applicant present himself to court on 13 March 2006 to explain the status of his appeal when, on 2 March 2006, the first respondent issued a warrant of arrest bringing the applicant before court. The applicant was brought before the court on the strength of the warrant on 6 March and an inquiry was held in the matter on 7 March 2006 resulting in the imprisonment of the applicant. It is the holding G of the inquiry that the applicant wishes to have reviewed.

As stated above, the applicant brought this application on an urgent basis, seeking a review of the proceedings held before the second respondent. I am satisfied that the matter is urgent as it involves the liberty of a subject.

In his application, the applicant contends that the proceedings before the second respondent are susceptible to review as the second respondent lacked H

2006 (1) ZLR p301

Makarau J

A jurisdiction to conduct such proceedings in view of the fact that the matter is pending before Makoni J. In oral argument before me, Mr *Matinenga* for the applicant agreed with my summation of his argument to the effect that there is a pending appeal noted by the applicant in 1992 and therefore the first respondent had no jurisdiction to issue a warrant for the arrest of the applicant.

B In my view, I first have to determine whether the appeal by the applicant is pending before this court. The second issue is whether the decision by the second respondent to hold the inquiry is reviewable. In my view, if there is no appeal pending in the matter that should end the inquiry before me.

It is common cause that in April 1992, the applicant filed an application to be admitted to bail pending appeal. It is further common cause that in a paragraph C in that application, it was indicated that an appeal had been noted to the Supreme Court against both the conviction and the sentence imposed on the applicant. No copy of the alleged notice of appeal was attached to the application. The applicant was then admitted to bail pending appeal.

It is further common cause that no record of the appeal having been noted with D the Supreme Court has been found. I have been invited to draw the inference that an appeal must have been noted in the matter as Hwacha J would not have granted bail pending appeal without having had sight of the notice of appeal. I have also been referred to the concession made by the State to the effect that a notice of appeal was probably filed in the matter as further basis for the alleged inescapable conclusion that the applicant noted an appeal in E the matter in 1992.

With respect, the concession made by the State that an appeal was probably noted in the matter in 1992 is not supported by the facts before me. The fact that bail pending appeal was granted in the matter does not in itself indicate that an appeal was indeed noted. The copy of the application that was placed before Hwacha J did not have attached to it the notice of appeal as is the usual F practice in this court to enable the court determining bail to assess the prospects of success on appeal. No copy of the notice of appeal has been seen by the Supreme Court, the High Court, the magistrates court, the applicant himself or his legal practitioners or by the State. All these parties, at one stage or another, would have been served or furnished with a copy of the notice of G appeal as they dealt with the matter. It is conceivable that documents such as notices of appeal will go missing from time to time from court records or the records kept by the state and accused persons. It is stretching coincidence beyond credulity that the notice of appeal filed and served by the applicant in accordance with the rules of court and to all relevant parties went missing in all those offices and coincidentally, the applicant's own copy was misplaced. H In my view, even if all the copies of the notice of the appeal had gone missing,

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the reference number in the Supreme Court where the appeal ought to have A been noted would have been found. No such reference number has been produced before me by the parties. It does not exist for if it did, the applicant would have referred to it in the applications that have come before this court concerning the appeal.

I further note that in 2004, an attempt was made in the application pending B before Makoni J to note the appeal by attaching an annexure with the grounds of appeal and for an order deeming this annexure to be the notice of appeal. Such an order would not have been sought were the applicant confident that an appeal had indeed been noted on his behalf in 1992.

It is therefore my finding that no appeal was ever noted on behalf of the applicant and accordingly, there is no appeal pending in the matter. C

I would dismiss the application on the above basis alone. However, in the event that I have erred in holding that no appeal was ever filed in this matter, I shall deal with the first argument raised on behalf of the applicant. The argument raised is that the matter of the status of the applicant's appeal is pending before this court and thus the second respondent lacked jurisdiction D to conduct the inquiry she did on 7 March 2006.

It is necessary in my view that I set out in full the relief that the applicant is seeking before Makoni J. It is as follows:

> "1 (a) The above matter be referred to the Supreme Court on the constitutional point of whether or not the appellant's constitutional E rights as enshrined in s 18 (2) being the right to a speedy hearing have not been violated and contravened.
>
> (b) The Registrar of the High Court be ordered to refer the matter to the Supreme Court.
>
> ALTERNATIVELY,
>
> 2 (a) The appellant's bail paid herein is still operating and in force. F
>
> (b) The appeal filed of record be deemed to be still operative.
>
> (c) In the absence of an appeal being located in the record, Annexure 'K', being the notice of appeal against sentence and conviction be deemed to be the operative appeal herein."

From the above, it is clear to me, and I make this observation well aware of the G risk I run of fettering Makoni J' s discretion when she determines the matter, that the applicant is setting up his own failure to prosecute his appeal timeously to have the matter referred to the Supreme Court for relief. It is only in the alternative that he seeks to regularize his appeal by seeking to have his bail recognized and his appeal deemed pending. The issues that he raises in this matter do not, in my view, invalidate the sentence imposed upon him in H

2006 (1) ZLR p303

Makarau J

A 1992. He is seeking some relief in the Supreme Court which if granted, may affect the sentence but until that eventuality occurs, the sentence remains valid and enforceable. Again, he is requesting Makoni J to validate his bail and the notice of appeal. Until Makoni J grants the order sought, there is no legal impediment in the way of the course of conduct taken by the second respondent. I am not conversant with a legal principle by which the mere filing B of the application before Makoni J to have the matter referred to the Supreme Court or alternatively, to resuscitate the applicant's appeal and bail pending appeal would have the effect of stalling any proceedings to enforce the sentence imposed on the applicant. I have not been addressed on any such principle. *Lis pendens* is not that principle. The first and second respondents C are not parties to the application before Makoni J as the issue of the enforceability of the sentence at the instance of the first and second respondents is not an issue in that matter. The dispute pending before Makoni J is whether the matter of the applicant can be referred to the Supreme Court in terms of the Constitution and in the alternative, whether the appeal by the applicant can be deemed to be pending. These disputes while related to the matter that came D before the second respondent are legally immaterial to the issue that confronted the second respondent. She was enquiring into the enforceability of a sentence imposed by her court earlier and against which no appeal was pending at the time she held the inquiry as Makoni J had not yet deemed the appeal pending. In the event that Makoni J deems the appeal to be pending, then the applicant will then be entitled to his immediate release. Similarly, in E the event that the matter is referred to the Supreme Court in terms of the Constitution, other considerations will come into play. In the absence of a decision by Makoni J, there was no consideration barring the second respondent from proceeding as she did.

It is, therefore, my finding that the matter of the enforceability of the sentence F imposed on the applicant is not pending before Makoni J.

Assuming I have erred in my finding above, I still would have dismissed the application on another basis. The exception of *lis pendens* is never a complete bar to further proceedings concerning the same dispute. It is a discretionary tool in the hands of the court used by the court to stay the latter proceedings having regard to the equities and to the balance of convenience in the matter. G See *D W Hattingh & Sons (Pvt) Ltd* v *Cole NO* 1991 (2) ZLR 176 (S); and *Mhungu* v *Mtindi* 1986 (2) ZLR 171 (S).

In casu, the second respondent decided to proceed with the inquiry after being informed that the matter was pending before this court. She exercised her discretion in the matter. The applicant is not impressed by the manner in which H that discretion was exercised and believes that the trial magistrate erred. In

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2006 (1) ZLR p304

Makarau J

complaining about the erroneous exercise of that discretion, the applicant A appeals and does not seek a review of the second respondent's exercise of her discretion. This is trite. The differences between a review and an appeal have been dealt with in several judgments of this and the Supreme Court. An appeal seeks to attack the correctness of the decision of the inferior court or tribunal while a review seeks to attack the manner in which the decision of the inferior court or tribunal has been arrived at. Grounds of appeal are unlimited B and cannot be prescribed as they relate to the errors in law or in fact made by the court whose decision is under attack. On the other hand, grounds of review are limited by law and have to be laid out in the application for review.

An error in exercising one's discretion can never be the basis for bringing a review. It is a ground of appeal. C

It is therefore, my alternative finding that the applicant has used the wrong procedure in approaching this court for relief. He ought to have noted an appeal against the decision of the

second respondent not to stay the inquiry pending the decision by Makoni J.

Before I dispose of this matter, there is one other issue that I feel I must remark D on.

The applicant was sentenced in April 1992. It has taken the offices of the first and third respondents almost 14 years to realize that there is no appeal pending in the matter. No indication has been given in the affidavit of the first respondent of what it is that occurred to move him and the third respondent sufficiently to enforce the long outstanding sentence with the efficiency with E which they have suddenly acted. Against this background, the perception that it was the application by Aaron Munautsi, a private citizen, which brought the whole matter to light in 2004, gains some credibility. The overall perception created by the facts of this matter is that the offices of the first and third respondents are grossly inefficient or select against whom they are going to F enforce prison sentences. Gross inefficiency or selective justice are both not complimentary attributes for the two offices and the perception that the two offices are either of the two merely serves to bring the administration of justice into disrepute.

By the same token, the applicant was lulled into a false sense of security by the inactivity on the part of the State over the years. Being desirous of G appealing against his conviction and sentence, he ought to have prosecuted his appeal timeously. Having realized that there was no record of the appeal in any of the relevant courts, he ought to have regularized his appeal at the earliest opportunity to avoid the current situation where the State has capriciously pulled the rug from underneath his feet after a lengthy period of H inactivity.

2006 (1) ZLR p305

Makarau J

A In my view, both the applicant and the respondents have conducted themselves in a manner that gravely undermines the integrity of the justice delivery system. As a mark of my displeasure with the parties, I decline to make an order as to costs.

In the result, I make the following order:

B The application is dismissed.

T K Hove and Partners, applicant's legal practitioners

The Attorney-General's office, respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/STANMARKER MINING (PVT) LTD v METALLON CORPORATION LTD 2006 (1) ZLR 306 (H)

STANMARKER MINING (PVT) LTD v METALLON CORPORATION LTD 2006 (1) ZLR 306 (H)

2006 (1) ZLR p306

Citation	2006 (1) ZLR 306 (H)
Case No	Judgment No. HH-36-06
Court	High Court, Harare
Judge	Omerjee J
Heard	30 May 2005; 3 June 2005; 6 February 2006; 9 February 2006
Judgment	22 March 2006
Counsel	*J C Andersen SC,* with him *G Mitha Valla*, for the plaintiff

C E Puckrim SC, with him *A R Bhana*, for the defendant

Case Type Civil trial

Annotations Link to case annotations

Flynote

Contract — *interpretation — preference for a construction which leaves in place an enforceable agreement — reluctance to adopt a construction which leads to nullity except where intention of the parties is to the contrary — written agreement of partnership — obligation in a binding clause thereof to act in good faith — effect upon a related but non-* D *binding clause*

Damages — *assessment — company yet to be formed — damages to be assessed on the basis of a willing buyer, willing seller transaction — need to determine what would have been the value of its shares if the company had been formed — what would a willing purchaser have been prepared to pay for such shares* E

Partnership — *formation — essentials for an agreement to create a partnership — essentials not necessarily conclusive to the existence of a partnership — extent of contribution by particular party required — substantial contribution not essential — objectives of partnership — element of "gain" — not restricted to commercial profits — includes* F *acquisition — joint venture in respect of a single transaction still a partnership — whether contrary intention revealed by contract — need to consider contract as a whole*

Partnership — *good faith — requirement for — requirement exists independently of the good faith imposed in written agreement of partnership — common law duty of good faith in respect of partnership* G *agreements — breach by one party of duty of good faith — failure to keep the other partner informed as to the progress of negotiations with a third party during the life of the partnership agreement — unfinished partnership business after the de facto termination of the agreement — continuing duty of good faith* H

2006 (1) ZLR p307

Omerjee J:

A **Practice and procedure** — *judgments sounding in foreign currency — when permissible — such judgment most fully and accurately compensating for loss — obligation upon plaintiff to lay a foundation for such a claim — quantum — to be converted into local currency at rate prevailing at date of enforcement*

Headnote

B The plaintiff was a Zimbabwean mining company and the defendant was a company domiciled in South Africa. In December 2001, the plaintiff entered into a confidentiality agreement with an English company, Lonmin plc, with a view to acquiring its shares in a company (IndepGold) which owned five gold mines in Zimbabwe. IndepGold was a wholly C owned subsidiary of another English company (Cableair) which was, in turn, wholly owned by Lonmin. Lonmin wished to dispose of its shareholding in Cableair and consequently of its interest in Indep Gold and its five Zimbabwean gold mines. In April 2002, separately and on its own initiative, the defendant also entered into a confidentiality agreement with Lonmin in respect of its shareholding in Cableair. In June 2002, the D plaintiff and the defendant decided to work together in a joint bid to acquire the shares in Cableair. They entered into an agreement in the form of written Heads of Agreement (HOA). While the HOA set out the principles upon which the parties would negotiate for the purchase of the shares, only four clauses thereof were to be of binding legal effect. These were clauses 2.3, 9, 10 and 11. In terms of clause 2.3, the parties undertook, E with effect from the date of the agreement, to negotiate with each other "… in good faith" and subject to clause 3.5, which was not prescribed as one of the four legally binding clauses, to negotiate with Lonmin in respect of the acquisition of the shareholding. Clause 3.5 provided that the defendant would, on behalf of a company to be formed (Newco), make F an offer to Lonmin for the acquisition of IndepGold in an amount of US $12 million "… or such other agreed amount…" The plaintiff, on the other hand, in terms of clause 9.1, undertook to its best efforts to ensure that the Zimbabwean Government was favourably disposed to Newco's acquisition of Indep Gold. Clause 11.1 of the HOA provided that neither party should, for a period of three months enter into discussions with any G third party who had an interest in acquiring IndepGold, without the written consent of the other party. In pursuance of their respective obligations, the plaintiff did ensure that the Government was favourable to the acquisition of the necessary shareholding. Over and above this, the plaintiff also prepared and made available to the defendant a due H diligence report relating to the proposed acquisition of the shareholding.

Omerjee J:

The defendant, on the other hand, entered into negotiations, on behalf A of the parties, with Lonmin for the acquisition of Cableair's shareholding in IndepGold. It failed, however, to keep the plaintiff fully informed as to the state of these negotiations

As at the date upon which the agreement between the parties expired, the defendant not been successful in acquiring the shareholding. B Negotiations, however, between the defendant and Lonmin continued after that date and, a month later, the defendant, for itself and to the exclusion of the plaintiff, acquired ownership of Lonmin's shareholding in Cableair, thereby, in effect, acquiring IndepGold and the five Zimbabwean gold mines. Thereafter, on 30 March 2004 the plaintiff instituted proceedings against the defendant, alleging that the defendant C was in breach of the agreement between the parties and, had it acted in good faith, the plaintiff would have become the owner of a 40 per cent shareholding in Cableair, leaving the defendant with a 60 per cent shareholding therein. In the alternative, it pleaded that, having instituted negotiations on behalf of the parties during the three month restraint period, the defendant accepted a continuing mandate to pursue such D negotiations until such time that they either were successful, had failed or the parties had formerly terminated their binding legal relationship.

It was argued on behalf of the plaintiff that the effect of the four binding clauses of the HOA, with which provision clause 3.5 had to be read, was to create a partnership between the parties. It was further argued that the E defendant was on breach of the agreement as it had not acted in good faith in bringing about an agreement with Lonmin for the acquisition of he shareholding which excluded the plaintiff. As far as damages were concerned, the plaintiff argued that it had established a sufficient basis for its claim to sound in United States dollars. It argued that as Newco was never formed, its damages must be assessed on the basis of a willing F buyer, willing seller transaction.

Held, that principally there are three essentials that must be present in order to create a partnership: (a) that each of the partners brings something into the partnership or binds himself to bring something into it, whether it be money or labour or skill; (b) that the business should be carried on for the joint benefit of both parties; and (c) that the object should be to make G a profit or some other gain. The presence, however, of these essentials is not necessarily conclusive but must yield to any contrary intention as revealed in the agreement itself, read in the light of the other admissible evidence.

Semble, that as far as the first essential is concerned, the contribution required of a partner does not need to be a substantive contribution. H

Omerjee J:

A *Held*, further, that as far as the third essential is concerned, the object or aim of a partnership is not restricted to the making of a profit, in the sense of commercial profits. It also includes obtaining some other gain.

Held, further, that the plaintiff was correct in submitting that the agreement constituted a partnership agreement. A joint venture even in respect of a single transaction, as *in casu*, is still a partnership if all the essential B elements for a partnership are present.

C *Held*, further, that in the interpretation of documents, the courts have traditionally preferred to place a construction which would leave in place an enforceable agreement rather than a nullity, save where the intention of the parties is to the contrary.

Held, further, that the obligation to perfect fairness and good faith, which is required of partners, also extends to persons who have dissolved the partnership but who have not completely wound up and settled the partnership affairs. Unless and until prior commenced business or otherwise been concluded, a partner is by law under an obligation to account, to his erstwhile partner, in respect of all benefits that are derived D from such business or transaction. In short, the duty of good faith in respect of unfinished partnership business continues beyond the *de facto* termination of a partnership agreement. The defendant had an express contractual obligation to act in good faith, when negotiating on behalf of the parties, in relation to the acquisition of the Cableair shares

Held, further, that in addition to the contractually created duty of good faith, E there existed a common law duty of good faith. This was because the real nature of the agreement between the parties constituted a partnership agreement. Once such an agreement exists, by law, the "duty of good faith" automatically comes into being. On the facts, during the three month restraint period, the defendant was in breach of its duty of good faith in failing to keep the plaintiff fully informed as to the progress of the F negotiations between the defendant and Lonmin. The defendant was also in breach of its continuing mandate imposed on it by the duty of good faith. Apart from breaching the agreement during the three month restraint period, the defendant has also breached it in respect to continuing obligations it owned plaintiff after the agreement expired.

G *Held*, further, that it is now settled law that a court can award a judgment sounding in foreign currency and the court's order may be expressed in units thereof. The court may provide that the units of foreign currency be converted into the local currency at the rate prevailing as at the date of enforcement. It is the plaintiff's prerogative to claim in a currency that will most truly express his loss and accordingly most fully and exactly H compensate him for that loss. In order to succeed, however, he would be

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Omerjee J:

required to lay a foundation that supports his claim. On the facts, the A plaintiff had laid an adequate foundation establishing its entitlement to damages sounding in the legal currency of the United States.

Held, further, that the plaintiff's damages had to be assessed on the basis of a willing buyer, willing seller transaction. What had to be determined was what the actual value of the shares would have been if Newco had been B formed in accordance with the agreement and had the parties acted as they were required to do. The ultimate criterion in regard to the evaluation of Newco and, bearing in mind that the shares would not be quoted on the market, was what a willing purchaser would at the given time have been prepared to pay to a willing seller for such shares. Having regard to the plaintiff's prospective forty per cent shareholding in Cableair, that C it should be awarded damages in the sum of $7.4 million with interest at the rates prevailing, from time to time, in the United States of America

Cases cited

AMI Zimbabwe (Pvt) Ltd v Casalee Hldgs (Successors) (Pvt) Ltd 1997 (2) ZLR 77 (S) D

In re *Arthur Association for British, Foreign and Colonial Ships* (1875) 10 ChD 452

A-G v Makamba 2005 (2) ZLR 54 (S)

Bester v van Niekerk 1960 (2) SA 779 (A)

Dennill v Atkins & Co 1905 TS 282

Industrial Equity Ltd v Walker 1996 (1) ZLR 269 (H) E

Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe 1988 (2) ZLR 482 (SC)

Marias & Anor v Kennedy & Anor 1996 (2) ZLR 610 (H)

Pezzutto v Dreyer and Ors 1992 (3) SA 327 (A)

Purdon v Muller 1960 (2) SA 785 (E)

Purdon v Muller 1961 (2) SA 211 (A)

Rhodesia Railways & Ors v CoT 1925 AD 438 F

Scott & Anor v Poupard & Anor 1971 (2) SA 373 (A)

Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 (1) SA 398 (A)

Case information

J C Andersen SC, with him *G Mitha Valla*, for the plaintiff

C E Puckrim SC, with him *A R Bhana*, for the defendant G

Judgment

OMERJEE J: This matter first came before the court by way of an *ex parte* chamber application, for an order, *inter alia*, confirming jurisdiction of this court. The application was dismissed in case No. HH-55-03. The plaintiff appealed against this decision and the Supreme Court in case No. S-51-03 set aside the High Court order and confirmed jurisdiction of this court. H

Omerjee J

A Consequently, the plaintiff issued summons against the defendant for payment in the sum of US$12 000 000 (twelve million United States dollars), representing the damages allegedly sustained by reason of the defendant's breach of a contract entered into between the parties.

THE BACKGROUND FACTS

B The plaintiff is a mining company registered in terms of the laws of Zimbabwe, and the defendant is a South African domiciled company having its registered office at Johannesburg, South Africa.

In or about December 2001, the plaintiff, on its own initiative entered into a confidentiality agreement with Lonmin (Plc) Ltd ("Lonmin") with a view to acquiring Lonmin's shares in Independence Gold Mining (Pvt) Ltd C ("IndepGold"), a Zimbabwean registered company which owned five gold mines in Zimbabwe – How Mine, Shamva Mine, Arcturus Mine, Mazowe Mine and Redwing Mine.

At the relevant time, IndepGold was a wholly owned subsidiary of Cableair (Pty) Ltd ("Cableair"), a private limited company incorporated in the United D Kingdom. Cableair was, in turn, a wholly owned subsidiary of Lonmin, a public limited company, incorporated in the United Kingdom. Lonmin was, therefore, the holding company of Cableair, which was the sole beneficial shareholder of IndepGold.

Lonmin wished to dispose of its shares in Cableair and, consequently its E interest in IndepGold and the five mines it owned in this country.

Separately and at its own initiative, the defendant, in or about April 2002, also entered into a confidentiality agreement with Lonmin, couched in similar terms as that entered into by the plaintiff.

In or about June 2002, the plaintiff and the defendant met and resolved to work together, in a joint bid to acquire the shares in Cableair.

F In this regard, the plaintiff and the defendant ("The parties") on 24 June 2002 (being the signature date) entered into an agreement, which was in the form of written Heads of Agreement ("HOA"). Under the heading "Status of the Heads" clause 2.2 provided as follows:

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

Omerjee J

It is clear that the only legally binding rights and obligations entered into by A the parties were those stipulated in clauses 2.3, 9, 10 and 11. Put differently, it cannot be disputed that the four clauses constituted the legally binding agreement between the parties.

These four clauses form the core of the dispute that arose between the parties. It is, therefore, necessary to set them out in full. B

Clause 2.3 provided that:

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

Clause 3.5 referred to in clause 2.3 provided that:

> "Metallon shall, on behalf of Newco, negotiate with Lonmin and make an offer to acquire Independence or its immediate holding company for the amount of approximately US$12million or such other amount agreed on D between the shareholders."

Clause 9.1 provided that Stanmarker shall use its best efforts to procure that:

> "all interested parties, relevant government officials and authorities are favourably disposed to Newco's acquisition of Independence or its holding company such that the acquisition of Independence or its holding company is not unduly hampered, obstructed and/or delayed in E any manner whatsoever."

Clause 11.1 provided that:

> "From the signature, date and for a period of three months thereafter, neither party shall, without the prior written consent of the other party, engage in or enter into discussions with any other party with an interest in acquiring the share capital or business of Independence or its immediate F holding company and/or engage in or enter into discussions with any other party desirous of achieving similar objectives than, or competing with Newco."

The plaintiff's cause of action is premised upon the alleged breach of a partnership agreement created by these clauses.

In its declaration dated 30 March 2004, the plaintiff alleged that the parties G entered into a written agreement to, *among other things*, submit a joint bid for the acquisition of the shares in Cableair. It was then alleged in para 10 of the declaration that:

> "In breach of the agreement and during the period of three months, the H

Omerjee J

> A defendant made a bid for Independence for itself and pursued negotiations with Lonmin for the acquisition of Independence without the plaintiff's prior written consent, pursuant to which it acquired ownership of the shares in Cableair and effective control of Independence for itself to the exclusion of the plaintiff."

On the fourth day of trial, the plaintiff filed a notice to amend its declaration B and by the consent order of 3 June 2005, the amendment was effected. This amendment, in so far as it is relevant to the issue under consideration, added the following paragraphs to para 10:

> "10A Alternatively, and in the event of the defendant having initiated negotiations on behalf of the parties prior to 24 September 2002:
>
> 10A.1 C The defendant accepted a mandate to act on behalf of the parties to secure the acquisition of the shares in Cableair in terms of clause 3.5 of the agreement between the parties.
>
> 10A.2 Properly construed, the defendant's mandate in terms of the agreement remained in force in respect of any negotiations instituted prior to 24 September 2002 until D such time, as the negotiations had been successful or had lapsed.
>
> 10A.3 Any negotiations instituted by the defendant prior to 24 September 2002 on behalf of the parties had not lapsed prior to 28 October 2002.
>
> 10A.4 In the premises, the defendant unlawfully and in breach of E the agreement between the parties, acquired ownership of the shares in Cableair for itself to the exclusion of the plaintiff on 28 October 2002."

Paragraph 11 (also after the amendment) then alleged as follows:

> "11. But for the defendant's breach of the agreement and had it acted in good faith towards Plaintiff, as was its duty, the shares in Cableair F would have been acquired by *the parties jointly or if not by the parties jointly* the plaintiff would have been the owner of 40 % and the defendant 60%."

When regard is had to the declaration, as amended, it is obvious that the plaintiff has cast the net widely in an endeavour to establish its claim for G breach. Principally, the plaintiff predicates its claim, on two different albeit alternative grounds. The plaintiff has thus alleged that:

(a) The defendant (during the three months restraint period) and in complete disregard of its legal obligations, arising out of the agreement between the parties, proceeded to make a bid for Independence and pursued H negotiations for the acquisition of the shares in Cableair for itself, as a

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consequence of which it acquired the shares in Cableair, to the exclusion A of the plaintiff.

ALTERNATIVELY:

(b) If the defendant in pursuance of the agreement had (during the three months restraint period) instituted negotiations on behalf of the parties, it accepted *a continuing mandate to pursue such negotiations until such* B *time that they either were successful; had failed; or the parties had formerly terminated their binding legal relationship* (my emphasis).

The plaintiff thus contends that the defendant breached the binding agreement created by the HOA, as a consequence of which, it is entitled to certain damages. On the other hand, the defendant contends that it did not breach C the said agreement and therefore, disavows any liability.

When regard is had to the opposing arguments advanced on behalf of both parties to the dispute, it becomes obvious that the question of the real nature of the agreement entered into between the parties is of importance. In this respect, the plaintiff contends that the agreement constituted a partnership agreement, whereas the defendant contends otherwise. D

As correctly submitted by Mr *Andersen* for the plaintiff:

> "It is for the court to interpret the agreement between the parties and, in particular, the obligations which arise from it."

Indeed, this submission was not contradicted by the the defendant as in its own submission it said: E

> "Although it is the task of the court to interpret an agreement and the task of the court alone, the court is always entitled to take into account background circumstances known to the parties at the time in order to interpret the agreement."

The court, therefore, will examine the agreement as constituted by the aforementioned binding clauses taking into account the admissible background F facts, with a view to determining the real nature of the relationship it created. Put simply whether the agreement created a partnership or some other relationship between the parties.

THE APPLICABLE LAW

It is trite that "if certain essential features are present in a contract between G two or more persons, then that contract constitutes a partnership agreement whatever the parties thereto may call it — unless there are clear indications in the terms of the agreement that it is not a partnership." See *Purdon* v *Muller* 1960 (2) SA 785 (E) at 795F. On subsequent appeal, this statement of law received affirmation from the Appellate Division which assigned the following H

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A meaning to it "although the presence in an agreement of the four essentials will, *prima facie*, establish the existence of a partnership, such presence is not necessarily conclusive but must yield to contrary intention as revealed in the agreement itself read in light of the other admissible evidence": Pardon & Muller 1961 (2) SA 211 (A) at 218A-B.

Principally, there are three essentials that must be present in order for an B agreement to create a partnership. These are:

1. that each of the partners brings something into the partnership or binds himself to bring something into it, whether it be money, or labour or skill;
2. that the business should be carried on for the joint benefit of both parties; and
3. C that the object should be to make profit or for some other gain.

The so-called fourth essential as identified in the leading case of *Rhodesia Railways & Ors* v *Commissioner of Taxes* 1925 AD 438 at 464-5, namely, that the contract between the parties should be a legitimate contract, was in subsequent years held not to be an essential peculiar to contracts of D partnership but common to all contracts and strictly speaking not, therefore, essential to the definition of a partnership: *Bester* v *van Niekerk* 1960 (2) SA 779 (A) at 784.

It is necessary to apply this law to the present case and in particular to the aforesaid binding clauses, in order to determine whether these requirements E are present in the agreement entered into between the parties.

Firstly, in accordance with the agreement, clause 3.5 which is expressly mentioned in clause 2.3, *prima facie,* obliged the defendant to:

> "*… negotiate [on behalf of Newco] with Lonmin and make an offer to acquire Independence or its immediate holding company…* "

It cannot be in dispute that the defendant, by the terms of this provision, F brought something or undertook to bring something into the partnership. In fact, the evidence placed before the court establishes that between 24 June 2002 and 24 September 2002 *(the restraint period)*, the defendant through one Peter Gain, was engaged in vigorous negotiations with Lonmin in respect of the intended acquisition of the shares in Cableair. Whether or not these G negotiations were being done on behalf of the parties is immaterial as regards the present issue. What is material is that, by the terms of the agreement the defendant undertook to bring something into the partnership.

What of the plaintiff? It will be recalled that clause 9 was one of the legally binding clauses of the "HOA". In particular, clause 9.1 provided as follows:

H [Stanmarker shall use its best efforts to procure that]:

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> "all interested parties, relevant government officials and authorities are A favourably disposed to Newco's acquisition of Independence or its holding company, such that the acquisition of Independence or its holding company is not unduly hampered, obstructed and /or delayed in any manner whatsoever …"

The terms of this provision required the plaintiff to employ its best endeavours (labour and skill) to facilitate the creation of a favourable climate aimed at B ensuring that the Government of Zimbabwe supported or at the very least seriously considered accepting the proposed acquisition of IndepGold by the parties. The plaintiff bound itself to bring something into the partnership.

In regard to the second requirement, it cannot be gainsaid that a factor that motivated the parties to enter into the agreement was, *inter alia*, to minimise C competition and maximise the chances of successfully acquiring, for themselves, the shares in Cableair. It therefore was a deliberate business-venture entered into for the joint benefit of both parties.

The third and final essential of a partnership agreement is that the object must be to make profit or for some other gain. In this regard, it is important to be reminded of some of the relevant admissible background facts of this case. D

The evidence establishes that initially each party separately and autonomously was interested and involved with the pursuit to acquire the Cableair shares and consequently the interests in IndepGold. Their individual commitment and dedication to be the successful bidder admits of no doubt. As separate contenders each had taken what appear to be meaningful steps toward E fulfilling that objective. However, on or about the 24 June 2002, the parties agreed to come together in a joint endeavour aimed at securing the Cableair deal, which, as already alluded to, they had hitherto independently pursued. When regard is had to these background facts it becomes apparent that in joining forces the object of the parties was to strengthen their bid of acquiring shares in a commercial gold mining concern – Cableair. F

It thus is clear that all the essentials for a valid contract of partnership are present in the agreement between the parties. The inquiry, however, does not end here, as the law requires the court to investigate further and determine whether on a correct construction of the agreement a contrary intention is revealed. De Villiers JP, in *Purdon* v *Muller supra* at 794C-D put it thus: G

> "I say that it is clear that all the essentials of a valid contract of partnership are present in this agreement. The question then is, is there something in the agreement which clearly indicates that it is not a partnership, because as the authorities say I must hold that it is a partnership in the absence of something showing that it is not?"

Mr *Puckrin*, for the defendant, submits that the HOA is anything but a H

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A partnership. In support of his submission he urges, firstly, that when properly construed clause 3.5 of the HOA does not create any obligations on the parties. In para 6 of the defendant's written argument, it is presented thus:

"In our submission clause 3.5 on its own does not create separate self standing legal obligations on the parties. Clause 3.5 is an exception to the restraint in clause 2.3."

B The defendant has thereafter sought to present argument whose main thrust is that the binding clauses of the HOA created what was in effect *an Agreement to Agree* and not a partnership. That it was an agreement to negotiate and concur on detailed future shareholders agreements which would culminate in the incorporation of Newco and nothing more.

C I find myself unable to accompany this line of reasoning. It seems to me that in order to appreciate the true nature of the agreement, as created by the binding terms of the HOA, it is important to be wary of the temptation to view these clauses in isolation of each other. Put differently, it is imperative to construe the clauses not as stand-alones but in conjunction with and in the context of one another. It is my view that the real intention of the parties can D only be deduced by looking at the agreement as a whole as opposed to considering its component parts in isolation of each other.

Furthermore, it must not be overlooked that clause 3.5 is expressly mentioned in clause 2.3 and therefore it necessarily must be construed in that light. I will, in the course of this judgement deal in more detail with this point. Suffice to state that, in my view, clause 3.5 when properly construed created legally E binding obligations and was not merely an exception to the restraint in clause 2.3.

Secondly, I understand the defendant to be submitting that the HOA had as its object the negotiation and conclusion of a future agreement. In particular, that what was envisaged by the HOA, was a future shareholders agreement. F To the extent that the future agreement envisaged, was a shareholders agreement presents no difficulty. However, I am not persuaded by the defendant's further contention as expressed in paras 13 and 14 of its written argument, namely:

Para 13

" G Once it is understood that the future Agreement is nothing more than a Shareholders Agreement it is clear that the HOA is an interim arrangement between parties who may become Shareholders in the future to regulate their conduct during the period of their negotiations."

H AND

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Para 14 A

"The plaintiff's contention that the HOA constitutes a Partnership is exposed as an absurdity once it is appreciated that the future Agreement is a Shareholders Agreement. We say it is an absurdity because this contention seeks to suggest that the HOA creates a Partnership and yet it is clear that parties will be negotiating a Shareholders Agreement within an incorporated company. *It is nonsensical to suggest that in the interim* B *a Partnership comes into existence which then somehow is miraculously transformed into an incorporated Company regulated by a Shareholders Agreement*" (my emphasis).

It is my view that the partnership agreement, being alleged by the plaintiff, is not predicated on any envisaged future plans of the parties. Once it is accepted that clause 2.3, 9, 10 and 11 of the HOA created legally binding rights and C obligations the question that necessarily requires answering is: What was the true nature of the relationship created between the parties? What would eventually occur in the future is of little consequence in as far as the true nature of the relationship, that came into being at the stage the parties bound themselves to the terms of the HOA is concerned. For the avoidance of doubt, I am of the view that the future legal relationship as contemplated *viz.* D Shareholders Agreements does not detract from the fact that a particular recognisable legal relationship was created as a consequence of clause 2.3, 9, 10 and 11 of the HOA.

Mr *Puckrin* submitted that it was nonsensical to suggest that in the interim a partnership comes into existence which then somehow is miraculously E transformed into an incorporated company regulated by a Shareholders Agreement. I find that the evidence does not support this argument. In my view, the intention of the parties was that upon the occurrence of certain events, namely, the concluding of the detailed written agreements, the HOA was to fall away *in toto.* This included the interim legal entity born out of clause 2.3, 9, 10 and 11. Thus the interim legal entity having fallen away, it would be F replaced (not by metamorphosis) with a company to be incorporated. That this was the express intention of the parties is revealed by the terms of clause 2.2 that:

"… these heads will fall away and be of no force and effect upon the signing of the detailed written agreements and them becoming unconditional in accordance with their terms." G

The further point advanced by Mr *Puckrin* in contending that there was no partnership agreement, was that on the evidence placed before the court the essentials of a partnership were absent and, in particular, that "Save for the bald allegation in its replication that the relationship between the parties constitutes a partnership the plaintiff has neither pleaded nor proved the *essentialia* of a partnership." H

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A In regard to the first essential, he argues that as clause 9 merely required the plaintiff to use his best efforts as opposed to imposing a positive commitment on it, that "this undertaking [was] so insignificant that it cannot be construed in any way as a substantive contribution manifesting in money, labour or skill toward the acquisition of Cableair …" I entertain grave doubt that the law requires the contribution of a party to be what amounts to a "substantive B contribution". In the present case the plaintiff in actuality achieved the mandate imposed by clause 9 in that it secured governmental support for the joint venture. Reference is here made to a letter dated 9 September 2002 addressed to IndepGold and signed by the Secretary to the Ministry of Mines and Mining Development. It reads:

> " C The Ministry of Mines and Mining Development is aware of a joint bid submitted by Metallon of South Africa and Stanmarker of Zimbabwe. We have a copy of the heads of agreement between the two companies signed on 24 June 2002.
>
> In line with the shareholding structure therein, the Ministry of Mines and Mining Development is *in full support of this bid as this shareholding* D *structures reflects the indigenisation of Independence Gold Mines which is in line with the Government Policy*" (my emphasis).

Furthermore, it should not be overlooked that, the plaintiff also contributed significantly by making available to the joint venture, the technical due diligence report it had undertaken. It goes without saying that the due diligence exercise involved labour, skill and expenditure of money. As a result E of this contribution, the defendant did not embark on its own technical due diligence exercise.

It has not escaped my mind that Mr *Puckrin* submitted that the aspect of the due diligence exercise should be disregarded as it is provided for in clause 5, a non-binding clause of the HOA. I am unable to accede to this line of F reasoning as it seeks to unduly prevent the court from having regard to the surrounding circumstances and facts to enable it properly to construe the real nature of the agreement in question. The court is entitled to look at the surrounding circumstances in determining the real nature of the agreement between the parties.

Nothing much turns on the second essential. As to the third and last essential, G Mr *Puckrin* has presented a rather novel argument. Firstly, that it is a requirement that for there to be a partnership agreement that the object should be for the making of profit or gain and that *such profits must be the immediate* (as opposed to the future) *aim* of the parties. That in the present case the immediate aim was to form a company and become directors of the company H even though the parties intended that the ultimate aim was to make profits

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through the company. As stated earlier, if regard is had to the background A facts of this case it is obvious that the immediate object of the parties when they entered into the agreement was to acquire the Cableair shares and consequently to gain interest in an already established commercial gold mining concern.

The second rung of Mr *Puckrin*'s argument is that "[a] partnership cannot B be established with the sole aim of acquisition as opposed to the sharing of profits". I do not agree. The object or aim of a partnership is not restricted to making a profit, in the sense of commercial profits, but also includes obtaining some other gain. In In re *Arthur Association for British, Foreign and Colonial Ships* (1875) 10 ChD 542 at 456 Jessel MR said:

> "… now, if you come to the meaning of the word 'gain', it means acquisition. C It has no other meaning that I am aware of. Gain is something obtained or acquired. It is not limited to pecuniary gain. We should have to add the word 'pecuniary' so as to limit it. And still less is it limited to commercial profits. The word used, it must be observed, is not 'gains', but 'gain', in the singular. Commercial profits, no doubt, are gain, but I cannot find anything limiting gain simply to a commercial profit. I take the word as D referring to a company which is formed to acquire something, or in which the individual members are to acquire

> something, as distinguished from a company formed for spending something, and in which the individual members are simply to give something away or to spend something, and not to gain anything …"

In the present case, the aim or object of the parties was to gain something in E the sense of acquiring the shares in Cableair.

It is my considered view, that the agreement entered into between the parties was, amongst other things, to submit a joint bid for the acquisition of the Cableair shares. A joint venture even in respect of a single transaction, as *in casu*, is still a partnership, if the three essentials already mentioned are present: F see *Bester* v *van Niekerk supra*; *Pezzutto* v *Dreyer & Ors* 1992 (3) SA 327 (A).

Accordingly, and for the aforementioned reasons, I come to the conclusion that the agreement entered into between the parties, when considered as a whole, reveals all the necessary elements of a partnership and an intention by the parties to enter into a partnership. G

THE ISSUE OF BREACH:

In order to succeed with its claim the onus is on the plaintiff to show, on a balance of probabilities, that the defendant breached the agreement in one or either of the ways alleged. I propose to deal separately with each of the plaintiff's allegations. H

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(a) On the evidence has the plaintiff established that during the restraint period *i.e*. between 24 June 2002 and 24 September 2002:

(i) The defendant made a bid and negotiated, for itself and to the exclusion of the plaintiff for the acquisition of the shares in Cableair.

AND/OR

(ii) The defendant failed to fulfil or carry out its legal obligations arising B from the agreement entered into between the parties on 24 June 2002 (being the date of signature).

The defendant denies that it made a bid for itself but that, as a matter of fact, it fulfilled its mandate and submitted a bid for and on behalf of the parties.

In its defence as contained in the founding affidavit deposed to by one C Nambita Sinazo Bam, the defendant averred that:

> "… it acted at all times in terms of the heads inasmuch as any and all negotiations between the defendant and Lonmin for the acquisition of Independence during the restraint period were engaged in for the purposes of acquiring Independence for the benefit of the parties."

D At the trial, Peter Gain ("Gain") testified on behalf of the defendant. In his evidence, he stated that during the period under review he worked for a company called Micofin Corporate Services, as its managing director and that he specialised in offering corporate advisory services to clients. He had joined Micofin in May 2000 and left in August 2004 to take up employment with the defendant until September of 2005. That during the relevant time the defendant E through Mzi Khumalo ("Khumalo") engaged Micofin to negotiate with Lonmin, in regard the possible acquisition of Cableair by Newco. Khumalo was the Chairman and CEO of the defendant. According to him, his mandate was to initiate and pursue negotiations for and on behalf of Newco, through the defendant's nominee styled First Gold Proprietary Ltd ("First Gold"). The ultimate aim being to bid for and make an offer for the acquisition by Newco F of 100 percent of the shares in Cableair. He testified that this is precisely what he did, culminating in First Gold submitting an offer to Lonmin on 20 June 2002. (Although the signature date of the HOA was 24 June 2002, the parties had already orally agreed on the joint bid and the defendant had on its part signed the HOA on 20 June 2002). It was his testimony that at this stage, he was aware of the existence of the HOA.

G The plaintiff, on the other hand, refutes this contention and has urged me to find that the defendant failed to make an offer or negotiate for and on behalf of the parties, thereby breaching the agreement. In support of its submission, the plaintiff has drawn my attention to the following points: That:

1 None of the documents relating to the negotiations with Lonmin made any H reference to the partnership or the plaintiff or a company to be formed.

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They all contained the name of one of the defendant's associates or A nominees.

2. On the evidence, there is nothing to show that Khumalo disclosed the existence of the agreement to those who acted for him. If he had done so, as contended by Gain, one would have expected that the name of the purchaser (i.e. Newco) would have otherwise been cited in some of the B documents relating to the negotiations.
3. Khumalo's failure to attend and give evidence at the trial raises the necessary inference that he would not have stood to scrutiny, on the witness stand, in regard to the claim that the negotiations by First Gold (during the restraint period) were being carried out for and on behalf of the parties. C

In order to resolve this matter, I shall have regard not only to the documents relative to the negotiations, but also to the evidence of Gain and one, John Neil Robinson. In this regard, I have already made reference to the evidence of Gain.

THE EVIDENCE OF JOHN NEIL ROBINSON ("ROBINSON")

On 3 June 2005 and at the instance of the parties, I caused a formal written D request to be directed to the Senior Master of the Queen's Bench Division of the High Court of Justice of England and Wales. The request was made pursuant to the provisions of The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. Para 5 set out the scope of the request as follows: E

> "The trial of the Action has commenced on 30 May 2005. This court considers that it is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties in the action that you cause the following, who is resident within your jurisdiction, and who appears to this court to have knowledge and information relevant to the issue in the action, to be examined and to answer such questions *viva* F *voce* as the agents of the parties in England shall desire to ask in respect of the topics set out below and to produce and permit copies to be made of the documents set out below:
>
> John Neil Robinson … who is and was at all times material to the Action an Executive Director and Chief Financial Officer of Lonmin, to be examined in respect of the following topics and to produce and permit G copies to be made of the following documents which are or are likely to be in his possession, custody or power."

The request proceeded to set out the topics for examination, the documents to be produced and further asked that Robinson be examined on oath or affirmation before a judicial officer or an examiner appointed by the High Court of Justice of England and Wales and that such examination be reduced to H

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A writing. A written record ("London Transcript") was filed with this court and forms part of these proceedings.

The main trial was adjourned on 2 June 2005 to facilitate for the examination in London and it resumed on 6 February 2006.

Not surprisingly, at the London examination Mr *Andersen* for the plaintiff, B traversed at length the issue of whether the defendant's conduct was such that it showed that the negotiations it had conducted was on behalf of a joint bid for the parties.

Robinson, in response to questions put to him by Mr *Andersen*, testified that during the relevant period he had either directly or indirectly dealt with a number of entities in respect to the sale of the Cableair shares. In this regard, C he had had dealings with Mawenzi Resources and Finance, Micofin Corporate Services, First Gold Proprietary (Pty) Ltd and Pemberton International (Pty) Ltd. As far as he was aware these four entities were associated with and only represented Khumalo. As to whether he was, at that time, aware of an agreement between the parties, relating to a joint bid for the Cableair shares D his testimony was to the effect that as far as he could recall Khumalo had, in a short conversation, intimated that he had some sort of arrangement with Hove. He divulged no details as to the terms or nature of this arrangement. Thabani Lloyd Hove is the CEO of the plaintiff. Robinson, throughout his evidence, maintained that as far as he was aware none of the entities

mentioned above made an offer or bid for and on behalf of Hove or any of his nominees. E Asked whether he had ever been appraised of a joint venture or any form of partnership between Hove and Khumalo, he remained adamant that apart from Khumalo having made mention of some sort of arrangement between the two of them, he was not aware of the existence of a joint venture or any other form of partnership between them.

The defendant in its defence contended that, the initial offer submitted F through First Gold, dated 20 June 2002, had in its para 9 a nomination clause to the effect that:

> "First Gold shall have the right, by written notice given to Lonmin within 30 (thirty) days after the signature date, to nominate any person (including a company, close corporation or unincorporated joint venture) ("the G Nominee") as purchaser of the Sale Shares and Sale Claims in terms of the Share Sale Agreement. On delivery of such notice to Lonmin, together with written acceptance by the Nominee of such nomination, the Nominee shall substitute First Gold as purchaser of the Sale Shares and Sale Claims and as a party to this offer and the Share Sale Agreement and any reference to First Gold in those agreements shall be deemed to be a reference to the H Nominee."

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Put simply, First Gold had reserved the right to nominate another entity to A substitute it as party to the offer and subsequently as purchaser of the shares in Cableair.

Secondly, and additionally, that it was in this context that within days of the submission of the initial offer the plaintiff, through Hove, was talking to Robinson in the knowledge that the bid was for and on behalf of the parties. B And that, on his part, Robinson entertained and kept Hove informed at all times, in relation to the First Gold bid. As a result, in its written argument, the defendant contended that:

> "Para 136 What all this demonstrates is that there was no breach of the HOA:
>
> 136.1 C Metallon negotiated with Lonmin (through First Gold) with Hove's full knowledge in terms of the HOA.
>
> 136.2 All the parties (Metallon and Stanmarker) regarded the First Gold bid to be in terms of the HOA. Had this not been so Hove would immediately have objected (before 24 September 2002). Thus there was no breach of clause 2.3 nor 3.5 (to the extent that that created binding obligations which we have D submitted it did not)."

The following relevant points are revealed by the evidence before me that the plaintiff and the defendant arrived at an understanding that the defendant was to negotiate and make a joint bid for and on behalf of the parties; that subsequent to this, Gain, was engaged by the defendant to negotiate and make E a bid through First Gold for the acquisition of the shares in Cableair; that on 20 June 2002, First Gold submitted an offer to Lonmin for the acquisition of 100 per cent shares of Cableair and thereafter, Gain pursued negotiations with Lonmin aimed at sealing a deal in that regard. For the purposes of the question under consideration, these negotiations continued as from 20 June to 24 F September 2002.

It is not in dispute that during this period, the plaintiff and Robinson were in communication via e-mail messages and telephonically. In this regard, no less than five e-mail messages were produced as part of the bundle of documents for the court's consideration. The contents in the e-mail messages are supportive of the defendant's contention that, in their knowledge First Gold's G offer was for and on behalf of the parties, hence Hove within days was talking to Robinson and Robinson, in turn, was entertaining him in relation to the First Gold bid. For instance, in relevant part, the message from Hove to Robinson of the 1 July 2002 read:

> "… We submitted our bid jointly with Metallon as Mr Khumalo may have explained to you. H

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> A What is of concern to us are the rumours in the market that the completion date was extended to 3 July. I write this to seek your clarification as to whether this is true or not. I hope you will appreciate our concern as our offer is already known in the market."

In response, Robinson wrote:

> "Thank you for your fax and e-mail of today's date. I had assumed that your B colleagues who are working with Mr Khumalo would have kept you informed as to the present position after my meeting with them last Friday afternoon. However, I can tell you that we now have told all parties that there is a Board

meeting here on Thursday at which the various offers will be considered. I left it with your colleagues on Friday that if they want to revise the terms of their offer before Thursday they were at liberty to do so."

C Then the message of the 1 & 2 August 2002 from Hove and Robinson respectively read:

"… I have been trying to get hold of Mr Khumalo in the last two days without much success. I would like to find out the outcome of your executive meeting held in Johannesburg and to know the current status."

D Robinson responded:

"I sent a letter to Mzi yesterday along with the other parties. If you cannot get a copy from him then please let me know."

The message from Hove to Robinson of 6 September 2002 in relevant part read:

"I would like to find out the outcome of your meeting with Mzi on E Wednesday. I have been trying to get hold of him but believe he is now in the USA.

I have with me a letter from our Ministry of Mines and Mining Development confirming their support of our potential acquisition of Cableair. Should you need a copy of this for your records, please send me your fax number so I can fax it to you."

F In response, Robinson wrote:

"The meeting was constructive but I am still awaiting for Mzi to remit the funds he promised in order to grant him exclusivity for a limited period to complete the contract negotiations.

A copy of the letter from the Minister would be most helpful …"

G Finally, the message from Hove to Robinson of 9 September 2002 read:

"Please confirm if you received my fax on Friday. As soon as you have received the money promised by Mzi please let me know …"

Robinson responded:

"… I did receive your fax on Friday and the initial deposit was received on H Friday …"

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When regard is had to these messages it is clear that at the very least both Hove A and Robinson proceeded on the basis that the bid made by First Gold was for and on behalf of the parties. Significantly, the letter from the Ministry of Mines referred to in the messages of 6 and 9 September 2002, expressly spells out that the plaintiff and the defendant had entered into an agreement to submit a joint bid for the acquisition of Cableair. Robinson received a copy of this letter. It B is for this and other reasons that I find Robinson's professing of ignorance of the precise nature of the arrangement between Hove and Khumalo, rather unconvincing.

In my considered view, although the documentation relating to the negotiations did not make any reference to the plaintiff or Newco, the probabilities of this case favour the finding that the defendant, through First Gold, negotiated and C made an initial offer on behalf of the parties. Put differently, I find that the plaintiff has failed to discharge its onus to show, on a balance of probabilities, that the defendant negotiated for itself and made a bid to the exclusion of the plaintiff.

Furthermore, the plaintiff has contended that the defendant was in breach of D its obligations under clause 3.5 of the agreement. The defendant on the contrary contends that clause 3.5 relied upon by the plaintiff did not create any legally binding obligations on it and therefore it cannot be said that it breached any obligations.

In amplification, the defendant contended that the only legally binding obligations of the agreement are found in clause 2.3, 9, 10 and 11 and that clause E 3.5 was not one of these obligations. It is further argued that of relevance to the current inquiry the obligations that have to be scrutinised are clause 2.3 and 11. In its written argument the defendant then placed the following construction on clause 2.3:

"Para 18.1.2 During the restraint period, and in terms of clause 2.3 two F separate obligations co-existed:

18.1.2.1 The parties undertook to negotiate with each other in respect of endeavouring to conclude the detailed written agreement (the final agreement).

18.1.2.2 The parties further undertook that neither would negotiate with Lonmin or any other person in respect of the acquisition G of Independence or its immediate holding company (Cableair) -— this was subject to one proviso …

18.1.3 In relation to the first obligation the negotiation in good faith we say at the outset that the court must not be misled by the use of the words good faith in this clause. The good faith obligation in clause 2.3 is not a general good faith H

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A obligation but one that requires the negotiation relating to the final Agreement to be in good faith."

Earlier in paras 6 and 7 respectively, the defendant contended that clause 3.5 on its own did not create separate self-standing legal obligations on the parties.

That whilst clause 2.3 allowed for the exception in clause 3.5, clause 3.5 did B not of itself create an obligation and hence the defendant did not have an absolute or "out and out"obligation to negotiate with Lonmin on behalf of Newco or to do the other things set out in clause 3.5. Put simply, clause 3.5 did not create a mandate and a positive obligation on the defendant to negotiate with Lonmin on behalf of Newco.

C It seems to me that the construction sought to be placed by the defendant on clause 3.5 regards it as a stand-alone clause or in isolation to the other clauses of the agreement. Earlier in this judgement, I pointed to the need to guard against the temptation of viewing the clauses in isolation of each other, but rather to construe them in conjunction with and in the context of each other. It is true that clause 2.2 does not expressly mention clause 3.5 as one of the D legally binding obligations of the HOA. However, it must not be overlooked that clause 3.5 is expressly mentioned in clause 2.3 and therefore it forms part of the binding obligations of the HOA.

It is important to remember that clause 2.3 is made subject to 3.5. This means that 2.3 is the dominant provision and 3.5 is subservient to it. It is trite that in E law the terms of a dominant provision prevail over that which it is made subject to. The phrase "subject to" has received judicial interpretation recently, the Supreme Court in *A-G* v *Makamba* 2005 (2) ZLR 54 (S) held that:

> "The phrase 'subject to' defines which provision is dominant and which is subordinate or subservient that to which a provision is 'subject' is dominant. In the case of conflict, it prevails over that which is subject to it."

F If regard is had to the above principle, it would appear that the defendant's argument ignores the fact that clause 3.5 is made a binding obligation by virtue of clause 2.3 which as already mentioned is the dominant provision. It, therefore, follows that to unduly restrict the "duty of good faith" in 2.3 as G applying only to negotiations relating to the final agreement cannot be a proper construction of the obligations imposed by it. Thus on a proper construction clause 3.5 (which is subservient) must necessarily be looked at, in the light and context of the binding obligations created by 2.3 the dominant provision. Simply put the positive obligation to act in "good faith" created by clause 2.3 permeates and extends to the defendant's mandate in clause 3.5. H This means that the defendant had an express contractual obligation to act

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in good faith, when negotiating on behalf of the parties, in relation to the A acquisition of the Cableair shares.

The defendant has also argued to the effect that even if the provisions of clause 3.5 were mandatory in the sense that they obliged it to negotiate with Lonmin on behalf of Newco they do not assist the plaintiff in that they do not create the mandate between Metallon and Stanmarker that the plaintiff seeks B to create from the terms of the agreement. In this regard, it is argued that, to the extent that clause 3.5 imposed any obligation, the defendant was mandated to negotiate on behalf of Newco. Since Newco was not in existence then and is still not in existence, no breach can be talked of.

This submission does not find favour with me. When properly construed and in the particular circumstances of this case, clause 3.5 mandated the defendant C to negotiate on behalf of the parties referred to in clause 2.3 and not for Newco, an entity which was not in existence at that stage. This, in my view, is the logical and more preferable construction of the binding clauses. It should not be overlooked that courts have traditionally preferred to place a construction which would leave in place an enforceable agreement rather than a nullity, save D where the intention of the parties is to the contrary. If the defendant's contention were to be embraced this would mean that the parties

entered into an agreement which obliged the defendant to negotiate for itself, as there was no other party in existence to whom it owed any obligations.

It must, again, be reiterated that *in casu* the parties deliberately entered into an agreement to jointly make a bid for the acquisition of the shares in Cableair. E It, is therefore, obvious that the plaintiff did not agree to be a mere passenger who had placed his fate to the whims of the defendant. That this was the case is supported by the fact that the defendant, by its own actions, accepted the mandate imposed by clause 3.5 and proceeded through First Gold (during the restraint period) to negotiate and make a bid for and on behalf of the parties. I therefore find that clause 3.5 imposed a positive obligation on the defendant F to act in good faith with regard to the plaintiff.

Separately, and additional to this contractually created "duty of good faith", there existed a common law "duty of good faith. As has already been determined the real nature of the agreement between the parties constituted a partnership agreement. In this regard once such an agreement exists, by law, G the "duty of good faith" automatically comes into being. In this connection, Mr *Andersen,* for the plaintiff, referred the court to *Marais & Anor* v *Kennedy & Anor* 1996 (2) ZLR 610 (H) at 632-633 where in relation to the "duty of good faith", Bartlett J stated as follows:

> "There is clearly a duty of *uberrima fides* between partners. The duty of utmost good faith, …, involves the highest standards of honour. See H

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> A Lindley on *Partnership* 15 ed pp 480-1 where the learned author states as follows:
>
> '… if any dispute arises between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has the law on his side, but that his conduct will bear to be tried by the highest standard of honour … This B obligation to perfect fairness and good faith … also extends to persons who have dissolved partnership but who have not completely wound up and settled the partnership affairs; and most especially is good faith required to be observed when one partner is endeavouring to get rid of another, or to buy him out.'
>
> I am quite satisfied that these expressions of a partner's duty are equally C applicable to the Roman Dutch Law."

What becomes necessary, therefore, is to determine whether the defendant fulfilled its legally binding obligations arising from the agreement, including the duty to act in good faith.

The evidence shows that during the three months restraint period the D defendant, whether intentionally or otherwise, failed to communicate or disclose to the plaintiff any material information relative to the negotiations or the bid made through First Gold. Hove testified on behalf of the plaintiff that he had made several attempts, during the restraint period, to communicate with Khumalo, with a view to finding out the progress of the negotiations. He was largely either unable to speak to him or on the few occasions he managed to E get hold of him, he was made to believe that all was well. This testimony, to a large extent, is corroborated by the e-mail messages between Hove and Robinson already referred to. Moreover, the only person who was in a position to contradict this evidence is Khumalo, who it must be pointed out did not make himself available to testify at the trial.

F *In casu*, another aspect relevant to the duty of disclosure and therefore, the duty of good faith, owed by one partner to another arises from the evidence of Gain. Gain, whom it has been accepted, was mandated by the defendant to negotiate on behalf of the parties, was unable to indicate or give any good reason as to why he did not at any stage appraise Hove about the progress or status of the negotiations.

G The evidence shows that during the period between 20 June and 24 September 2002, Gain was involved in critical and important aspects of the negotiations that required the defendant, acting in good faith, to have communicated the progress or otherwise, to its partner. Such communication or disclosure would have enabled the plaintiff to reassess its standing *vis-à-vis* its continued H participation in the partnership.

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On 20 June 2002, the defendant through First Gold submitted an initial offer A to Lonmin, but up until the trial discovery process, it neither availed nor communicated a copy of this document nor its

terms to the plaintiff. Lonmin, on 27 June 2002, responded to this offer document through a letter addressed to Khumalo wherein it made crucial comments having a bearing on the offer. In para 2, for instance, it was stipulated that:

> "In relation to the financial terms, we would be looking for a price for the B shares of Cableair and the benefit of the inter-company loan owing by Cableair to Lonmin together with an amount equal to the inter-company loan outstanding from Independence C to Cableair (currently approximately US$962 000) and a further amount in respect of current year profits of Independence."

In para 4, Lonmin reacting to the provision of warranties as contained in the offer document indicated its complete unwillingness to give extensive warranties, save for a limited warranty relating to the title to the shares being sold.

