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TOBAIWA v KASEKE & ORS 2006 (2) ZLR 1 (H)

2006 (2) ZLR p1

Citation	2006 (2) ZLR 1 (H)
Case No	Judgment No. HH-74-06
Court	High Court, Harare
Judge	Makarau J
Heard	16 May 2006
Judgment	5 July 2006
Counsel	Applicant in person First respondent in default <i>L T Biti</i> , for the second respondent Third respondent in default
Case Type	Civil application
Annotations	No case annotations to date

Flynote

c Contract — enforceability — sale of immoveable property — seller a tenant-to-buy — local authority requiring consent of seller's spouse before agreeing to transfer — whether authority can be compelled to transfer the property without spouse's consent

Family law — husband and wife — property rights — immoveable property d acquired during marriage and registered in name of one spouse only — rights of other spouse in respect of property

Headnote

The first respondent was the registered purchaser of a property from a local authority under a lease-to-buy agreement of sale, in which the local authority reserved unto itself the right to consent to a cession on certain *ε* terms and conditions. Before he acquired full ownership, he sold his rights in the property to the applicant. The local authority refused to accede to the cession as it required the consent of the second respondent, the first respondent's estranged wife. The applicant sought an order compelling the wife to give her consent to the cession failing which the local authority be compelled to give effect to the cession without her *ϕ* consent. There were two issues for determination: (1) whether the applicant had an enforceable agreement of sale; and (2) whether, assuming he had such an agreement, the absence of the wife's consent could stop the cession of rights as between the applicant and the first respondent.

Held, that in dealing with rights in immovable properties owned by local *g* authorities, the principles that apply in a sale of property owned outright by the seller are of no application. However, it is legally possible for a person in the position of the first respondent to enter into a contract of sale, not only of the property itself, but also of the rights, title and interest that he has under the suspensive agreement of sale and which rights will in due course mature into real rights in respect of the property. Those *h* personal rights that are conferred by the suspensive agreement of sale

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Makarau J

are capable of being sold and bought without the prior consent of the *α* local authority concerned. The agreement of sale/or assignment of rights was, however, binding as between the contracting parties only. It could not be enforced against the local authority to compel transfer or cession of rights. There was simply no *vinculum juris* between the buyer and the local authority and thus no cause of action could lie against the local authority at the instance of the buyer. *β*

Held, further, that the second issue was one aspect of the imprecise nature of the rights that spouses have in jointly acquired, but not jointly owned, matrimonial property during the subsistence of the marriage. This is an issue that eludes specific definition and resolution using the existing legal norms, as it pits the law of property against the institution of *c* marriage and how parties within the institution view their relationship to the assets of the matrimonial estate, jointly acquired. Spouses who contribute towards the acquisition of a property registered in the name of one spouse are not joint owners of the property. Their mere status as a spouse does not affect the rights of ownership that registration creates. Attempting to resolve the issue of the exact nature of the proprietary *δ* rights of spouses during the subsistence of a marriage using principles of property law has the potential of working injustices as between the spouses. During the subsistence of a marriage, strict observance of the rules of property law as to the acquisition of ownership rights in respect of matrimonial assets may arguably lead to the destruction of that community of life that marriage automatically brings into being between *ε* the spouses.

Held, further, that the evidence did not show whether it was a condition of the lease-to-buy agreement that the spouse's consent was required before the council could consent to transfer or whether this was merely a noble policy designed to protect spouses. The applicant had not *ϕ* discharged the onus on him of showing that her consent was unnecessary.

Cases cited

Chikonyora v Pedzisa 1992 (2) ZLR 445 (S)

Gomba v Makwarimba 1992 (2) ZLR 26 (S)

Hundah v Murauro 1993 (2) ZLR 401 (S) *g*

Jangara v Nyakuyamba 1998 (2) ZLR 475 (H)

Kazizi v Kazizi 2006 (1) ZLR 501 (H)

Magwenzi v Chamunorwa & Anor 1995 (2) ZLR 332 (S)

Mukarati v Mkumbu 1996 (1) ZLR 212 (S)

Nkomo v Mujuru 1997 (1) ZLR 155 (H) ^h

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Makarau J

Case information

^a Applicant in person

First respondent in default

L T Biti, for the second respondent

Third respondent in default

Judgment

MAKARAU J: On 24 September 2002, the applicant purchased certain rights, ^b title and interest that the first respondent had in respect of certain immovable property in Norton. He paid the asking price in full in the sum of \$1.9 million. The agreement of sale was reduced to writing. After paying the purchase price, he demanded that the seller cede to him the rights, title and interest that he had purchased. He was informed that the Norton Town Council was refusing to ^c accede to the cession as it required the consent of the second respondent, estranged wife of the first respondent.

Desirous of taking cession of the first respondent's rights in the property, the applicant approached this court for an order compelling the second respondent to give her consent to the cession failing which the third respondent be compelled to give effect to the cession without such consent.

^d The first respondent did not oppose the application. The second respondent did. In her opposing affidavit, she denied knowledge of the sale to the applicant and that the purchase price was paid in full or at all. She further alleged that she was married to the first respondent in terms of the Marriage Act [*Chapter 5:11*] and that the parties are currently before this court in ^e divorce proceedings wherein she has made a claim against the property.

In his answering affidavit, the applicant made the point that the first respondent, as the sole registered purchaser of the property from the local authority under a suspensive agreement of sale, had every right to sell his rights under the suspensive agreement of sale without the consent of the second respondent. He makes the further point that since the sale to him was concluded before the ^f divorce proceedings were initiated, such proceedings cannot vitiate the sale.

It appears to me that two legal issues arise from this matter. The first one would at first glance appear idle. It is whether the applicant has an enforceable agreement of sale. The second one is, in my view, more complex. It is whether, assuming the applicant has an enforceable agreement of sale, the absence of ^g the second respondent's consent can stop the cession of rights as between the applicant and first respondent.

I return to the first issue.

It is trite that in dealing with rights in immovable properties owned by local authorities, the principles that apply in a sale of property outrightly owned by ^h the seller are of no application. I am here reminded of the remarks by

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Makarau J

McNally JA in *Gomba v Makwarimba* 1992 (2) ZLR 26 (S) at 27H where he ^a had this to say:

"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 Maposa* S-172-91 (not reported)."

The learned judge of appeal then went on to lament that legal practitioners ^b persist in ignoring the distinction between sale and cession of rights in cases where the property is owned by a local authority, when there are many distinctions between the two legal transactions.

The transaction between the applicant and the first respondent was thus not a sale where the applicant can compel delivery of the *merx* sold. ^c

In *Chikonyora v Pedzisa* 1992 (2) ZLR 445 (S), the Supreme Court held that a cession between the registered tenant and a prospective purchaser of rights in respect of a municipal property is invalid if the prior written consent of the municipality concerned is not obtained, as such a cession fails to comply with a contractual formality. This rather distressing decision formed the basis of ^d the Supreme Court's decision in the year that followed in *Hundah v Murauro* 1993 (2) ZLR 401 (S), where McNally JA found it distressing that he and the concurring judges were reaching the conclusion that they did.

Ebrahim JA came with a refreshingly less distressing opinion on similar transactions in *Magwenzi v Chamunorwa & Anor* 1995 (2) ZLR 332 (S). It is noteworthy that Gubbay CJ, who penned the decision in *Chikonyora v* ^e *Pedzisa*, concurred with Ebrahim JA's opinion that the rights that the first respondent (Chamunorwa) had in the property were capable of being sold without the prior consent of the local and that such a sale would bring a binding agreement between the parties which, though unenforceable at the time of conclusion, could be enforced once the seller had full title to the property. In ^f sidestepping the decision in *Chikonyora v Pedzisa*, the learned judge of appeal had this to say at 335G:

"The agreement in *Pedzisa's* case *supra* was described as 'invalid', because it had failed to comply with a contractual formality. *Kelly v Wright* 1948 (3) SA 552 (A) was cited as authority for that statement. With respect, *Kelly's* case *supra* appears to relate to a situation where as a matter of ^g statutory law the consent of an official was required before a certain property could be leased. Without that consent, the lease was illegal. I would respectfully agree with the position that the present situation was not one where purported sale was invalid because of failure to comply with the requirement to get the Municipality's consent. It was in my view, a sale that was unenforceable. The plaintiff could not have obtained title from ^h

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Makarau J

a the first defendant, who did not have title to transfer. The Municipality could have decided to cancel the agreement between themselves and the first defendant and obtained the ejectment of the plaintiff. But none of those events occurred. The first defendant allowed the plaintiff to remain in occupation until a time when the sale became enforceable."

The year following, Ebrahim JA had occasion to reinforce the remarks he had ^b made in *Magwenzi v Chamunorwa supra*, thereby putting the matter to rest and in a way reversing *Pedzisa* and *Hundah*.

In *Mukarati v Mkumbu* 1996 (1) ZLR 212 (S) at 214H-215B, the learned judge of appeal had this to say:

"I think the real position with these arrangements is this:

^c In terms of her agreement with the Council, the defendant cannot cede title to the property without the Council's consent. This means that she cannot, without the council's consent contract to pass title to the property, because she has no title to pass. But this does not mean that she cannot contract to sell the property. It would, I think, be legally possible for her to enter into a contract of sale, conditional on the Council ^d granting its consent."

I would venture to suggest at this stage, and following the remarks of Ebrahim JA, that it appears to me legally possible for a person in the position of the first respondent to enter into a contract of sale, not only of the property itself as suggested by Ebrahim JA, but of the rights, title and interest that he has under the suspensive agreement of sale and which rights will in due course mature into real rights in respect of the property. Thus, it is my view, that those personal rights that are conferred by the suspensive agreement of sale are capable of being sold and bought without the prior consent of the local authority concerned.

It would appear to me that the law is now settled that the agreement that the ^e applicant and the first respondent had was valid and binding as between the contracting parties. It is not null and void. It is on this basis that I must reject the pressing by Mr *Biti* that I dismiss the application at this stage of the inquiry on the authority of the *Pedzisa* and *Murauro* decisions. These two decisions no longer represent the applicable position at law regarding the sale and purchase of rights in

properties owned by local authorities and sold to sitting ^G tenants under suspensive agreements of sale.

The issue still to be determined in this matter is whether the agreement of sale between the applicant and the first respondent is enforceable against the local authority.

The *dicta* in *Magwenzi* appears to me to suggest that a transaction entered ^H into between the seller and the purchaser without the prior consent of the local

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Makarau J

authority is unenforceable against the local authority before the seller has full ^A title in the property.

The same view appears to have been impliedly expressed by Robinson J in *Nkomo v Mujuru* 1997 (1) ZLR 155 (H) when he held that the agreement of sale or assignment of rights before him was binding as between the contracting parties only. In other words, it could not be enforced against the local authority ^B to compel transfer or cession of rights.

The point was succinctly made by Gillespie J in *Jangara v Nyakuyamba* 1998 (2) ZLR 475 (H) at 480G-481AB as follows:

"I am therefore of the respectful view that the following statement of principle is to be gleaned from the Supreme Court decisions. A cession of a right, originally acquired subject to a *pactum de non cedendo*, but in ^C breach of that reservation, creates rights as between the parties to that subsequent cession, which rights, however cannot bind the original holder of those rights. The court may, at the instance of the third party, enforce that contract as against the lessee-purchaser. No order however may be given which can bind the original holder of those rights. Thus, no order of transfer can be given against the original holder. An order of ^D specific performance of transfer may, at the court's discretion, be given against the lessee purchaser, such an order has the effect of obliging that party to effect transfer if he is in a position to do so, or to take transfer of the property in order to give it, if such be necessary."

I respectfully associate myself with the remarks made by the learned judge, which, in my view, are a correct rendition of the legal principle governing ^E transactions of this nature. I am much aligned to the reasoning of the learned judge at 480F as to the reason why the local authority cannot be bound to effect transfer of the rights in favour of the third party at the instance of the third party. There is simply no *vinculum juris* between these two parties and thus no cause of action can lie against the local authority at the instance of the third ^F party. In my view, the logic why a third party cannot compel transfer from the local authority is so simple it nearly escapes notice.

Thus, it is my finding that, while the applicant has a valid agreement of sale with the first respondent, he cannot obtain an order compelling the local authority to consent to the proposed cession in his favour. He has no contract with the local authority ^G. He has no legal relationship with the local authority and thus he has no cause of action against the local authority.

I would dismiss the application with costs on this basis alone.

Assuming, however, that I have erred in my perception of the principles emanating from the various decisions of the Supreme Court and of this court ^H

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Makarau J

^A on transactions similar to the one before me, I will proceed to consider the second issue arising from the papers.

It is my view that the second legal issue revealed by the facts of this matter is one aspect of the imprecise nature of the rights that spouses have in jointly acquired but not jointly owned matrimonial property during the subsistence of the marriage. See *Kazizi v Kazizi* 2006 (1) ZLR 501 (H). This is an issue that eludes specific definition and ^B resolution using the existing legal norms, as it pits the law of property against the institution of marriage and how parties within the institution view their relationship to the assets of the matrimonial estate, jointly acquired. From the various suits brought before this court, it appears that spouses who contribute towards the acquisition of matrimonial ^C assets directly or indirectly, mistakenly believe that they are joint owners with their spouses in whose sole name the property would have been registered. Ordinarily and in most cases, they are not, as their mere status as a spouse does not enter the realms of property law to clog or even cloud the rights of ownership that registration creates.

It is my further view that attempting to resolve the issue of the exact nature ^D of the proprietary rights of spouses during the subsistence of a marriage using existing principles of property law has the potential of working injustices as between the spouses, as during the subsistence of a marriage strict observance of the rules of property law as to the acquisition of ownership rights in respect of matrimonial assets may arguably lead to the destruction of that community ^E of life that marriage automatically brings into being between the spouses.

For what it is worth, I will not pass this opportunity to once again express my view that unless sooner Parliament intervenes and legislate on the position, the issue will continue to dog these courts.

The narrow legal issue brought out by the facts of this matter is whether the ^F refusal by the Norton Town Council to accede to the proposed cession of rights between the applicant and first respondent on the grounds that the consent of the second respondent as first respondent's wife, has any basis in law.

In my view, it is important that I at this stage set out in full the refusal by the Norton town Council. It was addressed to the first respondent and it reads as ^G follows:

"PROPOSED CESSION OF K1341: C. KASEKE TO D. TOBAIWA

I refer to our telephone discussion on 4 December 2002 regarding the above issue.

Procedurally, I am required to have your wife's consent in writing that she ^H does not object to the proposed cession. Now that you have failed to have

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Makarau J

this done you may proceed by way of court application to compel me to ^A be ordered to entertain the cession in the absence of your wife's consent."

The letter is signed by the third respondent.

It is not clear from a reading of the letter on what basis the consent of the second respondent was considered binding on the town council. It was, however, strenuously argued by Mr *Biti* that the stance adopted by the town ^B council in this matter is a noble policy on its part to protect the interests of those spouses, mainly women, who find themselves dispossessed of jointly acquired property that is registered in the sole names of their husbands. I have thus been urged not only to positively acknowledge but to uphold the policy stance adopted by the local authority to deny the applicant the relief that he is seeking. The temptation to do Mr *Biti*'s bidding in the name of judicial ^C activism, I must confess, is almost overwhelming, especially when calls for legislative intervention to alleviate the plight of spouses in the second respondent's position appear not to be bearing any fruit. However, I hesitate to do so on two scores.

Firstly, since the third respondent was not represented before me, it is my view ^D that the argument was not fully ventilated to allow one to form a definitive opinion on the issue, despite the detailed and very useful arguments made by Mr *Biti* both in his heads and orally.

Secondly, it is my view that I can dispose of this application on another basis.

It is common cause that the agreement of lease and sale between the first respondent and the town council, in terms of which rights to the property were granted him, was not adduced in evidence before me. I have proceeded to consider this matter on the broad basis that the agreement between the parties was a lease-to-buy agreement in which the local authority reserved unto itself the right to consent to a cession on certain terms and conditions. I however do not know the precise terms and conditions upon which the first respondent ^F was permitted to dispose of his rights under the agreement. If, as suggested, it was an express or implied term of the agreement that procedurally, cession of his rights under the agreement would only be consented to if his wife gave her prior consent, then the applicant is out of court. If, on the other hand, there was no such condition, expressed or implied, the issue raised above as to whether the policy position of the local authority should be elevated to a rule ^G of law then commands determination. At this stage, it is my view, that this is not necessary.

Thus, on the basis of the foregoing, I would hold that the applicant has not discharged the onus on him to show that there was no requirement under the lease/purchase agreement that the first respondent's wife would be required ^H to give her prior consent to any cession of rights by her husband.

Makarau J

A Further, the applicant seeks to have the second respondent compelled to give her consent to the cession. He cannot. There is no nexus between him and the second respondent that would give him a cause of action against her.

On the basis of the foregoing, I would hold that the applicant has failed to show that he is entitled to compel either the second or the third respondents to give their consent to the cession of the first respondent's rights in relation to the B property.

In the result, I make the following order:

1. The application is dismissed.
2. The applicant shall pay the second respondent's costs.

c *Honey & Blankenberg*, second respondent's legal practitioners

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ZINDOGA & ORS v MIN OF PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE & ANOR 2006 (2) ZLR 10 (H)

2006 (2) ZLR p10

Citation	2006 (2) ZLR 10 (H)
Case No	Judgment No. HH-75-06
Court	High Court, Harare
Judge	Patel J
Heard	11 May 2006
Judgment	5 July 2006
Counsel	<i>G T Mamvura</i> , for the applicants <i>N Mutsonziwa</i> , for the first respondent <i>J P Mutizwa</i> , for the second respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Employment — *retrenchment* — *decision by Minister* — *whether Minister c obliged to receive submissions from parties*

Headnote

The retrenchment of an employee impinges upon his rights, interests and legitimate expectations, as well as the rights and interests of his employer. It follows that they are both entitled to a fair hearing within the period specified by law or within a reasonable time as required by s 3(1) of the Administrative Justice Act [Chapter 10:28]. To that end, they must be afforded adequate notice of the intended hearing and a reasonable opportunity to make adequate representations in accordance with s 3(2) of the Act.

Section 12C of the Labour Act [Chapter 28:01], which deals with retrenchment procedures, is substantially consistent with the *audi alteram partem* rule, but falls short of the rule to the extent that it does not invariably and peremptorily require representations from all of the affected parties. On the other hand, it is entirely concordant with the requirements of s 3 of the Administrative Justice Act, having regard to the departures envisaged in s 3(3) of that Act. Given the specific time limits that were previously in s 12C of the Labour Act, the Minister was obliged to deal with the matter solely on the papers forwarded to him by the Board. He practicably could not and consequently was not required to invite the interested parties to make further written or oral representations in the matter. The position now may arguably be different, following the amendment of s 12C by Act 7 of 2005, which removes the time limitations.

Legislation considered

Administrative Justice Act [Chapter 10:28], s 3

Labour Relations Act [Chapter 28:01], s 12C(6), (7), (8), (9) and (11) H

Labour Relations Amendment Act No. 7 of 2005, s 8

2006 (2) ZLR p11

Patel J

Case information

A G T Mamvura, for the applicants

N Mutsonziwa, for the first respondent

J P Mutizwa, for the second respondent

Judgment

PATEL J: This is an application for the review of a decision to retrench approved by the first respondent on 30 May 2005, in terms of s 12C of the Labour Act [Chapter 28:01]. The grounds for review are that the first respondent approved the retrenchment of the applicants by the second respondent, firstly, while the question as to who could lawfully retrench the applicants was *sub judice*, secondly, without having heard the applicants on the merits of the matter and, thirdly, by failing to incorporate the issue of motor vehicles in the terms of retrenchment.

The applicants seek an order setting aside the impugned retrenchment and directing the first respondent to reconsider the retrenchment of the applicants taking into account submissions from both parties.

THE FACTS

On 23 September 2004, the Trust Bank Corporation Ltd was placed under curatorship. Several months later, on 4 March 2005, the second respondent, *qua* curator of the bank, filed a notice of intention to retrench the applicants.

On 14 April 2005, the applicants' legal practitioners forwarded their written submissions to the Secretary of the Retrenchment Board. They stated that the second respondent had no right to retrench the applicants because he had transferred Trust Bank's assets and business as a going concern to the Zimbabwe Allied Banking Group in January 2005. It was further stated that the second respondent did not have the requisite financial resources to meet any retrenchment package. In view of these factors, it was contended that the proposed retrenchment should not be permitted. In response, the second respondent's legal practitioners filed his answering submissions on 20 April 2005.

On 14 April 2005, the Retrenchment Board gave notice that the matter was set down for hearing on 21 April 2005 for oral submissions to be made. At the hearing before the Board, the applicants argued that the identity of their proper employer was an issue awaiting the decision of an arbitrator, and they ^g therefore declined to make any substantive representations on the question of their retrenchment. However, the first respondent proceeded to make his oral submissions at that hearing as to the quantum of the proposed retrenchment package. On 22 April 2005, the second respondent presented his detailed submissions to the Board in writing, pursuant to the Board's specific request. ^h The Board itself was unable to decide the question as to who was the

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Patel J

applicants' proper employer. As the Board was unable to determine the ^a application on its merits and make any specific recommendations thereon within the prescribed period, it resolved on 5 May 2005 to refer the matter to the responsible Minister, the first respondent.

Thereafter, the Board submitted the application to retrench, together with its supporting memorandum and minutes, to the first respondent for his ^b consideration. On 30 May 2005, the first respondent approved the retrenchment of the applicants in accordance with the terms of retrenchment presented by the second respondent.

On 1 July 2005, the arbitrator heard the matter before him and then delivered his determination on 18 August 2005. His ruling was that the undertaking of Trust Bank Corporation Ltd had not been transferred to the Zimbabwe Allied ^c Banking Group within the contemplation of s 16 of the Labour Act. He further ruled that the second respondent was responsible for the salaries of the applicants and therefore, by necessary implication, for their retrenchment under s 12C of the Labour Act.

THE ARGUMENTS ^d

Mr *Mamvura*, for the applicants, submits that the identity of the proper employer was important and relevant for the purpose of determining the terms and conditions of the retrenchment package to be availed to the applicants. The first respondent fixed the retrenchment package before the arbitrator's decision was delivered. In effect, he merely rubber-stamped the second ^e respondent's written offer. The applicants had made no submissions, either orally or in writing, before the first respondent made his decision. The applicants were entitled to be heard on all aspects of their retrenchment package, both under the common law rules of natural justice and in terms of s 12C of the Labour Act. Therefore, the first respondent's failure to afford the applicants a proper hearing constitutes a reviewable irregularity. ^f

Mr *Mutsonziwa*, appearing for the first respondent, submits that the Retrenchment Board invited representations from both parties. The applicants declined to make their submissions even though it was clear that the second respondent was their employer at that time. This is so because s 55 of the Banking Act [*Chapter 24:20*] clearly provides that the curator of a banking ^g institution takes over its entire management, including labour matters. Although the second respondent disposed of Trust Bank's assets to the Zimbabwe Allied Banking Group, he remained the curator in charge of the the bank. The applicants did not make any substantive representations to the Board even though they were given the opportunity to do so. In terms of s 12C of the Labour Act, the first respondent was entitled to determine the question of ^h

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^a retrenchment and the terms thereof on the papers submitted to him by the Board.

Mr *Mutizwa*, for the second respondent, supports the position taken on behalf of the first respondent. The applicants only made submissions as to whether or not the second respondent could retrench them. They made no ^b submissions as to the substance of their retrenchment package, to their own detriment. They should have made such submissions on the basis that, in the event that their retrenchment was approved, they should be retrenched on such terms as were presented and supported by them. The first respondent dealt with what was before him, to wit, the applicants' written submissions of 14 April 2005, the second respondent's written submissions of 20 and 22 April ^c 2005, and the memorandum and minutes of the Retrenchment Board meeting held on 5 May

2005. His decision to retrench in accordance with the second respondent's submissions was entirely in conformity with the requirements of s 12C of the Labour Act.

RIGHT TO BE HEARD GENERALLY

It is axiomatic that any party who has a right or interest that is likely to be affected by an administrative decision or which is susceptible to being prejudiced thereby must be heard before that decision is taken. This is dictated by the time honoured precept of the common law embodied in the *audi alteram partem* rule and now codified in the Administrative Justice Act [Chapter 10:28]. Section 3 of that Act provides as follows:

"(1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall:

- (a) act lawfully, reasonably and in a fair manner; and
- (b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
- (c) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.

(2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred to in subsection (1):

- (a) adequate notice of the nature and purpose of the proposed action; and
- (b) a reasonable opportunity to make adequate representations; and

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- (c) adequate notice of any right of review or appeal, where applicable. A

(3) An administrative authority may depart from any of the requirements referred to in subsection (1) or (2) if:

- (a) the enactment under which the decision is made expressly provides for any of the matters referred to in those subsections so as to vary or exclude any of their requirements; or
- (b) the departure is, under the circumstances, reasonable and justifiable, in which case the administrative authority shall take into account all relevant matters, including –
 - (i) the objects of the applicable enactment or rule of common law;
 - (ii) the likely effect of its action; c
 - (iii) the urgency of the matter or the urgency of acting thereon;
 - (iv) the need to promote efficient administration and good governance;
 - (v) the need to promote the public interest."

RIGHT TO BE HEARD ON RETRENCHMENT D

In order to properly evaluate the nature and extent of the right to be heard *in casu*, it is necessary to set out the provisions of s 12C of the Labour Act – as they stood at the time of the events under review, *viz.*, before the promulgation of the Labour Relations Amendment Act 2005 (Act No. 7 of 2005). That section, in its relevant portions, provided as follows: E

"(6) The Retrenchment Board shall consider any matter referred to it in terms of subparagraph (iii) of paragraph (a) of subsection (1), or subsection (4), and, having regard to the factors referred to therein, 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

(7) For the purpose of formulating recommendations in terms of subsection (6), the Retrenchment Board may in its discretion invite and receive representations, whether oral or written, from any interested parties.

(8) If the Retrenchment Board fails to make a recommendation within the period specified in subsection (6), the Minister shall require the Board to forward to him all documents in the matter and shall, within two weeks, G give his decision in the matter in terms of subsection (9) as if the Board had made a recommendation in terms of subsection (6).

(9) The Minister shall consider without delay any recommendation submitted to him by the Retrenchment Board and, having regard to the factors referred to in subsection (11), shall within two weeks:

- (a) approve the proposed retrenchment, subject to such terms and

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A conditions as he may consider necessary or desirable to impose; or

- (b) refuse to approve the proposed retrenchment;

and shall cause the Retrenchment Board, the works council or employment council, as the case may be, to notify the employer and employees concerned in writing of the decision in the matter.

B (10) If the Minister does not make a decision pursuant to subsection (8) or (9) within the time limits there specified, the proposed retrenchment shall be deemed to be approved.

(11) In deciding whether or not to approve the retrenchment of employees in terms of this section, due regard shall be paid: c

- (a) to the following general considerations:

- (i) that the retrenchment of employees should be avoided so far as possible, where this can be done without prejudicing the efficient operation of the undertaking in which the employees concerned are employed;
- (ii) that the consequences of retrenchment to employees D should be mitigated so far as possible;

- (b) to the following considerations in particular cases:

- (i) the reasons put forward for the proposed retrenchment; and
- (ii) the effect of the proposed retrenchment upon the E employees involved, including their prospects of finding alternative employment and the terminal benefits to which they will become entitled."

Section 12C has since been amended by s 8 of Act No. 7 of 2005, with effect from 30 December 2005, firstly, by the deletion of the words "within two weeks" in subs (8) and (9) and, secondly, by the repeal of subs (10). The import of these F amendments is largely self-evident. They were obviously designed to remove the time constraints imposed upon the Minister in the decision-making process and thereby avoid the potential inequities that might flow from the hurried exercise of his or her discretion.

Turning to the specific provisions of s 12C at the relevant time, it cannot be doubted that the retrenchment of an employee impinges upon his rights, G interests and legitimate expectations as well as the rights and interests of his or her employer. It follows that they are both entitled to a fair hearing within the period D specified or within a reasonable time as required by s 3(1) of the Administrative Justice Act. To that end, they must be afforded adequate notice of the intended hearing and a reasonable opportunity to make adequate H representations in accordance with s 3(2) of that Act.

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Subsection (6) of s 12C of the Labour Act enjoins the Retrenchment Board to A consider every application for retrenchment referred to it and to make its recommendations thereon to the Minister within a period of two weeks. Subsection (7) empowers the Board, at its discretion, to invite oral or written representations from the interested parties for the purpose of formulating its recommendations. Where the Board fails to make any recommendation within B two weeks, it must forward all the documents in the matter to the Minister in compliance with subs (8). By virtue of subss (8) and (9), the Minister is enjoined to give his decision in the matter within two weeks, as if the Board had made a recommendation in terms of subs (6), by either approving or rejecting the proposed retrenchment, having regard to the factors enumerated in subs (11). Where the Minister does not make a decision within the time limit C of two weeks, subsection (10) stipulates that the proposed retrenchment shall be deemed to be approved.

In my opinion, s 12C of the Labour Act is substantially consistent with the *audi alteram partem* rule, but falls short of that rule to the extent that it does not invariably and peremptorily require representations from all of the affected parties. On the other hand, the provision is entirely concordant with the D requirements of s 3 of the Administrative Justice Act, having regard to the departures envisaged in s 3(3) of that Act.

The papers that are referred to the Board, either from the employer or from the works council or employment council, form the initial basis for its deliberations. Where further representations are

deemed necessary, the Board may invite ^Ε written or oral submissions from the affected parties. Thereafter, the matter is referred to the Minister who is required to make his decision on the merits of the proposed retrenchment, taking into account the interests of the employer's business undertaking and the economic impact of redundancy on the employees. What is clear, in any event, is that the Minister is bound by the two week timeframe stipulated by s 12C. What is also clear, given that specific ^Ε time limit, is that the Minister is obliged to deal with the matter solely on the papers forwarded to him by the Board. He practicably cannot be and consequently is not required to invite the interested parties to make further written or oral representations in the matter. Section 12C, taken as a whole, is framed so as to enable the efficient and expeditious handling of proposed ^Γ retrenchments, having regard to the interests of employers and employees alike. The right to be heard, in terms of s 12C, is confined to the proceedings of the Board and does not, in my view, extend to the deliberations and decisions of the Minister.

I should note in passing that the position now may arguably be different, following the amendment of s 12C by Act No. 7 of 2005, with respect to those ^Η

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^Α applications for retrenchment that have been determined by the Minister after 30 December 2005 and those that will be considered by him in the future. For present purposes, however, it is not necessary for me to make any pronouncement on the subject *vis-à-vis* the amended provisions of the section.

^Β **DECISION**

On the affidavits and arguments before me, it is clear that the applicant and the second respondent were both invited to the hearing before the Board on 21 April 2005. Even before that date, both parties had filed their written submissions to the Board as regards the proposed retrenchment. The applicants, in their prior written submissions as well as their oral submissions before the ^ϸ Board, confined themselves to the *locus standi* of the second respondent to retrench and its capacity to meet the financial burden of retrenchment. They opted of their own volition not to make any substantive representations regarding the quantum of the retrenchment package that they should be awarded. It seems to me that they should have done so, notwithstanding the outstanding question as to the identity of the proper employer, by presenting ^Δ and claiming an appropriate retrenchment package based on their respective ages, years of service and prospects of employment elsewhere. These were issues that they could have dealt with and presented, regardless of which employer was entitled to retrench them. They deliberately declined to address these issues and, in my view, they did so at their own peril.

^Ε On the facts before me, it is clear that the applicants were given adequate notice of the nature and purpose of the hearing before the Board. They were also afforded ample opportunity to make adequate representations, not only to the Board but also to the first respondent after the matter was referred to him. They decided to forego these opportunities and cannot now complain that the first respondent should have given them a further opportunity to make ^Ε representations on the matter.

The first respondent was obliged to make his decision on the merits of the matter within two weeks and he did so having regard to the written submissions from both parties and the relevant memorandum and minutes of the Board. The fact that he did not have before him any specific submissions from the ^Γ applicants as to the quantum of the retrenchment package was due entirely to their own deliberate inaction.

In any event, the view that I have taken as to the meaning and application of s 12C of the Labour Act leads to the conclusion that the first respondent was entitled to make his decision on the merits of the proposed retrenchment on ^Η the papers before him. Moreover, he was at liberty to do so without having

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to invite further representations from either of the affected parties and without ^Α having to await the arbitrator's determination of the identity of the proper employer.

It follows that the timing and manner in which the first respondent made his decision to approve the applicants' retrenchment did not constitute reviewable irregularities. In the result, the application is dismissed with costs. ^B

Scanlen & Holderness, applicants' legal practitioners

Civil Division Attorney-General's Office, first respondent's legal practitioners ^C

Chihambakwe, Mutizwa & Partners, second respondent's legal practitioners

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LAW SOCIETY OF ZIMBABWE v MINISTER OF JUSTICE & ANOR 2006 (2) ZLR 19 (S)

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Citation	2006 (2) ZLR 19 (S)
Case No	Judgment No. S-16-06
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA, Ziyambi JA, Malaba JA & Gwaunza JA
Heard	27 March 2006
Judgment	11 July 2006
Counsel	<i>S Moyo</i> , for the applicant <i>N Mutsonziwa</i> , for the respondents
Case Type	Constitutional application
Annotations	Link to case annotations

Flynote

^C **Constitutional law** — *Constitution of Zimbabwe, 1980 — Declaration of Rights — s 24 — application to Supreme Court — who may bring application — need to show that Declaration of Rights has been contravened in relation to applicant*

^D **Practice and procedure** — *parties — locus standi — applications under s24 of the Constitution — concept narrower than under the common law*

Headnote

The Law Society brought an application under s 24 of the Constitution, challenging the constitutionality of certain amendments to the Criminal Procedure and Evidence Act [*Chapter 9:07*], relating to arrest and ^Edetention for certain offences. The respondents contended, *in limine*, that the applicant did not have the *locus standi in judicio* to bring such an application.

In its founding affidavit, the Law Society averred that it was the largest organisation representing the interests of all legal practitioners in Zimbabwe. It represented the views of the legal

profession in Zimbabwe ^F and maintains the integrity and the status of the legal profession. As such, it had a duty to consider and deal with all matters affecting the professional interests of the legal profession. Its *locus standi* was based on its status as the public defender or protector of the rule of law and human rights. There was, however, no averment that the impugned ^G provision violated the right of the applicant, or of a member of the applicant. However, the Society contended that the impugned provisions violated the public's right of liberty and entitlement to a presumption of innocence as guaranteed by ss 13 and 18 of the Constitution, respectively. It contended that, as an organisation representing the legal profession, it had the duty to protect the public from unconstitutional provisions of ^H any law, and thus had *locus standi* to bring the application.

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Chidyausiku CJ

Held, that a litigant in an application under s 24 has no *locus standi* to seek ^A redress for a contravention of the Declaration of Rights other than for himself or itself, the exception being where the person involved is in custody. *Locus standi* to make a direct application to the Supreme Court in terms of s 24 is much narrower than it is under the common law. It is not sufficient to simply establish that the applicant has an interest in the ^B matter. The applicant has to go further and establish that the Declaration of Rights has been or is likely to be contravened in respect to itself. However, in the High Court the common law test, namely having an interest in the matter under adjudication, is sufficient to establish *locus standi*. ^C

Cases cited

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

CCJP v A-G & Ors 1993 (1) ZLR 242 (S)

Min of Lands & Ors v CFU 2001 (2) ZLR 457 (S)

Rattigan & Ors v Chief Immigration Officer & Ors 1994 (2) ZLR 54 (S) ^D

Retrofit (Pvt) Ltd v PTC & Anor 1995 (2) ZLR 199 (S)

Ruwodo NO v Minister of Home Affairs & Ors 1995 (1) ZLR 227 (S)

United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors 1997 (2) ZLR 254 (S)

In re Wood & Anor 1994 (2) ZLR 155 (S) ^E

Legislation considered

Constitution of Zimbabwe 1980, s 24

Case information

S Moyo, for the applicant

N Mutsonziwa, for the respondents ^F

Judgment

CHIDYAUSIKU CJ: This application is made in terms of s 24 of the Constitution of Zimbabwe, the relevant part of which provides 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 ^G 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 subs (3), apply to the Supreme Court for redress." ^H

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Chidyausiku CJ

^A The application impugns certain sections of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which will be ("the Act").

The applicant is the Law Society of Zimbabwe, a statutory body incorporated in terms of the Legal Practitioners Act [Chapter 27:04]. The first respondent is the Minister of Justice, Legal and Parliamentary Affairs, who is being cited ^a in his official capacity as the Minister responsible for the administration of the Act, the constitutionality of some of whose provisions are being impugned in this application. The second respondent is the Intervener, cited in terms of s 24(6) of the Constitution.

A preliminary point has been taken that the applicant lacks the *locus standi in judicio* to bring this application.

^c The applicant, in the founding affidavit filed on its behalf, avers that it is the largest organisation representing the interests of all legal practitioners in Zimbabwe. It represents the views of the legal profession in Zimbabwe and maintains the integrity and the status of the legal profession. The applicant avers that it has a duty to consider and deal with all matters affecting the ^d professional interests of the legal profession. The applicant contends that the primary purpose of the legal profession is to protect the public against the undue administration of justice and to ensure that no person may be harmed in his person, property and fundamental rights except in accordance with a law duly enacted and in compliance with fundamental human rights. It is also the applicant's case that when the legal profession ceases to be effective in ^e protecting the interests of the public in the due administration of justice and in ensuring that no person is harmed as aforesaid except in accordance with a law which complies with fundamental human rights, it loses its status as public protector and custodian of the law, the due administration of justice and the rule of law.

The applicant avers that it has received numerous complaints and ^f representations from its members, urging it to challenge certain statutory provisions which have a negative effect on their effectiveness in representing and protecting members of the public and in ensuring the due administration of justice, and in particular to mount a constitutional challenge to certain sections of the Criminal Procedure and Evidence Amendment Act, No. 14 of ^g 2004.

It is clear from the foregoing that the applicant founds its *locus standi in judicio* on its status as the public defender or protector of the rule of law and human rights. There is no averment that the impugned provision has violated the right of the applicant, or of a member of the applicant. The impugned ^h provisions, ss 32(3a)-(3d) and 34(4)-(6) of the Act, provide as follows:

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Chidyausiku CJ

"32(3a) Where the person arrested without warrant is charged with any ^a offence referred to in paragraph 10 of the Third Schedule and the judge or magistrate before whom the person is brought in terms of this section is satisfied that there is a reasonable suspicion that the person committed the offence, the judge or magistrate shall order that person's further detention or issue a warrant for his or her further detention for a period of twenty-one days. ^b

(3b) Where the person arrested without warrant is charged with any offence referred to in the Ninth Schedule and there is produced to the judge or magistrate before whom the person is brought in terms of this section:

- (a) a certificate issued by or on behalf of the Attorney-General stating that, in the Attorney-General's opinion: ^c
 - (i) the offence in question involves significant prejudice or significant potential prejudice to the economy or other national interest of Zimbabwe; and
 - (ii) the further detention of the person arrested for a period of up to twenty-one days is necessary for any one or more of the following reasons: ^d
 - A. the complexity of the case;
 - B. the difficulty of obtaining evidence relating to the offence in question;
 - C. the likelihood that the person arrested will conceal or destroy the evidence relating to the offence in question or interfere ^e with the investigation of the offence or both; and
- (b) the following, where the arrest is made in the circumstances referred to in paragraph (b) of subsection (1) of section *twenty-five* —
 - (i) proof that the arresting officer was an officer of or above the rank of assistant inspector at the time of the arrest, or that the arresting officer made the arrest with the prior leave of such an officer; and ^f
 - (ii) where the alleged offence was disclosed through an anonymous complaint, a copy of the complaint as recorded in accordance with subparagraph (ii) of the proviso to paragraph (b) of

subsection (1) of section *twenty-five*;

the judge or the magistrate shall, if satisfied that there is a reasonable ^g suspicion that the person committed the offence, order that person's detention or issue a warrant for his or her further detention for a period of twenty-one days or the lesser period specified in the certificate.

(3c) A person referred to in subsection (3a) or (3b) shall, unless the charge or charges against him or her are earlier withdrawn, remain in detention for twenty-one days or the lesser period specified in a certificate ^h

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Chidyausiku CJ

^A mentioned in subsection (3b), as the case may be, from the date when an order or warrant for the person's further detention was issued in terms of the relevant subsection, and no court shall admit such person to bail during that period.

(3d) A person referred to in subsection (3a) or (3b) may continue to be detained after the expiry of the period referred to in subsection (3c) ^B pending the outcome of investigations into the charge or charges against him or her (without prejudice to the person's right to apply for bail) if an order or warrant for that person's further detention is obtained from a judge or magistrate in terms of section *thirty-three* within forty-eight hours of the expiry of the period referred to in subsection (3c) ...

34(4) If a person is arrested by virtue of a warrant is charged with any ^C offence referred to in:

- (a) paragraph 10 of the Third Schedule, and the judicial officer before whom the person is brought in terms of this section is satisfied that there is a reasonable suspicion that the person committed the offence, the judicial officer shall order that person's continued detention for a period of twenty-one days; or ^D
- (b) the Ninth Schedule and there is produced to the judicial officer before whom the person is brought in terms of this section a certificate issued by or on behalf of the Attorney-General in the same terms as those specified in subsection (3b) of section *thirty-two*, the judicial officer shall, if satisfied that there is a reasonable suspicion that the person committed the offence, order that person's continued ^E detention for a period of twenty-one days or the lesser period specified in the Attorney-General's certificate.

(5) A person referred to in subsection (4), shall, unless the charge or charges against him or her are earlier withdrawn, remain in detention for twenty-one days or the lesser period specified in a certificate mentioned in paragraph (b) of subsection (4), as the case may be, from the date when ^F an order for the person's further detention was issued in terms of that subsection, and no court shall admit such person to bail during that period.

(6) A person referred to in subsection (4) may continue to be detained after the expiry of the period referred to in subsection (5) pending the outcome of investigations into the charge or charges against him or ^G her if (without prejudice to the person's right to apply for bail) an order or warrant for that person's further detention is obtained from a judge or magistrate within forty-eight hours of the expiry of the period referred to in subsection (5)."

There is no doubt that the above provisions are a derogation of the individual's ^H right to liberty and possibly his right to a fair trial, guaranteed by the

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Chidyausiku CJ

Constitution. The substantial issue on the merits is whether or not the ^A derogation is permissible in terms of the Constitution.

The respondents, as already stated, challenge the *locus standi in judicio* of the applicant to bring this application in terms of s 24 of the Constitution. At the commencement of the hearing, the court directed that it be addressed on the point *in limine*, which it wished to determine before considering the merits ^B of the application.

As I have already stated, there is no allegation that the applicant's, or any of its members', fundamental right has been or is likely to be violated. The applicant's contention is that the impugned provisions violate the public's right of liberty and entitlement to a presumption of innocence as guaranteed by ss 13 and 18 of the Constitution, respectively. The applicant contends that, ^C as an organisation representing the legal profession, it has the duty to protect the public from unconstitutional provisions of any law, and thus has *locus standi in judicio* to bring this application.

This court has had occasion to consider and determine the issue of *locus standi in judicio* of an applicant in terms of s 24 of the Constitution. The ^D following are some of the cases in which the

issue of the *locus standi in judicio* of an applicant in terms of s 24 of the Constitution was considered and determined.

A. IN RE WOOD & ANOR 1994 (2) ZLR 155 (S)

The facts in *Wood's* case are that the immigration authorities of Zimbabwe had ^Erefused residence permits to Mrs Wood and Mrs Hansard and caused them to be prosecuted for remaining in Zimbabwe without permits to do so. At their trial before the magistrate's court, the accused women raised the question of whether they had a constitutional right to remain in Zimbabwe. The magistrate referred the matter to the Supreme Court in terms of s 24(2) of the Constitution.

The two women claimed that they were entitled to reside permanently in ^FZimbabwe. They maintained that they had this right by virtue of the protection of freedom of movement afforded under s 22(1) of the Constitution. Mrs Wood, though not a Zimbabwean citizen, had a minor child who was a Zimbabwean citizen by birth. She argued that s 22(1) of the Constitution afforded her the right to reside permanently with her minor child in Zimbabwe. ^GIf she was forced to leave Zimbabwe with her son, his constitutional right as a citizen would be infringed and therefore she had some sort of collateral right to remain permanently in Zimbabwe with her son. Mrs Hansard, who was also an alien, was married to a man who, though not a Zimbabwe citizen, had permanent residence status in Zimbabwe. She had been separated from him, but returned to Zimbabwe and claimed to have been reconciled with him. She ^H

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^A argued that s 22(1) of the Constitution afforded her a right to reside permanently in Zimbabwe with her husband.

The court held that only citizens and permanent residents had a constitutional right to remain permanently in Zimbabwe. Neither of the two women had such a constitutional right to reside permanently in Zimbabwe and therefore they had no basis for arguing that their freedom of movement was being unlawfully ^Binterfered with by the immigration authorities. The court also held that the persons who might be entitled to claim that their constitutional rights to freedom of movement were being infringed by the expulsion from Zimbabwe of these two women were Mrs Wood's minor child and Mrs Hansard's husband. Mrs Wood's child might claim that his right to reside in Zimbabwe ^Cwould be infringed by the expulsion of his mother, as he would be forced to accompany her in order to avoid separation from his mother and that this would interfere with his freedom of movement. Similarly, the court concluded that if there had in fact, been a reconciliation between Mr and Mrs Hansard, Mr Hansard might argue that his freedom of movement would be interfered with by the expulsion of his wife from Zimbabwe because he would be obliged ^Dto accompany her and establish a matrimonial home outside Zimbabwe in order to maintain the marital relationship.

In dismissing the application, Gubbay CJ at pp 159E-160D made the following pertinent remarks:

"Similarly, in *Rattigan & Ors v Chief Immigration Officer & Ors* 1994 (2) ZLR 56, ^Eit was the three wives who, as citizens of Zimbabwe, proclaimed their rights under s 22(1) and not the alien husbands. It was held that to disable the latter from living with their wives in Zimbabwe in a matrimonial regime in effect undermined and devalued the protection of freedom of movement in each wife as a member of a family unit.