It will be observed that para 2 clearly had an impact on the offer price submitted, as it was aimed at adjusting the share price upwards. Paragraph 4 had a D tendency of exposing a purchaser to unknown risks/liabilities. Gain in his evidence admitted that this was of great concern to him. In specific reference to para 4 he said:

> "That was of grave concern to me as an adviser to the transaction … when one buys a company which is operating mines, which has been in E operation for 40 years, and the seller is not prepared to warrant their conduct in how they have kept their affairs, be they tax returns, … environmental liabilities, the pension fund being fully funded, their financial records whether or not they are in breach of any legal agreements, to warrant absolutely nothing, is finally unusual."

Even with this realisation, neither Gain nor Khumalo appraised the plaintiff of F this clearly worrisome development.

In my view, it appears that from very early in the negotiations the defendant failed to disclose or communicate important information and this stance was maintained throughout the three months restraint period. In fact, Gain, in his testimony admitted that he did not disclose to the plaintiff any matter relating to the negotiations he was carrying out. In response to questions by G Mr *Andersen,* he stated that he had never spoken to Hove prior to the commencement of these proceedings, neither had he been provided with Hove's contact details nor asked, by the defendant, to keep Hove abreast of the transactions. H

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A Taking the above and the other evidence into consideration, I find that the conduct of the defendant, if considered against the duty of *uberrima fides* and the highest standards of honour, does not stand or bear scrutiny. In otherwords, in my view, the defendant was in breach of its duty of good faith as created by the agreement it entered into with the plaintiff.

B THE ALTERNATIVE CLAIM BASED ON A CONTINUING MANDATE

It is the plaintiff's further contention that over and above the aforementioned breach, the defendant was also in breach of its obligations after the three months restraint period. In particular that, if it is found, that during the three months restraint period, the defendant instituted negotiations on behalf of the parties, it means that the defendant accepted a continuing mandate to pursue C such negotiations until such time that they were either finalised or terminated in another lawful way.

The defendant, on the other hand, argues that in accordance with the express terms of the agreement, the legally binding obligations between the parties had a three months life span, being the restraint period, at the expiration of D which such obligations came to their natural end. Therefore, the defendant, in the circumstances of this case, cannot be adjudged to have breached any binding obligations after the three months restraint period had elapsed.

In view of the conclusions and findings already made, I will not concern myself with a forensic analysis of the arguments advanced by either party, but instead I propose to firstly set out the relevant law and thereafter apply that law to the E circumstances that occurred prior to and after 24 September 2002.

I have found already that the agreement between the parties, in express terms, imposed a duty of good faith and in addition the real nature of this agreement was a partnership which, by law, imposed the duty of *uberrima fides* on the parties. The duty of good faith whether arising out of the express terms of a F contract or by operation of law, covers a wide range of conduct between

contracting parties and/or partners. In this regard, in addition to what has already been quoted above, *Lindley on Partnership* states at p 489 that:

> "A partner who continues in business after the dissolution of a partnership and makes use of either the former partnership's assets or a business connection derived out of the former partnership assets or connection is G accountable to his former partner or partners for the profits attributable thereto."

By parity of reasoning, it follows that any transaction or business conducted or instituted by one partner on behalf of the partnership, during its subsistence, does not terminate or cease on the exfluxion of the partnership. At the same H page, the learned author continues:

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> Thus, in *Robert Watte Pathirana* v *Ariya Pathirana*, the plaintiff and the A defendant were partners in a petrol service station business in Ceylon. Following a dispute, the defendant gave notice terminating the partnership and, before the notice expired, he obtained the renewal of certain petrol supply agreements in his sole name, and, after the determination of the partnership, carried on trading from the same premises in his own name. The Privy Council held that he was accountable to the plaintiff for a share B of the profits attributable to the new petrol supply agreement."

It is clear, therefore, that unless and until the prior commenced business of a partnership has either terminated or otherwise been concluded, a partner is by law, under an obligation to account, to his erstwhile partner, all benefits that are derived from such business or transaction. In short, the duty of good faith in respect to unfinished partnership business continues beyond the *de* C *facto* termination of a partnership agreement.

I propose to apply the above law to the particular facts of this case. I already have found that on 20 June 2002, the defendant in pursuance of the agreement instituted negotiations for and on behalf of the parties by submitting an initial offer in the name of First Gold, for the acquisition of the Cableair shares. D Through these negotiations, on or about 15 August 2002, the defendant secured, on behalf of the parties, an exclusivity agreement with Lonmin. By this agreement, Lonmin undertook "not to participate in, or continue with, any discussions or negotiations or enter into any contract with any third party relating to the sale of Cableair and/or its wholly owned subsidiary, Independence, during the period" but on certain specified conditions. It is E pertinent to mention that this exclusivity agreement was subject to several amendments in respect to the dates when the defendant (on behalf of the parties) was required to fulfil the conditions set therein. The signed and final exclusivity agreement, dated 27 August 2002, read in relevant parts:

> "You have asked for a period of exclusivity within which to arrange the F funding necessary to complete this transaction.
>
> Subject to receiving from First Gold Proprietary Ltd or its nominee ("First Gold") the sum of US$1 million (the "Deposit") into our bank account in New York … on or before the close of business (New York time) on 2 September 2002, which monies we will hold on the terms of this letter, we will grant you exclusivity on the following basis: G
>
> 1 We will not participate in, or continue with, any discussions or negotiations or enter into any contract with any third party relating to the sale of Cableair and/or its wholly-owned subsidiary, Independence, during the period from receipt of the deposit into our bank account until 19 September 2002 *or*, if completion of Cableair to First Gold ("Completion") has not taken place on or before 19 H

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> A September 2002 but, on or before such date, we have received written confirmation addressed to us from a bank of international standing (the "Bank"), in form and substance reasonably satisfactory to us, that the Bank holds the sum of not less than US$14 million at your disposal for the purposes of this transaction (the "Bank Letter"), 26 September 2002.
>
> 2. B If completion has not taken place on or before 19 September 2002 and the Bank Letter has not been received by us on or before the close of business (New York time) on 19 September, 2002, then the Deposit and all interest earned thereon will be forfeited and will belong to us entirely.
>
> 3. …
>
> 4. C If the Bank Letter has been received by us on or before the close of business (New York time) on 19 September 2002 and completion takes place on or before 26 September 2002 (or such other date as may be agreed between Lonmin and First Gold in writing), then:

(a) the Deposit and all interest earned thereon (net of tax) shall be applied towards the purchase price of the shares in and D shareholders' claims against Cableair (the "Purchase Price"); and

(b) First Gold irrevocably undertakes to procure that the Bank transfers such sum of money to Lonmin as is necessary to complete payment of the Purchase Price, having taken into consideration (a) above."

E The important aspects of the exclusivity agreement were that a deposit of US$1 million was to be lodged with Lonmin by 2 September 2002, following which the balance of US$14 million was to be deposited or alternatively Lonmin was to receive by 19 September 2002 an acceptable "Bank Letter" guaranteeing that the bank held not less than US$14 million at the defendant's disposal. Failure to satisfy this last condition would entitle Lonmin to wholly forfeit the F US$1 million deposit, but, if satisfied, the deposit would be applied toward the final purchase price.

There is no dispute that on or about Friday, 6 September 2002, Lonmin received the US$1 million deposit as partial fulfilment of the conditions set out in the exclusivity agreement. Notwithstanding this late disbursement, Lonmin by letter of 18 September 2002 agreed to treat the deposit as having been received G on 2 September 2002. Additionally, by the same letter Lonmin agreed to further extend the deadline for receipt of the Bank Letter to 24 September 2002.

The evidence shows that on 24 September 2002 being the deadline set for the Bank Letter and incidentally also the last day of the three months restraint period, Deutsche Bank AG London, made available to Lonmin a letter couched H in the following terms:

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"Re: USD 15,000,000 Financing for Mawenzi A

We confirm that ourselves and our nominees hold sufficient assets which are pledged for the benefit of Mawenzi Resources and Finance (Pty) Ltd ('Mawenzi') such that we would be able to advance an amount of up to USD 15,000,000 to Mawenzi for the purchase of Cableair Ltd ('Cableair').

This would be subject to the fulfillment of the following conditions: B

1. A signed agreement in respect of the sale of Cableair between Lonmin plc and Mawenzi or its nominee acceptable to Deutsche Bank AG, and the fulfilment of the suspensive conditions contained therein;
2. Deutsche Bank AG Credit approval; and
3. Compliance with South African Exchange Control regulations.

This letter does not constitute a legally binding offer to finance or C guarantee any obligation of Mawenzi …"

It must, at this point, be stated that all the transactions narrated above formed part of the negotiations conducted by the defendant, for and on behalf of the parties, but the details of which were not communicated to the plaintiff.

The Deutsche Bank letter, was considered entirely unacceptable and Robinson D communicated Lonmin's position in this regard to Gain at a meeting held on 24 September 2002. According to Gain, Robinson's attitude was that the defendant had failed to demonstrate to his (Robinson's) satisfaction that the funding as required in terms of the exclusivity agreement, was available and that accordingly, the deal was off. It was Gain's belief that the US$1 million deposit was at that stage forfeited. The next matter of significance is that Gain E communicated this new development to Khumalo who immediately traveled and arrived in the UK on the morning of 26 September 2002. Sometime later that same day a meeting was convened between Gain, Khumalo and Hunter representing Metallon and Robinson respectively, representing Lonmin. Further negotiations took place which, finally culminated in an agreement on F 28 October 2002.

It is against this background that the defendant contends that the initial negotiations lapsed on 24 September 2002 and in accordance with the HOA, the binding obligations between the parties likewise lapsed. Accordingly, that because the defendant was no longer obligated to the plaintiff, at the meeting of 26 September 2002, it opened completely new and separate negotiations G with Lonmin.

As already stated the duty of good faith transcends beyond the *de facto* termination of a partnership. It is therefore a requirement that a partner account to his erstwhile partner in relation to partnership business that was initiated but had not yet been wound up. As stated by *Lindley:* H

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> A "… most especially is good faith required to be observed when one partner is endeavouring to get rid of another, or to buy him out."

Applying this principle to the present case, it is obvious that the defendant through First Gold initiated and carried out negotiations with Lonmin during the three months restraint period. During this period, US$1 million was deposited to secure exclusivity in negotiations for the parties. On the B defendant's version of events on 24 September 2002 being the final day of the restraint period, difficulties arose in the negotiations. Why then, one wonders, did the defendant not bring to the attention of the plaintiff this sudden turn of events, if it intended to fulfil its obligation of good faith? The defendant, instead, kept this to itself and without any warning decided that as the restraint C period had come to an end on that very day, it would exclude the plaintiff and negotiate for itself for the shares in Cableair.

In my view, the conduct of the defendant does not pass the good faith test. In this regard, I am in agreement with Mr *Andersen's* submission that "one would have thought that come 24 September, if it intended to break ranks that somebody representing the defendant would have got hold of Hove and said: D Hove, we really have to tell you in all fairness that we now regard this agreement [terminated], we regard ourselves as being free to do as we wish and you of course are free to do the same".

As already stated, Gain's evidence was to the effect that, the prior negotiations carried out on behalf of Newco lapsed on 24 September 2002. That as far as E he was concerned the US$1 million deposited on behalf of the parties was forfeited in accordance with para 2 of the exclusivity agreement. It was, on the basis of this development and the fact that the three months' restraint period had lapsed that on 26 September 2002, other negotiations not involving the plaintiff were initiated. These new and separate negotiations finally resulted into the Share Sale Agreement of 28 October 2002, between Lonmin and a F nominee of the defendant styled Pemberton International, a private company registered in the territory of the British Virgin Islands.

What transpired after 24 September 2002, however, does not support Gains' evidence that the prior negotiations had lapsed on 24 September 2002.

In particular, it was Hove's uncontradicted evidence that, having failed to G communicate with Khumalo from 23 September 2002 he managed to speak with him on 3 October 2002. Hove inquired from Khumalo about the progress made in respect to depositing the balance of the purchase price, which was to have been effected by close of business (New York time) by the 19 September 2002. Khumalo intimated that he was working on it and would soon be able to pay the balance. He promised Hove that as soon as he made that payment he would H be in contact to arrange a meeting to finalise their earlier arrangement.

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If, therefore, the defendant truly believed that the obligations under the HOA A had lapsed upon the expiry of the restraint period. Why is it that on 3 October 2002, Khumalo did not simply tell Hove that he was not prepared to discuss anything with him, as the binding agreement between the parties had already lapsed? Instead he elected to deceive Hove by making him believe that he was working towards paying the balance of the purchase price to Lonmin. The evidence further shows that on or about 7 October 2002, Hove discovered from B an associate of Khumalo's that Khumalo was experiencing some difficulties with obtaining authority from the Reserve Bank of South Africa, in respect to the transfer of the balance of the purchase price. As a result, Hove on or about 9 October 2002, sent a facsimile message to Khumalo suggesting a possible bridging financing arrangement with money that could be sourced from one C of his UK associates. Again, one wonders why Hove would have behaved in such manner, if the agreement between the parties had lapsed on 24 September 2002.

The next matter of significance is that on or about 28 October 2002, Khumalo communicated with Hove, inviting him to a face to face meeting in South Africa. The meeting took place on 30 October 2002, where for the first time ever, D Khumalo informed Hove that the defendant had acquired the shares in Cableair for itself. It is again a matter of mystery why, if the defendant regarded the agreement between the parties to have lapsed on 24 September 2002, Khumalo elected to wait in excess of a month before advising Hove of this fact.

In my humble view, the most probable explanation for the defendant's conduct E is that it capitalised on what it believed to be the *de facto* lapsing of the three months restraint period to eliminate the plaintiff from being a contender in the possible acquisition of the Cableair shares. After all, contrary to Gain's evidence to the effect that negotiations had lapsed, it is abundantly clear from the evidence that this was not the position. Robinson in his evidence testified as such and as it later transpired the US$ 1 million earlier deposited was never F forfeited but was instead applied, in accordance with para 4(a) of the exclusivity agreement, towards the final purchase price, that was paid by Pemberton, to acquire the shares in Cableair.

No doubt, by its deliberate conduct the defendant succeeded in excluding the plaintiff from being a contender in the race towards the acquisition of the Cableair shares. However, it must be emphasised that the duty of good faith, G which the defendant owed, transcends beyond the *de facto* end of a partnership and requires that one partner accounts to another, in respect to all prior commenced but unfinished partnership business. It should further be emphasised that the duty of good faith does not permit one partner to outsmart the other partner, as appears to have happened *in casu*: *Purdon* v *Mulleir supra* 1960 *supra* at 797H.

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A Having carefully considered the above, it is my conclusion that the defendant was in breach of its continuing mandate imposed on it by the duty of good faith. Accordingly, the plaintiff has established, on a balance of probabilities, that the defendant apart from breaching the agreement during the restraint period also breached it in respect to the continuing obligations it owed Plaintiff.

B **THE QUESTION OF DAMAGES:**

Having established that the defendant breached the agreement, the next question for determination is whether or not the plaintiff is entitled to damages.

The defendant contends that the plaintiff is not entitled to any damages in that the plaintiff "[was] unable to prove that it suffered any damages insofar as:

C Its claims for damages is predicated on the anticipated value of 40 per cent of Newco.

And:

It has failed to plead or prove the incorporation of Newco or any obligation on the part of the defendant to procure the incorporation of Newco due to the D failure of the suspensive conditions."

The defendant, therefore, contends that the agreement between the parties was subject to suspensive conditions and as there was neither waiver nor fulfillment of the conditions, the plaintiff cannot prove the damages claimed, even if there was breach of the agreement.

E The point to first note, is that clause 8 of the HOA which, stipulated the suspensive conditions does not form part of the binding obligations of the agreement. Secondly, and more importantly, it is trite that for a term in a contract to be properly regarded as a suspensive condition, its effects must be to suspend the operation of the agreement or part of it until the happening of some uncertain future event: *Tamarillo (Pty) Ltd* v *B N Aitken (Pty) Ltd* F 1982 (1) SA 398 (A) at 417.

If one looks at the agreement entered into between the parties, it contained no express provision that its operation was to be suspended until the incorporation of Newco. On the contrary, the terms of the agreement as per clause 2.3 read with 3.5 mandated the defendant to commence negotiations G with Lonmin immediately upon the coming into effect of the agreement i.e. upon the signature date of the HOA.

Even if there were any doubts as to whether the operation of the agreement was suspended, the defendant's contentions are totally inconsistent with the conduct of the parties. The evidence establishes that both treated the agreement as binding and operational. It must, in this regard, be remembered H that immediately upon entering the agreement defendant through First Gold

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submitted an initial offer, on behalf of the parties, for the acquisition of the A Cableair shares. I have already found that the object of the agreement entered into between the parties was to submit a

joint bid, and not for the formation of Newco. It follows that with or without the successful future formation of Newco, had the contract been fulfilled the parties would have each acquired a stake in Cableair. Besides it is clear that during the subsistence of the B agreement the defendant itself did not regard the question of incorporating Newco as important – the defendant never asked the plaintiff, at any stage, to effect incorporation of Newco failure of which it would consider itself free of any obligations.

It is therefore my view that there is no substance in thedefendant's contention that because of non-fulfillment of the suspensive conditions the pslaintiff is C not entitled to damages regardless of any breach.

ASSESSMENT OF DAMAGES

The plaintiff's case is that thedefendant's conduct constituted a breach of contract which entitles it to claim damages from the defendant in lieu of the 40 per cent shares it would have acquired and owned, but for the breach. D

Following the amendment of 3 June 2005, para 12 of the plaintiff's declaration read:

> "In consequence of the loss of the shares in Cableair and thereby Independence and its mines, the plaintiff has suffered damages in the sum of US$12 million being the value the shares would have had at the material E time."

The claim of US$12 million referred to above represents forty per cent of US$ 30 million which, in accordance with Hove's unchallenged evidence, is what Khumalo and himself had agreed, at their meeting of 17 June 2002, to be the real value of the shares in Cableair.

This figure of US$30 million was subsequently revised by agreement as is F reflected in paragraph 8 of the consent order of 3 June 2005 which reads:

> "8. The parties agree for the purposes of this matter that the fair and reasonable value for Cableair Ltd, at the time of the alleged breach on 28 October 2002, was USD 18.5 million. The aforegoing does not preclude the defendant from leading evidence to the effect that a loan G of USD$15.5 million was realised by the purchaser (Pemberton International) for the purchase of Cableair Ltd. The the defendant also reserves its rights to argue any issues arising out of the Metallon/Stanmarker Agreement, including the issue of whether any alleged damage suffered by the plaintiff was in fact a US Dollar loss."

Quite clearly, an additional consequential amendment to para 12 of the H

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A plaintiff's declaration was inadvertently omitted, namely, the quantum of damages allegedly suffered by the plaintiff should also have been amended to read US$7.4 million, being forty percent of US$18.5 million.

The defendant, in its defence, submits that although by agreement of the parties US$18.5 million was the fair value of the Cableair shares, the plaintiff "still has to prove what the value of the shares in Newco and a corresponding B forty per cent value in Newco would be worth."

That in deciding what value to place upon the shares in Newco, cognisance should be taken of the fact that Newco would have had to assume a liability of US$ 15.5 million in order to have financed the purchase of the shares in Cableair. The US$ 15.5 million represents the share purchase price that was C subsequently agreed to between Lonmin and the defendant in their final Share Sale Agreement, which according to the defendant, it financed through a loan.

In order to arrive at what damages are due to the plaintiff, it is therefore, important for me to determine what the value of the shares in Newco would have been at the material time. However, before dealing with this question, the following comments and observations, which in my view are pertinent to the D question require mention.

On a proper interpretation of the agreement, the clear and unambiguous intention of the parties was that, upon the successful acquisition of the Cableair shares, the defendant would be entitled to own sixty per cent whereas the plaintiff would be entitled to own forty per cent of the acquired shares. This E arrangement constituted the underlying intention of the parties with or without the future formation of Newco. Simply put, the parties intended the share ownership ratios of sixty per cent to obtain regardless of whether or not Newco eventually came into existence. It follows that if the

contemplated future detailed agreements did not materialise, as happened *in casu*, each party would still maintain ownership of its respective ratio of shares, with a F consequent entitlement to do with them as it pleased, be it disposing of them or retaining them.

It is also important to note that Cableair, at the material time, was the beneficial owner of all the issued share capital of IndepGold, as a consequence of which it held hundred per cent interest in all the five gold mines in the IndepGold G portfolio. This means that the sole assets owned by Cableair, were the five gold mines under the control of IndepGold. In reality, therefore, these five mines were what the shares in Cableair represented. It thus goes without saying that, whoever owned a share certificate of forty per cent in Cableair, also enjoyed or owned an equivalent stake in the five gold mines (the underlying assets – H as a going concern) owned by IndepGold.

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What then, at the material time, was the value of the shares in Newco, bearing A in mind that Newco was never formed?

Where a dispute arises, the law adopts the "willing-seller-willing-buyer" criterion to try and determine the value of shares in an entity that was not formed.

In *Scott & Anr* v *Poupard & Anor* 1971 (2) SA 373 (A) at 381, the principle was B stated thus:

> "What has to be determined is what the actual value of the shares would have been had the company been formed in accordance with the agreement and had the appellants acted as they were required to do. The ultimate criterion in regard to evaluation of the shares of the company on that hypothesis, and bearing in mind that the shares would not be quoted on C the market, is what *a willing purchaser would, at the given time, have been prepared to pay to a willing seller for such share*; and in considering that question it is *necessary to attribute to such imaginary purchaser reasonably detailed knowledge of the company, its management, its assets and liabilities, its potential and other relevant factors which might have a bearing on the company's prospects of flourishing and* D *paying a dividend*" (my emphasis).

The defendant contends that if account were to be taken of the actual loan of US$15.5 million that the defendant used to finance the purchase of the shares in Cableair, the maximum value of the shares in Newco, at that time, would have been US$3 million. That is, that "the balance sheet of Newco as at the relevant E date (which is October 2002) would indicate a net asset value of US$3 million".

I am not persuaded by this contention. In my view, using the balance sheet value or the net asset value would be the correct and acceptable approach if dealing with a company that is being dissolved or being wound up. In such circumstances, the hypothetical willing seller would place a value that was adequate to offset the loan owed as well as recoup a marginal profit. Different F considerations, however, apply when one is dealing with a going concern – as was clearly spelt out in *Scott & Anor* v *Poupard & Anor supra*.

In casu, the shares under consideration related to a going concern, with assets in the form of five operational gold mines. Thus in arriving at the sale value of the shares a hypothetical "willing-seller and willing-buyer" would have G regard to …

> " the company, its management, its assets and liabilities, its potential and other relevant factors which might have a bearing on the company's prospects of flourishing and paying a dividend."

Factors such as the following would therefore be considered: H

1 The company's history.

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2. Its current balance sheet.
3. The assessment of its future economic viability, taking into account the assets it owns e.g. five operational gold mines.
4. The assessment of the company's income stream to see if it is capable of servicing existing liabilities, including loans.

B A reasonable willing buyer, would thus do as the plaintiff did, namely, conduct a due diligence exercise and commission an independent valuation of the assets to be done, before determining what he would be prepared to pay to a willing seller for the shares.

It is my view that, when regard is had to the above, it is improbable that the imaginary prudent "willing seller" would accept US$ 3 million as the value of C the shares nor would the imaginary "willing buyer" expect to successfully acquire shares in a going concern of this nature for US$ 3 million. *In casu*, the court will also have regard to the following factual basis in determining what value to place on the shares in Newco.

(a) Hove and Khumalo, on 17 June 2002, agreed that the real value of the five D gold mines was, at that time, US$30 million.

(b) The above value was to a large extent confirmed by the two valuations and the critique done at the instance of Hove. These valuations used the net present value (NPV) and the discounted cash flow (DCF) methods, which are in line with the principle enunciated in *Scott & Anor* v *Poupard* E *& Anor supra.*

(c) Lonmin andthe defendant, as willing seller and willing buyer respectively, agreed at a final share sale price of US$15.5 million, which it must be added was a gross under valuation of the asset as admitted by the defendant in a press statement quoted in the Business Day of 30 October 2002.

I am mindful that in determining what the value of the shares would have been F at that time, I must not be influenced by subsequent events. Nonetheless, this does not mean that, in order to put the matter in correct perspective I am barred from having regard to the subsequent events that have a direct bearing to the question at hand. These are important but not decisive factors to be taken into account. It is in this light that I merely mention that a few months after acquiring G the Cableair shares, the defendant negotiated with and sold thirty per cent of the shares it now owned for a sum of US$9 million to a willing buyer called Manyame Consortium. I note that US$9 million translates to exactly thirty per cent of US$30 million the figure earlier agreed by Hove and Khumalo as the true value of the assets.

For the above reasons, it is my determination that the value of the shares in H Newco, at the relevant time, was US$18.5 million agreed to by the parties as

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the fair and reasonable value of the shares in Cableair on 28 October 2002 being A the date of breach. Thus in order to restore the plaintiff to the position he would have been had the contract been performed, he is entitled to an award of damages in the sum of US$7.4 million being 40 per cent of US$ 18.5 million.

The defendant has further contended that the plaintiff, in the first instance, should have claimed damages sounding in Zimbabwe dollars and secondly B that, even if the plaintiff stipulated its claim in United States dollars, on the evidence it failed to lay a proper and adequate foundation, as is required by law, showing why it is entitled to damages sounding in the legal currency of the United States of America.

In amplification, the defendant, in its written submissions, advanced the C following:

> "Para 205 The first enquiry, therefore, is whether a plaintiff is entitled *at all to claim his loss in foreign currency.* The enquiry postulated in *Makwindi Oil* must therefore be undertaken by the court to see whether the currency in which the loss was effectively felt or borne was US dollars or Zimbabwean D dollars …
>
> 205.1 Stanmarker had incurred no losses or expenses whatever in foreign currency. Its expenses in regard to the University of Zimbabwe were in Zimbabwean dollars and all of its expenses in Zimbabwe relating to the …claims for directors meetings and the like were in Zimbabwean dollars; E
>
> 205.2 Newco was to be a Zimbabwean company with its issued share capital being in Zimbabwean denomination;
>
> 205.3 The true underlying asset in Newco was a Zimbabwean venture, namely the mining business owned by Independence F ;
>
> 205.4 Most importantly, the business of Stanmarker was in Zimbabwe and its normal currency use is clearly Zimbabwean dollars. There is no evidence whatever that Stanmarker owns any foreign currency at all;
>
> 205.5 Stanmarker would have earned dividends from Newco in Zimbabwean dollars. That is abundantly clear and it would G have been a contravention of Exchange Control regulations for it to have been paid its dividends in any other currency;

205.6 Most importantly, had Stanmarker elected to sell its shareholding in Newco as at October 2002 it would inevitably …, have had to receive the value for its shareholding in H

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A Zimbabwean dollars. Accordingly the loss was 'felt' in Zimbabwean dollars and 'borne' in Zimbabwean dollars (as at October 2002 as pleaded)."

In this country, it is settled law that a court can award judgement sounding in foreign currency. The controversy as to whether or not this were permissible was settled in the leading case of *Makwindi Oil Procurement (Pvt) Ltd* v B *National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC). At p 492E-F, the Supreme Court made the following pronouncement:

"Fluctuations in world currency has justified the acceptance of the rule not only that a court order may be expressed in units of foreign currency, but also that the amount of the foreign currency is to be converted into local C currency at the date when leave is given to enforce the judgement. Justice requires that a plaintiff should not suffer by reason of a devaluation in the value of currency between the due date on which the defendant should have met his obligation and the date of actual payment or the date D of enforcement of the judgement. Since the execution cannot be levied in foreign currency, there must be a conversion into the local currency for this limited purpose and the rate to be applied is that obtaining at the date of enforcement."

The following principles are discernible from the *Makwindi case.* Firstly, that a court order may be expressed in units of foreign currency. Secondly, that a court may, in its order, provide that the units of foreign currency be converted into the local currency at the rate prevailing as at the date of enforcement. In E the second principle, it was accepted that in regard to execution of its judgement, a Zimbabwean court, may not levy this aspect in units of foreign currency but that, where necessary, a conversion into local currency, at the rate obtaining on the date of execution, may be ordered just for that limited purpose.

Another important principle in regard judgments sounding in foreign currency F is that it is the plaintiff's prerogative to claim in a currency that will most truly express his loss and accordingly most fully and exactly compensate him for that loss. However, in order to succeed, a claimant is required to lay a foundation that supports his claim.

Applying these principles to the present case, the issue is whether the plaintiff G is entitled to an award in damages sounding in units of foreign currency?

I find that the first ground of objection raised by the defendant ignores the rule that "when a contract is broken the injured party should if possible be indemnified for the breach, that is, should be placed as nearly as possible in the same position as he would have occupied if the contract had been performed, subject to the qualification, that in the absence of circumstances H of aggravation, such as fraud, the party in default is only liable for the damages

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which may fairly be considered to have been within the contemplation of the A parties": *Dennill* v *Atkins & Co* 1905 TS 282 at 289. Claims for damages emanating from contractual breach are, therefore, not restricted to recompensing a plaintiff for actual expenses or losses incurred prior to the breach. *In casu*, the focus should be: What position would the plaintiff have been had the contract been performed? I have already found that the plaintiff would have acquired and owned forty per cent of the shares in Cableair. As B to the second ground of objection, raised by the defendant, I am not entirely satisfied that the parties had agreed to restrict themselves to incorporating Newco in Zimbabwe. Hove's uncontradicted evidence is that Khumalo had initially suggested that Newco be incorporated in Zimbabwe, but the parties never conclusively decided this. This led the parties to agree that the domicile of Newco be left open. This position is corroborated by the definition of C "Newco" in the HOA. In clause 1.7, Newco is defined as:

"… a private company with limited liability to be incorporated in Zimbabwe or such other country agreed upon by the parties, and which shall be named by agreement between the parties in writing."

Be that as it may, whether or not Newco was to be incorporated in Zimbabwe D is of little significance. The underlying asset in which it sought to acquire an interest was a corporate entity which owned five operational gold mines, whose main product – gold – is priced and traded internationally in United States dollars. Furthermore, it must not be overlooked that Newco was to

acquire 100 percent shares in a UK registered entity (Cableair). Newco was therefore going to own IndepGold through a UK registered entity and E whatever dividends were to be declared would have been declared in the accounting currency of that entity, namely, United States dollars. That such dividends would be transmitted to Newco, a Zimbabwean registered company, does not detract from the fact that the dividends would be in units of foreign currency. The subsequent requirements of satisfying the Zimbabwean foreign F currency laws are of little consequence in this regard. On this basis alone, it is my view that the plaintiff felt its loss in United States dollars and is entitled to an award of damages in that currency. There are, however, additional factors that persuade me that the damages should be awarded in foreign currency. These are that, Lonmin as from the initial stage was selling the Cableair shares in United States dollars. All references to currency in the HOA is expressed G in United States dollars. Last but not least, a subsequent sale of the shares by either of the parties would have been in United States dollars. This is precisely what transpired a few months after the defendant acquired the shares when it sold 30 percent thereof to another Zimbabwean entity called Manyame Consortium in United States dollars totalling to US$9 million. H

Omerjee J

A In conclusion, therefore, I also find that the plaintiff has laid a satisfactory and adequate foundation establishing its entitlement to damages sounding in the legal currency of the United States.

THE RATE OF INTEREST

As is obvious from the foregoing, the court has decided to award judgement B sounding in units of foreign currency. The rate of interest thus applicable cannot be that prevailing in Zimbabwe but that applicable in the country where the currency is the home currency. The principle in regard the applicable rate of interest in circumstances such as the present was authoritatively laid down by this court in the case of *Industrial Equity Ltd* v *Walker* 1996 (1) ZLR 269 (H) at 307, C where Bartlett J stated as follows:

> "… where a judgment is given sounding in a foreign currency the rate of interest should follow the rate of interest applicable in the country where the foreign currency is the home currency. This is because … one of the basic criteria in setting prescribed rates of interest is the prevailing economic conditions in the country to which the currency relates."

D This principle was later reaffirmed by the Supreme Court in the case of *AMI Zimbabwe (Pvt) Ltd* v *Casalee Holdings (Successors) (Pvt) Ltd* 1997 (2) ZLR 77 (S).

In casu, neither of the parties adduced much evidence or information as to what level or percentage of interest should apply, in the event that I found in favour of the plaintiff. However, counsel had no difficulties with my suggestion E that. At the material time, the applicable rate of interest in the United States of America was in the range of between 2 to 4 per cent.

Accordingly, it is ordered as follows:

(1) On the claim for breach of agreement, the plaintiff is awarded damages in the sum of US$7.4 million with interest thereon from 28 October 2002 to F the date of payment at the rates prevailing, from time to time, in the United States of America.

(2) Costs of suit are awarded to the plaintiff. I am, however, not satisfied on the evidence before me, that the request for an order of costs in respect to the expenses incurred, arising from the valuations prepared at the instance of the plaintiff, can justifiably be granted. That aspect of the G plaintiff's claim is disallowed.

Kantor & Immerman, plaintiff's legal practitioners

H *Gill, Godlonton & Gerrans*, defendant's legal practitioners

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DYNAMOS FOOTBALL CLUB (PVT) LTD & ANOR v ZIMBABWE FOOTBALL ASSOCIATION & ORS 2006 (1) ZLR 346 (S)

Citation	2006 (1) ZLR 346 (S)
Case No	Judgment No. S-93-05
Court	Supreme Court, Harare
Judge	Ziyambi JA, Malaba JA andGwaunza JA
Heard	22 November 2005
Judgment	23 March 2006
Counsel	*S V Hwacha,* for the appellants No appearance for the first respondent *W Muchandibaya,* for the second respondent *S Sadomba,* for the third respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Appeal — *grounds of appeal — grounds seeking relief not sought in court below — when appeal court may grant relief sought on appeal*

Partnerships *and voluntary associations — clubs — legal basis of — changes to club constitution — may only be made in accordance with procedures laid down in constitution* D

Practice and procedure — *parties — order requiring the performances of acts by person who is not a party to action — order should not be made if possibly prejudicial to the interests of such person*

Headnote

The second appellant, a football club, was formed in 1963. The first respondent E was a body formed to co-ordinate, promote and control the game of soccer. Membership of the club was restricted initially to the individuals who, by accepting the constitution, became the founder members, and anyone who became a former player of the club's team at any given time. Any other person could become a member of the club at the discretion F of the board of trustees, provided the decision received the unanimous approval of members at an annual general meeting. Supporters and fans of the club were not members and could not attend and vote at the club's general meetings. Only founder members and former players had the right to attend and vote at the general meetings. Members exercised control over the operations of the club during the year through annual G general meetings. It was only at an annual general meeting that amendments to the club's constitution could be made, provided that the procedures relating to notice to the members had been followed.

In 1990, a meeting attended by supporters of the club was held, convened by the association. At the meeting, which was attended by non-members of the club, amendments to the clauses of the constitution dealing with H

A membership and the right to attend meetings were proposed and passed. The effect of the purported amendments was that supporters and fans could become members of the club, with the right to attend and vote at the club's annual general meetings for any office bearer. The meeting had been convened by the executive committee of the respondent association. Further amendments were purportedly made in 1994, effectively giving B the club a new constitution.

The changes made to the constitution split the members of the club into two factions, one comprising some of the founder members and former players who objected to the changes, the other consisting of the remaining founder members and former players and those persons who had acquired membership as a result of the amendments adopted at the C meeting in 1990, who wanted to have the affairs of the club run in terms of the amended rules. Citing the existence of what it described as "anarchy" in the administration of the club, the association purported to dissolve the club's executive committee and to appoint its own committees to carry out the day-to-day management of the affairs of the club. The D appellants applied to the High Court for an order declaring the participation by the association in the management of the affairs of the club unlawful and interdicting it from continuing to do so. The association claimed that by virtue of its own constitution it was entitled to do so. The High Court granted the order, but with provisos against which the appellants appealed. The relief claimed in the notice of appeal was not sought in the E court below and was being claimed for the first time on appeal.

Held, that an order requiring the performance of acts which may be prejudicial to the interests of a person should be made by a court of law when such person is not a party to the proceedings and has not been heard on the matter.

F *Held,* further, that the legal basis of an unincorporated voluntary association of persons, such as a social club, is the contract between and amongst the associates. The law recognizes their freedom to determine the acts by which they intend to be bound, who should perform them and when. The duty of a court of law is to determine whether what is claimed to have been done is in fact what was prescribed by the members of the club in G strict compliance with the procedure they laid down for validity to attach to those acts.

Held, further, that when a constitution says the rules of a club can only be amended or new rules made at an annual general meeting, they cannot be changed or new rules added at an extraordinary or special general meeting. Where the rules demand that the alterations or additions be H effected at an annual general meeting of a specified composition of

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members, and upon written notice of a prescribed number of days having A been given, the changes or additions which are not made in accordance with the prescribed procedures and without the preconditions having been met are null and void. A failure to give due notice to even one member of a club, according to the rules thereof, in circumstances where such member was entitled to attend and vote at the meeting renders the B meeting a mere nullity.

Held, further, that an appellate court has a discretion in appropriate cases to grant relief claimed for the first time on appropriate cases to grant relief claimed for the first time on appeal if it is satisfactory that all the facts on which the court of first instance would have decided the matter had it been raised with it were available for its consideration and such facts as C are essential to the decision are common cause or well-nigh incontrovertible.

Cases cited

Abrahamse and Ors v Cape Town City Council 1954 (2) SA 178 (C)

Baird v Wells (1890) 44 ChD 661

Re *Bucks, Constabulary Widows & Orphans Fund Friendly Soc (No.2*) D [1979] I WLR 936

Cape United Sick Fund Society v Forrest & Ors 1956 (4) SA 519 (A)

CIR v Est Lazarus 1958 (1) SA 311 (A)

Constantinides v Jockey Club of South Africa 1954 (3) SA 35 (C)

Donelly v Barclays National Bank Ltd 1990 (1) SA 375 (W) E

Goto v Goto 2001 (2) ZLR 519 (S)

Harington v Sendall [1903] 1 ChD 921

Re *Recher's Will Trusts* [1971] 3 All ER 401 (ChD)

Thellusson v Viscount Valentia [1907] 2 ChD 1

Workmen's Compensation Commissioner v Crawford & Anor 1987 (1) SA 296 (A)

Young v Ladies Imperial Club [1920] 2 KB 523; [1920] All ER Rep 223 (CA)

Legislation considered

Supreme Court Act [*Chapter 7:13*], s 22(1)(b)(ix)

Case information

S V Hwacha, for the appellants

No appearance for the first respondent

W Muchandibaya, for the second respondent

S Sadomba, for the third respondent

Malaba JA

Judgment

MALABA JA: This appeal is against part of para 2 and the whole of para 3 of the order of the High Court (Hungwe J) dated 5 February 2003. The order reads as follows:

> "1. It is declared that Dynamos Football Club is an independent club with the right to manage its own affairs except as prohibited by law.
>
> 2. It is ordered that the respondent (now the first respondent) or its appointees be and are hereby interdicted from participating in the management of the administrative affairs at Dynamos Football Club except in terms of a lawful directive issued by the Sports and Recreation Commission in terms of the Sports and Recreation Commission Act [*Chapter 25:15*].
>
> 3. The Sports and Recreation Commission is directed to within seven days verify the register of members of the Dynamos Football Club as at 31 December 2002 from the records kept by the Club and thereafter but within twenty one days from today's date convene a general meeting of the Dynamos Football Club for the purposes of electing office bearers in terms of the current constitution held by the respondent.
>
> 4. The respondent is to bear the costs of this application."

The part of para 2 of the order appealed against is the exception to the prohibition against the first respondent ("ZIFA") from participating in the management of the affairs of Dynamos Football Club. The order was made on an application by the appellants against the first respondent. The second and third respondents were joined as parties to the proceedings on appeal as a result of the terms of the order made by the court *a quo*.

Dynamos Football Club, to which I shall hereinafter refer as "the Club" when the context allows, is an unincorporated association of individuals bound together by a contract for the achievement of the common purpose of organising and promoting the game of football through a team of professional players. The contract, evidenced by a set of rules passed by the associates in 1963, gave the Club the right to acquire movable and immovable property, sue or be sued in its own name and have perpetual succession.

The first appellant is a company duly registered in terms of the laws of Zimbabwe. Its incorporation was provided for in the constitution or set of rules for the administration and control of the affairs of the Club.

The first respondent is a body formed in terms of its constitution (Annexure 'B') to co-ordinate, promote and control the game of "association football" (commonly abbreviated to "soccer"). It has affiliated to it a league of the most successful teams owned by different football clubs playing against each other for championship positions. That is the Premier Soccer League.

Malaba JA

The second respondent represents the membership committee of the Club, an A organ created under the "constitution" referred to in para 3 of the order appealed against.

The third respondent ("the Commission") is a body corporate established in terms of s 3 of the Sports and Recreation Commission Act [*Chapter 25:15*] ("the Act"). Its objects, as set out in s 19 of the Act, include the promotion B of the development of sport in the country, provision of facilities for sporting and recreational activities and influencing government policy on matters relating to sports and recreation.

The background facts to the case brought by the appellants to the High Court against ZIFA are these. In 1963, a group of about twenty people who had played football for such clubs as Salisbury City and Salisbury United, which C had disbanded, came together and agreed to form Dynamos Football Club. The terms of the agreement, to which I shall hereinafter refer as "the 1963 constitution", governed the relationship between members and the administration of the affairs of the Club.

Membership of the Club was restricted to the twenty individuals who, by D accepting the constitution, became the founder members, and anyone who became a former player of the Dynamos team at any given time (clause 7). Any other person could become a member of the Club at the discretion of the Board of Trustees, provided the decision received the unanimous approval of members at an annual general meeting.

Clause 10.15 of the constitution stipulated that supporters and fans of the Club E were not members and could not attend and vote at the Club's general meetings. Only founder members and former players had the right to attend and vote at the general meetings.

Clause 5.1.1 empowered founder members and former players who became members of the Club in the first year of its formation to constitute an "electoral F college" and elect a Board of Trustees, consisting of ten members who were to serve for a period of three years but be eligible for re-election at an annual general meeting. The trustees had to be elected from members of the Club. They, in turn, were empowered as a Board to appoint, in the first year of existence of the Club, an executive committee of six members to run its affairs. Only former players of proven leadership qualities were eligible for appointment. G They held office for a period of three years but were eligible for re-election at an annual general meeting.

The positions held by members of the executive committee were chairman, vice chairman, secretary, treasurer, director of youth and committee member. Amongst the powers delegated to the executive committee by members was H

A the acquisition of players and entering into contracts of service with them. It was also the duty of the executive committee to keep an up to date register of members of the Club (clause 9.1.8).

Members exercised control over the operations of the Club during the year through annual general meetings. Clause 10.1.1 required that annual general meetings be held soon after the playing season or before the commencement B of the new season. At the annual general meeting, members were able to review the previous year's events by hearing and scrutinising the chairman's and treasurer's reports. Important resolutions and decisions concerning the affairs of the Club were to be made at the annual general meetings and implemented by the executive committee. It was at an annual general meeting C that amendments to the constitution of the Club could be made.

The procedure for calling an annual general meeting was laid down in the rules and had to be strictly followed. The chairman of the executive committee had the power to convene an annual general meeting. If no amendment to the constitution was to be proposed at the meeting, notice to all members entitled to attend and vote at the annual general meeting had to be given seven days D before the date of the meeting. The notice had to set out the nature of the business intended to be transacted at the meeting. In clause 15.1.3, it was stipulated that if an amendment to the constitution was to be proposed at the annual general meeting, a written notice of the meeting containing the terms of the resolution on the proposed amendment had to be given to all members E forty days before the date of the meeting.

Then clause 15.1.1 was to the effect that:

"Founder and former players are the only *bona fide* members of the club and they are the persons who have the power and the right to change or amend the club's constitution. Any other amendments made unless proposed by and approved by the 'electoral college' are null and void."

F The "electoral college" was defined in the constitution as a meeting of founder members and former player members of the Club.

When a constitution says that rules of a club can only be amended or new rules made at an annual general meeting, they cannot be changed or new rules added at an extraordinary or special general meeting. Where the rules demand that G the alterations or additions be effected at an annual general meeting of a specified composition of members, and upon written notice of a prescribed number of days having been given, the changes or additions which are not made in accordance with the prescribed procedures and without the preconditions having been met are null and void. See *Baird* v *Wells* (1890) 44 Ch D 661 at 671-673; *Harington* v *Sendall* (1903) 1 Ch D 921 at 926; *Thellusson* H v *Viscount Valentia* (1907) 2 Ch D 1; *Cape United Sick Fund Society* v *Forrest*

Malaba JA

1956 (4) SA 519 at 528A.

In para 7 of the founding affidavit deposed to on behalf of the appellants A by one Danny Thomas Yaledi, who said he was a trustee and a member of the Club, it was said that on 10 May 1990 a meeting attended by supporters of the Club was held, at which amendments to clauses 7 and 10 of the 1963 constitution were proposed and passed. It will be recalled that clause 7 restricted membership B to founder members and former players and gave to them only the right to attend and vote at the meetings of the Club. Clause 10 also gave them the right to attend and vote at annual general meetings. It also declared that supporters and fans of the Club were not members and had no right to attend and vote at any of its meetings.

The purported amendments opened membership of the Club to any person C who, upon acceptance of his application to become a member by the executive committee, had attained the age of eighteen years and thereafter paid the registration and subscription fees fixed by the executive committee. The effect of the purported amendments was that supporters and fans could become members of the Club. They would have the right to attend and vote at the D Club's annual general meetings for any office bearer. In fact, any member of the public who had become a member in terms of the purported amendments could be voted into office.

There is some information on the circumstances of the meeting of 10 May 1990 in the papers placed before the High Court. The founding affidavit alleged that the meeting was called by the executive committee of ZIFA. The deponent said E that founder members and former players of Dynamos did not attend the meeting. There was no evidence that they assented to be bound by the acts of the meeting. The opposing affidavit sworn on behalf of ZIFA by its secretary general did not deny that the meeting was convened by its executive committee. It was admitted that the meeting was attended by people who were not members of the Club at the time. The deponent said that some of the F founder members and former players acquiesced in the amendments by accepting later to be elected into office in terms of the new rules. He said those who did not take up office acquiesced in the amendments by failing to challenge the validity of the acts of the meeting in court within a reasonable time. G

It appears that the 1963 constitution was further amended on 12 March 1994. Apart from the document produced in the court *a quo*, which the learned Judge described as "the 1994 constitution", there is no information on what happened on 12 March 1994. It, however, appears to be a re-write of the 1963 constitution as purportedly amended on 10 May 1990. H

Malaba JA

A What is clear is that the changes made to the 1963 constitution on 10 May 1990 split the members of the Club into two factions. One faction comprised some of the founder members and former players who strongly objected to the changes on the ground that they were irregular by virtue of not having been in accordance with the procedure prescribed in clause 15 of the 1963 constitution. This faction of members advocated for the running of the Club B in terms of the 1963 constitution until properly amended. The other faction consisted of the remaining founder members and former

players and those persons who had acquired membership as a result of the amendments adopted at the meeting of 10 May 1990. They were quite happy to have the affairs of the Club run in terms of the amended rules.

C These developments had negative effects on the fortunes of the Club. For quite a long time, Dynamos Football Club had been one of the most successful football clubs in the country. Its team had built a reputation for playing attractive football. At one time, they won the Premier Soccer League championship in three successive years. As a result of the team's attractive and winning style of playing the game of football, Dynamos Football Club had D attracted a huge following of supporters. Its fortunes, however, began to wane, largely because of the serious disagreements amongst the members over the administration and control of its affairs.

Citing the existence of what it described as "anarchy" in the administration of the affairs of the Club, which it said affected the operations of the Premier Soccer League, ZIFA dissolved the Club's executive committee. It appointed E its own committee to carry out the day-to-day management of the affairs of the Club. There were six committees running the affairs of the Club, namely, the audit committee, the constitutional committee, the finance committee, the membership committee, the technical committee and the marketing committee. Through its committees, ZIFA had access to the funds due to the Club. It decided the use to which the funds were put. I hasten to point out the fact F that the constitution of the Club did not provide in the structure for the administration of the affairs of the Club for appointment of so large a number of committees, let alone by an outsider.

Things did not get any better after the intervention by ZIFA. The performance of the team continued to deteriorate. The dispute amongst members over the G legitimacy of the changes made to the 1963 constitution remained unresolved.

On 22 February 2000, the appellants instituted proceedings in the High Court by way of an application for an order declaring the participation by ZIFA in the management of the affairs of the Club unlawful and interdicting it from continuing to do so. ZIFA took its stand on article 11(k) of its constitution, H which it said authorised it to act in the manner it did towards the second appellant.

Malaba JA

Article 11(k) of the constitution of ZIFA empowers it to: A

> "… cause enquiry into and the determination of any disputes that may arise whether between or within member bodies, clubs or players or between or within one or more of them and the Association and to ensure the maintenance of an effective, transparent, fair and credible disciplinary and/or dispute settlement system, rules, procedures and structures."

The court *a quo* held, correctly in my view, that, upon proper construction, B the nature and scope of the powers given to ZIFA under article 11(k) of its constitution did not include the right to dissolve the executive committee of a club and appoint committees of its own to carry out the day-to-day management of its affairs. What ZIFA did was an act that its own constitution did not permit it to do. Its actions were *ultra vires* article 11(k) of its constitution C and therefore null and void.

The decision on the relief claimed by the appellants against ZIFA had been made. The proceedings, as brought to the High Court, ought to have come to an end. The learned Judge, however, went on to make a pronouncement on what he described as "the 1994 constitution", the effect of which was that it comprised the rules by which the affairs of the Club had to be run. He had D indirectly decided the dispute between the two factions of members of the Club in favour of one of the factions when the matter had not been brought before him for determination. What had been brought to the High Court for determination was whether or not the participation by ZIFA in the day-to-day management of the Club was lawful. E

The learned judge said at p 6 of the cyclostyled judgment:

> "The earlier constitution is said to be a 1963 constitution and the latter is said to be a 1994 constitution …
>
> I do not attach any weight to the validity, or lack of it, of this particular constitution. My reason for this is that Dynamos Football Club has moved on since 1963. It cannot surely be expected to be working with an old 1963 F document. That is why I believe the 1994 constitution was adopted by those claiming to be members of Dynamos. One cannot expect a football club to be governed by a static constitution in the face of more modern copies of the constitution (such) as the 1994 one. It is more representative. It captures the modern spirit of freedom of association. It has more liberal provisions in respect of membership. At the

same time it is endowed with G provisions which exclude undesirable elements like criminal convicts and insolvents."

The learned judge then made the order directing the Commission to verify the register of members of the Club and thereafter convene a general meeting of the Club for the purposes of the election of "office bearers" in terms of "the H 1994 constitution".

2006 (1) ZLR p355

Malaba JA

A The noting of this appeal followed. ZIFA did not cross-appeal against the determination that it had no right to take over the day-to-day management of the affairs of the Club. It also did not support part of para 2 and the whole of para 3 of the order appealed against.

Knowledge of the stance taken by ZIFA, the grounds of appeal jolted into action the second respondent, particularly those persons who acquired B membership of the Club as a result of the decisions made at the meetings of 10 May 1990 and 12 March 1994. Represented by Milton Makore, the second respondent applied to be joined in the proceedings on appeal for the purposes of supporting the order made by the court *a quo*. The Commission also applied to be joined in the proceedings on appeal, but indicated that it would abide C the court's decision. The involvement of the second respondent in the litigation brought to the fore the question of the validity of the meetings of 10 May 1990 and 12 March 1994.

I need to mention one other matter before I turn to determine the appeal. The notice of appeal set out the grounds of appeal and the relief sought. It then D went on, in para VIII, to pray for an order declaring that:

> "(a) Consequent to the interdict granted by the High Court, the management and administration of the Dynamos Football Club shall revert to the applicants.
>
> (b) The 1963 Dynamos Football Club constitution has not been lawfully amended and remains the only lawful constitution of the Club. E
>
> (c) The ownership and management of Dynamos Football Club shall continue in terms of the 1963 constitution until such constitution is lawfully repealed or amended.
>
> (d) There is no requirement for elections of office bearers in terms of the 1963 constitution."

I now turn to determine the appeal.

F The first point taken was that the learned judge misdirected himself in making a finding of the fact that the document he described as "the 1994 constitution" contained the rules by which the affairs of the Club were to be administered without having determined the fundamental question of whether the procedure prescribed in clause 15 of the 1963 constitution was complied with for those G rules to be valid.

It is important to bear in mind what the learned judge appears not to have appreciated. It is the fact that the legal basis of an unincorporated voluntary association of persons such as a social club is the contract between and amongst the associates. The law recognises their freedom to determine the H acts by which they intend to be bound, who should perform them, and when.

2006 (1) ZLR p356

Malaba JA

The duty of a court of law is to determine whether what is claimed to have been A done is in fact what was prescribed by the members of the club in strict compliance with the procedure they laid down for validity to attach to those acts.

In *Constantinides* v *Jockey Club of South Africa* 1954 (3) SA 35 (C) at 44C, Herbstein J said: B

> "… the relationship between the parties is contractual and both are bound by the Rules and Regulations of the Jockey Club. This contract falls to be construed by the court according to the ordinary rules of construction; the court cannot, because it considers the contract unreasonable from the point of view of one or other of the parties, depart from the language used and attempt to make it a reasonable one according to its standards. It C cannot, because it might disapprove of some of its terms, disregard them or give them a meaning other than arises from the ordinary and natural meaning of the language employed."

As was stated by Brightman J in Re *Recher's Will Trusts* [1971] 3 All ER 401 (ChD) at 407E-408A:

> "… such an association of persons is bound, … to have some sort of D constitution, i.e. the rights and liabilities of the members of the association will inevitably depend on some form of contract *inter se*,

> usually evidenced by a set of rules … The contract is the same as any other contract and concerns only those who are parties to it, that is to say, the members of the society."

Lastly, in Re *Bucks, Constabulary Widows and Orphans Fund Friendly* E *Society (No. 2)* [1979] 1 WLR 936 at 952 Walton J said:

> "I think that there is no doubt that, as a result of modern cases springing from the decision of O'Connor MR in *Tierney* v *Tough* [1914] 1 IR 142 judicial opinion has been hardening and is now firmly set along the lines that the interests and rights of persons who are members of any type of unincorporated association are governed exclusively by contracts, that F is to say, rights between themselves."

The learned judge fell into the error of accepting, as a fact, the illusion that there were two constitutions and his duty was to decide on which of them the affairs of the Club were to be run. The Club, being an aggregate of its members, could have only one constitution unless, of course, the members had split into two G Clubs, each with its own constitution. There was no suggestion that two football clubs using the name "Dynamos" had emerged. The existence and scope of the Club as constituted in 1963 continued, except that disagreements had emerged amongst the members over the validity of certain terms of the "1963 constitution" said to have been adopted at the meetings of 10 May 1990 and 12 March 1994. H

Malaba JA

A If the question of the validity of the disputed terms had been raised in the High Court, its determination would have required an inquiry into the question whether they had been agreed upon by the members of the Club, which in turn would have brought into focus the establishment of the fact that the disputed meetings had been convened in accordance with the procedure prescribed in clause 15 of the 1963 constitution.

B The misdirection of the learned Judge lay in the fact that he decided a matter that had not been put to him for determination. Those who instituted the proceedings in the High Court on behalf of the Club in the exercise of its right to sue, did so on the basis that the participation of ZIFA in the day-to-day management of the Club's affairs was unlawful. The decision of the court *a* C *quo* on the relief sought depended upon the construction of article 11(k) of the constitution of ZIFA. The learned judge elevated the question of the validity of the terms of the contract amongst members of the Club to a cause of action when it had not been pleaded as such by the applicants.

The founding affidavit shows that those who brought the proceedings to the High Court on behalf of the Club did not raise for decision the question of the D validity of the acts of the meetings of 10 May 1990 and 12 March 1994 because they believed that, following a decision taken at the annual general meeting held on 7 February 1998, the affairs of the Club were to be run in terms of the 1963 constitution until it was properly amended in accordance with the requirements of clause 15.

E The second point taken was that the learned Judge misdirected himself in making the order directing the Commission to verify the register of members of the Club and convene a general meeting of members to elect office bearers in terms of what he described as "the 1994 constitution".

I agree. It is trite that an order requiring the performance of acts which may be F prejudicial to the interests of a person should not be made by a court of law when he is not a party to the proceedings and has not been heard on the matter. See *Abrahamse & Ors* v *Cape Town City Council* 1954 (2) SA 178 (C) at 182.

The Commission had not been cited as a party to the proceedings brought to the High Court by the appellants against ZIFA. No relief had been claimed against it. The court *a quo* was bound by the law to decide the case as between G the parties before it and issue orders which affected their interests only.

The court *a quo* had no right to make an order directing the Commission to perform acts which, in terms of the constitution of the Club, were to be performed by the executive committee. The law of the court is also that it could not order the Commission to do acts that it was not permitted to do by the H statute in terms of the provisions of which it was established. The statute did

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Malaba JA

not confer on the Commission the power to take over administrative matters A of a club, such as verification of the register of members and the convening of general meetings for the election of office bearers.

The last question is whether this court should grant the relief claimed in para VIII of the notice of appeal. It is clear that the order was not sought in the court below. It is being claimed for the first time on appeal. The claim is based on B the contention that the meeting of 10 May 1990, at which amendments to the 1963 constitution were purportedly made, was irregular, in that it was not in accordance with the procedure prescribed in clause 15 of the 1963 constitution. The contention seeks to advance the principle that if there is a rule in the contract of the Club permitting amendment, then clearly its terms must be strictly followed. C

There are authorities to the effect that a declaration based on an entirely new case sought to be built on appeal cannot be granted.

In *Commissioner for Inland Revenue* v *Lazarus' Estate* 1958 (1) SA 311 (A), the appellant sought to rely on appeal on a provision of Act 29 of 1922. Reliance had not been placed on it in the court of first instance. Holding that the D contention could not be considered on appeal as it constituted a new case altogether, Schreiner JA said at 320F-H:

> "It is clear that in the present proceedings the Commissioner relied only on the latter provision until sec 3(3)(a) was put forward by counsel for the first time on appeal. In my view, the passage quoted by counsel for the respondents from the judgment of Watermeyer CJ, in *Commissioner* E *for Inland Revenue* v *Estate Crewe & Anor* 1943 AD 656 at p 682, is in point. In relation to a new argument sought to be raised on appeal for the first time, the learned Chief Justice said:
>
> 'This contention, however, raised an entirely new case; it was not a contention put forward in the special case nor was it considered in the trial court, and it cannot now be considered, and I express no opinion F upon it.'
>
> The present proceedings were as I have indicated substantially by way of a stated case in which the legal issues to be decided were agreed by the parties. The cases quoted by counsel for the Commissioner, which state the general principles on which new points of law will be entertained on appeal, are less directly applicable than is the passage from *Crewe*'s G case. The Commissioner's proposal to rely on s 3(3)(c) would amount to setting up a wholly new case and this is sufficient to lead to the conclusion that the new point must be disregarded."

In *Goto* v *Goto* 2001 (2) ZLR 519 (S), the appellant claimed in the court of first instance a declaration that she was entitled to 50 percent of the value of the matrimonial assets. On appeal, she claimed a declaration that she was entitled H

Malaba JA

A to be given a particular property, that is to say, the matrimonial home. Sandura JA at 527C said:

> "… it is not open to Mercy, in the absence of an amendment to her declaration, to claim on appeal something which she did not claim in the court *a quo*."

There are, however, other decisions to the effect that the appellate court has B a discretion in appropriate cases to grant relief claimed for the first time on appeal if it is satisfied that all the facts on which the court of first instance would have decided the matter had it been raised with it were available for its consideration and such facts as are essential to the decision are common cause or well-nigh incontrovertible. See *Workmen's Compensation* C *Commissioner* v *Crawford & Anor* 1987 (1) SA 296 (A) at 307G; *Donelly* v *Barclays National Bank Ltd* 1990 (1) SA 375 (W) at 380I-381A.

I think that, on the principle that this court has a discretion in the matter, we should grant the order claimed. The necessary foundation therefor was laid in the founding affidavit. In my view, a decision on the validity of the acts of the meeting of 10 May 1990 could be made on the admitted facts. Regard may D also be had to the powers of the Supreme Court on appeal in civil cases set out in s 22(1)(b)(ix) of the Supreme Court Act [*Chapter 7:13*], authorising it, if it thinks it necessary or expedient in the interests of justice, to take any course which may lead to the just, speedy and inexpensive settlement of the case.

Rules of a club can be altered or added to only in accordance with the express E provisions of its constitution. In this case, there is incontrovertible evidence of the fact that the procedure for the amendment of the constitution of the Club prescribed in clause 15 by its members was not followed.

It was admitted by the Secretary-General of ZIFA in the opposing affidavit that there were persons who were not members of the Club who attended and voted at the meeting of 10 May 1990. He did not deny the fact that the meeting was F convened by the executive committee of ZIFA.

The members of the Club had agreed in clause 15 of the 1963 constitution that a decision to amend any part of the constitution, to be valid and binding on them, had to be made at an annual general meeting of founder members and former players convened by the chairman of the executive committee of the G Club by written notice served on each member entitled to attend and vote forty days before that meeting.

It is, in my judgment, particularly important for the stability of such a club that, when fundamental matters such as amendments or additions to the rights and liabilities of members are undertaken, there be full compliance with all the requirements of the rules to avoid the occurrence of the kind of squabbles that H have rocked the Club.

2006 (1) ZLR p360

Malaba JA

It appears to me that, upon a construction of the provisions of clause 15 of A the 1963 constitution, a meeting which was not an annual general meeting of founder members and former players, convened by an outsider like ZIFA and attended by non-members of the Club, was a void and unauthorised act. It would not have been a properly convened meeting for the purpose of effecting a valid amendment to the 1963 constitution. B

There was failure to give proper notice of the meeting according to the rules. The facts show that the notice was given by the executive committee of ZIFA. The rule is that failure to give due notice to even one member of the Club who was entitled to attend and vote at the meeting renders it a mere nullity. See *Baird*'s case *supra* at 671-673; *Young* v *Ladies Imperial Club Ltd* [1920] 2 All ER (CA) 223. C

Some members of the Club, who had the right to attend the meeting if it had been properly convened, did not do so. The facts before us show that what happened on 10 May 1990 was not in accordance with the procedure prescribed in clause 15 of the 1963 constitution of the Club.

In *Baird*'s case *supra*, Stirling J, referring to a similar failure to comply with D a rule on the amendment of a constitution of a club, said at 671:

> "What was done on 6 December 1888 and also the proceedings of 2 April 1889 were entirely irregular. If the election of the committee was to be confirmed and new rules were to be adopted proper and distinct notice should have been given to the members. No such notice was given and consequently the proceedings were not binding on the members who E were not present."

It was argued that the founder members and former players acquiesced in the purported amendment by not challenging its validity over a long period of time until they became part of the constitution of the Club through repeated use. Whilst I appreciate the force of the contention, I am not tempted to succumb to it. F

Not only does the argument concede that the purported amendment was invalid *ab initio*, it ignores the evidence that the founder members and some of the former players persisted in their objection to the amendment and did not assent to being bound by the new rules. In any case, they could not have acquiesced in what was at law a nullity. In my view, the length of the interval G between 10 May 1990 and the institution of proceedings in the High Court had no effect on their rights.

I would accordingly allow the appeal, with costs to be paid by the second respondent. The part of para 2, commencing with the word "except", and the whole of para 3 of the order of the court *a quo* are deleted. The order of the H court *a quo* should read as follows:

2006 (1) ZLR p361

Malaba JA A

"1. It is declared that Dynamos Football Club is an independent club with the right to manage its own affairs except as prohibited by law.

2. It is ordered that the respondent or its appointees be and are hereby interdicted from participating in the management of the administrative affairs at Dynamos Football Club.

3. The second respondent is to bear the costs of this application.

B **IT IS FURTHER DECLARED THAT:**

4. The 1963 Dynamos Football Club constitution has not been lawfully amended and remains the only lawful constitution of the Club.
5. The ownership and management of Dynamos Football Club shall continue in terms of the 1963 constitution until such time as it is C lawfully repealed or amended."

ZIYAMBI JA &Gwaunza JA concurred.

Dube, Manikai & Hwacha, appellants' legal practitioners

Muchandibaya & Associates, second respondent's legal practitioners

D *Gill, Godlonton & Gerrans*, third respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/S v MACHONA 2006 (1) ZLR 362 (H)

S v MACHONA 2006 (1) ZLR 362 (H)

Citation	2006 (1) ZLR 362 (H)
Case No	Judgment No. HH-41-06
Court	High Court, Harare
Judge	Uchena J
Heard	23 March 2006
Judgment	23 March 2006
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Court — *contempt — contempt in facie curiae — magistrates court — contempt may only be committed at gazetted place of sitting of court or* C *if court is elsewhere as part of court proceedings — magistrate's powers when offence committed in his presence*

Headnote

A magistrate, while travelling with his official party back from a place where he had been holding a circuit court, stopped at a business centre. There he saw the accused assaulting a woman. Prison officers travelling with D the magistrate attempted to arrest the accused, who resisted and insulted the officers. The magistrate warned the accused that he would be punished for contempt of court. When the accused continued to resist arrest, the magistrate ordered that he be imprisoned. On review:

Held, that the magistrate was not holding court at a gazetted court sitting E place. Section 71(1)(a) of the Magistrates Court Act [*Chapter 7:06*], which provides for summary contempt trials, does not provide for contempt trials by the roadside. Contempt of court *in facie curiae* is committed when a person, who is inside the court, insults the presiding judicial officer while the court is engaged in its proceedings or, as it is sometimes said, in open court. The magistrate and the court officials had F not gone to the business centre in furtherance of the court's business. If they had gone there to hold an inspection *in loco,* then it could have been said that the court was sitting and court proceedings were in progress. It was therefore not possible for the accused to have committed contempt in the face of the court, in terms of s 71(1)(a) of the Act.

Held, further, that in terms of s 24 of the Criminal Procedure and Evidence Act G [*Chapter 9:07*],the magistrate, on seeing the accused assaulting the woman, was entitled to act, but merely to arrest the offender or verbally order his arrest. While a magistrate may personally effect the arrest, where there are others present, he can order them to do so for him, and thus will preserve the dignity of his office if he takes a back seat as H suggested by subs (2).

Uchena J

Case cited A

S v Musa 1997 (2) ZLR 149 (H)

Legislation considered

Magistrates Court Act [*Chapter 7:06*], s 71(1)(a)

Case information

B **UCHENA J**: On 15 March 2006, court officials from Chivhu magistrates court travelled to Mvuma for the purposes of holding a circuit court in that town. Mvuma is a gazetted circuit court for Chivhu magistrates court. The magistrate's and prosecutor's statements in the record indicate that they performed their official duties and left Mvuma on their way back to Chivhu. They stopped at C Njiva Business Centre to relieve themselves. According to the prosecutor, when they stopped at Njiva Business Centre, which is 20 metres from the Masvingo highway, they found the accused viciously assaulting a female shop attendant. Prison officers who were travelling with the court officials tried to arrest the accused who resisted arrest and insulted them in the process. After a while the magistrate warned the accused not to resist arrest as the D prison officers were acting in their capacity as officials of the court, since they were coming from Mvuma circuit court and it was still during business hours. The accused ridiculed the magistrate and uttered derogatory words to the magistrate and prison officers. The magistrate then seriously warned the accused of contempt of court. The accused did not take heed of the magistrate's warning and was summarily convicted of contempt of court and sentenced to E 90 days' imprisonment. The magistrate's statement tells a similar story and confirms that he summarily convicted the accused of contempt of court and sentenced him to 90 days imprisonment.

These events were eventually reported to the Provincial Magistrate, Chivhu who made inquiries and visited Chivhu Prison. He confirmed that the accused's F conviction and arrest took place at Njiva Business Centre. He forwarded the reconstructed record of proceedings created at the Chivhu magistrates court, long after the accused's conviction and incarceration, to the Chief Magistrate, pointing out the irregularities in this case. The Chief Magistrate forwarded the record to the Registrar of this court for review.

In terms of s 29(4) of the High Court Act [*Chapter 7:06*], this court can review G any criminal proceedings by an inferior court brought to its notice which are not in accordance with real and substantial justice, notwithstanding that no application for review has been made and that the record has not been submitted for review in terms of the Magistrates Court Act. The facts of this case reveal that the Chivhu magistrates court's places of sitting mentioned H in this case are Chivhu and Mvuma. This case was not heard at either of them.

Uchena J

It was heard and completed at a business centre between Mvuma and Chivhu A which is 20 metres away from the Masvingo highway. Judicial officers must exercise their powers with caution and in terms of the law. In this case the court could not have been sitting at an ungazetted sitting place and the facts do not in my view constitute contempt *in facie curiae*.

CR Snyman *Criminal Law* 4 ed at p 327 says: B

> "The courts have held that the power of a court summarily to punish X in cases were this form of crime is committed is essential in order to uphold the dignity and authority of the court, *but they have also emphasised that this power is an extremely drastic weapon which should not be resorted to lightly but only with the utmost care and circumspection*" (my emphasis). C

In the present case, the magistrate seems to have used powers he did not have and without care and circumspection. The magistrates court is a creature of statute. It cannot exercise powers which are not given to it by statute. Section 71(1)(a) of the Magistrates Court Act, which provides for summary contempt trials does not provide for contempt trials by the roadside. It provides for D contempt trials during the sitting of the court.

CR Snyman *op cit* at p 326 says:

> "*A peculiarity of this form of the crime (contempt* in facie curiae) is that the presiding officer (judge or magistrate) has the power *summarily to act against the alleged offender*. In the case of other crimes, there is usually a lapse of time – at least months between the commission of the crime and E the trial of the alleged offender. However, if somebody *commits contempt* in facie curiae*, the presiding officer may there and then act against him by subjecting him to an immediate trial for contempt of court and if he is convicted, imposing a punishment upon him. The High Court may do this by virtue of its inherent, common law powers. Whereas the magistrates court has this power by virtue of the provisions of section 108 of the* F *Magistrates Court Act*" (my emphasis).

The learned author therefore clearly indicates the summary trial as a distinguishing feature between contempt *in facie curiae* and contempt *ex facie curiae*.

At p 325 in his book referred to the above says:

> "Contempt of court *in facie curiae* is committed *when a person who is* G *inside the court insults the presiding judicial officer while the court is engaged in its proceedings or, as it is sometimes said, in (open court)*" (my emphasis).

There is no doubt that no court was sitting at Njiva Business Centre. It is clear from the prosecutor's and magistrate's statements that there were no court H

Uchena J

A proceedings going on at the business centre. The court proceedings had ended at Mvuma Circuit Court. There was therefore no basis for convicting the accused of contempt of court, even at common law. The magistrates courts in this country, as in South Africa, can not summarily convict an accused of common law contempt. In the case of *S* v *Musa* 1997 (2) ZLR 149 (H) at 153A-B, B Chinhengo J said:

> "The magistrate has no common law powers of commital in the circumstances of the present case – his powers are statutory, as provided in the Magistrates Court Act."

I therefore, must examine the provisions of the Magistrates Court Act to determine whether the magistrate had authority to act in the manner he did. C Section 71(1) a of the Magistrates Court [*Chapter 7:06*] provides as follows:

> "71(1) If any person, whether in custody or not –
>
> (a) wilfully *insults the magistrate during his sitting in court or any clerk or messenger or other officer of any court during his attendance therein*; or
>
> (b) D wilfully interrupts the proceedings of or otherwise misbehaves in court; or
>
> (c) being a witness, refuses to answer any legal question relative to the matter in issue;
>
> it shall be lawful for any police officer or private person by order of the magistrate to take such offender into custody *and detain him until the* E *rising of the court*, and the *magistrate may by warrant under his hand commit any person so offending to prison* for any period not exceeding three months …" (my emphasis).

This offence can, therefore, be committed by any person who insults the magistrate or other court officials during the sitting of the court. The offender can be confined till the rising of the court and

the magistrate may summarily F convict him and, by warrant, commit him to prison. In the present case, there was no court sitting at business centre as the officers had gone there to relieve themselves. The magistrate and the court officials had not gone there in furtherance of the court's business. If they had gone there to hold an inspection *in loco* then it could have been said that the court was sitting and court proceedings were in progress. It was therefore not possible for the G accused to have committed contempt in the face of the court, in terms of s 71(1)(a) of the Act. The court had already risen when it completed its business at Mvuma Circuit Court.

I appreciate that, in terms of s 24 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the magistrate, on seeing the accused assaulting the female shop H attendant, was entitled to act. He was however merely entitled to arrest

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Uchena J

the offender or verbally order his arrest. Section 24 of the Criminal Procedure A and Evidence Act [*Chapter 9:07*] provides as follows:

> "24(1) It shall be lawful for any judge, magistrate or justice who has knowledge of any offence by seeing it committed, himself to arrest the offender or by a verbal order authorise others to do so.
>
> (2) The persons authorised in terms of subsection (1) are empowered and B required to follow the offender if he flees and to execute the order on him out of the presence of the judge, magistrate or justice."

All s 24 allows the magistrate to do is to arrest or order the arrest of the offender. In my view, ss (1) and (2) were meant to preserve the dignity of the judge, magistrate or justice by empowering him to arrest the offender to stop an injustice continuing in his presence and allowing those ordered to arrest the C offender to do so in his presence or his absence. In my view, while a magistrate can personally effect the arrest, where there are others he can order them to do so for him, as was the case in the present case. He will preserve the dignity of his office if he takes the back seat as suggested by ss (2).

After effecting the arrest, the magistrate had no authority to conduct a hearing, D as no contempt had been committed during the sitting of the court. He should merely have caused the accused to be referred to the nearest police station. In the circumstances, the magistrate erred when he convicted and sentenced the accused person for contempt of court when no contempt in terms of s 71(1)(a) of the Magistrates Court Act had been committed.

The accused's conviction and sentence are set aside. A warrant for the E accused's immediate release from prison is issued.

Kudya J concurs. F

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LONGHURST NO v LEE & ORS 2006 (1) ZLR 367 (H)

Citation	2006 (1) ZLR 367 (H)
Case No	Judgment No. HB-29-06
Court	High Court, Bulawayo
Judge	Ndou J

Heard 13 March 2006

Judgment 23 March 2006

Counsel Mrs *P Dube*, for the applicant
A Sibanda, for the first respondent
B Ndove, for the second respondent
S S Mazibisa, for the third respondent

Case Type Civil application

Annotations No case annotations to date

Flynote

C **Legal practitioner** — *conduct and ethics — conflict of interests — client of legal practitioner involved in litigation against former client of the same legal practitioner — whether ethical for legal practitioner to act*

Headnote

Counsel for the applicant had formerly drafted heads of argument on behalf of the third respondent. She did so from pleadings filed of record. She D did not, however, have access to the instructing legal practitioner's files. She did not interview the third respondent. In the current application she was instructed to appear on behalf of the applicant who was suing, *inter alios*, the third respondent concerning the same property and the same facts placed before her on behalf of the third respondent. The third respondent objected to her representing the applicant.

E *Held*, that it is manifestly incorrect for a legal practitioner to utilise, in favour of one client, information gleaned from another client. While having confidence that the applicant's counsel would not use information gleaned from the third respondent to advance the applicant's case, nothing should be done which creates even a suspicion that there has F been an improper interference with the course of justice. The courts have to regulate the conduct of legal practitioners and ensure that they comply with the high standards that are required of them. Justice must not only be done but it must manifestly be seen to be done. A legal practitioner must therefore decline or cease to act, not only where the interests of a former client are actually prejudiced if the legal practitioner continues to G act for the other client, but also where the former client's interests might appear to be prejudiced. The applicant's counsel accordingly could not be allowed to continue to act for the applicant.

Cases cited

H *Benmac Manufacturing Co (Pvt) Ltd v Angelique Enterprises (Pvt) Ltd* 1988 (2) ZLR 52 (H)

Ndou J

Pertsilis v Calcaterra & Anor 1999 (1) ZLR 70 (H) A

R v Chisvo & Ors 1968 (2) RLR 54 (A)

R v Sussex Justices ex p *McCarthy* [1924] 1 KB 256

Case information

Mrs *P Dube*, for the applicant

A Sibanda, for the first respondent

B Ndove, for the second respondent B

S S Mazibisa, for the third respondent

Judgment

NDOU J: At the commencement of the proceedings, the third respondent objected to Mrs *Dube* representing the applicant, on the basis of conflict of interest. It is common cause that in cross-reference file under cover of HC 494/05, C the third respondent sued the first and second respondents concerning the same property *in casu.* The matter involves the same facts and the same parties. Mrs *Dube* drafted heads of argument. Ideally, it would have been better for counsel to have sorted out this issue without going this far. But since they failed to do so, I have to determine it on its merits. The conflict of interest rule is defined in *Legal Ethics* by E A L Lewis (1982) at p 50 as follows: D

> "The rule is this: A practitioner must not act at the instance of a client or prospective client if he has or is likely to have a conflicting interest as above defined; and if such an interest or its likelihood appears when he is already acting, he must cease to act, unless before undertaking the task or when the interest or its likelihood appears, he shall have made the fullest disclosure to the client or prospective client of that interest or its E likelihood, and the latter, with the clearest understanding of the disclosure and of the implications, shall have unreservedly consented to his acting. There is, however, the rider that, even with such understanding and consent, the attorney shall avoid acting or continuing to act if he is not absolutely certain of his ability to do so without leaning towards any preference contrary to the client's interest unless exceptional circumstances F operate … The making of full disclosure in any instance may be inhibited by considerations of privilege or confidence which, if not waived, may render it impossible for the attorney to proceed on behalf of the instructor."

As alluded to above, Mrs *Dube* drafted heads of argument in this same matter on behalf of the third respondent. She has indicated, from the bar, that she did so from pleadings filed of record in that cross-application. She stated that she G did not, however, have access to the instructing legal practitioner's files. She did not interview the third respondent either. In the current application, she is instructed to appear on behalf of the applicant who is suing, *inter alia*, the third respondent concerning the same property and the same facts placed before her on behalf of the third respondent. Mrs *Dube* says that she did not have access to the instructing legal practitioner's files in respect of the third H

A respondent. I have no reason to doubt this statement. Dealing with a similar situation, Lewis *op cit* pp 53-54 observed:

> "If a practitioner wishes to act against a former client or client in circumstances where this is otherwise permissible, whether the matter is contentious or not, he must beware of the possibility that some information obtained under the seal of professional confidence may be or become germane to B the matter in hand. His duty to the client or former client absolutely precludes his disclosure or use in any degree of that information without the latter's consent. His duty to the one for whom he proposes to act (the instructor) is to do his best on the instructor's behalf and might command that disclosure or that use were it not for the prohibition. In this dilemma, he may not act. This most important question is authoritatively dealt with C … in *Robinson's* case [*Robinson* v *van Hulsteyn, Feltman & Ford* 1925 AD 12] in which the attorney were completely exonerated … The judgment in this case is of paramount importance… 'In order to advise a client as to his legal position the solicitor must know all the circumstances of his client's case, and therefore a client is often compelled to reveal to his solicitor the most intimate circumstances of his life. The solicitor may thus D become the repository of the most vital secrets of his client. These confidences reposed in him he may not divulge, and if he does the court will punish him for his breach of duty towards his client. If a solicitor who in the course of advising a client has become possessed of his client's secrets is engaged by another person to act against his former client his knowledge of the latter's secrets may be of great advantage to his client's opponent. Although the solicitor may conscientiously endeavour to do E his duty to his new client, yet he may find himself in an invidious position and his knowledge of the secrets of his former client may unconsciously affect him in doing his duty towards the other. In order to avoid such dilemma, the court will restrain a solicitor in whom confidences have been reposed by a client from acting against such client where it is made clear to the court in the words of Cozens-Hardy MR 'that real mischief and F real prejudice will in all probability result if the solicitor is allowed to act'."

In other words, it is manifestly incorrect for a legal practitioner to utilise in favour of one client information gleaned from another client. See also F van Blommestein *Professional Practice for Attorneys* p 65, *R* v *Chisvo & Ors* 1968 (2) RLR 54 (A); *Benmac Mfg Co (Pvt) Ltd* v *Angelique Entprs (Pvt) Ltd* 1988 (2) ZLR 52 (H) G and *Pertsilis* v *Calcaterra & Anor* 1999 (1) ZLR 70 (H). In the *Pertsilis* case at 74B-D, Smith J stated:

"Legal practitioners owe their clients a duty of loyalty. They are duty bound to advance and defend their client's interests. A legal practitioner is expected to devote his or her energy, intelligence, skill and personal commitment to the single goal of furthering the client's interests as those H are ultimately defined by the client: see *Modern Law Ethics* by Charles

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2006 (1) ZLR p370

Ndou J

W Wolfram, 1986 ed p 578 at 10.3.1. A legal practitioner who represents A the adversary of his own client in litigation would clearly be violating his or her duty of loyalty and the common law rules against conflict of interests. Nearly 150 years ago, in the American case of *Stockton* v *Ford* 52 US (11How) 232; 247; 13 L Ed 676 (1850) the fundamental and important point of the place and role of legal practitioners was made in the following words: B

'There are few of the business relations of life involving a higher trust and confidence that that of attorney and client, or generally speaking, one more honourably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed C shall not be used to the detriment or prejudice of the rights of the party bestowing it'."

The courts seriously and jealously guard these principles of conflict of interest: see *R* v *Sussex Justices* Ex p *McCarthy* [1924] 1 KB 256.

In casu, I must state that I have confidence that Mrs *Dube* will not use the D information gleaned from the third respondent at the time she prepared heads of argument in HC 494/05 to advance the case of the present applicant against him (third respondent).

However, my confidence in the ethical conduct of Mrs *Dube* will only solve but one of the two problems arising from the facts of this matter. The second problem is that nothing is to be done which creates even a suspicion that there E has been an improper interference with the course of justice. Therefore, the courts have to regulate the conduct of legal practitioners and ensure that they comply with the high standards that are required of them. Justice must not only be done but it must manifestly be seen to be done. Therefore, a legal practitioner must decline or cease to act, not only where the interests of a client are prejudiced if the legal practitioner continues to act for the other client, *but* F *also where the client's interests might appear to be prejudiced*: *Pertsilis supra* at 77G-78B and *Chisvo supra* at p 55. The highlighted rule applies to the facts of this case. The third respondent would be fully justified in fearing that his interests would be prejudiced by his prior acquaintance with Mrs *Dube* when she drafted the above-mentioned heads of argument. The mischief is G rightly anticipated. I fully understand and sympathise with the alarm and concern experienced and expressed on behalf of the third respondent.

Accordingly, I cannot allow Mrs *Dube* to continue to act for the applicant in this matter and I order her to cease to act for the applicant. There shall be no order as to costs. H

2006 (1) ZLR p371

Ndou J

A *Ben Baron & Partners,* applicant's legal practitioners

Joel Pincus Konson & Wolhuter, first respondent's legal practitioners

T Hara & Partners, second respondent's legal practitioners

B *Cheda & Partners*, third respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/AUSTERLANDS (PVT) LTD v TRADE & INVESTMENT BANK LTD & ORS 2006 (1) ZLR 372 (H)

AUSTERLANDS (PVT) LTD v TRADE & INVESTMENT BANK LTD & ORS 2006 (1) ZLR 372 (H)

Citation	2006 (1) ZLR 372 (H)
Case No	Judgment No S-92-05
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA & Malaba JA
Heard	17 October 2005
Judgment	27 March 2006
Counsel	*L T Biti,* for the appellant No appearance for the first and second respondents *E T Matinenga,* for the third respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Appeal — *grounds of appeal — points of law — raising of point of law for first time on appeal — when it may be raised*

Headnote

The appellant's property was sold in execution to the third respondent. It D applied for the sale to be set aside on the grounds that the sale price was unreasonably low. The court proceeded to determine the application on the basis that the issue before it was the price at which the property was sold. The application was refused. In its notice of appeal, and during submissions, the appellant contended that the sale in execution was not E *perfecta* by reason of the fact that the third respondent was never declared the purchaser in terms of r 356 of the High Court Rules and that there was never confirmation of the sale in terms of r 360. The suggestion that the sale in execution was not *perfecta* arose from the report of the Sheriff to the court *a quo*. The appellant also raised in its notice of appeal the ground that the court *a quo* failed to take into account the equities F of this matter.

Held, that the legal inadequacy of the sale in execution was not the cause of action set out in the founding affidavit. The general rule is that an application stands or falls on the founding affidavit and the facts alleged in it.

Held, further, that the issue of the sale being *imperfecta* was being raised for G the first time on appeal. The general rule is that a question of law may be advanced for the first time on appeal if its consideration then involves no unfairness to the party at whom it is directed; but an appeal court will not allow the matter to be raised unless (a) the point is covered by the pleadings; (b) there would be no unfairness to the other party; (c) the facts are common cause or well-nigh incontrovertible; and (d) there is no H

Chidyausiku CJ

A ground for thinking that other or further evidence would have been produced that could have affected the point. None of these applied in this case.

Held, further that the court *a quo* was never asked to consider the equities, nor were the relevant factors placed before the court. There could be no basis for challenging the court *a quo* for not having determined something B that was never placed before it to determine.

Cases cited

Donelly v Barclays National Bank Ltd 1990 (1) *SA* 375 (W)

Estate Lala v Mohamed 1944 AD 324

C *Pountas' Trustee v Lahanas* 1924 WLD 67

Legislation considered

High Court (General) Rules 1971 [RGN 1047 of 1971], rr 356, 360

Case information

D *L T Biti,* for the appellant

No appearance for the first and second respondents

E T Matinenga, for the third respondent

Judgment

CHIDYAUSIKU CJ: The facts of this matter are as follows: E

1. The first respondent obtained judgment against the appellant on 23 September 1998.
2. The second respondent sold the appellant's property to the third respondent for $3.5 million on 11 November 1999.
3. On 22 February 2000, the appellant launched a court application challenging the sale. F
4. The appellant obtained a default judgment setting aside the sale on 14 May 2003.
5. On 23 May 2003, the third respondent successfully applied for rescission of the default judgment and was allowed to oppose the application for the setting aside of the sale. G
6. Mrs Justice Mavingira heard the application on 16 July 2004 and handed down judgment on 2 March 2005 dismissing the application.

The appellant was aggrieved by the dismissal of the application and noted an appeal to this court on the grounds set out in the notice of appeal, which read H as follows:

Chidyausiku CJ

"GROUNDS OF APPEAL

1. The court *a quo* has grossly (*sic*) ignored the fact that the Sheriff's A report dated the 16th February 2000 … indicated that the sale in execution has never been confirmed and that a directive had been issued by the same Sheriff that the property be sold by private treaty, a fact unknown to the appellant at the time that it made its application.
2. *A fortiori* the court *a quo* thus erred in not holding that indeed in (the) B light of the Sheriff's report and in (the) light of the fact that the sale had not been confirmed by the Sheriff, there was no need for the appellant to make the application.
3. Even assuming that the sale had been properly confirmed, the court *a quo* ignored the fact that the property was sold for an unreasonably C low price.
4. Furthermore, the court *a quo* ignored the fact that there were serious delays in this matter brought (about) precisely by the third respondent, which meant that the equities no longer favoured the refusal of the application.
5. The court also ignored the fact that the appellant had cleared its D indebtedness to the judgment creditor, Trade and Investment Bank Limited.

WHEREFORE the appellant will pray that this appeal succeed with costs and the decision of the court *a quo* is upturned (overturned?) to read as follows:

'In the circumstances, it is declared that the sale in execution on the E 11th November 1999 was never confirmed by the Sheriff and therefore the application to set it aside was unnecessary or, alternatively, that the sale in execution of the 11th November 1999 is hereby set aside.'"

After submissions by both counsel, judgment in this matter was reserved. In the notice of appeal, and indeed during submissions, the appellant contended that the sale in execution was not *perfecta* by reason of the fact that the third F respondent was never declared the purchaser in terms of r 356

of the High Court Rules. It was also contended by the appellant that there was never confirmation of the sale in terms of r 360 of the High Court Rules.

The respective rules provide as follows:

> "356. **Declaration of purchaser by sheriff** G
>
> If the Sheriff is satisfied that the highest price offered is reasonable, having regard to the circumstances of time and place and to the state of the property market, he shall declare the highest bidder to be the purchaser, subject to confirmation as hereinafter prescribed. H

Chidyausiku CJ

> A 360. **Confirmation of sale**
>
> If no objection is made to the court within seven days from the date that the sheriff declares the highest bidder to be the purchaser in terms of rule 356 or from the date of a sale by private treaty in terms of rule 358, as the case may be, the sheriff shall confirm the sale."

While awaiting judgment, and by way of a letter to the Registrar of this court, B the third respondent sought to place before the court a document from the Sheriff declaring the third respondent the purchaser of the property in terms of r 356 of the High Court Rules. The appellant objected to the production of the document.

The third respondent then made a formal court application to lead further C evidence, namely, to produce the declaration from the Sheriff. The application was set down and argued before this court. The court reserved judgment. I do not intend to make a determination on that application because the appeal can be determined without reference to the document that the third respondent sought to introduce in evidence.

The appellant's cause of action in the court *a quo* is succinctly set out in paras 7 and 8 of the applicant's founding affidavit. Those paragraphs read: D

> "7. The said property is an attractive commercial land that houses many vibrant commercial tenants. This application is made in terms of rule 359 of the esteemed rules of this honourable court. It is the applicant's contention that the property was sold for an unreasonably low price. I base the open market value of Stand 90 to be at $4.8 million. E The forced market value being anything between $3 780 000 and $4 million. I attach hereto marked Annexure(s) 'A' and 'B' open valuation reports by Land & General Owen Mica & Associates, registered valuers of Bulawayo, which confirm my views. Indeed I maintain that during the time of the auction, which I attended, there were not many bidders and presumably this is due to the depressed F market in Zimbabwe.
>
> 8. I maintain that it will be unjust and inequitable that this valuable commercial property goes for such a pittance. I maintain that this honourable court should set aside the same on the basis that the property was sold for an unreasonably low price."

G In the court *a quo,* the appellant sought the relief that the sale in execution be set aside because the property was sold for an unreasonably low price. Nowhere in the founding affidavit of the applicant is it alleged that the sale in execution was not *perfecta*.

The suggestion that the sale in execution was not *perfecta* arises from the H report of the Sheriff to the court *a quo*. The report states in part as follows:

Chidyausiku CJ

> "I read through the applicant's founding affidavit and the reason for an A application to stay the sale of the property in question is that the price of $3 500 000 realised at the auction is too low.
>
> According to the auctioneer's report the 'Open Market Value' of the property is $5 950 000 and the 'Forced Sale Value' of the property is $3 850 000. The price realised at the auction is slightly lower than the Forced Sale Value. Although the Deputy Sheriff, who happens to be my B commissioner at the auction, indicated in his report that the price was reasonable the Sheriff directed the auctioneer to sell the property by private treaty for any price above the Forced Sale Value according to the auctioneer's report.
>
> The applicant in its application attached a valuation report showing that the 'Open Market Value' of the property stands at $4 000 000. C
>
> I will, however, not oppose the relief being sought by the applicant and will abide by the decision of the court."

Although the Sheriff in the report does not categorically state that he did not declare the third respondent the purchaser, it is contended that his directive that the property be sold by private treaty suggests that he did not confirm D the sale in terms of r 356 of the High Court Rules. It is also quite clear that the report of the Sheriff is made in the context that the issue before the court *a quo* was whether or not the purchase price was reasonable, and not that the third respondent had not been declared the purchaser.

Given that situation, I am not entirely satisfied that the implication was that the lack of such declaration was deliberate as opposed to being inadvertent. E The precise circumstances of the directive that the sale of the property be by private treaty are not clear.

It is quite clear from the founding affidavit in the court *a quo* that the appellant's cause of action was the unreasonably low price at which the property was sold. Indeed, the application *ex facie* was made in terms of r 359 F of the High Court Rules, which permits the setting aside of the sale of property sold by auction at an unreasonably low price.

The court *a quo* proceeded to determine the application on the basis that the issue before it was the price at which the property was sold. The learned judge in the court *a quo* concluded as follows: G

> "The *onus* to show that the price realised at a sale in execution is unreasonably low is upon the applicant. See *Morfopoulos* v *Zimbabwe Banking Corporation* 1996 (1) ZLR 626 at 633C. This was said to be 'a formidable task' in *Benma Enterprises* v *Benjamin &Ors* S-49-99 at p 6. In the *Morfopoulos* case *supra* at p 631G-H, the learned judge pointed out that such sales are not easily set aside and gave the reasons therefor at p 627F-H as: H

Chidyausiku CJ

> ' (a) A the judgment creditor is provided with his just relief; and
>
> (b) the reliability and efficacy of sales in execution should be upheld so that potential bidders at auction sales (are) not discouraged from bidding, and thus reducing the potential sale price to be realised.'
>
> The learned judge went on to point out at p 633B that the court should be reluctant to accept "the theoretical evidence of a valuator against the B specific evidence of a price offered in open competition at an auction sale, properly advertised and properly conducted". Reference was made therein to *Lalla* v *Bhura* 1973 (2) RLR 280 and *Zvirawa* v *Makoni* & *Anor* 1988 (2) ZLR 15 at 18E.
>
> In his heads of argument, the applicant's counsel properly conceded that judicial sales are not lightly set aside.
>
> C The learned judge in the *Morfopoulos* case *supra* further stated at p 635D that he would 'attach only slight weight to the assessments … for the reason that they are unsworn'. The two valuations *in casu* are similarly unsworn and I agree with the third respondent's counsel's submission that only slight weight should be accorded to them. In any event the percentage differences between the force sale values given in the two D reports and the price obtained for the property are, in my view, not of such magnitude as to warrant a finding that the price obtained for it is unreasonably low as contended by the applicant. As submitted by the third respondent's counsel, no evidence has been placed before the court of the sale of (a) comparable property (properties) at the prices set out in the two valuation reports. Needless to say, the valuation report of 14 May E 2003 is of no relevance whatsoever in the determination of whether or not $3 500 000 is an unreasonably low price. That price, on the evidence before the court, cannot be said to be 'substantially less than the market price' (*Zvirawa* v *Makoni supra*).
>
> In the result and for the above reasons, the application is dismissed with costs."

F The reasoning and the conclusion of the learned judge in the court *a quo* cannot be faulted.

It is contended in the notice of appeal and in the submissions to this court by the appellant's counsel that the court *a quo* erred in not considering the report of the Sheriff and in not concluding that the sale in execution was not *perfecta*.

G I am unable to accept this contention for a number of reasons:

Firstly, the legal inadequacy of the sale in execution was not the cause of action set out in the founding affidavit. The general rule that has been laid down in this regard is that an application stands or falls on the founding affidavit and the facts alleged in it. This is how it should be, because the founding affidavit H informs the respondent of the case against the respondent that the respondent

Chidyausiku CJ

must meet. The founding affidavit sets out the facts which the respondent is A called upon to affirm or deny. See *Pountas' Trustee* v *Lahanas* 1924 WLD 67 at 68. Nowhere in the founding affidavit is it alleged that the third respondent was called upon to affirm or deny that the sale in execution was *imperfecta*.

Secondly, the issue of the sale being *imperfecta* was being raised for the first time on appeal. Is this permissible? The general rule, as I understand it, is that B a question of law may be advanced for the first time on appeal if its consideration then involves no unfairness to the party at whom it is directed: see *Estate Lala* v *Mohamed* 1944 AD 324. The principles applicable to the raising of a point of law for the first time on appeal were succinctly set out by Kriegler J (as he then was) in the case of *Donelly* v *Barclays National Bank Ltd* 1990 (1) SA 375 (W) at 380H-381B, where the learned judge had this to say: C

> "Secondly, it is clearly a wholly new line of defence now being taken. It was not mentioned in the summary judgment proceedings nor in the plea. It was never referred to in evidence or argument at the trial. Its mere novelty, of course, is no ground *per se* for rejecting it. However, generally speaking, a Court of Appeal will not entertain a point not raised in the court below and especially one not raised on the pleadings in the court below. D In this regard I need do no more than to refer to Herbstein & van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed at 736-7. In principle, a Court of Appeal is disinclined to allow a point to be raised for the first time before it. Generally, it will decline to do so unless:
>
> (1) the point is covered by the pleadings;
>
> (2) there would be no unfairness to the other party; E
>
> (3) the facts are common cause or well nigh incontrovertible; and
>
> (4) there is no ground for thinking that other or further evidence would have been produced that could have affected the point.
>
> See *Cole* v *Government of the Union of South Africa* 1910 AD 263; *van Ryn Wine and Spirit Co* v *Chandos Bar* 1928 TPD 417 at 421; and F *Paddock Motors (Pty) Ltd* v *Igesund* 1976 (3) SA 16 (A) at 23."

Applying the above principles to the facts of this case leads me to the conclusion that this is not a proper case to allow the appellant to raise for the first time on appeal this new point of law.

The Sheriff in his report states that there was a directive for the sale of the property by private treaty. It was argued that this directive by implication G means that the third respondent was never declared the purchaser in terms of rule 356 of the High Court Rules. I have serious doubts that this reference to the directive in the Sheriff's report satisfies the first principle set out in *Donelly's* case *supra*, that the point in question must be covered by the pleadings. H

Chidyausiku CJ

A The second principle set out in *Donelly's* case *supra* is that there should be no unfairness to the other party. I have no doubt that the raising of this point of law on appeal for the first time is very unfair to the third respondent. The third respondent went to court in the court *a quo* to meet the case that the purchase price of the property was too low. He was entitled to assume at that point in time that the appellant was conceding that all the requirements of the B High Court Rules, including rules 356 and 360, had been complied with.

It is grossly unfair to raise for the first time on appeal that rules 356 and 360 of the High Court Rules had not been complied with. I accept the appellant's contention that it was not aware of this alleged non-compliance until the report of the Sheriff was filed. If the appellant wished to take advantage of this C revelation, he should have applied to the court *a quo* to file a supplementary affidavit setting out its newly found cause of action. The court, no doubt, would have allowed the third respondent to answer the new allegation. This would have been the fairest way to proceed. This procedure would have made it quite clear to the third respondent that he was facing two causes of action, the unreasonably low price of the purchase price and the incomplete sale in D execution.

The third requirement in terms of the principles set out in *Donelly's* case *supra* is that the facts should be common cause. There is a dispute between the parties on whether or not the agreement of the sale in execution was *perfecta*. The court application I have referred to earlier in this judgment makes it E abundantly clear that the point is contested.

The fourth principle set out in *Donelly's* case *supra* requires that there should be no grounds for thinking that further or other evidence would have been required or produced in the lower court. *In*

casu, it is quite clear that such evidence would have been led because there has been an application to lead further evidence on the issue in this court.

F Applying the principles set out in *Donelly's* case *supra*, the appellant cannot be allowed to raise for the first time on appeal the new point of law that the sale in execution was not *perfecta*.

The appellant also raised in its notice of appeal the ground that the court *a quo* failed to take into account the equities of this matter. The short answer to this G submission, as was correctly submitted by the third respondent's counsel, is that the court *a quo* was never asked to consider or to take into account those other considerations, nor were the factors placed before the court *a quo*. There is no basis for challenging the court *a quo* for not having determined something that was never placed before it to determine. Accordingly, this H ground of appeal cannot succeed.

Chidyausiku CJ

In the result, I would dismiss the appeal with costs. A

SANDURA JA & MALABA JA concurred.

Honey & Blanckenberg, appellant's legal practitioners

James, Moyo-Majwabu & Nyoni, third respondent's legal practitioners B

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/CARGILL ZIMBABWE v CULVENHAM TRADING (PVT) LTD 2006 (1) ZLR 381 (H)

CARGILL ZIMBABWE v CULVENHAM TRADING (PVT) LTD 2006 (1) ZLR 381 (H)

Citation	2006 (1) ZLR 381 (H)
Case No	Judgment No. HH-42-06
Court	High Court, Harare
Judge	Makarau J
Heard	22 March 2006
Judgment	29 March 2006
Counsel	*H Zhou,* for the plaintiff *P Ranchod,* for the defendant
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Arbitration — *referral of matter to — need for dispute to exist — need for dispute to arise ex facie the pleadings — appearance to defend insufficient — need to plead as to merits*

D **Practice and procedure** — *stay of proceedings — application — no dispute between the parties apparent ex facie the pleadings — application refused*

Headnote

The plaintiff and the defendant entered into a contract for the sale and purchase of cotton seed. It was a specific term of the agreement that in E the event of any dispute of whatever nature arising in connection with the agreement, such dispute would be referred to arbitration. Over a year later the plaintiff issued summons, claiming a sum representing the alleged balance of cotton seed and jute bags delivered. An appearance to defend the claim was timeously filed. When the defendant was put on notice to file its plea or other answer to the plaintiff's claim, it filed a special F plea, seeking an order staying proceedings and for the matter to be referred to arbitration in terms of the clause described above.

Held, that for a court to stay its proceedings and refer the matter to arbitration, in terms of an arbitration clause in the contract between the parties, there must be a dispute between the parties apparent *ex facie* the pleadings. Apart from being an essential characteristic of arbitration, the existence G of a dispute is necessary to render an arbitration agreement enforceable and to establish the arbitrator's jurisdiction. Such a dispute cannot be assumed or presumed from the mere fact of the entry of an appearance to defend. Nor cannot a dispute be brought to the attention of the court in counsel's heads of argument, for they are not part of the pleadings. H Heads of argument are counsel's conclusions and opinion of the facts

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Makarau J

and law applicable to the facts of the matter. Before raising a special plea A staying proceedings and referring the matter to arbitration, it would be necessary for the defendant to file a plea as to the merits of the matter for the dispute between the parties to arise *ex facie* the pleadings. Any practice short of this would result in the special plea being dismissed as having been prematurely filed. B

Cases cited

PTA Bank v Elanne (Pvt) Ltd & Ors 2000 (1) *ZLR* 156 (H)

Zimbabwe Broadcasting Corporation v Flame Lily Broadcasting (Pvt) Ltd 1999 (2) ZLR 448 (H)

Case information

H Zhou, for the plaintiff C

P Ranchod, for the defendant

Judgment

MAKARAU J: On 28 December 2004, the plaintiff and the defendant entered into a contract for the sale and purchase of cotton seed on certain terms and conditions. It was a specific term of the agreement that in the event of any D dispute of whatever nature arising in connection with the agreement, such dispute would be referred to arbitration in terms of the Arbitration Act [*Chapter 7.02*].

On 3 February 2006, the plaintiff issued summons in the above matter claiming the sum of $1 645 240 500 from the defendant, being the alleged balance of cotton seed and jute bags delivered. An appearance to defend the claim was E timeously filed. When the defendant was put on notice to file its plea or other answer to the plaintiff's claim, it filed a special plea, seeking an order staying proceedings and for the matter to be referred to arbitration in terms of the clause described above.

The special plea was resisted by the plaintiff on the basis that there is no F dispute between the parties.

For a court to stay its proceedings and refer the matter to arbitration, there must be a dispute between the parties apparent *ex facie* the pleadings. This appears to me to be a settled position in

our law. See *PTA Bank* v *Elanne (Pvt) Ltd & Ors* 2000 (1) ZLR 156 (H) and *Zimbabwe Broadcasting Corporation* v *Flame* G *Lily Broadcasting (Pvt) Ltd t/a Joy TV* 1999 (2) ZLR 448 (H).

In the earlier case, Smith J dealt with a situation where a plea in abatement was taken before a plea on the merits had been filed in the matter. He then ruled that there was no evidence of a dispute between the parties. A substantive plea was then filed raising certain defences to the claim. In upholding the special plea, the learned judge was satisfied that from the plea filed by the H

A defendant in that matter that a dispute in connection with the agreement was apparent.

In the *PTA Bank* case, the same judge reviewed a number of texts and decided cases on the issue and held that there must be a dispute between the parties before the court may refer a matter to arbitration. I am much persuaded by the observation by Butler & Finsen *Arbitration in South Africa: Law and* B *Practice,* cited by Smith J in his judgment, that:

> "Arbitration is a process for resolving a dispute between the parties regarding their existing rights. The requirement of a dispute is used to distinguish arbitration from certain other contractual provisions for referring matters to a third party … Apart from being an essential characteristic of arbitration, the existence of a dispute is necessary to C render an arbitration agreement enforceable and to establish the arbitrator's jurisdiction."

Thus, where there is no dispute arising in connection with the agreement between the parties, there can be no basis for submitting the matter to arbitration. The issue that then arises is how, for the purposes of the court D referring the matter to arbitration, evidence of the dispute is to be presented.

In my view, a dispute between the parties can only arise *ex facie* the pleadings filed with the court. It cannot be assumed or presumed from the mere fact of the entry of an appearance to defend. It is my further view that the dispute cannot be brought to the attention of the court in the heads of argument for counsel cannot plead on behalf of the parties. It is trite that heads of argument E are counsel's conclusions and opinion of the facts and law applicable to the facts of the matter. They are not part of the pleadings.

From the above, it appears to me that, before raising a special plea staying proceedings in this court and referring the matter to arbitration, the defendant must file a plea as to the merits of the matter for the dispute between the parties F to arise *ex facie* the pleadings. It further appears to me that any practice short of this will result in the special plea being dismissed as having been prematurely filed.

In casu, no plea was filed to meet the claim. In the absence of a plea, no dispute arises between the parties.

G Mr *Ranchod* for the defendant expressed the fear that if the defendant filed a substantive plea in the matter, he would have submitted to the jurisdiction of the court. With respect, the defendant is always subject to the jurisdiction of the court. It is only the proceedings that are stayed pending referral of the dispute to arbitration. An arbitration clause does not have the effect of ousting H the jurisdiction of the court. It merely seeks to compliment the court process

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in resolving disputes by engaging in an alternative dispute resolving process A but remains under the control of the courts.

Secondly, it is my view that the filing of a plea on the merits of the matter does not bar the defendant from simultaneously or thereafter raising the special plea seeking referral of the matter to arbitration.

On the basis of the foregoing, it is my view that the defendant's special plea B cannot stand. It is premature.

In the result, I make the following order:

1. The special plea is dismissed.
2. The defendant shall meet the costs of the plaintiff. C

Wickwar & Chitiyo, the plaintiff's legal practitioners

Hussein Ranchod & Co, the defendant's legal practitioners D

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Source:
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MAWERE & ORS v AGRICULTURAL FINANCE CORPORATION 2006 (1) ZLR 385 (H)

Citation	2006 (1) ZLR 385 (H)
Case No	Judgment No. HH-46-06
Court	High Court, Harare
Judge	Makoni J
Heard	1 July 2005
Judgment	29 March 2006
Counsel	*M Mazonde,* for the plaintiffs *J Dondo,* for the respondent
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Court — *High Court — jurisdiction — labour matter — court's jurisdiction ousted, even in case previously pending before the court*

Employment — *Labour Court — jurisdiction — exclusive jurisdiction in labour matters, even if case previously pending before the High Court*

Headnote

The plaintiffs instituted proceedings in the High Court challenging their retrenchment. After all pre-trial procedures were completed, amending legislation was promulgated, ousting the jurisdiction of the High Court in labour matters. The defendant argued that the matter should now be E dealt with by the Labour Court.

Held, that as a general rule, all statutes must be taken to apply to the future and cannot be held to have retrospective effect in their operation unless that is specifically or impliedly provided in the statute itself. This general rule is qualified in procedural matters: procedural statutes, once they are in operation, necessarily govern the procedure in every suit which comes F to trial after the date of promulgation. The High Court's jurisdiction was ousted by the amendment with effect from the date it came into force and the legislation stripped the court of its powers to commence, hear or determine labour matters. The legislature provided jurisdictional savings in respect of

specific matters, bodies and tribunals in s 47(5), but did not G list the High Court as one of the courts where jurisdictional savings had been made in relation to any case, pending or otherwise.

Case cited

H *Curtis v Johannesburg Municipality* 1906 TS 308

Makoni J

Legislation considered A

Labour Relations Act [*Chapter 28:01*], s 47(5)

Case information

M Mazonde, for the plaintiffs

J Dondo, for the respondent

Judgment

MAKONI J: This matter was brought before me by way of trial procedure and B was set down on the continous roll for the week beginning 27 June 2004. The trial had been set for the 1 July 2004 and before commencement of trial defendant raised a point *in limine* currently under consideration by this court. The preliminary point raised is that this court no longer has jurisdiction to determine disputes of a labour nature by virtue of s 89(6) of the Labour C Relations Act as amended by the Labour Relations Amendment Act No. 17/2002 (the Act).

The background of the matter is that summons was issued on the 15 February 2001 and all pre-trial procedures were completed before the promulgation of legislation ousting the jurisdiction of the High Court in labour matters. The D issue before the court is whether it has jurisdiction to commence the trial and determine the labour dispute in light of the provisions of s 89(6) of the Act as amended. Section 89(6) as amended reads:

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

It is common cause that the dispute subject matter of the intended trial is a labour dispute in which the plaintiffs seek:

(a) an order setting aside the retrenchment of the plaintiffs;

(b) an order compelling the defendant to reinstate the plaintiffs without loss of salaries and benefits, except for setting off of the amount taken by each F plaintiff as retrenchment package against the salaries and benefits owed to them;

(c) costs of suit.

What is in dispute is whether this court can still make a valid determination if it is to proceed with the trial under the provisions of the current law. G

The defendant contends that the court's jurisdiction has been ousted by the amending section which section the defendant classifies as an amendment to procedure. On the other hand, the plaintiffs argue that the litigation was instituted at a time when the court had jurisdiction over the matter and the court has powers to continue with the trial.as the amending section does not have H

Makoni J

A retrospective effect. The plaintiffs also contend that all statutes must be taken to apply to the future and cannot operate retrospectively unless the statute specifically provides for the retrospective effect. It was further submitted on behalf of the plaintiffs that s 47(5) of the Act confers limited retrospective effect for the sake of continuity and in order to avoid prejudice. Section 47(5) B reads:

> "Any proceedings that were commenced in terms of Part XII of the Principal Act before the 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."

C Part XII relate to powers of labour relations officers, senior labour relations officers and determinations by the labour and senior labour relations officers, appeals to tribunal, reference matters for compulsory arbitration and employees codes of conduct.

The plaintiffs argue that unlike the provisions of s 89 (6) as amended, the D provisions of s 47(5) provide limited retrospectivity. Section 89(6) was therefore not intended to have retrospective effect.

In determining the point *in limine,* the court accepts the general rule that all statutes must be taken to apply to the future and cannot be held to have retrospective effect in their operation unless that is specifically or impliedly E provided in the statute itself. This general rule laid down in case law over the years is however, only a starting point. A further consideration is at play in the current matter. The consideration is whether the section of Act under interpretation relates to procedural matters or not. There can be no doubt that issues relating to jurisdictional matters are procedural matters as these give power to the court as a legal body rather than individual rights or personal F rights.

In view of this classification, I agree with defendant's submissions that the general presumption against retrospectivity becomes qualified as stated by Innes CJ in the case of *Curtis* v *Johannesburg Municipality* 1906 TS 308 at 312. It is the finding of this court that under the said qualification of the general rule, procedural statutes, as is the current section under interpretation, once G they are in operation, necessarily govern the procedure in every suit which comes to trial after the date of promulgation. This is so even in relation to suits which were set in motion or were pending before the date on which the promulgation came into force. In the current matter, the court finds that all the pre-trial procedures that were done before the Act was amended were valid. H The court however, is not being required to preside over these past acts which

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were done in conformity with the procedure under the old law. The court is A currently concerned whether the current power, under the amended provisions, empowers the court to commence the trial and determine the labour dispute. A court without jurisdiction to hear or determine a matter cannot give a valid judgment which can be executed.

It is my finding that the court's jurisdiction was ousted by the amendment with B effect from the date it came into force and the legislation stripped this court of its powers to commence, hear or determine labour matters.

In making the Labour Relations Amendment Act 17 of 2002, the legislature envisaged problems that would emanate from pending cases as a result of the jurisdiction ouster. To cater for such problems, the legislature provided jurisdictional savings in respect of specific matters, bodies and tribunals in C s 47(5). In providing for the savings, after addressing its mind to the issue, the legislature did not list the High Court as one of the courts where jurisdictional savings had been made in relation to any case pending or otherwise. The legislature's intention was therefore that with effect from the date from which the Labour Relations Amendment provisions became effective the High Court D could not commence or continue with pending labour matters. Though the plaintiffs classified the effect of s 47(5), as giving limited retrospecivity, the court finds that this classification is wrong, as it should correctly be classified as savings of jurisdiction.

In the light of the above, it is the court's finding that it has no power to commence the hearing of labour dispute as its jurisdiction was ousted by the E amendment. This court no longer has the jurisdiction in the first instance to pronounce a judgment in this matter.

It should however be noted that the ouster of jurisdiction does not affect the litigants right to institute proceedings in the proper forum which right is subject to other existing procedural laws. The court shall not make an order F as to costs as the plaintiffs matter fails not on the facts but as a result of changes in the procedural laws for which none of the litigants carries the blame.

The point *in limine* is therefore upheld with no order as to costs. G

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Source:
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ZIMBABWE ALLOYS LTD v MUCHOHONYI 2006 (1) ZLR 389 (S)

Citation	2006 (1) ZLR 389 (S)
Case No	Judgment No. S-7-06
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA & Cheda JA
Heard	16 January 2006
Judgment	30 March 2006
Counsel	*A M Gijima,* for the appellant *R T Maganga,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

C **Employment** — *contract — termination — grounds — wilful disobedience to lawful order — serious nature of offence, even if moral excuse exists*

Employment — *Labour Court — factors court should take into account in determining penalty — obliged to take into account aggravating factors as well as mitigating ones*

Headnote

D The respondent was dismissed by the appellant, after a hearing in terms of its code of conduct, for wilful disobedience of a lawful order. He was on a final warning after two similar previous offences. The Labour Court overturned the decision and ordered reinstatement or damages in lieu. E The employer appealed.

Held, that in terms of s 12B(4) of the Labour Act [*Chapter 28:01*] the Labour Court is obliged to take into account, not only the mitigating factors in the case, but also the aggravating ones, such as the fact that the employee had previously been disciplined for the same offence. The offence of wilful disobedience to a lawful order given by the employer F is a very serious one, because it undermines the relationship between the employer and the employee, and goes to the very root of the contract of employment. The existence of a moral excuse for such disobedience will not make the disobedience any less wilful or the order any less lawful.

Cases cited G

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

Matereke v CT Bowring & Associates (Pvt) Ltd 1987 (1) ZLR 206 (S)

Ex p *Neethling & Ors* 1951 (4) SA 331 (A)

Legislation considered

H Labour Act [*Chapter 28:01*], s 12B(4)

Sandura JA

Case information

A M Gijima, for the appellant A

R T Maganga, for the respondent

Judgment

SANDURA JA: This appeal arose out of a labour dispute which was decided in favour of the respondent ("Muchohonyi") by the Labour Court.

The background facts are as follows. At the relevant time Muchohonyi was B an employee of the appellant company ("the company"). On a day in April 1999, Muchohonyi was on duty from 3 p.m. to 10 p.m. By 10 pm the employee who was supposed to relieve him had not arrived. Accordingly, the supervisor instructed him to continue working until a replacement was found. After working for another two hours, Muchohonyi left without the supervisor's permission. C

Subsequently, Muchohonyi was charged with wilful disobedience to a lawful order given by the employer, in terms of the company's Code of conduct ("the Code").

On 22 April 1999, Muchohonyi appeared before a hearing officer and pleaded guilty to the charge. He had two previous convictions for wilfully disobeying D a lawful order given by the company, in respect of which a severe warning was issued to him on 8 January 1999 and a final warning was issued on 5 February 1999. In the circumstances, the hearing officer recommended summary dismissal.

Thereafter, Muchohonyi appealed to the production director in terms of the Code, but the appeal was dismissed and his employment was subsequently terminated on 19 May 1999. In terms of the code, summary dismissal was the E penalty for wilfully disobeying a lawful order given by the employer.

Muchohonyi then appealed to the Labour Relations Tribunal (now the Labour Court), and on 23 October 2003, the Labour Court allowed the appeal and ordered that he be reinstated in his previous position or be paid damages in lieu of reinstatement. Aggrieved by that decision, the company appealed to F this court.

In its notice of appeal, the company set out the following grounds of appeal:

> "1. The learned President erred in finding that dismissal was not an appropriate penalty in the circumstances.
>
> 2. The learned President fell into error by highlighting mitigatory G features in favour of the respondent without considering or giving due prominence to aggravating features against him, such as his previous disciplinary record. The respondent had been convicted before of insubordination on two occasions within a space of one month on 8 January and 5 February 1999.
>
> 3 It was not proper for the learned President to substitute the penalty of a final written warning in place of a dismissal when at the time of H

Sandura JA

> A the respondent's conviction there was another final warning still in force against him."

Before determining the appeal, I wish to state that the determination of the appropriate penalty was a matter within the discretion of the President of the Labour Court ("the President"), and that this court does not normally interfere with the exercise of a judicial discretion unless there is a valid basis for doing B so. If, for example, the President mistook the facts and did not take into account, relevant facts o if she misdirected herself in the exercise of her discretion, this court would interfere with her decision.

This point was made by Gubbay CJ in *Barros & Anor* v *Chimphonda* 1999 (1) ZLR 58 (S). At 62F-63A, the learned Chief Justice said:

> " C The determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first – one which clearly involved the exercise of a judicial discretion – may only be interfered with on limited grounds. See *Farmers' Co-operative Society (Reg.)* v *Berry* 1912 AD 343 at 350. These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in D the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion E in substitution, provided always it has the materials for so doing."

See also Ex p *Neethling & Ors* 1951 (4) SA 331 (A) at 335A-C.

Applying that principle to the facts of the present case, I am satisfied that there is a valid basis for interfering with the decision of the court *a quo*. It is quite clear from her judgment that in considering the appropriate penalty the President did not take into account the fact that Muchohonyi had two F previous convictions for the same offence. He had been convicted on 8 January 1999 and 5 February 1999. The penalty on the first occasion was a severe warning, and the penalty on the second occasion was a final written warning.

Nowhere in her judgment did the President refer to the two previous convictions. G She, however, referred to the mitigatory factors and said the following at p 5 of the cyclostyled judgment:

> "The appellant in the present case had concluded his eight hour shift. He had agreed to stay on until a relief was found. He stayed for a further two hours. He then reneged upon this agreement and contrary to the H instructions he went home. He says he was tired and hungry. After a total

> of ten hours at work and during the night, it is human to feel tired and A require rest."

In terms of s 12B(4) of the Labour Act [*Chapter 28:01*] ("the Act") the President was obliged to take into account, not only the mitigatory factors but also the aggravating ones, including Muchohonyi's disciplinary record. The section reads as follows: B

> "In any proceedings before a labour officer, designated agent or the Labour Court, where the fairness of the dismissal of an employee is in issue, the adjudicating authority shall, in addition to considering the nature or gravity of any misconduct on the part of the dismissed employee, consider whether any mitigation of the misconduct avails to an extent that would have justified action other than dismissal, including the length of C the employee's service, the employee's previous disciplinary record, the nature of the employment and any special personal circumstances of the employee."

It is clear from a reading of the judgment of the court *a quo* that the provisions of s 12B(4) of the Act were not complied with. In particular, the judgment says nothing about the seriousness of the act of misconduct committed by D Muchohonyi, and Muchohonyi's previous disciplinary record.

In my view, had the President considered the aggravating features in this case, and given them due weight, she would not have set aside the penalty of dismissal.

In the first place, it should be appreciated that the offence of wilful disobedience E to a lawful order given by the employer is a very serious one. I say so because it undermines the relationship between the employer and the employee, and goes to the very root of the contract of employment.