In the present matter, as Mr *Colegrave* so fairly and graphically put it, ^FMrs Wood is seeking to assert a right to reside in Zimbabwe by hanging onto Martin's coat-tails. *Her claim, which she acknowledges she does not otherwise possess, is to some form of collateral right to the protection afforded a citizen or permanent resident under s 22(1). Such a stance, in my view, is quite untenable.*

Under subs (1) of s 24 of the Constitution, and by inevitable implication ^Gunder subs (2) as well, the applicant or party to the proceedings, save only in relation to a detained person, must be able to allege that a provision of the Declaration of Rights has been, is being, or is likely to be, contravened in respect of him. He must, therefore, sue only for the acts or threats to himself. Yet Mrs Wood does not assert, nor could she, that a constitutional right afforded her is being contravened by the decision ^Hto refuse the grant of a residence permit. Plainly it is not her freedom of

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Chidyausiku CJ

movement that is being unlawfully interfered with by the action of the A Immigration authorities" (myemphasis).

For the above proposition the learned Chief Justice relied on the case of *Rattigan & Ors v Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S).

Wood's case supra, in my view, is clear authority for the proposition that violation of a constitutional right cannot be founded on a collateral basis. The B violation has to be in relation to the applicant himself, herself or itself. It stands to reason that *locus standi in judicio* in terms of s 24 of the Constitution cannot be founded on a collateral basis.

The present applicant's *locus standi in judicio* is founded on a collateral basis. *Wood's case supra* is clearly against the applicant in this regard. C

B. *Ruwodo NO v Minister of Home Affairs & Ors* 1995 (1) ZLR 227 (S)

The applicant in that case alleged on behalf of her minor child that the minor child's fundamental right of freedom of movement, guaranteed in terms of s 22(1) of the Constitution, was violated or was likely to be violated by an immigration order deporting the applicant from Zimbabwe. The application D was dismissed on the basis that a minor child's right of freedom of movement was not absolute but subject to parental authority, which authority entitled the parent to determine the child's residence.

Although the issue of *locus standi in judicio* was not specifically raised in that case, it is quite clear from the judgment that the court did not recognise E Mrs Ruwodo's right to make the application on her own behalf, acquired through her relationship to the minor child.

C. *Retrofit (Pvt) Ltd v Ptc & Anor* 1995 (2) ZLR 199 (S)

In *Retrofit supra* the *locus standi in judicio* of the applicant was in issue. Gubbay CJ, who delivered the judgment of the court said at pp 207G-208E: F

"The contention advanced on behalf of the corporation was that s 24(1) affords the applicant no *locus standi in judicio* to seek redress for a contravention of the Declaration of Rights other than in relation to itself (the exception being where a person is detained). It has no right to do so either on behalf of the general public or anyone else. Put otherwise, a constitutional right that invalidates a law may be invoked by a person G affected by the law only if that person is also entitled to the benefit of the constitutional right. If not so entitled, then that person will be precluded from impugning the law. See *Hans Muller v Superintendent Presidency Jail, Calcutta* 1955 AIR 367 (Supreme Court of India). The exception is where a person is the accused in a prosecution for breach of the law. See Hogg *Constitutional Law of Canada* 3ed at p 1274. I have no difficulty H in accepting this proposition.

2006 (2) ZLR p27

Chidyausiku CJ

A It is plain, to my mind, that the primary purpose in the bringing of this application was not deep-felt anxiety over hindrance in the enjoyment of freedom of expression, caused by the prevailing serious shortcomings in the wireline telephone service and the absence of a mobile cellular telephone service. It was yet another legal attempt to secure a licence to operate a mobile cellular telephone service in Zimbabwe. Commercial B self-interest and advantage, not so much the desire to vindicate the right to freedom of expression, was, and is, the main motivation behind the application.

But is this a factor of any relevance? The decision in *In re Wood & Anor* 1994 (2) ZLR 155 (S); 1995 (2) SA 191 (S) at 195G-I; 1995 (1) BCLR 43 (ZS) at 46I-47B, cited in support of the applicant's lack of standing, concerned C a totally different situation. In that case, the right to reside in any part of Zimbabwe, as guaranteed by s 22(1) of the Declaration of Rights, vested in the minor child of Mrs Wood and not in her. No constitutional right afforded her was infringed by the refusal of the immigration authorities to grant her a residence permit. See also *Ruwodo NO v Minister of Home Affairs & Ors* 1995 (1) ZLR 227 (S); 1995 (7) BCLR 903 (S)" (my emphasis).

D The *Retrofit case supra* is clear authority for the proposition that a litigant in a s 24 application has no *locus standi in judicio* to seek redress for a contravention of the Declaration of Rights other than for himself, herself or itself; the exception being where the person is in custody.

Retrofit (Pvt) Ltd ("Retrofit") was held to have *locus standi* on the basis that the corporation's monopoly impugned on the freedom of expression of E Retrofit because it hindered everyone,

including Retrofit, from receiving information without interference. Accordingly, Retrofit could make the application in its own right, as it was its right to receive information that was being infringed.

D. *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S)

¶ This court held that a political party had no *locus standi in judicio* to challenge the provisions of the Electoral Act which it alleged contravened the right to freedom of expression of voters who might vote for the applicant, such right being protected by s 20 of the Constitution. In dismissing the application, Gubbay CJ had this to say at p 258B-E:

g "Thus, s 24(1) affords the applicant *locus standi in judicio* to seek redress for a contravention of the Declaration of Rights only in relation to itself (the exception being where a person is detained). It has no right to do so either on behalf of the general public or anyone else. The applicant must be able to show a likelihood of itself being affected by the law h impugned before it can invoke a constitutional right to invalidate that law.

2006 (2) ZLR p28

Chidyausiku CJ

See *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation & A Anor* 1995 (2) ZLR 199 (S) at 207H-208A; 1995 (9) BCLR 1262 (S) at 1269E-G; 1996 (1) SA 847 (ZS) at 854D-F.

So it was in *In re Wood & Anor* 1994 (2) ZLR 155 (S) at 159F-160B; 1995 (1) BCLR 43 (ZS) at 46H-47B; 1995 (2) SA 191 (ZS) at 195G-I, that this court held that the right to reside in any part of Zimbabwe, as guaranteed by s 22(1) of the Declaration of Rights, vested in the minor child of Mrs Wood b and not in her. No constitutional right in relation to her was violated by the refusal of the immigration authorities to grant her a residence permit. See also *Ruwodo NO v Minister of Home Affairs & Ors* 1995 (1) ZLR 227 (S); 1995 (7) BCLR 903 (S)" (my emphasis).

Thus, this court in the *United Parties* case *supra* reiterated that *locus standi c in judicio* in terms of s 24 of the Constitution is only available to an applicant in respect of whom there has been or is likely to be a contravention of the Declaration of Rights of the applicant.

E. *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Ors* 1993 (1) ZLR 242 (S)

The Catholic Commission brought an application in terms of s 24 of the d Constitution to prevent the execution of certain prisoners who were in custody. Initially, the *locus standi in judicio* of the Catholic Commission was challenged, but the challenge was subsequently withdrawn. Commenting on the issue of *locus standi in judicio* McNally JA made the following observation at 250: e

"Although the *locus standi* of the applicant to bring this application was initially objected to in an affidavit on behalf of the respondents, the contention was not pressed at the hearing, and correctly so.

The applicant is a human rights organisation whose avowed objects are to uphold basic human rights including the most fundamental right of all, the right to life. It is intimately concerned with the protection and preservation of the rights and freedoms granted to persons in Zimbabwe by the Constitution. Its non-frivolous submission is that, in the circumstances which presently obtain, the carrying out of the death sentence would amount to an abuse of the protection guaranteed the condemned prisoners under s 15(1).

It would be wrong, therefore, for this court to fetter itself by pedantically g circumscribing the class of persons who may approach it for relief to the condemned prisoners themselves, especially as they are not only indigent but, *by reason of their confinement, would have experienced practical difficulty in timeously obtaining interim relief from this court*" (my emphasis). h

2006 (2) ZLR p29

Chidyausiku CJ

A Section 24(1) of the Constitution specifically provides for constitutional applications to be brought on behalf of persons in custody. I have no doubt that in the *Catholic Commission* case *supra* the concession was made on the basis that the people, on whose behalf the application was made, were in custody.

The *Catholic Commission* case *supra* is no authority for the proposition that b a public body, such as the present applicant, has *locus standi in judicio* to make an application in terms of s 24 of the Constitution for and on behalf of members of the public. The *Catholic Commission* case *supra*, in my view, is of no assistance to the applicant in the present case.

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

The issue of *locus standi in judicio* was raised in the *Capital Radio* case *supra*. In that case, I made the following observation at 243B-G:

"This court is essentially an appeal court. It enjoys no original jurisdiction except in constitutional matters in terms of s 24 of the Constitution. Thus ^D the jurisdiction and the *locus standi* of litigants seeking to approach this court in terms of s 24 have to be found within the four corners of s 24 of the Constitution. This restriction does not affect a litigant that wishes to institute a constitutional application in the High Court. The provisions of s 24 do not, in any way, circumscribe the *locus standi* of an applicant in the High Court. In the High Court, the common law test, namely having ^E an interest in the matter under adjudication, is sufficient to establish *locus standi* (Herbstein & van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed at 364; *Zimbabwe Teachers' Association & Ors v Minister of Education* 1990 (2) ZLR 48 (H) at 51B *et seq*). In a constitutional application in the High Court, all that a litigant is required to show to establish *locus standi* is a substantial interest in a matter.

^F A direct approach to the Supreme Court requires a litigant to allege that *his* not another person's fundamental right has been violated. Obviously, it is not sufficient to merely allege that one's fundamental right has been, is (being), or is likely to be, violated. The factual basis for such an allegation has to be set out. It follows, therefore, that when a litigant is denied a hearing by this court, because he has no *locus standi* that does not necessarily mean that the door to litigation has been closed. It may ^G merely mean that the litigant has commenced his application in the wrong forum, taking into account the basis of his *locus standi*.

A constitutional application commenced in the High Court can always find its way to the Supreme Court on appeal. In short, the basis of a litigant's *locus standi* in the High Court is much wider than it is in this court ^H sitting as a constitutional court. In my view, it would be doing violence

2006 (2) ZLR p30

Chidyausiku CJ

to the language of s 24 of the Constitution to ascribe to it the meaning that ^A it is sufficient to allege an interest in the matter in order to establish *locus standi*."

The remarks I made in the *Capital Radio* case *supra* apply with equal force to this application.

G. Minister of Lands & Ors v Commercial Farmers' Union 2001 (2) B ZLR 457 (S)

The applicant also cited the *Commercial Farmers' Union* case *supra* as supportive of its contention.

Although the issue of *locus standi in judicio* was never specifically raised and determined, the court proceeded on the basis that the alleged violations of the ^C Declaration of Rights were in respect of the members of the Commercial Farmers' Union. Indeed, if the present applicant had founded its *locus standi in judicio* on the basis that the enshrined rights of its members have been, or are likely to be, violated, this court would have had no difficulty in accepting that the applicant has the *locus standi in judicio* in this case.

In his supplementary heads of argument, Mr Moyo has cited a number of ^D authorities, both local and from other jurisdictions, which support the proposition that an organisation such as the Law Society has a substantial interest, and consequently *locus standi in judicio*, in an application challenging the constitutionality of a statute. I agree with the submission and the authorities to the extent that such *locus standi in judicio* is based on common ^E law.

However, *locus standi in judicio* to make a direct application to the Supreme Court, in terms of s 24 of the Constitution, is much narrower than the common law.

CONCLUSION ^F

On the basis of the cited authorities, the applicant has no *locus standi in judicio* to bring this application to the Supreme Court in terms of s 24 of the Constitution.

I have no difficulty in accepting the general submission made by Mr Moyo that the Law Society has a substantial interest in a statute that is *ultra vires* the Constitution. I do not, however, accept that this substantial interest is ^G sufficient to vest the applicant with *locus standi in judicio* to make an application in terms of s 24 of the Constitution.

Locus standi to bring a constitutional application to the Supreme Court in the first instance must be found within the four corners of s 24 of the Constitution. ^H

Chidyausiku CJ

A It is not sufficient to simply establish that the applicant has an interest in the matter. The applicant has to go further and establish that the Declaration of Rights has been or is likely to be contravened in respect to itself.

The applicant in this case has failed to establish that a constitutional right, enshrined in the Declaration of Rights, has been or is likely to be violated in B respect of itself by the impugned Act.

While the applicant may be entitled to bring its application before the High Court on the basis argued before us, it certainly has not established the basis for approaching the Supreme Court directly in terms of s 24 of the Constitution.

In the result, the point *in limine* is determined in favour of the respondents. As has become the practice in matters such as this, there will be no order as C to costs.

CHEDA JA, ZIYAMBI JA, MALABA JA & GWAUNZA JA concurred.

Scanlen & Holderness, applicant's legal practitioners

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

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S v NDLOVU & ANOR 2006 (2) ZLR 32 (H)

2006 (2) ZLR p32

Citation	2006 (2) ZLR 32 (H)
Case No	Judgment No. HH-70-06
Court	High Court, Harare
Judge	Garwe JP and Kamocha J
Heard	12 July 2006
Judgment	12 July 2006
Counsel	Details not supplied
Case Type	Case transferred for sentence
Annotations	Link to case annotations

Flynote

Criminal procedure (sentence) — statutory offences — stock theft — C penalties applicable — person committing offence before but being convicted after penalties increased — increased penalty not applicable — theft of equine animal — does not include theft of a donkey

Interpretation of statutes — *retrospectivity* — *changes in law should not take effect retrospectively other than by necessary implication*

Statutes — *Stock Theft Act [Chapter 9:18] — s 12 — applicable only to equine and bovine animals — donkeys neither equine nor bovine animals — special sentence provided for by section having no application to persons convicted of theft of donkeys*

Words and phrases — “equine animal” — *does not include a donkey* — *Stock Theft Act [Chapter 9:18] — s 12*

Headnote

The two accused were convicted of stock theft, the offences having been committed before but the convictions occurring after an amendment to the Stock Theft Act [Chapter 9:18] came into operation. That amendment introduced into s 12 a mandatory minimum sentence of imprisonment for theft of bovine or equine animals unless special circumstances were found. The first accused stole four donkeys. The accused were both sentenced on the basis of the new sentences applicable.

Held, that the first accused should not have been sentenced on the basis that he stole an equine or bovine animal. A donkey is neither an equine nor a bovine animal. Section 12 of the Act has, therefore, no application to a person convicted of the theft of a donkey.

Held, further, that it is a principle of legal policy that, except in relation to procedural matters, changes in the law should not take effect retrospectively, unless it appeared by necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation. There was nothing to suggest that the

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Kamocha J

A provision of s 12 of the Act were to be applied in retrospect, nor could it be said that there was necessary implication from the language used that the legislature intended to the section to operate retrospectively.

Cases cited

Agere v Nyambuya 1985 (2) ZLR 336 (S)

Bater & Anor v Muchengeti 1995 (1) ZLR 80 (S)

Nkomo & Anor v A-G & Ors 1993 (2) ZLR 422 (S)

Legislation considered

Stock Theft Act [Chapter 9:18], s 12

Judgment

KAMOCHA J: These two matters are dealt with at the same time because they both raise issues that emanate from the misapplication by the trial courts of the provisions of the Stock Theft Amendment Act 6 of 2004 which came into operation on 27 August 2004.

The amending act inserted a new section to the principal Act, which sets out special sentences for offences in respect of certain stock. The section reads as follows:

“12 Special sentences for offences in respect of certain stock

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 offence 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.”

The amending Act, however, inadvertently omitted to confer upon magistrates special jurisdiction empowering them to impose the mandatory minimum sentence. In *S v Gangarahwe* HH-29-05, this court directed that upon conviction of any person on a charge of theft of stock the magistrates court had to invoke the provisions of s 54(2) of the Magistrates Court Act [Chapter 76:10].

The respective circumstances of these two cases are these:

G CASE 1

The 22 year old accused was charged with the theft of four donkeys which he had allegedly stolen on 25 October 2003 from Rosemary Dube of Mabhuku Village in Zhombe. He tendered a plea of not guilty on arraignment but changed his plea to one of guilty as the trial progressed and was accordingly ^H found guilty as charged. The conviction seems proper to me. The trial court

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Kamocha J

then sentenced the accused to undergo 36 years' imprisonment, of which 18 ^A years' imprisonment was suspended for a period of five years on the customary conditions of future good behaviour. In doing so, the trial magistrate purported to act in terms of the new s 12 quoted *supra* of the Stock Theft Act [*Chapter 9:18*] as amended by Act 6 of 2004.

The matter came for automatic review. The reviewing judge set aside the ^B sentence and directed the trial court to act in terms of s 54(2) of the Magistrates Court Act [*Chapter 7:10*] which reads as follows:

"54 Stopping and conversion of trials

1. ...
2. If upon the conviction of an accused person upon summary trial or ^C trial on remittal by the Attorney-General, before sentence is passed, the magistrate is of the opinion that a sentence in excess of his jurisdiction is justified, he may adjourn the case and remand the person convicted and submit a report to the Attorney-General, together with a copy of the record of the proceedings in the case."

The trial magistrate complied with the directive of the reviewing judge and ^D referred the matter to the Attorney-General who directed in terms of s 225(b)(i) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] that the matter be transferred to this court for sentence, which the trial court did.

After the record of proceedings had been placed before me in chambers pursuant to the provisions s 227 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] two errors were apparent on the record of proceedings. ^E

Firstly, the accused stole four donkeys. A donkey is neither an equine nor bovine animal. The word equine is defined in *Collins English Dictionary* as "adjective — pertaining to a horse; noun — a horse" and the word "bovine" is defined as "adjective — pertaining to cattle".

The Stock Theft Act [*Chapter 9:18*] defines stock in s 2 as "(a) any horse, mule, ^F ass, bovine, sheep, goat, pig, poultry, pigeon or chinchilla ... " It is, therefore, quite clear that it was not proper for the trial magistrate to impose on the accused a sentence which was meant for theft of a horse or bovine when his conviction related to theft of four donkeys (asses).

The second error relates to applying the law retrospectively. The theft of the ^G four donkeys was committed on 25 October 2003, which was 10 months before the Stock Theft Amendment Act 6 of 2004 was enacted. The magistrate sentenced the accused for an offence committed before the law was enacted using the provisions of the new law. That, in my view, is not proper as the general rule at common law is that statutes are not to operate retrospectively: see *Craies on Statute Law* 7ed by S G G Edgar at p 391. Francis Bennon ^H

2006 (2) ZLR p35

Kamocha J

^A *Statutory Interpretation*, (Butterworths, 1984) at p 313 states the principle as follows:

"It is a principle of legal policy that, except in relation to procedural matters, changes in the law should not take effect retrospectively. The court, when considering, in relation to the fact of the instant case, which of the opposing constructions of the enactment would give effect to the ^B legislative intention, should presume that the legislator, intended to observe this principle."

This general rule can however, be departed from where it is expressly enacted that an enactment shall be retrospective. Further, *Craies on Statute Law supra* at p 392 states that:

^C "If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give such an operation."

The above approach has been adopted by our courts several times. For instance, in *Agere v Nyambu* 1985 (2) ZLR 336 (S) at 338H-339A, Gubbay JA (as he then was) had this to say:

“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 an enactment so as to remove or in any way impair existing rights of obligations unless such a construction appears clearly from the language used or arises by necessary implication. For instance, where it is expressly retrospective, or deals with past events, or concerns a matter of procedure, practice or evidence. The supposition is that the legislature intends to deal only with future events and circumstances.”

See also *Bater & Anor v Muchengeti* 1995 (1) ZLR 80 (S) at 84G-H and *Nkomo & Anor v A-G & Ors* 1993 (2) ZLR 422 (S) at 428H-429B.

In casu, there is nothing to suggest that the provisions of s 12 inserted by the Stock Theft Amendment Act No. 6 of 2004 were to be applied in retrospect. Neither can it be said that there is a necessary implication from the language used that the legislature intended the said section to operate retrospectively. There was, therefore, no basis for the trial court to have had recourse to s 12 of the Stock Theft Act [Chapter 9:18] as amended when sentencing the accused. He should have exercised the jurisdiction conferred on him by the Stock Theft Act prior to the amendment.

CASE 2

In or about January 2004, the accused, with the connivance of his brother, who was employed as a herdsman by the complainant, took one beast belonging

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Kamocha J

to the complainant and kept it as his. The beast, valued at \$1.5 million, was recovered.

On arraignment in the magistrates court, he denied the charge but was convicted after trial. He was sentenced to the mandatory minimum sentence of 9 years' imprisonment. In my view, the conviction is proper and no issues arise from it.

The sentence, however, suffers the same defect of applying the law in retrospect. The accused was sentenced to the mandatory sentences of nine years for a crime he had committed eight months before the mandatory sentence came into operation. I have held in the first case that there was no legal basis for the trial magistrate to have done so. My reasons for arriving at that conclusion in the first case apply with equal force in this case also.

Just like the first case, this matter was also transferred to this court for sentence in terms of s 225(b)(i) of the Criminal Procedure and Evidence Act [Chapter 9:07] after the reviewing judge had set aside the sentence of nine years' imprisonment and directed the trial magistrate to invoke the provisions of s 54(2) of the Magistrates Court Act [Chapter 7:10].

In the light of the foregoing, there was no need for these two cases to be transferred to this court for sentence. After the sentences had been set aside the magistrates should have been directed to pass sentence *de novo* exercising the jurisdiction that was conferred on them by the Stock Theft Act [Chapter 9:18] prior to its amendment.

Be that as it may, I shall proceed to sentence both accused. In that regard, arrangements have been made to have them brought before me for sentence as soon as possible.

GARWE JP: I agree with the above remarks by Kamocha J.

The matters forming the subject of this review judgment stress the need for reviewing judges to exercise great caution before interfering with the proceedings of the lower courts. Clearly, the mandatory sentence of nine years' imprisonment was never intended for an offence other than theft of bovine or horse. A donkey, *i.e.* an ass, is neither. It was therefore not proper for this court to set aside the sentence imposed in the first matter and direct the trial magistrate to proceed in terms of s 54(2) of the Magistrates Court Act. The office of the Attorney-General must also share the blame. Had that office properly considered the matter, it would have been apparent that the trial magistrate in fact had jurisdiction to pass sentence and that this was not an appropriate case for transfer to the High Court for sentence.

That the law cannot operate retrospectively in the absence of a clear intention to that effect is trite. Again, this is an aspect judicial officers should be alive to

Kamocha J

A to. An accused person who committed theft of bovine or horse prior to the promulgation of the mandatory minimum sentence cannot be sentenced to the mandatory minimum sentence. The trial court must proceed to pass sentence in the light of the laws in existence at the time of the commission of the offence.

The directive in both cases to the trial magistrates to stop the proceedings (and proceed in terms of s 54(2) of the Magistrates Court Act) and the decision by B the office of the Attorney-General thereafter to transfer the matters to this court for sentence were improperly made. The result is that there has been a delay in the finalisation of both matters. Had the matters been properly handled in the first instance this court, in the exercise of its criminal review jurisdiction, could have set aside the sentences and substituted what it C considered to be more appropriate sentences in the circumstances. Alternatively, this court could have directed the trial magistrates to pass sentence afresh, taking into account their jurisdiction at the time of the D commission of the offences.

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Source:

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S v MBULAWA 2006 (2) ZLR 38 (H)

2006 (2) ZLR p38

Citation	2006 (2) ZLR 38 (H)
Case No	Judgment No. HB-62-06
Court	High Court, Bulawayo
Judge	Ndou J
Heard	13 July 2006
Judgment	13 July 2006
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) — statutory offences — Sexual Offences Act C [Chapter 9:07] — s 3(1)(b) — committing an immoral or indecent act with or upon a young person — serious offence — paedophilia has to be dealt with effectively — such conduct not to be tolerated — courts must not give the impression that they are condoning the sexual abuse of children

Headnote

The accused was convicted of contravening s 3(1)(b) of the Sexual Offences Act ^D [Chapter 9:07], that is committing an immoral or indecent act with or upon a young person. He was aged 30 and the female complainant was aged 12. The evidence established that the accused had fondled her breasts, kissed her and fondled her private parts on five occasions over a period less than a month. Not only did he gratify his own sensualities, ^E he also excited, encouraged and facilitated the illicit gratification of the twelve year old complainant.

Held, that sexual abuse of children is viewed by the courts in a serious light. Paedophilia has to be dealt with effectively. The courts have to drive home the message that such conduct will not be tolerated as it has grave consequences on the youth. Self gratification of adults should not be at ^F the expense of debauching young persons. The sentence should be not such that it gives the impression that the court is condoning sexual abuse of children.

Held, further, that the accused's moral blameworthiness was so high that an effective sentence in the region of two years was called for. ^G

Cases cited

S v Fizikolo HB-131-04

S v Mafu HB-38-85

S v Marx [2005] 4 All SA 267 (SCA)

S v Musoni HH-183-83 ^H

2006 (2) ZLR p39

Ndou J

^A *S v Nare* 1983 (2) ZLR 135 (H)

S v Ndlovu HB-66-03

S v Nyirenda HB-86-03

S v Tiger GB-8-80

Legislation considered ^B

Sexual Offences Act [Chapter 9:07], s 3(1)(b)

Judgment

NDOU J: The accused was aged 30 at the date of trial. He was properly charged before a Beitbridge Senior Magistrate of having had extra-marital intercourse with a young person in contravention of s 3(1)(a) of the Sexual Offences Act ^C [Chapter 9:21]. Nothing turns on the conviction. I am, however, concerned by the propriety of the sentence. The salient facts of the case are the following. The accused was aged thirty years at the time of the offence and he was employed by DHL in Beitbridge as an assistant manager. He is married with one child. The outline of the State's case erroneously states "... complainant is a female *adult* aged 12 years" (emphasis added). On the contrary, she is a ^D juvenile aged 12 years in fact, she turned 12 years a few days before the offence i.e. on 12 May 2005.

The complainant was in grade seven at the time at Beitbridge Government School. In mitigation, the accused said as a neighbour's daughter, he was aware of the complainant's age and that she was in grade seven. He nevertheless ^E proposed love to her and "she responded positively" to his advances. Typically of what is colloquially termed a "sugar daddy", he used money and presents to hold onto or cement their "relationship". Thereafter, the accused would pick up the complainant from church and drive with her to the bush. This took place on five different instances. The accused also became aware that the complainant was raped by two young men whose matter was before the ^F regional court. He nevertheless took her to the bush and sexually abused her. He bought the complainant a cellular phone with a South African Vodacom SIM card (Vodacom signal is received in Beitbridge). The matter did not come to light as a result of the change of heart by the accused. Instead, it was as a result of the efforts of the complainant's concerned mother and Const Matizirofa of the Victim Friendly Unit of Zimbabwe Republic Police Beitbridge. ^G Even as late as at the commencement of the trial, he did not admit the sexual abuse. It was only after the complainant testified that he merely fondled her breasts, kissed her and fondled her private parts that he conceded that indeed that was

the extent of his involvement with the complainant. The degree of contrition is, therefore, very low. The State accepted that there was no sexual intercourse and accepted the accused's altered plea. The accused was

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Ndou J

therefore, correctly found guilty of contravening s 3(1)(b) of the Act which reads:

"1. Subject to subsection (2), any person who —

(a) ...

(b) commits an immoral or indecent act with or upon a young person; or

(c) ...

shall be guilty of an offence and liable, subject to section *sixteen*, to a fine not exceeding level ten or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment."

(Section 16 does not apply here as there was no sexual intercourse). See *S v Marx* [2005] 4 ALL SA 267 (SCA).

Sexual abuse of children is viewed by the courts in a serious light. The legislature also holds a similar view as evinced by the promulgation of the Sexual Offences Act, *supra*, in 2001 (the Act came into operation on 17 August 2001). The penalties provided by the Act are very stiff. The offence is very prevalent. In this case, the child victim was aged 12 years and the accused 30 years, i.e. a very wide gap of eighteen years. Within a short space of less than a month he had taken her to the bush for purposes of the above-mentioned sexual abuses. Sexual offences upon young persons attract severe forms of punishment. See *S v Nyirenda* HB-86-03; *S v Ndlovu* HB-66-03 and *S v Fikizolo* HB-131-04.

Paedophilia has to be dealt with effectively. The courts have to drive home the message to so-called "sugar daddies" or paedophiles that such conduct will not be tolerated as it has grave consequences for the youth. The self-gratification of adults should not be at expense of debauching young persons. The accused offended against morality by not only gratifying his own sensualities, but by also exciting, encouraging and facilitating the illicit gratification of the 12 year old complainant. The accused acted in a depraved manner. See *S v Tigere* GB-8-80; *S v Mafu* HB-38-85; *S v Nare* 1983 (2) ZLR 135 (H) and *S v Musoni* HH-183-83. It is the duty of the court to play its part in preserving moral standards in society to punish sexual offenders appropriately and therefore safeguard the physical integrity of women and girls. The sentence should not be such that it will be taken as if the court is condoning fiendish crimes of sexual abuse of children. The accused's moral blameworthiness was so high that an effective sentence in the region of two years was called for.

In the circumstances, I am unable to certify the sentence imposed here as being in accordance with true and substantial justice. I accordingly withhold my certificate.

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Source:

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NCUBE v MPOFU & ORS 2006 (2) ZLR 41 (H)

2006 (2) ZLR p41

Citation	2006 (2) ZLR 41 (H)
Case No	Judgment No. HB-69-06
Court	High Court, Bulawayo

Judge	Ndou J
Heard	7 November 2005
Judgment	13 July 2006
Counsel	<i>K Phulu</i> , for the applicant First respondent in person
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Contract — *breach* — *specific performance* — *order for* — *principles* — *when specific performance rather than damages should be ordered*

Contract — *completion* — *payment to an agent* — *agent expressly authorised to receive payment* — *obligation to make payment thereby discharged*

Contract — *frustration* — *whether doctrine of frustration still part of our law* — *need for "common object" of contract to be frustrated*

Contract — *performance* — *impossibility* — *meaning* — *fact that changed circumstances made performance uneconomical* — *not impossible for contract to be performed*

Headnote

The applicant bought a house from the first respondent. In accordance with ^εthe agreement between the parties, the applicant paid the full purchase price to the second respondent, the first respondent's chosen estate agent. The estate agent did not pay over the full price to the first respondent, who then claimed that the contract had been "frustrated" due to the misappropriation of the purchase price. She also relied on ^φsupervening impossibility. The applicant sought an order compelling the transfer of the property.

Held, that a contract is performed by a party when he has done all that he is obliged to do under obligation. Payment to an agent expressly authorised to receive payment, discharges the obligation to make payment. By making payment to the estate agent, the applicant discharged his ^ςobligations in terms of the agreement. The first respondent was consequently obliged to pass transfer to the applicant.

Held, further, that even if the doctrine of frustration is still a part of our law, the "common object", i.e. the property, had not been frustrated. What seems to have been frustrated was the individual advantage of the first respondent when the second respondent misappropriated part of the ^η purchase price. This is not covered by the doctrine of frustration.

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Held, further, that the fact that the unfortunate occurrence had made it ^αuneconomical for the first respondent to carry out her obligations did not mean that it was impossible for her to do so – she was the one who appointed the second respondent as her *adjectus*. She would have to bear the consequences of such appointment; she could not visit the applicant with the punishment of the sins of her own *adjectus*.

Held, further, that *prima facie* every party to a binding agreement who is ^βready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. The court may, in appropriate circumstances, order the payment of damages instead. *In casu*, it would be just and equitable for an order for specific performance to be granted. No undue ^γhardship would be occasioned to the first respondent because she could seek recourse through the Estate Agents Council under s 34 of the Estate Agents Act [Chapter 27:05]. On the other hand, the applicant would incur immense

hardship should an order for specific performance be refused. He could never hope to acquire an immovable property for the agreed price in the current economic environment. He had also effected [Ⓓ] costly renovations on the property.

Cases cited

Baker v Probert 1985 (3) SA 429 (A)

Bardopoulos & Anor v Miltiadous 1947 (4) SA 860 (W)

C Pettigrew (Pvt) Ltd v Cone Textiles (Pvt) Ltd 1976 (1) RLR 293 (G); 1976 [Ⓔ] (3) SA 568 (R)

Compaan v Dorbyl Structural Engineering (Pty) Ltd 1983 (4) SA 107 (T)

Crispette & Candy Co Ltd v Michaelis NO & Anor 1947 (4) SA 521 (A)

de Roubaix's Trustee v Breda's Curator (1876) 6 Buch 196

Farmers' Co-op Soc (Reg) v Berry 1912 AD 343 [Ⓕ]

Haynes v King Williamstown Municipality 1951 (2) SA 371 (A)

Hirji Mulji v Cheong Yue Steamship Co [1926] AC 497

Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd [1942] AC 154; [1941] 2 All ER 165 (HL)

Koenig v Johnson & Co Ltd 1935 AD 262

Mahomed v Lockhat Bros & Co Ltd 1944 AD 230 [Ⓖ]

Mohr v Kriek 1953 SR 65; 1953 (3) SA 600 (SR)

C Pettigrew (Pvt) Ltd v Cone Textiles (Pvt) Ltd 1976 (1) RLR 293 (G); 1976 (3) SA 568 (R)

R v Milne & Erleigh (7) 1951 (1) SA 791 (A)

Scott & Anor v Poupard 1971 (2) SA 373 (A) [Ⓗ]

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[Ⓐ] *Swartz & Son (Pty) Ltd v Wolmaransstad Town Council* 1960 (2) SA 1 (T)

Wheeldon v Moldenhauer 1910 EDL 97

Legislation considered

Estate Agents Act [Chapter 27:05], s 34

Case information

[Ⓑ] *K Phulu*, for the applicant

First respondent in person

Judgment

NDOU J: The applicant seeks an order in the following terms:

[Ⓒ] "It is ordered that:

1. The first respondent be and is hereby ordered to take all the necessary steps to transfer right, title and interest of house No. 3931 Cowdray Park, Bulawayo to the applicant within five days of service of the order.
2. Failing compliance with paragraph 1 above, the Deputy Sheriff be and [Ⓓ] is hereby authorised to sign the relevant papers for the effecting of transfer to the applicant.
3. That the third respondent be barred from effecting any transfer of the property to anyone other than the applicant.
4. That the first respondent pays costs."

[Ⓔ] The application is opposed by the first respondent. Most facts in this matter, are common cause and can be summarised in the following manner.

On 26 November 2002, the applicant and first respondent entered into an agreement of sale of a certain immovable property commonly known as house No. 3931 Cowdray Park, Bulawayo. The terms of the contract were that applicant would pay to the first respondent the sum of \$1 450 000 as the purchase price. ^F This purchase price was to be paid through the first respondent's instructed estate agents. Accordingly, the applicant fulfilled his contractual obligations and paid the full purchase price, plus the transfer fees. The first respondent has refused to effect transfer of the property and alleges that the purchase price, save for the sum of \$325 000 received by her ^G in November 2002, was never received by her and was misappropriated by her own agents, i.e. the second respondent. She contends in her opposing affidavit that the contract "has been frustrated" and "has been brought to an end by virtue of the estate agent's conduct of dishonesty converting the funds which he held on trust (*sic*) for the purchaser, pending transfer". She further avers that the contract has been put to an end "by the operation of law". ^H In short, the applicant's case is that the first respondent is obliged to pass

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transfer to the applicant since he discharged his obligations in terms of the ^A agreement. Further, he avers that it is just and equitable and would not cause undue hardship to the first respondent if an order for specific performance is granted by this court. It is not disputed that the first respondent, in her opposing affidavit, clearly sets out that the applicant was "to pay cash through Universal Properties at the sum of \$1 450 000."

Accordingly, the applicant made payment of the said purchase price, along ^B with transfer fees, to the said estate agents who received it on behalf of the seller, the first respondent. Thus, by making payment to the estate agent, the applicant discharged his obligations in terms of the agreement. The first respondent was consequently obliged to pass transfer to applicant: see *Verbeek v Mather* 1978 (1) SA 61 (N). ^C

According to J W Wessels *Law of Contract in South Africa* 2 ed at para 2118, "a contract is said to be performed by a party when he has done all that he was obliged to do under obligation". Payment to an agent expressly authorised to receive payment discharges the obligation to make payment. See *Trustee of de Roubaix v Breda's Curator* 1876 Buch 196. *In casu*, payment was made ^D to the second respondent at the behest of the first respondent and such payment was therefore, effectively paid to the seller. Thus the applicant fulfilled his obligations in *forma specifica*. That the second respondent was the agent of the seller is evinced by the fact that all the negotiations were between the seller and the applicant directly and not through the estate agent, hence the affidavit by the first respondent canvassing the agreement between ^E the parties. The role of the estate agent was to receive the purchase price on behalf of the seller pending transfer and, indeed, the second respondent received the full purchase price from the applicant who by so acting discharged his obligations under the contract. In relation to the agreement at hand, the second respondent's role was that of an *adjectus solutionis gratia* i.e. a third person whose name is inserted in the contract for the purpose of receiving ^F payment. The applicant was justified in paying the *adjectus* (second respondent) and such payment discharged the debt: see *Mahomed v Lockhat Bros & Co Ltd* 1944 AD 230 at 237; *Baker v Probert* 1985 (3) SA 429 (A) at 440; *Compaan v Dorbyl Structural Engineering (Pty) Ltd* 1983 (4) SA 107 (T) and *C Pettigrew (Pvt) Ltd v Cone Textiles (Pvt) Ltd* 1976 (1) RLR 293 (G); 1976 (3) SA 569 (R). The first respondent also relies on the English doctrine ^G of frustration. I do not think this doctrine is still a part of our law: see RH Christie *The Law of Contract* 3 ed at 524. In any case, the "common object" has not been frustrated i.e. the property. What seems to have been frustrated is the individual advantage of the first respondent when the second respondent misappropriated part of the purchase price. This is not covered by the doctrine ^H

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Ndou J

^A of frustration even if the doctrine is found to be still part of our law: see *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] A C 154 and *Hirji Mulji v Cheong Yue Steamship Co* [1926] AC 497.

The first respondent also relied on supervening impossibility. In this case, it is still possible for her to pass transfer to the applicant. Indeed, she admits that the applicant has satisfied his obligations. It was never stated in the ^B contract that such an occurrence would entitle one to repudiate the contract. The fact that the unfortunate occurrence has made it uneconomical for the

first respondent to carry out her obligations does not mean that it has become impossible – the first respondent is the one who appointed the second respondent as her *adjectus*. Equity demands that she bears the consequences of such appointment. She cannot visit the applicant with the punishment of sins of her own *adjectus*: see *Koenig v Johnson & Co Ltd* 1935 AD 262 and *Scott & Anor v Poupard* 1971 (2) SA 373 (A). The first respondent cannot seek to avoid her obligations and the terms of the contract on the basis that her agents have defrauded her. Indeed, there is privity of contract between the first and the second respondents and none between the applicant and the latter. It is the first respondent and not the applicant who elected to employ the services of the second respondent.

It would be just and equitable for an order for specific performance to be granted. On the one hand, no undue hardship would be occasioned to the first respondent should an order for specific performance be made because she can seek recourse through s 34 of the Estate Agents Act [Chapter 27:05]. She can make a claim to the Estate Agents Council and recover the balance of the purchase price and therefore suffer no prejudice if ordered to transfer the property.

On the other hand, the applicant would incur immense hardship should an order for specific performance be refused. This is so because, while the first respondent can claim from the Council, the applicant can never hope to acquire an immovable property for the price of \$1 450 000 in the current economic environment. The applicant has also effected costly renovations on the property and he and his family consider it their permanent home. In the *locus classicus* on specific performance, *Farmers Co-op Society v Berry* 1912 AD 343 at 350, Innes J enunciated:

“*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by Kotzé CJ in *Thompson v Pullinger* (1894) OR at p 301 ‘the right of a plaintiff to the specific performance of a contract in which the defendant is in a position to do so is beyond all doubt’.

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Ndou J

It is true that courts will exercise discretion in determining whether or not a decree of specific performance will be made. They will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment of money. For in the words of Storey *Equity Jurisprudence*, s 717(a), ‘it is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it’. The election is rather with the injured party, subject to the discretion of the court.”

The discretion must be exercised judicially: see *Haynes v King William’s Town Municipality* 1951 (1) SA 371 (A). At p 378, de Villiers JA stated: c

“The discretion which the court enjoys, although it must be exercised judicially, is not confined to specific types of cases nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances. As examples of the grounds on which the courts have exercised their discretion in refusing to order specific performance although performance was not impossible may be mentioned: d

- (a) where damages would adequately compensate the plaintiff;
- (b) where it would be difficult for the court to enforce its decree;
- (c) where the thing claimed can be readily bought elsewhere;
- (d) where specific performance entails a rendering of services of a personal nature. To these may be added examples given by Wessels in *Contract* Vol 2 s 3119. All good and sufficient grounds for refusing the decree.
- (e) Where it would operate unreasonably hardly on the defendant or where the agreement giving rise to the scheme is not reasonable or where the decree would produce hardship in those circumstances or would be inequitable under all the circumstances.” f

See also *Wheeldon v Moldenhauer* 1910 EDL 97; *Swartz & Son (Pty) Ltd v Wolmaransstad Town Council* 1960 (2) SA 1 (T); *Mohr v Kriek* 1953 SR 65; 1953 (3) SA 600 (SR); *R v Milne and Erleigh* (7) 1951 (1) SA 791 (A); *Bardopoulos & Anor v Miltiados* 1947 (4) SA 860 (W) and *Crispette and Candy Co Ltd v Michaelis NO & Anor* 1947 (4) SA 521 (A). g

In casu, an award of damages would not adequately compensate applicant, nor can such a property be readily bought elsewhere for the same amount. It would not be difficult for the court to enforce the agreement as the *merx* forming the subject of the agreement is in the hands of the first

respondent. The service required here is not of a personal nature. The decree of specific performance would not operate unreasonably hardly on first respondent, H

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Ndou J

A neither would it produce injustice. Such a decree would not be inequitable under the circumstances of this case.

Accordingly, I grant the order in terms of the above mentioned draft.

B *Coghlan & Welsh*, applicant's legal practitioners

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Source:

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MARIMO & ANOR v MINISTER OF JUSTICE & ORS 2006 (2) ZLR 48 (S)

2006 (2) ZLR p48

Citation	2006 (2) ZLR 48 (S)
Case No	Judgment No. S-25-06
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA, Ziyambi JA, Malaba JA and Gwaunza J.A
Heard	12 January 2006
Judgment	25 July 2006
Counsel	<i>E T Matinenga</i> (with him <i>Miss E Mushore</i>), for the applicants <i>V Mabhiza</i> (with him <i>C Muchenga</i>), for the respondents F
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of c Rights — s 18 — right to protection of the law — right to determination of case by court "established by law" — Electoral Court — appointment of judges not in conformity with Constitution — court not properly constituted and thus not a court "established by law"*

Constitutional law — *Constitution of Zimbabwe 1980 — judges — D appointment of — appointment of High Court judges to serve in inferior courts — may only be appointed to serve in "special courts" — procedure to be followed for appointment to serve in a special court — effect of failure to follow procedure*

Elections — *Electoral Court — status of court — a "special court" for E purposes of s 92(1) of the Constitution — appointment of High Court judges to preside over Electoral Court — procedure to be followed — need for President or Chief Justice to consult Judicial Service Commission — procedure for appointment under s 162 of Electoral Act not in conformity with Constitution — appointments made in accordance with s 162 invalid F*

Headnote

The Electoral Court established by s 161 of the Electoral Act [*Chapter 2:13*] is a "special court" for the purposes of s 92(1) of the Constitution. As such, Parliament was bound by the latter provision to provide for the appointment of persons to exercise the powers of that court in the manner ^g prescribed by the Constitution.

The first applicant was the losing candidate for the Goromonzi constituency at the 2005 Parliamentary general elections. He represented the Movement for Democratic Change (MDC), the second applicant. The elections were conducted in terms of the Electoral Act [*Chapter 2:13*], which came into effect on 1 February 2005. The Act established a new court called the ^h

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^a Electoral Court with jurisdiction to hear and determine election petitions. Section 162(1) provided for the appointment of persons to preside over the court. In terms of s 162(1), "The Chief Justice shall, after consultation with the Judge President, appoint one or more judges of the High Court to be judge or judges, as the case may be, of the Electoral Court". The first applicant filed a petition with the Electoral Court challenging the ^b validity of the election of the fourth respondent, who represented the interests of the ruling party, as member of parliament for Goromonzi. Fifteen other losing candidates of the MDC similarly challenged the validity of the elections in their constituencies.

On 5 May 2005, the Chief Justice, acting in terms of s 162(1) of the Act, ^c appointed five judges of the High Court to preside over the Electoral Court. On the 23 May 2005, the applicants made application to the Supreme Court attacking the constitutional validity of the provision. They submitted that the Electoral Court was a "special court" as defined by s 92(4)(b) of the Constitution, and that s 162(1) of the Act was inconsistent with s 92(1) of the Constitution, which, *inter alia*, provided ^d that "Parliament may provide that the Chief Justice may after consulting the Judicial Service Commission, appoint a ... judge of the High Court to preside over a special court". It was common cause that the Chief Justice, adhering to the wording of s 162(1) of the Act, had not consulted the Judicial Service Commission before appointing the judges to the Electoral Court. In so far as the other fifteen petitioners were concerned, some of ^e the judges not only refused to suspend the hearings pending determination of the Supreme Court application, but also refused to refer the question of the validity of s 162(1) of the Act to the Supreme Court on terms of s 18(1) of the Constitution.

Held, that it was clear from the provisions of s 92(1) of the Constitution that consultation with the Judicial Service Commission was a mandatory ^f requirement for a valid appointment of a person to exercise judicial power conferred by Parliament on a "special court". Without it, there cannot be a valid discharge of the judicial functions of that of court by the appointee. The consultation by the President or the Chief Justice is so mandatory that Parliament cannot abridge the provisions requiring its ^g enactment in the statute establishing the "special court". Any method of appointment of persons to preside over a special court which is different from that prescribed under s 92(1) of the Constitution would be invalid.