Consequently, the existence of the mitigating features mentioned by the President in her judgment does not make Muchohonyi's disobedience any less wilful. This point was made by Gubbay JA (as he then was) in *Matereke* F v *CT Bowring & Associates (Pvt) Ltd* 1987 (1) ZLR 206 (S). At 212G-213B, the learned Judge of Appeal said:

> "The existence of a moral excuse for such disobedience will not make the disobedience any less wilful or the order any less lawful. This proposition is well illustrated by the old English case of *Turner* v *Mason* (1845) 14 M G & W 112; 153 ER 411, in which a domestic servant – quite deliberately because she had made a request which was rejected – absented herself during a night when she should have been on duty. Her plea of justification was that her mother was desperately ill, though it is not clear that she so informed her employer. She was summarily dismissed and the Court of Exchequer upheld the dismissal. Parke B remarked that even if the employer had been aware of the cause of her request to absent herself, H

Sandura JA

> A it would not have been sufficient to justify her disobedience to his order. He went on to say that: 'there is not any imperative obligation on a daughter to visit her mother under such circumstances, although it may be unkind and uncharitable not to permit her'. The decision was approved of in *Bouzourou* v *The Ottoman Bank* [1930] AC 271 (PC)."

In addition to the fact that the act of misconduct in question was a serious one, B Muchohonyi had two previous convictions for the same offence. As already stated, on 8 January 1999 he was found guilty of the same offence and a severe warning was issued to him. Shortly thereafter, on 5 February 1999, he was again found guilty of the offence, and a final written warning was issued to him. That final warning meant, and ought to have been understood by Muchohonyi to mean, that if he committed the offence again he would be dismissed.

C However, notwithstanding that fact, Muchohonyi committed the offence again in April 1999. In my view, the only appropriate penalty for that offence was dismissal.

In the circumstances, the following order is made:

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

   "The appeal is dismissed with costs."

CHIDYAUSIKU CJ & CHEDA JA concurred.

E *Danziger & Partners (Gweru)*, appellant's legal practitioners

Muzenda & Maganga, respondent's legal practitioners

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Source:
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S v WASTON 2006 (1) ZLR 394 (S)

Citation	2006 (1) ZLR 394 (S)
Case No	Judgment No. S-17-06
Court	Supreme Court, Bulawayo
Judge	Cheda JA, Malaba JA & Cheda AJA
Heard	3 April 2006
Judgment	3 April 2006
Counsel	Mrs *P Dube*, for the applicant *T Mkwananzi,* for the respondent
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

Constitutional law — *Constitutional of Zimbabwe 1980 — s 18(2) — right* C *to fair hearing within reasonable time — delay of a almost eleven years in bringing applicant to trial — no adequate or reasonable explanation for the delay — delay inordinate to the irretrievable prejudice of applicant.*

Headnote

The applicant, while driving his vehicle, had negligently caused the death of D a pedestrian. He was initially placed on remand on a charge of culpable homicide, but later placed off remand. Eleven years later, he was summoned to appear on the same charge.

Held, that in the absence of any reasonable explanation, a delay of almost eleven years in bringing an accused person to trial is inordinate. The E explanation for the delay was neither adequate nor reasonable. The delay was, by any standards, unreasonably long and could not be supported by any court of law. The applicant's right to a fair hearing within a reasonable time, which is enshrined in s 18 (2) of the Constitution, had been flouted.

Held, further, that the right to a fair trial is a basic human right. When it is F violated, innocent people face conviction, imprisonment and at times execution. If this occurs, the justice system itself loses credibility in the eyes of those who look to it for the smooth delivery of justice. Anyone arrested or detained on a criminal charge should, therefore, be brought promptly before a competent court of law, which will then exercise its judicial power over him; and such trial should be held within a reasonable G time. This is to ensure that an accused does not suffer unduly prolonged uncertainty and that evidence is not lost in the process. In casu, the inordinate delay caused irretrievable prejudice to the applicant and a permanent stay of proceedings would be granted. H

2006 (1) ZLR p395

Cheda AJA

Cases cited A

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

S v Nhando & Ors 2001 (2) ZLR 84 (S)

S v Tau 1997 (1) ZLR 93 (H)

Legislation considered B

Constitutional of Zimbabwe 1980, s 18(2)

Case information

Mrs *P Dube*, for the applicant

T Mkwananzi, for the respondent

Judgment

C **CHEDA AJA**: This is an application for a permanent stay of prosecution or proceedings against the applicant in terms of s 24(2) of the Constitution of Zimbabwe.

The brief facts of this case are that on 9 August 1994, the applicant, while driving a Toyota Hilux motor vehicle registration No. 571-878F, along the Ngundu-Chiredzi Road, negligently caused the death of one Tapiwa Gukutu. D He was thus charged with culpable homicide.

After the accident, the witnesses' statements were recorded, a sketch plan was drawn and a warned and cautioned statement was recorded from the applicant. The matter was then treated as a sudden death and the docket was closed.

The applicant was placed on remand but later placed off remand. He was, E however, re-summonsed to appear in court on 12 December 2004, wherein he was remanded to appear in court on 6 April 2005. It is on that date that he applied for the matter to be referred to this court, on the grounds that his right to a fair trial within a reasonable time had been infringed or violated. It is the applicant's contention that, the delay of ten years and eight months before F he was brought to trial is excessive and unreasonable.

Indeed, there has been a delay of almost eleven years in bringing the applicant to trial. A delay of any length requires an explanation and such an explanation must be a reasonable one. Mr *Mkwananzi*, for the respondent, in his submissions conceded that the delay was unreasonably long and the reason given by the Attorney-General's Office, namely that the public prosecutor G handling the matter died, is not adequate. The further reason for the delay is that there was a communication breakdown between the State and the applicant's legal practitioners.

This, too, is not a reasonable excuse. The concession by the respondent that there was an inordinate delay by the State in bringing the applicant to trial is H well-founded and is therefore proper.

2006 (1) ZLR p396

Cheda AJA

The right to a fair hearing within a reasonable time is enshrined in the A Constitution. Section 18(2) of the Constitution states:

> "(2) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an impartial court established by law."

The definition of "a reasonable time" is not defined in the Constitution. B Therefore, the question of a reasonable time is determined by the circumstances of each case.

In *In re Mlambo* 1991 (2) ZLR 339 (S), where there was a delay of four years eleven months, it was held that the said delay was very long, giving rise to a strong presumption of prejudice to the applicant. See also *S* v *Tau* 1997 (1) ZLR 93 (H). C

In *S* v *Nhando & Ors* 2001 (2) ZLR 84 (S), Chidyausiku ACJ (as he then was) clearly laid down the determining factors which should be considered in the allegations of an infringement of s 18(2) of the Constitution for referral to the Supreme Court, namely:

1. the length of the delay; D
2. the reasons for the delay;
3. the assertion by the accused of his or her right to a speedy trial; and
4. the prejudice to the accused caused by the delay.

The delay *in casu* is, by any standards, unreasonably long and cannot be supported by any court of law: see In re *Mlambo supra*. The reasons for such E delay are so flimsy that they are not worthy of serious consideration.

The applicant has always been available to stand trial and has always notified the authorities of his movements, albeit for ten years.

The delay has no doubt, in my view, resulted in anxiety and serious concern to him, which was not necessary at all. F

My judgment, therefore, is that there has been an infringement of the applicant's constitutional right by depriving him of a fair hearing within a reasonable time, which is his right in terms of s 18(2) of the Constitution.

It should be appreciated that the right to a fair trial is a basic human right. When it is violated innocent people face conviction, imprisonment and, at times, G execution. If this occurs, the justice system itself loses credibility in the eyes of those who look to it for the smooth delivery of justice. It should be emphasised, therefore, that anyone arrested or detained on a criminal charge should be promptly brought before a competent court of law, which will then exercise its judicial power over him or her and such trial should be held within a reasonable time. This is to ensure that the accused does not suffer unduly H

2006 (1) ZLR p397

Cheda AJA

A prolonged uncertainty and that evidence is not lost in the process.

In casu, in my view, the inordinate delay caused irretrievable prejudice to the applicant in the circumstances.

The applicant's relief in essence is the permanent stay of prosecution or proceedings against him.

B In the result, the application is allowed and the following order is made:

"The proceedings under case No. CRB 360/04 Chiredzi, be and are hereby permanently stayed."

CHEDA JA & MALABA JA concurred.

C *Calderwood, Bryce Hendrie & Partners*, applicant's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/ZIMBABWE DEVELOPMENT BANK v NAGA SALONS & ORS 2006 (1) ZLR 398 (H)

ZIMBABWE DEVELOPMENT BANK v NAGA SALONS & ORS 2006 (1) ZLR 398 (H)

Citation	2006 (1) ZLR 398 (H)
Case No	Judgment No. HH-43-06
Court	High Court, Harare
Judge	Kudya J
Heard	27 February 2006; 28 February 2006
Judgment	5 April 2006
Counsel	Miss *N G Maphosa,* for the plaintiff *C C Mudara,* for the defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Contract — *costs — provision for payment of — parties can agree upon the inclusion of attorney and client costs in event of litigation — need for clarity of stipulation — collection commission — need for similar clarity*

Costs — *agreement as to — parties can agree upon the inclusion of attorney and client costs in the event of litigation — need for clarity of stipulation* D

Interest — *date from which interest begins — in duplum rule — interest ceases once double has reached, irrespective of whether summons issued — interest begins to run on judgment debt as from date of judgment*

Headnote

The plaintiff bank lent a sum of money to the defendant company, of which E the second and third defendants were directors and guarantors of the loan. The loan was not repaid and the interest accumulated up to the amount of the original loan. The bank claimed interest on the total owing, as from the date of the summons. The question *in casu* was whether or not after the double is reached, interest commences to run afresh, and if F so at which stage and on which amount.

Held, that the *in duplum* rule remains part of our law. Interest, whether it accrues as simple or as compound interest, ceases to accumulate upon any amount of capital owing once the accrued interest attains the amount of capital outstanding. The rule enunciates a policy to protect a debtor who has not serviced his loan from facing an unconscionable claim for G accumulated interest and

to enforce sound fiscal discipline upon a creditor. The danger in holding that interest runs from the date of summons is that an unscrupulous creditor only has to institute action to defeat the *in duplum* rule. There is nothing against the public interest or the interests of modern finance if the *in duplum* rule operates to hold that once the double has been reached, interest must stop to run, regardless H

2006 (1) ZLR p399

Kudya J

A of the institution of proceedings or that the stage of *litis contestatio* has been reached. Upon judgment being given, however, interest on the full amount of the judgment debt commences to run afresh but will once again cease to accrue when it waxes to the amount of the judgment debt, being the capital and interest thereon for which the cause of action was instituted.

B *Held,* further, that the parties to a contract, in the event of litigation resulting there from, can agree on the inclusion of attorney and client costs. Such a stipulation must, however, be clear. The position is the same in regard to collection commission. It is for the plaintiff to demonstrate that the defendant agreed to pay it.

Cases cited C

Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pvt) Ltd & Ors 1996 (2) ZLR 420 (H)

Conforce (Pvt) Ltd v City of Harare 2000 (1) ZLR 445 (H)

Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd 1998 (2) ZLR 488 (S)

Ehlers v Standard Chartered Bank Zimbabwe Ltd 2000 (1) ZLR 136 (H)

LTA Construction Bpk v Administrateur, Transvaal 1992 (1) SA 473 (A)

Scotfin Ltd v Ngomahuru (Pvt) Ltd 1997 (2) ZLR 567 (H)

E *Standard Bank of SA Ltd v Oneanate Invstms (Pty) Ltd* 1995 (4) SA 510 (C)

Standard Bank of SA Ltd v Oneanate Invstms (Pty) Ltd 1998 (1) SA 811 (SCA)

Texas Co SA Ltd v Cape Town Municipality 1926 AD 467

van Dyk v Conradie & Anor 1963 (2) SA 413 (C)

Case information

F Miss *N G Maphosa,* for the plaintiff

C C Mudara, for the defendants

Judgment

KUDYA J: The plaintiff, the Zimbabwe Development Bank, hereinafter referred to as the bank, issued summons out of this court on 17 December 2004 seeking, G against the three defendants jointly and severally, the one paying the others to be absolved, payment of $587 612 879.86 and interest thereon capitalized monthly at 1per cent per day calculated from the date of issue of summons to the date of full payment and costs of suit on a legal practitioner scale and collection commission as provided for under the Law Society of Zimbabwe By-laws 1982. On 6 January 2005, the defendants entered appearance in which H they indicated that they had received the summons on 4 January 2005.

2006 (1) ZLR p400

Kudya J

Miss *Maphosa* for the plaintiff applied to amend the summons and declaration A during the plaintiff's cross-examination. She sought the deletion of the claim of interest on the bank charges, and the substitution of the payment of interest from the date of issue of summons by the date of service of summons. The application was not opposed. It was therefore granted. In essence, the plaintiff therefore seeks interest, from the date of service of summons calculated at 1per B cent per day to the date of full payment, on the sum of $500 million.

The plaintiff called the evidence of its credit controller, one Dumisani Sibanda and produced three documentary exhibits in a bid to prove its claim. The defendants called the evidence of Betty Chiwaura, the third defendant to counter the claim.

It was common cause that the plaintiff is a company duly incorporated in C accordance with the laws of Zimbabwe and is a registered financial institution while the first defendant is a company also duly incorporated in accordance with the laws of Zimbabwe while the other two defendants who are mother and daughter are directors of the first defendant and sureties and co-principal debtors with first defendant of the plaintiff. On 22 March 2004, the first D defendant (the company) which was represented by the third defendant executed an Invoice Discounting Agreement Exhibit "1" (the agreement) with the plaintiff. On the same date, the second and third defendants bound themselves jointly and severally with the first defendant as sureties and co-principal debtors of the plaintiff.

It was common cause that before the execution of the present agreement, the E parties had executed three similar agreements which had been discharged. The defendants were therefore alive to the contents of exhibit "2", the General Conditions of the Invoice Discounting Agreement, which consists of 32 conditions on three pages, which governed the operation of the agreement.

On 24 March 2004, the plaintiff disbursed $250 million to the company in terms F of the agreement. Notwithstanding the fact that the plaintiff averred in its declaration that the invoice discounting fee in terms of the agreement was set at 25 per cent of the capital sum disbursed, the company corrected it in its plea by stating that the 25 per cent per month was variable and would be compounded.

In its declaration, the bank had stated that the company would repay the G capital sum and interest, 60 days after the inception of the facility as a lump sum. The defendants in their plea disputed the averment stating in turn that repayment was in terms of para 4 of the agreement. The agreement referred to the general conditions of the agreement for guidelines on the dates of repayment. Exhibit "2" however, does not give the duration of the agreement. In his testimony, Sibanda alleged that the agreement had a lifespan of one H

Kudya J

A month, a fact which was confirmed by third defendant in her evidence in chief. The agreement was therefore for a duration of 30 days.

The defendants fell on hard circumstances and failed to meet their obligations to the plaintiff.

At the pre-trial conference held on 8 September 2005, the defendants admitted B owing the plaintiff the aggregate sum of $500 million made up of capital of $250 million and interest of $250 million. The following issues were referred for determination:

1. Whether or not the defendants are liable to pay to the plaintiff bank charges in the sum of $87 612 879.86. C
2. Whether or not defendants are liable to pay interest on both capital and interest on $500 million from date of summons to date of full payment.
3. Whether or not the defendants are liable to pay costs on an attorney/client scale and collection commission.

I have chosen to word the issues in the manner in which they were captured by the judge who presided over the pre-trial conference in his handwritten D notes in preference to the manner in which they are captured in the joint pre-trial conference minute filed by the parties on 13 September 2005. This is because the presiding judge's minutes captured the essence of the defendant's plea which cast the onus on the plaintiff to prove that the bank charges and interest were due and in the event that they were due, to establish how they E arose and their arithmetical computation. The plea also joined issue with the plaintiff on costs on a legal practitioner and client scale and collection commission.

The evidence led by each witness which was in dispute will be resolved as I determine the issues referred to trial by the parties.

[*The learned judge dealt with an aspect of the judgment not relevant to this* F *report and continued:*]

WHETHER OR NOT THE DEFENDANTS ARE LIABLE TO PAY INTEREST ON BOTH CAPITAL AND INTEREST ON THE SUM OF $500 MILLION FROM THE DATE OF SUMMONS TO THE DATE OF FULL PAYMENT

G The second issue deals with the question of when interest commences to run after reaching the *in duplum* level, that is, whether it commences to run from the date of the service of summons or from the date of judgment.

Miss *Maphosa* for the plaintiff contended that it commences to run from the service of summons, while Mr *Mudhara* was of a contrary view, submitting H that it starts to run from the date of judgment.

2006 (1) ZLR p402

Kudya J

The plaintiff's witness, Sibanda, in his testimony stated that the bank was A entitled to interest beyond *in duplum* because the money owed to the bank remained an outstanding cost to the bank as the bank finances this expense from the bank's own reserves from which it should be earning further income.

The *in duplum* rule remains part of our law. See:

1. *Commercial Bank of Zimbabwe Ltd* v *MM Builders and Suppliers (Pvt)* B *Ltd & Ors* 1996 (2) ZLR 420 (H) at 441E
2. *Georgias & Anor* v *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S)
3. *Ehlers* v *Standard Chartered Bank Zimbabwe Ltd* 2000 (1) ZLR 136 (H) at 137E C
4. *Conforce (Pvt) Ltd* v *City of Harare* 2000 (1) ZLR 445 (H)

It is also firmly entrenched in the South African Law. See:

1. *LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A) at 482B-D
2. *Standard Bank of SA Ltd* v *Oneanate Investments (Pty) Ltd* 1995 (4) SA 511 at 560 D
3. *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1998 (1) SA 811 (SCA) at 827H

In the South African Supreme Court of Appeal case of *Standard Bank supra* at 827H, Zulman JA stated: E

> "It is undoubtedly part of our law. It provides that interest stops running when the unpaid interest equals the outstanding capital. When due to payment interest drops below the outstanding capital, interest again begins to run until it once again equals that amount."

In Zimbabwe, Gillespie J, with the concurrence of Smith and Blackie JJ in the *Commercial Bank of Zimbabwe case supra* at 441E, stated: F

> "In conclusion, the result of this investigation is such as to persuade me that it is a principle firmly entrenched in our law that interest, whether it accrues as simple or as compound interest, ceases to accumulate upon any amount of capital owing, whether the debt arises as a result of a financial loan or out of any contract whereby the capital sum is payable together with interest thereon at a determined rate, once the accrued G interest attains the amount of capital outstanding."

The issue that confronts me relates to whether or not after the double is reached, interest commences to run afresh, and if so at which stage and on which amount. H

2006 (1) ZLR p403

Kudya J

A Gillespie J in the *CBZ* case *supra* at 441E-F, confirms that interest starts to run again and it does so from the date of judgment. He states:

> "Upon judgment being given, interest on the full amount of the judgment debt commences to run afresh but will once again cease to accrue when it waxes to the amount of the judgment debt, being the capital and interest thereon for which the cause of action was instituted."

B Mr *Mudhara* urged me to follow the *CBZ case supra* on the basis that it is highly persuasive as it was a decision of a three-judge panel of this court. Miss *Maphosa,* on the other hand, submitted that I should follow the persuasive authority of the Supreme Court of Appeal in South Africa in the *Standard Bank* case *supra*. She submitted that it overturned the earlier C decision of Selkowitz J in

the Cape Provincial Division, which decision she contended Gillespie J had followed. She referred to the local case of *Ehlers supra*, in which Malaba J came to a conclusion contrary to that of Gillespie J.

Ehlers' case was an application for condonation co-joined with an application for a partial rescission of a default judgment. *Ehlers* submitted that he had D prospects of success on appeal as the interest that had been levied on him which was confirmed by the default judgment ran foul of the *in duplum* rule. Malaba J dismissed both applications, holding that there were no prospects of success against the default judgment as *Ehlers* was not only in wilful default but had no prospects of success as interest in excess of the double commenced to run again on the date of service of the summons. At E pp 139G-140B, he stated:

> "The learned judges preferred the view that interest only commences to run anew as from the date of judgment. I must, with respect, express my dissent from the decision in *Commercial Bank of Zimbabwe*'s case *supra* on the date on which interest commences to run afresh in a case where the *in* F *duplum* rule applies. This view of the law does not give effect to the policy behind the *in duplum* rule, nor does it recognize the discretion enjoyed by the court in the matter. In *Georgias & Anor* v *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S) at 495D, Gubbay CJ said that the *in duplum* rule is based upon a public policy designed to protect borrowers from the exploitation of lenders by prohibiting usurious abuse. The principle that interest commence to run afresh from the date of *litis* G *contestatio*, which in this case is the date of service of summons is based upon the recognition of the fact that from that date the creditor ceases to be in control of the process by which interest accumulates."

The learned judge dissented from Gillespie J's decision on the basis that levying interest from the date of judgment did not give effect to the public H interest sought to be protected by the *in duplum* rule and, secondly, that

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Kudya J

making it an immutable rule cast in stone tended to deprive judges of their A discretion in the matter. In my view, he did not hold that in all matters involving interest above the double that interest starts to run after the date of service of summons. The date of service of summons in *Ehlers'* case was the date on which the parties were deemed to have joined issue (*litis contestatio*). *Litis contestatio* is reached at the time that pleadings are closed. *Ehlers' case* B therefore does not support Miss *Maphosa*'s contention.

The effect of Zulman JA's decision in the *Standard Bank* case was to order interest to run from the date of service of summons (26 November 1990 in that case). The learned judge of appeal was in no measure influenced in arriving at his decision by the delay in concluding the matter before him which had started in 1990. He held that public policy considerations would not favour C the debtor who kept the creditor, who had timeously instituted recovery but was frustrated by delays endemic in the legal system, out of his money when interest is the lifeblood of finance in modern times. It was his conclusion that such a creditor could not be held to have exploited the debtor.

The conclusion of Zulman JA, with respect, is difficult to follow, and appears D out of harmony with his reasoning on the entrenchment of the *in duplum* rule in our law. He recognized that it was part of our law (at 827H). He accepted that interest did not lose its identity, whatever label it was given (at 828I to 829A). He recognized that the rule in *Clayton*'s case as to appropriation is a presumption of fact (831E). Thus far the learned judge of appeal acknowledges the *in duplum* rule. E

It is difficult to reconcile the learned judge's conclusion with the opinion he states on p 832H. He poses the question:

> "If during the course of litigation the double is reached, whether interest stops running and only begins to run again once judgment is pronounced."

His preliminary response to that rhetorical question is that: F

> "There is no dispute that in this case the bank is entitled to interest as from the date of judgment at the agreed rate and in spite of the double having been reached."

The difficulty presents itself further when the learned judge of appeal surveys commentaries of van der Keessel, Scheltinga, van Bynkershoek, Huber, Gane's translations from Huber to Carpzovius and Sande. This survey G resulted in the finding that a judgment cannot and does not novate the original debt.

The effect of the conclusion resulted, with respect, in the proverbial throwing away of the baby with the bath water. It undermined the *in duplum* rule and made it irrevelant, especially on the basis of

unproven suspicions that in olden H

2006 (1) ZLR p405

Kudya J

A times legal interests were low. The suggestion begged the question of the necessity of introducing such a rule of law as the *in duplum*. If necessity is the mother of invention, clearly the rule came into being because at some point in our dim past, hyperinflation must have reared its ugly head.

I decline to follow the Supreme Court of Appeal decision in South Africa, not only for the reason that it undermines, before judgment, the *in duplum* rule B but also because on the facts, it is distinguishable from the case before me. In *Standard Bank* case *supra*, on the facts interest reached the double after litigation had commenced. In the present matter, it did so before litigation had started. The factual situation which therefore confronted the Supreme Court of Appeal in South Africa is distinguishable from the facts in the present C matter. Indeed, the learned judge of appeal's parting remarks at p 834G-H appear to recognize that in cases such as the present one, interest commences to run after judgment.

Miss *Maphosa*'s contention as to when interest should again commence to run after the double cannot, as I have demonstrated, be based on *Ehlers* case, nor can it be based on the Supreme Court of Appeal of South Africa's decision. D If, however, it could be so based, I would distinguish the basis on which those decisions were made with the present matter. It is on the following basis.

In *Georgias & Anor supra*, Gubbay CJ at 497A-B, approved the sentiments of Gillespie J in the *CBZ*'s case *supra*. He stated as follows:

> "Reverting to the considerations behind the *in duplum* rule, they are E correctly summarised and stated to be based on:
>
> 'a policy to protect a debtor who has not serviced his loan from facing an unconscionable claim for accumulated interest and to enforce sound fiscal discipline upon a creditor.'
>
> *Per* Gillespie J in *Commercial Bank of Zimbabwe* case at 465G. Thus, F there are two main objectives:
>
> (a) protection of a debtor against exploitation; and
>
> (b) enforcement of a sound fiscal discipline on a creditor.
>
> It follows that as waiver of the *in duplum* rule in advance cannot be sanctioned, for to do so would defeat these two objectives."

In coming to the decisions they did, Malaba J and Zulman JA did not, with G respect, consider the desire to enforce a sound fiscal discipline on the creditor. Neither did they consider the unconscionable aspect of discarding the *in duplum* rule.

I find comfort in the remarks of Chinhengo J in the *Conforce* case *supra* at H p 457B-D. At p 458A-F, he noted:

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Kudya J

> "I venture to say that the public interest served by the *in duplum* rule is A not identified with sympathy for the debtor, so as to protect him. I view the public interest involved as encompassing a wider spectrum of interests, from the protection of the debtor to securing fiscal discipline on the part of lenders to considerations of justification for charging interest in the first place i.e. to compensate the creditor for deprivation of use of the money due until payment (*Mawere* v *Mukura* 1997 (2) ZLR 360 (H) at B 364G) and to the interests of commerce generally and perhaps many more interests. Thus, the public interest cannot be restricted to one or two considerations i.e. the protection of the debtor and the dictates of modern commerce. But even if it were so restricted, I cannot see anything incompatible with the rule serving those interests if it were applied in the manner advocated for in *MM Builders'* case. The creditor's claim for C interest would be limited to an amount that does exceed the capital. In my view, the danger in adopting the approach in *Oneanate and Ehlers*' cases *supra* is that an unscrupulous creditor only has to institute action to defeat the *in duplum* rule. He may so act as to ensure that the institution of proceedings and the attainment of the double coincide with the result that the rule is rendered inoperative. I do not see anything that is against D the public interest or the interest of modern finance, if the *in duplum* rule operates in the manner outlined by Gillespie J and the old Roman Dutch authorities which espouse the view that once the double has been reached, interest must stop to run regardless of the institution of proceedings or that the stage of *litis contestatio* has been reached. Where in particular the double has not been reached, I find no relevance at all of the event of institution of proceedings. Interest must continue to run until E it equates to the capital amount soon after or long after the institution of proceedings, but that

is immaterial. I am therefore unpersuaded by the conclusion reached on this point in *Oneanate and Ehlers*' cases. I must respectfully express my dissent from those judgments."

I associate myself with these views so ably expressed by Chinhengo J.

It does not appear to me that the plaintiff in the present matter has even began F to discharge the onus on him on a balance of probability to circumvent the *in duplum* rule. It does not appear to me that it can be circumvented.

In the premises, I hold that interest on the sum $500 million dollars *in casu* can only commence from the date of judgment.

WHETHER OR NOT THE DEFENDANTS ARE LIABLE TO PAY G COSTS ON AN ATTORNEY/CLIENT SCALE AND COLLECTION COMMISSION

Clause 2 of Part 1 of the General condition of the Invoice Discounting Agreement reads:

"Unless stated otherwise, this Invoice Discounting Agreement provides H

Kudya J

A for a maximum amount of confirmed orders, advance payment amount, and discount rate together with additional interest levied on past due amounts, processing fees and costs relating to the enforcement of this agreement, recovery of charges incurred or paid by ZDB for legal, accounting, audit, consultancy or monitoring services where applicable."

It was submitted by the plaintiff that this clause obliged the defendants to pay B attorney and client costs as apposed to party and party costs. Sibanda in his testimony alleged that the defendants were apprised that they would pay the actual costs expended by the plaintiff in enforcing the agreement. This was disputed by the defendants.

The onus was on the plaintiff to show that clause 2 referred to attorney and C client costs. This was because it was the plaintiff who made that allegation. The clause does not on the face of it use the words attorney and client costs. There are two types of legal costs. These are attorney and client and party and party. The use of the words costs, charges incurred or paid may relate to either attorney/client costs party and party costs. The *contra preferentem* rule penalizes the author of a contract by having it interpreted against him if it is D ambiguous. Clearly, the plaintiff could easily have made its intention apparent by specifying that it would seek attorney and client costs. The ambiguity in the expressions favour the defendant's position.

Thus, while it is clear that parties to a contract can agree on the inclusion of attorney and client costs (see Innes CJ in *Texas Co. S.A. Ltd* v *Cape Town Municipality* 1926 AD 467 at 485), the stipulation must be clear. In the present E matter, it is not. Contractually stipulated attorney and client costs are not punitive costs in the sense highlighted in *van Dyk* v *Conradie & Anor* 1963 (2) SA 413(C).

I hold that in the present matter the plaintiff has failed to satisfy me that the agreement contemplated attorney and client costs.

F The plaintiff also sought to use clause 5 of part 1 of the General Conditions to found the claim for collection commission. The clause reads:

"When applying receipts to amounts due priority is given to collection charges, invoice discount charges, other fees, interest and principal in that order until the debt is discharged."

G It is apparent from the decision in *Scotfin Ltd* v *Ngomahuru (Pvt) Ltd* 1997 (2) ZLR 567 (H), that the plaintiff cannot recover collection commission, unless it demonstrates that the defendant agreed to pay it. It becomes doubly difficult to claim collection commission together with attorney and client costs without laying out proof that the collection commission was paid or incurred. Clause 5, in my view, dealt with appropriation of funds paid in general. Collection H commission was not covered in the agreement itself. The plaintiff did not show

Kudya J

that the defendants agreed to pay it. A

The plaintiff cannot resort to Part IX of the Law Society Rules of 1982. They do not sanction collection commission for the payment of a debt secured through contested action.

It seems to me therefore that the plaintiff's claim for collection commission cannot succeed. B

COSTS

The issues referred to trial have all been decided against the plaintiff. The trial was necessitated by the plaintiff's decision to pursue claims for which it has failed to prove. In the same token, the defendants did not tender payment of the $500 million that they admitted owing. For that reason, even though they C had succeeded, I will order them to pay the plaintiff's costs on the ordinary scale.

DISPOSITION

It is accordingly ordered that:

1. The defendants jointly and severally, the one paying the others to be D absolved, shall pay to the plaintiff:
   (a) The sum of $500 000 000 together with interest thereon calculated at the rate of 1 per cent per day from the date of judgment to the date of payment in full.
   (b) Bank charges in the sum of $8 750 000. E
   (c) Costs of suit.

Sawyer and Mkushi, plaintiff's legal practitioners

T H Chitapi & Associates, defendant's legal practitioners E

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MUNENGAMI v MINISTER OF DEFENCE 2006 (1) ZLR 409 (H)

Citation	2006 (1) ZLR 409 (H)
Case No	Judgment No. HH-45-06
Court	High Court, Harare
Judge	Patel J
Heard	14 February 2005; 18 February 2005
Judgment	6 April 2006
Counsel	*T Nkomo,* for the plaintiff Mrs *R Gatsi,* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

C**Delict** — *liability — vicarious liability — principles — when employer will be held liable for acts of employee — soldiers sent to assist police assaulting civilians — acting outside scope of employment*

Headnote

An employer is liable for those acts of his employee that have been authorised by him and for those acts which he has not authorised but which are so D connected with authorised acts as to be regarded as improper or wrongful modes of doing them. An employer can be held liable for his employee's negligence or inefficiency as well as for his abuses and excesses. However, for liability to attach to the employer, such conduct must still be within the scope of the employee's employment or closely E connected therewith. The fact that the employee uses equipment or material provided by the employer in carrying out his wrongful action is irrelevant. The critical inquiry is whether or not the employee was exercising the functions to which he was appointed and whether there was a close link between his conduct and his duties. If the employee was acting for his own interests and purposes, the employer is not liable. If F there is a sufficiently close link between the employee's acts for his own interests and the business of the employer, the latter may yet be liable. This is so if the employee's acts are connected with the employer's business, whether subjectively or objectively viewed. The question resolves itself into one of degree. Was the employee's digression from his appointed duty so great in space and time that it cannot reasonably G be said that he still exercised the functions to which he was appointed? To put it differently, did the employee's departure from the path of duty constitute such an abandonment or deviation from his prescribed task as to dissociate his wrong from the risk created by his employment and H to exonerate his employer from liability?

2006 (1) ZLR p410

Patel J

The normal peace time function of the ZNA is to constitute a disciplined force A which is prepared and ready to defend national borders against external armed threats and, when necessary, to supplement other State authorities in the maintenance of internal security. Within the purview of the latter, the ZNA may be called upon to assist the police in times of civil disorder for the purpose of maintaining law and order. *In casu*, it was the latter B function that the ZNA was invited to perform at the time when the assaults giving rise to the plaintiff's claim occurred. The soldiers' actions had nothing to do with the business of the ZNA or the Ministry of Defence. It could not be said that they were involved in defending the nation or assisting the police in maintaining law and order. What they did was not calculated to advance their employer's interests but purely to C further their own nefarious designs. The Minister of Defence could not be held vicariously liable. *

Cases cited

Biti v Minister of State Security 1999 (1) ZLR 165 (S)

Fawcett Security Ops (Pvt) Ltd v Omar Entprs (Pvt) Ltd 1990 (2) ZLR 108 (H) D

Feldman (Pvt) Ltd v Mall 1945 AD 733

H K Manufacturing Co (Pty) Ltd v Sadowitz 1965 (3) SA 328 (C)

Macala v Maokeng Town Council 1993 (1) SA 434 (A)

Min of Law & Order v Ngobo 1992 (4) SA 822 (A)

Min of Police v Rabie 1986 (1) SA 117 (A) E

Romansrivier Koöperatiewe Wynkelder Bpk v Chemserve Manufacturing (Pty) Ltd 1993 (2) SA 358 (C)

Rose NO v Fawcett Security Ops (Pvt) Ltd 1998 (2) ZLR 114 (H)

Smit v Min van Polisie 1997 (4) SA 893 (T)

Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor 1998 (2) ZLR 547 (H) F

Witham v Min of Home Affairs 1987 (2) ZLR 143 (H)

Case information

T Nkomo, for the plaintiff

Mrs *R Gatsi,* for the defendant

Judgment

PATEL J: The plaintiff in this matter claims payment in the sum of $8 150 000 G by way of damages sustained by her arising from an assault allegedly perpetrated by members of the ZNA (hereinafter referred to as "ZNA") on

Patel J

A 4 June 2003 in Glenview, Harare. The plaintiff avers that the soldiers in question were at the relevant time acting within the course and scope of their employment and that the defendant is therefore vicariously liable for their actions. The defendant denies that the plaintiff was assaulted by soldiers of the ZNA. The defendant further denies vicarious liability on the ground that, although soldiers were deployed in the area at the relevant time, they were B operating under the control of the ZRP (hereinafter referred to as "ZRP") and that therefore it is the Minister of Home Affairs who should have been sued in this matter. Alternatively, the defendant avers that, if the plaintiff had in fact been assaulted as alleged, she was probably attacked by impostors and deserters masquerading as members of the ZNA.

C It is necessary to note that at the end of the trial both counsel were directed to file heads of argument on specific points of law relating to vicarious liability. The defendant's counsel duly filed her heads on 24 March 2005. However, the plaintiff's counsel only filed his heads on 12 October 2005, after several reminders to do so. The delay in delivering this judgment is therefore largely attributable to the plaintiff's counsel.

D **EVIDENCE AT THE TRIAL**

The relevant evidence presented by and for the parties at the trial of this matter was as follows.
Rutendo Munengami (the plaintiff)

E At approximately 1.00 a.m. on 4 June 2003, about 20 armed soldiers forcibly broke into her home and demanded to see her husband. Her husband was, at that time, a councillor for Ward 30 Glen View and was a member of the Movement for Democratic Change ("MDC"). The soldiers were dressed in camouflage uniform and wore red or green berets. They were armed with rifles and batons. They were not accompanied by any policemen. When she stated F that her husband was not in they began assaulting her with batons. She was holding her nine month old baby at the time. The soldiers also destroyed her belongings and robbed her of some blankets, clothing and money that they found within the premises. She was unable to identify any of her assailants. Thereafter, she was taken outside into a white Mazda 323 and driven to the residence of one councillor Dehwa, who was also an MDC councillor. There G were two other vehicles involved, namely, a Puma lorry and a pick-up truck. At Dehwa's residence, the soldiers jumped over the gate and broke into the premises. She heard sounds of things being broken and the cries of people being assaulted. She then saw Mrs Dehwa and members of her family running H out of the house whilst being assaulted.

Patel J

She was asked to disembark and her baby was taken from her arms. She was A then held upside down and severely assaulted again on her arms, thighs and back. At that point, she became unconscious and regained consciousness some 16 hours later at Dandaro Hospital at approximately 6.00 p.m. Prior to her regaining consciousness, she was initially taken to the Avenues Casualty Unit for examination and treatment. She was then admitted to Dandaro Hospital on 4 June 2003 and discharged on 12 June 2003. When she awoke at B the hospital, she was confused and traumatised. She was examined by a Dr Coric and told that she had a fractured arm and fingers. Dr Coric's affidavit was produced, indicating the nature and extent of the injuries that she had sustained. Her arm was subsequently plastered and healed in due course. Her right hand was operated upon by Dr

Coric at St. Anne's Hospital in February C 2004. She produced two X-ray negatives and a discharge form from the hospital but no written report relating to the operation itself. Despite the operation, her right thumb is permanently damaged and lacks total mobility. She is presently under medication for stiffness in her hand. Until she was injured, she was right-handed and she is presently unable to work. She also suffered psychological stress and is currently being counselled by a Mr. D Kajau at the Amani Trust. The Trust undertook to pay for her medical examinations, treatment and the operation in February 2004.

Kerina Gweshe (Mrs Dehwa)

At about 2.00 a.m. on 4 June 2003, she was awoken by the sound of motor vehicles outside her house. She was in the house with her husband and E children as well as six MDC supporters. She looked out and observed two vehicles and a group of about 24 soldiers. They were all in camouflage uniform, with red or green berets, and were armed with rifles and batons. After a few moments, four soldiers jumped over the fence and broke down the front door to gain entry into the house. They took the keys to the front gate and subsequently opened the gate. The soldiers then began to assault the F occupants of the house with their batons and booted feet. They demanded money and her husband's books of account. They also took 28 bags of food which belonged to the MDC and was being stored at the house. During the assault, all the occupants ran out of the house. They were ordered to lie down outside the gate whilst the assault continued. She was beaten by the soldiers G till she was almost numb. When she was outside, she observed that there was a military lorry, a pick-up truck as well as a Mazda 323. The plaintiff was brought out of the Mazda and the witness was asked to hold the plaintiff's child. The plaintiff was then held upside down and beaten by the soldiers with their batons. H

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A Soon thereafter, the witness ran into the house and collapsed. She awoke at Dandaro Hospital at approximately 8.00 p.m. in a room next to the plaintiff's. As a result of the attack, her right hand was severely injured. It was plastered for three months and has not fully healed. The plaintiff's arm was also plastered at Dandaro Hospital. Both the witness and the plaintiff were at Dandaro Hospital for almost 12 days.

B Capt Munyengerwi

In June 2003, he was in command of the "C" Company Para-duty Regiment, comprising 106 soldiers, based at Nkomo Barracks. At that time, there were political demonstrations in the urban areas aimed at ousting the Head of State. He was part of the National Reaction Force ("NRF") constituted to maintain C peace and order. He was instructed by the Officer Commanding the NRF to assist the ZRP in maintaining law and order. His regiment left Nkomo Barracks on 29 May 2003 and was stationed at Southerton Police Station. They were encamped in three barracks and pitched tents at the station.

Their function was to escort the police on their patrols and at road-blocks and D to protect and assist them in the event that they were overpowered. In the event of any disorder, they were required to normalise the situation. They were assigned to cover the suburbs of Glen Norah, Glenview, Highfields, Budiriro and Southerton. Whilst they were based at Southerton Police Station, they commenced their duties at 6.00 a.m. and finished at 6.00 p.m. They were never asked to operate beyond 6.00 p.m.

E He had under his control a total of 10 armoured vehicles which are akin, but not identical, to the Puma armoured vehicle. He kept the keys to these vehicles as well as a log-book to record any deployment of the vehicles. The weaponry used by his regiment consisted of AK-47 rifles and ammunition. The soldiers of the regiment wore camouflage uniform, maroon berets and black boots.

F On 2 June 2003, some unrest and disorder was encountered within the locality. The crowds were dispersed and the situation was eventually normalised by 11.00 a.m. on that same day. On 3 June 2003, there was no unusual occurrence. On the evening of that day, his regiment was resting at Southerton Police Station.

As commander of the regiment responsible for the Glenview area, he did not G receive any official or unofficial report as to the alleged assaults during the early hours of 4 June 2003. All of the men in his regiment were asleep at that time. It would have been impossible for any group of soldiers to leave without being detected by the night guards on duty. It would also not have been possible for

any other regiment or group of soldiers to operate in the Glenview H area without his knowledge. Moreover, none of the vehicles under his control

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was used during the evening of 3 June and the morning of 4 June. The A witness's regiment departed from Southerton Police Station at 6.00 p.m. on 4 June 2006 and returned to Nkomo Barracks.
Lt-Col Tsatsi

He has been a member of the ZNA for 25 years. Between March and June 2003, his function was to receive instructions from the ZNA Commander in respect B of all deployments of the ZNA. At that time, the MDC and other opposition groups had called for the so-called Final Push. The ZRP requested the ZNA to assist in containing the political demonstrations that were anticipated at that time. This request was made at the end of May 2003. The procedure that is followed is for the Commissioner of Police to initiate such requests for C assistance through the Minister of Home Affairs. The Minister of Defence would then authorise the Commander of the Zimbabwe Defence Forces, who in turn would instruct the ZNA Commander, to proceed with the necessary assistance to the police. However, the witness was not aware of the requisite correspondence relating to this particular occasion. In the present case, the ZNA was deployed to assist the police from 30 May 2003 to 9 June 2003. For D the purposes of these operations, the soldiers of the ZNA are deployed in terms of the Public Order and Security Act. They were under the control of the Commissioner of Police and the Minister of Home Affairs. Ordinarily, soldiers would not be deployed in residential areas except in order to assist the police. On deployment, the soldiers would be equipped with boots, camouflage shirts and trousers, camouflage caps or red berets and AK-47 rifles. E

On the night of 3 June 2003, he was at home. He did not receive any reports of violence or assault during that night or in respect of the following day. The regiment stationed at Southerton Police Station was withdrawn on 4 June 2003. The soldiers deployed in other parts of Greater Harare were withdrawn on 9 June 2003. He confirmed that between March and June 2003 there was a F problem of impostors and deserters who roamed the high density suburbs of Harare masquerading as ZNA soldiers and who engaged in assaulting and robbing innocent civilians. However, he was also quite clear that they would not have been able to access any ZNA vehicles or weaponry.

At that time, the Military Police were deployed to apprehend the impostors and deserters in question. However, nothing was done to warn the general G public against the threat posed by these criminal elements. The deserters concerned were still liable to military discipline as members of the ZNA. In this respect, the witness produced in evidence a report compiled by the ZNA Directorate of Prosecutions, dated 11 September 2003. This report covers a total of 60 cases in which members of the ZNA were convicted of military H

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A offences, predominantly involving desertion and absence without leave. The report does not indicate the dates when the offences were committed but reflects the dates when the offenders were sentenced, ranging from 2 June 2003 to 1 September 2003. According to the witness, the military courts did not deal with the attendant assaults, thefts and robberies. These were referred to the ZRP for prosecution through the civil courts.

B THE ISSUES

The issues for determination in this matter are as follows:

1. Was the plaintiff assaulted on the night in question and, if so, what was the nature and extent of the assault? C
2. Was the assault in question perpetrated by soldiers of the ZNA?
3. If the assault was committed by soldiers, were the assailants soldiers under command or were they deserters?
4. Whether the plaintiff has sued the wrong defendant.
5. Whether the defendant is vicariously liable for the conduct of the soldiers D or deserters concerned.

6. If the defendant is vicariously liable, what is the quantum of special and general damages due to the plaintiff?

ASSAULT AND EXTENT THEREOF

The evidence given to the court by both the plaintiff and Kerina Gweshe was E generally clear and credible. Their evidence contained a few discrepancies, particularly as regards the nature and timing of their treatment at various medical institutions. However, looking at their testimony as a whole, I am more than satisfied that the plaintiff was violently assaulted several times during the early hours of 4 June 2003 in Glenview, Harare. I am also satisfied, having regard to the documentary evidence before the court, that the injuries F sustained by the plaintiff in consequence of the assaults upon her were not only very serious but also necessitated her prolonged detention for treatment, as well as a surgical operation on her hand several months later. Indeed, counsel for the defendant quite correctly conceded this point in her submissions to the court. Additionally, there is clear and uncontested evidence that the G plaintiff was deeply traumatised by her ordeal and that she has had to receive psychological counselling in that regard.

IDENTITY OF ASSAILANTS

Both the plaintiff and Kerina Gweshe testified as to the identity of their assailants. They described the military uniforms worn by their assailants, the H batons and firearms that they wielded and the military vehicle that they used

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on their excursion on the night in question. Their descriptions were consistent A with what was described by Capt Munyengerwi and Lt-Col Tsatsi as being the attire and accoutrements ordinarily worn and carried by members of the ZNA.

It is common cause that the ZNA was in fact deployed in the Greater Harare area in order to assist the ZRP over the period in question. In my view, it seems B highly improbable, if not impossible, that anyone other than ZNA soldiers would have been able to access and utilise the uniforms, weaponry and military vehicle that were positively identified by the plaintiff and Karina Gweshe. Their clear evidence in this respect was not critically challenged. Accordingly, the court finds that the plaintiff has discharged the onus of proving, on a balance of probabilities, that she was assaulted on the night in C question by persons who were members of the ZNA.

SOLDIERS OR DESERTERS?

For the defendant, Capt Munyengerwi and Lt-Col Tsatsi gave evidence as to the deployment of ZNA soldiers to assist the ZRP from 30 May 2003 to 9 June 2003. Their testimony was to the effect that several ZNA regiments were D deployed within the Greater Harare area and that each regiment was assigned to specific suburbs in that area. The "C" Company Para-duty Regiment under the command of Capt Munyengerwi was stationed at Southerton Police Station and was assigned to cover the suburbs of Glen Norah, Glenview, Highfields, Budiriro and Southerton. Capt Munyengerwi testified that he did not receive any official or unofficial report as to the assaults that took place E on 4 June 2003. All of the men in his regiment were asleep at that time and it would have been impossible for any group of soldiers to depart from their Southerton camp without being detected. It would also not have been possible for any other regiment or group of soldiers to operate in the Glenview area without his knowledge. He also stated that none of the vehicles under F his control were used during the night in question. His evidence in these respects was clear and credible and not materially shaken.

In his plea, the defendant admits that between March and June 2003, there were impostors and deserters who went about masquerading as soldiers and assaulting and robbing civilians. The defendant further concedes that it was probably these impostors and deserters who might have assaulted the G plaintiff. This admission and concession were amplified by the evidence of Lt-Col Tsatsi as well as the contents of the report compiled by the ZNA Directorate of Prosecutions in September 2003. This report confirms that 60 members of the ZNA were convicted of military offences involving desertion and absence without leave. The assaults, thefts and robberies perpetrated by H

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A the deserters were not dealt with by the military courts but were referred for prosecution through the civil courts.

From the foregoing evidence, it seems reasonably clear that the assailants *in casu* were not specifically authorised or permitted by their superiors to perpetrate the assaults and robberies in question. Indeed, no evidence in that B regard was placed before the court and the plaintiff's claim, as I understand it, does not hinge on any averment or proof to that effect. It is also fairly clear that the assailants were not members of the "C" Company Para-duty Regiment which was encamped at Southerton Police Station and which was assigned to cover the Glenview area. The plaintiff's assailants obviously originated from some other regiment or regiments stationed elsewhere. What is not clear C is whether the assailants *in casu* were soldiers under command but acting beyond their assigned mandate or renegade deserters operating independently and outside the military hierarchy. The plaintiff's case is that the former is the true position, while the defendant denies this but concedes that the latter might in fact be correct. The difficulty with accepting the latter is that the soldiers identified by the plaintiff and Kerina Gweshe were all in full military D garb and equipped with firearms and a military vehicle. According to Lt-Col Tsatsi's testimony, it would not have been possible for deserters to access any firearms or vehicles that were in the custody of the ZNA. That being so, it seems quite improbable that the plaintiff's assailants were deserters or impostors. In the event, having regard to all the evidence adduced, the only inference that can and must be drawn is that the assailants *in casu* were E members of the ZNA who were under command but who were pursuing their own personal inclinations and objectives beyond their assigned mandate.

PROPER DEFENDANT

It was argued for the defendant that the plaintiff has sued the wrong party in this matter and should have instead proceeded against the Minister of Home F Affairs and the Commissioner of Police. The basis of this argument is that members of the ZNA were deployed during the relevant period to assist the ZRP in order to deal with anticipated civil disturbances. At that time and for that purpose, so the argument goes, they were acting in terms of s 37 of the Public Order and Security Act [*Chapter 11:17*] and therefore they were under G the command and control of the ZRP authorities, as opposed to the military hierarchy. Although the ZNA was responsible for paying and equipping the soldiers, they were under the effective control and direction of the ZRP as to the manner in which they carried out their duties. Consequently, any claim for vicarious liability pertaining to their conduct must attach to the latter and not H the former.

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The defendant's argument is not entirely unattractive, even though it begs A the question as to the extent to which soldiers deployed in situations of civil commotion where ZRP control is ineffective can really be said to be under the control and direction of the ZRP. More significantly, however, the argument is fundamentally flawed for the simple reason that the soldiers who attacked the plaintiff on the night in question were not at that time carrying out their B assigned duty of containing civil disturbances under ZRP direction. The uncontested evidence before the court is that no police officer was present when the soldiers perpetrated their assaults upon the plaintiff. By no stretch of the imagination can it be said that they were performing their function of escorting the police on their patrols or at road-blocks and protecting and assisting the police in maintaining law and order at public demonstrations. The C defendant's argument is quite untenable and is accordingly rejected as being without any factual foundation.

VICARIOUS LIABILITY

The essence of the doctrine of vicarious liability is to hold the employer liable for the wrongful conduct of his employee within the course or scope of his D employment. The principle to be applied was succinctly expounded by Tebbutt AJ in *HK Manufacturing Co (Pty) Ltd* v *Sadowitz* 1965 (3) SA 328 (C) at 332C-E as follows:

> "It is, of course, now a well-established principle in our law that a employer is liable for harm caused to third parties by the negligence of his employee if such employee was acting within the course or scope of

his employment E — expressions which have been held to be synonymous (see *Estate van der Byl* v *Swanepoel* 1927 AD 141 at 151; *Feldman (Pty) Ltd* v *Mall* 1945 AD 733 at 741). Our courts have adopted the expressions of the law by Voet 9.4.10, *viz.,* that employers are liable *in solidum* for the delicts of their employees whenever they inflict injury or damage 'in the duty or service' (*in officio aut ministerio*) set them by their employers but that the F employers are not liable when the delict is committed 'outside of' (*extra*) their duty or service, and by *Pothier on Obligations*, s 453, *viz.*:

'Whoever appoints a person to any function is answerable for the wrongs and neglects which his agent may commit in the exercise of the functions to which he is appointed'."

According to the Salmond test, cited by Greenberg JA in *Feldman (Pty) Ltd* G v *Mall* 1945 AD 733 at 774:

"An employer … is liable even for acts which he has not authorised provided that they are so connected with acts which he has authorised that they may rightly be regarded as modes – although improper modes – of doing them …" H

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A The more extensive approach to vicarious liability is that enunciated by Watermeyer CJ in *Feldman*'s case *supra*, at 741, to the effect that:

"a employer who does his work by the hand of a employee creates a risk of harm to others if the employee should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the B employee's improper conduct or negligence in carrying on his work …"

Adopting this approach in *Minister of Police* v *Rabie* 1986 (1) SA 117 (A) at 134-135, Jansen JA held that:

"By approaching the problem whether van der Westhuizen's acts were done 'within the course or scope of his employment' from the angle of C creation of risk, the emphasis is shifted from the precise nature of his intention and the precise nature of the link between his acts and police work, to the dominant question whether those acts fall within the risk created by the State. By appointing van der Westhuizen as a member of the Force, and thus clothing him with the powers involved, the State created a risk of harm to others, *viz.*, the risk that van der Westhuizen could be untrustworthy and could abuse or misuse those powers for his own D purposes or otherwise, by way of unjustified arrest, excess of force constituting assault and unfounded prosecution. van der Westhuizen's acts fall within this purview and in the light of the actual events, it is evident that his appointment was conducive to the wrongs he committed."

Even on this broader approach, however, the fact that the employee uses E equipment or material provided by his employer, either during the course of his delictual conduct or in order to carry out his wrongful act, does not necessarily import vicarious liability as against the employer. As observed by Tebbutt AJ in *HK Manufacturing Co*, *supra*, at 337:

"… the fact that the employee was using property or 'apparatus' supplied by or belonging to the employer is really irrelevant. The enquiry still is: F was such use in the exercise of his functions to which he was appointed?"

Whatever approach is applied, the primary consideration is to ascertain whether or not the employee was engaged in his employer's business, *viz.* was he exercising the functions to which he was appointed and was there a sufficiently close link between his conduct and his duties. As explained by G Jansen JA in *Rabie*'s case *supra* at 134:

"It seems clear that an act done by a employee solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the employee does so fall, some reference is to be made to the employee's intention (cf. *Estate van der Byl* v *Swanepoel* 1927 AD 141 H at 150). The test is in this regard subjective. On the other hand, if there is

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nevertheless a sufficiently close link between the employee's acts for his A own interests and purposes and the business of his employer, the employer may yet be liable. This is an objective test."

In this context, I fully concur with Goldstone JA in *Macala* v *Maokeng Town Council* 1993 (1) SA 434 (A) at 440-1 where, with specific reference to the performance of police work, he stated that: B

> "… the cardinal question is always whether the policeman is acting in the course and scope of his employment as such and, in order to find that he was so acting, his acts must have some connection with police work, whether subjectively or objectively viewed."

Following this approach, in *Smit* v *Minister van Polisie* 1997 (4) SA 893 (T) the court held that the policeman whose conduct was in question was busy C with his own interests and activities, which were not related to those of his employer, and therefore his employer was not liable. The position in South Africa was aptly summarised by van Deventer J in *Romansrivier Koöperatiewe Wynkelder Bpk v Chemserve Manufacturing (Pty) Ltd* 1993 (2) SA 358 (C) at 366, as follows:

> "The test of a employer's liability for a wrong committed by his employee in the course of unauthorised activity is not whether it occurred while the employee was engaged in his employer's affairs. The question to be considered in the light of the facts in each case is whether the wrong was committed in the course of the employee's employment.
>
> The course or scope of a employee's employment is an expansive E concept, that encompasses such unauthorised acts as can be regarded as wrongful or unauthorised modes of performing an authorised task. In this respect, a subjective test may be appropriate, though not necessarily conclusive, for, if there is, objectively tested, a sufficiently close link between the employee's act for his own interests and purposes and his employer's business, the latter may nevertheless be liable.
>
> The question ultimately resolves itself into one of degree. What has to F be considered in the final analysis is whether the employee's departure from the path of duty constituted such an abandonment of or deviation from his prescribed task as to disassociate his wrong from the risk created by his employment and exonerate his employer from liability.
>
> In each case, a matter of degree will determine whether the employee can G be said to have ceased to perform the functions to which he was appointed … or whether his unauthorised acts can be regarded as wrongful or unauthorised modes of performing his prescribed task.
>
> It stands to reason that the less precisely the scope of the employee's duties is defined, the more likely it becomes that a deviation from his prescribed duties will be regarded as merely an unauthorised mode of H performing his authorised tasks."

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A In Zimbabwe, the approach of our courts to the proper parameters of vicarious liability has been generally *ad idem* with that adopted by the South African courts. See *Fawcett Security Operations (Pvt) Ltd* v *Omar Enterprises (Pvt) Ltd* 1990 (2) ZLR 108 (H), *Rose NO* v *Fawcett Security Operations (Pvt) Ltd* 1998 (2) ZLR 114 (H) and *Standard Chartered Finance Zimbabwe Ltd* v *Georgias & Anor* 1998 (2) ZLR 547 (H). In *Witham* v *Minister of Home Affairs* B 1987 (2) ZLR 143 (H), a policeman, despite a known history of alcohol-related psychiatric problems, had been detailed to guard the residence of a Government Minister in a Harare suburb. He had been issued with a rifle and ammunition. He had deserted his post during the night and gone on a shooting spree, ending up in the employee's quarters at the plaintiff's house, which was not far away in the same suburb. The plaintiff and his wife, unaware that the C policeman was in their employee's quarters, went out to the quarters early in the morning when their employee failed to appear at the arranged time. The policeman fired at the couple, killing the plaintiff's wife and severely injuring the plaintiff. The policeman was himself later shot and killed by other police details. The plaintiff sued for damages on the basis that the defendant Minister was liable because the policeman was acting in the course of his employment; D alternatively, he was negligent in allowing the policeman, who was known to have psychiatric problems, to be armed and assigned to guard duties; alternatively, he was liable for the negligence of his employees, members of the police, who, although aware that the deceased gunman was at large in the area, failed to take steps to warn the local residents or apprehend the gunman. E On these facts, it was held by Ebrahim J at 156, that:

> "… whilst it is common cause that the shootings occurred during the time Cst Mhembere was on duty, it cannot be disputed that they did not occur at a place where he was supposed to be on duty. He was appointed to guard the premises of a Government Minister. For this purpose, he was issued with an FN rifle. The Minister's house is a distance of 700 to 800 F metres away from where the plaintiff and his wife lived. I cannot find fault with Mr *O'Meara*'s contention that Cst Mhembere's digression from his appointed duty was so great in respect of space and time that it cannot reasonably be said that he still exercised the functions to which he was appointed. I agree with Mr *O'Meara*'s submissions that Cst Mhembere's digression was a complete relinquishment or abandonment of his G employer's business in favour of some activity of his own."

As regards the submission that the Minister had created a risk in assigning the policeman to carry out his appointed functions, the learned judge held at 158:

> "I am satisfied that had Cst Mhembere fired accidentally at the premises he was meant to be guarding or in trying to prevent an intrusion, even in H error, then such would have been within the risk created. The view I take

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> of the matter, however, is that this was not the case for the reasons I have A already indicated above."

Accordingly, it was held in *Witham*'s case that the defendant Minister was not vicariously liable for the aberrant policeman's wrongful conduct. However, the court went on to hold the Minister liable on the alternative grounds of negligence that were averred and proved against him. In *Biti* v *Minister of* B *State Security* 1999 (1) ZLR 165 (S), the driver of a Government vehicle was instructed to take three Government officers home after work and then keep the vehicle safely overnight. In the morning, he was to pick up the same officers and drive them to their work place. He was on call while not actively on duty. About two and a half hours after he should have finished dropping off the three officers, he rammed into a stationary taxi owned by the plaintiff, badly C damaging the taxi and severely injuring the plaintiff. The accident occurred at a place which was about a 5 kilometre deviation from the routes he would have had to have taken to drop off the Government officers. There was some evidence that the driver was heavily intoxicated and that he had his girlfriend in the car. The trial court had held that the Ministry which employed the driver was not vicariously liable. On appeal, McNally JA observed at 169 as D follows:

> "In the present case, it seems to me that to entrust a motor vehicle to a relatively low level employee overnight is to place an enormous temptation in his way. He probably has no car of his own; there is probably no way of checking the next day whether or not he has exceeded a reasonable mileage in carrying out his duty. The employer is taking a risk which is E easily foreseeable. If the risk materialises, the consequences are properly for his account."