Held, further, that the applicants had established a contravention of their right to protection of the law by proving the contravention of the ^h fundamental right guaranteed to them under s 18(9) of the Constitution.

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The applicants, in their capacity as election petitioners, were entitled ^a a fair hearing and determination of their cases by an independent and impartial court established by law before it could be able to afford the applicants the rights to due process and to the protection of the law.

Held, further, that the refusal of the application for reference of the question of the contravention of the Declaration of Rights to the Supreme Court, ^b in each case where it had arisen, constituted a denial to the election petitioners involved of the right to protection of the law guaranteed under s 18(1) of the Constitution.

Held, further (*per* Ziyambi JA) that there is no provision in the Constitution for judges of the High Court to serve in subordinate courts other than special courts. If, therefore, the Electoral Court is not a special court, then ^c the appointments of the judges of the High Court to preside in it were

all invalid. If, on the other hand, it was a special court then the procedure set out in s 92(1) of the Constitution had to be followed if the appointments were to be valid.

Cases cited ^D

A-G of Trinidad & Tobago v McLeod [1985] LRC 81 (PC)

Harrikissoon v Attorney-General [1980] AC 265

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

Tsvangirai v Mugabe & Anor 2006 (1) ZLR 148 (S)

Legislation considered ^E

Constitution of Zimbabwe 1980, ss 18(1), 18(9), 24(2), 92(1) and 92(4)(b)

Electoral Act [*Chapter 2:13*], ss 162(1) and 172(1)

Case information

E T Matinenga (with him *Miss E Mushore*), for the applicants

V Mabhiza (with him *C Muchenga*), for the respondents ^F

Judgment

MALABA JA: This is an application in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution") for redress of an alleged contravention of the Declaration of Rights contained in ss 18(1) and 18(9) of the Constitution.

The right guaranteed to any person under s 18(1) is the right to protection of the law, whilst that entrenched in terms of s 18(9) is the right to a fair hearing within a reasonable time by an independent and impartial court established by law.

The first applicant was a candidate for election as a member of Parliament for ^H the Goromonzi Constituency in the general election held on 31 March 2005.

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^A He was sponsored by the second applicant ("the MDC"), which is a registered political party. The seat in Parliament for the Goromonzi Constituency was won by the fourth respondent who was a candidate in the general election sponsored by the Zimbabwe African National Union – Patriotic Front ("ZANU-PF").

The Parliamentary elections were conducted in terms of the Electoral Act ^B [*Chapter 2:13*] ("the Act") which came into operation on 1 February 2005. Section 161 of the Act established a new court called the Electoral Court ("the Court") with jurisdiction to hear and determine election petitions and other matters in terms of the Act.

Section 162(1) of the Act provided for the appointment of persons to preside ^C over the court. It reads as follows:

"162(1) The Chief Justice shall, after consultation with the Judge President, appoint one or more judges of the High Court to be Judge or Judges, as the case may be, of the Electoral Court."

Section 172 of the Act provided that:

^D " 172(1) A decision of the Electoral Court on a question of fact shall be final.

(2) A decision of the Electoral Court on a question of law may be the subject of an appeal to the Supreme Court."

On 15 April 2005, the first applicant filed a petition with the court challenging the validity of the election of the fourth respondent as a member of Parliament for the Goromonzi Constituency. Fifteen other candidates sponsored by the ^E MDC who had lost the election to candidates sponsored by ZANU-PF filed petitions challenging the results in their respective constituencies.

On 5 May 2005, the Chief Justice, acting in terms of s 162(1) of the Act appointed five judges of the High Court to preside over the court to hear and determine the election petitions. On 23 May, the

applicants made the application ^F to the Supreme Court attacking the constitutional validity of s 162(1) of the Act. They alleged that the Electoral Court was a "special court" as defined in s 92(4) (b) of the Constitution.

The applicants contended that Parliament ought to have provided that persons to preside over the court had to be appointed in the manner prescribed under s 92(1) of the Constitution. It was their argument that s 162(1) of the Act ^G was inconsistent with s 92(1) of the Constitution. For that reason, they contended that s 162(1) of the Act and the appointments of the judges of the High Court to preside over the court were void. The first applicant alleged that, because of the constitutional invalidity of s 162(1) of the Act and the appointments of the judges to preside over the court, the rights guaranteed ^H to him under ss 18(1) and 18(9) of the Constitution were likely to be contravened

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should the hearing of his election petition commence. ^A

Section 92(1) of the Constitution reads:

"92(1) The power to appoint persons to preside over a special court shall vest in the President, after consultation with the Judicial Service Commission:

provided that Parliament may provide that the Chief Justice may, after ^B consulting the Judicial Service Commission, appoint a person holding the office of judge of the High Court to preside over a special court for such period as he may specify."

A "special court" is defined in s 92(4) of the Constitution to mean:

"(a) the Administrative Court established by s 3 of the Administrative Court Act [*Chapter 7:07*]. ^C

(a1) the Fiscal Appeal Court established by s 3 of the Fiscal Appeal Court Act [*Chapter 23:01*].

(a2) the Special Court for Income Tax Appeals established by s 64 of the Income Tax Act [*Chapter 23:06*].

(a3) any court or other adjudicating authority established by law which ^D exercises any function that was vested in a court referred to in paragraph (a), (a1) or (a2) on the date of commencement of the Constitution of Zimbabwe Amendment (No. 15) Act, 1998;

(b) any court or other adjudicating authority established by law other than –

(i) a local court; or ^E

(ii) a court established by or under a disciplinary law; or

(iii) a court established by or under an Act of Parliament for the adjudication of small civil claims; if there is no right of appeal, directly or indirectly, from a decision of that court or adjudicating authority to the Supreme Court or the High ^F Court;

(c) any court or other adjudicating authority established by law which is declared by that law to be a special court for the purposes of this section."

The application was served on the Chief Justice on 31 May. He appears to have accepted the validity of the contention advanced by the applicants, because ^G he thereafter consulted the Judicial Service Commission and the Judge President on the appointment of the judges of the High Court to preside over the court. On 1 June 2005, a letter was sent to each of the judges who had been appointed on 5 May. It reads:

"It has been brought to my attention that some of the litigants in the ^H

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Malaba JA

^A electoral petitions are unhappy about your previous appointment as a judge of the Electoral Court because the Judicial Service Commission was not consulted in terms of s 92(1) of the Constitution.

In the event of my appointment of you as a judge of the Electoral Court on 5 May 2005 not being in accordance with the law it is hereby revoked.

Please be advised that I, in my capacity as Chief Justice of Zimbabwe and ^B after consultation with the Judge President and the Judicial Service Commission have appointed you, as a Judge of the Electoral Court with effect from this day the 1st June 2005."

Acting on the authority of the letter of appointment, some of the judges refused applications by the petitioners to suspend the hearing and determination of the election petitions pending determination

of this application. They also refused requests by the petitioners to refer the question of the contravention of the Declaration of Rights arising in that court to the Supreme Court for determination in terms of s 24(2) of the Constitution.

It was contended on behalf of the applicants that the re-appointment of the judges on 1 June 2005 was also invalid, because there was no Act of Parliament ^d authorising the Chief Justice to appoint the judges of the High Court after consulting the Judicial Service Commission and the Judge President. It was further argued that the insistence by the judges presiding over the court to hear and determine the election petitions and the refusal to refer the question of the contravention of the Declaration of Rights which had arisen in those proceedings to the Supreme Court for determination violated the petitioners' ^e right to the protection of the law.

The applicants sought by way of relief a declaratory order in these terms:

"It is declared that:

- 1.1 The Electoral Court established by s 161 of the Electoral Act [*Chapter 2:13*] falls within the meaning of a 'special court' as defined by s 92(4) ^f of the Constitution.
- 1.2 Accordingly, the manner of appointment of judges to it as provided in s 162(1) of that Act be and is hereby declared to be inconsistent with s 92(1) and s 18 of the Constitution.
- 1.3 The initial appointments made by the third respondent to the Electoral Court without consulting the Judicial Service Commission on the ^g specific appointments are accordingly invalid.
- 1.4 Additionally any appointments made by the third respondent to the Electoral Court without specifying the period of the appointment are invalid.
- 1.5 All appointments made by the third respondent to the Electoral Court ^h after consulting the Judicial Service Commission without Parliament

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Malaba JA

having provided for the same are also declared to be inconsistent with ^a s 92(1) and hence s 18 of the Constitution and are accordingly invalid.

2. It is ordered that:

- 2.1 The appointments made by the third respondent to the Electoral Court, whether made in accordance with s 162 of the Electoral Act [*Chapter 2:13*] or made on 1 June 2005 are a nullity, and set aside." ^b

Only the first and second respondents filed opposing affidavits. The first respondent is the Minister responsible for the administration of the Act. The second respondent ^{*} was cited because s 24(6) of the Constitution gives him a right to be heard by the court on the question whether any law is in contravention of the Declaration of Rights arising for determination in any proceedings before it. ^c

The contention advanced by the respondents in opposing the application was that the Electoral Court was not a "special court" as defined in s 92(4) of the Constitution. The argument was based on the fact that s 172(2) of the Act gave to a party who felt aggrieved by a decision of the court on a question of law a right of appeal to the Supreme Court. There was a right of appeal from ^d a decision of the court to the Supreme Court (so went the argument). The contention was therefore that Parliament was not obliged, in the exercise of legislative power to provide for the appointment of persons to preside over the court after consulting with the Judicial Service Commission. Consequently the respondents denied that there was any inconsistency between s 162(1) of the Act and s 92(1) of the Constitution. ^e

The first question for determination is whether on a true interpretation of s 172(1) of the Act there was no right of appeal from a decision of the Electoral Court within the meaning of s 92(4)(b) of the Constitution. An affirmative answer to the question will establish as a fact the applicants' contention that the Electoral Court is a "special court" for the purposes of s 92(1) of the Constitution. ^f

A right of appeal is a matter of substantive law. The fact of its non-existence can only be established on the construction of the statute by which the court from a decision of which it is alleged that no right of appeal was created. In this case, the fact to be established requires proof of a negative statement to the effect that there is no right of appeal from a decision of the Electoral Court. ^g The contention advanced on behalf of the respondents to the effect that the Electoral Court is not a "special court" because s 172(2) of the Act gives a party aggrieved by a decision of that court a right of appeal on a question of law does not assist in the proof of the negative fact in s 92(4)(b) of the Constitution. ^h

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A It appears to me that one has to look at s 172(1) of the Act in the determination of the question whether there is no right of appeal from a decision of the Electoral Court. Section 172(1) does not expressly provide that there shall be no right of appeal from a decision of the court on a question of fact. It simply provides that a judgment of that court on a question of fact shall be final. Usually the draftsman adds such words as "and not subject to appeal" to put B it beyond doubt that the finality of the decision is not in respect of the court in the exercise of its jurisdiction only, but binds the parties as well.

Where Parliament intends to vest a decision of a court with finality, as was the case in s 172(1) of the Act, there is no right of appeal. Section 172(1) of the Act embodies the definitive criterion of a "special court" set out in s 92(4)(b) of C the Constitution. There is a decision of the court which would form the subject matter of that provision distinguished from the other type of a decision under s 172(2) of the Act from which an appeal would lie to the Supreme Court by the actual nature of the question on which the appeal would otherwise have lain to the Supreme Court but for the provisions of s 172(1). I accept the submission made on behalf of the applicants by Mr *Matinenga* that the D Electoral Court established by s 161 of the Act is a "special court" for the purposes of s 92(1) of the Constitution.

Having established a "special court" under Chapter VIII of the Constitution and conferred on it the judicial power to hear and determine election petitions, Parliament was bound by s 92(1) of the Constitution to provide for the E appointment of persons to exercise the powers of that court in the manner prescribed by the Constitution. The method of appointment of the persons to preside over a "special court" prescribed under s 92(1) of the Constitution ensured that the same conditions of the discharge of the judicial functions of the court were secured for them as were guaranteed to persons appointed under Chapter VIII of the Constitution (dealing with the judiciary) as judges F of the High Court.

It is common cause that our Constitution is based on the basic concept of the separation of the powers of the State into the legislative, executive and judiciary spheres. In that regard, the Constitution is divided into chapters dealing exclusively with the plenitude of each power and how parts of it may G be conferred upon appropriate bodies within its sphere.

Judicial authority is dealt with under Chapter VIII of the Constitution. Section 79(1), which commences Chapter VIII, declares that the judicial authority of the State shall vest in: (a) the Supreme Court; and (b) the High Court; and (c) such other courts subordinate to the Supreme Court and the High Court as may be established by or under an Act of Parliament. The H hierarchical structure of the courts has the Supreme Court at the apex to

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supervise the exercise of judicial power by subordinate courts through the A system of appeals.

The structure of the distribution of judicial power also shows that the independence of the judiciary is more firmly safeguarded for persons presiding over superior courts, that is to say, the High Court and the Supreme Court, than it is for subordinate courts. To that end, judges of the High Court and the B Supreme Court are appointed by the President after consultation with the Judicial Service Commission. They have security of tenure, in that they can remain in office during good behaviour until they voluntarily resign, or retire at the age of sixty-five or seventy. The office of a judge of the High Court and the Supreme Court cannot be abolished during his or her tenure of office. His or her salary cannot be reduced. C

The two pillars of security of tenure and conditions of service firmly secure for the judges of the superior courts the necessary independence from interference by the other organs of the State, that is to say the legislature and the executive in the discharge of judicial functions.

It was for the fundamental purpose of securing, for persons who preside over D "special courts", the independence in the discharge of judicial functions of those courts safeguarded by the two pillars of security of tenure and conditions of service, that the framers of the Constitution provided that they be appointed in the manner prescribed under s 92(1) which is one of the provisions of the Constitution falling under Chapter VIII.

Once it established a "special court," Parliament was bound by s 92(1) of the Constitution to provide that persons who were to exercise the judicial power vested in that court, be appointed by the **President** after consultation with the Judicial Service Commission or provide in the Act that they be appointed by the Chief Justice after consulting the Judicial Service Commission.

It is clear from the provisions of s 92(1) of the Constitution that consultation with the Judicial Service Commission is a mandatory requirement for a valid appointment of a person to exercise judicial power conferred by Parliament on a "special court". Consultation with the Judicial Service Commission by the **President** or **the Chief Justice** is such an integral aspect of the appointment of a person to preside over a "special court" that without it there cannot be a valid discharge of the judicial functions of that court by the appointee.

The consultation by the **President** or **the Chief Justice** with the prescribed body, and not any one else, is so mandatory that Parliament cannot abridge the provisions requiring its enactment in the statute establishing the special court. In fact, any method of appointment of persons to preside over a "special

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a court" which is different from that prescribed under s 92(1) of the Constitution would be invalid.

Under s 162(1) of the Act, Parliament empowered the Chief Justice to appoint sitting judges of the High Court to preside over the Electoral Court, which is a "special court", after consulting the Judge President. It transferred the right to be consulted on the appointment of judges of the High Court to exercise judicial power vested in a "special court" from the Judicial Service Commission to the Judge President. Parliament had no power to do that. It was under a duty to provide that the judges of the High Court were to be appointed to preside over the Electoral Court in the manner prescribed under s 92(1) of the Constitution. Failure to so provide means that s 162(1) of the Act is inconsistent with s 92(1) of the Constitution.

Section 3 of the Constitution provides that the Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with it that other law shall, to the extent of the inconsistency, be void. It must follow that to the extent of its inconsistency with s 92(1) of the Constitution, s 162(1) of the Act was beyond the legislative competence of Parliament. The appointment of the judges to preside over the special court in the manner prescribed under s 162(1) of the Act was clearly invalid.

The last question for determination is whether the applicants established the contravention of the fundamental rights protected under s 18(1) and 18(9) of the Constitution as they approached this Court on an application under s 24(1) of the Constitution. The law, the right to the protection of which the applicants alleged they had been deprived of under s 18(1) of the Constitution, was s 92(1) of the Constitution. But for Parliament to purport to make a law which was void by virtue of s 3 of the Constitution did not, in my view, deprive anyone of the "right to protection of the law." That is the case as long as the judicial system of Zimbabwe provides a procedure, as it does, by which any person interested in establishing the invalidity of a statute, in this case s 162(1) of the Act, can obtain from the courts of justice in which the plenitude of the judicial power of the State is vested, a declaration of the invalidity that would be binding upon Parliament itself and upon all persons attempting to act under, or enforce, the inconsistent law. Access to a court of justice for that remedy is itself "the protection of the law" to which all individuals including the election petitioners involved in this case would be entitled under s 18(1) of the Constitution.

See *Attorney-General of Trinidad & Tobago v Mcleod* (1985) LRC 81 (PC) at 90C-E; *Harrikissoon v Attorney-General* [1980] AC 265 at 269; 270.

I am, however, satisfied that the applicants established the contravention of their right to protection of the law by proving the contravention of the

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fundamental right guaranteed to them under s 18(9) of the Constitution. There is no doubt that the applicants, in their capacity as election petitioners, were entitled to a fair hearing and determination of their cases by an independent and impartial court established by law. The Electoral Court had to

be a "court established by law" before it could be able to afford the applicants the right to due process and to the protection of the law. ^B

The phrase a "court established by law" incorporated into s 18(9) of the Constitution includes two aspects. It refers to a court as an independent institution and a repository of judicial power. In that sense, the Electoral Court was "established by law", in that it was established by s 161 of the Act, the validity of which was not attacked.

The second aspect relates to a court as it is constituted; that is, when a judge ^C sits to exercise judicial power vested in the court and does so on the authority of a valid appointment. It is in the second sense that the phrase was used to allege a contravention of the Declaration of the Rights contained in s 18(9) of the Constitution. As pointed out earlier, the provision by Parliament for the appointment of the judges of the High Court to preside over the Electoral Court in the manner prescribed under s 92(1) of the Constitution was a necessary ^D condition for validity of the appointments and the exercise by the judges of the jurisdiction of that court.

It must follow that, as the judges were not validly appointed, they had no authority to exercise the judicial power of the Electoral Court at the time they purported to hear and determine the election petitions. In other words, the ^E court in which they sat was not properly constituted and was not a court "established by law." There was a violation of the right guaranteed to the applicants under s 18(9) of the Constitution.

A declaration by a validly constituted court as to the law applicable to a determination in a case becomes the law binding the parties to the proceedings ^F until it is reversed on appeal. In that way the court affords to the parties the right to protection of the law. But, in this case, the rulings refusing the request for the reference of the question of contravention of the Declaration of Rights contained in s 18(1) and 18(9) were not only clearly wrong in view of the fact that there were indeed invalid appointments of the judges concerned but the court was itself not validly constituted. ^G

The refusal of the application for reference of the question of the contravention of the Declaration of Rights in each case where it had arisen constituted a denial to the election petitioners involved, of the right to protection of the law guaranteed under s 18(1) of the Constitution. See *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S) at 157G-158A; *Tsvangirai v Mugabe & Anor* 2006 (1) ZLR 148 (S). ^H

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A This court has power under s 24(4) of the Constitution to make such orders and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights. What has exercised my mind in this regard is the question whether to order the suspension of the coming into effect of the declaratory order, to which the applicants are clearly entitled, for a period in order to give Parliament the ^B opportunity to correct the error in the exercise of its powers.

The problem I have faced is that such an order of suspension of the operation of the declaration of the invalidity of s 162(1) of the Act and the consequent effect thereof would not be "for the purpose of enforcing or securing the enforcement of the Declaration of Rights." It would have the effect of perpetuating a void. A court has no power to fill up such an empty space. It ^C is for Parliament to put in place a valid law on the appointment of the persons to preside over the Electoral Court to hear and determine the election petitions filed with that court.

The applicants are accordingly granted the following relief:

"It is declared that: ^D

- 1.1 The Electoral Court established by s 161 of the Electoral Act [*Chapter 2:13*] falls within the meaning of a 'special court' as defined by s 92(4) of the Constitution.
- 1.2 Accordingly, the manner of appointment of judges to it as provided in s 162(1) of that Act be and is hereby declared to be inconsistent with s 92(1) and s 18 of the Constitution. ^E
- 1.3 The initial appointments made by the third respondent to the Electoral Court without consulting the Judicial Service Commission on the specific appointments are accordingly invalid.
- 1.4 Additionally, any appointments made by the third respondent to the Electoral Court without specifying the period of the appointment are invalid. ^F

- 1.5 All appointments made by the third respondent to the Electoral Court after consulting the Judicial Service Commission without Parliament having provided for the same are also declared to be inconsistent with s 92(1) and hence s 18 of the Constitution and are accordingly invalid.
- 1.6 All appointments made by the third respondent to the Electoral Court, ^g whether made in accordance with s 162 of the Electoral Act [*Chapter 2:13*] or made on 1 June 2005 are a nullity and set aside.
- 1.7 The first respondent and second respondent are jointly and severally to pay the costs of the application one paying the other to be absolved."

^h SANDURA JA, CHEDA JA & GWAUNZA JA concurred.

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ZIYAMBI JA: I have read the judgment of Malaba JA and agree with the ^a conclusions at which he arrived as well as the relief granted. I wish to add the following remarks:

Judges in Zimbabwe are appointed and hold office in terms of the Constitution of Zimbabwe. Their security and tenure of office is guaranteed by the Constitution. Thus the terms and conditions of their appointment cannot, ^b without their consent, be altered during their tenure of office. These provisions make for the independence of the judiciary from the other arms of the State being the Executive and the Legislature.

Section 92(1) of the Constitution provides for judges of the High Court to be appointed to serve in a special court in circumstances limited to the manner of their appointment and the period of appointment. Section 92(2) ensures that ^c during the term of office of such judges appointed to preside over a special court, their conditions of service shall not be amended and their office shall not be abolished without their consent.

No provision is made in the Constitution for judges of the High Court to serve in subordinate courts other than special courts. Thus it would be fair to say ^d that if the Electoral Court is not a special court then the appointment of judges of the High Court to preside in that court is inconsistent with the provisions of the Constitution. The Chief Justice when acting in terms of s 91 of the Constitution can only assign a judge of the High Court to preside in an inferior court if that court is a special court.

In prescribing a manner of appointment by the Chief Justice, other than that ^e enacted in the Constitution, Parliament contravened the Constitution and the offending provision, being s 162 of the Electoral Act ("the Act"), is invalid by reason of its inconsistency with the Constitution.

It follows from the above that the appointment of the judges of the High Court to preside in the Electoral Court, made by the Chief Justice acting in terms of ^f s 162 of the Act was contrary to the provisions of s 92(1) of the Constitution and therefore invalid.

The contention by the respondent that the Electoral Court is not a special court as defined by s 92(4) of the Constitution, since there is a right of appeal on a point of law to the Supreme Court, does not assist its case. Apart from the fact that the right of appeal is, in my view, so limited as to be non-existent, if the ^g Electoral Court is not a special court, then the appointments of the judges of the High Court to preside in it are all invalid. If it is a special court, then the procedure set out in s 92(1) must be followed if the appointments are to be valid.

Whichever way one looks at it, the applicants' contentions are valid. If the Electoral Court is to be a special court, then Parliament must enact the enabling ^h

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^a legislation in conformity with the Constitution. If it is not a special court, then judges of the High Court cannot lawfully be appointed to preside in it.

The most favourable conclusion which can be arrived at in the circumstances, since Parliament is presumed to act in compliance with the Constitution, is that Parliament intended that the Electoral Court should be a special court. In order to give effect to that intention, the necessary legislation in accordance with ^b s 92 of the Constitution must be enacted to govern the appointment of judges of the High Court to preside in that court.

Atherstone & Cook, applicants' legal ^c practitioners

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TREGERS INDUSTRIES (PVT) LTD v ZIMBABWE REVENUE AUTHORITY 2006 (2) ZLR 62 (H) 2006 (2) ZLR p62

Citation	2006 (2) ZLR 62 (H)
Case No	Judgment No. HH-83-06
Court	High Court, Harare
Judge	Garwe JP
Heard	6 October 2005
Judgment	26 July 2006
Counsel	Mrs J B Wood, for the applicant A B Chinake, for the respondent
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Estoppel— *issue estoppel* — interpretation of legislation — revenue authority previously accepting one interpretation of legislation — whether can be estopped from subsequently arguing that such interpretation was incorrect

Practice and procedure — parties — citation — action against Zimbabwe Revenue Authority — normally no basis for citing Commissioner General in action against Authority

Revenue and public finance — Commissioner-General of Zimbabwe Revenue Authority — citation of as respondent — normally no basis for citing Commissioner in action against Authority

Revenue and public finance — value added tax — tax on goods exported from the country — when tax payable — goods supplied to foreign resident who collected goods and conveyed them outside Zimbabwe — tax payable

Headnote

The applicant sought the return of moneys garnisheed by the Zimbabwe Revenue Authority (ZRA), being valued added tax due on goods sold. The applicant cited the Commissioner of the ZRA as the respondent. The applicant claimed that as the goods were exported, they were not subject to VAT. The goods were supplied by the applicant to a foreign resident, who collected them himself, paid for and arranged the transportation, and received them in his country. It had previously been accepted by officers of the ZRA that the correct interpretation of the legislation was that VAT

was not payable in these circumstances. The applicant argued that the respondent was estopped from denying that the interpretation placed on the legislation by his staff was incorrect.

Held, that ordinarily there is no basis for citing the Commissioner personally ^H

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^A as a party in a matter handled by employees of the authority. The ZRA is a body corporate capable of suing and being sued in its own name. Under s 5 of the Revenue Authority Act [Chapter 23:11], the operations of the ZRA are controlled and managed by the Revenue Board and s 19(4) makes it clear that the Commissioner-General's position is akin to that of a chief executive in a company. Although there is specific reference in ^B the Value Added Tax Act [Chapter 23:12] to the Commissioner being responsible for carrying out the provisions of the Act, it is clear that such responsibility is subject to the control and management of the authority through the Revenue Board. The authority itself should have been cited.

Held, further, that there was no evidence, apart from the applicant's bare ^C assertion, that the goods were exported. They were supplied to a non-resident but there was no evidence that they were exported.

Held, further, that the fact that the ZRA's employees had previously accepted that the goods in question were zero rated did not estop the respondent from arguing that their interpretation of the legislation was not correct. If their interpretation was wrong, it remained wrong and the ^D respondent could not be estopped from arguing that it was wrong.

Quaere, whether s 11A of the Value Added Tax (General) Regulations 2003 (SI 273 of 2003), which provided that where goods were removed from the country by the purchaser and not by the supplier, were *ultra vires*, as being contrary to s 10(1) of the Value Added Tax Act [Chapter 23:12]. In any event, s 11A would not apply, as it was promulgated after the ^E present dispute arose.

Cases cited

Maradze & Ors v Chairman, PSC & Anor HH-223-98

Matida v Chairman, PSC & Anor 1998 (1) ZLR 507 (H)

Maxwebo v Chairman, PSC & Anor HH-125-97

Legislation considered ^F

Revenue Authority Act [Chapter 23:11], ss 3, 4, 5 & 19

Value Added Tax Act [Chapter 23:12], ss 2, 3, 5 & 10(1)

Value Added Tax (General) Regulations 2003 (SI 273 of 2003), ss 11 & 11A

Case information

^G Mrs J B Wood, for the applicant

A B Chinake, for the respondent

Judgment

GARWE JP: In this application Tregers Industries ("the applicant") seeks a ^H refund of the sum of \$2 183 861 227.71 paid by its bankers to the Zimbabwe

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Revenue Authority ("the respondent") at the instance and instructions of the ^A respondent. The application is opposed.

The applicant is in the business of manufacturing and selling products both locally and internationally. On 28 May 2004, an officer from the respondent's offices visited the applicant's offices and inspected the applicant's export files. The officer discovered that the applicant was not

charging value added tax (VAT) and called upon the applicant to pay. The applicant contended that it was not liable to pay and consequently the respondent proceeded to garnishee the applicant's current account with Barclays bank. A total sum of \$2 184 861 227.71 was paid to the respondent by the bank. The applicant now seeks a refund of that sum on the basis that the exported goods were not liable to VAT. Specifically, the applicant contends that the goods in question had a zero rating in terms of s 10 of the Value Added Tax Act [Chapter 23:12].

In its founding affidavit, the applicant says it has been exporting its finished products over the years and has been exempted from charging sales tax on the goods to be exported. When the system changed to VAT, the applicant understood that nothing had changed and that it was not required to charge VAT on its export orders. The export documents were presented to the respondent's office who, after examination, would authorise the exportation without requesting that VAT be charged on the invoices. This went on for some time. In this particular case, the goods had already been exported and the customer had already received the invoices and statement. In the circumstances, it was therefore, no longer possible to re-invoice the customer who was outside the country and expect him to pay. The applicant accordingly seeks a refund of the sum garnished, together with interest thereon at the prescribed rate from the date the money was transferred from the applicant's account, together with costs on the higher scale.

The respondent, in its opposing papers, accepts that all exports were exempted from sales tax in terms of s 9(1) of the Sales Tax Act. However with the promulgation of the Value Added Tax Act (which simultaneously provided for the repeal of the Sales Tax Act) as well as the VAT Regulations (SI 273 of 2003), certain changes were made. In this particular case, the goods were not consigned to a foreign country — as provided for in the definition of "exported" in s 2 of the Act. VAT should therefore, have been collected by the applicant in terms of section 6(a) of the Act. Direct exports are "zero rated" in terms of s 2(a) of the Act, whilst indirect exports are taxable under s 2(d), as read with s 11 of the Regulations. Accordingly, the respondent denies that it acted unlawfully in issuing a garnishee order against the applicant. In terms of s 49 of the Act, the liability of paying VAT, where this has not been collected, lies with the registered operator. The respondent submits that the applicant

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A deliberately used the same approach it used during the sales tax era where all exports were exempt without checking the correct position in terms of the new Act.

The main issue for consideration is whether in this case the applicant was obliged in terms of the law to collect VAT. Quite clearly, if the applicant was obliged to do so and did not, the respondent would be entitled to recover any amount calculated as being due by way of VAT. Section 48 of the Value Added Tax authorises the Commissioner to recover money from various sources, including a bank account.

Two other matters were raised *in limine*. These are, firstly, whether the deponent to the opposing affidavit had authority to depose to that affidavit and, secondly, whether the respondent himself has been correctly cited. I propose to deal with these two issues before dealing with the contentious issue of whether the applicant was obliged to charge and collect tax in this particular instance.

The deponent to the respondent's opposing affidavit, Susan Meda, states as follows in paras 1 and 2:

- "1. I am a legal officer in the Zimbabwe Revenue Authority, a duly constituted legal entity ...
2. The facts I depose to herein are within my personal knowledge or have been ascertained by me through reports received from the investigating officer. As such I can properly swear to this affidavit, which, to the best of my belief, is true and correct."

It is the applicant's contention that Susan Meda has apparently arrogated to herself the function to depose to an affidavit, but does not state that she has authority from the respondent to act on his behalf. It is true that Susan Meda has not in her affidavit specifically stated that she has been authorised to depose to the affidavit. She states, however, that she is a legal officer in the employ of the respondent and that she can properly swear to the affidavit, which to the best of her knowledge is true and correct. In my view, implicit in that statement, is the fact that she has authority to swear to the affidavit. I do accept that it would have been neater for Susan Meda to have expressly stated so. Her failure to do so, however, cannot nullify the opposing affidavit as has

g been suggested. In other words, the failure to state specifically that she had been authorised to depose to the affidavit is not fatal. I would accordingly dismiss the first point *in limine*.

The second point raised *in limine* is whether the respondent has been correctly cited. The respondent says it is the Zimbabwe Revenue Authority h which should have been cited and not himself. The applicant, on the other

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hand, has submitted that the Commissioner-General has been correctly cited a because he, and not the Authority, is responsible for administering the Act by virtue of ss 4 and 44 of the Act. Section 4 of the Act is clear that it is the Commissioner who shall be responsible for carrying out the provisions of the Act. It is also true that any refunds in terms of the Act should be refunded by the Commissioner. b

Matida v Chairman, PSC & Anor 1998 (1) ZLR 507 (H) is authority for the proposition, that in cases such as the present, it is the body and not the head of that body who should be cited. Adam J in that judgment cited with approval remarks by Smith J in *Maxwebo v Chrmn, PSC & Anor* HH-125-97 at pp 6-7 where he said:

"... The Chairman of the Public Service Commission was so cited. Although c exception was not taken thereto, I consider that it was improper to cite him as respondent. Section 74 of the Constitution establishes the Public Service Commission which consists of the Chairman and not less than two and not more than seven other members. Any findings, rulings or decisions of the Public Service Commission are those of that body and not of the Chairman. Accordingly, the Chairman of the Public Service d Commission cannot do anything in the name of the Commission if the majority of members do not agree with him. The distinction is illustrated by the order sought by the applicant. The draft order states that the respondent's decision to find the applicant guilty of misconduct should be set aside. However, the finding of guilty was not a decision of the respondent. It was a decision of the Public Service Commission. I e therefore, consider that it was improper to cite the Chairman as respondent. The Public Service Commission should have been cited as respondent."

See also *Maradze v Chrmn, PSC & Anor* HH-223-98. In the case, Smith J remarked at pp 7-8 that it was not appropriate to cite the Chairman of the Public Service Commission as a party unless the allegation is that he personally acted in a manner which necessitated recourse to the courts. f

I agree with the sentiments expressed in the cases cited above. Ordinarily there is no basis for citing the Commissioner personally as a party in a matter handled by employees of the authority. I am fortified in this view by the provisions of the Value Added Tax [Chapter 23:12] as well as the Revenue Authority Act [Chapter 23:11]. The latter Act provides in s 5 that the operations of the g Zimbabwe Revenue Authority (ZRA) shall, subject to the Act, be controlled and managed by a board which shall consist of the Secretary for Finance, the Commissioner-General of the ZRA and other members appointed by the Minister after consultation with the President. In terms of s 4 one of the functions of the Authority shall be to act as an agent of the State in assessing, collecting and enforcing the payment of all revenue. Of particular importance h

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a is s 3 of the Revenue Authority Act which provides:

"3. There is hereby established an authority, to be known as the Zimbabwe Revenue Authority, which shall be a body corporate capable of suing and being sued in its own name and, subject to this Act, of performing all acts that bodies corporate may by law perform."

It is the Authority which in terms of s 4 is charged with the responsibility of, b *inter alia*, collecting and enforcing the payment of all revenues. In terms of s 19 of the Revenue Authority Act, it is the board of the Authority which appoints the Commissioner-General of the Authority. However, in terms of s 3 of the Value Added Tax Act, it is the Commissioner-General of the Authority who is responsible for carrying out the provisions of the Act. Section 5 of the c same Act provides that the Commissioner-General may, subject to the Revenue Authority Act, delegate functions to officers in the employ of the Authority. That the Commissioner-General acts under the control of the Board of the Authority there can be no doubt. Section 19(4) of the Revenue Authority Act provides that the Commissioner-General shall be responsible, subject to the Board's control, for supervising and managing the authority's staff, d activities, funds, etc. As already noted, s 5 of the Revenue

Authority Act provides that the operations of the authority shall be controlled and managed by the Revenue Board and s 19(4) makes it clear that the Commissioner-General's position is akin to that of a chief executive in a company. He is appointed by the Board of Authority, which Board also appoints commissioners and other officers and members of staff. Although there is ^E specific reference in the Value Added Tax Act to the Commissioner-General being responsible for carrying out the provisions of the Act, it is clear that such responsibility is subject to the control and management of the Authority through the Revenue Board. At the end of the day, it is the Authority that is specifically given the power to sue or be sued.

^F In the circumstances, I find that the Commissioner-General of the Authority has been wrongly cited as the respondent and it is the authority itself that should have been so cited. I accordingly uphold the point raised *in limine* by the respondent and on that basis alone would dismiss the application.

The above notwithstanding, I proceed to consider whether or not as a matter of law the applicant was obliged to collect tax in the particular circumstances ^G of this case.

Section 10(1)(a) of the Value Added Tax Act provides as follows:

"10. ZERO RATING

- (1) Where, but for this section, a supply of goods would be charged ^H with tax at the rate referred to in subsection (1) of section *six*, such

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supply of goods shall, subject to compliance with subsection (3) ^A of this section, be charged with tax at the rate of zero *per centum* if –

- (a) the supplier has supplied the goods, being movable goods, in terms of a sale or instalment credit agreement and has exported the goods; or ..."

A supplier is defined as "the person supplying the goods or services". ^B

In terms of s 2 of the Act, which is the definition section, the word "exported", in relation to any movable goods supplied by any registered operator under a sale or an instalment credit agreement means:

- "(a) consigned or delivered by the registered operator to the recipient at an address in an export country as evidenced by documentary proof ^C acceptable to the commissioner; or
- (b) ...
- (c) ...
- (d) removed from Zimbabwe by the recipient, who is not a resident of Zimbabwe, for conveyance to an export country, subject to such ^D conditions as may be set by the Commissioner by notice in a statutory instrument."

Section 11 of the Value Added Tax (General) Regulations SI 273 of 2003 provides:

- "11. Subject to paragraph (a) of subsection (1) of section 10 of the Act, where goods are consigned or delivered in terms of paragraph (a) or ^E (b) of subsection (1) of section 2 of the Act in the definition of "exported", tax shall be charged at zero *per centum*.

- 11A. Subject to paragraph (a) of subsection (1) of section 10 of the Act, where goods are consigned or delivered in terms of paragraph (d) of subsection (1) of section 2 of the Act in the definition of "exported", tax shall be charged at zero *per centum*: ^F

Provided that –

- (a) registered operators seeking to benefit from zero rating of goods sold to non-residents in terms of paragraph (d) of the definition of 'exported' shall satisfy the Commissioner that they will comply with all exchange control regulations relating to export ^G of goods;
- (b) where the Commissioner is satisfied that the goods referred to in paragraph (d) of the definition of 'exported', were not taken out of Zimbabwe, the seller of such goods shall become liable to the tax calculated at the prescribed rate;
- (c) the tax shall – ^H

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Garwe Jp ^A

- (i) be debts due by the seller to the State; and

- (ii) be sued for and recovered by action by the Commissioner in any court of competent jurisdiction .”

So far as this case is concerned the position in terms of the various provisions is as follows: ^B

- (a) Tax shall be charged at zero *per centum* where a supplier has supplied movable goods in terms of a sale agreement and has exported the goods.
- (b) In terms of the Regulations, tax shall be charged at zero *per centum* in two situations:
 - (i) where goods are consigned or delivered in terms of para (a) in the definition of “exported” i.e. direct exports; ^C
 - (ii) where goods are consigned or delivered in terms of para (d) in the definition of “exported” i.e. indirect exports, but subject to the proviso;
- (c) The word “exported” means consigned or delivered by the registered operator to the recipient at an address in an export country as evidenced ^D by documentary proof acceptable to the Commissioner. To “consign” is defined in the *Concise Oxford Dictionary* as “to hand over or deliver to”.
- (d) “Exported” in terms of para (d) in the definition section means removed from Zimbabwe by the recipient, who is not a resident of Zimbabwe, for conveyance to an export country, subject to such conditions as may be ^E set by the Commissioner.
- (e) “Export country” means any country other than Zimbabwe but includes any part of Zimbabwe declared to be an export processing zone.

The facts giving rise to the dispute the subject of this application are not entirely clear but a perusal of the papers filed reveals the following. Goods were ^F purchased from the applicant by a foreign resident and subsequently conveyed outside Zimbabwe. It appears the cost of transportation of the goods was paid for or arranged by the foreign resident. The respondent in para 12 of his heads says the foreign resident collected the goods himself. This statement has not been disputed, although the applicant says in its heads that it ensured that the goods left the country and prepared all necessary documentation in this ^G regard.

The issue that arises is whether the goods were exported (as defined) by the applicant as the supplier. There is no evidence that the applicant itself consigned or delivered the goods at an address in an export country and indeed the applicant did not supply such evidence. All there is on the papers ^H is an unsubstantiated statement that it did so. The onus is on the applicant

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Garwe Jp

to prove that it did export the goods as defined. It has not discharged that onus. ^A To the contrary, the respondent has stated that the purchaser himself collected the goods, paid and arranged for their transportation and thereafter received the goods in his country. The applicant obviously would have assisted in ensuring that the goods were transported in accordance with the arrangements made by the purchaser. In short, no documentary proof which ^B evidences the exportation of the goods by the applicant has been produced.

I do accept that s 11A of the Value Added Tax (General) Regulations (SI 273 of 2003) as amended by the Value Added Tax (General Amendment) Regulations (SI 201 of 2004) would cater for a situation where the foreigner himself removes the goods from Zimbabwe. The amendment now provides that in that situation the goods too shall be charged tax at zero *per centum* provided certain ^C conditions are met. However, there appear to be two difficulties with s 11A of the Regulations. The first is that it contradicts s 10(1)(a) of the Value Added Tax Act, in that it provides for zero-rating even in a situation where the goods have been removed from the country by the purchaser himself and not by the supplier. Section 11A of the Regulations would therefore appear to be *ultra vires* the Act. The second difficulty is that s 11A would not in any event apply ^D in the present case. Section 11A was promulgated on 24 September 2004. The dispute giving rise to this application was sometime before that. Section 11A does not have retrospective effect.

In the result, I find that the respondent was entitled to demand that the applicant as the supplier or registered operator pays the value added tax. ^E

Two other issues were raised by the applicant. For completeness of the record I will also deal with them.

The first is estoppel. The applicant argued that the respondent is “estopped” by the actions of his subordinates from denying that the applicant’s interpretation of section of the Act is correct. I do not accept this submission. ^F What the applicant is saying is that, irrespective of the correct

interpretation, the fact that the respondent's employees accepted that the goods in question were zero rated estops the respondent from arguing to the contrary. As a matter of law, that cannot be correct. If an interpretation of the law is not correct, then that interpretation is not correct. The fact that respondent's employees may not have looked into the matter more carefully cannot estop ^g the respondent from arguing that such interpretation is not correct.

The second relates to the submission by the applicant in para 13 of its heads that in the event that this court finds that estoppel does not apply the applicant should nevertheless be entitled to payment of the sums claimed as damages for misrepresentation. This submission must also fail for the reason that the ^h

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Garwe Jp

A submission, made for the first time in the heads of argument, introduces a new cause of action i.e. damages for negligent misrepresentation. This cause of action does not form part of the applicant's founding affidavit. It is trite that an applicant must stand or fall by his founding affidavit. The misrepresentation is in any event denied by the respondent. Further, this court cannot allow such a submission to be raised for the first time in argument in view of the obvious ^b prejudice to the respondent.

For the above reasons, the application must fail.

The application is therefore, dismissed with costs.

Byron Venturas & Partners, applicant's legal practitioners

c Kantor & Immerman, respondent's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/MASUNDA v MINISTER OF STATE FOR LAND & ANOR 2006 (2) ZLR 72 (H)

MASUNDA v MINISTER OF STATE FOR LAND & ANOR 2006 (2) ZLR 72 (H)

2006 (2) ZLR p72

Citation	2006 (2) ZLR 72 (H)
Case No	Judgment No. HB-75-06
Court	High Court, Bulawayo
Judge	Bere J
Heard	7 July 2006
Judgment	20 July 2006
Counsel	<i>V Majoko</i> , for the applicant No appearance for the respondents
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Human rights — *protection of the law* — Minister using police to act *c* contrary to court order at instigation of senior colleague — *abuse of office*

Land — *acquisition* — *allocation of land appropriated from original owner for resettlement* — offer by responsible Minister — *once accepted is a contract, may not be withdrawn unilaterally by Minister* *d*

Headnote

The applicant had been allocated a farm appropriated from its original owners in terms of the Land Acquisition Act. The responsible Minister had, in writing, offered him the farm, which included a safari lodge. The applicant was assured that the lodge was part of the portfolio offered and accordingly accepted the offer. The second respondent, who was the *e* Speaker of the House of Assembly, had been allocated a farm adjacent to that allocated to the applicant. He claimed that the lodge was part and parcel of his land and sought to evict the applicant. He brought an application for summary judgment for *e*jection, but when this was rejected, he withdrew his application. Nonetheless, he continued to *f*threaten the applicant with eviction. The applicant obtained an interdict restraining the second respondent from interfering with his occupation of the land. In spite of the interdict, and in spite of the fact that there was no court order for his eviction, the applicant was ejected from the lodge by armed police who up to the time the present application was made, had remained at the applicant's lodge to ensure that no tourism or other *g* related operations were carried out. A few days later, the applicant was served with a letter from the first respondent, advising him that the offer of land previously made to him had been withdrawn with immediate effect and that he should cease all operations on the land and vacate it immediately. The applicant sought an order setting aside the first respondent's decision and restoring him to occupation of the land. *h*

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Bere J

A Held, that there could be no doubt that the Speaker had largely influenced the actions of the Minister to evict the applicant from the allocated land. Whoever instructed the police to act in the manner they did was abusing not only his office but also the Ministry of Home Affairs. That abuse must be condemned in the strongest possible terms. In a civilised or aspiring democracy, the police *must* be there for both the weak and the strong. For *b* those in positions of trust to use the police in the manner they did in this case was unacceptable.

Held, further, that once the applicant accepted the offer within the stipulated time and in the prescribed manner, there was a clear contractual agreement between the Ministry of Lands and the applicant. The Agricultural Land Settlement Act [*Chapter 20:01*], which regulates the allocation of land, *c* does not give the responsible Minister unilateral powers to withdraw "land offers" to beneficiaries of the land reform programme.

Held, further, that it is a very basic tenet of administrative law that before a decision is taken that adversely affects another person, the affected individual must be given an opportunity to be heard. This had not been *d* done. To invite the applicant to make representations on his eviction after the event was incompetent.

Legislation considered

Agricultural Land Settlement Act [*Chapter 20:01*]

Case information

e V Majoko, for the applicant

No appearance for the respondents

Judgment

BERE J: On 7 July 2006, after reading the documents filed of record, I made the following order in chambers.

"It is ordered that:

1. the decision of the first respondent to withdraw the offer of land made to the applicant be and is hereby set aside.
2. the applicant be and is hereby reinstated in his occupation and use of the land he was allocated by the first respondent and to his occupation of Jijima Lodge and its environs ^g
3. the first and second respondent and their agents including members of the Zimbabwe Republic Police be and are hereby interdicted, restrained and prohibited from interfering with the applicant's occupation and use of the land allocated to the applicant, including Jijima Lodge and its environs. ^h
4. The respondents pay the costs of this application jointly and

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severally, the one paying the other to be absolved." ^a

The following are the reasons which prompted me to grant the order.