However, the learned judge of appeal was somewhat wary of relying on the "risk" consideration, being conscious of the criticism of that approach by Goldstone JA in *Macala*'s case *supra*, at 440-1, and by Kumleben JA in F *Minister of Law & Order* v *Ngobo* 1992 (4) SA 822 (A). He therefore accepted that the "creation of risk" approach is not one which has found favour with the courts. Rather, he was inclined to follow the so-called "standard test" of vicarious liability, *viz.,* whether the wrongdoer was engaged in the affairs or business of his employer. On the facts before him, he accordingly held, at 170:

> "… it is relevant to bear in mind that that business included not only the G delivery of the passengers to their homes, but also the overnight custody of the vehicle. In my view, in the circumstances of this case, and by close analogy with *Feldman supra*, the deviation from his route was not too far removed, in time and space, from the driver's authorised mission, to convert it to what is called 'a frolic of his own'. It is properly to be seen, in the context of this case, as an improper mode of exercising his duty of H

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> A overnight custody of the vehicle."

The principles of vicarious liability that I glean from the authorities that I have cited may be summarised as follows:

1. An employer is clearly liable for those acts of his employee that have been authorised by the employer. The employer is also liable for those acts B which he has not authorised but which are so connected with authorised acts as to be regarded as improper or wrongful modes of doing them.
2. On the creation of risk approach, the employer can be held liable for his employee's negligence or inefficiency as well as his abuses and excesses. However, for liability to attach to the employee such conduct must still be within the scope of the employee's employment or closely connected C therewith.
3. The fact that the employee uses equipment or material provided by the employer in carrying out his wrongful action is irrelevant. The critical enquiry is whether or not the employee was exercising the functions to which he was appointed and whether there was a close link between his D conduct and his duties.

4. If the employee was acting for his own interests and purposes, the employer is not liable. But if there is a sufficiently close link between the employee's acts for his own interests and the business of the employer, the latter may yet be liable. This is so if the employee's acts are connected with the employer's business, whether subjectively or objectively viewed. E
5. In the final analysis, the question resolves itself into one of degree. Was the employee's digression from his appointed duty so great in space and time that it cannot reasonably be said that he still exercised the functions to which he was appointed? To put it differently, did the employee's departure from the path of duty constitute such an abandonment or deviation from his prescribed task as to dissociate his wrong from the risk created by his employment and to exonerate his employer from liability?

THE PRESENT CASE

The normal peace time function of the ZNA, as I understand it, would be to constitute a disciplined force which is prepared and ready to defend national G borders against external armed threats and, when necessary, to supplement other State authorities in the maintenance of internal security. Within the purview of the latter, the ZNA may be called upon to assist the ZRP in times of civil disorder for the purpose of maintaining law and order. In the context of the present case, it is the latter function that the ZNA was invited to perform H at the time when the events giving rise to the plaintiff's claim occurred.

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Turning to the facts *in casu*, there is, as I have already stated, no evidence to A suggest that the soldiers who gratuitously assaulted, robbed and abducted the plaintiff were authorised to do so by their superiors. By the same token, there is nothing to indicate that what they did was simply an improper or wrongful mode of doing what they were authorised to do. On the evidence adduced, it seems clear that the plaintiff's assailants were attired in military B garb and equipped with the kind of weaponry that is ordinarily used by the ZNA. However, it certainly cannot be said that they were exercising the functions to which they were appointed. Nor can it be said that their conduct was closely linked to their employer's business or to the performance of their duties, whether subjectively or objectively viewed.

In my view, the soldiers' actions *in casu* had nothing to do with the business C of the ZNA or the Ministry of Defence. By no stretch of the imagination can it be said that they were involved in defending the nation or assisting the police in maintaining law and order. What they did was not calculated to advance their employer's interests but purely to further their own nefarious designs. As I see it, their digression was so great in space and time that it cannot reasonably be held that they were exercising their appointed functions within D the course and scope of their employment at the time that they assaulted the plaintiff. Even if I were to apply the creation of risk approach, on the basis that the soldiers in question were undoubtedly appointed and equipped by the ZNA for military purposes, their conduct *in casu* constituted a complete abdication of their prescribed task so as to dissociate their wrongful conduct E from the risk created by their employment.

On these premises, it must be concluded that the defendant is not vicariously liable and must be absolved from liability for the injuries sustained by the plaintiff.

On the facts before me, a different result might conceivably have been possible F had the plaintiff averred negligence on the part of the defendant, insofar as it can be said that the ZNA owes a duty of care to the public to avert the reasonably foreseeable possibility of harmful conduct eventuating from the stationing and deployment of military personnel within civilian areas. However, any such negligence has neither been pleaded nor proven in the present case. The plaintiff has confined her claim to one predicated on vicarious liability and G has been unable to successfully establish that claim.

On the question of costs, it is trite that they should ordinarily follow the cause. However, applying the ordinary approach *in casu* would, I believe, entail the inequity of penalising a plaintiff who was undoubtedly injured, both physically and mentally, and who was sufficiently aggrieved to warrant the institution H

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A of legal proceedings. I am therefore inclined to depart from the ordinary disposition of costs in this matter.

In the result, the plaintiff's claim is dismissed with no order as to costs.

Legal Resources Foundation (Public Interest Unit), plaintiff's legal B practitioners

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

* *Editor's note*: compare *Gweshe v Minister of Defence* HH-28-06, where the vicarious liability of the Minister for other assaults on the same occasion was not disputed.

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TAWANDA v NDEBELE 2006 (1) ZLR 426 (H)

Citation	2006 (1) ZLR 426 (H)
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Court	High Court, Bulawayo
Judge	Cheda J
Heard	8 March 2006
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Counsel	*J Sibanda*, for the applicant *C P Moyo*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure — *documents — power of attorney — authentication* C *of — requirements for power of attorney to be signed by notary public — person admitted as solicitor in England not necessarily a notary public*

Headnote

Rule 3 of the High Court (Authentication of Documents) Rules 1971 (RGN 995 of 1971) provides that any document executed outside Zimbabwe shall D be deemed to be sufficiently authenticated for the purpose of production or use in any court or tribunal in Zimbabwe or for the purpose of production or lodging in any public office in Zimbabwe if it is authenticated by a notary public,

mayor or person holding judicial office. A power of attorney authenticated by a solicitor in England does not, in the absence E of evidence that he is also registered as a notary public, comply with this requirement.

Legislation considered

High Court (Authentication of Documents) Rules 1971 (RGN 995 of 1971), rr 2 & 3 F

Case information

J Sibanda, for the applicant

C P Moyo, for the respondent

Judgment

CHEDA J: This is an application for eviction of respondent by applicant, which G brings up for determination the question of the validity of the authentication of documents.

The applicant, Prosper Tawanda, (herein referred to as "Prosper") is based in the United Kingdom gave a general power of attorney to his brother Albert Tawanda (herein referred to as "Albert") with, amongst other powers, the power to purchase a house on his behalf and also sue on his behalf should H

Cheda J

A the need arise. The power of attorney filed of record was stamped:

"Anas A Khan BCom
LLB MA (LAW) Solicitor
8a Tooting High Street
Tooting, SW17 0RG"

B It is common cause that this power of attorney was attested to in the United Kingdom. It is this power of attorney which Albert used to sue for the eviction of respondent in this matter. Before the matter was argued, Mr *Moyo* for the respondent raised a point *in limine*, being that the power of attorney which the applicant was relying on was not properly before the court, as it was authenticated by a solicitor and not by a notary public, mayor or a person C holding judicial office as required by the High Court (Authentication of Documents) Rules in respect of documents executed outside Zimbabwe. The rule reads:

"(3) Any document executed outside Zimbabwe shall be deemed to be sufficiently authenticated for the purpose of production or use in any D court or tribunal in Zimbabwe or for the purpose of production or lodging in any public office in Zimbabwe if it is authenticated:

(a) by a notary public, mayor or person holding judicial office; or

(b) …"

Section 2 of the Rules define authentication as "authentication", in relation E to a document, means the verification of any signature thereon.

Mr *Sibanda* for the applicant, while accepting that the power of attorney was not authenticated by a notary public, urged the court to accept it as it is, as a solicitor is an officer of the court. It is his further argument that since a solicitor is an officer of the court, the court, therefore, should have trust in him and accord him the same status as that of a notary public. He further argued F that in Zimbabwe an attorney/legal practitioner is also a notary public. This argument by Mr *Sibanda* is a very broad interpretation of the word "notary public" which is a misleading interpretation of this legal term.

The authority of a notary public to practice must be viewed and understood in relation to the jurisdiction where such officer operates, as different G jurisdictions have different requirements.

The fact that the status of an attorney (solicitor) and a notary public is equal admits of no doubt. But that is only how far this can go. In this matter, we are not concerned with the status but with functions. In certain jurisdictions, the functions of an attorney and of a notary public are separate and as such are separately registered. While I agree with Mr *Sibanda* that in Zimbabwe a legal H practitioner, once registered with the Law Society, automatically practices as

Cheda J

a legal practitioner, notary public and conveyancer, but the same does not A obtain in other jurisdictions. In other jurisdictions, for instance in the United Kingdom, the procedure and practice is entirely different, in that the three practitioners, that is, the solicitor (as a legal practitioner is referred to), a notary public and a conveyancer are registered separately.

Although a solicitor can also practice as a notary public, he can only do so B under certain conditions, therefore such privilege is not automatic. The definition of "notary public" needs to be refined. In Halsbury's *Laws of England* 4 ed vol 34 at p 85 (201), a notary public is defined as follows:

> "Meaning of 'notary' A notary public is a duly appointed officer whose public office it is, among other matters, to draw, attest or certify, usually under his official seal, deeds and other documents, including conveyances C of real and personal property, and powers of attorney relating to real and personal property situate in England and Wales, other countries in the Commonwealth or in foreign countries; to note or certify transactions relating to negotiable instruments; to prepare wills or other testamentary documents; to draw up protests or other formal papers relating to occurrences on the voyages of ships and their navigation as well as the D carriage of cargo in ships."

In the United Kingdom, where the power of attorney was attested to by the solicitor, it is a legal requirement that in order for such a solicitor to practice as a notary public he should be registered as a duly certificated notary public in the United Kingdom. Such requirement is clearly laid down in Halsbury's *Laws of England op cit* at p 86, which states: E

> "In any enactment, 'duly certificated notary public' means a notary public who either: (1) has in force a practicing certificate as a solicitor, duly entered in the Court of Faculties of the Archbishop of Canterbury in accordance with the rules made by the Master of Faculties; or (2) has in force a practicing certificate as a notary public issued by the Court of F Faculties in accordance with the rules so made. Thus, a solicitor who is also a notary is only liable to take out one certificate, *but it must be registered at the office of the Master of the Faculties*" (my emphasis).

The particulars of a person who authenticated Prosper's power of attorney indicate that he is a mere solicitor. In the absence of evidence that he is registered as a notary public, I find it difficult to accept that he is indeed a G notary public authorised to practice as such in terms of the laws of the United Kingdom.

The office of a notary public is very important and his signature together with his seal of office is so important that it commands international recognition to the extent that the mere exhibition of a notarized document is absolutely acceptable for judicial purposes. H

Cheda J

A For this reason, therefore, a notary public's office should be protected and recognised for what is worth. Prosper's signature was not authenticated by a notary public. Therefore, its authority is questionable.

It is my view, therefore, that there should be no compromise by seeking to accept a questionably authenticated document either for academic or expedience B purposes. The rules of this court have listed certain officials who are authorised to authenticate documents and those rules should be applied *in toto*.

In light of the above, there is no power of attorney before this court authorising Albert to act for and on behalf of applicant. Accordingly, the application is C dismissed with costs.

Job Sibanda and Partners, applicant's legal practitioners

D *Majoko and Majoko*, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/CORONSEL INVESTMENTS (PVT) LTD v SPAR HARARE (PVT) LTD 2006 (1) ZLR 430 (H)

CORONSEL INVESTMENTS (PVT) LTD v SPAR HARARE (PVT) LTD 2006 (1) ZLR 430 (H)

Citation	2006 (1) ZLR 430 (H)
Case No	Judgment No. HH-51-06
Court	High Court, Harare
Judge	Chatukuta J
Heard	20 January 2006
Judgment	20 April 2006
Counsel	Ms *R T Hove,* for the applicant *R J Tsivama,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Company — *employee — unauthorized acts of — company's liability for — fraud by servant inducing contract — when company liable*

Contract — *validity — contract with company — effect of fraud by employee — when company bound*

Headnote

The applicant claimed payment for an order for goods supplied to the respondent. The respondent had refused to pay, claiming that its employee had fraudulently tampered with the order to substantially increase the quantity of goods ordered. It had reported the fraud to the police and the employee had been arrested. It then claimed that the contract for supply of the goods was invalid due to the fraud.

Held, that the fraud of an employee working within the bounds of his authority does not render a contract invalid. Section 12(a) of the Companies Act [*Chapter 24:03*] provides that any person dealing with a company is entitled to assume that the internal regulations of that company have been complied with. Section 13 provides specifically that liability under s 12 is not affected by fraud.

Cases cited

Karabus Motors (1959)(Pty) Ltd v van Eck 1962 (1) SA 451 (C)

Reed NO v Sager's Motors (Pvt) Ltd 1969 (2) RLR 519 (A)

Rhodes Motors (Pvt) Ltd v Pringle-Wood NO 1965 RLR 395 (A)

Legislation considered

Companies Act [*Chapter 24:03*], ss 12(a) and 13

Case information

Ms *R T Hove,* for the applicant

R J Tsivama, for the respondent H

2006 (1) ZLR p431

Chatukuta J

Judgment

A **CHATUKUTA J**: The applicant is claiming from the respondent payment of $255 689 400 for goods delivered to the respondent. The applicant has averred that on 30 August 2005, the respondent ordered 200 rolls of thermal shelf talkers and 1000 rolls of thermal computer labels which were duly delivered to the respondent on 5 September 2005. The items were received by the respondent's employees. On 6 September 2005, a Mr Alan Pirie, the general B manager of the respondent company, refused to pay for the goods, alleging that the orders were supposed to have been for 50 shelf talkers labels and 100 thermal labels. He alleged that the order forms prepared by the respondent had been tampered with by his employee, one Bernard. The respondent has alleged that Bernard acted in connivance with the applicant's employees in order to prejudice the respondent. The respondent made a report to the police C and Bernard was arrested.

The issues for determination are therefore whether:

(a) there is a valid contract between the applicant' and the respondent considering the alleged fraudulent actions of both the applicant's and the respondent's employees; D

(b) the applicant is entitled to payment of the sum of $255 689 400 plus interest at the rate of 160 per cent per annum; and

(c) the applicant is entitled to costs of suit at an attorney and client scale.

VALIDITY OF CONTRACT

The respondent has submitted that the general manager and assistant finance E manager approved the purchase of 50 shelf talkers labels and 100 thermal labels. Bernard is alleged to have tampered with the order forms to reflect 200 rolls of thermal shelf talkers and 1000 rolls of thermal computer labels and did not seek the approval of the general manager and assistant finance manager to alter the orders. This, he is said to have done in connivance with the F applicant's employees. Apart from that bold allegation, the respondent has not proffered any proof of such connivance. In fact, whilst Bernard is said to have been arrested and was placed on remand, none of the applicant's employees were arrested let alone interviewed by the police. The respondent did not dispute this. Therefore nothing turns on the respondent's submissions that the applicant was, through its employees, equally to blame for the alleged G fraudulent alteration of the orders. This leaves Bernard as the only suspect for the fraudulent altering of the orders.

Bernard was at the relevant time in the employment of the respondent. He was indeed authorized, from the evidence before me, to raise orders for the purchase of items for the respondent. In the event that Bernard did indeed fraudulently altered the orders, the question is then whether or not the H respondent can rely on Bernard's alleged fraudulent acts to avoid being

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2006 (1) ZLR p432

Chatukuta J

contractually bound. In other words, can Bernard's acts be said to be the A respondent's acts?

The respondent in its heads of arguments quoted Watermeyer J's observations in *Karabus Motors (1959) (Pty) Ltd* v *van Eck* 1962 (1) SA 451 (C) at 453C-E that:

> "It is a general rule of our law that if the fraud which induces a contract does B not proceed from one of the parties, but from an independent third person, it will have no effect upon the contract. The fraud must be the fraud of one of the parties or of a third party acting in collusion with, or as the agent of, one of the parties."

I do not see in what way this authority assists the respondent. It is my view that Watermeyer J's observations, in fact, favour the applicant. It is not C disputed that Bernard was an employee of the respondent. He cannot therefore be classified as an independent third party. The respondent has not placed before me any evidence of the connivance of the applicant's employees. In fact, the respondent has not challenged the applicant's submissions that the employees have not been

interviewed or arrested by the police. The alleged fraud was committed by the respondent's own employee. Bernard, D being the respondent's employee, had ostensible or apparent authority to make the orders, as he did in this instance. The respondent did not dispute the existence of such authority, I believe wisely so. As submitted by the applicant, Bernard conducted the negotiations for the orders. The orders were made on the respondent's order forms and approved by the respondent's officials. E

The test to be applied in deciding whether the master is contractually liable for the unauthorized acts of his servants has been discussed in *Rhodes Motors (Pvt) Ltd v Pringle-Wood NO* 1965 RLR 395 (A). At 405B-E, citing various authorities, MacDonald AJA (as he then was) states the accepted law as follows: F

> "It is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes-although G improper modes-of doing them. In other words, a master is responsible not merely for what he has authorized his servant to do, but also for the way in which he does it … On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorized act, as to be mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside it." H

Chatukuta J

A At 404A-C, MacDonald AJA cites Willes J in *Barwick* v *English Joint Stock Bank* LR 2 Ex 259 at p 266 as follows:

> "In all these cases, it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself B in doing the business which it was the act of his master to place him in."

Whilst this may appear to be an application of the doctrine of vicarious liability in contract law, it is clearly stated in *Reed NO* v *Sager's Motors (Pvt) Ltd* 1969 (2) RLR 519 (A) that what is in issue is whether or not there was ostensible or apparent authority binding the party seeking to resile from the contract. C Beadle CJ had this to say at 523D-H:

> "Mr *Tett*, who appeared for the defendant, appreciated his difficulties in regard to the *Rhodes Motor Company* case (*supra*), and argued that it was wrongly decided. As I understand his contention, he argued that the decision in that case confused the principles of vicarious responsibility applicable to the master and servant relationship in the law of delict with D the principles applicable to the principal and agent relationship in the law of contract. I express no opinion as to whether, on the facts of the *Rhodes Motor Company* case or, on the facts of the instant case, the plaintiff would have recovered had he based his cause of action on delict…the decision of the *Rhodes Motor Company* case (*supra*), was not founded on delict. The basis of the decision in that case was that on the facts the court held that though Winson had no express or implied authority to E direct payments in the manner in which he did, what he did was, nonetheless, within the scope of his 'ostensible' authority. The word 'ostensible' in the *Rhodes Motor Company* case is used in the sense of 'apparent', and in the language of the law of agency these two terms are synonymous."

F Whilst the above authorities refer to employees/agents who exceeded their authority, the espoused principles are equally applicable where the unauthorized acts are fraudulent. Reference is made to *Karabus Motors (Pty) Ltd* v *van Eck supra*, which, as I have already observed, does not support the respondent. Bernard conducted the negotiations for the orders. The orders were made on the respondent's order forms and approved by the respondent's G officials. The respondent is therefore answerable for the alteration of the order forms to reflect the increased quantities. Accordingly, Bernard's fraudulent acts do not render the contract between the applicant and the respondent invalid.

In any event, as rightly submitted by the applicant, the respondent is H precluded from denying such liability under the Companies Act

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Chatukuta J

[*Chapter 24:03*]. The respondent submitted that Bernard did not follow the A internal procedures of the company when he altered the order forms. The general manager and the assistant finance manager were supposed to have authorized the alterations. Section 12(a) of the Companies Act provides that any person dealing with a company is entitled to assume that the internal regulations of that company have been duly complied with. The company is B estopped from denying that the company's internal regulations were complied with. Of more importance is s 13 of the Act which provides that liability arising from s 12 is not affected by fraud. The section provides that:

> "A company shall be bound in terms of section *twelve*, notwithstanding that the officer or agent concerned acted fraudulently or forged a document purporting to be sealed or signed on behalf of the company" C

It is therefore concluded that there was a valid contract between the applicant and the respondent for the purchase of 200 rolls of thermal shelf talkers and 1000 rolls of thermal computer labels valued at $255 760 000. It therefore follows that the applicant is entitled to the amount claimed. The respondent abandoned, in its heads of arguments, its submissions that delivery was not timeous and D again I believe wisely so. There is no proof that time was of the essence.

INTEREST

The applicant claims that it is entitled to interest at the rate of 160 per cent calculated as from 5 September 2005, being the date of delivery and presentation of the invoice to the respondent. The applicant submits that the high interest is based on the quotation from the applicant dated 30 August which forms part E of the agreement between the parties. The relevant part of the quotation states that:

Interest on all overdue accounts is charged at the minimum bank lending rate specified by the supplier's bankers as at the date of delivery, on the daily balance, presently 290 per cent per annum. F

Apart from the statement in the Supporting Affidavit of T Magwaliba, the applicant has not presented any proof that the minimum bank lending rate was 160 per cent per annum. In the absence of such proof, the applicant has not proved its claim for interest at the higher rate and therefore would be entitled to interest at the prescribed rate. G

COSTS

The applicant submits that it is entitled to costs on a higher scale because respondent's defence was frivolous and vexatious, intended at frustrating the applicant. In view of the alleged tampering of the order forms, and the fact that the respondent caused the arrest of its own employee, I am of the view that H the respondent's defence was not frivolous and vexatious.

2006 (1) ZLR p435

Chatukuta J

A In the result, it is ordered that:

1. Judgment is hereby entered in favour of the applicant against the respondent for the sum of $255 689 400;
2. The respondent to pay interest at the prescribed rate of 30 per cent per annum with effect from 5 September 2005; B
3. The respondent to bear the costs of this application.

Hove & Associate, applicant's legal practitioners

C *Sawyer and Mkushi*, respondent's legal practitioners

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Source:

VERA v IMPERIAL ASSET MANAGEMENT CO 2006 (1) ZLR 436 (H)

Citation	2006 (1) ZLR 436 (H)
Case No	Judgment No. HH-50-06
Court	High Court, Harare
Judge	Makarau J
Heard	22 March 2006
Judgment	26 April 2006
Counsel	*L T Biti*, for the applicant Ms *S Zvarevashe*, for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Practice and procedure — *heads of argument — respondent's heads of* C *argument — when must be filed — failure by respondent to file heads of argument timeously — automatic bar of respondent — discretion of court — may be exercised in the interests of justice to avoid further costs and delays*

Headnote

The operative part of r 238(2a) of the High Court Rules 1971 is not to be found D in the proviso. It is in the main provision and is to the effect that the respondent is to file his heads of argument within ten days of being served with the applicants head's. That is the immutable rule. However, in the event that the respondent has been served with the applicant's heads close to the set down date, he shall not have the benefit of the full E ten day period within which to file and serve heads stipulated in the main provision but shall have to do so five clear days before the set down date. This is the import of the proviso to the main provision of the rule.

Where a respondent's heads of argument are not filed timeously in accordance with r 238(2a), the respondent concerned is automatically barred and the F court may deal with the matter on the merits or direct that it be set down on the unopposed roll. *In casu*, however, the court considered it in the interests of justice, so as to avoid further costs and delays, to exercise the discretion vested in it in terms of r 4(c) simply to grant applicant a default judgment. G

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 4c and 238(2a)

Case information

L T Biti, for the applicant

Ms *S Zvarevashe*, for the respondent H

Makarau J

Judgment

A **MAKARAU J:** Rule 238(2a) of the High Court Rules, 1971, provides that:

> "Heads of argument referred to in subrule (2) shall be filed by the respondent's legal practitioner not more than ten days after the heads of argument of the applicant or excipient, as the case may be, were delivered to the respondent in terms of subrule (1):
>
> Provided that – B
>
> (i) no period during which the court is on vacation shall be counted as part of the ten day period;
>
> (ii) the respondent's heads of argument shall be filed at least five days before the hearing."

The correct interpretation to be placed on the rule appears to have eluded the C respondent's legal practitioner, resulting in its heads of argument being filed out of time and without an accompanying or E preceding application for condonation.

The applicant filed and served his heads of argument on 8 December 2005, six days after the High Court rose on vacation. The High Court resumed sitting on 9 January 2006 and the 10 day period within which the respondent had to D file its heads in terms of r 238(2a)(ii) expired on 20 January 2006. No heads were filed on or before this date on behalf of the respondent.

On 14 December 2005, the applicant applied for a set down date and the matter was set down before me on 22 March 2006. On 14 March, five days before the set down date, the respondent filed its heads without an accompanying or preceding application for condonation explaining the delay.

At the hearing of the matter, the issue of whether or not the respondent was barred was raised and Ms *Zvarevashe* for the respondent maintained that the respondent was not barred as its heads were filed five days before the set down date. It then became necessary for me to render my interpretation of the rule. F This it is.

The operative part of the rule is not to be found in the proviso. It is in the main provision and is to the effect that the respondent is to file his or her heads of argument within 10 days of being served with the applicant's heads. That is the immutable rule. However, in the event that the respondent has been served with the applicant's heads close to the set down date, he or she shall not have G the benefit of the full 10 day period within which to file and serve heads stipulated in the main provision but shall have to do so five clear days before the set down date. This is the import of the proviso to the main provision of the rule.

It appears to me that r 238(2a) has to be read in conjunction with rules 238 and H 223(2)(a) for the High Court sitting at Harare where an opposed matter is to

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be set down on not less than six days' notice to the other side after the filing A and service of heads of argument by the applicant. Thus, where a matter is set down on six days' notice to the other side immediately after service of the applicant's heads or argument, the respondent only has one day within which to file and serve his or her heads; an unlikely reality currently where it takes between 20 and 120 days for an opposed matter to be set down after heads B of argument have been filed.

In view of the stance that she adopted, Ms *Zvarevashe* could not and did not make an application for condonation before the hearing of the matter. In terms of r 238(2b), where heads of argument that are required to be filed in terms of r 238(2) are not filed within the specified period, the respondent concerned shall be barred and the court or judge may deal with the matter on the merits C or direct that it be set down on the unopposed roll. The rule is in my view, peremptory and the court has no discretion to exercise whether to bar the respondent or not. The bar falls into place automatically and by operation of the rules of procedure. It is not an order of the court that bars the respondent.

It is my further view that, as the bar against a respondent in such circumstances D is automatic and brings about a technical default, a review of the merits of either case at this stage of the proceedings, though provided for in the rules, will unnecessarily fetter the discretion of a future court that may be seized with an application to rescind the default judgment that the applicant is entitled to at this stage. In view of the above, I have used the discretion vested in me by r 4c in the interests of justice and instead of directing that the matter be set down on the unopposed roll for the granting of a default judgment, I will save the incurring of further costs and delays in the matter and grant a default judgment in favour of the applicant as follows:

It is ordered that:

1. the respondent shall, within five days of the date of service of this order sign all documents necessary to have the motor vehicle registration No. 772-215N registered in the name of the applicant, failing which the Deputy Sheriff is hereby authorised to sign all such documents on behalf of the respondent.
2. the respondent shall pay the costs of this application.

Honey & Blankenberg, applicant's legal practitioners

Sinyoro & Co, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/S v GUMBO & ORS 2006 (1) ZLR 439 (H)

S v GUMBO & ORS 2006 (1) ZLR 439 (H)

Citation	2006 (1) ZLR 439 (H)
Case No	Judgment No. HB-46-06
Court	High Court, Bulawayo
Judge	Ndou J & Assessors
Heard	10 May 2006
Judgment	10 May 2006
Counsel	*A P Mpofu,* for the State *S Masuku,* for the second accused *N M Fuzwayo,* for the third accused *C P Moyo,* for the fourth accused *K I Phulu,* for the fifth accused
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

C **Evidence** — *extra-curial statement — admissibility — challenge to — multiple accused — desirability of determining admissibility of all challenged statements in one "trial within a trial" rather than piecemeal*

Headnote

Where there is more than one accused person challenging the admissibility of an extra-curial statement, the admissibility of all the challenged D statements should be determined at one trial within trial, rather than dealing with the statements piecemeal. This practice is calculated to ensure that the judicial officer has all relevant evidence before him when giving his rulings on admissibility. It may happen that the necessity for holding a trial within a trial arises quite

unexpectedly or at a time when it would be inconvenient or impracticable to consolidate such a trial E within similar trials. Departures from the general practice must be left to the good sense and judicial discretion of the presiding officer.

Case cited

R v Musekiwa & Ors 1965 RLR 225 (A); 1965 (3) SA 529 (RA)

Case information

F *A P Mpofu,* for the State

S Masuku, for the second accused

N M Fuzwayo, for the third accused

C P Moyo, for the fourth accused

G *K I Phulu,* for the fifth accused

Judgment

NDOU J: The accused persons are appearing before us in the main trial. We have already heard testimony from all prosecution witnesses in the main trial. The matter now before me, is a trial within a trial. The matter was postponed to this date for the commencement of the trial within trial. Neither Mr *Fuzwayo* H nor Mr *Phulu* are not in attendance. Mr *Moyo* and Mr *Masuku* are present.

2006 (1) ZLR p440

Ndou J

I assume this was by arrangement. Mr *Mpofu*, for the State, seeks leave to deal A with the objection of each accused person separately, starting with the fourth accused. Mr *Moyo*, for the fourth accused, though not vehemently opposed to this approach, raised the issue of the correctness of the procedure in light of the decision of this court in *R* v *Musekiwa & Ors* 1965 RLR 225(A); 1965 (3) SA 529 (RA). B

The general rule, as I understand it, is that where there is more than one accused person challenging the admissibility of the extra curial statement, the admissibility of all the challenged statements should be determined at one trial within a trial, rather than dealing with the statements piecemeal. This rule and its attendant exception was approved by MacDonald AJP (as he then was) in the *Musekiwa* case *supra* at 227F-H as follows: C

> "The practice adopted in the General Division … is correct and should be followed in other courts. The practice is calculated to ensure that the judicial officer has all relevant evidence before him when giving his rulings on admissibility and the obvious disadvantages inherent in the procedure adopted by the magistrate in this case are avoided. As was recognised by Holmes JA in *S* v *Letsoko & Ors* 1964 (4) SA 768 (A), it is usually more D 'convenient and practical' to consolidate the 'trials within trials'. It is not intended to lay down a hard and fast rule that the general practice must always be followed. It sometimes happens that the necessity for holding a trial within a trial arises quite unexpectedly or at a time when it would be inconvenient or impracticable to consolidate such a trial within similar trials. Departures from the general practice must be left to the good sense E and judicial discretion of the presiding officer."

I associate myself with the said sentiments of the learned Acting Judge President. It has to be borne in mind that a ruling on admissibility is not final. Relevant evidence adduced in the main trial may be taken into account by the presiding officer when reviewing his/her decision on admissibility irrespective of the source of such relevant evidence. There is no reason why this should F not also be the position when a trial within a trial is held. The fact that an issue is peculiar to one accused is not regarded as a reason for ignoring evidence relevant to the issue led by other accused persons or their witnesses.

In casu, the necessity to hold a trial within a trial did not arise unexpectedly; it was an issue known to all the parties right from the commencement of the G trial.

Further, the necessity did not arise at a time when it would be inconvenient or impracticable to consolidate the objections raised by the accused persons. There are not submissions from the accused persons' legal practitioners indicating that there are any factors placing the matter in the category of an exception to the general rule. It may be convenient on the part of the H

Ndou J

A prosecution because some of the witnesses are still on the way to court, but that factor alone does not constitute an exception to the general rule.

Accordingly, I order that all the trials within a trial are to be heard together and not piecemeal.

B *Attorney-General, Criminal Division,* for the State

Ben Baron & Partners, for the second accused

Calderwood, Bryce Hendrie, for the third accused

Majoko & Majoko, for the fourth accused

Coghlan & Welsh, for the fifth accused

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/OLD MUTUAL PROPERTY INVESTMENTS v METRO INTERNATIONAL (PVT) LTD & ANOR 2006 (1) ZLR 442 (H)

OLD MUTUAL PROPERTY INVESTMENTS v METRO INTERNATIONAL (PVT) LTD & ANOR 2006 (1) ZLR 442 (H)

Citation	2006 (1) ZLR 442 (H)
Case No	Judgment No. HH-53-06
Court	High Court, Harare
Judge	Patel J
Heard	8 June 2005; 23 June 2005; 9 November 2005
Judgment	11 May 2006
Counsel	*E W W Morris,* with him *G Gapu,* for the applicant *L Cook,* for the first respondent *L T Biti,* for the second respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Contract — *interpretation — ambiguities — extrinsic evidence of surrounding circumstances permissible to resolve them*

Contract— *interpretation — contra preferentem rule — when applicable — rule of last resort — only invoked where all other rules of interpretation have been exhausted — rule ought not to be applied if all parties are* D *relatively equal in their bargaining positions*

Contract — *interpretation — specific words — "supermarket" — means the entire area of the business including the ancillary facilities and areas not ordinarily open to the public*

Headnote

The first respondent was the lessee of trading premises. The lease stipulated E that no more than 1000 square metres of the premises could be used as a "supermarket", a term which was not defined in the contract. The supermarket trading floor *per se* consisted of 960 square metres. This area, combined with the coffee shop, take-aways, refrigerators and bulkheads, all of which were open to public access, comprised a total of F 1215 square metres. The remainder of the leased premises, which was not accessible to the public, constituted 1135 square metres assigned to storage and service facilities ancillary to the supermarket. The first respondent argued that the word "supermarket" pertained only to the trading area. It argued that the *contra proferentem* rule should apply in favour of the first respondent. The second respondent, a lessee of a G larger premises in the same complex, argued that the word included all the ancillary areas.

Held, that the *contra preferentem* rule is one of last resort and is only to be applied where it is not possible to ascertain the proper meaning of the contractual provision in question, after having exhausted all the ordinary rules of interpretation. The rule is generally applicable where the party H

A that drafted the document under dispute is the dominant party, allowing for minimal or purely perfunctory input from the other party, as invariably occurs in the case of contracts of insurance. The rule ought not to be applied where the parties are relatively equal in their respective bargaining positions. In the present case, both lease agreements were negotiated at the same time and only concluded by the parties after lengthy and B detailed negotiations. It could not be said that the applicant or either of the respondents was the dominant player in the course of negotiating and concluding the lease agreements.

Held, further, that in the interpretation of documents, the courts are at liberty to have regard to extrinsic evidence pertaining to the circumstances surrounding a written agreement in order to resolve any ambiguity in the C interpretation thereof. In this case, both lease agreements were negotiated at about the same time, and it was accepted that the second respondent would operate the principal supermarket in the complex.

Held, further, that the word "supermarket", regarded in both its grammatical and colloquial sense, meant the entire enterprise comprising the business D of a large self-service store, inclusive of its trading area as well as its ancillary storage, refrigeration, cooking and ablution facilities. It included not only the trading area which is open to the public but also the ancillary facilities and amenities to which the public are ordinarily denied access; in other words, the entire area devoted to the business of the supermarket.

Cases cited E

Botha v Venter 1999 (4) SA 1277 (O)

Cairns (Pvt) Ltd v Playdon & Co Ltd 1948 (3) SA 99 (A)

Commercial Union Fire, Marine & General Ins Co Ltd v Fawcett Security Org Bulawayo (Pvt) Ltd 1985 (2) ZLR 31 (S)

F *Delmas Milling Co Ltd v du Plessis* 1955 (3) SA 447 (A)

Presbyterian Church of Southern Africa v Shield of Zimbabwe Ins Co Ltd 1991 (2) ZLR 261 (H)

Richter v Bloemfontein Town Council 1922 AD 57

Case information

E W W Morris, with him *G Gapu,* for the applicant

G *L Cook,* for the first respondent

L T Biti, for the second respondent

Judgment

PATEL J: This is an application for a *declaratur* on the meaning of the word "supermarket" in the context of two lease agreements entered into between the applicant and the two respondents in respect of premises demised within H the Westgate Shopping Complex in Harare ("the Complex").

Patel J

THE FACTS A

The lease agreement with the first respondent ("the W Store lease") was concluded on 19 November 1995. The lease agreement with the second respondent ("the TM lease") was concluded on 8 March 1996. However, it is common cause that the two lease agreements were negotiated at the same time. Both leases are of 10 years duration, commencing on the first of April 1997 and B terminating on 31 March 2007, with options to renew. The W Store lease covers an area of 2 264.53 square metres, while the TM lease spans a larger area of 4 183.48 square metres.

From the inception of its lease, the first respondent traded as the "W" Store in its leased premises. In June 2004, the first respondent informed the applicant that it intended to cease trading as the "W" Store and to commence trading C as a Spar franchise. In the months that followed, it emerged that there was no agreement between the parties as to what comprised a "supermarket" for the purposes of the 1 000 square metre spatial limitation contained in clause 11.1 of the W Store lease. The first respondent contended that the term excluded ancillary facilities, such as storerooms, compressor rooms, butchery, bakery, D etc., while the second respondent argued that the term included such ancillary facilities. The applicant found itself in the invidious position of having to take sides and endeavoured to remain neutral. It then instituted this application on 4 February 2005.

For the sake of completeness, it is necessary to note that, notwithstanding the lack of consensus between the parties, the first respondent commenced E trading in its renovated premises as a Spar franchise in May 2005. This development formed the subject matter of a separate urgent application, in case No. HC 2255/05, wherein the second respondent sought to interdict the first respondent from operating a supermarket exceeding 1 000 square metres. This application was dismissed by Gowora J on 18 July 2005 for reasons which F are not directly relevant to the determination of the present application.

THE ARGUMENTS

Mr *Cook*, appearing for the first respondent, submits that the word "supermarket" in clause 11.1 of the W Store lease pertains to the selling or trading area only and excludes other ancillary areas where no trading takes G place. He further submits that both respondents have mutually exclusive contracts and that the provisions of the TM lease cannot be construed to restrict the application of the W Store lease. In this regard, he points out that the exclusivity clause in the TM lease was fixed after the W Store lease had been executed. In support of his submissions, Mr *Cook* refers to an addendum to the W Store lease which was verbally agreed with the applicant and which H

Patel J

A clearly implies that the ancillary facilities are separate and exclusive from the supermarket area. If there is any ambiguity in the W Store lease, it should, so he argues, be interpreted *contra proferentem* the applicant and in favour of the first respondent, particularly inasmuch as the latter has expended billions of dollars on the refurbishment of its leased premises in pursuance of its new Spar enterprise.

B On behalf of the second respondent, Mr *Biti* submits that the context in which the lease agreements *in casu* were concluded must be taken into account. The second respondent agreed to establishing a huge and costly supermarket located at a distance from the main parking area on the understanding that it would operate the principal supermarket within the Complex. The second C respondent's dominant position *qua* supermarket was accepted by all the parties concerned and the exclusivity clause in the TM lease is perfectly reasonable in view of its background. Mr *Biti* further submits that an inclusive interpretation of the term "supermarket" accords not only with the understanding of the parties *ab initio* but also with common sense and ordinary colloquial usage as to what constitutes a supermarket, *viz*., a large D self-service store.

Mr *Morris* and Mr *Gapu*, for the applicant, argue that the applicant has never fully acceded to the enlarged concept of a supermarket. In this respect, the addendum to the W Store lease has not as yet been signed and therefore cannot be regarded as binding on the parties until it has been signed. E Moreover, the applicant has always sought to protect the second respondent's exclusivity rights. The first respondent has been fully aware of that fact and in the past, *qua* the "W" Store, has adhered to the 1 000 square metre restriction as applying to a supermarket area inclusive of ancillary facilities. They also point out that both of the lease agreements under review were negotiated by the parties at the same time. Thus, the fact that the W Store lease was signed F before the TM lease is irrelevant in light of the overall context.

SKETCH PLANS

In November 2005, the parties were directed to produce sketch plans of the leased premises so as to enable the court to formulate a clearer picture of the layout and areas under review. These sketch plans were duly produced and G submitted in December 2005. In essence, although there is some dispute as to the precise dimensions involved, the plans depict the following:

(i) Apart from small areas set aside for office space and staff facilities totalling less than 700 square metres, the bulk of the premises under the TM lease is devoted to a supermarket trading area and ancillary facilities, H approximating *circa* 3500 square metres.

(ii) Under the W Store lease, the total trading area, inclusive of the clothing A and textiles area, exceeded 1000 square metres. However, the area assigned to the supermarket and its ancillary facilities comprised less than 1 000 square metres.

(iii) In the new Spar establishment, the total trading area has been reduced by approximately 150 square metres. The supermarket trading floor *per se* B consists of 960 square metres. This area, combined with the coffee shop, take-aways, refrigerators and bulkheads, all of which are open to public access, comprises a total of 1 215 square metres. The remainder of the leased premises, which is not accessible to the public, constitutes 1135 square metres assigned to storage and service facilities ancillary to the Spar supermarket. C

THE LEASE AGREEMENTS

Clause 11.1 of the W Store lease entitles the first respondent "to use the premises for a clothing store, plus a supermarket which may not exceed 1 000 square metres and for no other purpose whatsoever" without the applicant's prior written consent. In terms of clause 37, no variation of the lease agreement D is binding on the parties unless it is "reduced to a written agreement signed by or on behalf of the parties".

Correspondingly, clause 11.1 of the TM lease entitles the second respondent "to use the premises for a supermarket and for no other purpose whatsoever" without the applicant's prior written consent. Additionally, clause 40 of the E agreement constitutes an exclusivity clause whereby the applicant "undertakes not to lease any other premises over 1 000 square metres in the Building as a supermarket during the first ten years of this lease" without the written consent of the second respondent.

As regards the addendum relied upon by the first respondent, I am unable to see how this can assist to advance its position. Although it may well reflect F the negotiated stance of the parties as to the proposed conversion and refurbishment of the W Store premises, it is common cause that it was never signed by the applicant *qua* landlord. In the event, in the absence of such signature, it falls foul of clause 37 of the W Store lease and cannot be held to be binding on the parties. In my view, it is of no legal force or effect and does G not take the present matter any further.

Turning to clause 40 of the TM lease, the clarity of this clause is not entirely satisfactory in its reference to "any other premises over 1 000 square metres in the Building as a supermarket". It obviously could and should have been better drafted to reflect the agreed intention of the parties. H

A As for the crucial word "supermarket", the term is not defined in either of the lease agreements. Clauses 1 and 2 of both lease agreements, which respectively define the terms used therein and identify the premises leased thereunder, do not provide any assistance in this regard. More critically, the restriction contained in clause 11.1 of the W Store lease and the exclusivity conferred by clause 40 of the TM lease simply refer to the word "supermarket" without B articulating the intended parameters of that term.

In the final analysis, it is clear that the lease agreements under consideration, whether taken individually or together, fail to provide any meaningful answer to the central question posited in this matter, *viz.*, what is a "supermarket" for the purposes of the restriction imposed upon the first respondent.

C **THE** *CONTRA PROFERENTEM* **RULE**

As a rule, where there is some ambiguity in the use of a word or choice of expression which leaves the court unable to decide which of two meanings is correct, the word or expression ought to be construed against the party who was responsible for drafting the document in question. See *Cairns (Pty) Ltd* D v *Playdon & Co Ltd* 1948 (3) SA 99 (A), at 123; *Commercial Union Fire, Marine & General Insurance Co Ltd* v *Fawcett Security Organisation Bulawayo (Pvt) Ltd* 1985 (2) ZLR 31 (S); *Presbyterian Church of Southern Africa* v *Shield of Zimbabwe Insurance Co Ltd* 1991 (2) ZLR 261 (H).

It is to be cautioned, however, that the rule is one of last resort and is only to be applied where it is not possible to ascertain the proper meaning of the E contractual provision in question, after having exhausted all the ordinary rules of interpretation. See in this respect the *Cairns* case, *supra*, cited in *Jonnes* v *Anglo-African Shipping Co Ltd* 1972 (2) SA 827(A). As explained by Faber: *Rat 2.14.39* (Wessels' translation):

> "But the interpretation against the seller or the lessor must clearly not be F applied in the first instance, but only if nothing better can be determined: That is to say, if it can neither be proved what was the intention of the parties nor an interpretation given in accordance with the probabilities."

As I understand it, the rule is generally applicable where the party that drafted the document under dispute is the dominant party, allowing for minimal or purely perfunctory input from the other party, as invariably occurs in the case G of contracts of insurance. The rule ought not to be applied where the parties are relatively equal in their respective bargaining positions.

In the present case, it is not in dispute that both lease agreements were negotiated at the same time and only concluded by the parties after lengthy and detailed negotiations. Therefore, it cannot be said that the applicant or either of the respondents was the dominant player in the course of negotiating A and concluding the lease agreements.

Patel J

More significantly, I do not think that this is an instance where it is impossible A to ascertain the true or probable intention of the parties either from the lease agreements themselves or from their surrounding circumstances. Accordingly, while I accept that the restriction and exclusivity clauses under review might have been more lucidly formulated, I am unable to accept that the failure to define the word "supermarket" in the lease agreements should be held against B the applicant by invoking the *contra proferentem* rule.

MEANING OF SUPERMARKET

According to Anderson & Labley *Success in Commerce* at p 25, a supermarket is a large self-service store buying in bulk. This definition accords with the dictionary definition of the term. In the *New Collins Concise Dictionary* C (1982), the word "supermarket" is defined as "a large self-service store retailing food and household supplies", while "store" is defined as "an establishment for the retail sale of goods and services".

What emerges from these definitions is that a supermarket is a large commercial establishment where goods are stored in bulk and where goods, and possibly services, are retailed to members of the public. Obviously, the space where D goods are displayed and paid for, *viz.*, the trading area, is unquestionably an essential part of a supermarket. Moreover, the definitions cited above indicate

that the storage facilities of a supermarket, as well as the areas where services are provided, form as much an integral part of the supermarket as its trading area. Taking this conception further, it seems to me difficult to separate the other amenities and facilities that are usually attached to a supermarket from E its trading area *per se*. In other words, a supermarket in its totality must be viewed as comprising not only its trading area but also its ancillary warehousing, refrigeration and ablution facilities. In my view, the latter constitute intrinsic facets of the notion of a supermarket.

I am confident that the view that I have taken is consonant with ordinary F colloquial usage and the popular perception of a supermarket. A comparison of other commercial enterprises is also illustrative and instructive in this regard. Thus, a restaurant, bakery, bottle-store, pharmacy and butchery would ordinarily contain facilities and areas to which the public are denied access. These would include, *inter alia*, kitchens, storerooms, dispensaries, cold-rooms and cutting-rooms. It would, I think, be absurd to suggest that G these facilities should be divorced from the trading areas to which they are necessarily and intimately attached in determining what constitutes the relevant commercial enterprise under consideration. Each such enterprise must surely be regarded as being inclusive of all the amenities that are necessary for conducting the particular business of that enterprise. H

Patel J

A In the result, I am of the considered opinion that the word "supermarket", regarded in both its grammatical and colloquial sense, means the entire enterprise comprising the business of a large self-service store, inclusive of its trading area as well as its ancillary storage, refrigeration, cooking and ablution facilities. In the present context, it follows that the Spar supermarket presently operated by the first respondent includes not only its trading area B which is open to the public but also the ancillary facilities and amenities to which the public are ordinarily denied access, *viz.,* the entire area devoted to the business of the supermarket.

CONTEXT AND SURROUNDING CIRCUMSTANCES

It is trite law that the courts are at liberty to have regard to extrinsic evidence C pertaining to the circumstances surrounding a written agreement in order to resolve any ambiguity in the interpretation of the agreement. See *Richter* v *Bloemfontein Town Council* 1922 AD 57 at 59; *Delmas Milling Co. Ltd* v *du Plessis* 1955 (3) SA 447 (A) at 454; *Botha* v *Venter* 1999 (4) SA 1277(O). See also Kerr *Principles of the Law of Contract* 3ed 1982 at pp 217-220 and 226; Christie *Law of Contract in South Africa* 3ed at p 227ff.

D In the instant case, the second respondent agreed to establish a large supermarket at huge expense on the understanding that it would operate the principal supermarket within the Complex. This position was accepted by all the parties concerned and the restriction clause in the W Store lease as well as the exclusivity clause in the TM lease were negotiated and inserted within E that context. The applicant has thereafter acted to protect the second respondent's exclusivity rights, while the first respondent has in the past adhered to the 1 000 square metre restriction in accordance with the wider and more inclusive concept of what constitutes a supermarket.

Moreover, as I have already indicated, both of the lease agreements under F review were negotiated by the parties at the same time. Thus, it cannot be accepted that they are mutually exclusive and that each lease agreement must be interpreted without recourse to the other. Again, the fact that the W Store lease was signed before the TM lease cannot operate to vitiate the exclusivity rights conferred by the latter in view of the contemporaneous negotiation of both lease agreements and the circumstances surrounding their conclusion.

G Accordingly, even if the word "supermarket" were open to doub t and ambiguity as to its correct meaning, which it is not, I am satisfied that the intention of the parties, as gleaned from the context in which the leases were negotiated and the conduct of the parties after the leases were concluded, was to ascribe the wider and more inclusive connotation to that word as it is used H in the lease agreements.

Patel J

COSTS A

In this application, each of the three parties seeks costs against the other two parties, the one paying the other to be absolved. The outcome of this case is that the first respondent has not succeeded in persuading the court to accept its interpretation of the lease agreements under review. However, to some extent this interpretation was influenced by the applicant's involvement in the B formulation of the inchoate addendum relied upon by the first respondent.

The relief sought in this matter is a *declaratur* interpreting the word "supermarket" as used in the lease agreements. The proper scope and meaning of that word was obviously not self-evident *ex facie* the provisions of the lease agreements. In the absence of any acceptable consensus, recourse to this court for a declaratory order was perfectly proper and C unavoidable. Indeed, none of the parties *in casu* has taken issue with the propriety and necessity of this application.

Having regard to the foregoing factors, I am satisfied that this is a case where the court's discretion should be exercised against making any order as to costs in favour of or against any of the parties. D

ORDER

In the result, it is ordered that:

1. The word "supermarket" in the context of the two lease agreements entered into by the applicant with the first respondent on 19 November 1995 and with the second respondent on 6 March 1996, in respect of E premises situate at the Westgate Shopping Complex, includes the trading floor area and ancillary facilities, *viz.*, reception and pricing areas, kitchens, storerooms, cold-rooms, toilets and such other facilities as are necessary for or ancillary to the business of a supermarket.
2. Each party shall bear its own costs. F

Scanlen & Holderness, applicant's legal practitioners

Atherstone & Cook, first respondent's legal practitioners

Honey & Blanckenberg, second respondent's legal practitioners G

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KINGSTONS LTD v L D INESON (PVT) LTD 2006 (1) ZLR 451 (S)

Citation	2006 (1) ZLR 451 (S)
Case No	Judgment No. S-8-06
Court	Supreme Court, Harare
Judge	Ziyambi JA, Malaba JA and Gwaunza JA
Heard	9 January 2006
Judgment	15 May 2006
Counsel	*L T Biti,* for the appellant *E W W Morris,* for the respondent

Case Type Civil appeal

Annotations Link to case annotations

Flynote

C **Appeal** — *cross appeal — right to — no such right unless respondent seeks a variation of the court order*

Landlord and tenant — *tenant — eviction of — Commercial Premises (Rent) Regulations 1983 — s 22(2) — lessor to have "good and sufficient" grounds for seeking recovery of commercial premises — what evidence* D *is required of landlord to establish claim and of tenant to refute claim — purpose of Regulations — enacted for the protection of tenants from unscrupulous landlords — no protection afforded against genuine landlords desirous of reclaiming their property for their own use*

Practice *and procedure — summary judgment — application — defendant* E *raising triable issue — what is required of defendant before summary judgment may be refused — vague generalities insufficient*

Practice *and procedure — summary judgment — application — evidence which may be led by plaintiff — limited extent to which plaintiff may adduce evidence other than through affidavit*

Headnote

F In summary judgment proceedings, not every defence raised by a defendant will succeed in defeating a plaintiff's claim. What the defendant must do is to raise a *bona fide* defence, or a plausible case, with sufficient clarity and completeness to enable the court to determine whether the affidavit disloses a *bona fides* defence. The defendant must allege facts, which, G if established, would enable him to succeed. If the defence is averred in a manner which appears in all circumstances needlessly bald vague or sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides*. The defendant must take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with vague generalities H and conclusory allegations not substantiated by solid facts.

2006 (1) ZLR p452

The proviso to r 67 of the High Court Rules, 1971 does not give a plaintiff A in summary judgment proceedings a licence to dispense with the provisions of the main rule itself, which clearly prohibits him from adducing evidence except through his original affidavit. The purpose of the proviso is not to enable a plaintiff to reply to respondent's affidavit, otherwise summary judgment proceedings would develop into a court application. The B proviso is therefore to be restrictively interpreted

The Commercial Premises (Rent) Regulations 1983 were enacted for the protection of tenants. However, the protection affordable is meant to be from unscrupulous landlords, not those who are genuine in their desire to reclaim their property for their own use.

In case of ejectment in terms of s 22 of the Regulations, the landlord needs C do no more than assert his reasons in good faith and to bring some small measure of evidence to demonstrate the genuineness of his assertions. It rests upon the lessee who resists ejectment to bring forward circumstances casting doubt on the genuineness of the landlord's claim. In determining what constitutes good and sufficient grounds for the purposes of the section, the court makes a value judgment, which, if D arrived at without caprice, bias or the wrong application of principle, will not lightly be set aside on appeal.

Care must be taken, in a suit for ejectment, not to elevate every alleged dispute of fact into a real issue which necessitates the taking of oral evidence, for to do so might well encourage a lessee against whom ejectment is sought to raise fictitious issues of fact, thereby delaying the resolution E of the matter to the detriment of the lessor.

It is open to a respondent on appeal to contend that the order appealed against should be supported on grounds which were rejected by the trial judge. A respondent cannot, however, note a cross-appeal unless he desires a variation of the order (*dicta per* Centlivres JA in *Western* F *Johannesburg Rent Board & Anor* v *Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355 followed).

Cases cited

Boka Enterprises (Pvt) Ltd v Joowalay & Anor 1988 (1) ZLR 107 (S) G

Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T)

Chidyausiku v Nyakabamba 1987 (2) ZLR 119 (S)

District Bank Ltd v Hoosain and Ors 1984 (4) SA 544 (C)

Film & Video Trust v Mahovo Enterprises (Pvt) Ltd 1993 (2) ZLR 191 (H)

Hales v Doverick Investments (Pvt) Ltd 1998 (2) ZLR 235 (H)

Jena v Nechipote 1986 (1) ZLR 29 (S)

Lincoln Court (Pvt) Ltd v Axis International (Pvt) Ltd & Anor HH-54-94 H

Ziyambi JA

A *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd* S-139-86

Moffat Outfitters (Pvt) Ltd v Hoosein & Ors 1986 (2) ZLR 148 (S)

Newman v Biggs 1945 EDL 51

Omarshah v Karasa 1996 (1) ZLR 584 (H)

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

B *Scotfin Ltd v Afritrade supplies (Pvt)* Ltd 1993 (2) ZLR 170 (H)

Western Johannesburg Rent Bd & Anor v Ursula Mansions (Pty) Ltd 1948 (3) SA 353 (A)

Legislation considered

Commercial Premises (Rent) Regulations, 1983 (SI 676 of 1983), s 22

C High Court Rules, 1971 (RGN 1047 of 1971), r 67

Case information

L T Biti, for the appellant

E W W Morris, for the respondent

Judgment

D **ZIYAMBI JA**: This is an appeal from an order of summary judgment granted by the High Court and a cross appeal by the respondent against the refusal of the High Court to allow the introduction by the respondent of a supplementary affidavit dealing with points raised by the appellant in its opposing affidavit.

The background facts may be stated as follows.

E The respondent is the owner of certain premises situated at Shop 1A, 10 George Silundika Avenue, Harare ("the shop"), leased to the appellant initially for the period 1 July 1994 to 30 June 1995. The lease was thereafter renewed annually at increased annual rentals until 30 June 2003. On 26 March 2003, the respondent gave the appellant three months notice of its intention to occupy the shop for its own business with effect from 1 July 2003 and, by inference, F it required the appellant to vacate the shop not later than 30 June 2003. The property from which the respondent operates its business is adjacent, and contiguous to, the shop. No response was received from the appellant until 27 April 2003 when the appellant through its legal practitioners, advised the respondent that the appellant would not be moving out in terms of the notice as its status was that of a statutory tenant in terms of s 22 of the Commercial G Premises (Rent) Regulations, 1983, SI 676/83 ("the Regulations") and that the respondent had no good and sufficient cause to require the eviction of the appellant.

The respondent issued summons in the High Court against the appellant seeking an order of ejectment and, the appellant having entered an appearance H to defend, proceeded to apply for summary judgment.

Ziyambi JA

It was averred in the affidavit accompanying the application that owing to the A difficult economic climate presently obtaining in Zimbabwe the respondent, who up to 2002 had carried on the business of sales of electrical hardware, had now ventured into the sale of second hand appliances and goods. As a result, the respondent's premises had become 'too cramped' and it was the respondent's intention to extend its business into the shop. All that was B necessary to effect the extension was a door in the wall separating the shop from the respondent's business premises in order to convert the two premises into one shop. The respondent annexed to its founding affidavit photographs which depict the cramped condition of its business premises as well as items of second hand goods displayed for sale by the respondent therein.

The appellant, in its opposing affidavit, denied that the respondent had good C and sufficient cause in seeking its eviction from the leased premises; denied that the respondent sells second hand goods and, therefore, the requirement for more space for its business. It averred that the respondent's intention was not to occupy the shop itself but to lease the shop to another tenant who would pay a higher rental. Accordingly, so it was averred, the appellant was protected by s 22 of the Regulations which provides as follows: D

> " (2) No order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom which is based on the fact of the lease having expired, either by the effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee –
>
> (a) continues to pay the rent due, within seven days of due date; and E
>
> (b) performs the other conditions of the lease;
>
> unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that –
>
> (i) the lessee has declined to agree to an increase in rent; or
>
> (ii) the lessor wishes to lease the premises to some other person." F

At the hearing, the respondent applied, unsuccessfully, to file a supplementary affidavit in which it responded to the denials and averments made by the appellant in its opposing affidavit. On the application for summary judgment, the learned judge found that the respondent had shown good and sufficient grounds for seeking the ejectment of the appellant from the shop. G

Mr *Biti,* on behalf of the appellant, based his submissions on two grounds. Firstly, he submitted that the learned judge was wrong in concluding that the respondent had shown "good and sufficient cause" for seeking the order of ejectment since the evidence produced by the respondent was insufficient to establish sufficient grounds for requiring the order of ejectment. For example, H

Ziyambi JA

A no plan of the proposed alterations of the premises was provided by the respondent.

The learned judge reasoned as follows:

> "It is my considered view that the applicant has shown good and sufficient ground for wanting to eject the respondent and recover its shop. The B respondent has merely denied that the grounds raised by applicant are *bona fide*. The respondent has clearly not raised any triable issue by making bare denials of the applicant's grounds. If such bare denials were to be accepted, very few applications, if any, would be granted for summary judgment. This is so for all the respondent would need to do is to deny whatever applicant says are his good and sufficient reasons.
>
> The respondent in a summary judgment application has to do more than C just raise denials. He has to raise triable issues which consist of averments or denials, which if proved at the trial will constitute a defence. I find that respondent has failed to raise such triable issues in this matter. I am of the view that the applicant clearly set out in detail why it needs to expand its existing second hand goods business and how it proposes to do it. He has suggested that an interlinking entrance between the shops would be D erected giving access from one shop to the other, together with shelving which would be needed. For the respondent to suggest that some plan should have been provided would not amount to raising a triable issue. I have been impressed by applicant's photographs which amply demonstrate the extent to which his current shop is under pressure. I also fail to understand the basis upon which respondent suggests that the E applicant requires the premises for speculative purposes. Such suggestions have not been supported by any evidence.