By letter of 13 July 2002 from the Ministry of Lands, Agriculture and Rural Resettlement the applicant was made one of the beneficiaries of the land reform programme – a programme undertaken by the Government of Zimbabwe in an effort to address land imbalances in this country. That programme has been ^b hailed nationally as it has immensely benefited and economically empowered many Zimbabweans.

Internationally, the programme has received mixed reactions. Generally, in this country, the programme is largely seen as the single cause of the isolationist policy pursued against this country by some western countries led by the former colonial power – Britain. It is not intended in this judgment to dwell ^c at all on the pros and cons of the land reform programme in this country. Suffice it to say it has benefited both the rich and the poor in this country.

The applicant was one of those offered by letter Volunteer Farms 47, 48 and 49 by the Minister of Lands before the land portfolio was moved to the first respondent. In accordance with paragraph four of the offer letter, the applicant ^d signified his acceptance of the offer made by the Minister of Lands by signing and dispatching his acceptance in the manner indicated. Thus, there was a clear contractual relationship between the applicant and the Ministry concerned.

Having made enquiries as regards the status of Jijima Lodge *vis-à-vis* the land ^e allocated to him, the applicant was assured by those representing the first respondent that the lodge was part of the land allocated to him. The applicant went on to pour his resources in developing the hitherto abandoned and dilapidated lodge until it reached a stage where it became a hub of tourist attraction.

As fate would have it, the lodge subsequently caught the attention of the ^f second respondent who is the Speaker of the House of Assembly in Zimbabwe who also had been allocated land adjacent to the applicant. The second respondent claimed that Jijima Lodge was in fact part and parcel of his land and he sought to evict the applicant. For some time now, the second respondent has been embroiled with the applicant in a wrangle over the ownership of Jijima Lodge. ^g

On 2 February 2006, I had the privilege of dealing with an application for summary judgment by the second respondent which was meant to evict the applicant. After carefully assessing the material that was presented before me by counsel for both the applicant and the second respondent, I felt legally inclined to dismiss the application for summary judgment and held that the ^h

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A rights of the parties be determined at a fully fledged trial. That decision was made on 9 February 2006.

I am advised, and reliably so, that the dismissal of the application for summary judgment was followed by the formal withdrawal of the main action for eviction against the applicant by the second respondent. After the withdrawal of the B main eviction action, the second respondent continued to threaten the applicant with his forced removal from the lodge.

Feeling vulnerable and insecure the applicant made an urgent chamber application seeking an order restraining the second respondent from interfering with the applicant's occupation of Jijima Lodge and his hunting activities. The order was granted and remains in force.

C What followed the restraining order against the second respondent is a sad state of affairs which this court *must* frown upon. It is disturbing, unacceptable and of course screams for censorship from this court.

On 15 June 2006, the applicant was arrested on certain criminal allegations. He was literally ejected from the lodge by armed police who, up to the time this D application for review was made, had remained at the applicant's lodge to ensure that no tourism or other related operations were carried out. To get an insight into what happened, it is important to restate what the applicant's legal practitioners stated in their letter to the first respondent on 20 June 2006. The letter reads in part as follows:

"... as threatened, the state machinery was unleashed and it descended E heavily on our client and his clients.

On Thursday 15 June, our client was arrested. This was the day on which clients from the Czech Republic arrived at camp after a gruelling 20 hours of travel. Within hours of the clients' arrival the police descended, *en masse*, at the camp and ordered that the camp be evacuated within a period of 30 minutes. This was at night. Pleas that the clients vacate the following F morning fell on deaf ears.

Our client was bundled into a police van before he could even make alternative arrangements for his clients' accommodation ..." ¹

In the absence of any other information to the contrary, I am inclined to accept that the above is a true reflection of how the applicant was evicted from Jijima G Lodge. The applicant's clients from the Czech Republic are tourists who had come to this country.

According to the applicant, his unlawful eviction was a follow up to threats of forced eviction uttered to him by the second respondent. There was no court order for the eviction of the applicant. It is inconceivable that the police A would have *mero moto* initiated the ejection of the applicant and his clients without a proper

Bere J

court order. Even if there was such a court order, the police would only have come to the aid of either the Deputy Sheriff or the Messenger of Court, *but* only by invitation.

In my view, whoever instructed the police to act in the manner they did was B not only abusing his office but was clearly abusing the office of the Ministry of Home Affairs. That abuse must be condemned in the strongest possible terms. In a civilised or aspiring democracy, the police *must* be there for both the weak and the strong. If those in positions of trust are allowed to use the police in the manner they did in this case, we must all be concerned. It is an unconscious attempt to take the country back to the dark ages where the C survival of the strongest reigned supreme. It is unacceptable.

On 20 June 2006, the applicant was served with a letter from the first respondent, advising him that the offer of land made to him on 13 July 2002 had been withdrawn with immediate effect and that he should cease all operations on the land and vacate the same immediately. The letter invited the applicant to make representations to the first respondent within seven days. D This was not before but after his eviction.

It is imperative that I refer in elaborate detail to the letter written by the first respondent to the applicant. The most relevant parts of that letter reads as follows:

"TO: L Masunda Date 7 June 2006 E

RE: WITHDRAWAL OF LAND OFFER UNDER THE LAND REFORM AND RESETTLEMENT PROGRAMME (MODEL A2, PHASE II)

Please be advised that the Minister of State for National Security, Lands, Land Reform and Resettlement in the President's Office is withdrawing the offer of land made to you in respect of subdivision 1 of Volunteer 47, 48, 49 Farm in the Hwange District of Matabeleland North. The withdrawal F is in terms of the condition of offer attached to the Offer Letter to you of ...

You are therefore notified of the immediate withdrawal of the offer of subdivision 1 of Volunteer 47, 48, 49 measuring 611.79 hectares. You are required forthwith to cease all or any operations that you may have commenced thereon and immediately vacate the said piece of land.

If you wish to make any representation on this issue please do so in writing G within seven days of receipt of this notification and please direct your correspondence to the Minister.

(Signed)

Hon D N E Mutasa (MP)

Minister of State for National Security, Land, Land Reform and Resettlement H in the President's Office"

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Bere J

A Aggrieved by the actions of both the respondents the applicant sought to have their actions reviewed.

The second respondent has been sucked to this review because the applicant genuinely believes that it is the second respondent who has largely influenced the actions of the first respondent to evict him from the allocated land. I have B gone out of my way in detailing the conflict between the second respondent and the applicant. I am satisfied beyond doubt that it is that conflict which prompted the eviction of the applicant from the allocated land by the first respondent. The applicant's decision to bring in the second respondent within the ambit of these review proceedings was a well informed position.

I will now shift my focus to the actions of the first respondent.

C Was it competent for the first respondent to withdraw the land offer in the manner he did?

In my view, the answer must be in the negative for basically two reasons.

The very basic requisite of a contract is that there must be an offer and acceptance. G H Treitel, succinctly sums up the legal position in the following:

D "An offer is an expression of willingness to contract on certain terms made with the intention (actual or apparent) that it shall become binding as soon as it is accepted by the person to whom it is addressed." 2

By its letter of 13 July 2002, the Ministry of Lands, Agriculture and Rural Resettlement extended an offer of land to the applicant. Paragraph four of that E offer letter invited the applicant to indicate in a prescribed manner whether or not he accepted the offer. The applicant states in his unchallenged founding affidavit that he together with his colleagues fully complied with the requirements of the offer letter and accepted the offer made by doing what they were required to do. This has not been challenged. The court is obliged to religiously accept the position as stated by the applicant.

F Once the applicant accepted the offer within the stipulated time and in the prescribed manner, there was no more offer to talk about. What resulted was a clear contractual agreement between the Ministry of Lands, Agriculture and Rural Resettlement and the applicant. To talk of withdrawal of a land "offer" which offer had transmogrified itself into something else is clearly a misconception of what transpired. That position is not borne out by what the G two contracting parties did and the first respondent's position is therefore not sustainable.

Secondly, it is a very basic administrative procedure that before one takes a

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Bere J

decision that adversely affects the other, the affected individual must be given A an opportunity to be heard. As correctly argued by the applicant, this is a very basic tenet of the rules of natural justice.

In administrative law, this concept is referred to as the *audi alteram partem* rule. It is part of our law. One of the most respected legal writers in Zimbabwe, Professor G Feltoe states: ^b

“Literally translated *audi alteram partem* means ‘hear the other party’. It is an elementary notion of fairness and justice that a decision should not be made against a person without allowing the person concerned to give his side of the story. Put in the context of administrative decision making, the *audi* principle requires that a decision affecting a person’s rights or his legitimate expectations of receiving a benefit, advantage or privilege ^c should only be made after hearing first from that person and taking into account what he or she has said. If the decision-maker is holding prejudicial information against the person concerned that prejudicial information must be disclosed to the person and he or she must be given a chance to refute that information.” ³

Clearly, the first respondent, in sympathy with the second respondent took ^d drastic action against the applicant in clear violation of the *audi alteram partem* rule. The applicant was neither afforded an opportunity to make representations nor told the reasons why that decision against him was taken before it was made. To invite the applicant to make representations on his eviction after his eviction was merely to put the cart before the horse. It was incompetent for the first respondent to do so. I want to believe that the first ^e respondent inadvertently acted in the manner he did.

I am well acquainted with the provisions of the Agricultural Land Settlement Act [*Chapter 20:01*] – the Act which regulates the allocation of land in this country. That Act does not give the Minister of Lands, Agriculture and Rural Resettlement or the Minister of State for National Security, Lands, Land ^f Reform and Resettlement in the President’s Office *unilateral powers* to withdraw “land offers” to beneficiaries of the land reform programme.

If it were so, it would make almost every citizen of this country who benefited from the land reform programme vulnerable.

It would mean for example, that such beneficiaries (the two respondents ^g inclusive) would wake up one day to find they have been evicted from their respective pieces of land in complete violation of the *audi alteram partem* rule.

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Bere J

A This chaotic situation could not have been the intention of the legislature when it enacted the Agricultural Land Settlement Act [*Chapter 20:01*].

It was for these reasons that I felt strongly inclined to make the order of 7 July 2006.

^b *Majoko and Majoko Legal Practitioners*, applicant’s legal practitioners

No appearance for the respondents

¹ Paragraphs 12-14 of letter of 20th June 2006 from Majoko and Majoko Legal Practitioners addressed to first respondent

² *The Law of Contract* by G H Treitel 4 ed Stevens and Sons, London, (1975) at p 7

³ G Feltoe *A Guide to Administrative Law* 3 ed, (Legal Resources Foundation, Harare, 1998) at p 30.

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/CHICHI CLOTHING MANUFACTURERS (PVT) LTD & ORS v COMMERCIAL BANK OF ZIMBABWE & ORS 2006 (2) ZLR 80 (H)

CHICHI CLOTHING MANUFACTURERS (PVT) LTD & ORS v COMMERCIAL BANK OF ZIMBABWE & ORS 2006 (2) ZLR 80 (H)

2006 (2) ZLR p80

Citation	2006 (2) ZLR 80 (H)
Case No	Judgment No. HH-88-06
Court	High Court, Harare
Judge	Patel J
Heard	28 July 2006
Judgment	28 July 2006
Counsel	<i>F Mutangamira</i> , for the plaintiffs
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Practice and procedure — *barring* — *failure to file plea* — *bar not automatic* C — *steps plaintiff must take if defendant is to be barred*

Practice and procedure — *barring* — *procedure for barring* — *procedure for barring a defendant who has failed to enter appearance different from that for barring one who has failed to file his plea*

Headnote

The plaintiffs sought default judgment against the defendants after the D defendants had failed to respond within the stipulated time to a notice to plead. However, the first defendant had filed its plea, albeit belatedly. The plaintiffs argued that the first defendant was barred. The plaintiffs had followed the procedure set out in rr 17 and 50 of the High Court Rules for barring a party who had failed to enter appearance. E

Held, that in terms of rr 80 and 81 of the High Court Rules, the plaintiff must give the defendant five day's notice of his intention to bar unless the latter files his plea within that period. In the event that the defendant fails to file his plea within five days after being served with the notice, the plaintiff is entitled to realise his intention to bar by duly completing and F signing a copy of the notice and filing it with the Registrar. The bar does not come into operation unless and until two things have occurred: the time limit stipulated must have expired and a copy of the notice must be filed thereafter in the prescribed format. In the specific context of rr 80 and 81, the bar is not automatic and the defendant's failure to file his plea within five days does not automatically operate to bar him. The plaintiff's G intention to bar the defendant can only be effectuated by filing a duly endorsed copy of the notice with the Registrar. Until this is done, the bar does not come into effect.

Case cited

HPP Studios (Pvt) Ltd v ANZ 2000 (1) ZLR 318 (H) H

2006 (2) ZLR p81

Patel J

Legislation considered A

High Court Rules 1971 (RGN 1047 of 1971), rr 17, 50, 80 and 81

Case information

F Mutangamira, for the plaintiffs

Judgment

PATEL J: The plaintiffs in this matter issued summons in November 2004, ^B claiming, *inter alia*, the cancellation of the sale and transfer of an immovable property situate in Chipinge, together with rentals and other ancillary relief. The first defendant duly and timeously entered appearance to defend.

After the passage of various intervening proceedings, the plaintiffs filed a notice to plead on 13 March 2006. This notice was served on the first ^C defendant's legal practitioners on the same day. The first defendant filed its plea on 22 March 2006, two days after the time to plead had expired. Subsequently, on 23 March 2006 (as appears from the Registry date-stamp) the plaintiffs' legal practitioners purported to bar the first defendant pursuant to their notice to plead.

On the same day, the plaintiffs' legal practitioners filed the present chamber ^D application for default judgement against the first defendant averring that the latter had been duly barred. The matter appears to have been queried at some stage and the plaintiffs' legal practitioners responded by persisting in their claim for default judgement. In response to a further query raised through the Deputy Registrar on 20 July 2006, the legal practitioner in question, ^E Mr *Mutamangira*, wrote to advise that:

"... it is trite that where a party is served with a notice to plead and they default, as is (*sic*) in the present matter, the bar is automatic and it is not peremptory that for a bar to be effective, the notice to bar be filed. In this regard, a party is barred whether or not a notice to bar is filed to the extent that it can be proved that *dies inducia* (*sic*) has (*sic*) expired ...

^F ... We also refer the court to the provisions of Order 12 r 81 ... It is apparent that the use of the word 'may' clearly shows that it is not peremptory that a bar must be filed for the other part (*sic*) to be barred."

Mr *Mutamangira* is emboldened in his position by the decision in *HPP Studios (Pvt) Ltd v Associated Newspapers of Zimbabwe (Pvt) Ltd* 2000 (1) ZLR 318 (H), where it was held that a party who fails to enter an appearance ^G to defend is automatically barred. He further alludes to the point that where the defendant is in default the plaintiff is not obliged to give notice of his intention to apply for default judgement.

Rule 17 of the High Court Rules provides that "The time within which a defendant shall be required to enter appearance to defend shall be ten days, ^H exclusive of the day of service". Rule 50 then stipulates that "A defendant who

2006 (2) ZLR p82

Patel J

has failed to enter appearance shall be deemed to be barred". The effect of ^A these Rules, taken together, is abundantly clear. A defendant who fails to enter appearance to defend within the *dies induciae* is *ipso facto* barred. Rule 50 specifically says so. The bar against the defendant is automatic and the plaintiff is not required to do anything else before sallying forth to obtain his default judgement. And this is precisely what the decision in the *HPP Studios* case declares. ^B

In the present matter, however, we are not concerned with the first defendant's failure to enter appearance to defend but its alleged failure to file its plea in response to the plaintiffs' notice to plead. In this context, the procedure for barring is spelt out in Order 12 as follows.

Rule 80: ^C

"A party shall be entitled to give five day's notice of intention to bar to any other party to the action who has failed to file his declaration, plea or request for further particulars within the time prescribed in these rules and shall do so by delivering a notice in Form No. 9 at the address for service of the party in default."

Rule 81: ^D

"On the expiry of the time limited by the notice, the party who has served the notice may bar the opposite party by filing a copy of the notice with the registrar. The endorsement on Form No. 9 shall be duly completed before filing and it shall be signed by the party who has given the notice or his attorney." ^E

Form No. 9 consists of three distinct parts. The first part constitutes the notice to the defendant in the following terms:

"Take notice that the defendant is hereby required to file his plea ... within five days ... and in default it is the plaintiff's intention to file a copy of this notice with the Registrar as a bar."

The second part of Form No. 9 is the certificate of service providing proof of ^F service of the notice upon the defendant. The third part of the form evinces the actual barring of the defendant after the

time limit for pleading has expired.

The requirements of rr 80 and 81, taken together with Form No. 9, are clear and relatively straightforward. The plaintiff must give the defendant five day's notice of his intention to bar unless the latter files his plea within that period. ^gIn the event that the defendant fails to file his plea within five days after being served with the notice, the plaintiff is entitled to realise his intention to bar by duly completing and signing a copy of the notice and filing it with the Registrar. The bar does not come into operation unless and until two things have occurred: the time limit stipulated must have expired and a copy of the notice ^h

2006 (2) ZLR p83

Patel J

^A must be filed thereafter in the prescribed format. In the specific context of rr 80 and 81, *the bar is not automatic*. In other words, the defendant's failure to file his plea within five does not automatically operate to bar him. The plaintiff's intention to bar the defendant can only be effectuated by filing a duly endorsed copy of the notice with the Registrar. Until this is done, the bar does not come into effect.

^BI have deliberately belaboured the foregoing self-evident propositions because of the obvious misconception besetting the legal practitioner *in casu*. The court trusts that he will in future venture to pronounce what he imagines to be trite only after careful research and diligent reflection.

In the present case, the plaintiffs' legal practitioners have contrived to botch ^cthe procedure for barring in two critical respects. Firstly, the endorsement of the requisite bar (the third part of Form No. 9) is dated 10 March 2006, three days before the Notice to plead was actually served on the first defendant and ten days before the bar might have been activated at the earliest. Secondly, and more significantly, the notice purportedly barring the first defendant was only filed with the Registrar on 23 March 2006, a day after the first defendant ^D had already filed its plea. The first defendant cannot therefore be held to have been barred and its plea quite properly forms part of the pleadings in this case.

It follows that the plaintiffs' application for default judgment on the papers filed of record is ill-founded and cannot succeed. It is accordingly hereby dismissed.

^E *Mutamangira & Associates*, plaintiff's legal practitioners

Gollop & Blank, first defendant's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/MUGABE & ORS v ZVIMBA RDC 2006 (2) ZLR 84 (H)

MUGABE & ORS v ZVIMBA RDC 2006 (2) ZLR 84 (H)

2006 (2) ZLR p84

Citation	2006 (2) ZLR 84 (H)
Case No	Judgment No. S-29-06
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA and Malaba JA
Heard	18 October 2005
Judgment	31 July 2006

Counsel	<i>L Uriri</i> , for the applicants <i>P Matizanadzo</i> , for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — *retrenchment — procedure for — role of works council in retrenchment procedure — to act as a mediator in securing an agreement between an employer and employees — employer and employees reaching agreement without involvement of works council — works council D subsequently ratifying agreement — retrenchment lawful*

Headnote

The appellants had been retrenched from their employment with the respondent council. Before the retrenchment took place, the respondent's representatives put forward their proposed retrenchment package and E the representatives of workers were asked to come up with their own proposals. Most of the items proposed by the workers' representatives were accepted by the respondent and a final retrenchment package was agreed upon by the parties. The respondent gave notice to the Works Council of its intention to retrench the workers whose names it listed. The first appellant, in his capacity as the chairman of the workers' committee, F and the secretary of the committee sent a memorandum to the respondent, which they signed, agreeing with the retrenchment and the package. Thereafter the works council gave its formal approval to the retrenchment. The appellants appealed, unsuccessfully, to the Labour Court, and then to the Supreme Court, where they argued *inter alia* that the respondent G had not complied with the legal requirements for the retrenchment of appellants.

Held, that the object of the requirement of the steps to be taken in accordance with the procedure for the retrenchment of employees prescribed under s 12C of the Labour Relations Act [Chapter 28:01] is to ensure that the retrenchment is by agreement between the employer and employees H

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Malaba JA

A concerned or their representative with the approval of a third party. The role of the works council in the prescribed procedure is not to have an agreement reached between its own members. Its role is that of a mediator to secure an agreement on the retrenchment, its terms and conditions between the employer and the employees concerned or their representatives. Here, the representatives of the employer and the B employees concerned reached an agreement on the retrenchment and its terms and conditions without the involvement of the works council. The works council, which was required by law to approve the retrenchment in terms of the agreement, did so. It could not be said that the procedure followed in this case was not in accordance with s 12C of the Act.

Cases cited C

Chidziva & Ors v Zisco 1997 (2) ZLR 368 (S)

Fungura & Anor v Zimnat Insurance Co Ltd 2000 (1) ZLR 379 (H)

Prosser & Ors v Ziscosteel HH-201-93

Nyangoni & Ors v ZDC HH-34-98

Legislation considered D

Labour Relations Act [Chapter 28:01], s 12C

Case information

L Uriri, for the applicants

€ P Matizanadzo, for the respondents

Judgment

MALABA JA: This is an appeal from a judgment of the Labour Court dated 16 December 2004 dismissing an application for an order setting aside the retrenchment of the appellants from employment with the respondent.

The first appellant, Wilbert Mugabe, was the chairman of the Workers *Ƒ* Committee. On 29 September 2003, the appellants were served with notices to the effect that their contracts of employment were to be terminated on 30 October on retrenchment. On 30 October 2003, they received payment of varying sums of money in cheques as part of the retrenchment package. They thereafter left employment.

Ƒ On 11 November 2003, the applicants made an application to the Labour Court challenging the validity of their retrenchment on the ground that it was not carried out in accordance with the procedure prescribed under s 12 of the Labour Relations Act [*Chapter 28:01*]. The court *a quo* held that there had been an agreement on the retrenchment, its terms and conditions between the *Ɔ* appellants and the respondent which was approved by the Works Council.

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It held that there was compliance with the legal requirements for a lawful *Ɔ* retrenchment set out in s 12C of the Act.

The appellants appealed on the grounds that:

- “1. The court *a quo* erred in holding that the respondent had complied with the legal requirements for the retrenchment of appellants.
2. The court *a quo* seriously erred and failed to appreciate that the *Ɓ* respondent did not have a properly constituted Works Council.
3. The court *a quo* erred in holding that the appellants were bound by the decision of the Works Council.
4. The court *a quo* further erred in holding that there was agreement between the parties.”

None of the grounds of appeal is, in my view, sustainable on the facts of the *ƀ* case. The facts are these:

In 2002, the respondent found itself with a redundant work force after an amalgamation of five local authorities. As a result, there were many areas of duplication of roles and responsibilities of employees. The respondent was incurring a huge wage bill for a redundant work force. *Ɓ*

At a meeting of representatives of the respondent and those of the employees, held on 17 September 2002, the need to have workers who were mainly general hands retrenched was discussed. The respondent’s representatives put forward the proposed retrenchment package and the representatives of workers were asked to come up with their own proposal on the retrenchment *€* package. At a meeting held on 12 June 2003, the workers’ representatives put forward their proposal for the retrenchment package which was as follows:

- “(a) Three months’ notice pay;
- (b) Five months’ salary for every year served;
- (c) \$210 000 to cover relocation expenses; *Ƒ*
- (d) Severance package of five months’ salary;
- (e) Three months’ notice for those staying in council houses;
- (f) For those on medical aid to continue for six months; and
- (g) Financial assistance should remain for six months.”

Most of the items proposed by the workers’ representatives to be included *Ƒ* in the retrenchment package were accepted by the respondent. The package, which was finally agreed upon by the parties at a meeting held on 20 June 2003, was as follows:

- “(a) One months’ notice

- (b) Three months' pay for loss of job ^H

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Malaba JA ^A

- (c) One months' salary for each year of service (factoring in 70 percent on current salaries)
- (d) Payment of other terminal benefits like pensions and cash *in lieu* of leave
- (e) Relocation assistance within Zvimba District
- (f) Free treatment at Council Clinics for three months ^B
- (g) Three months notice for those in Council accommodation."

On 17 July 2003, the respondent gave notice to the Works Council of its intention to retrench the workers whose names it listed. The notice which was on Form LRR1 read:

c "NOTICE OF INTENTION TO RETRENCH

To:Zvimba RDC Works Council

Kindly take note that Zvimba Rural District Council of Private Bag 2001, Murombedzi intend to retrench the employees whose names are listed in Annexure 1 and seek approval to effect such retrenchment. Our reasons ^D for the retrenchment are listed in Annexure 2 to this notice."

On the same day, the first appellant in his capacity as the chairman of the Workers Committee and the secretary thereof sent a memorandum to the respondent which they signed. It reads:

"ZVIMBA RURAL DISTRICT COUNCIL

^E We members of the Workers Committee have agreed to the conditions for retrenchment as shown in Annexure 2."

c Annexure 2 referred to in the memorandum contained the proposed retrenchment package agreed upon by the parties on 20 June 2003.

The Works Council gave notice to the respondent on Form LRR2 on 17 July 2003. It reads:

"APPROVAL OF RETRENCHMENT OF EMPLOYEES

The Zvimba RDC Works Council hereby grants approval to Zvimba Rural District Council of Private Bag 2001, Murombedzi to retrench the employees whose names are listed in Annexure 1 to this form on 1 September 2003 subject to the terms and conditions which are listed in Annexure 2."

Annexure 2 referred to in the notice of approval of the proposed retrenchment contained the retrenchment package accepted by the workers' representatives.

On 29 September 2003, the respondent gave each retrenchee a notice of termination of employment. It wrote:

"This serves to advise you that due to the retrenchment exercise being ^H undertaken by the Organisation the Zvimba Rural District Council will

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Malaba JA

terminate your service of employment with effect from 31 October 2003. ^A

During this notice period, you are required to communicate with the Administration Department pertaining payment of your package which will be based on the following bargaining agreement terms." (The retrenchment package mentioned in the judgment was then set out.)

It is clear from these documents that the finding by the court *a quo* that there ^B was an agreement between the representatives of the respondent and those of the employees on the need for the retrenchment and on its terms and conditions was supported by evidence. The agreement on the terms and conditions of the retrenchment was not reached within the works council. A careful reading of the finding by the learned President that the approval by the works council suggested "that the parties agreed on the retrenchment ^C package" does not, as contended by Mr *Uriri*, justify the conclusion that the agreement referred to was between members of the works council. The case of *Fungura & Anor v Zimnat Insurance Co Ltd* 2000 (1) ZLR 379 (H) relied upon by counsel is of no assistance. The principle that a works council is an entity separate from the employees and employers and that its duty is to secure an agreement between these parties or their representatives was not put in ^D issue by the facts of this case. I accept the contention by Mr *Matizanadzo* that the fact of the signed approval of the retrenchment by the works council is *prima*

facie evidence of the existence of an agreement on the retrenchment package between the parties. That was the basis of the finding made by the court *a quo*.

It was not a ground of appeal that there was no works council for the establishment. What was alleged was that it was not properly constituted. There was no evidence on the papers to suggest that the works council was not properly constituted. On 17 July 2003, when it approved the retrenchment of the appellants on the terms and conditions agreed upon by the parties, the question whether the works council was made up of equal numbers of members representing the employer and employees was raised at a meeting held on 12 June 2003. The chairman ruled that the works council was properly constituted and the meeting proceeded with its business. The fact that the works council may not have been properly constituted on 12 June would not be evidence that it was not properly constituted on 17 July 2003. The onus was on the appellants to show that the works council was in fact not properly constituted on that day.

The last question for determination is whether the court *a quo* misdirected itself in holding that the respondent had complied with the legal requirements for the retrenchment of the appellants. Section 12C of the Act is relevant. It provides that: ^H

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- “(1) An employer who wishes to retrench five or more employees within a period of six months shall:
- (a) give written notice of his intention to:
 - (i) to the works council established for the undertaking.
 - (ii) ...
 - (iii) ...
 - (b) provide the works council ... with details of every employee whom the employer wishes to retrench and of the reasons for the proposed retrenchment; and
 - (c) send a copy of the notice to the retrenchment board.
- (2) A works council to which notice has been given in terms of subsection (1) shall forthwith attempt to secure agreement between the employer and employees concerned or their representatives as to whether or not the employees should be retrenched and, if they are to be retrenched the terms and conditions on which they may be retrenched, having regard to the consideration specified in subsection (ii).
- (3) If, within one month after receiving notice in terms of subsection (1), a works council secures an agreement between the employer and employees concerned or their representatives on the matters referred to in subsection (2), the works council shall:
- (a) send the employer its written approval of the retrenchment of the employees concerned in accordance with the agreement; and ^E
 - (b) send the retrenchment board a copy of the approval.
- (4) ...
- (5) No employer shall retrench any employee without affording the employee the notice of termination to which the employee is entitled.”

The object of the requirement of the steps to be taken in accordance with the procedure for the retrenchment of employees prescribed under s 12C of the Act is to ensure that the retrenchment is by agreement between the employer and employees concerned or their representatives with the approval of a third party. The role of the works council in the prescribed procedure is not to have an agreement reached between its own members. Its role is that of a mediator ^G to secure an agreement on the retrenchment, its terms and conditions between the employer and the employees concerned or their representatives. See *Prosser & Ors v Ziscosteel* HH-201-93; *Chidziva & Ors v Zisco* 1997 (2) ZLR 368 (S); *Nyangoni & Ors v ZDC* HH-34-98.

In this case, the representatives of the employer and the employees concerned reached an agreement on the retrenchment and its terms and conditions ^H without the involvement of the works council. The works council which was

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required by law to approve the retrenchment in terms of the agreement did so. ^A The retrenchment therefore was to be carried out in accordance with the approval granted in terms of s 12C of the

Act. The employer gave the employees concerned written notice of termination of their employment as it was obliged to do in terms of s 12C(5) of the Act.

Mr *Uriri's* submission that the retrenchment of the appellants was not in accordance with the procedure prescribed under s 12C of the Act cannot be correct in light of the finding that the court *a quo* correctly found that there was an agreement on the retrenchment package between the representative of the employer and the employees concerned.

I would accordingly, dismiss the appeal with costs. c

CHIDYAUSIKU CJ & SANDURA JA concurred.

Honey & Blanckenberg, appellant's legal practitioners

Manase & Manase, respondent's legal practitioners D

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Source:

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THORNTON v MCKENZIE 2006 (2) ZLR 91 (H)

2006 (2) ZLR p91

Citation	2006 (2) ZLR 91 (H)
Case No	Judgment No. HH-84-06
Court	High Court, Harare
Judge	Bhunu J
Heard	14 June 2006
Judgment	2 August 2006
Counsel	Ms <i>P Matizanadzo</i> , for the applicant T <i>S Nyawo</i> , for the first respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

c **Arbitration** — *Arbitration Act [Chapter 7:15] — s 35 — arbitral award upon registration is enforced as an arbitral award — unlike the Arbitration Act [Chapter 7:02] it does not provide for the award first being converted into a court order*

Contract — *sale of immovable property — sale agreement containing an D arbitration clause in case of a dispute between the parties — setting aside of deed of transfer — Deeds Registry Act [Chapter 20:05] — s 8(1) — registration of deed of transfer cannot set it aside — seller of immovable property is not bound to proceed by way of arbitration in circumstances where a successful arbitral award would be incapable of enforcement*

E **Statute** — *Deeds Registry Act [Chapter 20:05] — s 8(1) — cancellation of deed of transfer — cannot be cancelled in terms of an arbitral award*

Headnote

The Arbitration Act, 1996 (No. 6 of 1996), now [Chapter 7:15] which repealed and replaced the Arbitration Act [Chapter 7:02] made a fundamental ^F change to the then existing law regarding the enforcement of arbitral awards. Whereas the old Act had provision for the conversion of arbitral awards into court orders, that provision no longer exists. The new Act provides that an arbitral award upon registration is simply enforced as an arbitral award without first being converted into a court order.

^G The applicant concluded a contract of sale in terms of which she sold her immovable property to the respondent for \$900 millions. The respondent, while paying most of the purchase price, failed to pay in full. She did, however, take transfer of the property. The applicant sought cancellation of the sale and the transfer of the property back into her name. She also sought the eviction of the respondent and all those claiming occupation ^H through her, from the property. It was common cause that the contract

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Bhunu J

of sale contained an arbitration clause in terms of which any dispute ^A between the parties to the sale should "... be referred to and finally resolved by arbitration ...". Relying upon the arbitration clause in the contract of sale, the respondent objected to the applicant bringing proceeds against her in the High Court. In response thereto, the applicant pointed to s 8(1) of the Deeds Registry Act [Chapter 20:05] which ^B provided that "... no registered deed, deed of transfer, certificate of title to land, or any real or other deed conferring or conveying title to land, or any real right other than a mortgage bond ... shall be cancelled by the registrar except upon an order of court". It was argued upon the applicant's behalf that if she proceeded by way of arbitration she would end up with an unenforceable award, because the registrar could only ^C effect the cancellation of the title deeds in the respondent's name on the basis of a court order and an arbitral award was not a court order.

Held, that if the applicant were to take advantage of the arbitration clause in the contract of sale, she would, if successful, have no more than an award which was incapable of achieving its purpose as it would be incapable of enforcement by the registrar because of the prohibition set out in s 8(1) ^D of the Deeds Registry Act [Chapter 20:05]

Held, further, that although the parties expressly agreed that any dispute from their contract be finally determined by arbitration, they were not by so doing ousting the inherent unlimited jurisdiction of the High Court.

Held, further, that the applicant was within her rights in bringing the dispute directly to the High Court, notwithstanding the existence of an arbitration ^E clause in the parties agreement.

Case cited

Cargill Zimbabwe v Culvenham Trading (Pvt) Ltd 2006 (1) ZLR 381 (H) ^F

Legislation considered

Arbitration Act [Chapter 7:02], s 27

Arbitration Act, 1996 [Chapter 7:15], s 35

Deeds Registry Act [Chapter 20:05] s 8(1)

Case information

Ms P Matizanadzo, for the applicant ^G

T S Nyawo, for the first respondent

Judgment

BHUNU J: The applicant and the first respondent concluded a contract of sale on 2 June 2005 in which the applicant sold her immovable property known as No. 126 Malvern of Waterfalls in the district of Salisbury for \$900 000 000 (nine ^H

Bhunu J

A hundred million dollars).

The third respondent financed the purchase of the property and subsequently had a mortgage bond registered against the property.

The applicant acknowledges that the first respondent paid \$135 000 000 on 2 August 2005, and a further \$588 000 000 on 5 August 2005, totalling \$723 000 000, leaving a balance of \$132 000 000 plus agents fees \$45 000 000, B totalling \$177 000 000.

The first respondent has since taken transfer of the disputed property.

The applicant now seeks cancellation of the sale and transfer of the disputed property from the first respondent to herself. She has offered a refund of the part payment of \$723 000 000. She further seeks cancellation of the mortgage C bonds registered against the property and an eviction order against the first respondent and all those claiming occupation through her, plus costs of suit against all the respondents jointly and severally the one paying the other to be absolved.

The applicant's claim is premised on first respondent's failure to pay the balance of the purchase price despite demand.

D The application is hotly contested, with the first respondent objecting to these proceedings on the ground that the parties' written contract is subject to an arbitration clause.

Indeed, clause 23 of the agreement provides as follows:

"ARBITRATION

E Any dispute arising out of or in relation to or in connection with this contract, or the breach or termination or invalidity thereof *shall be referred to and finally resolved by arbitration* in Harare. If the parties fail to agree on the appointment of the arbitrator either party may, on giving not less than seven days written notice to the other request the commercial arbitration centre in Harare (or any successor in that centre) to appoint F an arbitrator" (my emphasis).

The applicant, while agreeing that the contract is subject to the above clause, contends that the dispute which has arisen between the parties is not one capable of resolution by arbitration because of a statutory prohibition. She has pointed to s 8(1) of the Deeds Registry Act [Chapter 20:05] which G provides as follows:

"Save as is otherwise provided in this Act or in any other enactment, no registered deed, deed of transfer certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond and no cession of any registered bond not made as security shall be cancelled by a registrar except upon an order of court."

H It is pertinent to note that the section does not prohibit arbitration in disputes

Bhunu J

of this nature. What it prohibits is cancellation without a court order. In other A words, the section prohibits enforcement without a court order. Thus, if a plaintiff proceeds by way of arbitration, if successful, he will obtain an unenforceable arbitral award. This is because the registrar can only effect cancellation on the basis of a court order

and an arbitral award is not a court order.

Matters could have been different had the Arbitration Act [Chapter 7:02] not B been repealed and replaced by Act 6 of 1996. Section 27 of the repealed Act rendered it possible to convert an arbitral award into a court order upon registration with the court.

The section provided as follows:

"27. Award May Be Made Judgment of Court. C

The report or award of any officer of the court or official or special referee or arbitrator may upon motion by any party after due notice to the other parties be made a judgment of the court."

It is self evident that in terms of the repealed law an arbitral award was easily convertible to a court order. The situation has, however, since changed drastically regarding the enforcement of arbitral awards by the enactment of D Act 6 of 1996 which became law on 13 September 1996.

Article 35 of the new Act provides for the recognition and enforcement of arbitral awards. It provides as follows:

“(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and upon application in writing to the High Court, shall be enforced subject to the provisions of this article and article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authentic original award or a duly certified copy thereof and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in the English language, the party shall supply a duly certified translation into the English language.”

It appears to me that the new Act introduced a fundamental change to the then existing law regarding the enforcement of arbitral awards. Whereas the old Act had provision for the conversion of arbitral awards into court orders, that provision no longer exists. My reading of article 35 of the new Act is that an arbitral award upon registration is simply enforced as an arbitral award without first being converted into a court order.

Such an award, not being a court order, is incapable of enforcement by the registrar because he is specifically prohibited from doing so by s 8(1) of the Deeds Registry Act [Chapter 20:05].

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Bhunu J

The net result is that if the applicant were to take the arbitration route as provided for under clause 23 of the written agreement he will end up with an unenforceable arbitral award, which in itself will be a *brutum fulmen*, that is to say a harmless thunderbolt. The award will obviously be incapable of achieving its purpose.

Generally speaking, the courts and society at large are averse to someone suffering harm without a legal remedy. For that reason, I take the view that, although the parties expressly agreed that any dispute arising from their contract be finally determined by arbitration, they were not by so doing ousting the inherent unlimited jurisdiction of the High Court.

That position finds expression in the words of Makarau JP in the recent case of *Cargill Zimbabwe v Culvenham Trading (Pvt) Ltd* 2006 (1) ZLR 381 (H). In that case, after surveying a number of authorities, her Ladyship made the pertinent observation that:

“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 the jurisdiction of the court. It merely seeks to compliment the court process in resolving disputes by engaging in an alternative dispute resolution process but remains under the control of the courts*” (my emphasis).

I am in respectful agreement with the above sentiments of wisdom. The natural and logical conclusion to that observation is that it is the primary function of the court to resolve all legal disputes save where its jurisdiction has been expressly ousted by the law maker. All other alternative dispute resolution mechanisms are merely supporting structures meant to aid the court in its difficult primary duty of resolving legal disputes. While the courts prefer that where there is an arbitration clause the parties must first exhaust their domestic remedies, they will not insist on arbitration where that route is fraught with insurmountable hurdles.

Thus, notwithstanding the existence of an arbitration clause, where the dispute is incapable of resolution by arbitration, as in this case, the question of exhaustion of domestic remedies before approaching the court does not arise.

In the result, I come to the conclusion that the applicant was within her rights in bringing the dispute straight to court notwithstanding the existence of an arbitration clause in the parties’ agreement. I accordingly rule that the application is properly before me and that the registrar is directed to set down the main application for hearing as soon as is reasonably possible. Costs are to be costs in the cause.

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Bhunu J

Mabalala & Motsi, the applicant’s legal practitioners

Mandizha & Co, the first respondent’s legal practitioners

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DUBE v MAVAKO-DUBE 2006 (2) ZLR 97 (H)

2006 (2) ZLR p97

Citation	2006 (2) ZLR 97 (H)
Case No	Judgment No. HB-78-06
Court	High Court, Bulawayo
Judge	Ndou J
Heard	8 May 2006
Judgment	3 August 2006
Counsel	<i>K Ncube</i> , for the applicant <i>N M Fuzwayo</i> , for the respondent
Case Type	Application for maintenance
Annotations	Link to case annotations

Flynote

c Costs — contribution towards — divorce action — when contribution may be ordered

Family law — husband and wife — divorce — contribution to costs — principles — when contribution may be ordered

Headnote

- The procedure for making a claim for a contribution towards costs in a matrimonial suit is *sui generis*. It has its origin in Roman-Dutch procedure and has been sanctioned through many decades of practice. Its basis is the duty of support spouses owe each other; its purpose is to enable a spouse, who would otherwise not be able to do so, to place his or her case adequately before the court. The court must look at the means of both ^e parties and try to determine what is reasonable and just. The requirements for an order for contribution of costs are:
- there must be a subsisting marriage;
 - the suit in question is a matrimonial one;
 - the applicant has a reasonable prospects of success; ^f
 - the applicant is not in a financial position to bring or to defend the action, as the case may be; and
 - the other spouse is able to provide the applicant with this contribution.

No contribution order will be granted if the spouse asking for it is well able to afford the costs of the action himself or herself, either because he or she has a substantial separate estate or because he or she has an income, ^g savings or other assets which are under his or her control. The onus

is on the applicant to show that he or she does not have the necessary means while the other spouse is able to make a contribution.

Cases referred to

^H *Ansell v Ansell* 1980 ZLR 416 (G)

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Ndou J

Barrass v Barrass 1978 RLR 384 (G); 1979 (1) SA 245 (R) ^A

Bernstein v Bernstein 1946 CPD 325

Bordihn v Bordihn 1956 (2) PH B32 (A)

Botes v Botes 1969 (2) RLR 238 (G); 1969 (3) SA 168(R)

Butterworth v Butterworth 1943 WLD 127

Chamani v Chamani 1979 (4) SA 804 (W) ^B

Engelbrecht v Engelbrecht 1944 NPD 186

Greyling v Greyling 1959 (3) SA 967 (W)

Jones v Jones 1973 (1) RLR 302 (G); 1974 (1) SA 212 (R)

Landry v Landry 1970 (1) RLR 134 (G)

Lindsay v Lindsay 1993 (1) ZLR 195 (S)

Mentz v Simpson 1990 (4) SA 455 (A) ^C

Scott v Scott 1946 WLD 399

Smith v Smith 1963 R & N 738 (SR); 1963 (3) SA 84 (SR)

Taneka v Taneka 1993 (2) ZLR 9 (H)

Treger v Treger GS-1-77

van Rippen v van Rippen 1949 (4) SA 634 (C) ^D

Case information

K Ncube, for the applicant

N M Fuzwayo, for the respondent

Judgment

NDOU J: The parties married each other in 1996. Their marriage is wading through quicksand of problems. In fact, it has broken down and the divorce is due to be finalised under case No. HC 2403/05. Three children were born ^E of the marriage. The children are in the custody of the applicant. She claims maintenance *pendente lite* in the sum of \$35 000 000 per month. The respondent has offered to and is indeed paying \$15 000 000 per month. This is the first issue for determination in these proceedings. She also seeks an order that the respondent contributes an amount of \$350 000 000 towards her legal costs. I ^F will now deal with these issues in turn.

QUANTUM OF MAINTENANCE

The respondent does not deny that he has an obligation to pay maintenance. The only issue arising is that of the quantum of maintenance. While applicant has demanded \$35 000 000 per month, respondent has offered \$15 000 000 per ^G month, in addition to his accepted obligation to pay the children's school fees. The court has to make a value judgment, based on the income and assets of the parties. The court will endeavour to make an order such that the children continue to enjoy a standard of living reasonably comparable to the standard of living that they were accustomed to while the parents still lived together. A variety of factors play a role in calculating the amount of maintenance: see ^H

Ndou J

^a *Mentz v Simpson* 1990 (4) SA 455 (A) at 458. These are, *inter alia*, the needs of the child in view of his age, health, educational needs, the financial circumstances and social status of parents: see *Scott v Scott* 1946 WLD 499; *Bordihn v Bordihn* 1956 (2) PH B32 (A); *Barrass v Barrass* 1978 RLR 384 (G); 1979 (1) SA 245 (R) and *Mutenure v Mutenure* HH-308-90. It is trite in such matters, that both parties must, in the interest of the children, disclose their ^b means to the court fully. This principle is captured well in the instructive judgment delivered by Korsah JA in *Lindsay v Lindsay* 1993 (1) ZLR 195 (S). The learned judge of appeal said, at 197(F):

"I entertain no doubt that the quantum of maintenance, *pendente lite*, or otherwise, which a court may order a husband to pay to a wife ... is at the discretion of the court. In order to ensure the proper exercise of that ^c discretion, the court requires that every party to an application for maintenance shall deal with the court with candour and utmost good faith. Each party must disclose to the court every material fact, whether for or against him or her, which will enable the court to make a fair and just assessment."

^d See also *Taneka v Taneka* 1993 (2) ZLR 9 (H) at 12A-B.

Further, in *Ansell v Ansell* 1980 ZLR 416 (G) at 418A-D, Dumbutshena J (as he then was) observed:

"I hold the view that where parties are applying for maintenance for themselves or for the children of the marriage and contribution to costs or opposing the same, they should at least produce documentary evidence ^e of their incomes. Such documentary evidence can be in the form of salary slips or commission payments and/or any other payments made to the parties. To be of assistance to the court, payslips for the last three consecutive months would be most helpful. The mere assertion that a party is in receipt of X dollars per month is, in my opinion, not enough. There is always the temptation to reduce one's actual income in order to ^f qualify for a bigger award or to pay less to the applicant, just as there is a tendency to exaggerate estimates of expenditure in order to gain more or pay less maintenance. Parties should be encouraged to prove their income by the production of documentary evidence in order that the courts may be better able to determine as early as is humanly possible an award or a contribution which falls reasonably within the income bracket ^g of the respondent."