In the result, I find that the applicant has shown good and sufficient grounds for requiring ejectment of the respondent."

I find no fault with the reasoning of the learned judge.

F It was accepted by Mr *Biti* during argument that the evidence necessary to prove good and sufficient reasons must vary with the complexities of each case. We were referred to the following passage in *Boka Enterprises (Pvt) Ltd* v *Joowalay & Anor* 1988 (1) ZLR 107 (S) at 114G-H to 115A-C:

"In the *Checkers Motors* case *supra*, the view was expressed that if an owner is able to prove that he reasonably requires the use of the leased G premises for the operation of his business, a court would be justified in attaching substantial weight to such factor in determining whether there are good and sufficient grounds for an eviction order. That decision did not, however, lay down that it is incumbent upon the owner to establish that he 'requires' the premises for his personal use, in the sense of 'needs', H though on the particular facts Karoi Farmtech did so require them.

2006 (1) ZLR p456

Ziyambi JA

Each case of an owner genuinely seeking the use of leased premises for A himself must be assessed on its own merits. It will not be enough for him somewhat naively to proclaim: 'The premises belong to me and I now desire to use them for my own purposes.' That would not constitute good and sufficient grounds. The court would want to know the precise use to which it was intended to put the premises. If that use were found to be illegal or frivolous or, having regard to the owner's circumstances, B unreasonable, the eviction of the lessee would be refused."

Mr *Biti* argued that this placed the *onus* on the landlord at all material times to prove that he requires the property for his own use. That may be so but what is the degree of proof required? In the same case at p 114B-C, Gubbay JA, as he then was, remarked:

"In conclusion on this aspect, I do not think it out of place to repeat what C I said in *Checkers Motors (Pvt) Ltd* v *Karoi Farmtech (Pvt) Ltd* S-146-86:

'In cases such as this care must be taken not to elevate every alleged dispute of fact into a real issue which necessitates the taking of oral evidence, for to do so might well encourage a lessee against whom ejectment is sought to raise fictitious issues of fact thereby delaying the D resolution of the matter to the detriment of the lessor.'

Mr *Donagher*'s final argument was that, accepting that the respondents were to be taken as *bona fide* in their desire to establish and operate a general dealer's business at Stand No. 1091, they had nonetheless failed to discharge the *onus* cast upon them by s 22(2) of the Commercial Premises (Rent) Regulations 1983, of showing that they had 'good and E sufficient grounds' for requiring the appellant's eviction.

The phrase 'good and sufficient grounds' is not defined in the Regulations. Save for providing that such grounds exclude the refusal of the lessee to agree to an increase in rent and the wish of the lessor to lease the premises to someone other than the lessee, no guidance is given to the court as to the factors to be taken into account in making its determination. F

In the nature of things, it is hardly possible, and certainly undesirable, for this court to attempt to itemise the grounds which would be regarded as good and sufficient. And no general rule would be likely to cover all the varying circumstances which may arise in determinations of this type. What is clear, however, is that the court is enjoined to exercise a value judgment. G

In the *Checkers Motors* case *supra*, the view was expressed that if an owner is able to prove that he reasonably requires the use of the leased premises for the operation of his business, a court would be justified in attaching substantial weight to such factor in determining whether there are good and sufficient grounds for an eviction order …" H

2006 (1) ZLR p457

Ziyambi JA

A Our courts have held that the landlord need do no more than assert his reasons in good faith and then to bring some small measure of evidence to demonstrate the genuineness of his assertion and it rests upon the lessee who resists ejectment to bring forward circumstances casting doubt on the genuineness of the lessor's claim. See *Film & Video Trust v Mahovo Enterprises (Pvt) Ltd* 1993 (2) ZLR 191 (H); see also *Newman* v *Biggs* 1945 EDL 51 at 54 and 55.

B The learned judge *a quo* attached substantial weight to the fact that the respondent's intention was to use the property for the extension of his business.

In determining what constitutes good and sufficient grounds, the court makes a value judgment which, if arrived at without caprice, bias, or the wrong C application of principle, will not lightly be set aside on appeal. See *Moffat Outfitters (Pvt) Ltd* v *Hoosein & Ors* 1986 (2) ZLR 148 (S). The learned judge, as he was enjoined to do, made a value judgment. It has not been alleged that the learned judge was biased or his finding capricious nor was it alleged that the use to which it was intended to put the property was illegal or frivolous or that the learned judge acted on a wrong principle.

D The two properties are adjacent and contiguous to each other and all that has been alleged by the respondent to be necessary is an archway between the two in order to grant access from the one to the other.

The learned judge was satisfied, upon perusal of the photographs attached to the application, that the respondent's existing premises are too cramped E and that the respondent's desire to occupy the space presently occupied by the appellant was *bona fide*.

It is readily apparent from the photographs of the interior of the respondent's existing premises that there are displayed therein, goods other than electrical components. The photographs depict a wine rack with a bottle of wine, an F antiquated tumble dryer and what appears to be an old oven, among other things.

In view of the above considerations, I find no reason to hold that the court *a quo* was wrong in the conclusion at which it arrived, namely, that the respondent's desire to make use of the shop for the expansion of its business was *bona fide*.

G It was correctly submitted, on behalf of the appellant, that the Regulations were enacted for the protection of tenants. See *Moffat Outfitters supra,* at p 154C-D. However, the protection afforded is meant to be from unscrupulous landlords – not those who are genuine in their desire to reclaim their property H for their own use.

2006 (1) ZLR p458

Ziyambi JA

The second contention advanced by Mr *Biti* was that the appellant having A raised a triable issue, it was wrong of the court to grant summary judgment since the issues raised by the defendant were to be proved at the trial of the matter and not to be determined by the court at summary judgment stage. That in itself means, in my judgment, and it was so submitted in argument by Mr *Biti*, that the court before which an application for summary judgment is B made has no discretion to decide whether or not the defendant has raised a *bona fide* defence but that once a defence is raised which, if proved at the trial, could amount to a defence to the claim, the court must fold its hands and refuse the application for summary judgment.

This would be an untenable situation for, as Mr *Morris* submitted, the debtor who in answer to an application for summary judgment consequent on his C failure to make payment on due date swears in an affidavit that "the debt was paid. I deny that the debt remains unpaid" without producing a receipt or an affidavit of a witness or some other document proving payment, would escape an order for summary judgment on the basis that he has raised a triable issue which must be determined at the trial.

Care must be taken not to elevate every alleged dispute of fact into a real issue D which necessitates the taking of oral evidence, for to do so might well encourage a lessee against whom ejectment is sought to raise fictitious issues of fact thereby delaying the resolution of the matter to the detriment of the lessor: see *Boka Enterprises (Pvt) Ltd* v *Joowalay & Anor* 1988 (1) ZLR 107 (S) at 114. E

The above remarks, though made in a case where the respondent had proceeded by way of "notice of motion" (now known as a "court application") are, in my view, equally applicable in the instant matter where the respondent proceeded by way of summary judgment.

Not every defence raised by a defendant will succeed in defeating a plaintiff's F claim for summary judgment. Thus what the defendant must do is to raise a *bona fide* defence — a "plausible case" — with "sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a *bona fide* defence". He must allege facts which, if established, "would entitle him to succeed". See *Jena* v *Nechipote* 1986 (1) ZLR 29 (S); *Mbayiwa* v *Eastern Highlands Motel (Pvt) Ltd* S-139-86; G *R v Rhodian Investments Trust (Pvt) Ltd* 1957 R & N 723 (SR).

If the defence is averred in a manner which appears in all circumstances needlessly bald, vague or sketchy that will constitute material for the court to consider in relation to the requirement of *bona fides*. See *Breitenbach* v *Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228D-E). H

2006 (1) ZLR p459

Ziyambi JA

A The defendant must take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with "vague generalities and conclusory allegations not substantiated by solid facts". See *District Bank Ltd* v *Hoosain & Ors* 1984 (4) SA 544 (C) at 547G-H; *Mbayiwa* v *Eastern Highlands Motel (Pvt) Ltd supra*; *Hales* v *Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H).

B It is an understatement to say that the appellant's opposing affidavit goes nowhere near to satisfying the above criteria. It simply contained bare denials — that the respondent deals in secondhand goods, that the respondent requires the shop for the expansion of his business and that the premises presently occupied by the respondent are no longer adequate for his business C — and a bald unsubstantiated averment that the "applicant desires to take over the property so that it can enter into a more profitable lease agreement." It gave the court no information with which to assess its defence but was content with "vague generalities and conclusory allegations not substantiated by solid facts". Accordingly, the court *a quo* was correct in granting summary judgment as prayed.

D **THE CROSS APPEAL**

The respondent was the successful litigant in the court *a quo*. It is trite that an appeal can only be noted against the substantive order made by a court and not against the reasons for making, or the process by which it arrives at, the order in question. See *Chidyausiku* v *Nyakabambo* 1987 (2) ZLR 119 (S) E at p 124C-E where Gubbay JA (as he then was), quoted with approval the following passage from the judgment of Centlivres JA in *Western Johannesburg Rent Board & Anor* v *Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355:

> "… it is clear that an appeal can be noted not against the reasons for judgment but against the substantive order made by a court. For instance, F it is open to a respondent on appeal to contend that the order appealed against should be supported on grounds which were rejected by the trial judge: he cannot note a cross-appeal under r 6(4) unless he desires a variation of the order. See *Municipal Council of Bulawayo* v *Bulawayo Waterworks Ltd* 1915 AD 611 at pp 625, 631, 632. In the present case, the notice of appeal is not against the order granted by the Transvaal G Provincial Division but against that part of the reasons for judgment in which it was held that the appellants had acted arbitrarily."

Mr *Biti* submitted that the dismissal of the application to introduce a supplementary affidavit was not a substantive order since it did not affect the H decision which was arrived by the court *a quo*.

2006 (1) ZLR p460

Ziyambi JA

I am inclined to agree. It seems to me that in effect the appeal is against the A process by which the judgment was arrived at, namely, the refusal by the court *a quo* to allow evidence which the respondent sought to lead but which the court found both to be failing to meet the prescribed legal criteria for the admission of such evidence and to be unnecessary in assisting the court to arrive at a decision on the substantive issue in the matter which was whether B or not the respondent had made out a case for the ejectment of the appellant. That was the real issue before the court *a quo* and it was decided in favour of the respondent who has not appealed against the grant of the order of ejectment in its favour. The following words of Gubbay JA in the *Chidyausiku* case *supra*, at p 124G-H are in my view, equally applicable in the instant case.

> "In my view, Mr *de Bourbon*'s objection is well taken. What this court is C being asked to do is not to reverse the order of the learned judge but to cure the procedural defects, by either considering the merits of the application itself or remitting the matter for the learned judge to do so. Once that is done, the appellant will be content whatever the outcome should happen to be."

In any event, as Mr *Biti* contended, the drastic nature of the remedy of D summary judgment makes strict compliance with the provisions of the Rules peremptory.

Rule 67 of the Rules of the High Court provide as follows:

"No evidence may be adduced by the plaintiff otherwise than by the affidavit of which a copy was delivered with the notice, nor may either E party cross-examine any person who gives evidence *viva voce* or by affidavit:

Provided that the court may do any one or more of the following —

(a) …

(b) …

(c) permit the plaintiff to supplement his affidavit with a further affidavit F dealing with either or both of the following –

(i) any matter raised by the defendant which the plaintiff could not reasonably be expected to have dealt with in his first affidavit; or

(ii) the question whether, at the time the application was instituted, G the plaintiff was or should have been aware of the defence."

In dismissing, the application the learned judge said:

"I agree with Mr *Biti*'s submission in his heads of argument that r 67 has been restrictively interpreted by these courts. That proviso, does not give plaintiff a licence to dispense with the provisions of the main rule itself, which clearly prohibits him from adducing evidence except through his H

Ziyambi JA

A original affidavit. The purpose of the proviso is not to enable a plaintiff to reply to respondent's affidavit, otherwise summary judgment proceedings would develop into a court application. See *Lincoln Court (Pvt) Ltd* v *Axis International (Pvt) Ltd & Anor* HH-54-94, *Scotfin Ltd* v *Afri Trade Supplies (Pvt) Ltd* 1993 (2) ZLR 170 (H) and *Omarshah* v *Karasa* 1996 (1) ZLR 584 (H).

B I also fully agree with Mr *Biti*'s further submission that the supplementary affidavit which is being sought to be introduced does not take the applicant's case any further. The applicant claims that it is dealing with issues which it could not reasonably have been expected to deal with in its founding affidavit. The respondent did not introduce anything new in its opposing affidavit. All it did was to question the reasons being C proffered by the plaintiff for the ejectment.

It is my view, therefore, that the proposed affidavit is not introducing any fact nor is it dealing with any new issue. The affidavit in no way advances the plaintiff's case any further. It is a superfluous affidavit and allowing the same will have the effect of reducing the present proceedings to a mere court application. It is my opinion that the issues raised in the application D for summary judgment can be decided without having resort to the supplementary affidavit."

In view of the above, I consider that the trial court's discretion was properly exercised having regard to the evidence placed before it and the conclusion arrived at was appropriate in the circumstances.

For the above reasons, I am of the view that the cross appeal lacks merit and E it is dismissed with costs.

In the result, it is ordered as follows:

The appeal is dismissed with costs.

The cross appeal is dismissed with costs.

F MALABA JA & GWAUNZA JA concurred.

Honey & Blanckenberg, appellant's legal practitioners

G *Wintertons*, respondent's legal practitioners

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Source:
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N E I ZIMBABWE v MAKUZVA 2006 (1) ZLR 462 (S)

Citation	2006 (1) ZLR 462 (S)
Case No	Judgment No. S-24-06
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Malaba JA
Heard	18 May 2006
Judgment	18 May 2006
Counsel	*L T Biti,* for the applicant *G Valla*, for the respondent
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

Employment — *Labour Court — assessment of penalty — when court may substitute its own penalty — disciplinary matter arising before* C *introduction of s 12B of Labour Act [Chapter 28:01] — court having no power to substitute its own penalty*

Headnote

In terms of s 12B(4) of the Labour Act [*Chapter 28:01*], which came into effect in March 2003, the Labour Court is obliged to consider whether there is D any mitigation of the misconduct which would avail to an extent that action other than dismissal would be justified. In effect, the court has the discretion to set aside the decision of a disciplinary authority and substitute its own where an employee is clearly guilty of misconduct. However, this would not apply to disciplinary matters determined before the amendment was made. The amendment does not have retrospective E effect.

Cases cited

Agere v Nyambuya 1985 (2) ZLR 336 (S)

Bell v Voorsitter van die Rasklassifikasieraad en Andere 1968 (2) SA 678 (A) F

Curtis v Johannesburg Municipality 1906 TS 308

Net-One Cellular (Pvt) Ltd v Net-One Employees & Anor 2005 (1) ZLR 275 (S)

Nkomo & Anor v A-G & Ors 1993 (2) ZLR 422 (S) G

Legislation considered

Labour Act [*Chapter 28:01*], s 12B(4)

Case information

L T Biti, for the applicant

G Valla, for the respondent H

Cheda JA

Judgment

A **CHEDA JA**: The respondent in this matter was an employee of the applicant. The exact nature of her employment is not disclosed in the papers, save to say that she was appointed to represent the other employees when some negotiations were going on concerning the allocation of shares to employees when the appellant was taking over the company from Rolls Royce, the previous owner of the appellant company. A confidential document was B forwarded to the appellant's Financial Director by the Operations Director of the appellant.

The contents of the confidential document are relevant to the issue of shares but the envelope containing the documents was addressed to Doris Asher, the Secretary to the Finance Director, and clearly marked *"private and* C *confidential".*

Once it was discovered that these documents had gone missing from Doris Asher's office the employees of the appellant were questioned and none admitted any knowledge of the whereabouts of the documents. The respondent was also asked about the documents and she denied any knowledge. Some plain clothes investigators were called in and a massive search was conducted D in offices and motor vehicles.

The documents were later found in the vehicle of the respondent, hidden under the carpet inside the boot. This background was not contested by the respondent. Such conduct was not taken lightly by the appellant. The fact that the documents concerned shares that the workers were entitled to did not E justify what she did. Once she was aware of the information she could have dealt with the matter in some other way. The appellant then applied for authority from the Labour Relations Officer to dismiss the respondent from employment.

The Labour Relations Officer failed to adjudicate on the matter properly. Her findings clearly contradicted the factual situation revealed on the papers. She F concluded as follows:

> **"OFFICER'S FINDINGS**
>
> 1. That applicant failed completely to prove that respondent had unlawfully removed documents from Doris Asher's office. Doris Asher was not even called to give evidence to this effect. G
> 2. That by first offering a severance package to respondent, applicant shared (*sic*) that he had also a case to answer, why would one offer a package to a thief? It is clear from the submissions that it was the applicant who stole from all employees their right to shares.
> 3. That on the issue of extortion the applicant can refer the case to the H police."

Cheda JA

The above sounds like a finding on a charge of theft. It is again, not clear on A the papers if the charge against the respondent was that of theft, which was referred to the police, or that of misconduct. The appellant had dismissed her for her conduct which was inconsistent with the nature of her employment.

The Labour Officer made no clear finding regarding misconduct. It was then ordered that she be reinstated without loss of pay and benefits from the date B of her suspension or be paid damages agreed between the parties. The appellant appealed to the Labour Relations Tribunal ("the Tribunal") against that decision. The Tribunal concluded, and rightly so, that the letter to the Ministry dated 31 August 2000, that is the application for dismissal of the respondent, clearly explained the conduct for which she was dismissed, and that it was not theft. It also found that the conduct complained of was not C denied by the respondent.

The Tribunal found that the conduct of the respondent, in hiding the documents in her car and failing to own up, was clearly dishonest conduct and was totally contrary to what could be expected from an honest employee, and if left unpunished, could lead to chaos in the work place. I find no fault with this conclusion. On appeal to this court, the above finding was not challenged D by the respondent. What was challenged is the decision that the Tribunal made concerning the respondent's dismissal.

The Tribunal proceeded to state the following in conclusion:

> "Having found that the respondent's conduct was punishable, one has to look at the punishment that was imposed. I am in agreement with Mr E Hwacha's submissions that regard should have been had to s 12B(4) of the Act. The circumstances of this case required Management to closely examine the facts that led to the act of misconduct. The conduct of Management itself was not up to scratch. Given the need for good

corporate governance, the conduct of Management, which conduct was not denied, was not commendable. Management did not act in good faith F and that was a betrayal of the worker's interests. As stated elsewhere in this judgment, the appellant's conduct promoted agitation in the workforce. That, however, is not to suggest that workers should have taken the law into their own hands.

I am convinced that in providing for s 12B(4) in the Act, the Legislature meant to ensure that employers did not rush to dismissals merely because G the acts of misconduct are dismissable."

After making observations about the copies of the same document(s) from the Reserve Bank, the President of the Tribunal went on to say:

"The act of misconduct, although deserving punishment, does not in my view call for the dismissal of the respondent." H

Cheda JA

A The Tribunal then went on to confirm the refusal of authority to dismiss the respondent and substituted its own penalty for her misconduct. This was after it had observed that the referral back to the Senior Labour Officer to consider an appropriate punishment would delay the course of justice. This is the conclusion of the matter which the appellant has now appealed against. In short, the issue is whether the Tribunal had the discretion to set aside the B decision of the disciplinary authority and substitute its own where an employee is clearly guilty of misconduct.

Section 12B(4) of the Labour Act [*Chapter 28:01*] , inserted by Act 17 of 2002, ("the Act") reads as follows:

"(4) In any proceedings before a designated agent or the Labour Court C where the fairness of the dismissal of an employee is in issue, the adjudicating authority shall, in addition to considering the nature or gravity of any misconduct on the part of the dismissed employee, consider whether any mitigation of the misconduct avails to an extent that would justified action other than dismissal, including the length of the employee's service, the employee's previous disciplinary D record, the nature of the employment and any special personal circumstances of the employee."

Two questions immediately arise for consideration. Firstly, was this law at the time this matter arose? Secondly, if it was, were there any circumstances which it can be said the Tribunal took into consideration in the respondent's favour? By then, the appellant had a vested right to have the respondent dismissed E according to the law as it was then, after seeking authority. Such right accrued before Act 17 of 2002 came into operation. It cannot be said that such right did not exist just because the labour officer made the wrong decision on the matter. Section 12B(4) of the Act cannot be applied to this matter retrospectively. See *Curtis* v *Johnnesburg Muncipality* 1906 TS at 311; *Bell* v *Voorsitter van die Rasklassifikasieraad en Andere* 1968 (2) SA 678 (A); *Agere* v *Nyambuya* F 1985 (2) ZLR 336 (S); *Nkomo & Anor* v *Attorney-General & Ors* 1993 (2) ZLR 422 (S) and more recently *Net-One Cellular (Pvt) Ltd* v *Net-One Employees & Anor* 2005 (1) ZLR 275 (S).

Even if the law had changed following the amendment made by s 12B(4), were there any mitigatory factors or special circumstances that the Tribunal was G asked to consider? No information regarding the respondent's nature of employment, record of employment or previous conduct was placed before the Tribunal at all for its consideration, except the fact that she dishonestly concealed the documents in her car and lied, firstly, that she had not seen them, and secondly, that she handed over the documents, yet they were found as H a result of a search. The correct position is that the law at the time had no

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Cheda JA

provision for the Tribunal to exercise any discretion in the form it did. A Accordingly, I find that the Tribunal misdirected itself in concluding that it could substitute its own penalty in terms of s 12B(4) of the Act.

In the result, it is ordered as follows:

1. The finding of guilty of conduct inconsistent with one's nature of employment is to stand. B
2. The penalty imposed by the Tribunal is set aside.
3. The appellant is granted authority to dismiss the respondent in terms of the conditions on which she was suspended.

CHIDYAUSIKU CJ & MALABA JA concurred. C

Honey & Blackenburg, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners D

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/S v TELECEL (PVT) LTD 2006 (1) ZLR 467 (H)

S v TELECEL (PVT) LTD 2006 (1) ZLR 467 (H)

Citation	2006 (1) ZLR 467 (H)
Case No	Judgment No. HH-55-06
Court	High Court, Harare
Judge	Omerjee J & Kudya J
Heard	11 May 2006
Judgment	24 May 2006
Counsel	*D P Drury*, for the appellant *V Shava*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

C **Criminal procedure (sentence)** — *general principles — mandatory minimum sentence — "special reasons" for not imposing such sentence— meaning*

Criminal procedure (sentence) — *general principles — matters which court may take into account — hearsay evidence — admissibility of — case involving unlawful purchase of foreign currency — newspaper articles illustrating difficulty of purchasing currency lawfully — admissibility of*

D **Criminal procedure (sentence)** — *statutory offences — exchange control — purchasing foreign currency without exchange control authority — company buying foreign currency on black market due to unavailability of foreign currency on official market — currency required to service debts and keep company in business — "special reasons" shown for not* E *imposing mandatory minimum sentence*

Headnote

The appellant company was charged with a number of offences under the exchange control regulations. It had bought foreign currency on the unofficial, "parallel", market in order to service its debts outside the country, to pay for capital equipment and make other payments essential F to keep the company in business. In support of its case, the appellant introduced into evidence press articles explaining the practical impossibility of acquiring foreign currency at the official rate and through official sources. The court *a quo* found no "special reasons in the particular case" which would result in the imposition of a fine of not less than the value of the currency involved.

G *Held*, that while the newspaper articles were merely the opinions of the writers, they constituted the type of hearsay evidence which could, in terms of s 334(3)(a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], be received in evidence so that the court could consider the proper sentence to be passed.

H *Held*, further, that, save in those situations where the legislation in question

contains a definition of "special reasons" or "special circumstances" A and that definition specifically confines the determination of such reasons or circumstances to the commission of the offence to the exclusion of the offender, the broad approach is preferable, which allows the court to consider the triad of the offender, the offence and the interests of society, the factors which any sentencer must always bear B in mind, to arrive at an appropriate sentence. The appellant had two choices: either it had to behave in an ethical manner and search for foreign currency on the official market, where it was unavailable, and thereby commit corporate suicide or it had to enter the parallel market and survive. It chose life instead of death. It was necessary for its survival to purchase foreign currency from unauthorised dealers without Exchange Control C authority at parallel market rates. Special reasons therefore existed not to impose the minimum sentence.

Cases cited

Annandale v Material Finance (Pvt) Ltd 2002 (2) ZLR 740 (H)

Echodelta Ltd v Kerr & Downey Safaris (Pvt) Ltd 2002 (1) ZLR 632 (H) D

Meristem Invstms (Pvt) Ltd v NMB Bank Ltd 2002 (2) ZLR 729 (H)

Pickett v Fesq [1949] 2 All ER 705 (KBD)

S v Mbewe & Ors 1988 (1) ZLR 7 (H)

S v Chidziva S-96-82

S v Chisiwa 1981 ZLR 666 (H)

R v da Costa Silva 1956 R & N 369; 1956 (2) SA 173 (SR) E

S v Greatermans Stores (Rhodesia) Ltd 1974 (1) RLR 292 (A)

S v Holmes 1982 (2) ZLR 267 (H)

S v Rawstron 1982 (2) ZLR 221 (H)

S v Stouyannides 1984 (1) ZLR 144 (S)

S v Trucking & Construction (Pvt) Ltd & Anor HH-195-86 F

S v Vera 1976 (2) RLR 228 (A)

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 334(3)(a)

Case information

D P Drury, for the appellant G

V Shava, for the respondent

Judgment

KUDYA J: This is an appeal against the mandatory minimum sentence of $374 251 198, which was equal to the value of the foreign currency that the appellant dealt in without the approval of the regulatory authority, that was imposed by the regional magistrate, sitting at Harare on 1 April 2004, which H

Kudya J

A was predicated on her finding that there were no special reasons, in this matter, for the imposition of a lesser fine.

On 4 March 2004, the appellant (Telecel) pleaded guilty to and was duly convicted of 60 counts of purchasing foreign currency from unauthorised dealers at the parallel market rates without exchange control authority in contravention of s 5(1)(a)(i) of the Exchange Control Act [*Chapter 22:05*] as B read with s 4(1)(a)(i) of the Exchange Control Regulations SI 109 of 1996. The transactions took place between 20 October 2000 and 7 January 2004 and involved an outlay of $374 251 198. At the hearing it was represented by its Managing Director, Mr Antony John Carter (Carter), pursuant to a resolution of its Board of Directors of 20 February 2004.

C The statement of agreed facts was bereft of any details on the domicile and destination of the foreign currency at the stage that it was in the hands of the sellers and before it was purchased by Telecel.

THE EVIDENCE ON SPECIAL REASONS

The evidence on special reasons was led by Carter. The respondent sought D to discredit Carter's testimony through the evidence of Superintendent Joseph Tani and Mr Joseph Jagada, a Chief Law Officer in the Economic section of the Attorney-General's Office.

Carter's testimony went uncontroverted in most respects. He highlighted Telecel's profile. It was established in Zimbabwe in 1998 with a capital injection of US$44 million. Forty per cent of its shareholding is held by local investors E while 60 percent remains in the hands of foreigners. At the material time it had a staff complement of 140 and a substantial, though unquantified, number of downstream dependants who were engaged in selling recharge cards and operating public pay phones. It had 120 000 subscribers, and contributed $1 billion in tax revenues per month with 3½ percent of its turnover going to F POTRAZ, the telephone regulator, as fees, in an amount in excess of $200 million every month.

In a bid to provide a necessary and efficient service, it imported all its network equipment from Siemens Atea of Belgium. From its inception, its appetite for foreign currency was known by the Reserve Bank of Zimbabwe (RBZ) in its capacity as the Exchange Control Authority and by the Zimbabwe Investment G Centre. While its founding managing director was an expatriate, all its other managerial and technical staff were locals.

In mid-2000, it began to experience major difficulties in accessing foreign currency from its bankers to pay off the Siemens loan and to service Siemens' maintenance fees, to purchase more equipment and pay management fees. He H produced Exhibit "3" a schedule with attachments, showing the payments that

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it made in honour of its international contractual obligations. The schedule's A authenticity was confirmed by invoices from its foreign suppliers.

US$686 000 was paid to Siemens to offset the loan representing 3.5 million deutschmarks, which were authorised by the RBZ on 6 April 2000 as shown in Exhibit "4" but could not be paid then due to the unavailability of foreign currency. Telecel owed the following: US$74 500 to PSP Canada Inc on 27 B March 2001, for five sets of recharge cards; US$36 200 to Psitek (Pty) Ltd in Cape Town South Africa on 4 May 2001 for 50 GSM payphones; South African R318 169 to Mithratech SA (Pty) Ltd on 18 April 2002 for 10 000 sim cards; US$40 400 to Global Communications for two Siemens base stations incurred on 8 October 2002 and 27 November 2002 respectively; SA R61 000 to Broadland Investors for 40 000 blank compact discs and two printers, incurred C on 5 November 2002 and 26 November 2002; US$235 045 to Converse of Tel Aviv, Israel, for undisclosed equipment, US$93 150 to Schlumberger for sim cards, incurred on 25 November 2002. There were other amounts which were listed but had no supporting vouchers, like R257 000, and US$170 000 purportedly paid to Telecel International representing two percent of the D appellant's turnover which was due to it as management fees.

The appellant negotiated with its foreign shareholders, who agreed to reduce fees due to them of US$3.4 million and with Siemens, who reduced its annual entitlement to maintenance fees by 250

000 euros. It also contracted a local company to produce recharge cards for its customers, thus saving US$70 000 per month. It carried out all these measures in a bid to mitigate the impact of E the shortage of foreign currency, endemic in the official market, on its operations.

In addition, Carter testified on the foreign currency drought experienced in the country during the period that Telecel committed the 60 offences in question. He produced cuttings of an article in the *Zimbabwe Independent* of 28 June F 2002 entitled "Forex rates skyrocket" which made reference to "runaway parallel market rates" and to a press release of 1 July 2002 by National Foods Ltd, a public company quoted on the local bourse, which explained that salt was in short supply in the market because price controls had impacted negatively on its ability to remain viable as "foreign currency to pay for salt imports has only been available at current parallel market exchange rates as G there is no currency available at the official rate in the market"; and cuttings from the *Daily News* of 8 July 2002, where unnamed exporters complained that the viability of their operations were being negatively affected by the fact that they were sourcing foreign currency on the black market, while their remittances were pegged at the official rate. He also referred to the commentary of the editor of the *Herald* of 28 November 2002 entitled "current forex woes on way out" H

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A in which he praised the measures that had been introduced by the Government to bring sanity onto the foreign exchange market, to plug the loopholes as reflected by the sharp drop in parallel market rates and the recognition therein that 80 percent of all foreign currency transactions were being carried out in that market. The commentary also gave the parallel market rates for the US dollar and pound sterling. Lastly, he produced a cutting from the *Business* B *Herald* of 18 February 2004 which was entitled "Bank chiefs warned: RBZ boss reads riot act to financial institutions". The article alleged that 15 banks had been penalized for fuelling the parallel market but as a gesture of goodwill the governor had lifted and refunded the penalties in exchange for discipline in the financial sector.

C I recognize that these articles were merely the opinions of the writers of those articles, which opinions could not be subjected to cross-examination to establish their veracity. They were the type of hearsay testimony contemplated by s 334(3)(a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as admissible on the basis that, through its failure to challenge them, the respondent was deemed to have consented to their production into evidence. D They made the point, however, that there existed in the country at the material time a creature called the parallel market whose rates were ascertainable. Further, those articles poignantly demonstrated the large existence of the parallel market which appeared to be overshadowing the official market.

The existence of the shadowy and secretive parallel market at the time cannot E be gainsaid. In *Echodelta Ltd* v *Kerr and Downey Safaris (Pvt) Ltd* 2002 (1) ZLR 632 (H), Smith J gave judicial recognition of the existence of the parallel market for forex which had been very volatile over the last 15 months as at 28 February 2002. Again, in *Meristem Investments (Pvt) Ltd* v *NMB Bank Ltd* 2002 (2) ZLR 729 (H), he recognised the pervasive nature of the parallel market at 732, a theme he reverted to in *Annandale* v *Material Finance (Pvt) Ltd* 2002 (2) ZLR 740 (H) at 744. F

It was Carter's further testimony that the drought of foreign currency on the official market drove Telecel to buy it on the parallel market out of necessity and not out of a conscientious effort to defy the regulatory authority or a desire to breach the exchange control regulations. It kept official records of all the transactions, which posed no difficulties for the police when they descended G on it. Business survival through acquisition of equipment and the need to service its customers (subscribers) and international loan obligations, drove it to the more expensive parallel market; and as soon as the official market introduced a viable alternative through the foreign currency auction system in mid January 2004, Telecel ceased operating in the parallel market. It would H not have survived but for dabbling in the parallel market.

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The cross-examination that he was subjected to revealed that Telecel had paid A two of its local directors in foreign currency. Supt Tani could not shed light as to when this had occurred and as to whether they were paid from funds purchased in any one of the 60 counts in question. Mr Jagada's

testimony related in the main to the plea bargaining events that occurred in his office. Both these two witnesses' evidence did not discredit Carter's testimony that B all the foreign currency was purchased outside Zimbabwe and was paid into Telecel's INVIK foreign currency account in Luxembourg. It was from that account that it found its way into the hands of Telecel's creditors. Indeed, Supt Tani could not proffer any one business enterprise, even those which had flighted press releases on their involvement in the parallel market, which had been prosecuted for purchasing foreign currency on that illegal market. C

In the final analysis, Carter's evidence did demonstrate on a balance of probabilities that Telecel breached the law on 60 occasions by dealing in foreign currency transactions on the parallel market without Exchange Control approval. It used that foreign currency to pay for its equipment, foreign loan obligations and management fees which it had no choice but to pay in forex. It played the parallel market in order to survive, to remain in business and to D ensure the livelihood of its employees, both direct and indirect and its subscribers.

TRIAL MAGISTRATE'S FINDINGS

The court *a quo* found no "special reasons in the particular case" before it, which would result in the imposition of a fine of not less than the value of the E currency involved. It took, firstly, the view that Telecel had led no evidence to show that it tried to source foreign currency through authorised dealers and was unsuccessful in that endeavour. Secondly, the trial magistrate took the view that, as the company knew very well that it was transgressing the exchange control regulations, it could not hide behind the façade of the large F crowd of business corporations that were also doing so to justify the morality of its sixty acts. The trial court found those actions a direct and total disregard of the law which could not under any circumstances be dignified by the appellation "special circumstances" especially as both the *Echodelta* and the *Annandale* cases *supra* did not even apply the parallel rate.

On appeal, Mr *Drury* for the appellant attacked the trial magistrate's findings, G while Mr *Shava* for the respondent supported them.

THE LAW

In *S* v *Stouyannides* 1984 (1) ZLR 144 (S) at 152C-D, Gubbay JA, as he then was, stated:

> "Where a finding on whether special reasons exist or not is left by the H

> A lawmaker to the opinion of the trial court, in the absence of a misdirection on the facts upon which that opinion is based, the power of an appeal court to overrule it is curtailed. It will only interfere with the opinion of the trial court if satisfied that the facts do not reasonably justify it. It will not interfere merely because it might have formed a different opinion on the facts."

B The sole issue for determination in this appeal is therefore whether or not the trial magistrate misdirected herself when she ruled that there were no special reasons in this matter.

The law on special reasons has been laid out in this jurisdiction in a variety of cases, both in the Supreme Court and in this court. In *S* v *Vera* 1976 (2) RLR (A) 228 at 232, C MacDonald AJP, as he then was, dealt with the meaning of "special circumstances" under the Law and Order (Maintenance) Act and stated:

> "The court, as the use of the plural in the words 'special circumstances', clearly implies may take into account, in arriving at its decision, the cumulative effect of a number of circumstances. This, too, involves a D value judgment. But the use of the word 'special' is not to be ignored. The clear intention of the legislature is that the circumstances should be out of the ordinary, either in their degree or their nature, and that the court should not accept all mitigating circumstances as constituting 'special circumstances'. A special circumstance will always be a mitigating circumstance but every mitigating circumstance is certainly not a special circumstance within the meaning of the section."

E In *S* v *Chidziva* S-96-82, a contravention of the Precious Stones Act as replaced by Act 1 of 1982 which introduced "special reasons in the particular case" too, Georges JA (as he then was) noted that "special circumstances" and "special reasons" bore the same meaning. He stated:

> "Although the Act used the word 'reasons' it would appear that the factors F to be taken into consideration in considering what are 'special circumstances' would not differ from those to be taken into account in

considering what are 'special reasons'."

In *S* v *Holmes* 1982 (2) ZLR 267 (H) at 271A (which was quoted with approval by Gubbay JA in *Stouyannides* case *supra* at 152H-153A), Pittman J held G that:

> "'special reasons' in s 5(3a), [the precursor to s 5(4)] thus involve an inquiry whether the facts of the case reveal that the moral blameworthiness of the convicted person is less than normal for reasons extraordinary in nature or degree, and thus justify a reduction of the normal punishment."

A debate ensued as to whether the phrase "special reasons in the particular H case" encompassed unusual factors peculiar to the offence only, excluding

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those unusual factors peculiar to the offender (the narrow view) or whether A it encompassed unusual factors peculiar to both the offence and the offender (the wider view).

In *Da Costa Silva* v *R* 1956 R & N 369 (SR) at 372, Beadle J (as he then was) appeared to prefer the wider view, which position was also taken by Pittman J in *Holmes supra*, as did Squires J in *S* v *Chisiwa* 1981 ZLR 666 (H) at 671B. B Dumbutshena J (as he then was), however preferred the narrow view in *S* v *Rawstron* 1982 (2) ZLR 221 (H). In *S* v *Trucking and Construction (Pvt) Ltd & Anor* HH-195-86 Sansole J preferred the wider view. He stated at p 7:

> "Speaking for myself, it seems to me that, save in those situations where the section or the Act in question contains a definition of 'special reasons' C or 'special circumstances' and that definition specifically confines the determination of such reasons or circumstances to the commission of the offence to the exclusion of the offender, the broad approach is preferable. It clearly accords with the philosophy of our jurisprudence on sentencing. Thus, bearing in mind this distinction, the conflict between the two approaches regarding the definition of special reasons or special D circumstances becomes more apparent than real."

See also Ebrahim J's sentiments to the same effect in *S* v *Mbewe* 1988 (1) ZLR 7 (H) at 12H-13A.

It seems to me that the wider view best captures the intention of the legislature. "Case" in my view, covers the triad of the offender, the offence and the E interests of society, the factors which any sentencer must always bear in mind, to arrive at an appropriate sentence.

While a plethora of cases have defined special reasons, it seems to me that a clearer definition was provided in *Mbewe*'s case, *supra* at p 13C-D. It reads:

> "It is apparent that mitigating factors such as 'good character' or 'particular hardship' which are of general application, cannot be taken as 'special F circumstances'. Neither, it would seem, would contrition as evidenced by a plea of guilty to the offence or co-operation on the part of the accused constitute special reasons. However, where for example the accused was out of necessity compelled by circumstances to commit an offence, e.g. forced to drive whilst drunk because of urgent medical necessity, or was *bona fide* ignorant of some statutory provision of the law, such factors G could constitute not only mitigating factors but 'special circumstances' in the case. The above are offered merely as illustrations and are not intended as a closed list."

It is apparent from decided cases, therefore, that the question of special reasons is dependent on the particular facts of the matter before the court. These factors must be abnormal, unusual; extraordinary, in the sense H

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A approximating to a choice between life and death, that is, that the accused person is left with no choice but to break the law in order to save his or her life or the life of some other person. Another factor has to do with the technical breaking of the law as happened in *S* v *Greatermans Stores (Rhodesia) Ltd* 1974 (1) RLR 292 (A) in the sense that the accused breaks the shell but not the essence of law. In other words, the breach of the law is an illusion as opposed B to reality.

THE MISDIRECTION

Mr *Drury* submitted that the trial magistrate misdirected herself by failing to consider that the totality of the evidence laid out before her constituted "special reasons". In her findings, she accepted that the appellant was C experiencing hardships. She also accepted that other business

players were also sourcing foreign currency on the parallel market. She also found as an indisputable fact, a fact conceded to by Mr *Drury* on appeal, that the appellant had not provided any documentary proof that it had applied for foreign currency from the official market and had failed to access it. She did not agree that the appellant was genuinely ignorant of the statutory provisions that it D breached nor did she accept that this was a technical breach of these provisions.

These findings were, in my view, correct. They were factual. What was impeached on appeal was the interpretation she gave to them. Her interpretation was, however, supported by Mr *Shava*. I agree with Mr *Shava* that the E evidence led at the trial clearly demonstrated that the appellant, through the letter of 6 April 2000 from RBZ, knew that it was mandatory that it seeks authority from the central bank to purchase foreign currency, from authorised dealers, for its legitimate needs. While it recorded the 60 transactions, *in casu* this was not done with a view to assist either the regulating authority or law enforcement agencies, but to comply with its own internal accounting and F information processes. After all, parallel marketeers were not openly advertising their places of operation and rates on billboards and the media, as authorised dealers were doing. Their operations must have been shrouded in secrecy and were hidden under cover of other legitimate business operations, as some of the sellers appear to be legitimate business concerns involved in other fields G of endeavour whose core business is divorced from selling foreign currency.

I also agree with the trial magistrate's finding that this was not a technical breach of the law. In my view, the appellant's actions in purchasing foreign currency from unauthorised dealers was the kernel, the substance of the offence. It was not the shell, the form of the offence. It is inconceivable that the Exchange Control Authority would have breached its own laws by H allowing the appellant to purchase foreign currency from unauthorised

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dealers at parallel rates market if the appellant had applied. The trial magistrate A was, therefore, correct for that reason to hold that it was not a technical breach of the law.

She further ruled that the fact that other business players were engaged in the parallel market was not a special reason. It does not seem to me that that conclusion, standing on its own, can possibly be impeached. The appellant, B however, did not adduce this evidence of what other corporates were doing in order to demonstrate that it was merely following the crowd. Nor did counsel for the appellant cite and produce the judgments of Smith J and his opinions and comments thereon in a bid to show that it did not break the law. If those were the appellant's intentions then it would have pleaded not guilty. The appellant pleaded guilty and produced the documents it did for the purpose C of setting up the easel on which it would paint the grim and graphic picture of the economic environment in which it was operating. It was not necessary for it to produce documentation of its own failed applications in order to demonstrate that there was an acute drought of foreign currency on the official market. It let the picture tell the tale more effectively, in fact, than would have been done by any documented words. D

It is my view that the trial magistrate failed to read and therefore interpret the message that that picture conveyed. That picture showed that there was a palpable shortage of foreign currency on the official market in the country. Further that this shortage was abnormal, as 80 percent of the available foreign currency was being traded on the illegal parallel market. It demonstrated that E it was public knowledge, as expressed in the media, that the parallel market was blooming, while the official market was shrinking. Notwithstanding this public knowledge, it appeared that law enforcement agencies and the regulatory authority were incapable of stamping it out. It further showed that, while it was illegal, this illegality was sanitized and whitewashed by referring to it as the "parallel" market instead of the "black market", thus giving it an aura of F legitimacy.

Faced with this hostile environment, the appellant had two choices: either it had to behave in an ethical manner and search for foreign currency on the official market, where it was unavailable, and commit corporate suicide; or it had to enter the parallel market and survive. It chose life instead of death. G

It tried to mitigate its exposure to its foreign currency denominated obligations by pursuing negotiations with its shareholders to forego some of their entitlements to management fees and it contracted a locally based company to produce recharge cards for it. This was, however, inadequate to satisfy its foreign obligations. H

Kudya J

A In any event, it would not make business sense for it to purchase foreign currency on the parallel market, which was not only illegal but was also expensive and risky, but for the fact that it could not be found on the legal, cheaper and clean official market. The appellant did not utilize the foreign currency to purchase trivial trinkets or luxury goods but to purchase capital equipment for expanding and enhancing its business operations and to meet B its foreign contractual obligations which enabled it to retain its staff and subscribers and to contribute to government revenues. The country thus benefited from the foreign currency which might otherwise never have found its way into this country.

The operating economic environment, the use to which the foreign currency C that was purchased was put to and the motive(s) that drove the appellant to the parallel market cumulatively show the existence of abnormal, unusual, peculiar and extraordinary circumstances which drove the appellant to break the law. For it, it was clearly a matter of life and death. It was necessary for its survival to purchase foreign currency from unauthorised dealers without Exchange Control authority at parallel market rates. All these constitute D "special reasons".

I agree with Mr *Drury,* that faced with the evidence adduced by the appellant which was mostly uncontroverted, the court *a quo* misdirected itself in holding that there were no special reasons. That finding is set aside.

SENTENCE

E The effect of finding special circumstances is that we are at large on sentence. The appellant is therefore liable to a sentence which is less than the value of the currency that it purchased.

In sentencing the appellant, regard is had to the plea of guilty and its beneficial effects on the speed and efficient running of the administration of justice. The appellant was a first offender. It cooperated with the police. The special F reasons found lessen its moral blameworthiness and are therefore mitigatory.

I have not lost sight of the aggravating features of the repeated violations of the exchange control regulations on 60 occasions. In *Greatermans Stores* case *supra*, Beadle CJ emphasised that offences involving contraventions of the Exchange Control Regulations involve the economic security of the G State and quoted with approval Lord Goddard CJ in *Pickett* v *Fesq* [1949] (2) All ER 705 at 707G that:

> "If a person commits an offence against this statute, a statute for the breach of provisions of which very heavy penalties have been provided by Parliament, the offence is serious. It is almost impossible to suppose that there could be circumstances which would justify a court in treating such H an offence as trivial."

Kudya J

Mr *Drury* sought to rely on *Greatermans* case for the submission that a A relatively nominal fine be imposed and that all the counts be treated as one for sentence. In that case at p 301D, it was emphasised that, "the sentence imposed in this case is no precedent for sentences in cases where the facts are different". In that case, it was held that the appellant *bona fide* believed that no one in authority objected to what it was doing, as the Department of Commerce permitted trafficking in import permits, while in the present matter B purchasing foreign currency from unauthorised dealers was not permitted. Further in that case, it was conceded and was accepted by the appeal court that the breach was of a technical nature. It was not so in the present matter. The effect of the appellant's actions was to encourage the sellers to stay away from the official market, which further reinforced shortages on that market. C

In sentencing the appellant, I will treat all counts as one for sentence as the manner of execution of the offences and the motive for doing so was the same in all the 60 counts. I do not accept that a nominal fine is called for as I believe that I would be setting the wrong precedent to other persons who found and will find themselves in the same shoes as the appellant.

The appellant is accordingly sentenced to pay a fine of $200 million. D

DISPOSITION

In the result we make the following order:

It is ordered that:

1. The finding that there are no special reasons is set aside and is substituted E by a finding that special reasons exist. These are that the appellant acted out of economic necessity for business survival and used the foreign currency for the benefit of the country as a whole.
2. The sentence imposed by the trial magistrate is set aside and is substituted by one of a fine of $200 million or in default of payment a warrant of F execution against the company's property in that value be issued in the manner contemplated by s 348 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

OMERJEE J concured. G

Gollop and Blank, appellant's legal practitioners

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

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COURTESY CONNECTION (PVT) LTD & ANOR v MUPAMHADZI 2006 (1) ZLR 479 (H)

Citation	2006 (1) ZLR 479 (H)
Case No	Judgment No. HH-63-06
Court	High Court, Harare
Judge	Makarau J
Heard	24 May 2006
Judgment	24 May 2006
Counsel	*T Nyakunika,* for the applicants *T G Kasuso,* for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

C **Arbitration** — *award — review — application — must be brought within time limits stipulated in Arbitration Act — court has no power to extend time or grant condonation*

Practice and procedure — *review — application — to set aside arbitrator's award — application must be made in terms of Arbitration Act and time* D *limits set out in Act must be strictly followed*

Headnote

An application to set aside an arbitral award is made under article 34 of the First Schedule to the Arbitration Act [*Chapter 7:15*] and not under ss 26 and 27 of the High Court Act. An application to set aside an arbitral award is not a review application brought under the High Court Act and E Rules and the Rules of the High Court are not of direct application. It is an application brought strictly in terms of the provisions of the Act and within the time limits set out in the Act. The right to bring an arbitral award before the High Court is not governed by the common law where the court has inherent jurisdiction to control its procedures. It is granted by statute F and the powers of the court to grant that right are expressly provided for in the statute. The provisions of article 34 (3) provide a prescription period within which the right to set aside an arbitral award may be enjoyed. Once the prescription period runs out, the right is lost and no court has been granted the power to revive that right once it has been lost. The general power that the court has to control its procedures does G not extend to granting condonation for the late filing of applications under article 34.

The Act is of international pedigree and certainty and finality of legal proceedings were paramount in its formulation. It would destroy both features if courts of the different countries adopting the Model Law were H to be allowed to extend the period within which an award is to be set aside.

Makarau J

Section 2 of the Act specifically provides that in interpreting the Model A Law, regard shall be had to its international origin and to the desirability of achieving international uniformity in its interpretation and application.

Cases cited

Pamire & Ors v Dumbutshena NO & Anor 2001 (1) ZLR 123 (H) B

Zimbabwe Electricity Supply Authority v Maposa 1999 (2) ZLR 452 (S)

Legislation considered

Arbitration Act [*Chapter 7:15*], First Schedule, Arts 34(1) (2) and (3)

Case information

T Nyakunika, for the applicants C

T G Kasuso, for the respondent

Judgment

MAKARAU J: This is an application for condonation for the late filing of an application for review and an application for the review of an arbitration award made in terms of an agreement between the parties. D

After hearing submissions from counsel, I dismissed with costs the application for condonation and indicated that my reasons would follow. They are these.

It is necessary that I set out the background facts to this application at this stage.

A dispute arose between the parties in connection with an agreement relating E to a certain piece of land. In terms of the written agreement between the parties, the dispute was submitted to an arbitrator, one C A Banda, who on 1 September 2004, made available his award. In terms of the award, the applicants before me were ordered to transfer the piece of land in favour the respondent and to complete the construction of a dwelling on the property in accordance with the agreement between the parties. On 19 January 2005, the respondent F approached this court for the registration of the award. This was duly granted and an order issued on 19 July 2005. In the order registering the award, an order of costs on the scale pertaining to legal practitioner and client was made against the applicants. A notice to tax such costs was served on the applicants, setting down the taxation for 8 November 2005. On 9 November G 2005, this application for condonation and review was filed.

It is common cause that in terms of the Arbitration Act [*Chapter 7:15*] an award made under the Act may be reviewed within three months of being made. This is notably different from the time period

provided for in Order 33 of the High Court Rules 1971 for the filing of an ordinary review. H

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Makarau J

A The applicants were of the mistaken belief that they had to file their application for review in terms of r 256. Be that as it may, the applicants were out of time in bringing this review before the court. The review ought to have been brought not later than 1 December 2004. It was only filed in November 2005, some 11 months out of time.

Before I proceed to examine the reasons proffered by the applicants for the B delay, it is necessary, in my view, to reflect on the law that applies to applications for condonation for the late filing of an application to review an arbitral award made in terms of the Act.

Article 34 (3) of the Act provides:

> "An application for setting aside may not be made after three months C have elapsed from the date on which the party making that application had received the award or, if a request has been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal."

Article 34 (1) provides that recourse to a court against an arbitral award may D be made only by an application setting aside in accordance with paras (2) and (3) of this article. Paragraph (2) provides the various bases upon which the High Court may set aside an arbitral award and is not immediately relevant.

In my view, the provisions of art 34 (3) provided a prescription period within which the right to set aside an arbitral award may be enjoyed. It is my further view that once the prescription period runs out, the right is lost and no court E has been granted the power to revive that right once it has been lost. In entertaining this view, I seek reliance on two legal principles that appear to me to be coinciding.

Firstly, it is trite that the power of the court in relation to arbitral awards is to be found strictly within the language of the statute. Article 34 (3) does not F provide for the extension of the three month period within which an application to set aside an arbitral award may be made. I have searched for a manner of reading the express provisions of Article 34 in a way that confers a power on the part of the court to extend the period. I have fou nd none. In my view, the clear meaning of the article is that an application to set aside an arbitral award may be made not later than 3 months from the date of receipt of the award by G the party intending to have it set aside. No court or other authority is granted power by the statute to extend that period.

In *Pamire & Ors* v *Dumbutshena NO & Anor* 2001 (1) ZLR 123 (H), following *ZESA* v *Maphosa* 1999 92) ZLR 452 (S), I had occasion to hold that an application to set aside an arbitral award is made under art 34 and not under H ss 26 and 27 of the High Court Act. I remain of that opinion.

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Makarau J

Thus, an application to set aside an arbitral award is not a review application A brought under the High Court Act and rules and the rules of this court as set out in Order 33 are not of direct application. It is an application brought strictly in terms of the provisions of the Act and within the time limits set out in the Act.

If at all the court is to hold that it has any power to extend the period provided B for in art 34 (3) of the Act, in my view, that power is clearly not derived from the statute itself but may be searched for in the inherent powers of the court at common law.

But secondly, the right to bring an arbitral award before the High Court is not governed by the common law, where the court has inherent jurisdiction to control its procedures. It is granted by statute, and the powers of the court C to grant that right are expressly provided for in the statute. Thus, the power that the court has in terms of its rules to depart from the rules or to extend times within which certain court formalities have to be observed does not in my view apply. It is common knowledge that the court can extend time within which appeals can be noted for instance. This is so because the court has already D reserved unto itself the power on good cause shown, to extend the time within which an appeal can be noted. Similarly, the court grants condonation for the late filing of a number of applications where the rules have provided that such applications are filed within a certain specified period. Such applications include applications to rescind default judgments and

applications to bring review proceedings. In such instances, the court has again reserved unto itself E the power to grant condonation in deserving cases, where the applications are not filed within the specified time. Where no specific rule of the court provides for condonation, the court exercises its inherent power to control its proceedings and grants condonation so that justice may be done.

The application before me, being an application to set aside an arbitral award in terms of the Act, is not an application initiated in terms of the rules of the F court and thus, the time within which it has to be filed is not provided for in the rules but in the Act. Where a delay has ensued before the matter is properly before the court, it is my view that the court may not properly make recourse to its rules to consider condonation nor may it use its inherent power to control proceedings before it as the matter will not be before it and the legislature has G made specific provisions which do not appear to grant the court any power to extend the time within which such applications can be made.

This is not the only instance in which the general power of the court to grant condonation does not apply. One can think of the provisions of the Prescription Act and of the State Liabilities Act which prescribe times within which certain actions have to be brought. It is common cause that the court does not have H

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Makarau J

A power to extend such periods even on very good cause shown. I would therefore put art 34 of the Act on the same level as such provisions and hold that the general power that the court has to control its procedures does not extend to granting condonation for the late filing of applications under this article.

I am further persuaded to hold as I do by the fact that the Act is of international B pedigree and certainty and finality of legal proceedings were paramount in its formulation. It would destroy both features if courts of the different countries adopting the Model Law were to be allowed to extend the period within which an award is to be set aside. Section 2 of the Act specifically provides that in interpreting the Model Law, regard shall be had to its international origin and C to the desirability of achieving international uniformity in its interpretation and application.

On the basis of the application of the above two principles, I would hold that the right to have set aside an arbitral award under article 34 is irrevocably lost if it is not brought within 3 months of the date of receipt by the party intending to have it set aside.

D Assuming that I erred in dismissing the application on the above basis, I still would have dismissed the application on another basis.

Firstly, the reason given for the delay is far from impressive. The applicant alleges that his retiring legal practitioners had a dispute with the arbitrator over the arbitrator's fees, and pending settlement of this dispute the reasons for E the award were withheld. It is common cause that the dispute relating to fees was settled in October 2004 and thereafter no reason has been advanced as to why the application to set aside the award was not filed.

Secondly, the applicants have sought to argue that they cannot afford to complete the building of the agreed residence on the stand purchased by the F respondent and thus, for reasons of financial incapacity, the arbitrator should not have compelled them to put up the residence. Were such a defence acceptable at law, bad bargains would never found valid contracts and the doctrine of sanctity of contract would have no meaning in our law of contract.

Thus, even if the applicant had the right to request this court to extend the period stipulated in the Model Law, he would not have persuaded me that his G circumstances are such that the indulgence can be granted. He has neither good reason for the delay nor a *bona fide* defence to challenge the recognition.

It is on the basis of the above that I dismissed the application for condonation H on the turn.

2006 (1) ZLR p484

Makarau J

Mutezo & Company, applicants' legal practitioners A

Mantsebo & Partners, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/MUWALO v MUGUNGA 2006 (1) ZLR 485 (H)

MUWALO v MUGUNGA 2006 (1) ZLR 485 (H)

Citation	2006 (1) ZLR 485 (H)
Case No	Judgment No. HH-60-06
Court	High Court, Harare
Judge	Gowora J & Bhunu J
Heard	26 January 2006
Judgment	14 June 2006
Counsel	*D Matimba,* for the appellant Respondent in person
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Customary law — *prescription — not applicable to claim under customary law — claim may be brought at any time if it is clear and acceptable — effect of delay in bringing claim*

Prescription — *extinctive — not applicable to matter determinable in terms of customary law — court having no discretion to contrary*

Headnote

D The wording of s 3(2) of the Prescription Act [*Chapter 8:11*] is couched in peremptory terms. The Act does not apply to any legal dispute determinable in terms of customary law. It admits of no exception, nor does it confer any discretion on the part of the court.

E However, delay in bringing an action under customary law will react detrimentally to a plaintiff unless his claim is clear and acceptable as to render the delay reasonable. When an obligation is disputed, delay vitiates to vanishing point any claim not brought within a reasonable time.

Cases cited F

Moyo v Moyo 1999 (2) ZLR (H)

Pasipanodya v Muchariwa 1997 (2) ZLR 182 (S)

Legislation considered

G Matrimonial Causes Act [*Chapter 5:13*], s 7(1)

Prescription Act [*Chapter 8:11*], s 3(2)

Case information

D Matimba, for the appellant

H Respondent in person

Bhunu J

Judgment

BHUNU J: At the commencement of this appeal hearing, Mr *Matimba*, counsel A for the appellant, sought a postponement of this matter to a later date. He sought the postponement on the basis that his instructing attorney had not furnished him with the record of proceedings as he had failed to obtain a copy from the magistrates court. Without the record of proceedings he was unable to prepare heads of argument and was ill disposed to make any meaningful B submissions without having had sight of the record of proceedings.

The application for a postponement was vigorously opposed by the respondent. She argued that the application for a postponement was only a delaying tactic calculated to prejudice her. She pointed out that it was the appellant who had appealed. He was therefore, in the driving seat and ought to have put his house in order. She further argued that the matter has been C dragging on and on for a long time to her prejudice. Although she is the defendant she has timeously filed her heads of argument and is ready to proceed with the hearing. Having listened to both parties we observed that if the appellant's legal practitioners could not find a copy of the record from the magistrates court, with due diligence they could have obtained a copy from this court's registrar. This they did not. D

It was therefore, remiss of the appellant's legal practitioners to sit back and do nothing about obtaining a copy of the record with the full knowledge that the registrar had copies of the record. Of course, the record of proceedings could not be found at the magistrates court because it had been forward to this court for the appeal hearing. In the interest of the due administration of E justice we however decided against dismissing the appeal on a technicality. We accordingly stood down the matter to the afternoon to enable counsel to peruse the record before addressing us. We now proceed to determine the matter on the merits.

The appeal is against the decision of the magistrate delivered on 13 January 2003. The facts giving rise to this matrimonial dispute are to a large extent F common cause.

The undisputed facts are that the parties contracted a registered customary law marriage sometime in 1971. At the material time, they were both employed by the same employer as domestic workers. The appellant was employed as a cook while the respondent was employed as a housemaid.