On the one hand, the respondent has attached his payslip to the opposing affidavit. While the applicant has disputed the genuineness of the payslip and gone so far as to allege forgery (which she says she once participated in to deceive a banking institution) the applicant has not stated how much, to her knowledge, the respondent earns every month, if it is not the \$30 000 000 that ^h the respondent alleges. It has been alleged that the respondent has "hidden or elusive resources," without any substantiation of what these hidden

Ndou J

^a or elusive resources are. Unfortunately, this court cannot make a decision based on such allegations of "elusive resources", which get mentioned only in answering affidavits.

On the other hand, the respondent has alleged that the applicant does earn some income from her gown making business. The applicant has not disputed ^b that she is, indeed, engaged in that kind of business. She has not denied that she does earn from that business, and often in foreign currency. The applicant has, however, failed to disclose to the court fully what her income is on average, whether per month or *per annum*. What is clear to me from the papers is that the applicant is not living in indigent circumstances and on charity of others. The onus was on the applicant to lay before the court, in full and in ^c detail, her own means and, since she disputed them, those of the respondent as laid down by him. She did not. In the circumstances, this court has to go by the respondent's more definitive statement of his means. The respondent has laid before this court proof of his earnings and, in Annexure "C" to his founding affidavit, has broken down the needs of the children as he perceives them, for the next few months. Regarding the life style that the children have ^d been accustomed to the applicant has made the allegation that the children "go overseas for holidays". The picture that emerges from this allegation is one of an unbelievably affluent lifestyle, where the children fly overseas every holiday. With respect, from the papers before me, this picture is too bright. This is so especially in view of the respondent's explanations of the ^e circumstances surrounding the children's two visits to the United Kingdom. The respondent has explained that the children went to the United Kingdom at the invitation of other parties, who gave them tickets and met their expenses while in the United Kingdom. The applicant did not refute the respondent's allegations in her answering affidavit. This court will not be unduly influenced by

these said visits to the United Kingdom. The same applies to the statement ^F that the "respondent is a businessman" and averments that follow soon after. This statement is casually flung into the applicant's heads of argument, notwithstanding the respondent's explanation that he does not own the business at all, but that the business is a family one, from which other parties expect to benefit as well. This court has to keep in mind the true picture, rather than the extravagant one painted by the applicant. The applicant has not ^G denied that the respondent is not the sole owner of the business. The true picture is that the respondent runs a family business, from which he draws a monthly salary, and the fact that, twice, the children have been to the United Kingdom to visit with family, and the respondent did not bear the full costs of their travel and related costs. On this issue, I find in favour of the ^H respondent. In the circumstances, and in view of the lack of detail in the

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Ndou J

A applicant's papers of her income, the only order this court can make would be for \$15 000 000 for the three minor children per month. It is important to bear in mind that the order sought now will only be obtaining until a final order is made, after a full enquiry, at the time that the divorce is granted. (In this case, the trial has already been set down for the next term). In view of this fact, and the fact that the respondent will continue to buy the children clothing, and to ^B pay school fees, the order would be a fair one.

CONTRIBUTION TOWARDS APPLICANT'S COSTS

Now, I come to the somewhat thorny issue of the respondent's contribution to the costs of the applicant to enable her to prosecute the pending divorce proceedings. In *Treger v Treger* GS-1-77, Smith J had this to say at p 7:

c "The court must look at the means of both parties and try to determine what is reasonable and just."

See also *Landry v Landry* 1970 (1) RLR 134 (G) at 137D-H; *Davis v Davis* 1939 WLD 108 and *Butterworth v Butterworth* 1943 WLD 127 at 130.

According to H R Hahlo *South African Law of Husband and Wife* 5 ed at 424, ^D the claim for a contribution towards costs in a matrimonial suit is *sui generis*. It has its origin in Roman-Dutch procedure, and has been sanctioned through many decades of practice: see *Chamani v Chamani* 1979 (4) SA 804 (W) ^B and *van Rippen v van Rippen* 1949 (4) SA 634 (C). Its basis is the duty of support spouses owe each other and its purpose is to enable a spouse, who would ^E otherwise not be able to do so, to place his or her case adequately before the court: see *Botes v Botes* 1969 (2) RLR 238 (G); 1969 (3) SA 169 (R). The requirements for such an order are that:

- (a) there must be a subsisting marriage;
- (b) the suit in question is a matrimonial one;
- (c) the applicant has a reasonable prospects of success; ^F
- (d) the applicant is not in a financial position to bring or to defend the action, as the case may be; and
- (e) the other spouse is able to provide the applicant with this contribution.

My understanding of the respondent's papers is that the opposition is based mainly on (d) but also to a lesser extent on (e). In short, his case is that the ^G applicant is capable of earning enough and she does not merit a contribution towards her costs. Further, he states that he cannot afford the quantum claimed by the applicant of \$350 000 000. It is trite that no contribution order will be granted if the wife is well able to afford the costs of the action herself, either because she has a substantial separate estate or because she has an ^H income, savings or other assets which are under her control – H R Hahlo *op*

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Ndou J

cit at 425; *Engelbrech v Engelbrech* 1944 NPD 186 and *Greyling v Greyling* ^A 1959 (3) SA 967 (W). In this case, the onus is on the applicant to show that she does not have the necessary means while her husband is able to make a contribution: see *Barras v Barras supra*. The applicant has, by design, decided not to disclose what her means are. She had admitted that she makes wedding gowns for sale. She has admitted that some of the gowns are for sale ^B overseas. The applicant

surely must be able, even with the failure of access to the overseas market, to sell her products locally. She has decided not to disclose to the court how much she makes from her business, contenting herself with stating only that her income is not regular. Further, the applicant has not shown where the respondent would get the sum of \$350 000 000 from. The applicant has failed to show the *bona fides* of her claim by declining to disclose how much she earns. Such applications should be *bona fide*. See *Smith v Smith* 1963 R&N 738 (SR); 1963 (3) SA 84 (SR); *Bernstein v Bernstein* 1946 CPD 325 and *Jones v Jones* 1973 (1) RLR 302 (G) at 305; 1974 (1) SA 212 (R) at 214D-H.

On the probabilities, the applicant has not shown that she does not have the necessary means to raise money for the costs of her divorce proceedings. She has, therefore, failed to discharge the above mentioned onus on a balance of probabilities.

Her claim for a contribution towards her costs therefore fails. See *Ansell v Ansell supra*. The order of the court will, therefore, be as follows:

1. The applicant is awarded maintenance *pendente lite* in the sum of R\$15 000 000 per month for the three children.
2. The respondent shall, *pendente lite*, continue to pay school fees for the children, buy uniforms and meet all the educational expenses relating to the children at the private schools.
3. There will be no order of contribution towards the applicant's costs.
4. Costs shall be costs in the cause.

Job Sibanda & Associates, applicant's legal practitioners

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

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Source:

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ZVOBGO v MADONDO NO & ORS 2006 (2) ZLR 103 (H)

2006 (2) ZLR p103

Citation	2006 (2) ZLR 103 (H)
Case No	Judgment No. HH-96-06
Court	High Court, Harare
Judge	Chitakunye J
Heard	9 August 2006
Judgment	9 August 2006
Counsel	<i>A P de Bourbon SC</i> , for the applicant <i>J P Mutizwa</i> , for the first respondent <i>L Chibwe</i> , for the remaining respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

^c **Succession** — will — interpretation — reference to testator's "lawful issue" as well as children born of his marriage — includes children born outside the marriage but recognised by him

Headnote

In his will, the testator created a trust to be divided between the three children born of his marriage and his "lawful issue". He had fathered four children ^d outside of his marriage and they claimed a share of the estate.

Held, that a will should be so construed as to ascertain from the language used therein the true intention of the testator in order that his wishes be carried out. If the testator clearly intends to benefit a particular person, the bequest will be valid despite any mis-description of that beneficiary. If it is accepted that ordinarily the term "issue" includes one's children, ^e "lawful issue" would be like "lawful child". However, the words "lawful child" and "legitimate child" do not have exactly the same meaning. A legitimate child is one born of parents who are married. The term "lawful" refers to recognised by law. The recognition can either be as a legitimate or illegitimate child. The important aspect is that of recognition by the law as one's child or issue. The term "lawful issue" was meant to cover ^f children recognised by law and by the testator himself as children sired by him.

Cases cited

Board v Titterton (1896) 13 SC 164

^g *Ex p Bosch* 1943 CPD 369

Horowitz v Brock and Others 1988 (2) SA 160 (A)

Case information

A P de Bourbon SC, for the applicant

J P Mutizwa, for the first respondent

^h *L Chibwe*, for the remaining respondents

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Chitakunye J

Judgment

CHITAKUNYE J: The late Dr Eddison Jonas Mudadirwa Zvobgo (herein ^a referred to as Dr Zvobgo) was during his lifetime and until his earlier death married to the late Julia Tukai Zvobgo (herein referred to as Julia) in terms of the Marriages Act [*Chapter 5:11*]. Their marriage was solemnized in 1961.

Dr Zvobgo died on 22 August 2004, and his late wife Julia pre-deceased him and died on 16 February 2004. Dr Zvobgo did not remarry for the remainder ^b of his life. Three children were born to their marriage namely:

1. Kerina Makaita Zvobgo born on 2 October 1962.
2. Eddison Mudiwa Zvobgo born on 20 June 1964, and
3. Tsungirirai Julia Zvobgo born on 21 of December 1973.

Four other children were born to Dr Zvobgo outside his marriage to Julia and ^c they are:

1. Jonas Zvobgo born on 1 January 1966.
2. Tendai Zvobgo born on 6 February 1983.
3. Esther Zvobgo born on 1 January 1985, and
4. Farai Emily Zvobgo born on 26 June 1986. ^d

In 1987 Dr Zvobgo and Julia executed a mutual will which was prepared by a law firm.

On 20 November 1997, Julia revoking all former wills, codicils and other testamentary dispositions made by her executed another will which was prepared by another law firm. She was perfectly entitled to do so. ^E

It is trite law that either party to a mutual will may, while both are alive revoke his or her share of the mutual will with or without communication to the other party. But after the death of one party the survivor may not revoke his or her share of the mutual will where both the following further conditions and circumstances occur: ^F

1. the mutual will effects a "massing"; and
2. the survivor has accepted some benefits under the will.

(See *Wille's Principles of South African Law*, 8 ed at p 403).

The late Julia's will of 20 November 1997, revoked her portion of the 1987 joint will. Her estate was thus to be dealt with, in terms of her 20 November 1997 will. ^G Her revocation did not alter the portion of the joint will relating to the late Dr Zvobgo. His intentions in that joint will remained the same.

The joint will created a trust which was to terminate upon the death of the second of the testators. That has now happened with Dr Zvobgo's death. The issue is how Dr Zvobgo's share of the capital, which in effect is his estate, falls to be distributed. The relevant provision of the joint will on beneficiaries reads ^H

2006 (2) ZLR p105

Chitakunye J

A as follows:

"3(d) Upon the termination of the TRUST, the capital thereof shall devolve as follows:

- (i) As to that portion of the capital thereof which accrued from the estate of the aforesaid EDDISON JONAS MUDADIRWA ZVOBGO, same shall devolve upon and be paid in equal shares to the children born ^B of our marriage and to the lawful issue of the said EDDISON JONAS MUDADIRWA ZVOBGO, in equal shares.
- (ii) As to that portion of the capital thereof which accrued from the estate of the said JULIA TUKAI ZVOBGO, same shall devolve upon and be paid in equal shares to the children born of our marriage."

^C A clear distinction is apparent between beneficiaries to the estate of Dr Zvobgo and Julia. Beneficiaries to the estate of Julia comprise children of their marriage only where as beneficiaries to the estate of Dr Zvobgo comprise children of their marriage and Dr Zvobgo's lawful issue. The word "and" is underlined apparently to emphasize it is in addition to, hence a larger group. The late Dr Zvobgo's estate is to be divided in equal shares not only amongst ^D the children of their marriage but also amongst his lawful issue.

The first respondent was appointed executor dative of the estate of the late Dr Zvobgo. The applicant, a child of their marriage brought an application on his behalf and that of the other two children of the marriage seeking an order restraining the first respondent from selling assets in the estate of the late

Dr Zvobgo pending an interpretation of the joint will as it applies to the extent ^E of beneficiaries to Dr Zvobgo's estate.

Legal opinion was sought but that did not resolve the dispute. The parties thus brought this matter as a stated case.

The main issue pertains to the term "lawful issue" as used by Dr Zvobgo in the will. Did the term include the four children born out of wedlock?

^F There are three basic principles in the interpretation of wills namely:

1. The main rule of construction is to ascertain the intention of the testatrix.
2. The testator's intention as ascertained from the will may be supplemented, if necessary, by the "armchair" evidence that may be admissible, and ^G
3. the court cannot make, or remake a testator's will for him. It cannot change the devolution of his estate as he has directed.

(See *The Law of Succession through the cases by Lila E Isakow* 1995 at p 259).

The cardinal rule is that a will should be so construed as to ascertain from the language used therein the true intention of the testator in order that his wishes ^h be carried out.

2006 (2) ZLR p106

Chitakunye J

On p 264 *supra* the learned author epitomized the point when he said: ^a

"If the testator clearly intends to benefit a particular person, the bequest will be valid despite his mis-description of that beneficiary."

In their written submissions, counsel for the parties alluded to the need to look at the surrounding circumstances to ascertain what Dr Zvobgo meant. Such is the armchair rule alluded to above. Under this principle court places itself ^b in the armchair of the testator at the time he executed his will, and considers his Will in accordance with the material facts and circumstances probably considered by him when making his will.

In *Ex P Bosch* 1943 CPD 369 at p 372, Sutton J had this to say:

"In order to understand the language employed, the court is entitled to use ^c a familiar expression, to sit in the testator's armchair. I do not of course intend to suggest that settled rules of construction are to be disregarded. On the contrary, I think they should be strictly observed. But they ought to be applied in a reasonable way. It is no doubt of great importance to lawyers that certain well known words and phrases will receive from the court the meaning that the court has for generations past attributed to them. Much confusion and uncertainty would be caused if this were not ^d so. In other words, the rules of construction should be regarded as a dictionary by which all parties, including the courts, are bound. But the court should not have recourse to this dictionary for the purpose of construing a word or a phrase until it has ascertained, from an examination of the language of the whole will when read in the light of the surrounding circumstances, whether the testator has indicated his intention of using ^e the word or the phrase in other than its dictionary meaning; whether, in other words, to use another familiar expression, the testator has been his own dictionary."

Courts must endeavour to ascertain what the words mean as used by the testator or what the testator meant by using them.

For instance the term "issue" has been taken to the extend to varying ^f categories of descendants.

In *Osborne's Concise Law Dictionary*, 6 ed, by J Burke at p 184, the term "issue" is defined to mean a person's children, grand children, and all other lineal descendants.

In *Board v Titterton* (1896) 13 SC 164, it was said that the word "issue" ^g embraces all descendants, not just children.

On the other hand, in *Horowitz v Brock and Others* 1988 (2) SA 160 (A), the court recognized that the way the term "issue" was used drew a distinction between children, on the one hand, and issue and remoter descendants, on the other hand. ^h

2006 (2) ZLR p107

Chitakunye J

^a *In casu*, it was argued that as Dr Zvobgo was a lawyer by profession, he must have chosen words "lawful issue" deliberately to exclude illegitimate children.

It is my view, that if it is accepted that ordinarily the term "issue" includes one's children "lawful issue" would be like "lawful child." The words "lawful child" and legitimate child would really not mean exactly the same. A legitimate child ^b is one born of parents who are married.

The term "lawful" refers to recognised by law. The recognition can either be as a legitimate or illegitimate child. The important aspect is that of recognition by the law as one's child or issue.

Thus to try to say that by "lawful issue" Dr Zvobgo meant legitimate children, and no-one else, would be to do injustice to his intentions. As a lawyer using ^c the words "our children and his lawful issue", as he did, he meant two groups of beneficiaries. The group comprising his lawful issue was an addition to the group comprising "our children".

Being a lawyer did not deprive him of describing beneficiaries in any way he desired. As long as it is evident, he meant to include other issue of his, he ^d described as lawful issue, it is incumbent upon court to ascertain what other issue that description encompassed.

A reading of the will gives the impression that beneficiaries to the late Julia's estate comprised children of their marriage only, whilst beneficiaries to late Dr Zvobgo's estate included children of their marriage and his other issue not of their marriage.

E I am of the view that the term lawful issue was meant to cover children recognised by law and by Dr Zvobgo himself as children sired by him. This may have been meant to exclude any other child who may pop up claiming to be Dr Zvobgo's child without having been accepted and recognised as such by Dr Zvobgo.

F To seek to exclude children recognized and accepted as born to him from the term "lawful issue" would be an injustice to his intentions. Equally, now that it is common cause that he had no other children apart from the three legitimate and the four illegitimate, to seek to say that by "lawful issue" he did not include the illegitimate children would be to say that he meant the three already covered by his marriage to Julia. That certainly was not his intention.

The fact G that they chose to make a distinction between children born of their marriage and Dr Zvobgo's lawful issue means that they recognised and accepted that there were such children born out of wedlock.

I find that the only inference to be drawn from the surrounding circumstances under the joint will which was executed, is that by lawful issue was meant

H Dr Zvobgo's four illegitimate children.

2006 (2) ZLR p108

Chitakunye J

I accordingly rule that the beneficiaries described in clause 3(d)(i) of the joint A Will are:

1. Kerina Makaita Zvobgo born on 2 October 1962;
2. Eddison Mudiwa Zvobgo born on 20 June 1964;
3. Tsungirirai Julia Zvobgo born on 21 December 1973; B
4. Jonas Zvobgo born on 1 January 1966;
5. Tendai Zvobgo born on 6 February 1983;
6. Esther Zvobgo born on 1 January 1985; and
7. Farai Emily Zvobgo born on 26 June 1986.

These are to benefit in equal shares from the estate of the late Dr Zvobgo. C

As agreed by the parties, the costs shall be borne by the estate of the late Dr Zvobgo.

Gill, Godlonton & Gerrans, the applicant's legal practitioners

Chihambakwe, Mutizwa & Partners, the first respondent's legal practitioners D

Coghlan, Welsh & Guest, the second, third, fourth and fifth respondent's legal practitioners H

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Source:

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KHOSA v CARGO CARRIERS (PVT) LTD 2006 (2) ZLR 109 (H)

2006 (2) ZLR p109

Citation 2006 (2) ZLR 109

Case No Judgment No. HH-90-06

Court High Court, Harare

Judge	Uchena J
Heard	28 June 2006; 29 June 2006; 3 July 2006
Judgment	23 August 2006
Counsel	<i>D T Mwonozora</i> , for the plaintiff <i>A I Ahmed</i> , for the defendant
Case Type	Civil action
Annotations	No case annotations to date

Flynote

c Delict — liability — vicarious liability — employer's liability — driver carrying passenger in contravention of explicit instructions to the contrary and injuring passenger due to his negligent driving — prohibition limiting sphere of employment — employer not liable

Headnote

The plaintiff sustained serious injuries due to the negligence of the driver of ^o the defendant's lorry. The driver had, in spite of specific instructions that passengers were not to be carried in the lorry, given the plaintiff a lift and charged him a fee for the lift. The plaintiff argued that the defendant was vicariously liable because the driver drove negligently and caused the plaintiff's injuries during the course of his duties. The defendant submitted ^e that, as the driver was prohibited from carrying passengers, he acted outside the sphere of his employment, therefore the defendant is not vicariously liable.

Held, that there was no deviation from the route the driver was to use while carrying his employer's cargo. His only digression was to carry the plaintiff against his employer's instructions. There were two distinct ^f aspects of the driver's behaviour to be looked at as a whole course of conduct: (1) the more immediate cause of the injury to the plaintiff, that is, the driver's bad driving; and (2) his conduct in causing the plaintiff to be a passenger exposed to the risk of injury by bad driving. Both aspects of that conduct had to occur for the plaintiff to be harmed: if either of them had been absent the plaintiff would not have been injured. Unless ^g both aspects of the driver's conduct can properly be said to be acts done in the exercise of the functions to which the driver had been appointed, he did not act throughout as the defendant's servant in inflicting harm on the plaintiff, and there was no room for the operation of the principle of vicarious liability of the master for the conduct of his servant. The ^h driver was instructed not to carry passengers. He carried the plaintiff in

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Uchena J

disobedience of his master's instruction. It could not therefore be said ^a that in so doing he was acting within the sphere of his employment.

Cases referred to

Gorah v Mahona & Anor 1984 (2) ZLR 102 (S)

Nott v ZANU (PF) 1983 (2) ZLR 208 (S)

Phillips Central Cellars (Pvt) Ltd v Director of Customs & Excise 2000 (1) ZLR 353 (H) ^b

Wentworth-Wear v Zvipundu 2000 (1) ZLR 281 (S)

Case information

D T Mwonzora, for the plaintiff

A I Ahmed, for the defendant c

Judgment

UCHENA J: On 8 October 1998, the plaintiff boarded the defendant's truck which was traveling to Harare on the Beitbridge-Masvingo Road. The defendant's truck overturned, injuring the plaintiff in the process. The plaintiff was hospitalized for a long time at Masvingo, Bulawayo, Harare and finally Masvingo hospitals. When he was finally discharged from Masvingo hospital, d he was wheelchair bound as his right leg had been amputated above the knee. He had also sustained a fracture of the right humerus. His right hand had been pinned for restoration, hence his inability to use clutches. At the trial, the pin had been removed. He was then able to use clutches, but for short distances. He has been forced into this by the breakdown of his wheel chair and his e inability to have it repaired. His right side has very limited use.

He now has further problems arising from injuries he sustained in the accident of 8 October 1998. He experiences phantom pain. He feels pain on the toes and foot of the amputated right leg. He feels as if the amputated leg is still there and suffers pain from it. The bone in the amputated leg is outgrowing the amputation, also causing pain. It has to be cut and the new amputation will f need medical attention.

He now claims \$1.5 billion as general damages for pain and suffering. The figure was a result of amendments to the original claim of \$500 000. The first amendment increased it to \$1 000 000. It was subsequently increased to \$15 000 000. The last amendment was granted by consent at the pre-trial g conference increasing it to \$1.5 billion.

At the pre-trial conference, the parties agreed on the following issues:

1. Whether or not the defendant is vicariously liable for the plaintiff's injuries arising out of the accident.
2. If so, what is the quantum of damages arising from injuries sustained by the plaintiff. h

2006 (2) ZLR p111

Uchena J

A The plaintiff gave evidence to the following effect. He waved down the defendant's driver, who was driving the defendant's truck on the Beitbridge-Masvingo Road towards Harare. The defendant's driver stopped. The plaintiff asked for a lift. He was offered a lift and charged \$10. The defendant's driver opened the door for him. He got into the truck and the driver closed the door. As they were taking off, the driver drove with some wheels in a depression B and others on higher level road surface and the truck overturned. The plaintiff's right side was trapped by the door when the motor vehicle landed on its side. He was subsequently taken to Masvingo Hospital. The plaintiff said he did not see any instruction prohibiting the carrying of passengers. He said he was allowed into the defendant's truck by the defendant's driver. He c said the accident was due to the defendant driver's negligent driving.

Before the accident, he was employed by the Ministry of Transport as a supervisor and a driver. He was in charge of a section of the Beitbridge-Masvingo Road and his group was camped after Chivi turn off. On the day in question, he had left his camp for the Mwenezi area. It was on his way back that he got a lift from the defendant's driver. At the time of his injury he was D earning a salary of \$10 000 per month. After his discharge from Masvingo Hospital, he was not able to go back to work. His employer retired him on medical grounds. He now has no income and is not able to take up any other employment.

Dr E G V Sithole gave evidence for the plaintiff. At the time the plaintiff was F first admitted at Masvingo Hospital, Dr Sithole was a Government medical officer based at Masvingo Provincial Hospital. He was at the time the Acting Medical Superintendent. He recalls attending to the plaintiff after he had been involved in a road accident. He said the plaintiff came to Masvingo Hospital several times. He initially was referred to Bulawayo Hospital. He said the plaintiff had a traumatic amputation of his right leg above the knee. He also F had a fracture of the right humerus. When he came back to Masvingo, he was moving around in a wheel chair. He prepared a medical report for the plaintiff for purposes of his claim to Old Mutual. The report was produced as Exhibit 3. He got the information from the patient's file and the examination of the plaintiff at the time of compiling the report. In Exhibit 3, Dr Sithole said:

"The above was involved in a road traffic accident on 8 October 1998. He sustained fracture of the right humerus and traumatic amputation of right leg above the knee.

Because of the nature of his injuries, he was retired on medical grounds. He has not been able to work since the day of injury and his condition will not improve."

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Uchena J

Dr Sithole also produced the report prepared by Dr Shamu. He said it reflects what he observed and it is an accurate record of the plaintiff's injuries. He agreed with the plaintiff's disability of 56 percent. He said any injury involving amputation above the knee entitles one to 50 percent disability. He then said that if the injury to the right arm is considered, 56 percent is a fair assessment of the plaintiff's disability. ^B

Asked to comment on the pain which the plaintiff says he feels on the limb, which is no longer there, he said that is called phantom pain which is caused by the brain still functioning as if the limb is still there. He said phantom pain is a well recognised experience and is one of the complications of amputation. He also commented on the plaintiff's stump needing re-sectioning.

Dr Sithole gave his evidence well. He is a qualified and experienced doctor. ^C He gave detailed explanations on the plaintiff's condition now and his long and prolonged hospitalization, his being wheelchair bound and the current complications with phantom pain and the bone growing out of the amputation. His evidence fully supports the plaintiff's claim for pain and suffering during and after the accident and the pain and suffering he is going to suffer as a result ^D of phantom pain and the growing bone which needs re-sectioning.

The defendant's defence is that its driver was on a frolic of his own as he was under instruction prohibiting him from carrying passengers. The witnesses who gave evidence for the defendant said their trucks carry cargo and not passengers. They said their drivers are instructed not to carry passengers. They said drivers sign contracts with that instruction and are verbally ^E instructed to that effect during the induction training. Mr Sam Hungwe, the defendant's operations manager, gave evidence to this effect and produced samples of drivers' contracts. He did not produce the contract for the driver, who was involved in the accident which caused the plaintiff's injuries. He denied the existence of that driver (Prosper Hita) in their company but later conceded that the personnel manager would be better placed to know whether ^F or not they had or still have a driver by that name. When asked whether checks had been made on records for that accident, he said the security manager would know. He seems to have very limited knowledge about personnel and the accidents their drivers have been involved in. He conceded that there are imperfections in the driver's contracts he produced. He in particular conceded ^G that:

1. The contracts were not signed by all persons who should have signed them.
2. Some have no employee numbers.
3. Some were not signed on the part to be signed by the employee. ^H

2006 (2) ZLR p113

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^A 4. Some were not signed by witnesses.

The documents left a poor impression on the efficiency of the defendant's company. Hungwe agreed that all the documents he produced were incomplete in one way or another. His evidence, as supported by the documents, does, however, leave no doubt that the defendant's drivers are prohibited from ^B carrying passengers.

The contracts have on p 7 a provision on carrying of unauthorized passengers. It reads:

"It is against the company regulations and it is an offence by law to carry unauthorised passengers in a company vehicle. If a driver is found doing this he will be dismissed. He could also be legally fined or imprisoned for ^C such an offence. The company will not assist the driver in any way should he be found guilty of this offence as we have no insurance covering passengers. If an accident occurs and the passengers are maimed or killed, the driver will be responsible for any legal fees if the passengers or their families decide to prosecute."

The provision, though not elegantly formulated, indicates that the defendant's ^D drivers are generally instructed not to carry passengers. Though no contract was produced for Prosper Hita, the driver in question, I have no doubt that the prohibition applies to all of the defendant's drivers. In fact, the

plaintiff only mentioned this driver's name in court. The pleadings did not give this detail. The issue to be decided is what effect such an instruction to the driver has on the plaintiff's claim.

¶ The next witness for the defendant was Lovemore Ndoro. He is the company's security manager. He also said the company's policy is that no passengers will be carried on their trucks as they only carry cargo. Though he has no direct involvement in the training of drivers, he understands that drivers are made to sign a document with such an instruction. He also said that on their trucks ¶ are written the words "No unauthorised passengers". He said if a driver carries passengers he will be dismissed.

Under cross-examination, he said he is not involved in the training or instructing of drivers. He is not aware whether drivers have any discretion on whether or not to carry passengers. He was employed in 2001 after another officer had dealt with this case. He admitted that his company's driver was ¶ involved in an accident on 8 October 1998 along the Beitbridge-Masvingo Road. He could, however, not find the file or the details of the accident. He said they then changed lawyers as they were not happy with the plea which admitted the accident. He attempted to deny that they have or ever had a driver ¶ called Prosper Hita.

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He said he did not know who the contact of the previous legal practitioners ¶ was. When it was put to him that para 3 of defendant's plea prepared by the current legal practitioners admits that their driver was involved in an accident on 8 October 1998, he said "we denied that".

It is apparent that the witness is trying to absolve the company at any cost, including giving misleading evidence. ¶

In address, Mr *Ahmed* said the only issues were as per the joint pre-trial conference minute. He specifically said he concedes that the accident occurred and that the joint pre-trial conference issues are what should concern the court.

I will therefore proceed on the basis that the plaintiff was injured while ¶ travelling in the defendant's truck driven by the defendant's driver who was prohibited from carrying passengers.

Mr *Mwonzora* submitted that the defendant was vicariously liable, because the defendant's driver drove negligently and caused the plaintiff's injuries during the course of his duties. On the other hand, Mr *Ahmed* submitted that as the driver was prohibited from carrying passengers he acted outside the ¶ sphere of his employment, therefore the defendant is not vicariously liable.

An employer can be vicariously liable for his employee's delicts if they are committed in the course of his employment. In *Nott v ZANU (PF)* 1983 (2) ZLR 208 (S) at 210E-F, Beck JA said:

"The doctrine of vicarious liability of a master for such delictual acts of his ¶ servant as are committed in the course of the servant's employment is part of our law."

The issue in this case is not whether or not the plaintiff was injured due to the negligence of the defendant's employee, but whether the defendant is liable as the driver was prohibited from carrying passengers and was therefore on a frolic of his own. ¶

In *Nott v ZANU (PF)* *supra*, Beck JA said at 211F-H:

"The leading South African decision in which extensive consideration was given to the problem that is presented by the servant's delictual act committed when he has diverted from the immediate furtherance of his master's affairs is the case of *Feldiman (Pty) Ltd v Mall* 1945 AD 733. Two ¶ of the judgments in that case stress that it is the degree of the servant's deviation from the execution of his master's work, or looked at conversely, the degree of the servant's retention of his master's work, that is the determining factor. Watermeyer CJ at 742 said:

'If he does not abandon his master's work entirely but continues partially to do it and at the same time to devote his attention to his own affairs, ¶

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¶ then the master is legally responsible for harm caused to a third party, which may fairly, in a substantial degree, be attributed to an improper execution by the servant of his master's work and not entirely to an improper management by the servant of his own affairs.

Tindall JA put the matter this way at 756:

'In my view, the fact to be applied is whether the circumstances of the particular case show that the servant's digression is so great in respect of space and time it cannot reasonably be held that he is still exercising the functions to which he was appointed; if this is the case, the master is not liable. It seems to me not practicable to formulate the test in more precise terms. I can see no escape from the conclusion that ultimately the question resolves itself into one of degree and in each particular case a matter of degree will determine whether the servant can be said to have ceased to exercise the functions to which he was appointed'."

In *Nott supra*, the defendant's driver deviated from his route by seven to eight kilometres but it was held at 214G that he was still acting in the course of his duties, as it was held not to reasonably be "so serious a departure from obedience to the instruction to return with the vehicle 'chop chop', not forgetting the added injunction to interrupt the return journey by collecting the lawn mower".

In the present case, there was no deviation from the route the driver was to use. He remained on the Beitbridge-Masvingo Road. He continued to drive towards Harare carrying his employer's cargo. His only digression was to carry the plaintiff against his employer's instruction. Can he be said to have ceased to exercise the functions for which he was appointed by the defendant?

In *Gorah v Mahona & Anor* 1984 (2) ZLR 102 (S) at 108H-109A, Beck JA said:

"In situations where disobedience by a servant of his master's instructions is causally linked with the injury delictually inflicted by the servant on a third party, a useful test is whether *the instruction that the servant disobeyed was one which limited the sphere of his employment or one which merely regulated his conduct within that sphere* ...

It would be altogether too narrow an approach and indeed wrong in principle to look only, as Mr Paul invites us to do, at the more immediate cause of the injury to the third party, namely, the bad driving of the servant, and to ignore the servant's conduct in causing the third party to be a passenger exposed to the risk of injury by bad driving. These are two distinct aspects of the servant's behaviour looked at as a whole course of conduct. Both aspects of that conduct had to occur for the third party to be harmed; if either of them had been absent the appellant would not have lost his leg. Unless both aspects of the servant's conduct can properly be said to be 'acts done in the exercise of the functions to which

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the servant has been appointed' it must follow that he has not acted throughout as his master's servant in inflicting harm on the third party, and there is no room for the operation of the principle of vicarious liability of the master for the conduct of his servant" (my emphasis).

In *Wentworth-Wear v Zvipundu* 2000 (1) ZLR 281 (S) at 284G-H, Gubbay CJ, dealing with prohibited conduct by a servant, said:

"In *Plumb v Cobden Flour Mills* [1914] AC 62, Lord Dunedin drew a distinction between two different types of prohibitions in the relationship between employer and employee.

He said at 67:

'There are prohibitions which limit the sphere of employment and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere'."

Later, at 285C, the learned Chief Justice went on to say:

"It is clear to me that in driving the commuter omnibus – albeit for the apparent benefit of the respondent and in the hope that by so, doing the latter would be prepared to retract what must have been viewed as a lawful dismissal – Chigariro disregarded a prohibition which limited the sphere of his employment, and not one which dealt only with the conduct within the sphere of his employment. As he was thus not acting within the course of his employment at the time of the collusion, the principles of vicarious responsibility for his negligence cannot be extended to embrace the respondent."

The cases of *Gorah* and *Wentworth Wear supra* establish that our law does not extend vicarious liability to an employer if the employee's conduct is one outside the sphere of his employment. The court must, therefore, first determine the nature and effect of the prohibition before attaching vicarious liability to an employer.

Cases where the employee has been told not to perform acts for the employer because he has been dismissed, as was the case in *Wentworth Wear supra*, are easy to determine, while those where the employee is prohibited from doing a thing but is still employed call for careful consideration.

In *Phillips Central Cellars (Pvt) Ltd v Director of Customs and Excise* 2000 (1) ZLR 353 (H) at 358, Gillespie J said:

"An application of this test of degree becomes even more problematic where the employee's conduct involves behaviour that is forbidden him by the employer, such as where the employee steals his employer's or customer's property. *Many considerations have been invoked by the*

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A courts in an attempt to reach a reasonable conclusion as to whether the employee's behaviour was sufficiently proximate to his appointed function. For instance, whether or not the employer had clothed the employee with powers that were abused, or whether goods stolen by an employee were entrusted to the particular care of the dishonest employee" (my emphasis).

8 However, that difficulty does not arise in the present case because of the clear precedent set by the Supreme Court in *Gorah supra* which is on all fours with the present case.

In the present case, as in *Gorah supra*, the defendant's driver was instructed not to carry passengers. He carried the plaintiff in disobedience of his master's instruction. It cannot therefore be said that in so doing he was acting within the sphere of his employment.

In *Gorah supra* at 109H, Beck JA said:

"Instances of drivers *negligently injuring unauthorised passengers* on their master's vehicles are instances where part of the causation of the injury done has been the servant's disobedience to an instruction that limited the sphere of his employment" (my emphasis).

It is clear that, once the prohibition limits the sphere of employment, harm caused to a third party while the employee is disobeying the prohibition does not make the employer vicariously liable.

Exhibits 4(a)-(i) clearly demonstrate that the carrying of passengers was prohibited. The defendant carries cargo. It uses trucks for that purpose. The prohibition against the carrying of passengers is consistent with the nature of its business. The evidence led makes it clear that the defendant's drivers are given such instructions. The disobedience is sanctioned by discharge. It therefore follows that it is a serious disobedience which limits the employee's sphere of employment.

9 In the result, I find that the defendant is not vicariously liable for the delict of its driver who drove negligently after giving a lift to the plaintiff.

The plaintiff's claim is therefore dismissed with costs.

Mwonzora & Associates, the plaintiff's legal practitioners

10 *Ahmed & Ziyambi*, the defendant's legal practitioners

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ZIMBABWE DEVELOPMENT BANK v ZAMBEZI SAFARI LODGES (PVT) LTD & ORS 2006 (2) ZLR 118 (H)

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Citation	2006 (2) ZLR 118 (H)
Case No	Judgment No. HH-95-06
Court	High Court, Harare
Judge	Patel J

Heard	23 November 2005; 5 June 2006
Judgment	24 August 2006
Counsel	<i>R M Fitches</i> , for the plaintiff <i>E T Matinenga</i> , for the defendants
Case Type	Stated case
Annotations	Link to case annotations

Flynote

Contract — *validity* — *contract sounding in foreign currency* — *lawfulness of* — *tender in settlement* — *rate of exchange* — *when official rate applies* — *whether judgment creditor obliged to accept tender*

Headnote

The plaintiff had loaned the defendant a sum of money in foreign currency. ^o The defendant paid most then tendered the balance in local currency at the official rate of exchange, which was very much lower than the unofficial “parallel” rate.

Held, that because of the glaring disparity between the official and parallel rates, acceptance of the tender at the official rate would have operated so as to unjustly enrich the defendant to an exorbitant and unconscionable ^e extent. However, because execution cannot be levied in foreign currency, there must be a conversion into local currency at the prevailing official rate for the limited purpose of enforcement – and for that purpose alone. It is thus necessary to distinguish a tender in settlement in local currency from the requirement to convert a judgment debt into local currency at ^f the date of execution. Both take place at the official exchange rate, but the former is only allowed if repayment in local currency is agreed by contract or otherwise accepted by the creditor. In the absence of such agreement or acquiescence, a tender in local currency does not constitute sufficient discharge of an obligation sounding in foreign currency. The options for recovering a foreign currency debt must be left to the ^g judgment creditor’s discretion. It may sometimes be possible for the creditor to recoup the debt specifically in foreign currency, but if all other options for recovery fail and it becomes necessary as a last resort to execute against the debtor’s local assets, the judgment debt must then be converted into local currency at the official exchange rate prevailing at the date of enforcement. ^h

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Cases cited ^A

AMI Zimbabwe (Pvt) Ltd v Casalee Holdings (Successors)(Pvt) Ltd 1997 (2) ZLR 77 (S)

CBZ v Watergate (Pvt) Ltd HH-166-04

Echodelta Ltd v Kerr & Downey Safaris (Pvt) Ltd 2002 (1) ZLR 632 (H)

Lowveld Leather Products (Pvt) Ltd v International Finance Corp Ltd ^B & Anor 2003 (1) ZLR 78 (S)

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

Legislation cited

^c Exchange Control Regulations 1996 (SI 109 of 1996)

Case information

R M Fitches, for the plaintiff

E T Matinenga, for the defendants

Judgment

PATEL J: On 27 January 2003, the plaintiff filed summons claiming payment ^o in the sum of US\$715 185.66, together with interest and costs on the higher scale. The defences proffered by the defendants are that the plaintiff is not entitled to judgment in United States dollars (US\$) and that, in any event, they have already tendered payment in the Zimbabwe dollar (ZW\$) equivalent.

The parties have agreed to refer the matter to the court for determination by way of a stated case.

THE FACTS

In January 1996, the plaintiff and the first defendant entered into a finance agreement (as per Annexure "A") whereunder the plaintiff provided the first defendant a credit facility enabling the latter to withdraw a maximum of US\$1 million. Interest was to accrue on any withdrawn amount at the rate of ^r 12.5 per cent *per annum*, with additional penalty interest being levied on arrears at the rate of 4 per cent *per annum* compounded monthly. The capital sum together with interest was repayable in 20 equal instalments with effect from 31 August 1997, the balance being repayable in equal quarterly instalments, with the final instalment being due on 31 December 2001.

On 8 January 1996, the second and third defendants bound themselves jointly ^g and severally with the first defendant as sureties and co-principal debtors under the agreement. The first defendant also executed two general notarial bonds in favour of the plaintiff.

The amounts advanced to the first defendant under the facility were sourced by the plaintiff offshore, from the Finnish Fund for Industrial Co-operation Ltd ^h (the Fund), and on-lent to the first defendant. This was in terms of a special

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facility for the local tourism sector designed to benefit operators who ^a generated foreign currency earnings. The plaintiff borrowed the requisite funds from the Fund in US dollars, in terms of a finance agreement concluded in November 1994, at an interest rate of 9 percent *per annum*. It has repaid the bulk of its principal loan but remains under an obligation to repay the balance outstanding to the Fund in foreign currency. ^b

The first defendant withdrew a total of \$1 million under the facility (as reflected in Annexure "B"). The withdrawals were disbursed by the plaintiff in various currencies, *viz.*, in US dollar its equivalent, at the first defendant's special instance and request. The amounts disbursed were denominated in US dollars, SA rands and ZW dollars.

The first defendant has so far repaid a total sum of US\$1 078 088.79 in ^c liquidation of its debt. All of its payments were made in US dollars. Full repayment of the debt was not effected as agreed by 31 December 2001. The balance outstanding, inclusive of bank charges, constitutes the amount claimed by the plaintiff. The quantum of the debt as calculated in US dollar is not in issue. ^d

On 25 November 2003, the defendants tendered the sum of ZW\$40 501 749 in full settlement of their debt. This tender was rejected by the plaintiff as not constituting proper discharge of the defendants' obligation under the agreement.

THE ISSUES ^e

The issues for determination by the court are as follows:

- (1) Whether the credit facility agreement provides for repayment in foreign currency, i.e. US dollars, as per the plaintiff's claim and whether the plaintiff is entitled to judgment in the said foreign currency denomination.
- (2) Whether the tender of settlement made in the sum of \$40 million was and ^f is sufficient compliance with the first defendant's indebtedness in terms of the agreement.
- (3) Whether the agreement provides for costs to be borne on a legal practitioner and client scale.

THE ARGUMENTS ^G

Mr *Fitches*, appearing for the plaintiff, submits that the finance agreement describes the amount lent as being “up to US\$1 million” and does not refer to any ZW dollars equivalent. Moreover, the repayment clause obligates the borrower to repay the amounts due in specified instalments. Thus, both the money of account as well as the money of payment *in casu* are denominated in US dollars. The fact that all the repayments effected thus far have been in ^H

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^A US dollars is a clear indication that the parties understood the currency of payment to be US dollars. The disbursements to the first defendant in other currencies were only made at the first defendant’s special request and instance.

Mr *Fitches* further submits that the defendants’ unilateral tender of ZW\$40 million at the official exchange rate ignores the fact that the money was ^B borrowed in US dollars and that the official exchange rate operates unfairly to the prejudice of the plaintiff. In this respect, it is argued that the court cannot ignore the disparity between the official and parallel exchange rates. The plaintiff has suffered loss in US dollars terms and must be fully compensated for its expenditure in sourcing the foreign currency that it provided to the first ^C defendant. The latter’s inability to source foreign currency at the time of repayment cannot be a valid ground for exonerating it from its obligation under the agreement.

As regards costs, Mr *Fitches* submits that the agreement itself provides for the reimbursement of all legal costs incurred by the plaintiff in the event that it institutes legal proceedings to recover any moneys due. In any event, the ^D first defendant’s obligation to repay in US dollars was clear *ab initio*. Litigation in this matter was unnecessary and, therefore, an award of costs on the higher scale is warranted.

For the defendants, Mr *Matinenga* submits that the parties in this matter did not specifically address the moneys of account and payment and the finance ^E agreement is silent on these issues. The amount lent under the agreement, i.e. “up to US\$1 million”, reflects the value of the loan amount and not the currency of payment. Similarly, the repayment clause simply indicates the time and manner in which capital and interest are to be repaid. It does not stipulate the currency of payment and does not clearly and expressly require repayments in US dollars. The moneys withdrawn under the credit facility were disbursed ^F in three currencies and the money of account under the agreement was any one of these currencies, including ZW dollars. The fact that all repayments hitherto were effected in US dollars is irrelevant as the plaintiff has not specifically pleaded estoppel *in casu*. Furthermore, the plaintiff has failed to establish that it sustained any loss in US dollars terms. Conversely, the securities pledged by the defendants in respect of their obligations can only ^G be realised in local currency.

As regards the defendants’ tender of ZW\$40 million, Mr *Matinenga* submits that this was a formal offer of settlement in terms of the High Court Rules. In the event that the court finds for the defendants on the first and principal issue, the plaintiff is only entitled to the amount tendered in November 2003 at the ^H official exchange rate, i.e. ZW\$40 million. The plaintiff is not entitled to any

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higher amount by virtue of subsequent fluctuations in exchange rates or the ^A devaluation of the local currency.

On the question of costs, Mr *Matinenga* submits that the agreement itself does not provide for the payment of legal costs on the higher scale. In any case, the agreement is unclear as to the currency of payment and the defence *in casu* is obviously not frivolous or vexatious. There is therefore no basis for ^B awarding costs on the higher scale.

JUDGMENTS IN FOREIGN CURRENCY

It is now settled law in Zimbabwe, consequent upon the decision of the Supreme Court in *Makwindi Oil Procurement (Pvt) Ltd v Noczim (Pvt) Ltd* 1988 (2) ZLR 482 (S), that our courts are at liberty to

give judgments sounding in foreign currency. This follows the radical approach adopted in England by the House of Lords in 1975. As was observed by GUBBAY CJ at 488A-B:

"... in *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801 (HL), the majority of the members of the House of Lords (Lord Simon of Glaisdale dissenting) took the unusual step, termed by some as 'revolutionary', of reversing their earlier decision. Their Lordships laid down a new rule that where the justice of the case so required the court could give judgment in favour of the plaintiff for the amount of the foreign currency due to him or its sterling equivalent at the time of payment. With regard to the proper conversion date, Lord Wilberforce noted that changes in the value of currency between the breach date and the date of judgment or payment were the rule rather than the exception." ^E

The rationale for this novel approach is explained, at 492B-C, as follows:

"That the majority of the Law Lords succeeded in surmounting such an obstacle and opted for a more realistic approach to modern economic conditions, is strongly illustrative of the concept, never to be overlooked, that the law is a living system that adapts to the necessities of present times and is to be given new direction where on principle and in reason it appears right to do so."

Accepting the need for adaptation, the learned Chief Justice concluded that it was necessary to depart from the earlier restrictive approach and held at 492C-F:

"I am firmly of the opinion that in the absence of any legislative enactments which require our courts to order payment in local currency only, the innovative lead taken both in *Miliangos* and the subsequent extensions to the rule there enunciated, and in the *Murata Machinery* case in South Africa, is to be adopted. This will bring Zimbabwe into line with many foreign legal systems. See Mann *The Legal Aspect of Money* 4 ed at pp 339-340. ^H

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^A 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 that the amount of the foreign currency is to be converted into local currency at the date when leave is given to enforce the judgment. 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 ^B 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 enforcement."

See also *AMI Zimbabwe (Pvt) Ltd v Casalee Holdings (Successors) (Pvt) Ltd* ^C 1997 (2) ZLR 77 (S) at 85-87, where it was held that it was proper not only to give judgment in a foreign currency but also to couple such award with the standard order that interest on the amount be payable *a tempore morae* at the rate applicable to the currency in question.

REPAYMENT IN FOREIGN CURRENCY

^D In *Lowveld Leather Products (Pvt) Ltd v International Finance Corp Ltd & Anor* 2003 (1) ZLR 78 (S^I), the appellant had borrowed the sum of US\$300 000 from the first respondent in terms of a loan agreement concluded in March 1997. The latter subsequently obtained a judgment in the High Court for payment of the capital sum and other amounts in US dollars. Following attachment in execution, the appellant tendered payment of the full judgment ^E debt in ZW dollars at the official exchange rate. The first respondent rejected the tender and insisted on payment in foreign currency. Consequently, the appellant filed an urgent application in the High Court seeking an interdict to restrain the first respondent from proceeding with the sale in execution, pending the determination of an application for an order directing that ^F payment of the judgment debt be made in the ZW dollars equivalent of the foreign currency amount at the official exchange rate. The urgent application was dismissed resulting in an appeal to the Supreme Court. In view of the specific obligation assumed by the appellant to repay the loan in US dollars, it was held that performance had to be effected in US dollars as specified in the loan agreement.

^G In *CBZ v Watergate (Pvt) Ltd* HH-166-04, the respondent entered into a loan agreement in 1998 and undertook to repay the loan in US dollars. In 2002, after the time for payment had expired, he offered to repay the equivalent of the loan amount in local currency. The applicant refused to accept the offer, insisting ^H on payment in US dollars. It was held that the option to accept repayment in

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local currency rested with the applicant. Accordingly, the applicant was ^A entitled to repayment and judgment in US dollars.

Although the facts in the *Lowveld Leather* case and the *CBZ* case are distinguishable in that they involved an express agreement to repay in US\$, I do not comprehend the decisions in those cases as excluding the propriety of a judgment in foreign currency in the absence of an express stipulation to ^B that effect. In other words, the borrower's obligation to repay in foreign currency need not be explicit and may be implied. It is necessary in each case to consider the specific terms of the agreement under review, as well as the conduct of the parties in their performance of the agreement, in order to determine the true intention of the parties *vis-à-vis* the currency of payment.

The specific terms of the finance agreement *in casu* are as follows. The amount ^C of the credit facility is stated to be "up to US\$1 Million (One Million United States Dollars)". The term of the facility is a period of 84 months at an interest rate of 12.5 percent *per annum*, with an additional interest charge of 4 percent *per annum* on overdue amounts. The fees chargeable comprise a commission of 1 per cent on the amount of the loan and a commitment fee of 2 per cent ^D *per annum* on the undrawn amount.

The repayment clause stipulates as follows:

"Instalments of principal amount to be repaid in 20 equal instalments beginning from 31 August 1997 and quarterly thereafter. Interest and Commitment fees to be billed and paid at quarterly intervals beginning 31 March 1996." ^E

The loan amount is secured by a first charge over a notarial lease in respect of Unit 7 of Matetsi Safari Area, a notarial bond over the first defendant's movable assets "for a value of ZW\$1 Million (One Million Zimbabwe Dollars)", and a joint and several guarantee provided by its shareholders, namely, the second and third defendants. ^F

The statement of account prepared by the plaintiff in respect of the first defendant is captioned "USD Loan Account". The statement covers the period from 1 April 1996 to 15 January 2003. The disbursements, repayments and balances reflected on the statement are all denominated in US dollars.

As regards the currency of account, it is common cause that the disbursements of the loan to the first defendant were effected in three different currencies, ^G including ZW dollars. It is also not disputed that the securities pledged by the defendants are realisable in local currency. However, the disbursements in currencies other than US dollars were made at the first defendant's special instance and request. Moreover, it is trite and unavoidable that any security consisting of an asset located in this country can only be realised at the stage ^H

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^A of enforcement in local currency. What is more relevant *in casu* are the first four clauses of the finance agreement which, in my view, make it abundantly clear that the currency of account governing the loan facility was intended to be the US dollars. The loan amount of "up to US\$ 1 Million" is unambiguous and clearly entitled the first defendant, if it so wished, to borrow the entire amount in US dollars. This construction of the parties' intention is fortified ^B by the fact that the statement of account utilised by the parties from the inception of the facility is denominated in US dollars.

As for the more critical question as to what was intended to be the currency of payment, the repayment clause in the finance agreement does not explicitly state that payments are to be effected in US dollars. It provides for repayment ^C of the principal amount and interest in specific instalments and at prescribed intervals. The principal amount, as I have stated, is stipulated in US dollars and the interest and commitment fees are fixed at rates applicable to the US dollars. The specified interest rate of 12.5 percent would be quite incongruous if it were to be applied to a commercial loan sounding in ZW dollars at the relevant time. Having regard to these terms and conditions of the loan ^D agreement, I take the view that the currency of payment contemplated by the parties when the loan facility was agreed upon was the US dollars and not any other currency. This is buttressed by the undisputed fact that all the repayments of capital and interest effected by the first defendant hitherto have been made in US dollars.

£ Apart from the terms of the finance agreement itself, it is necessary to bear in mind that the plaintiff initially sourced the amounts disbursed under the facility off-shore in US dollar and was and continues to be obligated to repay its principal loan in US dollar. Applying the notion of equity endorsed by the Supreme Court in the *Makwindi* case *supra*, it seems to me just that the plaintiff should be properly compensated for its actual and anticipated expenditure in ₣ foreign currency. A judgment sounding in local currency would patently fail to meet the justice of this case. Accordingly, I hold that the plaintiff is entitled to judgment in the agreed foreign currency denomination, *viz.*, in US dollars.

TENDER IN SETTLEMENT

In *Echodelta Ltd v Kerr & Downey Safaris (Pvt) Ltd* 2002 (1) ZLR 632 (H), ₧ evidence was adduced to the effect that the exchange rate on the parallel market was more attractive than the fixed statutory exchange rate. The reality of this situation was recognised by the Supreme Court in the *Lowveld Leather* case *supra*, where it was argued that the law would fail the parties if the appellant were permitted to pay the judgment debt in ZW dollars in accordance ₨ with its tender to the first respondent. Having regard to the huge disparity

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between the official exchange rate and the parallel market rate, the appellant ▲ stood to make a profit of an amount almost equal to the original loan amount. The court agreed that such a result would be grossly unfair and unjust and that it should not be sanctioned by it. The appeal was accordingly dismissed.

Similarly, in the *CBZ* case *supra*, the court agreed that the respondent's tender of the equivalent amount of the loan in local currency had been properly ▼ rejected and that the applicant was entitled to repayment and judgment in foreign currency. It was further held that, if for any reason the applicant was unable to recover the amount due in US dollars, it should recover the equivalent in local currency at the official exchange rate prevailing at the date of enforcement.

It is trite that the parallel exchange rate is not cognisable at law and cannot be ₣ enforced as a yardstick for payment under any circumstances. The governing rate for the purpose of converting a judgment debt at the date of execution must be the official exchange rate, *viz.*, that which is fixed from time to time by notice, order or direction made in terms of the Exchange Control Regulations 1996 (SI 109 of 1996) under the aegis of the Exchange Control Act [*Chapter 22:05*]. On that basis, it is arguable that a tender of the ZW dollar equivalent ▽ at the prevailing official rate in satisfaction of a judgment sounding in foreign currency must be recognised as fully absolving the judgment debtor. This is so because acceptance of the tender by the judgment creditor would obviate the need to execute on the judgment debt.

In casu, this is in effect the contention that is made on behalf of the defendants. £ However, while it is not entirely devoid of merit, the argument ignores the crucial fact that, because of the glaring disparity between the official and parallel rates, acceptance of the tender at the official rate would have operated at the relevant time so as to unjustly enrich the first defendant to an exorbitant and unconscionable extent and to the plaintiff's extreme detriment. And this was precisely the reason for rejecting the tenders in local currency in the cases ₦ that I have cited. Moreover, as explained in *Makwindi supra*, it is because execution cannot be levied in foreign currency that there must be a conversion into the local currency at the prevailing official rate for the limited purpose of enforcement – and for that purpose alone.

It is necessary, in my view, to distinguish a tender in settlement in local ₧ currency from the requirement to convert a judgment debt into local currency at the date of execution. Both take place at the official exchange rate, but the former is only allowed if repayment in local currency is agreed by contract or otherwise accepted by the creditor. In the absence of such agreement or acquiescence, a tender in local currency does not constitute sufficient discharge of an obligation sounding in foreign currency. ₨

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Patel J

A From a practical standpoint as well as in legal principle, the options for recovering a foreign currency debt must be left to the judgment creditor's discretion. In certain instances, it may be possible for the creditor to recoup the debt specifically in foreign currency from convertible currency assets held by the debtor, either within or outside this jurisdiction. If, however, all other options for recovery fail and it becomes necessary as a last resort to execute B against the debtor's local assets, the judgment debt must then be converted into local currency at the official exchange rate prevailing at the date of enforcement.

In the event, I hold that the tender of settlement made by the defendants in the sum ZW\$40 million in November 2003 did not and does not constitute C sufficient compliance with the first defendant's indebtedness in terms of the finance agreement.

COSTS

Cilliers *Law of Costs* 2 ed points out that an agreement to pay attorney and client costs is not prohibited by the common law and that the courts are D generally bound to give effect to such an agreement (para. 4.11). However, an award of costs on the higher scale is not lightly granted and the courts will grant such costs only on rare occasions (para 4.09). The learned author further observes that even the expression "all costs" does not include attorney and client costs (para 13.50).

Clause 2 of the plaintiff's General Conditions regulates the payment of legal E costs attendant upon enforcement. It stipulates that the first defendant is liable for, *inter alia*, "costs relating to the enforcement of [the] agreement, recovery of charges incurred or paid by the Bank for legal, accounting, audit, consultancy or monitoring services where applicable". As I read it, although this clause undoubtedly covers the recovery of costs relating to enforcement F and charges incurred by the plaintiff for legal services, it is not specific as to the scale of legal costs to which the plaintiff is entitled. In the absence of any such specific stipulation, the clause does not in my view justify or support the plaintiff's claim for costs on the higher scale.

Turning to the general rules governing costs, I am satisfied that the issues raised by the defendants for determination by this court are not frivolous or G vexatious. It cannot be said that the answers to the matters raised in defence are obvious or self-evident and that the litigation *in casu* was therefore unnecessary. Accordingly, I take the view that the plaintiff, although it has succeeded on the two principal issues in dispute, is only entitled to costs on H the ordinary scale.

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Patel J

ORDER A

In the result, it is ordered that judgment be entered for the plaintiff against the defendants jointly and severally, the one paying the others to be absolved, for payment of:

- (a) the sum of US\$668 676.27, being capital;
- (b) the sum of US\$46 509.35, being interest;
- (c) interest on the sum of US\$668 676.27 at the rate of 15 per cent *per annum*, with effect from 16 January 2003 to the date of payment in full; and
- (d) the costs of suit.

Sawyer & Mkushi, plaintiff's legal practitioners C

Costa & Madzonga, first and second defendants' legal practitioners

Coghlan, Welsh & Guest, third defendant's legal practitioners D

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/ESTATE
 UTAUMIRE & ANOR v KADZUNGE & ORS 2006 (2) ZLR 129 (H)

ESTATE UTAUMIRE & ANOR v KADZUNGE & ORS 2006 (2) ZLR 129 (H)**2006 (2) ZLR p129**

Citation	2006 (2) ZLR 129 (H)
Case No	Judgment No. HB-113-06
Court	High Court, Bulawayo
Judge	Bere J
Heard	25 August 2006
Judgment	31 August 2006
Counsel	<i>C Dube</i> , for the applicants <i>T Ndlovu</i> , for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

c Administration of estates — estate — protection of pending appointment of executor — who may bring action to protect estate — action may be brought by any person having an interest — wife under customary law — right of wife to bring action

Customary law — marriage — wife — right of widow under customary law to share of estate — right of widow to bring action to protect estate pending appointment of executor

Headnote

The deceased had entered into a marriage under the African Marriages Act [*Chapter 238 of 1974*]. Some 14 years later he married the second applicant in terms of customary law. Not long before he died, the [£]deceased entered into a lease agreement for premises in which he ran a supermarket and other shops, assisted by the second applicant. On his death, the first and second respondents, the lessors of the property, instructed the utilities to cease supplying electricity, water and telephone services to the premises and gave the second applicant notice to vacate. The second applicant brought an application in the name of the deceased's [£]estate and in her own name, seeking an order to restore the services and to allow the businesses to continue to operate without interference. The respondents' counsel argued that the first applicant had no *locus standi*, no executor having been appointed, and that the second applicant could not bring an action, as she was not party to the lease. He also argued that because the second applicant did not have a registered marriage with the [£]deceased, she could not claim to be a lawful wife for the purpose of protecting his estate.

Held, that it was not competent for the second applicant to act on behalf of the estate; only an executor could bring an action in the name of the estate. [£]

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Bere J

Held, further, that the deceased's first marriage was potentially polygamous [£]and so the second applicant's marriage to the deceased would safely have co-existed with the deceased's earlier marriage and would entitle her to a share of the deceased's estate. As the law relating to

administration of estates recognises an unregistered customary law union, the law must also recognise the need for any woman in such a union to take reasonable ^b steps to protect the deceased's estate whilst awaiting the formalities for the proper registration of that estate. It could not be argued that a woman in the position of the second applicant would not have *locus standi* to protect the deceased's estate. Even if she had been a mere manager of the deceased's businesses she would still be entitled at law to protect that property pending the regularisation of that estate. It is unimaginable ^c that, once someone is deceased, the duty to protect his estate exclusively rests with an executor. This duty to protect such property lies with any person who can demonstrate he or she has an interest in that estate. This is particularly so, given the fact that the appointment of an executor is certainly not an overnight exercise. It has its own formalities which have to be followed and in the interim the deceased's estate must be protected.
D

Cases referred to

Gartrell v Southern Life Assn 1909 TS 57

Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-Operative & Ors 1999 (2) ZLR 19 (S)

Zimnat Insurance Company Limited v Chawanda 1990 (2) ZLR 143 (S); 1991 (2) SA 825 (ZS) ^e

Legislation considered

Administration of Estates Act [*Chapter 6:01*], ss 23 & 68(3)

Case information

C Dube, for the applicants ^f

T Ndlovu, for the respondents

Judgment

BERE J: On 31 August 2006, I granted the following order and indicated that my reasons would follow.

"It is ordered:

1. That in the absence of a proper court order the first and second ^g respondents be and are hereby interdicted from interfering with the second applicant's occupation of the premises in question, namely, stand No. 942 Emakhandeni, Bulawayo, including the instruction to the third, fourth and fifth respondents to terminate their services to the said premises, including bringing or referring people to view the premises as potential tenants; ^h

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Bere J ^a

2. That the third, fourth and fifth respondents be and are hereby interdicted from terminating services to the phone shop's four lines, electricity and water to stand No. 942 Emakhandeni, Bulawayo, provided the second applicant continues to pay for such services;
3. That the first and second respondents or any person(s) acting or purporting to be acting in their interest keep absolute peace with the ^b second applicant or any of the employees on the estate property;
4. That the first and second respondents shall not harass, threaten or use abusive language against the second applicant or conduct themselves in any manner that might cause fear in the second applicant and or her employees;
5. That the first and second respondents pay costs on the ordinary ^c scale jointly and severally, the one paying the other to be absolved."

Here are my reasons.

On 18 February 1985, the late George Utaumire (the deceased) had his marriage with one Phoebe Machaka solemnized in terms of the then African Marriages Act [*Chapter 238 of 1974*] (now the Customary Marriages Act [*Chapter ^d 5:07*]). According to the second applicant, the deceased subsequently entered into a second but unregistered customary union with her seven years ago. Before his demise, the deceased had on 28 April 2004 entered into a ten year lease agreement with the first and second respondents for a property referred to as stand No. 942 Emakhandeni,

Bulawayo to run a supermarket, butchery and phone shop. The leased property is also commonly referred to as Woza Woza Supermarket.

The lease agreement was to commence on 1 May 2004 and continue for a period of 10 years. Upon assuming occupation, the deceased, together with the second applicant, started running the business operations. The second applicant states that she was actively involved in the running of the enterprises and was part of the management. This averment has not been controverted by the two respondents. The second applicant's averment that she was customarily married to the deceased about seven years ago, has equally not been seriously challenged by the respondents.

It appears from the papers that have been put before me that, despite the respondents having leased out their property to the deceased, the first respondent's name was retained in the registers of the service providers, namely, the third, fourth and fifth respondents. There is no suggestion in the filed papers that this arrangement presented any difficulties to the parties to the lease agreement.

As fate would have it, the deceased died before enjoying the full life span of the signed lease. When this occurred, the second applicant continued to run

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Bere J

the business entity in her capacity as the manager and surviving spouse of the deceased. She continued to honour all the bills by the above referred service providers.

When the first and second respondents got wind of the death of the deceased, they wrote to the second applicant, giving her notice to vacate the premises by 31 July 2006, failing which eviction proceedings would be instituted. The letter in question was dated 29 June 2006.

The second applicant's reaction to the letter was to approach her own legal practitioners who, through their letter of 13 July 2006 and on her behalf, pleaded with the first and second respondents to consider giving the second applicant three months' notice within which to wind up her operations.

Whilst all this was going on, the respondents then instructed the third, fourth and fifth respondents to terminate their services to the leased property. The termination was done on 12, 13 and 14 July and on the specific instructions of the first and second respondents.

Aggrieved by the sudden and unexpected turn of events, the second applicant filed an urgent chamber application in which she cited first applicant as the "Estate late George Utaumire" and herself as the second applicant.

When the matter was brought as an urgent chamber application on 16 July 2006, my brother Cheda felt compelled to grant the following provisional order:

"2. Interim Relief Sought

Pending the finalisation of this matter, the applicants be and are hereby granted the following interim relief:

- (i) That the first and second respondents be and hereby interdicted from interfering with the first applicant's operations at Woza Woza Supermarket, Butchery and phone shop at stand No. 942 Emakhandeni, Bulawayo including the bringing in or referring any other people thereat.
- (ii) That the third, fourth and fifth respondents be and are hereby ordered to immediately upon service of this order reconnect phone shop telephone lines, electricity and water respectively, to stand No. 942 Emakhandeni, Bulawayo.
- (iii) That the first and second respondents or any other person(s) acting or purporting to be acting in their interest keep absolute peace towards the second applicant or to any employee(s) of the first applicant at its business known as Woza Woza Supermarket situated at stand No. 942 Emakhandeni, Bulawayo, particularly that they do not harass, threaten or use abusive language or

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Bere J

A conduct themselves in any manner that might cause fear in her and the first applicant's employees."

The matter now before me is to consider confirmation or discharge of the provisional order granted.

Before the matter could be heard on merits, counsel for the respondents raised two pertinent points *in limine*. He argued that these two fundamental flaws ^B were, firstly, that the first applicant lacked *locus standi in judici* to initiate the current proceedings because, in the absence of an executor having been duly appointed, the first applicant had no legal status and therefore could not be referred to as a properly constituted party to any proceedings. See s 23 of the Administration of Estates Act [Chapter 6:01] and s 68B of the Act, inserted ^C by the Administration of Estates Amendment Act 6 of 1997.

This point was conceded by counsel for the applicants and I am satisfied that that indeed is the legal position and that the concession was properly made. See *Gartrell v Southern Life Association* 1909 TS 57, where the point was made that it is imperative that the executor firmly takes charge of litigation on behalf of or against a deceased's estate. It is therefore, the court's position ^D that the citation of the estate of the late George Utaumire as the first applicant was not competent and the first applicant was therefore, not properly before the court.

The second point raised *in limine* was targeted on the *locus standi* of the second applicant. The point was aggressively made, that the lease agreement ^E having been between the deceased and the first and second respondents, the lease agreement therefore terminated with the demise of the deceased and the second applicant could not sue on the lease agreement which she was not party to.

The point was also made loud and clear that, because the second applicant did not have a registered marriage with the deceased, she could not claim to ^F be a lawful wife of the deceased for purposes of laying her hands on the deceased's estate.

Mr *Dube*, for the first and second applicants, argued that the second applicant, having been customarily married to the deceased, had *locus standi* to protect the deceased's estate in terms of s 42 of the Administration of Estates Act. ^G He further sought to buttress his position by relying on the decision in *ZIMNAT Insurance Co Ltd v Chawanda* 1990 (2) ZLR 143 (S), where, after extensive reference to other decisions, the court concluded that a wife married under an unregistered customary union had a right to sue the insurance company for loss of support brought about by the untimely death of her ^H husband. The insurance company's liability stemmed from it being the insurer

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Bere ^J

of the offending motor vehicle which was alleged to have caused the ^A deceased's death.

Although the case cited by Mr *Dube* was not dealing with a similar scenario as in the instant case, I am sufficiently persuaded that the principle of law enunciated therein would apply in the instant case.

It is also clear from the papers filed that the deceased had, prior to staying with ^B the second applicant, entered into a potentially polygamous marriage with one Phoebe Machaka. The second applicant said she was married to the deceased in terms of an unregistered customary union and that she had been in this relationship for seven years prior to the deceased's death.

It is clear to me that if the second applicant's position is true, then her marriage ^C to the deceased would safely have co-existed with the deceased's earlier marriage and would entitle her to a share of the deceased's estate. This position is fortified by s 68(3) of the Administration of Estates Act, as amended by Act 6 of 1997, which is worded as follows:

"(3) A marriage contracted according to customary law shall be regarded as a valid marriage for the purposes of this part, notwithstanding that ^D it has not been solemnized in terms of the Customary Marriages Act [Chapter 5:07] ..."

If the law recognises an unregistered customary law union, it must recognise the need for any woman in such a union to take reasonable steps to protect the deceased's estate whilst awaiting the formalities for the proper registration of that estate. It would be idle reasoning in my view, for anyone to argue that ^E a woman in the position of the second applicant would not have *locus standi* to protect the deceased's estate. It does seem to me further that even if the second applicant turns out to have been a mere manager of the deceased's businesses, she would still be entitled at law to protect that property pending the regularisation of that estate. It is unimaginable, in my view, that once ^F someone is deceased the duty to protect his estate exclusively rests with an executor. It is clear to me that this duty to protect such property lies with any person who can demonstrate he or she has an interest in that estate. This is particularly, so given the fact that the appointment of an

executor is certainly not an overnight exercise. It has its own formalities which have to be followed and in the interim the deceased's estate must be protected. ^g

Having made a finding that the second applicant had *locus standi* to bring the action before this court, I am satisfied that, in essence, her application before the court was one for a spoliation order. I move on to consider the requirements for the order sought. It is trite that in order to obtain a *mandament van spolie* or spoliation order, the applicant must show that: ^h

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Bere J ^a

- (a) He was in peaceful and undisturbed possession of the thing; and
- (b) he was unlawfully deprived of such possession.

As McNally JA stated in *Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-Operative & Ors* 1999 (2) ZLR 19 (S) at 21, the only valid defences that may be proffered are: ^b

- (a) the applicant was not in peaceful and undisturbed possession of the thing in question at the time of dispossession;
- (b) the dispossession was not unlawful and therefore did not constitute spoliation;
- (c) the restoration of possession is not impossible; ^c
- (d) The respondent acted within the limits of counter-spoliation in regaining possession of the article.

I am more than satisfied that, as manager and one of the deceased's surviving spouses, in running Woza Woza Supermarket and other ancillary businesses, thereat, the second applicant was indeed in peaceful and undisturbed ^d possession of the business entity, despite her not having been part and parcel of the leasing arrangement.

I am further satisfied that the first and second respondents' decision to instruct the third, fourth and fifth respondents to terminate services on the leased property was calculated to unlawfully interfere with the second applicant's peaceful and undisturbed possession of the leased property.

^eI accept that the first applicant has been wrongly cited and, further, that being a deceased estate matter, the Assistant Master should have been cited in these proceedings. However, I do not accept that both these omissions are fatal to the order sought by the second applicant, whom I hold to have *locus standi* to seek an order for spoliation.

^fI was satisfied that the second applicant was able to establish all the requirements for spoliation and accordingly, I felt inclined to confirm the provisional order granted by Cheda J on 16 July 2006.

Dube and Partners, applicants' legal practitioners

^g *Cheda and Partners*, first and second respondents' legal practitioners

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TEL*ONE (PVT) LTD v COMMUNICATIONS & ALLIED SERVICES WORKERS' UNION 2006 (2) ZLR 136 (S)

2006 (2) ZLR p136

Citation	2006 (2) ZLR 136 (S)
Case No	Judgment No. S-26-06
Court	Supreme Court, Harare

Judge	Chidyausiku CJ, Cheda JA & Ziyambi JA
Heard	19 June 2006
Judgment	12 September 2006
Counsel	<i>S V Hwacha</i> , for the appellant <i>L T Biti</i> , for the respondent
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

Employment — strike — right of employee to take part in strike — disciplinary proceedings under code of conduct — may be brought against employees participating in unlawful job action

Employment — trade union — locus standi to participate in legal proceedings — review proceedings — trade union bringing application in its own name although not directly a party to proceedings being brought on review — right of union to bring application

Practice and procedure — parties — locus standi — trade union — locus standi to participate in legal proceedings — review proceedings — trade union bringing application in its own name although not directly a party to proceedings being brought on review — right of union to bring application

Headnote

Employees of the appellant corporation, at least some of whom were employees rendering an essential service, took part in a strike. The Minister of Labour issued a disposal order which was set aside by the Labour Court on technical grounds. In the meantime, the appellant suspended the striking workers without pay and charged them under the applicable code of conduct. The striking workers were all dismissed as a result of the disciplinary proceedings. The respondent trade union brought the matter on review in the High Court in its own name, not in the names of any of the employees.

Three questions arose for determination: (1) whether the union had *locus standi* in the matter; (2) whether the High Court should have heard the matter, domestic remedies not having been exhausted; and (3) whether the appellant should have followed the procedures laid down in the Labour Act [Chapter 28:01] and was barred from proceeding under the

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Chidyausiku CJ

A code of conduct. In this regard, it was argued that strike action is a collective game of power between an employer and an employee and that an employee who participates in this game of power cannot be disciplined for narrow breaches of his contract of employment arising from engagement in that game of power. Whenever there is collective job action the issue is no longer one of the narrow breach of the contract of employment, and the code of conduct is ousted and has no application.

The High Court determined: (1) that the union had *locus standi*; (2) that the High Court had jurisdiction despite the employees' failure to exhaust their domestic remedies; and (3) that it was irregular for the appellant to conduct disciplinary proceedings in terms of the code of conduct in respect of misconduct arising from the collective job action. The appellant appealed. Without deciding whether the collective job action was lawful or not, the court:

Held, that generally speaking, only parties to the proceedings can challenge on review or appeal the outcome of such proceedings. Section 29 of the Act confers on a trade union the right to sue or to be sued or to be joined as a party to proceedings but that did not make the respondent, by virtue of its being a trade union, a party to the proceedings. However, in this matter the

disciplinary proceedings were part and parcel of the ongoing dispute between the appellant and the employees and their representative union, the respondent. To insist in the light of these facts that the respondent was not a party to the disciplinary proceedings, which were ^ε part of the ongoing dispute between the appellant and the respondent, was pedantic and too technical. In addition, the employees were members of the respondent and had authorised the respondent in writing to institute the proceedings.

Held, further, that the High Court had a discretion to hear the matter and it had not been shown that the exercise of that discretion was unreasonable.

^ε *Held*, further, that an employee cannot be dismissed from employment for participating in a lawful collective job action, even if such participation contravenes a code of conduct, such as absence from work in excess of five days contrary to the provisions of the code of conduct. There was nothing in the language of the Act, either express or implied, that codified ^ε the proposition advanced by the respondent, that once employees were participating in a strike, the code of conduct was *ipso facto* ousted. None of the relevant provisions of the Act barred an employer from disciplining employees engaged in an unlawful collective job action in terms of a code of conduct. Nothing in the Act limited an employer to taking disciplinary action against employees to situations where there is specific prescription ^η of unlawful collective job action in the code of conduct. It was lawful for

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the appellant to charge the employees with absence from work in ^α contravention of the code of conduct. It was open to the employees then to plead participation in a lawful collective job action. This they did not do, and probably could not have done, as they were employed in an essential service. ^β

Cases cited

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

Black Allied Workers' Union & Ors v Prestige Hotels CC 1993 (14) ILJ 963

*Net*One Cellular (Pvt) Ltd v Communications & Allied Services Workers' Union* S-89-05 ^γ

SACTWU & Ors v Novel Spinners (Pty) Ltd 1999 (11) BLLR 1157

ZISCO v Dube & Ors 1997 (2) ZLR 172 (S)

Legislation considered

Labour Act [*Chapter 28:01*], ss 29 & 102; Part XIII

Labour (Declaration of Essential Services) Notice 2003 (SI 137 of 2003) ^δ

Case information

S V Hwacha, for the appellant

L T Biti, for the respondent

Judgment

CHIDYAUSIKU CJ: This is an appeal against a judgment of the High Court ^ε (Makarau J (as she then was)). The facts of the matter are, to a very large extent, common cause. They are as follows:

On 6 October 2004, some employees of the appellant embarked on a collective job action. The collective job action was in the form of the employees absenting themselves from work. On 19 October 2004, the Minister of Public ^ε Service, Labour and Social Welfare ("the Minister") issued a show cause order against the employees on strike. On 9 November 2004, the show cause order was set aside on technical grounds by the Labour Court. As a result of the Labour Court's ruling, no disposal proceedings were held under the provisions of Part XIII of the Labour Relations Act [*Chapter 28:01*] (hereinafter referred to as "the Act"). ^ε

Meanwhile, on 15 October 2004, the appellant suspended the employees who were on strike without pay and other benefits and proceeded to charge them under its Code of Conduct ("the Code") with

absence from work, disobedience to a lawful order, and disregarding standing procedures. In December 2004, the appellant conducted disciplinary hearings for each employee charged, ^h

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^a culminating in the dismissal of the employees. The dismissal proceedings were held under, and in terms of, the Code.

The respondent, the Communications and Allied Services Workers' Union ("the Union"), then filed an application in the High Court for a review of the disciplinary proceedings in its own name, and as the only applicant in the review. The court *a quo* determined on the facts that the Union had *locus standi* ^b to file the review in its own name, that the High Court had jurisdiction to review the disciplinary proceedings despite the employees' failure to exhaust domestic remedies before approaching the High Court, and that it was irregular for the appellant to conduct disciplinary proceedings in terms of the Code in respect of misconduct arising from the collective job action.

^c The appellant was dissatisfied with that judgment and appealed to this court. The notice of appeal reveals essentially three grounds of appeal, firstly, that the respondent, who was not a party to the disciplinary proceedings, had no *locus standi* to bring this matter in its own name; secondly, that the High Court erred in assuming jurisdiction in this matter when the employees had not exhausted the domestic remedies available to them; and, thirdly, that the court *a quo* ^d erred in holding that the appellant was legally bound to follow procedures laid down in Part XIII of the Act and was barred from using its disciplinary Code in disciplining the employees.

Thus, this court needs to determine whether the court *a quo* was correct in holding as it did that:

- (1) the respondent had *locus standi* in this matter;
- (2) the High Court had jurisdiction to determine this matter; and (3) the appellant ^e was barred from using its Code to discipline its employees in the circumstances of this case.

Before dealing with the above three issues, I wish to make the following observations on the issue of the lawfulness or otherwise of the collective job action in this case. The parties are in disagreement on the issue.

^f Mr *Hwacha*, for the appellant, contends that the collective job action was unlawful because members of the respondent who are employees of the appellant are prohibited from engaging in collective job action by Statutory Instrument 137 of 2003 ("the Statutory Instrument"), as read with s 102 of the Act. The SI declares the appellant an essential service. It provides in the ^g relevant section, s 2(f)(i), as follows:

- "2. The following services are hereby declared to be essential services in terms of s 102 of the Act —
 - a) — (e) ...
 - f) transport and communication services provided by —
 - (i) telecommunication technicians, drivers and mechanics in ^h the industry;"

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Chidyausiku CJ

It is common cause that collective job action in essential services is prohibited ^a in terms of the Act.

Mr *Biti*, for the respondent, on the other hand, contends that it is not every employee of an essential service, such as the appellant, who is prohibited from engaging in collective job action. He argues that it is only those employees employed in certain categories in an essential service that are prohibited from ^b engaging in collective job action.

There is no doubt that some of the appellant's employees who participated in the collective job action were prohibited from doing so by s 2(f)(i) of the statutory instrument, as read with s 102 of the Act. There may be some doubt in respect of others. Consequently, those of the appellant's employees who participated in the strike action and who are prohibited from collective job ^c action by the Statutory Instrument did so unlawfully. It is not possible to determine on the record which of the appellant's employees went on strike unlawfully.

The learned judge in the court *a quo* assumed that the collective job action was lawful and determined the matter on that basis. It is not entirely clear on ^d what basis the court *a quo* assumed that the collective job action was lawful. It would appear that the learned judge's assumption was

based on the Labour Court's ruling that set aside the show cause order issued by the Minister. The Minister's show cause order purported to terminate the collective job action. It would appear that the learned judge's attention was not drawn to s 2 of the statutory instrument, as read with s 102 of the Act, which prohibits employees ^E of the appellant from collective job action. I am sure if her attention had been drawn to the above provisions she might have refrained from assuming that the strike action was lawful.

Be that as it may, I agree with Mr *Hwacha's* submission that the issues that fall for determination in this appeal can be determined without the need to ^F determine the issue of whether the collective job action was lawful or not.

I will now turn to deal with the three issues.

(1) DOES THE RESPONDENT HAVE LOCUS STANDI?

The disciplinary proceedings which resulted in the dismissals of the appellant's employees were brought against each employee personally and each employee ^G was notified of the proceedings personally. The outcome of the proceedings was notified to each employee personally. In some instances each employee appealed against the ruling of the disciplinary body in terms of the Code.

Mr *Hwacha's* contention in this regard is succinctly captured in para 6 of his heads of argument, wherein he makes the following submission: ^H

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A " Despite it having been clear who the parties to the initial hearings were, the court *a quo* considered and determined that it was legally competent that an omnibus review of those earlier proceedings was brought by a body which was *clearly not a party in the first place*. It is the appellant's submission that the court *a quo* erred in this regard" (my emphasis).

Put differently, Mr *Hwacha's* contention is that a party that was not privy to ^B the original proceedings cannot apply for the review of such proceedings. I recognise the cogency of this submission. The proposition that only parties to the proceedings can challenge on review or appeal the outcome of such proceedings admits of little doubt.

The court *a quo*, however, reached the conclusion that, although the ^C respondent was not a party to the disciplinary proceedings, it had *locus standi* to challenge on review the outcome of the disciplinary proceedings. In coming to this conclusion, the court *a quo* relied on the provisions of the Act, in particular s 29(4)(d). In this regard, the learned judge reasoned and concluded thus at p 3 of the cyclostyled judgment:

"10. Dealing with the first issue, I note that s 29(2) of the Act clothes trade ^D unions with corporate status and specifically provides that trade unions shall be capable of doing all such acts that are authorised by its constitution. The section proceeds in subs (4)(d) to grant a trade union the right to make representations before any determining authority or the Labour Court.

11. In my view, the fact that the Act entitles (vests?) a registered trade ^E union with the right to make representations before any determining authority or the Labour Court does not limit it to that role only, as suggested by Mr *Hwacha*. It appears to me that if its constitution authorises it to sue and be sued on behalf of its membership, a trade union can bring or defend representative actions on behalf of its members. In my further view, s 29(4)(d) is expressly providing for a ^F trade union to have a voice in labour disputes that are before determining authorities and the Labour Court, which voice may have been denied at common law and on the narrow construction of the general rule governing rules of procedure as to who may address a determining authority or court in formal hearings.

12. It is my further view that in addition to having a voice before a ^G determining authority and the Labour Court, a trade union may be a party before this court as long as its constitution allows it to sue in the subject matter and as long as it can establish a standing before this court."

In concluding thus, the learned judge also placed reliance on *Zimbabwe ^H Teachers' Association & v Minister of Education & Culture* 1990 (2) ZLR 48

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(H) and *Law Society of Zimbabwe & Ors v Minister of Finance* 1999 (2) ZLR 231 (S). ^A

Sections 29(2) and 29(4)(d) of the Act provide as follows in relevant part:

"29 Registration and certification of trade unions and employers organisations and privileges thereof

(1) ... B

(2) Every trade union, employers' organisation or federation shall, upon registration, become a body corporate and shall in its corporate name be capable of suing and being sued, of purchasing or otherwise acquiring, holding or alienating property, movable or immovable, and of doing any other act or thing which its constitution requires or permits it to do, or which a body corporate may, by law, do. c

(3) ...

(4) Subject to this Act, a registered or certified trade union or federation of such unions shall be entitled —

a) - (c) ...

d) to make representations to a determining authority or the Labour D Court; and ...".

It is quite clear that s 29 of the Act, which the learned Judge relied on, confers on the respondent the *locus standi* to sue and to be sued in its own name in matters such as *in casu*. Section 29 of the Act, however, does not make a trade union such as the respondent a party to proceedings which the trade union has not commenced or in respect of which the trade union has not been cited E or joined as a party. Section 29 of the Act merely confers on a trade union the right to sue or to be sued or to be joined as a party to proceedings. In my view, s 29 of the Act does not make the respondent, by virtue of its being a trade union, a party to the present proceedings.

However, there are facts peculiar to this case that militate against refusing the F respondent *locus standi*. The record reveals that the respondent gave notice to the appellant that the appellant's employees who were members of the respondent intended to embark on collective job action. Following this, the appellant applied to the Minister for a show cause order. The Minister issued the show cause order, which prohibited the collective job action. The respondent successfully appealed to the Labour Court against the Minister's G show cause order. The parties in those proceedings were the respondent as the appellant, and the present appellant and the Minister were the respondents. Following the Labour Court's determination setting aside the show cause order, the appellant instituted disciplinary proceedings against its employees. Correspondence between the parties clearly shows that the disciplinary proceedings were part and parcel of the ongoing dispute between the H

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A appellant on the one hand and the employees and their representative union, the respondent, on the other hand. In my view, to insist in the light of these facts that the respondent was not a party to the disciplinary proceedings, which were part of the ongoing dispute between the appellant and the respondent, is pedantic and too technical. Apart from this, the employees are members of the respondent and they authorised the respondent to institute B the proceedings in terms of a document on p 74 of the record, which reads in part:

"We, the undersigned, hereby authorise the Union to institute High Court proceedings on our behalf, against Tel-One (Pvt) Ltd, for unfairly dismissing us following a collective job action.

A At the time of the collective job action, which we believe was engaged upon in compliance with the Labour Act, (we) were fully paid up members of the Union."

Thereunder the signatures of the various employees of the appellant who were members of the respondent are attached.

Thus, while I agree with Mr *Hwacha* that a party that was not privy to the D original proceedings cannot appeal against or take on review a decision of a court *a quo*, the facts of this case are somewhat peculiar. They clearly show that the present case was an ongoing process of litigation between the respondent and the appellant, in which at one stage the respondent was not joined as a party. In these circumstances, it would be a travesty of justice to E deny the respondent *locus standi*.

I accordingly come to the conclusion, though for reasons different from those of the court *a quo*, that the court *a quo* was correct in concluding that the respondent had *locus standi* to bring the application.

This ground of appeal therefore fails.

F (2) DID THE HIGH COURT HAVE JURISDICTION TO ENTERTAIN THE REVIEW PROCEEDINGS?

Mr *Hwacha*, in his heads of argument, accepts that the High Court enjoys a discretion to hear a matter where other domestic remedies have not yet been exhausted. It therefore follows that the High Court had a discretion to hear this matter and it decided to hear it. That being the case, the issues that then fall ^G for determination are whether there was a misdirection in the exercise of the discretion and whether the court *a quo* was grossly unreasonable in exercising the discretion in favour of hearing the matter.

No misdirection has been alleged.

I see nothing in the heads of argument of counsel for the appellant that ^H suggests that the exercise of the discretion was grossly unreasonable. At

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best, Mr *Hwacha* advances reasons why it would have been better for the ^A court *a quo* to have declined to exercise its discretion. So, even if this Court were to agree with him, this would not assist his case, as this does not amount to gross unreasonableness in the exercise of a discretion.

Accordingly, this ground of appeal fails as well.

(3) DOES PART XIII OF THE ACT BAR AN EMPLOYER FROM ^B TAKING DISCIPLINARY ACTION IN TERMS OF ITS CODE AGAINST EMPLOYEES WHO PARTICIPATE IN COLLECTIVE JOB ACTION?

The appellant's contention in the court *a quo*, and indeed in this court, was that there was no law which barred the appellant from relying on its Code of Conduct in taking disciplinary action against those of its employees that had ^C taken part in the unlawful collective job action. The appellant argued that ss 106-107 of the Act do not impose a mandatory procedure to be followed whenever there is collective job action.

In essence, the appellant's stance is that, although Part XIII of the Act provides for the resolution of a collective job action, it does not bar an ^D employer from resorting to a Code of Conduct to discipline employees who will have participated in such collective job action.

Mr *Biti*, on the other hand, submitted that collective job action or strike action is *sui generis*. Strike action, he argued, is a collective game of power between an employer and an employee and that an employee who participates in this ^E game of power cannot be disciplined for narrow breaches of his contract of employment arising from engagement in that game of power. Put simply, whenever there is collective job action the issue is no longer one of the narrow breach of the contract of employment, and the code of conduct is ousted and has no application. For this proposition he relied on *SACTWU & Ors v Novel Spinners (Pvt) Ltd* 1999 (11) BLLR 1157 and *Black Allied Workers' Union & ^F Ors v Prestige Hotels CC t/a Blue Waters Hotel* (1993) (14) ILJ 963 at 972(a)-(c), where the following was stated:

"The right to strike is important and necessary to a system of collective bargaining. It underpins the system – it obliges the parties to engage thoughtfully and seriously with each other. It helps to focus their minds on the issues at stake and to weigh up carefully the costs of failure to reach ^G agreement.

If an employer facing a strike could merely dismiss the strikers from employment by terminating their employment contracts then the strike would have little or no purpose. It would merely jeopardise the rights of employment of the strikers. The strike would cease to be functional to ^H

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^A collective bargaining and instead it would be an opportunity for the employer to take punitive action against the employees concerned."

I agree with the above in as far as it relates to a lawful collective job action. I do not understand the above remarks to apply to an unlawful collective job action. I have no doubt that an employee cannot be dismissed from employment for participating in a lawful collective job action, even if such participation ^B contravenes a code of conduct, such as absence from work in excess of five days contrary to the provisions of the code of conduct.

Mr *Biti* further submitted that it is precisely because of the *sui generis* nature of the strike action that any misconduct arising therefrom is not punished by way of Part IV of the Act but rather by way of Part XIII of the Act. He submitted c that the only qualification is that where participating in an unlawful collective job action has been specifically proscribed in a Code of Conduct, then the Code of Conduct may be used. For this submission, he relied on *Zimbabwe Iron and Steel Co Ltd v Dube & Ors* 1997 (2) ZLR 172 (S). In particular, he relied on what Gubbay CJ had to say at pp 176B-177A of the judgment:

"The real point to decide, so it seems to me, is whether it was the legislative d intention that employees who have taken part in unlawful collective job action are only dismissable under the direction of a disposal order – such conduct not being subject to a code of conduct. Put differently, that ss 104 to 108 in Part XIII of the Act are specifically designed to deal with all forms of collective job action.

This was the main and most weighty argument that Mr *Nherere* advanced e on behalf of the respondents. Acknowledging that the bringing of disciplinary proceedings under a code of conduct would be permissible where the charges resulted from the taking of collective job action, as for instance theft or wilful destruction of the employer's property, counsel submitted that such conduct was not dependent on the unlawfulness or otherwise of collective job action.

f It is true, as was emphasised, that Part XII of the Act is concerned with the determination of disputes and unfair labour practices; Part XIII with collective job action. But these Parts are not mutually exclusive. Section 107(5)(a) details the powers conferred upon an appropriate authority in the making of a disposal order in the case of unlawful job action. Although the power to dismiss specified employees or categories g of employees engaged in the unlawful h collective job action is provided for in para (iv), its exercise is discretionary. The appropriate authority need not have recourse to it. Instead, the appropriate authority may decide merely to suspend the employer's liability to pay part of wages due to specified employees in respect of part of the duration of the unlawful collective job action (see para (i)); or suspend, with pay, specified

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employees for a defined period (see para (ii)); or take no disciplinary A measures against the employees. *In casu* the disposal order of 26 March 1995 only directed that the unlawful job action be terminated. It was not directed to the liability of the respondents involved in the unlawful strike for disciplinary proceedings.