In 1977, the parties rented the disputed property being house No. 2 Kasipiti G Way, Dombotombo Township, Marondera from the Municipality. To qualify for the allocation of the house, the Municipality required that the parties should produce a marriage certificate as proof of marriage.

The parties duly complied with that requirement. The house was however subsequently offered to them for sale on a rent to buy basis. They obliged and H

Bhunu J

A the marriage endured happily until sometime in 1984 when the parties went separated for reasons which are not relevant to the determination of this case. The marriage was however officially annulled in 1988.

Following the annulment of the marriage, the respondent made no immediate claim for division of their matrimonial property. She belatedly made the claim about eight years later in 1996.

B At the hearing, the appellant objected to the respondent's claim on the basis that it had prescribed in terms of the Prescription Act [*Chapter 8:11*].

Placing reliance on *Pasipanodya* v *Muchariwa* 1997 (2) ZLR 182 (S), the trial magistrate correctly ruled that the Prescription Act does not apply to any legal dispute determinable in terms of customary law. That ruling is unassailable C considering that s 3(2) of the Act provides that:

> "In so far as any right or obligation of any person in relation to any other person is governed by customary law *this Act shall not apply*" (emphasis supplied).

It must be noted that the section is couched in peremptory terms. It therefore D admits of no exception nor does it confer any discretion on the part of the court. It is a command which must be obeyed.

While admitting that the Prescription Act does not apply to matters determinable in terms of customary law Mr *Matimba* sought to defeat the respondent's claim on an ingenious argument based on the decision in *Moyo* v *Moyo* 1999 (2) ZLR 265 (H).

E In *Moyo*'s case *supra*, there was a delay of about nine years in claiming division of matrimonial property following divorce. In that case, the High Court in dismissing the plaintiff's claim held that after divorce there must be some time limit within which a divorced spouse can institute proceedings for division of matrimonial property. If the property being held is owned or jointly F owned by the other spouse, the spouse holding the property should expect a claim after the divorce. But in respect of the other property a spouse is entitled to start again and may remarry and it is disruptive for the other spouse many years later to start claiming that property, some of which may have been disposed of.

In short, Cheda J (as he then was) ruled that the plaintiff must bring his claim G within a reasonable time otherwise he or she is barred. He did not say the claim would have prescribed in terms of the Prescription Act.

In the *Pasipanodya*'s case *supra*, there had been a delay of about seven years in bringing the claim for division of the matrimonial property. In the case at H hand, there has been a delay of eight years.

Bhunu J

We therefore find ourselves in between the *Moyo* and *Pasipanodya* cases A *supra*.

The starting point is that both cases acknowledge that the concept of prescription is unknown to customary law. That much is beyond question.

The History and Extent of Recognition of Tribal Law in Rhodesia at p 126 B explains the principle as follows:

> "There is nothing in African Law analogous to the Civil Law of prescription: Ex p *Remigio* 1959 SRN 660. Delay in bringing an action reacts detrimentally to the plaintiff unless his claim is clear and acceptable.
>
> When an obligation is disputed delay vitiates to vanishing point any claim not brought within a reasonable time …" C

And at p 127:

> "Delay in bringing an action never affects the right to institute proceedings and no right may be acquired by long possession under customary law."

In my view, based on the authorities, the issue to be resolved is whether the plaintiff's claim is clear and acceptable so as to render the delay of eight years reasonable D .

The plaintiff's claim is that she is entitled to a division of the matrimonial home because she contributed towards its acquisition during the subsistence of the marriage. She made substantial contributions because at the material time she was employed earning more or less the same as the defendant.

The basis of her claim is therefore clear and reasonable. She may very well have E found it difficult to claim division of the matrimonial property in circumstances where she had deserted the defendant. Viewed from that angle, the reason for delay of eight years appears to be reasonable.

That being the case the trial magistrate must be commended for dismissing the plaintiff's claim on movables whose existence were not clear due to wear and F tear and loss through the passage of time. Her claim to the immovable property however, remained clear, solid and unshakeable.

For that reason, we come to the conclusion that despite the delay of eight years, the plaintiff was entitled to bring her claim for a division of the matrimonial home.

In saying that, it is pertinent to note that s 7(1) of the Matrimonial Causes Act G [*Chapter 5:13*] authorises a court to make an order with regard to the division of the matrimonial property *at any*

time after divorce. The section reads:

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

Bhunu J A

> (a) the division, apportionment or division of the assets of the spouses including an order that any asset be transferred from one spouse to the other" (my emphasis).

It is self evident that the enabling Act empowers the court to distribute matrimonial property at any time after divorce. That being the case, we proceed to determine the appeal on the merits.

B Lot Mambiya, the applicant's nephew and witness confirmed that the house was purchased in 1983 and the respondent left the appellant in 1984. He made it clear in his evidence that the respondent left after the house had been acquired.

Having regard to the unassailable evidence staring him straight in the face, B it was naive of the appellant to claim that he acquired the disputed house on his own and that it is his sole property. That claim goes against the weight of evidence and is clearly unsustainable.

Both parties having been employed as domestic workers their wages could not have been significantly different. They must therefore, have pooled their resources together for the benefit of the common household. That being the D case it does not seem to matter who paid for what. What matters is that they were contributing to the common household. While the appellant was paying for the house, the respondent was paying for the other amenities of life for their common good.

It is common cause that at the time of separation in 1984 the house had not E been fully paid for. The appellant subsequently paid off the balance after the respondent had left. He also took care of and maintained the house in the absence of the respondent but he also benefited from the use of the property during that period.

Having regard to the above facts, the trial magistrate considered in his F discretion that the appellant's contribution was 60 per cent and that of the respondent 40 per cent. We are unable to fault that assessment as it is based on sound reasoning and is backed up by unassailable proven facts.

Initially, the plaintiff was claiming various movable properties from the appellant. The trial magistrate dismissed that claim on the basis that the property had not been proven to be still in existence. The property could have G been disposed of during the subsistence of the marriage or destroyed through wear and tear.

Neither party appears to have contested that ruling regarding the movables. The contest appears now to be concerned with the disputed immovable H property being No. 2 Kasipiti Way, Dombotombo Township, Marondera.

Bhunu J

From the foregoing, it is our unanimous view that there is no merit in this A appeal. The magistrate's decision is beyond reproach.

It is accordingly ordered that, the appeal be and is hereby dismissed with costs.

GOWORA J concurred. B

Mafuka & Associates, the appellant's legal practitioners

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Source:

CITY OF HARARE v HARARE MUNICIPAL WORKERS UNION 2006 (1) ZLR 491 (H)

Citation	2006 (1) ZLR 491 (H)
Case No	Judgment No. HH-86-06
Court	High Court, Harare
Judge	Chitakunye J
Heard	19 June 2006
Judgment	19 June 2006
Counsel	*J S Mandizha,* for the applicant *J Mambara,* for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

C **Arbitration** — *award — review — grounds — allegation that award contrary to public policy — approach to be adopted by courts — need to construe public policy narrowly — onus on applicant — what applicant must show*

Headnote

D In cases where it is sought to set aside an arbitral award on the grounds that it is contrary to public policy, the approach to be adopted is to construe the defence restrictively so as to preserve and recognise the basic objective of finality in all arbitrations and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated (*dicta per* Gubbay CJ in *ZESA* v *Maposa* 1999 (2) ZLR 452 at E 465 followed).

In seeking to set aside an arbitral award on the grounds that it is contrary to public policy, it is for the applicant to show that some fundamental principle of the law or morality or justice was violated. This is especially so, in that in terms of articles 34 and 36 of the Model Law of Arbitration the court does not exercise any appeal power and neither upholds nor F sets aside nor declines to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond a mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider G that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it.

Cases cited

Catering Employers Assn of Zimbabwe v Deputy Chrmn, Labour H *Relations Tribunal & Anor HH*-206-00

Chitakunye J

Cone Textiles (Pvt) Ltd v Redgment & Ors 1983 (1) ZLR 88 (S) A

Zimbabwe Electricity Supply Authority v Maposa 1999 (2) ZLR 452 (S)

Legislation considered

Arbitration Act [*Chapter 7:15*], First Schedule, arts 34(2)(b)(ii), 34(5) & 36 B

Case information

J S Mandizha, for the applicant

J Mambara, for the respondent

Judgment

CHITAKUNYE J: The applicant applied for the setting aside of an arbitral award of 13 October 2005 in favour of the respondent. The applicant's main C ground was that the substantive effect of that award makes it contrary to public policy.

The applicant argued that a proper appreciation of the substantive matter of the award, its substantive effect, its impact on the welfare of the general citizenry of Harare, its impact, inevitably, on the nation, in short, its practical financial, social, political and economic welfare of the capital city, and the D nation, makes it contrary to public policy.

The respondent contended that the substantial effect of the award is not contrary to public policy.

Both parties appeared agreed that the major contention regarded the applicant's ability to pay the increased salaries. There is no dispute that the arbitrator gave E both parties the opportunity to fully argue their cases before making the determination. In that determination, the arbitrator, as acknowledged by the applicant, referred to the need to cater for the welfare of both parties. It is common cause that the respondent was demanding a 330 percent salary increase. It was instead awarded 120 percent.

On p 9 of the award under "Findings", the arbitrator articulated very well how F he eventually came to the decision he did. He recognised the need for an employer to award meaningful increments, increments that must be seen to alleviate his employees' hardships. He also recognised the need for employees not to make the sort of demands that the employer clearly cannot meet. Further on, he lamented that "the fact that" in this case "the employer's stance of G offering nothing on all but one of the allowances is tantamount to refusing to face the reality on the ground."

It is thus necessary to ascertain whether the award that the arbitrator eventually made can be said to be contrary to public policy in light of what was presented before him and his analysis thereof. H

2006 (1) ZLR p493

Chitakunye J

A In council's heads of arguments, it is clear that what constitutes public policy is not clearly defined. It must however, be narrowly construed. A number of decided cases were cited.

In *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (S) at 465, Gubbay CJ opined that:

> " B In my opinion, the approach to be adopted is to construe the public policy defence as being applicable to either foreign or domestic awards restrictively in order to preserve and recognise the basic objective of finality in all arbitrations, and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated."

In *Cone Textiles (Pvt) Ltd* v *Redgment & Ors* 1983 (1) ZLR 88 (S) at 89, C Fieldsend CJ stated that:

> "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 that 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."

D Article 34(2)(b)(ii) of the Model Law, which is part of the Arbitration Act [*Chapter 7:15*], provides that an arbitration award may be set aside by the High Court only if the award is in conflict with the public policy of Zimbabwe.

Article 34(5) points at what may meet the above as:

(a) the making of the award was induced or effected by fraud or corruption; E or

(b) a breach of the rules of natural justice occurred in connection with the making of the award.

One may also allude to the decision as being repugnant to basic notions of justice, such as to say the arbitrator virtually considered extrinsic factors and F not those before him in arriving at his decision.

In this case, neither (a) nor (b) above is alleged. Instead it is the substantive effect of the award being contrary to public policy of Zimbabwe.

In *ZESA* v *Maposa supra* at p 465, the court accepted that "the substantive matter of the award may also make it contrary to public policy. For example, an arbitral award which, after consideration of the merits of the dispute, G endorsed an agreement to break up a marriage, or dealing in dangerous drugs or prostitution, on any view of the concept would be in conflict with the Public Policy Zimbabwe."

I associate myself with the above view. It is for the applicant to show that some fundamental principle of the law or morality or justice was violated. This is H especially so in that in terms of Article 34 and 36 of the Model Law of

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2006 (1) ZLR p494

Chitakunye J

Arbitration this court does not exercise any appeal power and neither upholds A or sets aside or declines to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond a mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in B Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. See p 466 *ZESA* v *Maposa supra* at 466.

In *Catering Employers Association of Zimbabwe* v *Deputy Chairman, Labour Relations Tribunal & Anor* HH-206-00, Chinhengo J emphasized the point when he said that: C

> "Even where the arbitrator made a finding that was erroneous or unreasonable the court should not interfere but it could only interfere if the decision was attended by a gross irregularity or it resulted in a failure of justice."

A perusal of the award in question reveals that the arbitrator carefully considered the interests of both parties as portrayed by the parties before him. The applicant's argument of inability to pay was well considered. There is D nothing to fault the arbitrator's reasoning in this regard. The substantive effect of the award was simply to awaken the applicant to the realities of today's economy.

The applicant's argument before this court seemed to be more directed at the category of employees represented by respondent and arguing that respondents should not concern themselves with what is being awarded to E other employees or officers of applicant. But surely, the respondents are entitled to point out that those other categories of employees or officials are getting astronomical salaries which may in fact be eating more into the applicant's revenue than the paltry salaries and allowances the lowly paid workers are getting? The applicant appeared not to be comfortable to deal with F this argument and appeared content to brush it aside. But surely if you have an entity that pays astronomical salaries to its top heavy management/officers but that same entity is reluctant to pay its lowly paid workers a living wage, can such an entity sincerely cry bankruptcy if ordered to pay its lowly graded workers a meaningful salary? There was simply nothing to fault the arbitrator in arriving at the decision he gave on what was placed before him. G

I accordingly, rule that no meaningful case has been made for the setting aside of the Arbitrator's award.

The application is dismissed with costs.

Mandizha & Co, the applicant's legal practitioners

J Mambara & Partners, the respondent's legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/AUTOMOTIVE & ALLIED WORKERS' UNION v MOTOR TRADE WORKERS' UNION 2006 (1) ZLR 495 (S)

AUTOMOTIVE & ALLIED WORKERS' UNION v MOTOR TRADE WORKERS' UNION 2006 (1) ZLR 495 (S)

Citation	2006 (1) ZLR 495 (S)
Case No	Judgment No. S-18-06
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Malaba JA
Heard	16 May 2006
Judgment	19 June 2006
Counsel	*R Matsikidze*, for the appellant *T D Muskwe*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

C **Employment** — *trade union — registration — matters to be taken into consideration by Registrar — discretion vested in Registrar — when discretion may be interfered with*

Headnote

The appellant union objected to the registration of the respondent union in D terms of s 45 of the Labour Act [*Chapter 28:01*]. Both unions represented workers in the same industry. The respondent was nonetheless registered. An appeal to the Labour Court failed. On appeal to the Supreme Court:

Held, that when a trade union applies for registration, the Registrar is obliged to take into account all the considerations listed in s 45 of Act. Provided he does so, whether he came to the correct conclusion after taking into E account the relevant factors is an issue of the exercise of the registrar's discretion. The exercise of the registrar's discretion can only be interfered with on appeal on the basis that it was so grossly unreasonable that no registrar, applying his mind to the facts before him, could have come to the conclusion that he did without having taken leave of his senses. *In casu*, the Registrar had properly considered the factors he was required F in law to consider; his conclusion was not grossly unreasonable and the court would not interfere.

Case cited

Agricultural Labour Bureau & Anor v Zimbabwe Agro-Industry Workers Union 1998 (2) ZLR 196 (S)

Legislation considered G

Labour Act [*Chapter 28:01*], s 45

Case information

R Matsikidze, for the appellant

H T D Muskwe, for the respondent

Chidyausiku CJ

Judgment

CHIDYAUSIKU CJ: This is an appeal against a judgment of the Labour Court. A The appeal is made in terms of s 92D of the Labour Act [*Chapter 28:01*] ("the Act"). The appellant is a trade union which has been in existence since 1963 and is duly registered in terms of the Act. The respondent is a newly registered union, representing members of the same trade as those represented by the appellant union.

The respondent union was registered on 15 June 1999 by the Registrar of Trade B Unions ("the registrar") following its application for such registration. The appellant objected to the registration of the respondent. The respondent was, however, registered despite the objection. The appellant was aggrieved by the registration of the respondent and appealed to the Labour Court for the registration to be set aside. The appeal was dismissed by the Labour Court. C Aggrieved by that decision, the appellant appeals to this court.

The grounds of appeal to the Labour Court are essentially the same as the grounds of appeal to this court. The grounds of appeal to this court are set out in the notice of appeal filed of record, which provides in the relevant part as follows: D

"1. The learned President of the Labour Court erred in including (concluding?) that the Registrar of Trade Unions complied with mandatory provisions of s 45 of the Labour Relations Act [*Chapter 28:01*] in registering the respondent trade union when (the) facts on record indicate that he did not comply with these, particularly as he:

2. (i) accepted an unverified membership of 5 000 which he himself E doubted;

(ii) did not elicit the Minister of Labour's comments and attitude to the respondent's application; F

(iii) did not consult and elicit the comments of the Minister of Transport and Energy's comments (*sic*) and attitude to the respondent's application;

(iv) did not consider and address the objections to the respondent's application by important relevant players in the motor industry;

(v) did not consider the desirability (of) affording the majority of employees and employers within the motor industry effective representation in negotiations affecting their rights and interests; G

(vi) did not consider seriously the desirability of reducing to the least possible number the number of trade unions in the industry as envisaged by statute.

3. The registration of the respondent as a trade union may only be done in terms of and subject to strict compliance with mandatory statutory provisions. As this was not done the learned President of the Labour H Court ought to have set aside the registration."

Chidyausiku CJ

A Thus, in essence the appellant contends that the registrar did not comply with s 45 of the Act when he registered the respondent. The Labour Court concluded that there was compliance with s 45 of the Act. The appellant persists in its contention that there was no such compliance.

Section 45 of the Act provides as follows:

B **"45 Considerations relating to registration, certification or variation, suspension or rescission of registration or certification of trade unions or employers organisations**

(1) In any determination of the registration of a trade union or employers organisation or of the variation, suspension or rescission thereof, the Registrar shall: C

(a) take into account –

(i) representations by —

A. employers and employees who might be affected; and

B. the Minister and any other Minister whose Ministry or Department may be affected; and D

C. any member of the public or any section thereof likely to be affected; and

(iii) the desirability of affording the majority of the employees and employers within an undertaking or industry effective representation in negotiations affecting their rights and interests; and

(iv) E the desirability of reducing, to the least possible number, the number of entities with which employees and employers have to negotiate; and

(vi) whether representations made in terms of subsection (3) of section *thirty-nine* or at any accreditation proceedings in terms of section *forty-one* indicate that the trade union F or employers organisation will not be substantially representative of the employees and employers it proposes to represent; and

(b) ensure compliance with the following requirements:

(i) a trade union shall not represent employers; G

(ii) an employers organisation shall not represent employees other than managerial employees; and

(iii) the constitution of a trade union or employers organisation shall not be inconsistent with this Act.

(2) Where any person asserts that there should, in any particular case, H be any departure from the general rule referred to in subparagraph (iv)

2006 (1) ZLR p498

Chidyausiku CJ

of paragraph (a) of subsection (1), the burden of proving such A assertion shall lie on such person."

The appellant's first ground of challenge is that the registrar erred in accepting the unverified membership of the respondent. The respondent, in its application for registration, stated that it had a membership of 5 000. The appellant never disputed the authenticity of the membership of the respondent at the registration B hearing. In fact, none of the stakeholders questioned the authenticity of the membership of the respondent. The registrar commended the respondent for having raised its membership from about 1 500 members in June 1998 to 5 000 members at the time of accreditation. The registrar attributed this phenomenal increase in the membership to the hard work of the respondent. There is nothing on the record to suggest that the membership of the respondent is C not genuine. If the appellant wanted the registrar to verify the membership of the respondent, then it should have asked the registrar to do so. It is not open to the appellant to impugn the determination of the registrar on the basis of an issue it never raised at the determination of the registration. Accordingly, this challenge has no merit.

The appellant also contends that the views of the Minister of Labour and D Social Services and those of the Minister of Transport and Energy were not sought and considered, as is required in terms of s 45 of the Act. The record clearly shows the opposite. Both the Ministers approved the registration of the respondent. The Ministers' approvals are on the record.

In paras 2(iv), (v) and (vi) of the notice of appeal, the appellant contends that E the registrar did not consider or address the objections to the respondent's application by important players in the motor industry and did not consider the desirability of affording the majority of employees and employers within the motor industry effective representation in negotiations affecting their rights and interests. A perusal of the record of the proceedings of the registration, and in particular the reasons of the registrar for approving the F registration of the respondent, clearly shows that he took into account the factors it is alleged he did not take into account.

This same point was raised in the court *a quo*. The learned President of the Labour Court in her judgment at pp 4-7 quoted extensively from the reasons for registration of the registrar before concluding as follows: G

> "The registrar's conclusions show that the registrar did as much as possible to comply with the requirements of the Act. It may be worth referring to the Amtec members as an example of employees who needed representation but did not have access to representation before the respondent union was registered. Such representation can now be obtained from the respondent." H

2006 (1) ZLR p499

Chidyausiku CJ

A Further on in her judgment, the learned President of the Labour Court cited ss 33, 34 and 45 of the Act and concluded:

> "A look at the registrar's considerations when he was seized with this application will show that the registrar acted in terms of section 45 of the Act.
>
> Having commented on the procedure followed by the registrar in having B the respondent registered, what remains is to say whether or not the registrar acted erroneously. The registrar made the necessary consultations in terms of the Act. He specifically commended (commented?) upon the provisions of s 45 of the Act and concluded that it was desirable under (in?) the circumstances to have the respondent registered. I see no error in the manner he conducted the registration. The C registration is confirmed."

The President of the Labour Court for the foregoing reasons dismissed the appeal.

In my view, the reasoning and the conclusion of the learned President of the Labour Court cannot be faulted. It is quite clear from the record that the D registrar, before registering the respondent, took into account everything that was required to be taken into account in terms of ss 33, 34 and 45 of the Act. Whether the registrar came to the correct conclusion after taking into account the relevant factors is an issue of the exercise of the registrar's discretion.

The exercise of the registrar's discretion can only be interfered with by this court and the court *a quo* on the basis that it was so grossly unreasonable that E no registrar, applying his or her mind to the facts before him or her could have come to the conclusion that he or she did without having taken leave of his or her senses. There is absolutely nothing indicative of that on the record.

Mr *Matsikidze*, for the appellant, cited *Agricultural Labour Bureau & Anor* v *Zimbabwe Agro-Industry Workers' Union* 1998 (2) ZLR 196 (S) as authority F for his submission that this matter be remitted to the registrar for further consideration. The two cases are distinguishable on the basis that in the *Agricultural Labour Bureau* case *supra* the reasons of the registrar were so inadequate as to amount to no reasons at all, while in the present case the reasons could have been more detailed and lucid but they sufficiently indicate that the registrar did consider the factors that he was required in law to G consider before arriving at the conclusion that he reached. The conclusion he reached cannot possibly be characterised as grossly unreasonable.

In the result, I hold that this appeal is devoid of any merit and it is accordingly H dismissed with costs.

2006 (1) ZLR p500

Chidyausiku CJ

CHEDA JA & MALABA JA concurred. A

Sinyoro & Co, appellant's legal practitioners

Muskwe & Associates, respondent's legal practitioners B

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Source:
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KAZIZI v KAZIZI 2006 (1) ZLR 501 (H)

2006 (1) ZLR p501

Citation	2006 (1) ZLR 501 (H)
Case No	Judgment No. HH-69-06
Court	High Court, Harare
Judge	Makarau J & Hlatshwayo J
Heard	18 May 2006

Judgment 21 June 2006

Counsel Applicant in person
Respondent in person

Case Type Civil appeal

Annotations Link to case annotations

Flynote

Family law — *husband and wife — property rights — matrimonial property —* C *possibility of a future divorce — spouses not bound to retain property acquired during the subsistence of marriage for distribution inter se in the event of a divorce sometime in the future*

Practice *and procedure — application — ex parte application — absence of good reasons therefor — applications should not be brought ex parte in these circumstances*

D **Practice and procedure** — *interdict — restraining a party from disposing of assets of a marriage — in effect amounting to a permanent and perpetual interdict — court erred in granting such an interdict*

Headnote

In an action before the magistrates court, the respondent alleged that her E husband, the appellant, had sold a beast belonging to the matrimonial estate. She was fearful that the appellant would sell more livestock and other property belonging to the estate. *Ex parte,* and without providing good reasons therefore, she sought and obtained a rule *nisi* restraining him from selling the livestock and property set out in her affidavit. Therein, she did not claim that the livestock or the property was hers, nor F did she allege that it was owned jointly. There was no evidence that the parties were married in community of property. Notwithstanding that the appellant thereafter filed an opposing affidavit in which he claimed that the dispute had been no more than a misunderstanding leading to the respondent's departure from the matrimonial home, the magistrate G confirmed the rule *nisi*. He did so, on the basis that in the event that the parties failed to reconcile and to protect the interests of the respondent "… the property … [would] be there to share". On appeal, setting aside the magistrate's order:

Held, that in the absence of a good reason which should been set out in the affidavit, the application should not have been heard on an *ex parte* H basis.

2006 (1) ZLR p502

Makarau J

Held, further, that the magistrate erred in granting what was, in effect a A perpetual or permanent interdict restraining the appellant from ever disposing of the assets.

Held, further, that there is no principle of law that binds spouses to retain property acquired during the subsistence of a marriage for distribution, in terms of s 7 of the Matrimonial Causes Act [*Chapter 5:13*] in the event B of their divorce.

Cases cited

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

Nyatwa v Nene S-119-91 C

Legislation considered

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

Case information

Applicant in person

Respondent in person D

Judgment

MAKARAU J: The precise property rights that a husband and a wife each have in the matrimonial estate during the subsistence of a marriage are not easy to define.

The facts of the above appeal brought the issue to the fore and required us E to reflect on the effect of s 7 of the Matrimonial Causes Act [*Chapter 5:13*] on the property rights of spouses during the subsistence of a marriage. As facts go, they are quite simple and commonplace. They however mask a legal issue of some complexity. We summarise them as follows.

On 7 June 2005, the respondent appeared before the magistrates court at F Harare, on an affidavit, alleging that her estranged husband had sold a beast belonging to the matrimonial estate and she was apprehensive that he would proceed and sell the remaining livestock and certain other household effects set out in the affidavit. Without hearing the husband, the magistrate issued a rule *nisi*, calling upon the appellant to show cause why he should not be restrained from selling the livestock and property set out in the respondent's G affidavit. The rule *nisi* was returnable to court on 7 July 2005. Pending the return day, the rule was to operate as a temporary interdict, restraining the appellant from disposing of the livestock and property. For good measure, the rule authorised the police to arrest the appellant should he breach the terms of the order. H

Makarau J

A On the return day, the appellant appeared before the magistrates court and filed an opposing affidavit. In the affidavit, he denied that the respondent and him were estranged but averred that they had had a misunderstanding (which he brushed off as minor), leading to the respondent leaving the matrimonial home. He had made efforts to have her return home and at the time of the hearing, she was resisting such efforts.

B The record of proceedings is not clear as to whether the parties made any oral submissions before the magistrate in addition to their respective affidavits.

In his ruling, the magistrate confirmed the rule *nisi*. His reason for so doing appears in the following two paragraphs of his reasons for judgment:

> "It is this court's observations that there is a matrimonial wrangle. Whatever C the parties decide to do it is of no harm or prejudice to respondent to be stopped from disposing of matrimonial assets.
>
> On a balance of equities, it is just for an order to stand to protect the interests of the applicant. In the event that both parties fail to reconcile and decide to divide the property, it will be there to share."

Dissatisfied with the outcome, the appellant noted an appeal to this court.

D Two grounds of the notice of appeal are in my view worth setting out in full as they capture the issue that falls for determination in this matter. In paras 1 and 3 of the notice of appeal, the appellant wrote:

> "1. The magistrate erred in confirming the rule *nisi* without considering the operation of the court order and the effects it (the court order) will E have on the appellant, the husband, the head of the home and the entire clan of Kazizi family groupings.
>
> 2. …
>
> 3. By confirming the rule *nisi* the court actually gave the respondent powers to do as she likes or feels at the Kazizi home and during Kazizi family groupings."

F At the hearing of the matter, it was confirmed before us that there is no divorce pending between the parties and that the parties are not estranged. They resolved their differences and are back together. The rule *nisi* however remains in force.

A number of issues arise from the order granted by the trial magistrate.

G Firstly, while the point was not taken on appeal, we are not persuaded that this was a proper matter for the magistrates court to have issued a rule *nisi* without first affording the appellant the right to be heard. While the Magistrates Court Rules, 1980 permit the bringing of *ex parte* applications without defining the instances where such is permissible, there was no basis laid out in this H application why notice to the appellant should not have been given. The right

Makarau J

to be heard in legal proceedings is fundamental and is integral to a fair hearing. A It should only be denied a party if there is evidence of a good reason, set out in the affidavit, why the application should not be served on the other party. No such good reason was set out in the respondent's affidavit.

Secondly, the interdict granted by the trial magistrate is a perpetual or permanent interdict, restraining the appellant from ever disposing of the B assets. It has no time limiting the extent of its operation. It is commonsensical that this was not a matter where a permanent interdict was being sought or could be granted.

Thirdly, the order appears to have no basis at law.

The respondent did not allege in her affidavit that the property the appellant C was disposing was hers. This could have been one basis upon which she could have succeeded in restraining the appellant from disposing of the property. In that regard, she simply would have been asserting her rights of ownership, which hold not only against her husband but the world at large.

Further, the respondent did not allege that the property in issue was jointly owned property. Again, as co-owner, she would have been entitled to assert D her rights of part ownership to defeat her husband from disposing of jointly owned property without her consent.

It appears to us that the respondent and the trial magistrate in turn regarded the assets, which may be matrimonial assets, as jointly owned. This appears from the wording used in the ruling by the trial magistrate that the assets in E issue are matrimonial property, to be preserved so that in the event that the parties do not reconcile, there would be something for the parties to share upon divorce. It is in this regard that the trial magistrate fell into error as there was no evidence before him that the parties were married in community of property.

There is no principle of law that binds spouses to retain property acquired F during the subsistence of marriage for distribution in terms of s 7 of the Matrimonial Causes Act [*Chapter 5:13*] "(the Act"), in the event of their divorce. In this regard, the remarks of McNally JA in the unreported judgment of *Nyatawo* v *Nene* S-119-91, though he was dealing with a somewhat different issue, are apposite. At p 3 of the cyclostyled judgment, G he had this to say:

> "The respondent may indeed have a claim for maintenance and or division of property rights against her former husband. I say nothing in that regard, except that, if and when she institutes proceedings against him, she must take him as she finds him at that stage. She cannot force him to retain all property, movable and immovable that he possessed on the day of H

Makarau J

> A divorce on the grounds that one day she may make a claim for division of that property, which claim may succeed."

The issue before the court in the *Nyatawo* case was whether a divorced wife could compel her former husband to retain the property acquired during the subsistence of the marriage to enable the plaintiff wife to claim it in future under s 7 of the Act.

B Were the parties divorcing, then the considerations discussed in the *Muzanenhamo* case and upheld and applied in *Muganga* v *Sakupwanya* 1996 (1) ZLR 217 (S) may have applied.

Since the parties are not divorcing, such considerations are not applicable.

In our view, the respondent failed to establish any one of the recognized C grounds upon which the court should have moved to her aid to restrain the appellant from disposing of the assets in question.

In the result, the appeal is allowed and the order by the magistrates court is set aside.

D HLATSHWAYO J concurred.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/OKEKE v DURO & CO (PVT) LTD 2006 (1) ZLR 506 (H)

OKEKE v DURO & CO (PVT) LTD 2006 (1) ZLR 506 (H)

Citation	2006 (1) ZLR 506 (H)
Case No	Judgment No. HH-71-06
Court	High Court, Harare
Judge	Makarau J
Heard	11 April 2006
Judgment	21 June 2006
Counsel	*L Uriri*, for the plaintiff Miss *R Gasa,* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Contract — *conditional — sale of rights in immoveable property — seller* C *a shareholder in association owning property — sale conditional on association agreeing to issue certificate — association declining to issue share certificate to buyer — not a breach by seller of his obligations –– condition precedent not met*

Contract — *sale — of portion of immoveable property — cession of rights* D *relating to a right of exclusive occupation — such a sale not a sale of immoveable property* E *— need to distinguish between the two emphasized*

Land — *sale — cession of exclusive rights of occupation in immoveable property — need to distinguish between such a cession and a sale of immoveable property*

Headnote

Care must be taken to distinguish between a sale of immoveable property and what is in reality a cession of rights relating to a right of exclusive occupation of a portion of immoveable property (*dicta per* McNally JA in *Gomba* v *Makwarimba* 1992 (2) ZLR 26 (S), followed).

The system of share transfer is a fairly recent concept in home ownership in F Zimbabwe, whereby the ownership in a block of flats vests in a legal *persona* such as a body corporate or a voluntary association that then grants the rights to individuals to occupy exclusively certain units in the block. The share certificate is not proof of ownership of the immoveable property but proof of shareholding in the entity owning the property.

The plaintiff purchased the defendant's rights to a flat in a block of flats G owned and managed by a voluntary association. After the purchase price had been paid, the estate agency handling the transaction wrote to the association requesting it to issue a certificate in favour of the plaintiff. The request was unanimously turned down by the association, on the grounds of the plaintiff's foreign origin. The defendant instructed the H

A agents to cancel the sale to the plaintiff and offered the property to a Zimbabwean national, who was accepted by the association and was duly issued with a certificate. The plaintiff issued summons against the defendant for breach of contract, claiming a sum equal to the purchase

price of an equivalent flat as damages. The plaintiff specifically averred that the defendant sold the property to a third party thereby prejudicing B the plaintiff's rights in the agreement of sale. The defendant admitted that it sold the property to a third party but averred that the subsequent sale was not concluded with the intention to breach the sale agreement with the plaintiff but only after the association had declined to issue a certificate in favour of the plaintiff.

C *Held*, that the plaintiff did not buy the immovable property on which the flat was situated; he simply bought the right to exclusively occupy the flat subject to the approval of the owner of the piece of land. The share certificate was not proof of ownership, only proof of shareholding in the entity owning the property. The rights of the parties were derived from and attached to the agreement between the parties and did not necessarily D attach to the immovable property itself as there was no registration of such rights against the title of the immovable property. Such rights, though not real, can be sold and bought and can be ceded to the purchaser with the consent of the person enjoying real rights in the land. The plaintiff as purchaser could not compel the defendant to pass title to him as the defendant was not possessed of such title.

E *Held,* further, that the agreement between the parties was, by implication, conditional upon the association agreeing to defendant's cession of its rights. When the association withheld its consent, the sale of defendant's rights in the flat could not be enforced and it thus fell through. There was, therefore, no sale agreement to breach and the defendant had no contractual obligation to keep the offer open indefinitely.

F *Held*, further, and in any event, that the refusal by the association to consent to defendant's cession of its rights could not be a breach of its obligation to the plaintiff under the agreement. The plaintiff had established no cause of action in respect of his claim for damages.

Cases cited G

Gombe v Makwarimba 1992 (2) ZLR 26 (S)

Magwenzi v Chamunorwa & Anor 1995 (2) ZLR 332 (S)

Mukarati v Mkumbu 1996 (1) ZLR 212 (S)

Case information

L Uriri, for the plaintiff

H Miss *R Gasa,* for the defendant

Makarau J

Judgment

MAKARAU J: The plaintiff hails *from* Nigeria and is in Zimbabwe on a A permanent residence permit. His country of origin would have deserved no mention whatsoever in this judgment were it not for an unjustified attack on the people of his nation and other foreign nationals by the Cranford Court Home Owners Association, ("the association"), a voluntary organization that owns and administers a block of flats in Central Avenue, Harare.

The material facts of this matter are largely common cause are not seriously B disputed. I summarise them as follows.

On 13 July 2001, the plaintiff and the defendant concluded a written agreement of sale whereby the plaintiff purchased a "certain piece of land called stand No. 52 Central Avenue, Harare situate in the District of Salisbury being 11 Cranford Court, held under share certificate No. 17"(*sic*), for the price of C $640 000.

It is pertinent in my view, to note at this stage that the agreement of sale between the parties contained two fundamental errors. Firstly, the plaintiff was not purchasing the piece of land at No. 52 Central Avenue, Harare, whatever its correct description is. It is common cause that the purchaser was D purchasing the seller's rights to Flat No. 11 Cranford Court, which is situate at the street address given in the agreement.

As observed by McNALLY JA in *Gomba* v *Makwarimba* 1992 (2) ZLR 26 (S):

> "As so often happens, the parties have used the word 'sale' to describe what is in reality a cession of rights, since the house actually belongs to the Chitungwiza Town Council. Compare *Majuru* v *Maphosa* S-172-91 E (not reported).
>
> It is unfortunate that legal practitioners persist in ignoring the distinctions between sale and cession of rights in these cases, both because there are many such cases and because there are many such distinctions."

Further, the agreement stipulated that the purchase price be paid to Byron F Venturas & Partners, the nominated conveyancers of the property. It is further common cause that the rights were held by virtue of a certificate issued by the association. As such, there was no freehold title to conveyance and the appointment of conveyancers was unnecessary.

The above errors, although legally fundamental, were common to both parties and thus have no effect on the validity of the agreement of sale between the G parties. I simply highlight them for the guidance of the legal practitioners in future.

After the purchase price had been paid, the estate agency handling the transaction duly wrote to the association requesting it to issue a certificate in favour of the plaintiff. The request was unanimously turned down by the H

Makarau J

A association and in turn it unleashed a xenophobic tirade of abuse against people from other countries who had occupied flats within the block, including people from the plaintiff's country.

As a result of the attitude evinced by the association, the defendant, as seller, instructed the agents to cancel the sale to the plaintiff and offered the property to a Zimbabwean national at $650 000, who was accepted by the association B and was duly issued with a certificate.

On 24 September 2002 some 14 months after the sale, the plaintiff issued summons against the defendant, claiming the sum of $7.5 billion as damages for breach of contract.

Thus, the issue that was referred to me for trial was not whether or not the C defendant had been unfairly treated in the circumstances by the association but whether the defendant is liable to the plaintiff for breach of contract in the sum of $7.5 billion, being the replacement value of a flat similar to No. 11 Cranford Court, Harare.

At the trial of the matter, the plaintiff gave evidence.

D His evidence was to a large extent a narration of the facts that are common cause and which I have already referred to above. He testified that when he was advised of the stance of the association, he took the issue to Byron Venturas & Partners who advised him that the association had no right to refuse him a certificate and that the issue would be taken up. While he was waiting for the lawyers to take action, he was advised that the seller would E rather not wait for the ensuing legal battle between the plaintiff and the association and had found another buyer. He advised the lawyer of this turn in events and was told not to worry as the lawyer would deal with the issue as well. He thus left the purchase price with the law firm for a period of about 18 months before he withdrew the purchase price.

F The witness further testified that in his opinion, the defendant cancelled the sale not because of circumstances beyond his control but because it had found another buyer who offered it more money for the same property.

After collecting the purchase price from the conveyancers, he kept it on his person and did not have time to purchase another property to mitigate his loss. He did not invest the money in any other manner.

G The witness gave the impression of a shrewd business person, meriting the description given him in the summons that he came to this country to invest in the economy. He gave his evidence generally well and parried most of the questions put to him under cross-examination with ease and confidence. But I did not believe him when he said he kept his money at the conveyancers for H over a year hoping that the lawyers would somehow have the sale ratified even

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Makarau J

though he now knew that the property had been sold to a third party to whom A a certificate had been issued. I also did not believe him when he testified that he did not know where to invest the money and kept it on his person up to the date of the trial.

The plaintiff also called Raymond Muzembe, Wilfred Mukuna and Pardon Kangamwiro, property negotiators who gave the current market value of the B property in dispute as falling between $4.5 billion and $5 billion. I have no reason to doubt the veracity of their respective testimonies in this regard.

In addition to giving an estimated value of the flat, Raymond Muzembe also testified as to how his agency handled the sale of the flat to the plaintiff. In this regard, he struck me as a forthright and honest witness. His evidence was C mainly a corroboration of the facts that are common cause in this trial.

The defendant's founder and managing director took to the stand and testified in defence of the claim. His evidence was also a narration of the events that are common cause and that led to the defendant canceling the agreement of sale after the owners association had declined to accept the plaintiff and issue a share certificate in his name in respect of the flat. D

The witness who appeared hard of hearing gave his evidence in a meandering manner which gave rise to Mr *Uriri* for the plaintiff, urging me to find him evasive. Rather than find the witness evasive, I found him quite emphatic in his denials and honest in his testimony.

Next to testify was Sgt Kalumba who was subpoenaed by the defendant. At E the time of the sale of the property to the plaintiff, he was secretary to the Cranford Court Homeowners Association. He penned the letter wherein the plaintiff was denied a certificate in respect of the flat he had purchased. At the time of testifying, he was the Chairman of the association.

The witness was most unhelpful in his testimony and declined to testify on behalf of the association hiding behind the allegation that he did not have the F authority of the association to do so. I shall not rely on his evidence as it was selective and in any event, did not advance either of the parties' cases.

The plaintiff's case as formulated in the declaration is based on breach of contract. It is plaintiff's specific averment that the defendant sold the property to a third party thereby prejudicing the plaintiff's rights in the agreement of G sale. The defendant has admitted that it sold the property to a third party but avers that the subsequent sale was not concluded with the intention to breach the sale agreement with the plaintiff but after the association had declined to issue a certificate in favour of the plaintiff.

In my view, the issue that arises between the parties is whether the defendant breached the sale agreement by selling the property to a third party in the H

Makarau J

A circumstances of this matter. In argument, Mr *Uriri* further narrowed the issue down to whether after the association had declined to accept the plaintiff as the lawful occupier of flat No. 11, the defendant had an obligation to wait for the plaintiff to compel the association to accept him before canceling the agreement.

It is common cause that title to the flat in dispute is held by way of share B certificate. As such, the plaintiff did not buy the immovable property on which the flat is situated. He simply bought the right to exclusively occupy the flat subject to the approval of the owner of the piece of land.

The system of share transfer is a fairly recent concept in home ownership in Zimbabwe wherein the ownership of a block of flats vests in a legal *persona* C such as a body corporate or a voluntary association that then grants the rights to individuals to exclusively occupy certain units in the block. As it is aptly put by L Mhishi in his book *The Law and Practice of Conveyancing in Zimbabwe* at p 86, the share certificate is not proof of ownership of the immovable property but proof of shareholding in the entity owning the property.

D In the light of the nature of landholding that pertained to the flat, an analysis of the transaction that the plaintiff and the defendant entered into then reveals that the plaintiff bought the right to exclusively occupy a part of a property that the Cranford Court Homeowners Association owned.

In my view, the rights of the parties to this transaction are largely similar to E the rights of parties who are purchasing properties from local authorities under suspensive agreements of sale. It is debatable whether the rights possessed by the occupiers of such properties are rights in the agreement of sale or are rights that attach to the immovable property itself. I prefer the view that such rights are derived from and attach to the agreement between the parties and do not necessarily attach to the immovable property itself as there is no F registration of such rights against the title of the immovable property. Such rights, whatever their origin, though not real, can be sold and bought and can be ceded to the purchaser with the consent of the local authority enjoying real rights in the land. See *Gomba* v *Makwarimba* 1992 (2) ZLR 445 (S); *Magwenzi* v *Chamunorwa & Anor* 1995 (2) ZLR 332 (S) and *Mukarati* v *Mkumbu* 1996 (1) ZLR 212 (S). G

Likewise, it is my view that the defendant's right to exclusively occupy the flat could be sold and bought without the prior consent of the association. As between the parties, a valid agreement of sale came into being. However, the plaintiff as purchaser could not compel the defendant to pass title to him as H the defendant was not possessed of such title.

Makarau J

I would associate myself with and wholeheartedly adopt the remarks of A Ebrahim JA in *Mukarati* v *Mkumbu supra* at 215D-F, as representing the correct position at law. In giving his opinion that the holder of rights under a suspensive agreement of sale with the City Council of Harare could sell her rights under the agreement although she could not pass title, the learned judge of appeal had this to say: B

> "Consequently, while the would-be buyer cannot force the seller to pass title or even to give him occupancy, he is not without a remedy. One thing he can do is claim the return of any purchase price paid and the cost of any improvements made. It would also, in my view, be reasonable to hold that a contract of this nature is a conditional one, with an implied term that the sale is subject to the approval of the council. If the traditional officious C bystander had said to the parties: 'You know that the seller will need to apply to the council for its consent to the transfer', they surely would have said: 'Yes, of course that is what she will do'. This would cast a duty on the seller to seek the council's approval. If she failed to do so, she could be compelled to, though the council could not be compelled to give its approval. If the council gave its approval, the transfer would take off. If the council declined to give approval, the contract would be unenforceable D until such time as the seller was in a position to pass title."

In casu, it is common cause that the purchase price of the property was kept in the trust account of Byron Venturas & Partners pending the issuance of the certificate by the association. It was thus impliedly accepted by the parties that the sale would only be complete once the plaintiff was issued with a certificate E in respect of the flat. Then, the plaintiff would be entitled to the purchase price. When the consent of the association was withheld, the sale of rights as between the plaintiff and the defendant could not be enforced and thus fell though.

On the basis of the foregoing, I would hold that the defendant could not be in breach of a conditional sale that fell through when the condition precedent F was not met. There was no sale agreement to breach and the defendant had no contractual obligation to keep the offer open for an indefinite period.

Assuming I have erred in holding that the sale agreement between the parties was a conditional one that fell through when the consent of the association was withheld, I would have found for the defendant on another basis. In my G view, the transaction between the parties may be better understood if it is viewed as a triangle of rights and obligations. One side of the triangle is made up of the agreement of sale between the plaintiff and the defendant while the other side of the triangle is made up of the transfer of the rights sold from the defendant to the plaintiff by the association. At the base of the transaction or of the triangle of rights and obligations is the existing certificate of H

Makarau J

A occupation issued to the plaintiff by the association. Viewed in this manner, it becomes untenable for the plaintiff to allege that a refusal by the grantor of the rights to grant such rights to the plaintiff amounts to breach of the obligations the defendant had in terms of the agreement of sale. It is common cause that the defendant had no obligation to consent to the cession. In fact, it could not. Thus, the refusal by the association to consent to the cession B cannot be a breach of the defendant's obligations under the agreement between the parties.

I would therefore resolve this matter on the simple basis that after agreeing to sell its property to the plaintiff and advising the association of the sale, the defendant was under no further obligation to ensure that the owners of the C property consented to the cession. The refusal by the association to issue a certificate in favour of the plaintiff was not a breach of the sale agreement or of any other obligation the defendant had, giving rise to a cause of action in contract to the plaintiff.

D In the result, the plaintiff's claim is dismissed with costs.

Honey & Blankernberg, plaintiff's legal practitioners

E *Gasa Nyamadzawo & Associates*, defendant's legal practitioners

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Source:
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MADZIVIRE & ORS v ZVARIVADZA & ORS 2006 (1) ZLR 514 (S)

2006 (1) ZLR p514

Citation	2006 (1) ZLR 514 (S)
Case No	Judgment No. S-10-06
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA & Cheda JA
Heard	17 January 2006
Judgment	27 June 2006
Counsel	*H Zhou,* for the appellant *H Simpson,* for the respondents
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Company — *director — powers of — bringing legal proceedings on behalf* C *of company — need for director to be specifically authorised by board meeting to do so*

Headnote

A company, being a separate legal person from its directors, cannot be represented in a legal suit by a person who has not been authorised to D do so. This is a well established legal principle, which the courts cannot ignore. It does not depend on the pleadings by either party. The fact that a person is the managing director of the company does not clothe him with the authority to sue on behalf of the company in the absence of any resolution authorising him to do so. The general rule is that directors of a company can only act validly when assembled at a board meeting. An E exception to this rule is where a company has only one director who can perform all judicial acts without holding a full meeting.

Cases cited

African Diamond Distributors (Pvt) Ltd v van der Westhuizen NO & Ors 1988 (4) SA 726 (T) F

Burstein v Yale 1958 (1) SA 768 (W)

Case information

H Zhou, for the appellant

H Simpson, for the respondents

Judgment

CHEDA JA: The first, second and third appellants are directors of the fourth G appellant. The first respondent is also a director of the fourth appellant. The first appellant is the managing director of the fourth appellant.

Sometime in March 2004, the first appellant discovered that there were documents filed in the office of the Registrar of Companies, which is the third respondent, which related to the fourth appellant. According to him, those H

Cheda JA:

A documents were forged. The documents were allotment forms for shares to persons who were not allocated shares in the fourth appellant and minutes of meetings which had never taken place. The first appellant proceeded to make an application to the High Court asking for the following order:

"1. The Return of Allotments form No. CR 2 filed of record with the Registrar of Companies on 28 February 2003 and date-stamped on 13 B March 2003 be and is hereby declared null and void *ab initio*. C

2. The third respondent be and is hereby ordered to cancel the Return of Allotments form No. CR 2 (referred to in paragraph 1 above).

3. The forms of Annual Returns for 2000, 2001, 2002, 2003 and form CR 6 be and are hereby declared null and void *ab initio*.

4. The third respondent be and is hereby ordered to cancel the said forms of Annual Returns for 2000, 2001, 2002, 2003 and form CR 6.

5. In the event that the third respondent fails to act in accordance with the terms of paragraphs 2 and 4 of this order, the Deputy Sheriff be and is hereby directed to cancel all documents/forms mentioned in this order. D

6. The first, second and third applicants be allowed/authorised to regularise the fourth applicant's papers/documents/forms to be properly filed of record with the third respondent as required by the Companies Act.

7. The first and second respondents be and are hereby ordered (the one paying the other to be absolved) to pay the costs on attorney-client E scale."

The High Court dismissed this application. However, it was established at the hearing in the High Court that the documents had in fact been forged, but the first respondent denied that he was the one who had forged the documents. On appeal, the appellants have submitted the following as their main arguments: F

"1. There was only one issue which the court *a quo* was being called upon to determine in the light of the evidence placed before it, which was whether the impugned documents must be expunged from the records of the fourth appellant kept by the Registrar of Companies.

2. The question of the *locus standi* of the appellants or the authority of the fourth appellant to institute the application did not arise from the papers."

G While it is correct that the issue of the *locus standi* of the appellants or the authority of the fourth appellant was not raised in the papers, there is no indication at all that authority was granted to the first appellant by the fourth appellant to institute proceedings on its behalf. In his affidavit, the first H appellant says he was making the founding affidavit on his own behalf and

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Cheda JA

on behalf of the fourth appellant, as well as on behalf of the second and third A appellants. These last two appellants have filed affidavits to confirm this, but there is nothing to that effect from the fourth appellant.

Section 9 of the Companies Act [*Chapter 24:03*] reads as follows:

> "A company shall have the capacity and powers of a natural person of full capacity in so far as a body corporate is capable of exercising such B powers."

It is clear from the above that a company, being a separate legal *persona* from its directors, cannot be represented in a legal suit by a person who has not been authorised to do so. This is a well established legal principle, which the courts cannot ignore. It does not depend on the pleadings by either party. The fact that the first appellant is the managing director of the fourth appellant does C not clothe him with the authority to sue on behalf of the company in the absence of any resolution authorising him to do so. In *Burstein* v *Yale* 1958 (1) SA 768 (W), it was held that the general rule is that directors of a company can only act validly when assembled at a board meeting.

There is no evidence that there was any service of a notice of a meeting to pass D the required resolution authorising the first appellant to represent the fourth appellant. Even if the first, second and third appellants had agreed on the action, there is no indication that the first respondent, who is one of the directors, was served with a notice of a meeting of directors to pass the resolution of authority. Both the fourth appellant and the first respondent are entitled to be served with a notice of meeting so that a resolution be passed E authorising the first appellant to represent the fourth appellant. This was not done. Failure to do so renders the decision to represent the fourth appellant invalid. An exception where a meeting of directors and a resolution would not be required is where a company has only one director who can perform all judicial acts without holding a full meeting. See *African Diamond Distributors* F *(Pvt) Ltd* v *van der Westhuizen NO & Ors* 1988 (4) SA 726 (T).

Having said that, I should add that even if the appellants could have sought an order in their own right, such an order would not be proper if the order would have the effect of interfering with the records of the fourth appellant when it had not been served. The above reasons support the conclusion that the court *a quo* arrived at, and I find no misdirection in its refusal to grant the application. G However, it is clear that the appellants have a genuine case that needs to be resolved, because the fact that the entries in the company's records are false is not disputed by the respondents. For that reason, closing the door by dismissing the application is not the appropriate resolution of the matter.

The following order is therefore made: H

Cheda JA A

"1. The appeal is dismissed.

2. The order of the court *a quo* dismissing the application is set aside.

3. The respondents are granted leave to file a resolution duly passed by the fourth respondent's board of directors, authorising the institution of legal proceedings against the respondents.

4. The matter is remitted to the court *a quo* (before the same or a different B judge) to determine it on the merits after the resolution in para 2 of this order has been filed.

5. The costs of this appeal shall be borne by the first, second and third appellants jointly and severally, the one paying the others to be absolved."

C CHIDYAUSIKU CJ & SANDURA JA concurred.

Mhiribidi, Ngarava & Moyo, appellants' legal practitioners

D *Mushonga & Associates*, respondents' legal practitioners

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Source:

BELLE'S CREATIONS & ORS v MUTOMBWA & ORS 2006 (1) ZLR 518 (S)

Citation	2006 (1) ZLR 518 (S)
Case No	Judgment No. S-21-06
Court	Supreme Court, Harare
Judge	Cheda JA (in chambers)
Heard	24 May 2006
Judgment	28 June 2006
Counsel	*G G Chikumbirike*, for the applicants *S Mushonga*, for the respondents
Case Type	Application for leave to note appeal
Annotations	No case annotations to date

Flynote

Court — *High Court — jurisdiction — labour matter — High Court having* C *already granted warrant of execution — effect of amendment to Labour Act conferring exclusive jurisdiction in labour matters on Labour Court*

Headnote

The amendment to the Labour Act [*Chapter 28:01*], by which exclusive jurisdiction in labour matters was given to the Labour Court, does not D have retrospective effect. Where the High Court was already dealing with a matter and had granted a warrant of execution and the respondents already had vested rights in the matter before the amendment came into effect, it is not correct to say that the amendment ousted the jurisdiction of the High Court. E

Cases cited

Agere v Nyambuya 1985 (2) ZLR 336 (S)

Barclays Bank Zimbabwe Ltd v Nyahuma 2004 (2) ZLR 248 (S)

Curtis v Johannesburg Municipality 1906 TS 308

Net-One Cellular (Pvt) Ltd v Net-One Employees & Anor 2005 (1) ZLR 275 (S) F

Nkomo & Anor v A-G & Ors 1993 (2) ZLR 422 (S)

Legislation considered

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

Labour Relations Amendment Act 17 of 2002, s 47(5) G

Case information

G G Chikumbirike, for the applicants

S Mushonga, for the respondents

Judgment

CHEDA JA: (in Chambers, in terms of r 20(5) of the Supreme Court Rules). This is an application for leave to note an appeal out of time. H

2006 (1) ZLR p519

Cheda JA

A On 2 December 2003, an application was made at the High Court before Hlatshwayo J by the parties in this case. The parties waited for the determination of this case for two years and three months. Judgment was only delivered on 1 March 2006.

There is no indication whether the judgment was handed down or not. The applicants' deponent argues that it was not handed down and he only got to B know about it on 4 May 2006, when the Deputy Sheriff served him with a notice of seizure and attachment of property, together with a notice of removal. The deponent says he consulted his legal practitioner, who then instructed him to note an appeal. He gives the above explanation as the reason for not noting the appeal in time.

C One Fambisai Ganda, who deposed to the affidavit on behalf of the respondents, says the learned judge's clerk telephoned the parties when the judgment became available and the respondents duly attended and uplifted a copy of the judgment.

In the absence of an affidavit from the clerk concerned indicating whether he advised the appellants, it cannot be ascertained if the applicants were advised D when the judgment became available or not.

Due to the long delay from the date the application was heard to the date of judgment, I accept that the applicants would not have known that judgment was now available without being so informed.

Even if it is argued that the applicants should have been making follow-ups, E one wonders how many times one would keep checking on the judgment over the period of two years and three months, especially if there had been no indication when the judgment was likely to be delivered.

I can only go as far as saying that perhaps regular enquiries concerning the judgment could possibly have moved the court to deliver the judgment within F a reasonable period.

Once the applicants became aware of the judgment, although by being served with a notice of seizure on 4 May 2006, the affidavit in support of this application was made on the very following day, that is, 5 May 2006. The notice of appeal was filed on 8 May 2006. I am, therefore, persuaded that the applicants would have noted the appeal on time if the availability of the G judgment had come to their notice as soon as it was issued.

I now turn to the prospects of success if the application is granted.

The grounds of appeal were stated as follows in the notice of appeal:

"1. The learned judge erred at law in dismissing the application on the H basis that r 449(1) of the High Court Rules cannot be invoked to

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2006 (1) ZLR p520

Cheda JA

correct a wrong assumption by a court that it has jurisdiction to A determine a matter. Rule 449(1) is not restrictive in relation to the subject matter requiring correction. As long as there is an issue, which the court has dealt with, which if certain facts or provisions of the law had been brought to its attention, it would have dealt with differently, r 449(1) is applicable. In this regard the provisions of s 8 of the Labour Act (17of 2002) ousts the jurisdiction of the High Court B in the subject matter before the High Court (Case No. 1000/2003) the provision has retrospective effect. Its provisions were not brought to the attention of the High Court on 19 March 2003 when it deliberated on it, (understandably) because it had only been operational from 7 March 2003. This was therefore a matter which required correction once the statutory provision was brought to its C attention.

2. The learned judge further erred in stating that once a court has jurisdiction at the time proceedings are instituted, then jurisdiction endured until the end of proceedings, in this context, the application before it. Whilst that might be applicable in terms of common law, that position does not apply in this law of explicit and unequivocal D provision to the contrary. Section 8 of the Labour Act has retrospective effect, thus barring the High Court from entertaining a matter which, even if it had jurisdiction at the inception of proceedings, it no longer had at the time of determining it by virtue of the intervention of statutory provisions.

3. The learned judge erred into (*sic*) not giving any reasons or authority E for the findings he made that the learned judge was to express a contrary view to that urged upon him by the applicants (appellants) and no more. A court when dismissing or upholding a litigant's contention must give full reasons for any position it states."

I responded by a minute which had the following comment:

"It is the responsibility of the applicant in such a situation to formulate his F application clearly and accurately.

The reference to s 8 of Act 17 of 2002 is useless and irrelevant to the issue raised. The relevant section seems to be s 89(6) which should be read with s 47(5).

The judgment referenced 1000/03 is not attached and I cannot guess what G it was about in order to consider the issue raised against which the decision was made as this is relevant to the merits to be considered.

The order sought is therefore declined."

Section 8 of Act 17 of 2002 reads as follows:

"**8 Amendment of s 8 of Chapter 28:01**

Section 8 of the Principal Act is amended – H

Cheda JA A

(a) by the insertion after 'An employer' of 'or, for the purposes of paragraphs (g) and (h), an employer or any other person';

(b) in paragraph (f) by the deletion of 'certified' and the substitution of 'registered';

(c) by the insertion of the following paragraphs after paragraph (f)—

'(g) demands from any employee or prospective employee B any sexual favour as a condition of –

(i) the recruitment for employment; or

(ii) the creation, classification or abolition of jobs or posts; or

(iii) the improvement of the remuneration or other conditions of employment of the employee; or C

(iv) the choice of persons for jobs or posts, training, advancement, apprenticeships, transfer, promotion or retrenchment; or

(v) the provision or facilities related to or connected with employment; or D

(h) engages in unwelcome sexually-determined behaviour towards any employee, whether verbal or otherwise, such as making physical contact or advances, sexually coloured remarks, or displaying pornographic materials in the workplace.'"

The response from the applicants' legal practitioners was most astonishing. E Firstly, the legal practitioner denied that he made any reference to s 8 of Act 17 of 2002 in his notice of appeal. Next, he argued that he did not agree that attachment of the earlier judgment which is not subject to the appeal being sought was necessary in terms of the Rules or that its absence was fatal to the application. He insisted that "the registrar shall give notice of the date of hearing to the parties". Other remarks from the legal practitioner in the same F letter were uncalled for and displayed unwarranted arrogance which I found to be most objectionable.