Accordingly, it is my view that a disposal order made pursuant to s 107(5)(a) of the Act, in which the dismissal of specified employees had B not been ordered by the appropriate authority, does not bar the employer, under a code of conduct which categorised 'illegal industrial action' as a dismissal offence, from subsequently charging that offence and applying the prescribed penalty to those employees found guilty. Plainly, there is no provision, either express or implied, in Part XIII of the Act to the effect that a disposal order grants immunity from the unlawful collective job C action referred to in it."

Mr *Biti* also contended that the learned judge in the court *a quo* was correct in her reasoning and in concluding that:

- "28. Section 102 of the Labour Act provides that, subject to the provisions of the Act, all employees, workers' committees and trade unions shall have the right to resort to collective job action to resolve disputes of D interest. The Act proceeds under s 107 to provide for the issuance of disposal orders disposing of illegal collective action. In s 108(3) the Act affords protection to employees engaged in lawful collective job action. Such employees are not liable for breach of contract and their employment shall not be terminated on the ground that they engaged in a lawful collective job action. E
29. In my view, it is these clear provisions of the law that provide the short answer to Mr *Hwacha's* submission and bar the respondent from resorting to its code of conduct to discipline employees that engaged in the collective job action.
30. For the respondent to proceed to charge the employees who engaged F in collective job action under its code was grossly irregular and flies in the face of the express letter of the law. It is not permissible. It seeks in vain to make the code superior to the provisions of the Act under which the code is registered. A code is not part of the *corpus juris* of this country. It is essentially part of the terms of the contract of employment between employer and employee. It cannot override the law of the country." G

I agree with the learned judge to the extent that her remarks relate to lawful collective job action. I have some doubt that her remarks, as Mr *Biti* seems to imply, include unlawful collective job action.

While Mr *Biti's* submission that once the employees are engaged in collective job action the code of conduct is ousted and the action becomes a power game H

Chidyausiku CJ

A between an employer and the employees has some merit as a labour relations management principle, this has not been incorporated in the Act.

There is nothing in the language of the Act, either express or implied, that codifies the proposition advanced by Mr *Biti*. If anything, certain sections of Part XIII of the Act suggest the contrary. Thus, ss 108 and 109 of the Act provide for immunity for participating in a lawful collective job action and B criminalises participation in an unlawful collective job action.

The issue here is one of interpretation. In particular, what meaning is to be ascribed to Part XIII of the Act. Part XIII of the Act consists of ss 102 to 112. Section 102 is a definition section, which defines what constitutes a disposal order, a lawful collective job action, a lock-out and a show cause order. C Section 103 provides for appeals against a declaration of an occupation or service as an essential service by the Minister. Sections 104 and 105 create the right to resort to collective job action and sets out the procedures to be followed on embarking on a lawful collective job action or lock-out. Sections 106 and 107 provide the modalities for the management of collective job actions through the use of show cause orders and disposal orders. I see D nothing in the language of these two sections which prohibits or proscribes the use of a code of conduct by employers to discipline employees who will have participated in an unlawful collective job action or absented themselves from work by reason of participating in an unlawful collective job action. As I have said, ss 108 and 109 deal with the immunity of participants in a lawful E collective job action and criminalise participation in an unlawful collective job action. Section 110 provides for appeals against a show cause order, while s 111 provides for the cessation of collective job action. Section 112 deals with offences and mitigating factors. None of the above sections bar an employer from disciplining employees engaged in an unlawful collective job action in terms of a code of conduct.

F The issue of the proper construction or interpretation of Part XIII of the Act in relation to codes of conduct is not new. This court has had occasion to consider and determine this issue in a number of cases –

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

In the *Cargo Carriers* case *supra* the employer sought to dismiss some three G hundred and forty employees through the use of its code of conduct. Notice of disciplinary proceedings to the three hundred and forty employees was pinned on the entrance to the employer's premises. Very little time was given to the workers in this notice. The employer thereafter instituted disciplinary hearings *en masse*. The employer found the employees guilty *en masse* and punished them *en masse*. The code of conduct provided that disciplinary H action against an employee be conducted on an individual basis. The

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disciplinary proceedings were set aside as irregular on the basis that the A events of the collective job action simply dwarfed the code of conduct and that in a situation like that it was appropriate to deal with such industrial action in terms of ss 105-107 of the Act. The *Cargo Carriers* case *supra* is authority for the proposition that where the collective job action is massive it would be inappropriate to deal with it in terms of a code of conduct. Part XIII of the Act, B as opposed to a code of conduct, provides the correct procedure to follow in such circumstances.

The *Cargo Carriers* case *supra* is no authority for the proposition that it would be irregular to discipline employees in terms of a code of conduct in every case where there has been a collective job action. It certainly is authority for the proposition that where the particular facts of the case dwarf the code C of conduct it would be inappropriate to use a code of conduct.

(b) *Zimbabwe Iron and Steel Co v Dube & Ors* 1997 (2) ZLR 172 (S)

In the *Zimbabwe Iron and Steel Co* case *supra* the employees participated in an industrial action which was unlawful. The code of conduct specifically provided that engaging in an unlawful collective job action constituted D misconduct. The employer instituted disciplinary proceedings in terms of the code of conduct and dismissed the employees. The court held that disciplinary proceedings in terms of the code of conduct for participating in the unlawful collective job action were competent and confirmed the dismissal of the employees.

I do not accept Mr *Biti's* contention that it is only in those instances where ^ε participating in an unlawful collective job action is expressly prohibited in terms of the code of conduct that disciplinary action can be taken against the employees in terms of the code of conduct. I see nothing in the Act that limits the employer to taking disciplinary action against employees to situations where there is specific prescription of unlawful collective job action in the code ^ϕ of conduct.

(c) *Net*One Cellular (Pvt) Ltd v Communications and Allied Services Workers Union S-89-05*

In the *Net*One* case *supra*, I made the following observation at p 19 of the cyclostyled judgment: ^g

“By parity of reasoning, there is nothing in Part XIII of the Act which bars the appellant (the employer) from taking disciplinary action against employees for absenting themselves from work for a period in excess of five consecutive days in terms of ... the code, which is precisely what the appellant did in this case ...” ^h

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A There is nothing that I have heard in the instant case which would cause me to reconsider what I said in the *Tel*One* case *supra*. I hold the view that Part XIII of the Act does not bar an employer from conducting disciplinary proceedings against employees for absenting themselves from work for a period in excess of five days if such is prohibited in terms of a code of conduct. It is up to the employee to raise as his defence that he was absent from work ^b for the period in question by reason of participating in a lawful industrial action. Participation in a lawful industrial action is a sufficient defence to such a charge – see s 108 of the Act. However, participation in an unlawful collective job action does not provide a defence to such a charge.

The respondent and those employees who were dismissed in the present case ^c did not raise the defence of participation in a lawful collective job action. Accordingly, there is no basis for holding that their dismissals were unlawful. It was lawful for the employer to charge the employees with absence from work in contravention of the code of conduct. It was open to the employees to plead participation in a lawful collective job action. They did not. Because the employees are employed in an essential service, I doubt if the employees could ^d have successfully raised that defence.

On that basis the appeal succeeds and the order of the High Court is altered to read:

“The application for review is dismissed with costs.”

The appellant has been substantially successful and is entitled to its costs. ^ε Accordingly, the respondent is ordered to pay the appellant's costs.

CHEDA JA & ZIYAMBI JA concurred.

Dube, Manikai & Hwacha, appellant's legal practitioners

^ϕ *Honey & Blanckenberg*, respondent's legal practitioners

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UNITED BOTTLERS v KADUYA 2006 (2) ZLR 150 (S)

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Citation	2006 (2) ZLR 150 (S)
Case No	Judgment No. S-34-06
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA and Cheda JA

Heard	16 January 2006
Judgment	12 September 2006
Counsel	<i>G T Mamvura</i> , for the appellant <i>T Sakutukwa</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — dismissal — wrongful — distinction from wrongful suspension c — wrongfully dismissed employee has duty to mitigate his damages — wrongfully suspended employee has duty to remain available for employment by his employer

Employment — labour legislation — Labour Relations Act [Chapter 28:01] — s 2A — section does not provide for a wholesale amendment of the d common law

Employment — suspension — unlawful — a repudiation of contract of employment by employer — options open to employee — accept repudiation or enforce contract — employee who takes up alternative employment accepts the employer's repudiation — in that event damages e for breach of contract is employee's only remedy — calculation of damages

Headnote

Section 2A of the Labour Relations Act [Chapter 28:01] sets out the objectives of the Act and specifically provides that in the event of conflict between the Labour Relations Act and "any other" enactment, f the Act shall prevail. The section is not a wholesale amendment of the common law. The common law can only be altered by an explicit provision of the Labour Relations Act.

Where an employee is under suspension and he takes up employment elsewhere, he terminates his employment. An unlawful suspension of an g employee is a repudiation of the contract of employment by the employer. The employee can elect either to accept the repudiation or enforce the contract. A wrongfully suspended employee has a duty by operation of law to remain available for employment by his employer. If he accepts alternative employment, by that fact alone he accepts d the employer's repudiation and his only remaining remedy is to sue the employer for h

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Chidyausiku CJ

A damages for breach of contract. His damages for wrongful dismissal can only be calculated from date of wrongful suspension until the date he took the other employment.

It is incorrect to equate the position of a wrongfully suspended employee with that of a wrongfully dismissed employee. A wrongfully dismissed employee has a duty to mitigate damages by finding alternative as soon b as possible, whereas a wrongfully suspended employee has a duty to remain available for employment by his employer.

Cases cited

Ambali v Bata Shoe Co Ltd 1999 (1) ZLR 417 (S)

c *Zimbabwe Sun Hotels (Pvt) Ltd v Lawn* 1988 (1) ZLR 143 (S)

Legislation considered

Labour Relations Act [Chapter 28:01], s 2A

Case information

D G T Mamvura, for the appellant

T Sakutukwa, for the respondent

Judgment

CHIDYAUSIKU CJ: This is an appeal against a judgment of the Labour Court. The issue in this case is the quantification of damages.

The appellant suspended the respondent from work without pay and benefits ^E on 15 March 1999. The matter was heard before a labour relations officer, who ordered that the respondent be reinstated without loss of pay and benefits, alternatively that he be paid his wages up to 30 January 2000 plus three months' pay as damages and cash in lieu of leave. The appellant took the matter on review before a senior labour relations officer. On review, the senior ^F labour relations officer upheld the decision of the labour relations officer, but ordered that the wages were to be paid up to 30 June 2000.

The appellant appealed to the Labour Court against the decision of the senior labour relations officer. The Labour Court directed that the appellant comply with the determination of the senior labour relations officer before its appeal could be heard by it. The appellant complied with the determination of the ^G senior labour relations officer and paid the respondent his pay and benefits for the period 15 March 1999, being the date the respondent was suspended, to 30 June 2000, plus three months' salary.

While he was on suspension the respondent secured alternative employment with Bella Blue Track (Pvt) Ltd with effect from 1 June 2001. He continued in ^H this employment up to 3 February 2004, a period of about two-and-a-half years.

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When the matter of quantification came up before the Labour Court, the ^A appellant offered to pay the respondent his pay and benefits from 1 October 2000 to 31 May 2001, when the respondent was not gainfully employed. The Labour Court determined that the respondent was entitled to his pay and benefits with effect from the date of his dismissal to the date of the judgment of the Labour Court. ^B

It is against this determination that the appellant appeals to this court. The learned President of the Labour Court held that the respondent had a duty to mitigate damages and find employment. Accordingly the respondent's employment with Bella Blue Track (Pvt) Ltd had no bearing on the contract of employment.

The learned President's reasoning and conclusion appear on pp 6-7 of the ^C cyclostyled judgment (LC/H/289/2004), wherein she said:

"In the present matter the appellant argued that the respondent was on suspension and by securing alternative employment he repudiated his contract of employment with the appellant. The respondent submitted that he secured temporary employment in order to mitigate his loss. I am of the opinion that he had a duty to do so. To state that a person who is ^D on suspension without pay and benefits should not work and if he does work he risks losing his employment would be contrary to the purpose of the Act.

Further the appellant submitted that he was available for employment with the respondent after the court had ordered his reinstatement with the ^E alternative for payment of damages. He submitted that it was the appellant who opted to pay damages and not that he (the respondent) was not available for reinstatement.

In view of the above, it is my considered view that the respondent is entitled to his back pay and benefits with effect from [the] date of dismissal to the date of judgment of this court (i.e. forty-seven months' salary – item ^F 1 of his claim).

In addition if items 2-4 of his claim were his entitlements he should get them. The respondent is also entitled to damages, which is the equivalent of twenty-four months' salary. The computation of the amount should take into consideration –

- (a) the amount the appellant has already paid to the respondent; and ^G
- (b) the earnings he got during the period he had secured alternative employment.

The back pay should be as at the 1 January 2004 figure – as supplied by the appellant upon request by the court – i.e. \$1 896 044.46.

Accordingly, it is ordered that damages be calculated in terms of the H above."

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A Mr *Mamvura*, for the appellant, submitted that the effect of the respondent taking up employment with Bella Blue Track (Pvt) Ltd was to terminate his contract of employment with the appellant. In support of this submission he cited the case of *Zimbabwe Sun Hotels (Pvt) Ltd v Lawn* 1988 (1) ZLR 143 (S), wherein Gubbay JA (as he then was) stated at p 151 as follows:

"Plainly, the obligation of an employee who is placed under suspension B to hold himself available to perform his duties if called upon to do so, is one which arises by operation of law. It is of no consequence therefore that no provision in that regard is contained in the contract of service; and it is not necessary for the employer at the time of suspension to so inform the employee."

I agree with Mr *Mamvura*. His submission reflects the correct position in law. C Where an employee is under suspension and he takes up employment elsewhere he terminates his employment. An unlawful suspension of an employee is a repudiation of the contract of employment by the employer. The employee can elect either to accept the repudiation or enforce the contract. If an employee accepts alternative employment, by that fact alone he accepts D the employer's repudiation and the only remaining remedy for the employee is to sue the employer for damages for breach of contract.

The learned President of the Labour Court fell into error in two respects — firstly, by equating the position of a wrongfully suspended employee with that of a wrongfully dismissed employee. A wrongfully dismissed employee has a duty to mitigate damages by finding alternative employment as soon as F possible. A wrongfully suspended employee has a duty by operation of law to remain available for employment by his employer. This is the legal position, as stated in the *Zimbabwe Sun* case *supra*. The issue was further clarified in *Ambali v Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S), wherein McNally JA at 418H-419D stated as follows:

F "I think it is important that this court should make it clear, once and for all, that an employee who considers, whether rightly or wrongly, that he has been unjustly dismissed, is not entitled to sit around and do nothing. He must look for alternative employment. If he does not, his damages will be reduced. He will be compensated only for the period between his wrongful dismissal and the date when he could reasonably have been expected to G find alternative employment. The figure may be adjusted upwards or downwards. If he could in the meanwhile have taken temporary or intermittent work, his compensation will be reduced. If the alternative work he finds is less well-paid his compensation will be increased.

There are also those, and *Ambali* is one of them, who seem to believe that they must on no account look for alternative employment; that so long H as their case is pending they must preserve their unemployed status; that

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Chidyausiku CJ

if they look for and find a job in the meanwhile they will destroy their claim. A

It cannot be emphasised too strongly that this is wrong. There may be some confusion arising out of cases which deal with wrongful suspension rather than wrongful dismissal. Zimbabwe Sun Hotels (Pvt) Ltd v Lawn 1988 (1) ZLR 143 (S) is an example. But if an employee is wrongfully dismissed his duty to mitigate his loss arises immediately. If he is offered a good job the day after he is dismissed he must take it, or forfeit any claim B for damages. If he is offered a good job only after he has been unemployed for six months, he must take it. If in the meantime, he has instituted proceedings for reinstatement, he may continue them, but his claim for damages will usually then be limited to his loss over the six month period" (my emphasis)

The respondent in the present case accepted the repudiation by the employer C of his contract of employment when he took up employment with Bella Blue Track (Pvt) Ltd. His damages for wrongful dismissal can only be calculated from that date to the date of wrongful suspension.

Secondly, the learned President of the Labour Court appeared to be under the impression that s 2A of the Labour Relations Act [Chapter 28:01] has D amended the common law position as stated in *Zimbabwe Sun Hotels (Pvt) Ltd supra*. Section 2A of the Act provides as follows:

"2A Purpose of Act

(1) The purpose of this Act is to advance social justice and democracy in the workplace by –

(a) giving effect to the fundamental rights of employees provided E for under Part II;

- (b) giving effect to the international obligations of the Republic of Zimbabwe as a member state of the International Labour Organisation and as a member of or party to any other international organisation or agreement governing conditions of employment; ^f
 - (c) providing a legal framework within which employees and employers can bargain collectively for the improvement of conditions of employment;
 - (d) the promotion of fair labour standards;
 - (e) the promotion of the participation by employees in decisions affecting their interests in the workplace; and ^g
 - (f) securing the just, effective and expeditious resolution of disputes and unfair labour practices.
- (2) This Act shall be construed in such manner as best ensures the attainment of its purpose referred to in subsection (1). ^h

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^A (3) In the event of inconsistency between this Act and any other enactment then, unless the enactment expressly excludes or modifies the provision of this Act sought to be applied –

- (a) this Act shall prevail over the enactment concerned to the extent of the inconsistency; and
- (b) the enactment concerned shall be construed with such ^B modifications, qualifications, adaptations and exceptions as may be necessary to bring it into conformity with this Act.”

Section 2A essentially sets out the objective of the Act and specifically provides that in the event of a conflict between the Labour Relations Act and any other enactment the Labour Relations Act shall prevail. The section is not ^C a wholesale amendment of the common law. The common law can only be altered by an explicit provision of the Labour Relations Act.

The appeal is allowed and the order of the Labour Court is set aside and substituted with the following:

“The appellant is ordered to pay the respondent his salary and benefits from 1 October 2000 to 31 May 2001 when he was gainfully employed.”

^D The costs follow the result and the respondent is ordered to pay the appellant’s costs.

SANDURA JA & CHEDA JA concurred.

^E *Scanlen & Holderness*, appellant’s legal practitioners

^F *Sakututwa & Partners*, respondent’s legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/PRIME SOLE v KAZI 2006 (2) ZLR 156 (H)

PRIME SOLE v KAZI 2006 (2) ZLR 156 (H)

2006 (2) ZLR p156

Citation	2006 (2) ZLR 156 (H)
Case No	Judgment No. HH-111-06
Court	High Court, Harare
Judge	Gwora J
Heard	13 May 2006
Judgment	13 September 2006

Counsel	<i>H Zhou</i> , for the applicant <i>L Mazonde</i> , for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Insolvency — *sequestration* — *application* — *need to show that respondent c was a debtor and had committed an act of insolvency* — *director of company* — *not per se responsible for debts of company*

Headnote

The applicant sought the provisional sequestration of the respondent on the basis that the respondent had committed an act of insolvency as provided for by s 11(f) of the Insolvency Act [Chapter 6:04]. The applicant had paid large sums of money to various companies, of which the respondent was a director, for the purchase of raw materials. The goods were not supplied and the applicant demanded a refund from the respondent. Cheques drawn against one of the companies, and signed *ε* by the respondent, were not met as the account was closed.

The applicant alleged that, by his conduct, the respondent had given notice to it that he had suspended or was about to suspend payment of a debt the respondent owed to it. The facts, however, as presented to the court, did not establish that the respondent owed it any money. It did not prove, therefore, that respondent was a “debtor” as defined in the Act. Further, *ε* and even assuming that the respondent was indebted to the applicant as it claimed, there was no clear evidence of anything more than an unwillingness on the part of respondent to settle its indebtedness to applicant. In dismissing the application with costs:

Held, that it is necessary that the respondent in such an application has committed an act of insolvency. An instance of such an act is where the *g* debtor gives notice to any of his creditors that he has suspended or is about to suspend payment of his debts or if he has suspended payment of his debts. The applicant in this case had the onerous burden of establishing that the respondent was a debtor as defined by the Insolvency Act. It also bore the onus of establishing that the sequestration *h*

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Gowora J

A of the respondent’s estate was to the advantage of his creditors. All the payments made by the applicant were to the various companies. The applicant, although describing the companies as the nominees of the respondent, adduced no evidence to that effect. Although the respondent was alleged to be the principal officer of one of these companies, that did not make the company in question a nominee of the respondent. The *β* applicant had not instituted process for the recovery of any amounts of money either from the respondent or his so-called nominees. The respondent had not given notice that he had suspended the payment of his debts.

Semble, that for the purposes of s 11(f) of the Insolvency Act [Chapter 6:04] an unwillingness to make payment of a debt is not sufficient. The notice *c* given to creditors must be given in circumstances where the debtor is unable to pay.

Cases cited

Barlow’s Estate (Eastern Province) Ltd v Bouwer 1950 (4) SA 385 (E)

ο Scottish Rhodesia Finance Ltd v Ridgeway 1978 RLR 452 (G)

Legislation considered

Insolvency Act [Chapter 6:04], ss11(f) & 13(b)

Case information

€ *H Zhou*, for the applicant

L Mazonde, for the respondent

Judgment

GOWORA J: The applicant has approached this court by way of an application for an order placing the estate of the respondent under provisional liquidation. £ As the respondent is an individual, it is understood and accepted by both parties that what is sought is an order placing the estate of the respondent under provisional sequestration and appointing a trustee to run and manage the financial and business affairs of the respondent.

The background to the dispute is as follows. On 12 July 2005, a company called Maniam Investments issued two invoices to the applicant. The first, Annexure 6 "A" to the applicant's papers was in relation to 2 500 units of Butadiene Styrene Rubber Granular at a total price of Z\$2 345 329 500. The second, Annexure "B" was in respect of 2 500 units of PVC Nitrite Granular at a total price of Z\$2 600 618 025. Both invoices bore the legend "*Please note that this invoice is valid for 48 hours from date of issue*" (my emphasis).

¤ On the same day, the applicant deposited an amount of Z\$450 000 000 into the

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Gowora J

account of Guistein Investments (Pvt) Ltd. The following day an equal amount ¤ was again deposited into the account of Guistein Investments by the applicant. On 15 July 2005, two further payments of Z\$450 000 000 each were deposited into the account of Guistein Investments. Subsequent deposits into the account of Guistein were as follows; Z\$250 000 000 on 21 July 2005, Z\$200 000 000 on 23 July 2005, Z\$200 000 000 on 5 August ¢ 2005, Z\$489 000 000 on 10 August 2005, and Z\$99 731 198 on 17 August 2005. Thereafter, a number of deposits were made by the applicant into the account of Sutcliffe. Although the applicant states that it is a company there is no place on the papers where it is described in a manner that shows this status. For all I know Sutcliffe could be an individual. The four deposits made into the account of Sutcliffe were as follows; Z\$450 000 000 on 12 July 2005, ¢ Z\$450 000 000 on 13 July 2005, Z\$450 000 000 on 15 July 2005 and Z\$450 000 000 on 18 July 2005. The applicant has attached to its papers proof of additional payments by it to yet another entity called Gargnet Enterprises in the sum of Z\$450 000 000 on 12 July 2005. The applicant, however, has not shown proof of any payment to the respondent personally. According to the papers, the total amount paid to Guistein is Z\$3 039 690 877. Payment to Sutcliffe totalled ¤ Z\$1 800 000 000 whilst the amount paid to Gargnet was Z\$450 000 000.

According to the applicant, and this is not denied by the applicant, an amount of ZAR55 830 was paid to its suppliers in South Africa. Payment was effected on 8 September and 9 September 2005 respectively. Apart from stating that payment was effected by the respondent, the applicant has adduced no ¤ further evidence as to the mode of payment, the person who eventually paid on behalf of the respondent and where payment emanated from. The applicant contends that going by the prevailing exchange rate at the time of payment, the amount paid was the equivalent of US\$8 589. This payment, as far as the applicant was concerned, then left the respondent with the obligation to pay US\$100 361. The applicant avers that the respondent has made several offers £ to pay either in the currency of United States dollars or in Zimbabwe dollars but that none of the offers to settle have come to fruition. The applicant further avers that the respondent has offered to refund the applicant but that again nothing has come out of this offer. It is common cause that on 23 November 2005, the applicant's legal practitioners sent a letter of demand to the respondent. The letter, sent by facsimile, indicated that the respondent had 6 made an arrangement with the applicant to pay an amount of ZAR102 000 and that respondent had only paid ZAR55 800. The respondent was called upon to make payment *of the aforementioned sums by no later than 24 November 2005 failing which an application for the sequestration of his estate would be launched* (my emphasis). On 9 December 2005, the applicant's legal ¤

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Gowora J

A practitioners received three undated cheques, each with a face value of Z\$450 000 000 drawn by Guistein Investments. The cheques were not met on presentation as they were apparently drawn against a closed account. All these circumstances have, cumulatively, led to the applicant seeking from this court an order for the sequestration of the estate of the respondent.

I now examine the case for the applicant. It is the submission of the applicant B that the respondent has committed an act of insolvency as provided for in terms of s 11(f) of the Insolvency Act [Chapter 6:04]. Although there is no document bearing the name of the respondent, it is the applicant's case that the respondent with craft raised invoices in the names of Maniam Investments and arranged for payment in the names of the corporate entities, his nominees. C According to the applicant, the respondent is indebted to the applicant in the stated amount and has refused or suspended payment on the amount due. Smith in *The Law of Insolvency* 3 ed at p 32 states:

"If a debtor owes money to a creditor which he fails or refuses to pay, the creditor may enforce his rights by having recourse to the courts and eventually, after the required procedural steps have been taken, causing D the attachment and selling in execution of the debtor's assets in order to obtain satisfaction of his, the creditor's claim. Compulsory sequestration of a debtor's estate embodies the ultimate form of execution and results in a *concursum creditorum*. Instead of piecemeal sales in execution of the debtor's assets at the instance of several execution creditors, all of the debtor's assets vest, on his insolvency, in the master and subsequently E the trustee, for realization and distribution amongst the general body of his creditors. The same results flow from the voluntary surrender by a debtor of his own estate."

The applicant therefore contends that in terms of s 13(b) of the Act there is reason to believe that it would be to the advantage of the creditors of the respondent for his estate to be sequestrated.

Section 13 of the Act provides:

F "The High Court shall not grant an order of provisional sequestration unless it is of the opinion that, *prima facie* –

- (a) the debtor has committed an act of insolvency or is insolvent;
- (b) there is reason to believe that it will be to the advantage of creditors of the debtors if his estate is sequestrated; and G
- (c) the petitioner has a claim against the debtor to the extent referred to in subsection (1) of section twelve."

In order to establish the requirement of insolvency on the part of the respondent, the applicant seeks to rely on the provisions of s 11(f). The contention is that the respondent needed money and fraudulently led the H applicant to pay money to his nominees, which are companies. The respondent

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Gowora J

is the secretary of one of the companies as well as a director with a relative of A his. The three cheques drawn by Guistein Investments were allegedly signed by the respondent. Although the heads of argument filed by the applicant are silent on the issue, in its founding affidavit, the applicant makes the averment that the respondent has by conduct advised his creditors that he has suspended payment of his debts and has further compromised with his B creditors. The applicant is of the view that the respondent has the assets and means to settle his debts but that he has concealed such assets and means as a way of avoiding paying the debts. Paragraph (f) provides:

"A debtor shall be deemed to have committed an act of insolvency if –

- (f) he gives notice to any of his creditors that he has suspended or is about to suspend payment of his debts or if he has suspended C payment of his debts; or ..."

Neither of the legal practitioners has referred me to a Zimbabwean authority on the meaning to be ascribed to this paragraph of the Act. Counsel for the respondent has referred me to the South African case of *Barlow's Estate (Eastern Province) Ltd v Bouwer* 1950 (4) SA 385 (E), which is a judgment by Reynolds J. The learned judge was considering an application for a final D order of sequestration under the Insolvency Act in South Africa. At issue was the meaning to be ascribed to s 8(g) of that country's Insolvency Act which, in ambit at the time, was somewhat, narrower than our own, in that it only provided for notice by the debtor. The section in the South African Act provided:

E "a debtor commits an act of insolvency ...

- (g) if he gives notice in writing to any one of his creditors that he is unable to pay his debts."

At p 393E-G, the learned judge stated:

"It is perfectly true that under s 12 (1) the creditor has not to prove F respondent has committed an act of insolvency, but where a creditor relies on notice as being a declaration of an inability to pay, and notice shows that respondent is able to the knowledge of the creditor to pay, and can be forced to pay all creditors in full by due process of law apart from insolvency proceedings, the mere notification of what is in true substance an unwillingness to pay is not an act of insolvency ..." G

The cheques which the applicant seeks reliance on were drawn by Guistein Investments (Pvt) Ltd which to all accounts is the holder of the current account against which the said cheques were drawn. The applicant has also attached an application for an electron transfer in the sum of Z\$450 000 000 by Guistein Investments against its account with Stanbic Bank in favour of the applicant. It appears that the electronic transfer was completed as it bears the stamp of H

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Gowora J

A the bank. The applicant has indicated that no payment was effected into its account. In order to determine the application before me, it not necessary for me to resolve whether or not the electronic transfer was given effect to. In the documents I have just referred to, the name of the debtor is Guistein. I have not been referred to any document that bears the name of the respondent. According to the Act a debtor is defined as follows:

"‘debtor’, in connection with the sequestration or assignment of the estate of a debtor, means a person or partnership or the estate of a person or partnership, including a partnership which has been terminated but has not been wound up, which is a debtor in the usual sense of the word but does not include a body corporate or a company or other association of persons which may be placed in liquidation or which may be wound up c in terms of the law relating to companies or any other law."

The applicant in the circumstances of this case was under a most onerous burden to establish that the respondent was a debtor as defined by the Act. The onus to establish that the sequestration of a debtor's estate is to the advantage of the debtor's creditors is on the creditor. See *Scottish Rhodesia D Finance Ltd v Ridgeway* 1978 RLR 452 (G). All payments in this matter made by the applicant were made to the three companies variously. The applicant describes the companies into whose accounts it paid monies as the nominees of the respondent and yet has adduced no evidence to that effect. The respondent is alleged to be the principal officer of one of these companies, but that does not make the company in question a nominee of the respondent. It E is trite that a company is separate from its members and the applicant has not even alleged that the respondent owns shares or is the controlling shareholder in any of the companies. The applicant has not made any effort to open up the relationship between the respondent and the companies it calls the nominees of the respondent. Without lifting the corporate veils of the said companies they remain distinct and separate from the respondent.

F Thereafter the applicant had to show on a balance of probabilities that that the respondent had committed an act of insolvency. The applicant has not instituted process for the recovery of any amounts of money either from the respondent or his so-called nominees. The respondent has not given notice that he has suspended the payment of his debts. The conduct complained of G is that cheques were issued against a closed account, which account is not that of the respondent. The applicant did not prove that the respondent owed any money to it, neither did it show that the respondent had committed an act of insolvency. I cannot even go further to decide whether or not there is an unwillingness to pay by the respondent. The respondent's conduct can only H be examined in the circumstances where it can be termed a debtor in terms of

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Gowora J

the Act. The facts before me do not justify the respondent being referred to A as a debtor in any manner.

The application has no merit and it is therefore dismissed with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Chibune & Associates, respondent's legal practitioners B

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/CHINHO v CHINHO & ORS 2006 (2) ZLR 163 (H)

CHINHO v CHINHO & ORS 2006 (2) ZLR 163 (H)**2006 (2) ZLR p163**

Citation	2006 (2) ZLR 163 (H)
Case No	Judgment No. HH-99-06
Court	High Court, Harare
Judge	Kamocha J
Heard	6 February 2006
Judgment	20 September 2006
Counsel	<i>J Musimbe</i> , for the applicant <i>C U Kandemiri</i> , for the second, third, fourth and fifth respondents No appearance for the first and sixth respondents
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

c Customary law — marriage — spouse — spouse under customary law — deceased marrying a second wife under civil law while first marriage subsisted — d both wives regarded as spouses for purposes of succession

Succession — spouse — who is — spouse under customary law — deceased marrying a second wife under civil law while first marriage subsisted — both wives regarded as spouses for purposes of succession

Headnote

The applicant had been married to the deceased for many years under an unregistered customary law marriage. There were four children born of the marriage. Three years before he died, the deceased contracted a marriage under the Marriage Act [*Chapter 5:11*] with the first respondent. [£] After he died, the first respondent became executrix of his estate. His former employer's pension fund paid a lump sum and periodic payments to the first respondent. The applicant claimed that she was a surviving spouse and that the pension payments should be paid to the Master's office and distributed through a neutral executor. The manager of the pension fund claimed that the rules of the fund, which stated that a [£] marriage certificate was necessary to determine who was a surviving spouse, were sacrosanct; and in terms of those rules the applicant did not qualify to benefit, not being the holder of a marriage certificate.

Held, that under Part IIIA of the Administration of Estates Act [*Chapter 6:01*], introduced by Act 6 of 1997, when a person who is already married [£] to someone else in terms of the customary law subsequently contracts a civil marriage, the latter is regarded as a valid marriage for the purposes of estates of persons subject to customary law; and the civil marriage is regarded as a customary law marriage. The deceased could not be said to have removed his estate from the ambit of customary law since the civil marriage he contracted must be regarded as a customary-law marriage for [£] the purposes of persons subject to customary law. The pension fund

Kamocha J

could not ignore customary law. Accordingly, both the applicant and the ^A first respondent were spouses of the deceased and were entitled to benefits from the pension fund.

Cases referred to

Gwatidzo v Masukusa 2000 (2) ZLR 410 (H)

Kusema v Shamva 2003 (1) ZLR 395 (H)

Mutaisi v Muzondo 1999 (2) ZLR 435 (H)

Legislation considered

Administration of Estates Act [*Chapter 6:01*], s 68(4)

Case information

J Musimbe, for the applicant ^c

C U Kandemiri, for the second, third, fourth and fifth respondents

No appearance for the first and sixth respondents

Judgment

KAMOCHA J: The applicant was seeking for an order in the following terms:

“IT IS ORDERED AND DECLARED THAT: ^D

1. The applicant is the late IRVINE CHINHO’S surviving spouse and has all the rights and is entitled to privileges and benefits accorded by law to a spouse (wife) of the said deceased person;
2. The second to fifth respondents be and are hereby interdicted from paying directly to the first respondent pensions, benefits or money ^E owing or payable to the Estate of the late IRVINE CHINHO and be ordered to pay the same to the sixth respondent’s office;
3. The sixth respondent be ordered to ensure that the pensions, benefits or money owing and payable to the Estate of the late IRVINE CHINHO be properly distributed or shared among the beneficiaries or dependants including the applicant through a duly appointed neutral ^F executor; and
4. The respondents pay the costs of this application (if they contest this claim).”

The applicant based her claim on the fact that, in early 1976, she married the late Irvine Chinho in terms of customary law but their marriage was not registered. The marriage was, therefore, an unregistered customary law union. ^G Their customary union was blessed with four children, one of whom is still a minor attending school at Sanyati Baptist High School.

Irvine Chinho was employed as a shift charge engineer by the Zimbabwe Power Company and was based at Bulawayo Power Station, directly under the manager of ZESA Bulawayo. He unfortunately died on 12 October 2004 at ^H

Kamocha J

^A Harare while still so employed. At the time of his death, his customary law union with the applicant had been in subsistence for a period of 28 years.

During his lifetime, Irvine Chinho contracted a marriage with Lorrain Chinho in terms of the Marriage Act [*Chapter 5:11*] on 3 September 2001, which marriage subsisted at the time he passed away on 12 October 2004. It was three ^B years old. There were no children to the marriage.

The applicant contended that, as a result of Chinho’s death, his surviving dependants and spouses became entitled to receive pensions, benefits and other payments from Zesa Holdings (Pvt) Ltd, the Zimbabwe Power Co, ZESA Pension Fund and the manager of ZESA Power Station, Bulawayo including cash in lieu of leave and bonus.

^c She claimed that, despite the fact that she had been married to the deceased for more than 27 years and despite the production of the birth certificates of the children of the deceased, including that of the minor child going to school, and in allegedly dire need of the support from his father’s

estate, the second to fifth respondent, had allegedly refused to release adequate payment to the applicant and deceased's children. It was only the ZESA Staff Pension Fund ^D which, with effect from December 2004, had been paying a meagre sum of \$955 218 meant for the minor child, without proffering any explanation of how that figure was arrived at.

She alleged that the respondents had preferred to pay a lump sum and almost all periodic payments to Lorraine, the first respondent. They did so on the ^E belief that she was the sole surviving spouse by virtue of her marriage to the deceased in terms of the Marriages Act [*Chapter 5:11*]. The result was that the applicant had been left without any support from the time of the death of deceased. The minor child had found it very difficult to pay his school fees and other school requirements.

^F The applicant alleged that she had made representations to the employers of the deceased without any success. Instead, she was told to obtain an affidavit from the first respondent, agreeing that either half or the bulk of the benefits from the deceased's employers be paid to the applicant for the sustenance of the family. That suggestion was not workable, given the stance taken by the first respondent towards the whole matter, which had been worsened by lack ^G of communication between the two.

Worse still, the first respondent had been appointed executrix to the estate of the deceased. The applicant had already written to the Master of the High court seeking to reverse that appointment so that a neutral executor could be ^H appointed.

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Kamocha J

In the result, she contended that the second to fifth respondents should be ^A interdicted from making any payments to the first respondent and be ordered to channel any such payments to the Master's office, which shall pay the same to the proven beneficiaries through a duly appointed and neutral executor, unless the parties agree on another mutually acceptable method or mode of payment. ^B

The first respondent hotly disputed the applicant's assertions. She contended that the applicant had separated from the deceased sometime in 2000 and by the time she was married to him on 3 September 2001 they were already separated.

She asserted that the children of the deceased had been included in the death notice and their names had been forwarded to the pensions office which would ^C give them whatever benefits due to them in due course. It was, therefore, not correct to suggest that the deceased's children had been receiving maintenance. However, the other children's shares had been stayed pending the finalisation of this matter.

The first respondent reiterated that the applicant was not the deceased's ^D spouse at the time of his death since her union with him had been terminated at the time of their separation in 2000. She then concluded that the applicant was not entitled to the spouse's benefits she was claiming. That being the case, she saw no need to advise the applicant about the edict meeting but she duly advised those she deemed needed to be advised.

The stance taken by the second to fifth respondents was basically that they ^E acted within the confines of the ZESA Staff Pension Fund Rules of 1986. The Acting General Manager, who deposed to an affidavit, averred that they relied on the marriage certificate of the deceased and the first respondent to determine who the surviving spouse was and concluded that it was the first respondent. ^F

Having concluded that first respondent was the only surviving spouse, they would calculate the benefits accruing to her and the minor child in terms of the ZESA Staff Pension Fund Rules. The minor child's entitlement was in terms of ^r 28(2) of those rules. The respondents had no obligation to pay the applicant children who are majors. Consequently, the respondents held the view that the applicant had no legal basis for stopping the disbursement of pension ^G benefits in terms of the Staff Pension Fund Rules.

The deponent averred that the deceased died before reaching pensionable age. He therefore did not leave a large sum of money for his beneficiaries. What was being paid to the minor child was what it was entitled to in terms of the rules. ^H

2006 (2) ZLR p167

Kamocha J

A What this court had to grapple with was the issue of which of the two women was the surviving spouse. There is no controversy that the applicant had been married to the deceased, in terms of customary law, for 28 years and the union had been blessed with four children, while the first respondent contracted a civil marriage with the deceased on 3 September 2001.

The first respondent did allege in her papers that the applicant had separated B from the deceased but failed to provide proof for her assertions. The applicant denied that she had been separated from the deceased. I therefore cannot make a finding that the applicant had been separated from the deceased. I however find that her customary law marriage with the deceased had not been registered as required by s 3 of the Customary Marriages Act [Chapter 5:07] C ("the Act") which provides thus:

"3 Marriages not to be valid unless solemnized

(1) Subject to this section, no marriage contracted according to customary law, including the case where a man takes to wife the widow or widows of a deceased relative, shall be regarded as a valid marriage unless

—

(a) such marriage is solemnized in terms of this Act; or ... D

(5) A marriage contracted according to customary law which is not a valid marriage in terms of this section shall, for the purposes of customary law and custom relating to status, guardianship, custody and rights of succession of the children of such marriage, be regarded as a valid marriage."

E In the light of the above provisions of the Act, this court, in *Katiyo v Standard Chartered Zimbabwe Pension Fund* 1994 (1) ZLR 225 (H), held that the plaintiff was not regarded as a spouse in terms of the defendant's Pension Fund Rules as she had failed to prove so by submitting a copy of a marriage certificate as proof that she was legally married to the deceased. Relying on s 3 of the Act, an unregistered customary law union was held to be an invalid F marriage and, as such, the plaintiff was not entitled to the annuity. The court, however, stated *obiter* that it was the responsibility of the law maker to amend the law so as to protect widows in unregistered customary law unions.

The legislature appeared to have paid heed to the court's call to amend the law and amended the Administration of Estates Act [Chapter 6:01] by the G Administration of Estates Amendment Act No. 67 of 1997 which repealed s 68 of the principal Act and substituted it with a new part which caters for estates of persons subject to customary law. The new part defines a beneficiary as follows:

"beneficiary" in relation to a deceased person's estate means —

G (a) a surviving spouse or child of the deceased person; or

2006 (2) ZLR p168

Kamocha J

(b) where the deceased person left no surviving spouse or child, any A person who is entitled to inherit any property in the estate in terms of this Part."

The amending Act validated marriages contracted in terms of customary law for purposes of the estates of persons subject to customary law by providing the following in s 68(3): B

"(3) A marriage contracted according to customary law shall be regarded as a valid marriage for the purposes of this part notwithstanding that it has not been solemnized in terms of the Customary Marriages Act [Chapter 5:07], and any reference in this part to a spouse shall be construed accordingly:

Provided that such a marriage shall not be regarded as valid for the C purposes of this part if, when it was contracted, either of the parties was married to someone else in accordance with the Marriages Act [Chapter 5:11] or the law of a foreign country under which persons are not permitted to have more than one spouse."

It is clear from the papers filed of record that, when the deceased and the applicant contracted the customary law union, neither of the parties had been D married to someone else in accordance with the Marriage Act.

Unlike the provisions of s 3(5) of the Customary Marriages Act which had limited the validity of a customary law to status, guardianship, custody and rights of succession of the children of such marriage, the Administration of Estates Amendment Act No. 6 of 1997 extends the validity to the estates of E persons subject to customary law. It therefore admits of no doubt that the applicant is a spouse of the deceased.

When the first respondent married the deceased in terms of the Marriage Act [Chapter 5:11] on 3 September 2001, she knew that he was married to the applicant in terms of customary law. In fact, that union had been in existence for 25 years. In *Gwatidzo v Masukusa* 2000 (2) ZLR 410 (H) where,

like *in casu*,^F the plaintiff contracted a civil marriage with a man she knew was already married to another woman in terms of customary law and practices, the court held *inter alia* that both customary and civil marriages were valid and recognised at law and that rights under a customary law union cannot be excluded by or subordinated to rights acquired under a civil marriage. The court had this to say at 420B: ^G

“a woman to [*sic*] a customary union has acquired rights in that union. A woman to [*sic*] a civil marriage has also acquired rights in that marriage. Why should the one woman lose her rights merely because the other woman has acquired rights which purport to exclude the rights of the one?”^H

2006 (2) ZLR p169

Kamocha J

^A In the Administration of Estates Amendment Act No. 6 of 1997, the legislature enacted that when a person who is already married to someone else in terms of the customary law subsequently contracts a civil marriage, the latter is regarded as a valid marriage for the purposes of estates of persons subject to customary law provided the civil marriage shall be regarded as a customary law marriage. Section 68(4) provides:

^B “(4) A marriage contracted according to the Marriage Act [*Chapter 5:11*] or the law of a foreign country under which persons are not permitted to have more than one spouse shall be regarded as a valid marriage for the purposes of this part even if, when it was contracted, either of the parties was married to someone else in accordance with customary law, whether or not that customary law-marriage was solemnized in terms of the ^C Customary Marriages Act [*Chapter 5:11*]:

Provided that, for the purposes of this part, the first mentioned marriage shall be regarded as a customary law marriage” (my emphasis).

It seems to me that, in the light of the above provisions, the deceased cannot be said to have removed his estate from the ambit of customary law since the ^D civil marriage he contracted must be regarded as a customary law marriage for the purposes of persons subject to customary law.

It was submitted on behalf of the respondents that the rules of the pension funds were sacrosanct and the applicant did not qualify to benefit in terms of those rules so long as she did not possess a valid marriage certificate. In my view, the submission seems to ignore the provisions of the law quoted *supra*.^E The pension fund rules seem to continue ignoring customary law as a law believed in by the Zimbabweans and which they consider binding. Chinhengo J in *Mutaisi v Muzondo* 1999 (2) ZLR 435 (H) at 437 called on this country’s courts to recognize customary law. This court has heeded the call, hence the decision in *Gwatidzo v Masukusa supra* and in the case of *Kusema v Shamwa*^F 2003 (1) ZLR 395 (H). I therefore see no reason why the pension funds should not follow suit.

In the result, I find that both the applicant and the first respondent are spouses of the deceased and are entitled to benefits in terms of r 28(1) of the ZESA Staff Pension Fund Rules.

Consequently, I would grant an order in terms of the draft order on the first ^G page of this judgment.

J Musimbe and Associates, applicant’s legal practitioners

^H *Mawere and Sibanda*, second to fifth respondents’ legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/WATYOKA v ZUPCO (NORTHERN DIVISION) 2006 (2) ZLR 170 (H)

WATYOKA v ZUPCO (NORTHERN DIVISION) 2006 (2) ZLR 170 (H)

2006 (2) ZLR p170

Citation

2006 (2) ZLR 170 (H)

Case No	Judgment No. S-86-05
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA and Gwaunza JA
Heard	24 October 2005
Judgment	25 September 2006
Counsel	<i>Z Lunga</i> , for the appellant <i>L Mazonde</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — *code of conduct* — *proceedings conducted under* — *when c a matter may be referred to a labour officer* — *no referral allowed once a determination has been made under a code of conduct* — *referral before determination only permissible after 30 days* — *such a referral optimal* — *time limits within which a labour relations officer may hear the matter* D

Headnote

The applicant had been dismissed from his employment for an act of misconduct. The determination to dismiss him had been made under the respondent's code of conduct. Notwithstanding the fact that the matter had been determined and that there was no agreement between the parties to refer the matter to a labour relations officer, it was referred. The E appeal to the labour relations officer was successful. As a result, the respondent then appealed to a senior labour relations officer but was unsuccessful. Finally, the respondent appealed to the Labour Court, upheld its appeal. The appellant thereupon appealed to the Supreme Court.