Once the date of hearing was given, the legal practitioner appeared to argue the application with no heads of argument. Even at the hearing of the application, he continued to argue that he had never referred to s 8 until his G papers were read to him. It was only then that an application for amendment of the grounds of appeal was made. The application was opposed.

On the merits, the appeal is based on the argument that the amendment in s 8 of Act 17 of 2002 ousted the jurisdiction of the High Court which made an order against the applicants. This argument arose from the fact that the judgment of Hlatshwayo J, which the parties waited for, for a period of more than two H years, had dismissed an application in which that court was being asked to

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Cheda JA

rescind the judgment of the High Court granted on 19 March 2003 in case A No. HC 1000/03.

As has been pointed out, s 8 of the Act, as it stood, had nothing to do with the intended appeal.

Without any correction or amendment, the notice of appeal is obviously defective. B

Section 89(6) of the Labour Act [*Chapter 28:01*], which was inserted by the Labour Relations Amendment Act 17 of 2002 ("the amending Act") provides as follows:

> "(6) No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter C referred to in subsection (1)."

The above amendment came into effect on 7 March 2003.

The amending Act provided for savings and transitional provisions as follows in s 47(5):

> "(5) Any proceedings that were commenced in terms of Part XII of the principal Act before the date of commencement of the Labour D 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 clear that the legislature was alive to the fact that there could be cases that E were in process at the time, and the provision was to ensure that such cases "shall be proceeded with accordingly" without being affected by the amendment.

Even if the notice of appeal was amended to reflect the above, the provision referred to cases before the Labour Relations Tribunal. It does not in any way F refer to cases that were already before the High Court.

The applicants submitted that the provisions of s 89(6) are retrospective and that, once they came into effect, the High Court should not have made the order it made even if it had jurisdiction when the matter was started.

The dispute in this matter started long before the Amendment Act came into G effect (see case No. HC 6242/02, wherein a warrant of execution was issued and a notice of removal of the applicants' property was served). This shows that the High Court was already dealing with the matter and had granted a warrant of execution. The respondents already had vested rights in the matter before the amendment. To suggest that the amendment ousted the jurisdiction of the High Court in such a matter cannot be correct. H

Cheda JA

A The applicants submitted that the issue of the amendment provisions being retrospective needed to be argued on appeal. I do not agree.

The same issue was argued before the Supreme Court in *Nkomo & Anor* v *Attorney-General & Ors* 1993 (2) ZLR 422 (S), wherein the applicants raised the same issue before the Supreme Court sitting as a Constitutional Court. The facts of that matter appear from the chronology of that case given by Gubbay B CJ. The Supreme Court held that the effect of the amendment in s 15(5) of Amendment Act No. 13 of 1993 was prospective and therefore the rights of the applicants were preserved.

This decision was in line with the Supreme Court's ruling in the previous case of *Agere* v *Nyambuya* 1985 (2) ZLR 336 (S), where it held that:

> C "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 operation is not to be given to any 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, D or concerns a matter of procedure, practice or evidence. The supposition is that the legislature intends to deal only with future events and circumstances."

The Supreme Court also quoted with approval what Innes CJ said in *Curtis* v *Johannesburg Municipality* 1906 TS 308, namely:

> E "That general rule is that, in the absence of express provisions 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."

More recently, the same issue was dealt with by Chidyausiku CJ in *Barclays Bank Zimbabwe Ltd* v *Nyahuma* 2004 (2) ZLR 248 (S) and in *Net-One Cellular* F *(Pvt) Ltd* v *Net-One Employees &*

Anor 2005 (1) ZLR 275 (S). In the above two cases, the principle of not depriving a party of existing rights by subsequent legislation was upheld.

It is therefore, clear that the issue that the applicants want to argue in the intended appeal has been argued before in both the Zimbabwean and South African Courts and settled.

G There are therefore no prospects of the issue being determined differently as Mr *Chikumbirike* has submitted.

Accordingly, leave to file an appeal out of time is refused. The application is H dismissed with costs.

2006 (1) ZLR p524

Cheda JA

Chikumbirike & Associates, applicants' legal practitioners A

Mushonga & Associates, respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/CHAWORA v RESERVE BANK OF ZIMBABWE 2006 (1) ZLR 525 (H)

CHAWORA v RESERVE BANK OF ZIMBABWE 2006 (1) ZLR 525 (H)

2006 (1) ZLR p525

Citation	2006 (1) ZLR 525 (H)
Case No	Judgment No. HH-59-06
Court	High Court, Harare
Judge	Karwi J
Heard	18 May 2006
Judgment	28 June 2006
Counsel	*C T Mantsebo,* for the applicant *B Mujeyi,* for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

C **Court** — *High Court — jurisdiction — labour matters — High Court's jurisdiction not completely ousted — matters which High Court can entertain*

Headnote

The applicant was suspended from duty with her employer on various D disciplinary charges. She brought an application to the High Court, ostensibly for a declaratory order, declaring her

suspension to be a nullity. The respondent argued that, as a result of the amendment to the Labour Act [*Chapter 28:01*], under which the Labour Court was created, the High Court had no jurisdiction to hear the matter.

Held, that the High Court, by virtue of its inherent jurisdiction, can do E anything except that which is specifically prohibited by law, whereas the Labour Court can only do those things that it is specifically permitted by law. Superior courts will jealously guard their jurisdiction and there exists a presumption against the ouster of the court's jurisdiction unless the legislature states so in very clear terms. Thus it is imperative that any statute or contract that purports to oust the jurisdiction of the courts F must be restrictively interpreted. There is no specific provision in the Labour Act that ousts the High Court's jurisdiction. The High Court has review jurisdiction in labour matters and the jurisdiction to issue declaratory orders. However, what the applicant sought was an order, which ought properly in terms of s 89 of the Act to be sought from of the G Labour Court in the first instance.

Cases cited

City of Harare v Gwindi 2003 (2) *ZLR* 188 (H)

Dewet v Deetlefs 1928 AD 286

Hatfield Town Mgmt Bd v Mynfred Poultry Farm (Pvt) Ltd 1962 R & N H 799; 1963 (1) SA 737 (SR)

Karwi J

Tuso v City of Harare 2004 (1) ZLR 1 (H) A

R v Padsha 1923 AD 281

Sibanda & Anor v Chinemhute NO & Anor HH-131-04

Legislation considered

High Court Act [*Chapter 7:01*], ss 14, 27 & 28 B

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

Labour Relations (Retrenchment Regulations) 2003 (SI 186 0f 2003), ss 3(6)(b) and 3(8)

Case information

C T Mantsebo, for the applicant

B Mujeyi, for the respondent C

Judgment

KARWI J: The applicant is employed by the respondent as its Division Chief-in-Charge of Financial markets. She has been employed by the respondent since 1980 in various capacities. She has approached this court seeking an order declaring the disciplinary proceedings initiated by the respondent D against her as a nullity and an order compelling the respondent to comply with the provisions of s 3(6)(b) as read with s 3(8) of S I 186 of 2003, Labour Relations (Retrenchment Regulations) 2003.

The applicant was suspended from service on 22 September 2004. She was later charged in terms of s 4.2.3(g) and (h) of the respondent's Code of E Conduct, that is:

(a) habitual and or substantial neglect of duty; and

(b) gross incompetence or inefficiency in the performance of work.

The parties then entered into prolonged correspondence concerning the alleged misconduct, attempts to negotiate an exit package and so forth. The failed attempts to reach an amicable understanding on the way forward F culminated in this application.

A question has arisen as to whether this court has jurisdiction to determine the application in view of the provisions of the Labour Relations Act, which reposes the responsibility of determining all labour related matters to the Labour Court. The applicant contends that although this is a labour matter *per se,* this court has jurisdiction to determine this application. The respondent is G of the

opposite view. The respondent contends that this is purely a labour matter which should be determined by the Labour Court. It is contended by the respondent that the applicant is in the wrong forum and that this court should simply decline to determine this matter on that basis. H

2006 (1) ZLR p527

Karwi J

A In his submissions, counsel for the applicant has argued that this application was in terms of s 14 of the High Court Act [*Chapter 28:01*]. It was not an attempt to circumvent the domestic remedies available under the Labour Relations Act [*Chapter 28:07*]. It was submitted that this court had inherent jurisdiction to issue declaratory orders in terms of s 14 of the High Court Act. The jurisdiction of the High Court to hear Labour matters had not been ousted B by the advent of the Labour Court, particularly with regard to its inherent powers to review labour matters in terms of ss 27 and 28, and to issue declaratory orders. It was submitted that declaratory orders were primarily used to declare that a "particular decision of a public body or authority was *ultra vires* and a nullity or to determine the existence of public law powers and C public law duties."

It was also argued that a declaration was not only used for the primary purpose of establishing whether or not a particular action or inaction is unlawful, but also to perform an ancillary role in clarifying the consequences of a finding of invalidity or settling other questions of law that needed to be resolved. It was further submitted that before issuing a declarator, this court was obliged D to decide whether the case before it was a proper one for the exercise of its discretion provided under s 14 of the High Court Act. It was added that in this case the respondent had not acted in accordance with provisions of its code of conduct. The code of conduct did not provide for the suspension of a managerial employee in the applicant's position. It was therefore submitted that such failure to comply with the code of conduct rendered the suspension E of an employee a complete nullity and the subsequent proceedings of no force or effect. It was also submitted that not only were the disciplinary proceedings instituted against the applicant a nullity but also the respondent's refusal to enter into negotiations for a retrenchment package as prescribed in SI 186 of 2003 is an unfair labour practice which is illegal, and it was proper for this court F to declare so, as this would enable the parties to know their respective rights and map the way forward.

In her opposing affidavit, Jean Maguranyanga who is the respondent's Corporate Society, raised the all important issue of the jurisdiction of court to determine this matter. It was her view that "the applicant has brought these proceedings before the wrong court. This honorable court does not have G jurisdiction to hear a labour matter as a court of first instance". She also added that "the fact is that the applicant wants to force herself to be retrenched so that she can garner as much by way of a retrenchment package as she can. I therefore submit that in as far as this application is premised on an intention to somehow force the respondent to conduct a retrenchment exercise, it is H incompetent and ought to fail on that basis." Mrs Maguranyanga further

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2006 (1) ZLR p528

Karwi J

added that there was no basis at all upon which the respondent may be ordered A to comply with retrenchment regulations because it has never been its intention to retrench the applicant.

The position is that before the enactment of the Amendment Act of 2002 to the Labour Relations Act, the High Court entertained any labour matter. A litigant was free to approach this court on any such labour related matter and B in exceptional cases, this court would decline jurisdiction on the basis that the parties should have exhausted domestic remedies before approaching this court. This court would also take the view that the Labour Relations Act did not oust the inherent jurisdiction of this court so that a party would approach this court even before exhausting domestic remedies as long as "special grounds" existed which would justify a party to approach this court. C

The situation in Zimbabwe changed completely in March 2003 when the Labour Relations Tribunal that had existed under the old Labour Relations Act was transformed into a fully fledged court in terms of s 92 of the Constitution of Zimbabwe as read with s 83 of the Labour Relations Act [*Chapter 28:01*] as amended by the Labour Relations Amendment Act No. 17 of 2002 which D became law in March 2003.

The functions of the Labour Court is provided for in terms of s 89 of the same Act as follows:

> "1. The Labour Court shall exercise the following functions:

(a) hearing and determining applications and appeals in terms of this E Act.

(b) hearing and determining matters referred to it by the Minister in terms of this Act.

(c) …

(d) …"

It would appear that it has been established that this court by virtue of its F inherent jurisdiction can do anything except that which is specifically prohibited by law whereas on the other hand the Labour Court can only do those things that it is specifically permitted by law. See *Hatfield Town Management Board* v *Mynfred Poultry Farm (Pvt) Ltd* 1962 R&N 799; 1963 (1) SA 737 (SR) at 739 and *City of Harare* v *Gwindi* 2003 (2) ZLR 188 (H).

It is equally true that superior courts will jealously guard their jurisdiction and G there exists a presumption against the ouster of the court's jurisdiction unless the legislature states so in very clear terms. Thus it is imperative that any statute or contract that purport to oust the jurisdiction of the courts must be restrictively interpreted. See *de wet* v *Deetlefs* 1928 AD 286 at 290 and *R* v *Padsha* 1923 AD 281 at 304. H

Karwi J

A The competing jurisdiction of the Labour Court and the High Court fell for decision in this court in *Tuso* v *City of Harare* 2004 (1) ZLR 1 (H) and *Sibanda & Anor* v *Chinemhute NO & Anor* H-131-04. In the *Tuso* case, it was held that s 89 gave exclusive jurisdiction to the Labour Court in all labour matters in the first instance thus ousting this court's jurisdiction. It was held in the *Sibanda* case that this court jealously guarded its inherent jurisdiction and that B jurisdiction could not implied be ousted. It was held that this court had review jurisdiction in labour matters and the jurisdiction to issue declaratory orders.

Section 89(6) of the Act provides as follows:

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

C It is clear that the jurisdiction of any other court has been ousted in respect of those applications and appeals that are defined in the Act.

These are:

(a) the right to go to the Labour Court against a decision made in terms of a D Code of Conduct;

(b) an appeal against a decision of a Minister in terms of ss 25, 40, 41, 71 & 82;

(c) an appeal against a determination of a Labour Relations Officer;

(d) an appeal on a question of law from the decision of an arbitrator; E

(e) an application for interim remedies provided for in s 97(H)

(f) an application for rescission of judgment

(g) an application for reference of a matter to the Labour Court.

It seems to me that there is no specific provision in the Labour Act that ousted this court's jurisdiction. I am of the considered opinion that a cursory and F simplistic approach was adopted in the *Tuso* case. Besides jealously guarding the inherent jurisdiction of this court, the *Sibanda* case correctly takes into recognition the fact that there is no law in Zimbabwe which has ousted the jurisdiction of this court in such matters.

In casu, the applicant has sought to justify the bringing of the application in G this form on the basis that it was a prayer for a declaratory rather than an order and therefore this court was said to have jurisdiction in such matters. I do not agree. A perusal of the draft order in this matter, clearly shows that the applicant is seeking for an order, which order properly, in my view, is sought from of the Labour Court in the first instance. This is a labour matter which squarely falls under the jurisdiction of the Labour Court. The applicant seeks H an order to set aside her suspension from employment. Setting aside a

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Karwi J

suspension is not necessarily a declarator, but an order. A direction to the A respondent to comply with the provisions of s 3(6)(b) of SI 186 of 2003, Labour Relations (Retrenchments) Regulations, 2003 is equally not a declarator, but an order. These are matters which fall under the jurisdiction of the Labour Court. This court therefore declines to determine this application on that basis.

It is accordingly ordered that the application be and is hereby dismissed with B costs.

Mantsebo & Partners, applicant's legal practitioners

Gollop & Blank, respondent's legal practitioners C

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 1/EX-COMBATANTS SECURITY CO v MIDLANDS STATE UNIVERSITY 2006 (1) ZLR 531 (H)

EX-COMBATANTS SECURITY CO v MIDLANDS STATE UNIVERSITY 2006 (1) ZLR 531 (H)

Citation	2006 (1) ZLR 531 (H)
Case No	Judgment No. HH-80-06
Court	High Court, Harare
Judge	Makarau J
Heard	28 June 2006
Judgment	28 June 2006
Counsel	*D Muskwe*, for the applicant *E W W Morris*, for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

C **Practice and procedure** — *application — court application — use of application procedure — when may be used — not appropriate where will lead to an injustice — claim based on oral agreement terms of which are disputed — claim for damages arising from breach of contract — quantum of damages in dispute — matters on which evidence must be* D *led and credibility of witnesses assessed*

Headnote

The superior courts have repeatedly decried the practice by some legal practitioners to use motion proceedings for matters that ought to proceed by way of trial. It is indisputable that the court has discretion E to refuse an applicant the use of application procedure where the use of such procedure will lead to an injustice. This discretion is part of the inherent power that the court has over its own procedures to avoid injustices. The courts have adopted the approach that they will be robust and try to do justice between the parties and resolve matters brought on application procedure even where disputes of facts are manifest, "always F provided that (the court) is

convinced there is no real possibility of any resolution doing an injustice to the other party concerned" (*dicta per* Gubbay JA in *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peach* 1987 (2) ZLR 338 (S) followed).

A claim based on an alleged oral agreement whose terms are disputed cannot be resolved on the basis of affidavits without doing an in injustice to one G of the parties. A disputed oral agreement, by its very nature, existing as it does in the memories of the contracting parties, cannot be proved other than by a comparison of the credibility of those in whose memories the agreement resides. Such an agreement can only be established by the word of those witnesses whose words the court believes. The advantages H inherent in a trial will be lost to the court.

2006 (1) ZLR p532

Makarau J

Similarly, a claim for damages arising from an alleged breach of contract, A unless the damages are pre-set and agreed to between the parties, should not be brought on application procedure. A claim for damages, by its very nature, always puts in dispute the quantum of damages that are due to the applicant, even where the defendant has not defended the matter. The assessment of damages for breach of contract involves an B investigation by the court into the financial position the plaintiff is in on account of the breach and the position he would have been had there been proper performance of the contract.

Cases cited

Bevcorp (Pvt) Ltd v Nyoni & Ors 1992 (1) *ZLR* 352 (S)

Lavery & Co v Jungheinrich 1931 AD 156 C

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

Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1

Williams v Tunstall 1949 (3) SA 835 (T)

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

Case information

D Muskwe, for the applicant

E W W Morris, for the respondent

Judgment

MAKARAU J: After hearing argument in the above matter I dismissed the E application with costs and indicated that my reasons would follow. I now set them out.

On 25 October 2004, the applicant filed a court application seeking an order compelling the respondent to pay to it a sum of $96 410 250 being damages for lost income over three months, the sum of $83 215 248.75 being arrear fees for services rendered and the sum of $52 500 000 representing damages F suffered as a result of the alleged breach of contract.

In the founding affidavit, it was alleged that the applicant had a contract with the then Gweru Teachers' College for the provision of security services. The contract was allegedly concluded on behalf of the college by the Ministry of Higher and Tertiary Education. Whilst the contract was duly signed by both G parties, the applicant was not furnished with a signed copy. When the respondent was established in 2000, the applicant and the Ministry of Higher education were operating in terms of the alleged contract. It was further alleged that the respondent took over all the rights and obligations of the College including the contract between the applicant and the Ministry. On 27 July 2004, the respondent gave notice to the applicant that it was terminating the H

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Makarau J

A service contract with effect from 31 July 2004. In term of the written but unsigned agreement between the applicant and the Ministry, the notice period provided was a period of three months. As a result of the breach by the respondent in this regard, the applicant suffered damages as claimed

as it had 40 guards on site who were earning $437 000 per month. Due to the termination of the contract, the applicant had to pay each one of them three months salary B in lieu of notice. A statement of account was attached to show the arrears in charges for services rendered. Further, it was alleged that had the contract not been terminated, the applicant would have earned the sum of $32 136 750 per month over three months, representing the notice period.

The application was opposed. In the opposing affidavit, the date upon which C Gweru Teachers' College ceased to exist was put in issue. The alleged contract between the appellant and the Ministry of Higher and Tertiary Education on behalf of the respondent was denied. The respondent further alleged that it was a creature of statute and did not take over the rights and obligations of Gweru Teachers' College as that was not provided for it the statute creating the university. Regarding the provisions of security services by the applicant D at the university, it was alleged that the parties were in an oral agreement that was renewed on a monthly basis. It was further allegedly agreed between the parties that the contract between the parties would be terminated once a proper tender had been floated and awarded. A tender was floated in June 2004 and the applicant participated but was unsuccessful.

E The damages allegedly suffered by the applicant and the arrear charges were denied and the applicant was put to the proof thereof.

The applicant filed an answering affidavit wherein it reinforced its earlier position, thereby, in my view, bringing into clearer focus the numerous disputes of facts arising from the affidavits. For instance, the date when Gweru Teachers' College ceased to exist became hotly contested and the fact that F some other security company provided services to the respondent from January to December 2000 was denied "*in toto*", to use the applicant's language. An attempt was made to explain how the respondent allegedly took over the contract between the applicant and the college and the suggestion that the contract between applicant and the respondent was a monthly oral contract was also denied.

G With the papers between the parties in this state, Mr *Muskwe* moved for an order in terms of the draft or as a fall back position, that the matter be referred to trial on account of the disputes of facts. Mr *Morris* for the respondent sought to deepen the disputes of facts further by arguing that the applicant did not have a contract with Gweru Teachers' College, as alleged, that the H respondent allegedly took over. I was thus being called upon to find on a

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balance of probabilities whether or not the parties had an oral contract for the A provision of security services by the applicant on the terms that it alleged.

Time and again this court and the Supreme Court have decried the practice by some legal practitioners to use motion proceedings for matters that ought to proceed by way of trial. See *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (H); *Bevcorp (Pvt) Ltd* v *Nyoni & Ors* 1992 (1) ZLR 352 (S). B

The remarks by Dowling J in *Williams* v *Tunstall* 1949 (3) SA 835 (T) at 839 have not lost their instructive edge despite the passage of time. He had this to say:

> "I agree, however, that the courts must today recognize that in contemporary practice any dispute, save matrimonial causes and claims for damage, but not excluding money counts, may be decided by motion proceedings in C an appropriate case. It is, however, not possible to visualize all the contingencies that may arise in relation to such cases, and I am of the opinion that the court should, even when it is clear that there is no *bona fide* dispute of fact, reserve to itself a discretion, where the respondent objects to this form of procedure and it is reasonably possible that he may suffer prejudice in some form or another through its use, to deny the D applicant the use of motion procedure in cases where *rauw actie* would normally be the appropriate remedy."

That the court has a discretion to refuse an applicant the use of application procedure where in the view of the court the use of the procedure will lead to an injustice, is in my view, undisputable. This discretion is part of the inherent powers that the court has not over its own procedures to avoid injustices. Our E courts have adopted the approach that they will be robust and try and do justice between the parties and resolve matters brought on application procedures even where disputes of fact are manifest "always provided that [the court] is convinced there is no real possibility of any resolution doing an injustice to the other party concerned": *per* Gubbay JA in *Zimbabwe Bonded* F *Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S).

The resolution of the dispute without doing an injustice to the other party appears to me to be one of the prime considerations in allowing or disallowing the use of application procedures.

It thus presents itself clearly to me that a claim based on an alleged oral agreement whose terms are disputed cannot be resolved on the basis of G affidavits without doing an injustice to one of the parties. A disputed oral agreement, by its very nature, existing as it does in the memories of the contracting parties, cannot be proved other than by a comparison of the credibility of those in whose memories the agreement resides. Such an agreement can only be established by the word of those witnesses whose words the court believe. H

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Makarau J

A It further presents itself clearly to me that application procedure is inappropriate to allege and prove a disputed oral agreement as a resolution of the matter on the basis of the affidavits will lead to an injustice as the advantages inherent in a trial will be lost to the court.

Further, a claim for damages arising from an alleged breach of contract, unless the damages are pre-set and agreed to between the parties, should not be B brought on application procedure. A claim for damages by its very nature always puts in dispute the quantum of damages that are due to the applicant even where the defendant has not defended the matter.

While a claimant may quantify his damages, the assessment of such damages is done by the court on evidence adduced and on principles of law applicable C for that claim and on a comparative basis with decided cases. Thus, the monthly payments that were being made as between the parties in the form of service charges for instance, while forming the basis of the claimant's quantification may not necessarily be the amount of damages actually suffered after assessment by the court.

It is trite that the fundamental rule in regard to the assessment of damages for D breach of contract is to place the plaintiff in the position he would have been had the contract been properly performed by the defendant, so far as this can be done by the payment of money and without causing undue hardship to the defendant. Thus, in assessing damages that will achieve this end, the court will have to assess the actual value of the loss to the plaintiff amid considerations of efforts made by the plaintiff to mitigate his loss and the reasonableness of E the amount in relation to the prevailing market values.

It further appears to me that since damages for breach of contract involves some degree of speculation as to the position that the plaintiff would have occupied but for the breach (being an opinion of the plaintiff), such speculation cannot be tested and adopted by the court as its own opinion without it being F subjected to examination and cross examination. For the court merely to accept the speculation of the plaintiff as given on the affidavits without testing it may work an injustice on the other party.

The assessment of damages for breach of contract involves an investigation by the court into the financial position the plaintiff is in on account of the breach and the position he would have been had there been proper performance H of the contract. See *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 and *Lavery & Co* v *Jungheinrich* 1931 AD 156. The assessment also involves an investigation as to whether the alleged damage flows naturally from the breach or was reasonably within the contemplation of the parties. These are not matters of fact alone but involve H a degree of conjecture and clairvoyance on the part of the court.

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Makarau J

Due to the nature of the exercise that the court has to go into, it is, in my view, A undesirable and inappropriate that such be done outside a trial.

Thus, in my view, an applicant wishing to claim damages for breach of contract other than pre-set damages, must always be aware that there is a dispute regarding the quantum of damages and should err on the side of caution by launching an action rather than filing an application. B

In casu, the applicant sought to prove the terms of a disputed oral agreement and damages for breach of that agreement in application proceedings. Such damages included loss of gross income for three months and the salaries paid to a number of guards over an equal period. The measure of such damages was not established on the papers.

In my view, this was clearly inappropriate for the reasons I have given above. C It is for these reasons, that I dismissed the application with costs.

Muskwe & Associates, applicant's legal practitioners

Dzimba Jaravaza & Associates, respondent's legal practitioners D

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TEESDALE v REED & ORS 2006 (1) ZLR 537 (S)

Citation	2006 (1) ZLR 537 (S)
Case No	Judgment No. S-22-06
Court	Supreme Court, Harare
Judge	Gwaunza JA (in chambers)
Heard	7 June 2006
Judgment	29 June 2006
Counsel	*P Machaya,* for the applicant *I E G Musimbe,* for the first respondent No appearance for the second respondent *T K Hove,* for the third respondent
Case Type	Application for leave to appeal out of time
Annotations	No case annotations to date

Flynote

C **Practice and procedure** — *execution — sale — sale by public auction — sale confirmed by Sheriff — Sheriff subsequently realising sale price unreasonably low — when Sheriff entitled to set aside sale and resort to sale by private treaty*

Headnote

The appellant's property was first sold in execution by public auction. The D Sheriff, although he did so after initially confirming the sale and after an application had been made to court to set the sale aside, realised and was satisfied that the price that the property had fetched at the public auction sale was unreasonably low. The property was then sold to the third respondent by private treaty.

E *Held*, that no time limits are imposed by r 358(2) of the High Court Rules 1971 as to when the decision by the Sheriff to reject a sale by public auction and resort to a sale by private treaty should be made. The confirmation by the Sheriff of the sale by public auction did not bar him from dealing with the property under r 358(2). The situation might, however, have been

otherwise had the initial purchaser not agreed to the setting aside of the F sale, and proceeded to take transfer of the property in question.

Legislation considered

High Court Rules 1971 (RGN 1074 of 1971), r 358(2)

Case information

P Machaya, for the applicant

G *I E G Musimbe,* for the first respondent

No appearance for the second respondent

T K Hove, for the third respondent

Judgment

GWAUNZA JA: The applicant seeks leave to appeal, out of time, against a H judgment of the High Court passed on 22 February 2006.

2006 (1) ZLR p538

Gwaunza JA

The applicant asserts that following renunciation of agency by his legal A practitioners after the matter was heard in the court *a quo*, he personally took on the task of constantly enquiring with the Registrar of the High Court, whether the judgment was ready. He adds that up until 24 March 2006, when he was finally able to collect the judgment in question, the answer to his enquiries as to its availability had been in the negative. The applicant B professes ignorance as to the date on which the judgment was handed down, saying neither he nor his erstwhile legal practitioner Mr *Kamdefwere* had been notified of this fact.

The applicant's assertion, that he checked for the judgment constantly between January and 24 March 2006, is not supported by any other evidence. He has, however, filed a supporting affidavit from his former legal practitioner, C Mr *Kamdefwere*, who could only confirm that the applicant had indeed called him on 24 March 2006, to advise that the judgment had been handed down. Both the applicant and Mr *Kamdefwere* assert that further delay in noting the appeal (which the latter was given instructions to file, having resumed agency) had been occasioned by their failure to locate some of the documents related to the matter, which the applicant had collected from the legal practitioner D upon the latter's earlier renunciation of agency.

On these two grounds, the applicant urges me to find that he has tendered a reasonable explanation for the delay in noting the appeal in question.

The respondents, who oppose this application, dispute that the applicant's explanation is reasonable. They argue that the applicant, like the other parties E to the dispute, must have received notification from the registrar of the court *a quo*, that the judgment was to be handed down in motion court, as is the practice. Alternatively, that had he been more diligent in his enquiries concerning the judgment, he would not have failed to see the motion court roll indicating when the judgment was to be handed down.

I find on the evidence before me, that the possibility cannot be discounted, F that the applicant may indeed not have received notice as to the date on which judgment was to be handed down. His assertion that at some point before the judgment was handed down, his lawyers had renounced agency, has not been disputed. It is in fact, corroborated by Mr *Kamdefwere*. He was therefore, for all intents and purposes, a self actor on the occasions he said he made G enquiries about the judgment. It can be assumed that he could not, in that capacity, have had knowledge of the inside workings of the registrar's office concerning motion court rolls and the handing down of judgments. For its part, the registrar's office might have had problems determining to whom to address the applicant's notice concerning the date on which judgment was to be handed down. H

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Gwaunza JA

A I am persuaded in the light of all this, that the applicant may be given the benefit of the doubt, and find, accordingly, that he has proffered a reasonable excuse for not timeously filing his notice of appeal against the judgment of the court *a quo.*

Having passed this first hurdle, the applicant still has to prove that he has good B prospects of success on the merits of his appeal.

To determine this matter it is necessary to consider the background to the dispute between the parties.

The applicant, as surety, defaulted in repaying a certain loan advanced by Stanbic Bank, to a company in which he had an interest. A default judgment was obtained against him for the amount owed. Rather than seek to enforce C the default judgment, Stanbic Bank ceded its rights therein to the first respondent. The first respondent subsequently caused the applicant's immovable property to be attached, and later sold by public auction on 27 July 2001. A company called Corundum Mining Company (Pvt) Ltd objected to the confirmation of this sale by the Sheriff, on the ground that it had previously bought the same property from the applicant and was entitled to transfer of D such property into its name.

When the Sheriff proceeded despite this objection, to confirm the sale, Corundum Mining Company resorted to a court application for the setting aside of the sale. At this juncture, the first respondent, who as an interested party had not been cited in the application by Corundum, successfully E petitioned the court to be joined as a party to the proceedings. The first respondent made it clear that while he agreed with Corundum Mining (Pvt) Ltd that the sale in execution had to be set aside, he did not agree with the reason tendered by the company for such nullification. His objection to the sale was based on what he perceived to be an unreasonably low purchase price realised for the property. The parties subsequently entered into negotiations, which F culminated in a consent order setting aside the sale in execution. The basis for the negotiated settlement was that the price realised at the sale by public auction was unreasonably low. It is the first respondent's evidence that the parties further agreed that the property be sold by private treaty, consequent upon which advertisements for the sale of the property by private treaty were G flighted in the newspapers. It is not in dispute that the property was then sold to the third respondent by private treaty, for $23 750 000. The sale was thereafter confirmed by the Sheriff.

Following this sale, the applicant, for the first time, raised an objection to the sale and filed an urgent chamber application in which he sought a provisional order interdicting the Registrar of Deeds from transferring the property to the H third respondent, pending an application that he wished to file, for the setting

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aside of the sale. The applicant cited an unreasonably low price as a reason A for seeking the nullification of the sale. For this, he relied on what he termed a "desk top" evaluation by Gabriel Real Estate, which had placed the forced sale value of the property at between $50 million and $60 million. The High Court dismissed the application in what appears to have been a final order. That the High Court considered the merits of the application and issued a final B rather than a provisional order, is evidenced by the applicant's initial grounds of appeal against the court's order. The second ground of appeal read as follows:

> "The learned judge erred in denying that the professional opinion by Gabriel Real Estate Agents as to the value of the property at the time it was sold was a true indication of the value of the property, pending the C compilation of a comprehensive report."

The third ground of appeal charged that the learned trial judge had erred by deciding that the applicant had no prospects of success in the application he meant to file, for the setting aside of the agreement of sale between the Sheriff and the third respondent.

The notice of appeal containing the two grounds cited was, for reasons not D too clear from the papers, withdrawn on 19 February 2003. Almost five months later, on 5 August 2003, the appellant filed an application to this Court, seeking to reinstate the appeal withdrawn in February 2003. The Supreme Court dismissed the application.

From a legal and procedural standpoint, the dismissal of the applicant's E application for the reinstatement of this appeal should have brought finality to the litigation surrounding this dispute.

This was however, not the case, as the applicant went back to the High Court and, in a fresh application founded on a different cause of action, he again sought to have the same sale by private treaty, set aside. As the learned judge F *a quo* correctly pointed out in his judgment, the applicant's fresh application was filed fourteen months after the sale he sought to have set aside was concluded, and thirteen months after such sale was confirmed by the Sheriff.

The applicant argued in the court *a quo*, and for the first time, that the sale of the property by private treaty was null and void as it did not comply with subrule 358(1) of the High Court Rules, in particular that neither he as the G judgment debtor, nor a judge, had consented to the sale by private treaty. The subrule reads as follows:

> "… where all persons interested including the judgment debtor consent thereto, or otherwise with the consent of a judge, the Sheriff may sell the movable property attached in execution otherwise than by public auction, H

Gwaunza JA

> A if he is satisfied that the price offered is fair and reasonable and that the property is unlikely to realise a larger sum by a sale at a public auction."

The respondents opposed the application, and argued that the sale by private treaty had been conducted in terms of subrule 358(2) and not 358(1) of the rules. The respondents contended that subrule 358(2) provided for a sale by private treaty "after a sale by public auction has taken place and the Sheriff B is not satisfied that the highest price offered is reasonable."

They argued further that, since the condition precedent in subrule 358(2) (that the property must have been offered for sale at a public auction before being sold by private treaty) had, in the view of the respondents, been met, there was no need to secure the consent of the parties. In other words, their case was C that subrule 358(1) did not apply.

The learned judge *a quo* was persuaded by the respondent's contention and accepted as correct, their interpretation of the law as set out in r 358.

The question to be considered against this somewhat long background to the dispute, is whether the applicant has good prospects of success on the merits of his appeal. A closer analysis of the facts of the case as outlined, reveals what D in effect are two separate applications by the applicant, based on the same facts, involving the same parties, and seeking exactly the same relief. The only difference between the two cases is the basis for the application. It is at this juncture pertinent to note that there was nothing to stop the applicant, in his first application, from citing as an additional ground for the setting aside of E the sale in question, the ground that he has taken up in the second application, that is the alleged non compliance with subrule (1) of r 358.

As indicated, the first application was heard, on the merits, and dismissed by the High Court. By dismissing his application for leave to appeal against this judgment out of time, this court effectively and finally resolved the dispute. Surprisingly, neither the respondents nor the court *a quo* considered the F correctness or otherwise of the applicant literally attempting to, as it were, have a "second bite of the cherry" through his second application. That application clearly sought to resuscitate a matter against which a defence of *res judicata* could, in my view, have been successfully raised. The learned trial judge, who it must be mentioned, was the one who had heard the first G application and dismissed it, went on to hear the matter all over again, that is the second application, and made a ruling based on the new argument advanced by the applicant.

In argument before me, the respondents, while not specifically referring to *res judicata* as a defence, emphasised the point that the applicant had on H numerous occasions taken the same dispute to court under various guises,

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Gwaunza JA

resulting in the matter dragging on for over six years. Strong argument was A also advanced on the need to bring finality to litigation. I fully agree with these contentions, as, indeed, did the learned trial judge.

Be that as it may, correctly or not, the learned trial judge considered the arguments concerning the interpretation of r 358, and determined that subrule (2), rather than subrule (1) of the rule, applied to the circumstances of this case. B I am satisfied, for what it is worth, that his interpretation was

correct. There is no dispute that the property in question was first sold by public auction. Nor is it disputed that the Sheriff, although he did so after initially confirming the sale and after an application had been made to court to set such sale aside, realised and was satisfied that the price that the property had fetched at the public auction sale was unreasonably low. This reality, in my view, stands C despite the fact that the sale was set aside following negotiations and agreement between the parties and the Sheriff.

As correctly contended for the third respondent, no time limits are imposed by subrule (2) of r 358 as to when the decision by the Sheriff to reject a sale by public auction and resort to a sale by private treaty should be made. There D is, therefore, no merit in the argument advanced for the applicant that the confirmation of the sale by public auction, by the Sheriff, effectively barred him from dealing with the property under subrule (2) of r 358. The situation might, however, have been different had the purchaser:

(i) not agreed to the setting aside of the sale; and

(ii) proceeded to take transfer of the property in question. E

This, as indicated, was not the case.

When all is considered, I am in the result not satisfied that the applicant has proved that he has good prospects of success on the merits of his proposed appeal.

In the premises, the application for leave to appeal out of time is dismissed with F costs.

Musunga & Associates, applicant's legal practitioners

I E G Musimbe & Partners, first respondent's legal practitioners G

T K Hove & Partners, third respondent's legal practitioners H

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COLTART v MIN OF HOME AFFAIRS & ORS 2006 (1) ZLR 543 (H)

Citation	2006 (1) ZLR 543 (H)
Case No	Judgment No. HB-67-06
Court	High Court, Bulawayo
Judge	Bere J
Heard	5 May 2005
Judgment	29 June 2006
Counsel	*T A Cherry,* for the plaintiff *M Munjanja,* for the defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

C **Damages** — *amount — when to be assessed — rule that damages are fixed at the time of wrong or breach — effect of inflation*

Delict — *actio injuriarum — police — allegation of illegal search of premises by police — order of court rendering such a search illegal — court order only made after the search had been conducted — police acted in good* D *faith*

Delict — *damages — rule that damages are fixed at the time of wrong or breach — effect of inflation on the rule*

Police — *action against — illegal search warrant — no jurisdiction by magistrate to issue the search warrant — Police Act [Chapter 11:10]* — E *s 67 — provides protection to police officers acting in good faith — need to adopt a robust approach when scrutinising behaviour of police in the conduct of their duty — unreasonable to expect police officers to be guided by plaintiff's views as to the legality of search warrant*

Practice and procedure — *parties — police officer — action against — police officer acting in obedience to warrant — defective warrant —* F *when police officer protected against suit*

Practice and procedure — *pleadings — amendment — discretion of court — discretion to be exercised judicially — discretion may be exercised at any time before judgment*

Practice and procedure — *summons — amendment — application to* G *increase amount of damages being claimed — long delay since summons issued, through no fault of plaintiff — original claim now unrealistically low due to hyper-inflation — application granted*

Headnote

The granting of an application for the amendment of a pleading is a matter H for the discretion of the court to be exercised judicially in the light of all

the facts and circumstances before it. The court has such a discretion to A allow a litigant to amend his pleadings at any time prior to judgment (*dicta per* Ndou J in *Ncube* v *Dube & Ors* HB-106-04, followed).

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 (*dicta per* Cheda J in *Sikazwe & Ors* v *Mchada & Ors* 2005 (2) ZLR 448 (H) followed). B

The provisions of s 67 of the Police Act [*Chapter 11:10*] which affords police officers protection from liability for acts done under an irregular warrant must only be read to protect those officers who act *bona fide* in the execution of their duties. It could not have been the intention of the C legislature to protect and camouflage police actions clouded by *mala fides.*

On 9 March 2001, the plaintiff issued summons against defendants claiming general damages in the sum of $100 000. He alleged that a search of his home conducted by police officers was illegal, *inter alia*, because the High Court had ordered that the private radio station, of which he was D a director of the company operating it, was entitled to broadcast. He also alleged that because the search warrant had been issued by a magistrate of the magistrates court, Harare, and the plaintiff's home, being in Bulawayo, was outside, its jurisdiction, the search was illegal. On the day before the trial, because of the inflation which had occurred, the plaintiff filed a chamber application in which he sought to amend his claim so as E to claim the sum of $10 000 000. The defendants opposed the application on the grounds that the application was irregular, the plaintiff only being entitled to the value of the claim at the time of the loss. On the merits, it was common cause that the search of the plaintiff's home had been conducted on 4 October 2000. The defendants, however, claimed that the F order of High Court (issued by Chatikobo J) was only granted at about 2000 hours on that date, which was about four hours after the police, armed with the search warrant, arrived at the plaintiff's home. It was clear, so argued the defendants, that they were unaware of the High Court order, at the time the plaintiff's house was searched. The defendants also argued that while it must be conceded that the magistrate in Harare had G no jurisdiction to issue a search warrant in respect of premises in Bulawayo, they were protected from liability for damages by virtue of s 67 of the Police Act [*Chapter 11:10*], notwithstanding the attempt by the plaintiff, at the time of the search, to point out that the search warrant was defective. H

A *Held,* that the plaintiff's application to amend his claim from $100 000 000 should be granted. Although the principle that damages must be assessed at time of the wrong or breach is tried and

tested, it is only sustainable in a normal economic environment. There is a general acknowledgement that the economic situation is declining. Further, through no fault of the plaintiff, the case was only heard four years after the issue of summons.

B *Held,* that the defendants had acted in good faith in conducting a search of the plaintiff's home. The evidence, indeed, established that the High Court order had only been granted after the search had been conducted.

Held, further that as far as the illegality of the search warrant was concerned, s 67 of the Police Act [*Chapter 11:10*] did provide the defendants with C protection from liability therefrom. The police officers who conducted the search, in the circumstances of the case, could not have been expected to have been guided by the plaintiff as to the validity or otherwise of the search warrant and had acted in good faith in conducting the search.

Held, further, that the plaintiff's action should be dismissed with costs.

Cases cited D

Munhuwa v Mhukahuru Bus Svcs (Pvt) Ltd 1994 (2) ZLR 382 (H)

Ncube v Dube & Ors HB-106-04

Sikazwe & Ors v Mchada & Ors 2005 (2) ZLR 448 (H)

Legislation considered E

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 49 and 50

High Court Rules 1971 (RGN 1047 of 1971), r 134

Police Act [*Chapter 11:10*], s 67

Case information

F *T A Cherry,* for the plaintiff

M Munjanja, for the defendants

Judgment

BERE J: The plaintiff is a legal practitioner and partner with a law firm, Webb, Low and Barry, Legal Practitioners, Bulawayo. He is also a member of the opposition party in Zimbabwe called the Movement for Democratic Change G (pro-senate faction) and a Member of Parliament for Bulawayo South Constituency having been elected in March 2005.

On 9 March 2001, the plaintiff issued summons commencing action against the five defendants for a sum of $100 000 in the form of general damages plus other ancillary relief. The basis of his claim is clearly laid out in his declaration H and it is important to re-state the most relevant parts of that declaration:

Bere J

"8. On 4 October 2000 at about 7.40 p.m third, fourth, fifth and sixth A defendants conducted a search at plaintiff's premises at 5 Martin Close, Burnside, Bulawayo, pursuant to a search warrant issued on that day alleging that plaintiff, a Director of Capital Radio [Pvt] Ltd, was suspected of breaching section 13[a], [b] and [e] as read with section 29[R][ii] of the Radio Communication Services Act [*Chapter 12:04*]. B

9. The said search was illegal as in terms of a High Court order issued on 4 October 2000, prior to the search, the High Court had ordered that Capital Radio [Pvt] Ltd was entitled to operate, had interdicted the Minister of Information, Posts and Telecommunications Corporation and the Commissioner of Police for interfering with the right to operate and had specifically stated that section 12 and 13 of the Radio C Communication Services Act were of no application to Capital Radio [Pvt] Ltd. Second defendant was or ought to have been aware of the said order, and so was aware that the search was illegal.

10. Alternatively, the said search was illegal as the search warrant was issued by a Magistrate of the Magistrates Court, Harare and plaintiff, being in Bulawayo, was outside of the jurisdiction of the Harare D Magistrates Court.

11. Alternatively, the said search was illegal as no search warrant was served on the plaintiff, the copy served on the plaintiff being invalid by reason of being a facsimile.
12. At all times, the second, third, fourth, fifth and sixth defendants acted in the course with their employment with the first defendant.
13. As a consequence of the illegal actions of the defendants, the plaintiff has suffered damages of contumelia, the unlawful invasion of his home, and discomfort, in the sum of $100 000.
14. …"

This, in its elaborate form, formed the basis of the plaintiff's suit.

The defendants filed their defence to the claim in two different pleas with the fifth defendant filing a separate plea.

Basically, the position of the defendants was that at the time a search was conducted at the plaintiff's premises they were not aware of the interdict granted by the High Court against their actions. They therefore, believed the search was perfectly lawful.

It was conceded by the defendants that the warrant used to search the plaintiff's premises had been issued by a magistrate who had no jurisdiction to issue it. They further stated that, despite the defect in the warrant, it was necessary for them to conduct a search and that in any event they could have

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done so without such a warrant in terms of s 51 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

In dealing with this matter, I feel more inclined to address the issue of the application for amendment of pleadings first.

APPLICATION FOR AMENDMENT OF THE *QUANTUM* FOR DAMAGES

On 4 May 2005, a day before trial, the plaintiff filed a chamber application seeking an amendment to the amount claimed in the summons. At the time the summons was issued the claim had been pegged at $100 000. The chamber application sought to have the amount of claim raised to $10 000 000. The sole reason given was that due to lapse of time in setting the matter down the value of the Zimbabwe dollar has depreciated to such an extent as to render the claim wholly unrealistic.

In his founding affidavit in support of the chamber application, the plaintiff detailed his difficulties in having the matter expeditiously dealt with from the time the pleadings were being filed right up to the time when all pleadings had been closed. He also gave a detailed summary of his frustration in having the matter set down. The stark reality is that the matter which commenced with summons being issued in the High Court on 9 March 2001 was only heard on 5 May 2005. It took over four years to have this matter set down despite the plaintiff's countless efforts to have this matter set down.

The chamber application was vehemently opposed by the respondents through their legal practitioner, Mr *Munjanja* who argued that the applicant's application was irregular and that he was only entitled to the value of claim at the time of loss.

The question of amendment of pleadings is adequately dealt with by order 20 rr 132-136 of High Court Rules 1971. The amendment sought by the plaintiff is specifically provided for in r 134 which reads as follows:

> "134. **A summons or declaration: Cause of action arising after issue of summons**
>
> (1) A summons or declaration may with the leave of the court or judge be amended to substitute or to include a cause of action arising after the issue of summons:
>
> Provided that in the opinion of the court or judge such an amendment does not change the action into, or add it, an action of a substantially different character which would more conveniently be subject of a fresh action."

As pointed out by my brother Ndou in *Ncube* v *Dube & Ors* HB-106-04 at p 3 of the cyclostyled judgment:

> "… it is trite that the granting of an application for the amendment of a

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> pleading is a matter for the discretion of the court to be exercised judicially A in light of all the facts and circumstances before it. The court has such a discretion to allow a litigant to amend his or her pleadings at any time prior to judgment."

I endorse that position. In *Munhuwa* v *Mhukahuru Bus Services (Pvt) Ltd* 1994 (2) ZLR 382, Chatikobo J expressed the view that damages must be assessed as at the time of the wrong or breach. It appears to me that the position B adopted by the defendants in opposing the application for amendment was leaning on this tried and tested principle of our law as stated by Chatikobo J. I accept that the view expressed by Chatikobo J in *Munhuwa* is derived "from a respectable pedigree of cases" extensively referred to in his judgment. It is difficult to depart from such a principle.

I must, however, add caution and say, persuasive as it is, in my respectful view, that approach is only sustainable in a normal economic environment. There is a general acknowledgement in this country that our economic situation is on the decline. The continuous and systematic rising of inflation puts our economic situation in an awkward position.

This case was only heard four years or so after summons had been issued and D the delay in hearing this matter was through no fault of the plaintiff. He did all he could to try and have the matter heard in time but failed. It is a well known fact that generally unless matters are heard on urgent basis, there is quite some considerable period of time that lapses between issuing of court process and the trial of the case. Add to this, an economy that is not performing to E expectations with inflation currently pegged at over 1 000 percent.

In my view, given the peculiar circumstances of our situation, the application for amendment made by the plaintiff was well founded. It would have to be in extremely exceptional circumstances where an application like the one made by the plaintiff is denied particularly where it is apparent that the other party F would not be prejudiced by such an amendment.

The amendment sought is accordingly granted.

I must now proceed to deal with the substantive issues in this matter. In doing so, I propose to deal with the issues as chronologically set out in the plaintiff's declaration commencing with the effect of the High Court provisional order of 4 October 2000. G

WAS THE SEARCH CONDUCTED IN VIOLATION OF THE HIGH COURT ORDER?

It is clear from the plaintiff's pleadings that, the order made by the High Court on 4 October 2000 is central to his civil suit. It is the main ground upon which he sought to found liability against the defendants. H

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A The plaintiff was therefore expected to demonstrate to this court on a balance of probabilities that at the time a search was conducted at his residence those who conducted or initiated the search knew of the existence of the interdict issued by the High Court on 4 October 2000.

Because of the passage of time none of the witnesses had a vivid recollection of the exact time the police arrived at the plaintiff's house. That is understandable B given the fact that this case was only heard in court more than four years after the event.

However, the witnesses were generally agreed that the police officers arrived at the plaintiff's house armed with a search warrant late in the afternoon of 4 October 2000. In fact according to the plaintiff, he testified that he had been C advised by his wife that the police had been at their premises at approximately 1600 hours and that when they arrived they had exhibited a search warrant.

The plaintiff further testified that he engaged the third defendant at approximately 18.45 p.m. He could, for obvious reasons, not state the time with absolute precision. After failing to dissuade the police officers from conducting the search, the plaintiff eventually gave in but, when he did so, he made it clear D that he was doing so on a without prejudice basis. The plaintiff's attitude towards the search and his threat of litigation against the police was confirmed by the third defendant.

From the evidence of the plaintiff, as well as that of the third defendant, it would appear that the search was concluded well after 2000 hours. It is clear to me that if there was no initial resistance to the search from both Mrs Coltart and E the plaintiff the search would have taken place as soon as the police arrived at plaintiff's residence.

It is clear from the affidavit of one Anthony Andrew Brooks that the much talked about High Court interdict or order granted by Chatikobo J was only granted at around 2000 hours on 4 October 2000.

F For clarity's sake, Anthony Andrew Brooks stated in his affidavit para 5 thereof as follows:

> "Mr Samukange and I then proceeded to the High Court where we appeared before Hon. Mr Justice Chatikobo at around 8 p.m., to make urgent application for the suspension of the search until this matter could be heard in full argument the following day (i.e. 5 October 2000). The learned G judge then issued an order …"

It is abundantly clear to me that at the time the police officers exhibited a search warrant at the plaintiff's residence in the afternoon of 4 October 2000, there was no High Court interdict or order to talk about. That order was a subsequent development and it would not have bound police officers who were at the H Coltarts' residence almost 4 hours before it was issued.

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I am aware that when the plaintiff gave evidence in court he made reference A to a Supreme Court decision that was granted on 22 September 2000 by the full bench of the Supreme Court[1]. I note, however, that the basis of his claim as derived from his declaration which I have referred to in *extenso* was the alleged violation of an interdict issued by Chatikobo J[2]. Even the pre-trial conference memorandum suggests the focus at trial was going to be on the High Court order of 4 October 2000. B

There appears to be some confusion as regards when precisely the High Court provisional order granted by Chatikobo J, was issued. This is so because on the order itself which is on pp 3 and 4 of the bundle of the plaintiff's documents marked exhibit "A", the learned judge put 5 October 2000 as the date he granted the order. This is despite the High Court stamp dated C 4 October 2000.

I have not allowed this confusion to detain my mind or cloud my perception of what took place on 4 October 2000. I am satisfied the order was made on 4 October 2000. I say so basically for two reasons. Firstly, I derive support from the affidavit of Anthony Andrew Brooks, earlier on referred to.

Secondly, exhibit 'C' which is a confirmation of the provisional order of D Chatikobo J by Gwaunza J (as she then was) on 5 October 2000 specifically made reference to the order made by Chatikobo J on 4 October 2000.

Whichever way one looks at the evidence of the plaintiff and all the witnesses, it cannot be concluded by any fair minded person that the defendants knew of the existence of the High Court order by Chatikobo J when they went to the plaintiff's residence on 4 October 2000. If the High Court interdict was the E sole basis of plaintiff's claim, I would have proceeded to dismiss the claim without further ado.

Given the nature of plaintiff's declaration, I am enjoined to consider the alternative basis of his claim as captured in para 10 of his declaration.

I am aware that counsel for the plaintiff argued during court addresses that F the fact that the initiator of the search warrant, that is, Asst Comm Liberman Ndlovu was subsequently found to be in contempt of the court order of 4 October 2000 and fined $3 000 should be read in favour of the plaintiff's case.

To get an insight into what happened in this regard, I sought assistance from the founding affidavit of one Jonathan Samukange, a legal practitioner whose founding affidavit appears to have been the cornerstone of the contempt of G court proceedings against Asst. Commissioner Liberman Ndlovu. I also H

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A sought assistance from the supporting affidavit of Anthony Andrew Brooks in the same application for contempt of court.

It is clear that after Chatikobo J had issued an order at around 8 p.m. on 4 October 2000, that order was exhibited to the Asst Comm Liberman Ndlovu who chose to disregard the order at his own peril. Paragraph 15 of Mr Samukange's affidavit suggests the officer acted in total contempt of that B order after it was issued and that his contemptuous actions spilled over to the early morning of 5 October 2000. This was long after the police officers had visited the Coltarts and conducted a search. Given this scenario, the position taken by Mr *Cherry,* the plaintiff's counsel, is clearly untenable.

WAS THE SEARCH ILLEGAL ON THE BASIS OF THE DEFECT C IN THE WARRANT ITSELF

It was contended by the plaintiff that "the search warrant was issued by a magistrate of the magistrates court, Harare, and the plaintiff, being in Bulawayo, was outside of the jurisdiction of the Harare magistrates court". This fact was conceded by the defendants. That concession was well made.

D There can be no argument, in my view, that the search warrant used by defendant and his fellow officers was defective in that it had been issued by a magistrate who did not have jurisdiction in Bulawayo.

The powers of any magistrate in this country are governed by statute. Such magistrate can only enjoy the power conferred upon him by statute and nothing more. It is patently clear therefore that the search warrant which was E relied upon by the third defendant and his fellow police officers was defective, in that the magistrate who issued it had no legal power or jurisdiction to do so. His authority was limited to his province in terms of the Magistrates Court Act [*Chapter 7:10*].

Despite the defects in the warrant, it would appear that what happened in this F case is precisely what was anticipated by s 67 of the Police Act [*Chapter 11:10*], which tends to provide wide protection to members of the force who execute their duties on the strength of a warrant which turns out to be defective. The section in question is couched in the following words:

> "67.*Non-Liability for acts done under irregular warrant*
>
> G If any legal proceedings other than legal proceedings for unlawful arrest or detention, be brought against any member for any act done in obedience to a warrant purporting to be issued by a judge, magistrate or justice of the peace or other officer authorised by law to issue warrants *such member shall not be liable for any irregularity in the issuing of the warrant or for want of jurisdiction in the person issuing the same, and* H *upon producing the warrant containing the signature of the person*

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> *reputed to be a judge, magistrate or justice of the peace or other such* A *authorised officer and upon proof that the acts complained of were done in obedience to the warrant, judgment shall be given in favour of such member*" (my emphasis).

It is important to note that our law requires a police officer desiring to obtain a search warrant to have satisfied himself on reasonable grounds that the search and seizure of the items targeted, is imperative and in accordance with B ss 49, 50 and 51 of the Criminal Procedure and Evidence Act before he sets out to obtain such a search warrant.

The focus in this case, must be restricted to the provisions of ss 49 and 50 of the Act as it would appear the warrant used to search the plaintiff's premises was obtained in terms of s 50. The assumption must be that before the defective C warrant was granted, the Harare magistrate must have been satisfied from the information given under oath that the plaintiff had under his control items listed on the search warrant which had to do with Capital Radio (Pvt) Ltd.

The witnesses who executed the warrant, led by Supt Mathe, were criticised for not having applied their minds to the search warrant before executing it. They were attacked for not having accepted the plaintiff and his lawyer's D advice that the search warrant was defective. They were also criticised for not having personally formulated reasonable grounds for suspecting that the plaintiff indeed had the articles mentioned on the warrant.

All the witnesses testified that they believed their function was merely to execute the warrant faxed to them by their senior officer in Harare, E Asst Comm Liberman Ndlovu, who incidentally was not

cited in these proceedings, despite it being common knowledge that he had himself initiated, obtained and faxed the search warrant in question.

The third defendant testified that when the defect of the warrant was brought to his attention by the plaintiff, he believed the warrant was in fact valid and F felt compelled to execute it.

It is tempting to say the third defendant was negligent in his conduct. One must understand the nature of the force. It is a command structure where one is obliged to follow lawful orders from those above him. In my own view, police operations would grind to a halt if they were to take instructions from suspects during the course of their investigations, for example. They are expected to G act swiftly and competently in their quest to maintain law and order.

As observed by Cheda J in *Sikazwe & Ors* v *Mchada & Ors* 2005 (2) ZLR 448 (H) at 450G-451A:

> "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 H

> A a robust approach when scrutinising their behaviour in the conduct of their duty."

When the police officers in this case were armed with a search warrant directing them to conduct a search at the plaintiff's residence it would have been naïve in my view, to have expected them to accept to be guided or to be advised by the plaintiff whose premises they had instructions to conduct a B search upon. Otherwise, the whole object of conducting a search would have been defeated.

It is, in my view, this sort of situation which s 67 s*upra* envisaged. I must however add caution to the provisions of s 67. That section in my view must only be read to protect those officers who act *bona fide* in the execution of C their duties. It could not have been the intention of the legislature to protect and camouflage police actions clouded by *mala fides.*

In the instant case, if it is accepted that the cornerstone of plaintiff's action is non-compliance with a High Court order issued by Chatikobo J, I am unable to find *mala fides* on the part of the conduct of the police and consequently all the defendants.

D I would probably have been persuaded to look at the matter differently if the plaintiff's case was premised on failure by the defendants to comply with the Supreme Court judgment of 22 September 2000. As earlier on mentioned that has never been the basis of the plaintiff's action. I can only speculate and say perhaps it was an acknowledgment by the plaintiff that the Supreme Court E decision had gray areas which required a subsequent High Court provisional order granted by Chatikobo J and confirmed by Gwaunza J on 5 October 2000. That might explain why focus was on violation of the High Court interdict as opposed to the Supreme Court decision.

The plaintiff's claim was also premised on the third alternative that "the search was illegal as no search warrant was served on the plaintiff, the copy served F on the plaintiff being invalid by reason of being a facsimile."

I listened carefully to the evidence in chief adduced by the plaintiff and also to the submissions made by his counsel in summary and I did not hear the plaintiff to have taken this issue seriously in his evidence.

According to the plaintiff, once the faxed copy was exhibited to him, the focus G shifted to the jurisdiction of the magistrate who had granted the warrant. The plaintiff said he clearly saw what was on the search warrant and p 15 of the plaintiff's bundle of documents gives the search warrant in what appears to be in its original form. In any event, it would appear the plaintiff had by H implication abandoned this as the basis of his action.

If I am wrong in my reading of the plaintiff's evidence, it would seem that that A defect was not such that it could invalidate or illegalise the search in the light of s 67 of the Police Act.

Having considered all the evidence in this case, I am satisfied that the plaintiff has failed to establish his claim. The action is dismissed with costs. B

Coghlan & Welsh, plaintiff's legal practitioners

Cheda & Partners, defendant's legal practitioners c

1 *Captital Radio (Pvt) Ltd* v *Min of Information* (1) 2000 (2) ZLR 243 (S) — *Editor*
2 *Captital Radio (Pvt) Ltd* v *Min of Information* (2) 2000 (2) ZLR 265 (H) — *Editor*

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