It was clear from the facts that, although the determination was made more F than 30 days after the matter arose, the appellant had intended to wait for the determination to be made. It was also clear that the referral to the labour relations officer had been made more than 180 days after the dispute between the parties had arisen. On appeal before the Supreme Court, there were three main issues: (1) the jurisdiction of the labour relations to hear the matter; (2) the hearing by him being outside the G prescribed time limits; and (3) the merits of the case.

Held, that the labour relations officer had no jurisdiction to hear the matter. Section 101(6) of the Labour Act [Chapter 28:01] provides for a referral of a matter to a labour relations officer if it has not been determined within 30 days. It does not provide for a referral of a matter which has already been determined, as had happened here. The referral to a labour relations H officer, which is optional, is a relief granted to a party who is concerned

2006 (2) ZLR p171

Cheda JA

A about the delay in the determination that has already been made. In this case, although the determination was made more than 30 days after the matter arose, the delays were largely due to the appellant. It was also clear from the facts that the appellant intended to wait for the determination to be made. It was also clear that there was no agreement between the parties to refer the matter to a labour relations officer, as required by B s 93(1)(b) of the Act.

Held, further, that in terms of s 94(1)(b) of the Act, in the form which applied at the time of the dispute, any referral to a labour relations officer had to be made within 180 days of the dispute arising.

Held, further, dismissing the appeal, that, in any event, on the merits, the facts of the matter revealed that the appellant had been clearly guilty of the misconduct alleged

Case cited

Mwenye v Lonrho Zimbabwe Ltd 1999 (2) ZLR 429 (S)

Legislation considered ^D

Labour Act [*Chapter 28:01*], ss 94 and 101(6)

Case information

Z Lunga, for the appellant

L Mazonde, for the respondent

Judgment

^E **CHEDA JA:** This is an appeal from a decision of the Labour Court, which allowed the respondent's appeal against the decision of a senior labour relations officer.

The appellant was employed by the Zimbabwe United Passenger Co Ltd (ZUPCO), hereinafter referred to as "the company". The main business of the ^F company is the carrying of passengers travelling to various destinations within and outside Zimbabwe by means of buses. The company has a code of conduct for its employees.

On assuming duty, although the letter of the contract of employment was not produced, it is common cause that the appellant signed a letter in which he was barred from conducting any business that was in direct competition with his ^G employer.

During the course of his employment, it was alleged that the appellant was found to have purchased and operated two minibuses. He was charged with misconduct and dismissed from employment.

The appellant referred the matter to a labour relations officer, who determined ^H the matter in his favour and ordered his reinstatement. The matter was referred

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Cheda JA

to a senior labour relations officer, who upheld the decision of the labour ^A relations officer.

The respondent appealed to the Labour Court, and that court set aside the decision of both labour relations officers. The appellant now appeals against that judgment.

The appellant's grounds of appeal are fragmented into twelve grounds, but ^B a careful reading of the grounds reveals three main issues that the appellant refers to in his heads of argument. These main issues are:

1. The jurisdiction of the labour relations officers to hear the matter;
2. The determination being made outside the time limits specified;
3. That the merits were not considered and the misconduct was not proved. ^C

I shall deal with each of these issues in turn.

LACK OF JURISDICTION

Section 101 of the Labour Relations Act [*Chapter 28:01*] ("the Act") provides as follows:

"101 Employment codes of conduct ^D

(1) - (4) ...

(5) Notwithstanding this Part, but subject to subsection (6), no labour relations officer or senior labour relations officer shall intervene in any dispute or matter which is or is liable to be the subject of proceedings under a code, nor shall he intervene in any such proceedings. ^E

(6) If a matter is not determined within thirty days of the date of the notification referred to in paragraph (e) of subsection (3) the employee or employer concerned may refer such matter to a labour relations officer, who may then determine or otherwise dispose of the matter in accordance with section *ninety-three*."

There are, therefore, three important conditions under which such a matter can ^F be referred to a labour relations officer or senior labour relations officer:

- (a) the matter must not be one that is or is liable to be the subject of proceedings under a code of conduct;
- (b) the matter has not been determined within thirty days of the date of notification; and ^G
- (c) where the parties to the dispute request it and are agreed on the issues in dispute (s 93(1)(ii)).

In this case, there were delays in the determination of the matter due to a number of postponements at the request of the appellant. At one meeting, the appellant and his legal practitioner attended without submitting the appellant's ^H

2006 (2) ZLR p173

Cheda JA

A response to the allegations. At yet another meeting, the appellant and his legal practitioner walked out before the meeting was closed, as the legal practitioner said he wanted to catch his flight and had other business to do in Harare. When the appellant and his legal practitioner raised the issue of delay, the chairperson did point out to them that it was actually their fault, as they were responsible for the delays.

^B Subsection (6) of s 101 provides for a referral of the matter to a labour relations officer if it has not been determined within thirty days. It does not provide for a referral of a matter that has been determined. The referral to a labour relations officer is a relief granted to a party who is concerned about the delay in the determination. It is not a referral intended to challenge a determination that has ^C already been made.

The section should be read as being only permissive and not restrictive. In my view, the intention of the legislature is to grant relief to a party who is affected by the delay. The section provides that:

"... the employee or employer concerned may refer such matter to a labour relations officer, who may then determine or otherwise dispose of the ^C matter ..."

Clearly, the referral can only be made before a determination is made.

It was probably foreseen that in certain cases one party could frustrate the other by causing delays to the prejudice of the other. That seems to be the reason why the word "may" is used.

^E The party concerned does not have to refer the matter to the labour relations officer. That party may still wait for the determination to be made even after the thirty day period.

Accordingly, the period of thirty days does not refer to the time within which a valid ^F determination should be made. The section does not say the determination should be made within the thirty days period. All it does is to restrict any concerned party from rushing to refer the matter to a labour relations officer before the expiry of the thirty days.

It follows that where the thirty days have lapsed the concerned party can choose to refer the matter to a labour relations officer or wait for a determination to be made.

^G The thirty days, therefore, refers to the period after which the party concerned may complain, and does not make any determination made after its expiry a nullity.

In this case, the appellant continued to attend the proceedings even after the period of thirty days had expired. He clearly intended to wait for the determination ^H to be made. The section cannot be read as providing for a second determination

2006 (2) ZLR p174

Cheda JA

over and above one already made by a disciplinary committee. Once there was ^A a determination, the correct procedure was to appeal to the company's management, as provided in the code of conduct.

The suggestion that no letter of dismissal was issued and that the appellant was prevented from appealing in time does not assist him, as the decision was made in his presence. According to the minutes, he was informed and there ^B is no indication that his legal practitioner requested the letter of dismissal or the record for the purpose of appeal.

It is also clear that there was no agreement between the parties to refer the matter to a labour relations officer, as required by s 93(1)(ii) of the Act.

Worse still, s 94 of the Act provides as follows in relevant part: c

"94 Prescription of disputes

(1) Subject to subsection (2) after 1 January 1993 no labour relations officer shall entertain any dispute or unfair labour practice which –

- (a) ...
- (b) arises after 1 January 1993, unless it is referred to a labour relations officer within one hundred-and-eighty days from the date when such d dispute or unfair labour practice first arose."

I should point out that Amendment Act 17 of 2002 came long after and does not affect this case.

This matter commenced with a letter dating as far back as 13 October 1997. The appellant started complaining about being sent on leave at the meeting held e in November 1997. At this meeting, he complained that he was being victimised. He also raised what he called "unfair labour practices" because the misconduct was not investigated by the personnel department, although the record and the minutes filed show that the appellant attended preliminary meetings with his legal practitioner.

The notification to the employer was dated 13 October 1997. f

When the thirty days expired before the matter was determined, the appellant did not raise any complaint. At a meeting held on 21 November 1997, which was already after the expiry of the thirty day period after the notification, the appellant and his legal practitioner asked for a postponement.

At the meeting of 4 December 1997, the appellant and his legal practitioner said g they wanted the author of a certain document to be called. It is clear that they still wanted to proceed with the hearing and required a postponement.

It cannot be said that the chairperson should have refused the appellant's request for a postponement because the thirty day period had expired. h

2006 (2) ZLR p175

Cheda JA

a Both parties referred to *Mwenye v Lonrho Zimbabwe Ltd* 1999 (2) ZLR 429. That case clarified the provisions of s 101(6) of the Act. It also made the point clear that both parties had agreed on the referral of the dispute to a labour relations officer.

In this case, by the time the matter was entertained by the labour relations officer, two separate provisions of the Act had ousted his jurisdiction. They b were, firstly, the fact that a determination had been made; and, secondly, the dispute had prescribed in terms of s 94(1)(b), in that the allegations of unfair labour practice were raised at meetings held with the disciplinary committee in November 1997 but the labour relations officer only entertained the complaint on 6 August 1999, after a period of about eighteen months, and well c beyond the period of one hundred and eighty days provided in s 94(1)(b).

THE MERITS

The appellant also raised a complaint about the composition of the disciplinary committee, but it was not shown that there was any bias or prejudice at all. The composition of the committee is a technicality that cannot be allowed to nullify d the proceedings which, according to the record, reflect that he had a fair hearing.

The minutes of the different meetings, at which the appellant was legally represented, indicated that the hearing was conducted properly and that evidence was led in his presence on the merits. He failed to challenge the evidence from his own secretary regarding the preparation of a project e document that was used to obtain the loan and the typing by his secretary of waybill tickets.

It was established beyond doubt that he was involved in the operation of the minibuses, the very act that was prohibited by the letter of appointment that he had signed.

f Accordingly, I see no merit in the appeal and it is dismissed with costs.

CHIDYAUSIKU CJ & GWAUNZA JA concurred.

^G *Legal Aid and Advice Scheme of the University of Zimbabwe*, appellant's legal practitioners
^H *Muzangaza, Mandaza & Tomana*, respondent's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/CITY OF MUTARE v SAMUPINDI 2006 (2) ZLR 176 (S)

CITY OF MUTARE v SAMUPINDI 2006 (2) ZLR 176 (S)

2006 (2) ZLR p176

Citation	2006 (2) ZLR 176 (S)
Case No	Judgment No. S-20-06
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Gwaunza JA
Heard	30 March 2006
Judgment	25 September 2006
Counsel	<i>L T Biti</i> , for the appellant <i>V Mazengero</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — *urban council employee — disciplinary proceedings against c — need not be referred to labour relations officer — power of council to dismiss employee*

Local government — *urban council — employee — disciplinary proceedings against — need not be referred to labour relations officer — power of council to dismiss employee*

Headnote

The respondent was dismissed from her employment with the appellant urban council for an act of misconduct. Although the council could have dismissed her in terms of s 141(2)(b) of the Urban Councils Act [*Chapter 29:15*], it chose to refer the matter to a labour relations officer, who, having heard the respondent's counsel's submissions in mitigation, ^E ordered her reinstatement out of sympathy with her situation. Such a referral was permissible under s 93 of the Labour Act [*Chapter 28:01*] as it stood at the relevant time. An appeal by the council to the Labour Court resulted in that court referring the matter back to the labour relations officer and considering the case on its merits.

Held, that under the Labour Act [*Chapter 28:01*] as it stood at that time ^F (1999), the labour relations officer had no jurisdiction to exercise his discretion in sympathy with the respondent's situation by taking into account mitigatory factors. Section 12B(4) of the Act, introduced in 2002, provided for such a discretion.

Held, further, that it would have been appropriate to refer the matter back to ^c the Labour Court to decide it on its merits, but no good purpose would be served by doing so since the record shows clearly that the respondent admitted her wrong doing, and s 141 of the Urban Councils Act provided that the appellant was entitled to dismiss the respondent once the misconduct was proved. The matter had to be brought to finality and the respondent's dismissal would be confirmed. ^h

2006 (2) ZLR p177

Cheda JA

Legislation considered ^a

Labour Act [*Chapter 28:01*], s 12B(4)

Urban Councils Act [*Chapter 29:15*], s 141(2)

Case information

L T Biti, for the appellant

^b *V Mazengero*, for the respondent

Judgment

CHEDA JA: The appellant is a municipality established in terms of s 4 of the Urban Councils Act [*Chapter 29:15*] ("the Act").

The respondent was employed by the appellant at its treasury department, where her duties included posting of receipts into the main computer system.

^c Following the discovery of an improper entry against a house belonging to her relative, which had been reversed, she was brought before a departmental works council and charged with misconduct, for having:

- (a) falsified entries on an account in respect of stand No. 137, Chikanga, thereby prejudicing the Council of \$1 200; and ^d
- (b) failed to account for the above-mentioned discrepancy.

The hearing was conducted on 21 September 1998.

At this hearing, it is recorded in the minutes as follows:

"On being asked whether she had anything to say, Ms Samupindi admitted that she was guilty of falsifying the account and begged for forgiveness."

^e Certain recommendations were then made, but management maintained that her case deserved dismissal.

In her letter to the Executive Mayor, dated 7 July 1999, she asked why she was not merely cautioned as this was her first mistake after fifteen years of service.

A report had been submitted to the Executive Mayor, and the Executive ^f Committee noted that Ms Samupindi had acted in an improper manner and had gone out of her way to cover up a debt owed by Mr Samupindi which had been handed over to the debt collection section.

The appellant then applied to a labour officer for authority to dismiss her in terms of SI 371 of 1985 (s 3(a) and (d)).

It should be noted here that the appellant did have powers to dismiss the ^g respondent in terms of s 141(2)(b) of the Act.

The suspension of the respondent and the report to the Executive Mayor were proper and in compliance with the provisions of s 141 of that Act.

The Executive Committee, having noted the report and issues stated in the report submitted to it, could have simply dismissed the respondent from ^h employment.

2006 (2) ZLR p178

Cheda JA

However, the appellant chose to seek authority from the Labour Relations A Department to dismiss her.

Section 141(2) of the Act provides as follows:

"(2) Subject to the conditions of service of the employee concerned, a council or, in the case of a municipality council, the Executive Committee of the council, may at any time discharge an employee other than a senior B official –

- (a) upon uneven notice of not less than three months; or
- (b) summarily on the grounds of misconduct, dishonesty, negligence or any other ground that would in law justify discharge without notice."

There was, therefore, sufficient cause for the discharge of the respondent without having to refer the matter to the labour officer. c

Once the matter was referred to the labour officer, his appreciation of his role appears confused. He accepted, in his determination, that "Samupindi did not follow procedures", then considered mitigatory factors raised by her legal practitioner, after which he concluded that reversal of the entry was an oversight. d

If she did not follow the proper procedures and/or there was negligence on her part, that is covered by s 141(2)(b) of the Act. Instead, the labour officer decided to exercise his discretion in sympathy with her situation. This was not appropriate because such a discretion was not within the jurisdiction of the labour relations officer.

The discretion of a labour officer was only brought about by the amendment e in Act 17 of 2002 which came into operation after this case. It provided as follows in s 12B(4):

"In any proceedings before a labour officer, designated agent or the Labour Court where fairness of the dismissal of an employee is in issue, the adjudicating authority shall, in addition to considering the nature or f gravity of any misconduct on the part of the dismissed employee, consider whether any mitigation of the misconduct avails to the extent that would have justified action other than dismissal, including the length of the employee's service, the employee's previous disciplinary record, the nature of the employment and any special personal circumstances of the employee." g

The labour officer, having taken these factors into account, ordered that the respondent should be reinstated with effect from the date of determination of the matter, which was 30 April 1999.

The next complication in the case was that, when the matter was taken on appeal before the Labour Court, that court did not deal with the merits of the h case.

2006 (2) ZLR p179

Cheda JA

A Instead, the Labour Court only referred to the issue as follows:

"The Labour Relations Officers (LRO) who heard the application found the respondent had not falsified an entry but that the discrepancy was an oversight."

The Labour Court did not itself make any finding but merely referred to the finding of the labour relations officer without considering or assessing its b correctness in view of the evidence in the record.

On the issue of jurisdiction, the appellant was adequately empowered by s 141 of the Act to dismiss the respondent from employment. It did not dismiss her. Instead, it referred the matter to the labour relations officer.

If it had dismissed her, setting aside the labour relations officer's determination c would be the end of the matter.

The referral of the matter to a labour relations officer was not fatal to the matter either.

At the time, this matter arose, there was provision for a labour relations officer to entertain matters referred to a labour officer by the parties.

d Section 93 of the Labour Relations Act [Chapter 28:01] provided as follows:

"POWERS OF LABOUR RELATION OFFICERS

(1) A labour relations officer, acting on his own initiative to redress any dispute or unfair practice or upon reference to him by any person of a dispute or unfair labour practice – e

- (a) ...;

- (b) after giving both parties an opportunity to submit representations orally or in writing, may make such determination in respect to the dispute or unfair labour practice as may be just in the circumstances; or ...
- (c) ...; F
- (d) ...;
Provided that, where –
 - (i) ...
 - (ii) the parties to the dispute request it and are agreed on the issues in dispute, the labour relations officer may determine the dispute or unfair labour practice or refer it to compulsory arbitration, as the case may be.”

In view of the above, I am of the view that this was an alternative procedure which the appellant chose to follow.

It is notable that when the matter went to the Labour Court the merits were not ^H argued. The Labour Court did not deal with them but dealt only with the

2006 (2) ZLR p180

Cheda JA

technical point that was raised. There was a need for the Labour Court to ^A consider the merits instead of only endorsing the labour officer's determination. This matter started in 1998, which is now more than seven years ago. It would have been more appropriate to remit the matter to the Labour Court to hear the merits and conclude the matter.

However, it appears that no good purpose will be served by doing so since ^B the record shows clearly that the respondent admitted her wrong doing, and the Act shows in s 141 that the appellant was entitled to dismiss the respondent from employment once the misconduct was proved.

There is no point in referring the matter back to the Labour Court to hear merits in the circumstances when the respondent's guilt is obvious and admitted.

The matter has to be brought to finality. ^C

1. The appeal succeeds and it is granted.
2. There will be no order as to costs.

CHIDYAUSIKU CJ & GWAUNZA JA concurred. ^D

Honey & Blanckenberg, appellant's legal practitioners

Muvingi & Mugadza, respondent's legal practitioners ^E

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/BARCLAYS BANK OF ZIMBABWE v ZRA 2006 (2) ZLR 181 (S)

BARCLAYS BANK OF ZIMBABWE v ZRA 2006 (2) ZLR 181 (S)

2006 (2) ZLR p181

Citation	2006 (2) ZLR 181 (S)
Case No	Judgment No. S-31-06
Court	Supreme Court, Harare
Judge	Cheda JA, Ziyambi JA & Malaba JA

Heard	20 February 2006
Judgment	25 September 2006
Counsel	<i>J Mafusire</i> , for the appellant <i>L Mazonde</i> , for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

c Revenue and public finance — *income tax — taxable income — grant of share option to senior employees as part of an incentive scheme — taxable advantage or benefit in respect of employment — value of shares determined at date option exercised*

Headnote

▫ The appellant bank had a scheme whereby it would grant to its managerial employees options to purchase its shares within a certain period at prices ruling at the time of the grant of such options. This gave the employees preferential rights of allotment commensurate with their seniority within the bank. The purpose of the scheme was to provide further incentives ^ε for motivating and retaining managerial staff for the benefit of the bank. The option price payable on exercise of the option was the middle market price prevailing on the day immediately before the day on which such option was granted. The options were not transferable and terminated on such events as termination of employment or demotion. The option was to be exercised by way of a written notice signed by the participant ^ε and stating the number of shares he wished to take. The date on which the bank received the notice was deemed to be the date on which the option was granted. When the notice was given to the bank that an employee wished to exercise his option in respect of ^x number of shares, the appellant sold ^x shares on behalf of the employee, deducted from the proceeds thereof the price of the shares (the option price in terms of the ^g scheme) and paid the balance to the employee. That was a profit obtained without the employee having to make any out-of-pocket payment. The respondent contended that this was a taxable benefit and that PAYE should have been withheld, and garnished the bank's account with the ^h Reserve Bank.

2006 (2) ZLR p182

Ziyambi JA

Held, that the profit received by the employee in this manner was an ^a advantage or benefit in respect of employment, service, office or other gainful occupation in terms of s 8(1)(f) of the Income Tax Act [*Chapter 23:06*] and an amount received or accrued in respect of services rendered or to be rendered in terms of s 8(1)(b) of the Act. Upon the grant of the option, the employee received a mere expectation to make ^b a profit from the shares, but once he exercised the option and received the shares, their value, less any amount paid for them before or upon exercise of the option, was taxable.

Cases cited

Abbott v Philbin [1960] 2 All ER 763 (HL) ^c
de Villiers v Commr for Inland Revenue 1929 AD 229
Mooi v Sec for Inland Revenue 1972 (1) SA 675 (A)

Legislation considered

Income Tax Act [*Chapter 23:06*], s 8(1)(b) and (f) ^d

Case information

J Mafusire, for the appellant

L Mazonde, for the respondent

Judgment

ZIYAMBI JA: The appellant is a Commercial Bank which carries on business within Zimbabwe. On 23 October 2001, the respondent, as the authority ^E responsible for the collection of revenue in Zimbabwe, served a garnishee order upon the Reserve Bank of Zimbabwe requiring that bank to pay to the respondent, by way of taxes, the sum of \$301 572 750.05 from the appellant's account with the Reserve Bank. Thereafter, on 6 November 2001, the garnishee was effected. Part of the funds represented employees' tax ("PAYE") which the respondent claimed ought to have been withheld by the appellant from the ^F employees for payment to the respondent.

In the High Court, the appellant brought a court application seeking, *inter alia*, a *declaratur* that:

"No taxable benefit accrued to the employees of the applicant as at the date of exercising rights in terms of the management share option scheme, and ^G accordingly that the applicant was not obliged to withhold any employees' tax in respect of the exercise of such options";

and, an order that the respondent repay to the appellant the sums garnished from its account with the Reserve Bank.

This appeal is against that part of the judgment of the High Court in which it found, in favour of the respondent, that a taxable benefit did accrue to the ^H

2006 (2) ZLR p183

Ziyambi JA

^A employees at the time of the exercise of their rights in terms of the management share option scheme.

The management share option scheme ("the Scheme") was set up by the appellant to grant to its managerial employees options to purchase its shares within a certain period at prices ruling at the time of the grant of such options, thereby giving to the employees, preferential rights of allotment commensurate ^B with their seniority within the bank. The purpose of the scheme was to provide further incentives for motivating and retaining managerial staff for the benefit of the bank. The number of shares allocated to the scheme constituted 1.5 percent of the issued share capital of the bank and was to be maintained at that level at all times. The option price payable on exercise of the option was the ^C middle market price prevailing on the day immediately prior to the day on which such option was granted. The options were not transferable and were to expire:

- (a) when the employee's employment was terminated whether through resignation or dismissal;
- (b) upon demotion of the participant to a grade lower than that of manager; ^D
- (c) at the lapse of 12 months from the date on which the participant retired from the bank's service after reaching normal retirement age; and
- (d) upon the expiry of 10 years from the date on ^E which the option was granted.

The option was to be exercised by way of a written notice signed by the participant and stating the number of shares the participant wished to take. The date on which the bank received the notice was deemed to be the date on which the option was granted.

The appellant contended that because the grant of the share options was unconditional and the employees were entitled to use their discretion as to when to exercise the options, the taxable event was to be determined by reference to the share option price and the middle market value of shares ruling ^F at the date of granting the option. Thus, if the prices were the same, there would be no taxable event. While accepting that the subsequent rise in the value of the shares between the dates of granting and exercising the share options was a benefit to the employees, the appellant denied that the benefit thus obtained was a taxable benefit in terms of ss 8(1)(b) or 8(1)(f) of the Income Tax Act [*Chapter 23:06*] ("the Act"), for which the appellant was obliged by virtue ^G of para 3(1) of the Thirteenth Schedule to the Act, to deduct PAYE as opposed to a capital gains tax liability taxable in the hands of the employee.

It was further contended by the appellant that since the Act does not specifically deal with share options, regard should be had to the case law ^H developed over the years in particular the English

Ziyambi JA

[1960] 2 All ER 763 (HL) and the South African case of *Mooi v Secretary for Inland Revenue* 1972 (1) SA 675 (A).

The respondent's stance was that the grant of the option was conditional as seen from the fact that the options were not transferable, they lapsed automatically upon resignation or dismissal, and they were granted upon promotion of employees to managerial level, in recognition of services rendered or as an inducement to render future services to the bank. Accordingly, so it was argued, the provisions of s 8(1)(b) and (f) of the Act are applicable in these circumstances in that there was an accrual of an advantage with an ascertainable money value at the time of exercising the offer.

The respondent further submitted that the case of *Abbott v Philbin* was not applicable as the facts therein differed materially from those in the instant case and that there existed the necessary "causal relationship" between the benefit acquired by the employees and their services to the bank to bring the benefit within the statutory definition of gross income. See *de Villiers v Commissioner of Inland Revenue* 1929 AD 229 at 233.

The relevant provisions of the Act are set out hereunder: ^D

"8. Interpretation of terms relating to income tax

(1) For the purposes of this part –

'gross income' means the total amount received by or accrued to or in favour of a person or deemed to have been received by or to have accrued to or in favour of a person in any year of assessment from a source within ^E or deemed to be within Zimbabwe excluding any amount (not being an amount included in 'gross income' by virtue of any of the following paragraphs of this definition) so received or accrued which is proved by the taxpayer to be of a capital nature and, without derogation from the generality of the foregoing, includes:

...

- (b) any amount so received or accrued in respect of services rendered or to be rendered, whether due and payable under any contract of employment or service or not, and any amount so received or accrued by reason of the cessation of the employment or service of a person other than a benefit (not being a pension or gratuity) received or accrued by reason of contributions made to the Consolidated Revenue ^G Fund, and any amount so received or accrued in commutation of amounts due under a contract of employment or service ...
- (f) an amount equal to the value of an advantage or benefit in respect of employment, service, office or other gainful occupation or in connection with the taking up or termination of employment, service, office or other gainful occupation ... ^H

Ziyambi JA

^A For the purposes of this paragraph:

1. 'advantage or benefit'–

(a) means –

- (iv) the use or enjoyment of any other property whatsoever, corporeal or incorporeal, including a loan, ..."

^B There is no doubt that the share options were granted, in respect of services rendered, ^F to those who had rendered satisfactory service to the bank and were promoted to the rank of managers and, in respect of services to be rendered, to all managers including new managerial appointees. The appellant says that the scheme was an incentive to them. Assuming the share options were exercised on the day of grant of the options, there would be no profit accruing ^C to the employee. However, as the options were exercised at a later date when the value of the shares at the date of the exercise of the option had risen, the difference between the option price and the actual value of the shares would be a profit to the employee and constitute a benefit. That much was conceded by the appellant who maintained, nevertheless, that the benefit so obtained does not fall within the definition of remuneration in para 1(1)(b) of the ^D Thirteenth Schedule of the Act and accordingly that there was no obligation on the appellant to deduct PAYE therefrom in terms of para 3(1) of the said Schedule.

What in fact occurred upon exercise of the share options is that when notice was given to the bank, in terms of the conditions of the scheme, that the ^E employee wished to exercise his option in respect of ^x number of shares, the appellant sold ^x shares on behalf of the employee, deducted from the proceeds thereof the price of the shares (the option price in terms of the scheme) and paid the balance to the employee. That was a profit obtained without the employee having to make any out-of-pocket payment. It is this profit which the appellant claims is not taxable in the employer's hands, while the respondent ^F maintains that it is an amount equal to an advantage or benefit in respect of employment, service, office or other gainful occupation in terms of s 8(1)(f), and an amount received or accrued in respect of services rendered or to be rendered in terms of s 8(1)(b) of the Act.

In my view, the respondent is correct. The provisions of the Act aforesaid are clear and unambiguous and the amounts accrued to the employees fall within ^G the provisions of both the said paragraphs.

It was submitted by the appellant that the cases of *Abbott v Philbin* and *Mooi supra* are authority for the proposition that the share option itself was the thing granted to the managers as a perquisite of their employment; that it is a thing which could be turned to some value; and that the date of the grant ^H of the option was the date on which it should be taxed. If the value of the shares

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at the date of grant of the option was different from the share option price ^A offered to the employee then the difference would be taxable. However, as in this case, there was no difference, the option price being the mid-market price of the shares, there was nothing to be taxed.

The decisions referred to, though not binding on this court, would of course be persuasive authority which could assist this court in arriving at a decision ^B in the instant matter. But, as it was put by Rumpff JA in *Mooi's case supra*, at p 686, referring to the decision in *Abbott v Philbin*:

"What does persuasive authority mean? In my view, certainly not the mere final order of that court, but the force and validity of the reasoning upon which the order is based."

In that event, I am persuaded by the reasoning of Denning LJ in *Abbott v Philbin supra*, in his dissenting judgment at pp 777F-778C, where he stated as follows:

"Now in *Salmon v Weight* ... that case shows decisively that the *expectation* of receiving a benefit, no matter how well founded is not itself a perquisite or profit. It must be reduced into possession. A bird in the hand is taxable, but a bird in the bush is not. So, here, if nothing had been paid for the ^D option, the letters that passed would have been nothing more than a standing offer by the company to allot shares to the appellant at 68s. 6d. a share. That offer could have been withdrawn by the company, at any time before acceptance, with impunity. The offer itself would not be a perquisite or profit, for it conferred only the expectation of profit, not any profit itself. But, when it was accepted and shares worth 82s. apiece were ^E allotted to the appellant for 68s. 6d., he would then receive profits which would be taxable in his hands. No difficulty would arise about the year of assessment. The profits would accrue to him in the year they were received.

... I ask myself, what is the difference for tax purposes between the case ^F I have just put, where nothing is paid for the option, and the case we have before us, where a nominal sum is paid? The difference is that in the one case he has only an *expectation* of profit whereas in the other he has a *right* to make profits in the future, if the opportunity arises. But in either case, until the option is exercised, he has not the *profits* themselves. And, as I read the Act, it is not the *expectation* to make profits, nor the *right* to make profits, which is taxable, but only the *profits* themselves. Just as ^G it is not the expectation to salary nor the right to salary which is taxable, but only the salary itself. A bird in the bush is not taxable ... if it is still there. You must have it in hand before you can be taxed for it. And when you come to consider what 'profits' the servant receives from his employment by virtue of the option, surely it makes no difference whether he pays ^H

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a nominal sum or not. In either case, the employer grants him the option as a reward or return for his services; and the profits he makes out of it are the same save ^I for this: if he paid nothing, it is all profit: if he paid a peppercorn, it is all profit less the value of a pepper berry; if he paid 1s., less a 1s., if he paid £20, less £20."

It follows from the above that I do not accede to the submission made on behalf ^B of the appellant that no taxable event occurred upon the exercise of the share options by the employees. Rather, I take the view that upon the grant of the option, the employee receives a mere expectation to make a profit from the shares. Once he exercises the option and receives the shares, their value, less any amount paid for them before or upon exercise of the option, is taxable in terms of para 3(1). The argument that the employee received, at the time of the ^C

^D grant of the option, an offer which could be turned to monetary value does not assist the appellant. The option was not transferable. In any event, until he exercised the option there was nothing to transfer but an expectation which would in this case be valueless.

Accordingly, the judgment of the court *a quo* is upheld and the appeal is dismissed with costs.

CHEDA JA & MALABA JA concurred.

Scanlen & Holderness, appellant's legal practitioners

^E *Kantor & Immerman*, respondent's legal practitioners

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CHEVRON INVESTMENTS (PVT) LTD v CHIHURI & ANOR 2006 (2) ZLR 188 (S)

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Citation	2006 (2) ZLR 188 (S)
Case No	Judgment No. S-36-06
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Gwaunza JA
Heard	9 May 2006
Judgment	26 September 2006
Counsel	<i>A Moyo</i> , for the appellant <i>T Mangena</i> , for the first respondent No appearance for the second respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Appeal — evidence — application to lead fresh evidence on appeal — evidence available at time of trial — effect of new evidence would be to allow party to argue its case differently — application refused

Company — directors — disposing of assets of company without assent of shareholders — validity of transaction — need to show that assets being ^D disposed of constitute whole or major part of company's assets before transaction can be held to be invalid — assent of shareholders being giving retrospectively — such assent valid — directors being sole shareholders — directors ratifying actions taken by single director — authority given in retrospect ^E

Headnote

The appellant company, acting through an estate agent, offered an immovable property for sale. The first respondent attended on the estate agent and signed an irrevocable offer form, offering to buy the property for and to pay a little over half the purchase price as a deposit, with the balance being payable upon transfer. The following day a director of the appellant ^F signed the offer form and the respondent signed a formal agreement of sale. A day later, he paid the deposit. On the next day, the appellant wrote to the estate agents, instructing them to cancel the contract of sale. The grounds for cancelling were that a review of the selling price was necessary given "the rate of inflation". The letter was signed by the appellant's three directors, including the director who had signed the ^G irrevocable offer form two days previously. The respondent insisted on the appellant abiding by the contract of sale. The appellant responded by letter, advancing new grounds for wishing to have the agreement cancelled, among them being that no company resolution had been passed to dispose of the property in question. The respondent obtained ^H

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^A an order for the appellant to sign all papers necessary to effect transfer of the property to him.

On appeal, the appellant sought to advance yet another ground for revoking the sale, and filed an application to adduce fresh evidence, that the property in dispute was the only immovable property registered in the name of the appellant and was the appellant's sole asset. Counsel for the ^B appellant claimed that it was an "oversight" on the part of the appellant's then legal practitioner in the court *a quo* not to tender this evidence, though he also conceded that the evidence was available at the time the matter was heard and could have been obtained, except that no effort had been made to do so. The appellant also contended that s 183 of the Companies Act [Chapter 24:03] renders unenforceable any agreement ^C entered into for and on its behalf by one of its directors to dispose of the company's undertaking or the whole or greater part of its assets, without the sanction of the shareholders.

On the merits, the appellant argued first, that the High Court erred in finding that one director had ostensible authority to sell the property; and ^D second, that the High Court erred in finding that two of the three directors had signed the irrevocable offer form.

Held, that it was clear that the motivation for the application to adduce fresh evidence was the wish to present the appellant's case differently from the manner it was presented in the court *a quo*, to lay the ground for the contention that an order upholding the agreement of sale would result ^E in a contravention of s 183 of the Companies Act. Good grounds for adducing of fresh evidence on appeal do not include the need to argue the dispute on the basis of new facts not presented in the court *a quo*. Effectively, the appellant was stating that the evidence it presented in support of its case in the court *a quo* was inadequate, hence its desire to complete or supplement that evidence by adducing additional evidence ^F on appeal. Apart from giving the appellant another chance to argue its case differently, granting the application would result in unduly delaying finalisation of the matter. There were no special circumstances to warrant a departure from the general rule. The evidence was available and could have been easily accessed.

^G *Held*, further, that the appellant led no evidence in the court *a quo* specifically relating either to the applicability or otherwise of s 183 or the extent of the appellant's assets and the court was entitled to decide the matter on the basis of ostensible authority.

Held, further, that the purpose of s 183 of the Act is to protect the shareholders of a company against unscrupulous directors who might wish to dispose ^H of its assets at will, and to the shareholders' detriment. It is not to provide

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the directors of a company with the means to resile from an agreement ^A they would have validly entered into with an innocent party, when they realise that they may have made a bad bargain. The section is contravened when the directors of a company go behind the back of its shareholders and dispose of the undertaking of the company or of the whole or the greater part of its assets. However, the directors of a company can ^B properly dispose of minor assets of the company without the authority of the shareholders. In order to establish that the asset in

question constitutes a quantity the disposal of which would contravene the section, it is necessary to place before the court evidence concerning the full extent of the company's assets. No information was placed before the court *a quo*, nor was the point argued, as to what percentage of the total assets of the appellant was represented by the immovable property and so it was not possible for the court to ascertain, for purposes of s 183 of the Act, whether the property constituted the whole or a greater part of the assets of the company. There is nothing in s 183 to make any transaction entered into without the approval of a company in a meeting, null and void, so long as it is capable of ratification by the shareholders. ^d There is also nothing in the Act to prohibit the authority required for purposes of s 183 being given retrospectively. Where the only shareholders and directors express — whether at the same time or not — their joint approval of a transaction contemplated by s 183(1)(b) their decision is as valid and effectual as if it had been taken at an effective general meeting convened with all the formalities prescribed by the Act. ^e

Held, further, that even if the property in question was the whole or a major part of the appellant's assets, the appellant could not have resiled from the agreement of sale. The doctrine of unanimous assent would have been successfully invoked against the appellant. While calling themselves directors, the three signatories to the letter cancelling the sale were also ^f the only shareholders of the appellant. In their joint capacities as directors and shareholders, the three commissioned the estate agent concerned to sell the property in question, on their behalf. All were present during the viewing of the property by prospective buyers, including the respondent. After the latter made an offer for the property and one of the directors accepted it in writing, the rest of the directors ^g ratified his actions, thereby and effectively giving their authority in retrospect.

Cases cited

Colman v Dunbar 1933 AD 141 ^h

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^a *Farmers' Co-op Ltd v Borden Syndicate (Pvt) Ltd* 1961 R & N 28; 1961 (1) SA 441 (FS)

Kearns v Walter Entprs S-160-90

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

In re Olympus Consolidated Mines Ltd 1958 (2) SA 381 (SR)

^b *Royal British Bank v Turquand* (1856) 6 E & B 326; 119 ER 886

Sugden v Beaconsfield Dairies (Pty) Ltd & Ors 1963 (2) SA 174 (E)

Legislation considered

Companies Act [Chapter 24:03], s 183

Case information

^c *A Moyo*, for the appellant

T Mangena, for the first respondent

No appearance for the second respondent

Judgment

GWAUNZA JA: This is an appeal against a judgment of the High Court, in ^d terms of which the appellant was ordered to sign all papers necessary to effect transfer of certain property in Harare, to the first respondent. The court *a quo* also set aside the purported cancellation, by the appellant, of the agreement in terms of which the disputed property had been sold to the first respondent.

The following background to the dispute is not disputed:

^e On 15 February 2005, the first respondent responded to a newspaper advertisement concerning the sale of immovable property at No.48 Tunsgate Road, Northwood. The property belonged to the appellant and had been advertised for sale, at the appellant's instance, through an estate agent. Having decided to buy the property, the first respondent attended on the estate agent and signed an

irrevocable offer form, offering to buy the property F for \$765 million. He offered to pay a deposit of \$400 million, with the balance being payable upon transfer.

On 16 February 2005, the irrevocable offer form was signed on behalf of the appellant. Even though in the space provided for this purpose on the form, it is indicated that the offer had been accepted for the appellant by Innocent G Muchenje and Mordeline Nedziwe, there is a dispute as to whether the latter actually signed the form. It is, however, not disputed that Innocent Muchenje signed it. I will address this dispute later.

The first respondent, on the same day, signed a formal agreement of sale and paid the deposit of \$400 million the following day. A day later, on 18 February 2005, the appellant wrote to the estate agent, instructing them to cancel the H contract of sale. The opening paragraph of the letter read as follows:

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"We wish to formally put aside *our acceptance* of the offer put forward, A of ZW\$765 million as the purchase price of the property ..." (my emphasis).

The letter went on to state that a review of the selling price was necessary given "the rate of inflation". The letter was signed by the appellant's three directors, including Innocent Muchenje, who had signed the irrevocable offer form two days previously. B

In response to this development, the respondent, through his lawyers, rejected the withdrawal of the appellant's acceptance of his offer and insisted on the latter abiding by the contract of sale. The appellant responded by letter dated 22 February 2005, and advanced new grounds for wishing to have the agreement cancelled. These were that no company resolution had been passed to dispose of the property in question; that the first respondent had C failed to disclose the fact that his offer to purchase the property was conditional upon obtaining mortgage finance; and that, in accepting the offer, the appellant had acted on incorrect information supplied by the estate agents in respect of the Capital Gains Tax payable by it.

The first respondent after this resorted to the application whose determination D is now being appealed against.

In the court *a quo*, the learned Judge correctly determined that the issue to be decided was whether a valid contract between the parties existed and if so, whether the appellant *in casu* had a basis for cancelling such agreement.

APPLICATION TO ADDUCE FRESH EVIDENCE ON APPEAL E

As already indicated, the appellant, in the court *a quo*, advanced a number of reasons for wishing to rescind its earlier acceptance of the first respondent's offer.

Now, on appeal to this court, the appellant seeks to advance yet another ground for revoking the sale, and has for that purpose filed an application, F which is opposed by the first respondent, to adduce fresh evidence.

I will deal with this application first before considering the merits of the appeal.

The fresh evidence that the appellant seeks to adduce on appeal is in the form of a report from the Registrar of Deeds, to the effect that the property in dispute is the only immovable property registered in the name of the appellant. The appellant relies on this report to contend that the property in question forms G the sole asset of the appellant. In para 4 of its founding affidavit, the appellant submits that the court *a quo* had proceeded on the assumption that it (appellant) had no property, movable or otherwise, outside of the disputed property. Later in the same affidavit (para 7), the appellant seemingly contradicts itself by stating that the allegation to the effect that the house in question H

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A constituted the sole asset of the appellant, was not made in the court *a quo*. The appellant does not explain how the court *a quo* could have proceeded on that assumption if the matter was not specifically alleged, and if, as the appellant itself concedes, it was not an issue then. In any event,

there is no indication in the judgment of the court *a quo* that the implications of the appellant owning that or any other asset had exercised the learned Judge's ^B mind, much less that she had proceeded on the assumption that the appellant owned only one asset. Simply, the matter was not placed before her as evidence, and therefore was not considered at all.

Counsel for the appellant, Mr *Moyo*, submits that it was an "oversight" on the part of the appellant's then legal practitioner in the court *a quo*, not to tender ^C the evidence now being sought to be adduced. He also concedes that the evidence concerned was available at the time the matter was heard *a quo* and could have been obtained, except that no effort had been made to do so. From this, it can, in my view, be safely assumed, and I so find, that the evidence could have been obtained without any due diligence at all.

I however, find Mr *Moyo*'s submissions to be quite instructive, in that they ^D suggest clearly what the motivation was for the application to adduce fresh evidence on appeal. It was, evidently, the wish to present the appellant's case differently from the manner it was presented in the court *a quo* by a different legal practitioner. The intention, in the light of the new arguments now being advanced for the appellant, is to lay the ground for the contention that an order ^E upholding the agreement of sale would result in a contravention of s 183 of the Companies Act [*Chapter 24:03*] ("the Act").

As both counsel indicate in their heads of argument, the law, and the authorities, are quite clear on what constitutes good grounds for the adducing of fresh evidence on appeal. ¹ The grounds do not include the need to argue the dispute on the basis of new facts not presented in the court *a quo*. To the ^F contrary, the law expressly frowns upon such attempts, as was succinctly stated by McNally JA in *Kearns v Walter Enterprises* S-169-90:

"In the circumstances, we do not wish to set a precedent for litigants to treat the Supreme Court as a second court of first instance, a court in which they can try out the issues again on fresh facts if the first set proved to be inadequate."

^G These words can aptly be applied to the circumstances of this case. By asserting that the appellant's counsel in the court *a quo*, through an oversight,

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failed to adduce the evidence now being sought to be introduced, the ^A appellant is clearly stating that the evidence it presented in support of its case in the court *a quo* was inadequate. Hence its desire to complete or supplement that evidence by adducing additional evidence on appeal. Apart from giving the appellant another chance to argue its case differently, granting the application would result in unduly delaying finalisation of the matter. As ^B Wessels CJ correctly stated in *Colman v Dunbar* 1933 AD 141 at 161:

"It is essential that there should be finality to a trial, and therefore if a suitor elects to stand by the evidence which he adduces, he should not be allowed to adduce further evidence except in exceptional circumstances."

In casu, the appellant has not shown that there are special circumstances to warrant a departure from the general rule. The evidence was available and ^C could have been easily accessed. No effort was made to obtain the evidence because it did not occur to the appellant's counsel that it was relevant to the dispute, and it is being brought up now simply because another legal practitioner considers it to be relevant after all. In addition to this, I am not persuaded, as indicated below, that the evidence in question would have had an important influence on the result of the case. ^D

In view of the foregoing, I find that the applicant has failed to prove a case for adducing fresh evidence on appeal.

The application is accordingly dismissed with costs.

MERITS ^E

I will turn now to the merits of the appeal, and note from the outset that the appellant has abandoned its first ground of appeal and now relies on the remaining two grounds, which are that the court *a quo* erred by:

- (i) finding that one of the directors had ostensible authority to sell the property in question; and
- (ii) finding that two directors signed the irrevocable offer form. ^F

The argument concerning the lack of authority that the appellant now alleges in respect of its director, Innocent Muchenje, has been expanded upon on appeal. The appellant now argues that the authority in question could only have been that referred to in s 183 of the Act. ^g

Section 183 of the Act provides as follows:

“(1) Notwithstanding anything in the articles, the directors of a company shall not be empowered, without the approval of the company in general meeting –

(a) ... ^h

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A (b) to dispose of the undertaking of the company or of the whole or the greater part of the assets of the company.

(2) No resolution of the company shall be effective as approving ... of a disposal in terms of paragraph of subsection (1) unless it authorizes, in terms, the specific transaction proposed by the directors.”

The appellant contends that s 183 of the Act renders unenforceable any ^b agreement entered into for and on its behalf by one of its directors to dispose of the company’s undertaking or the whole or greater part of its assets, without the sanction of the shareholders as provided for in that section. The appellant advances this argument even though, by its own admission, it led no evidence in the court *a quo* specifically relating to the applicability or otherwise, of ^c s 183 of the Act, nor the extent of the appellant’s assets. Despite what counsel for the appellant, Mr Moyo, now wishes to advance as one of the appellant’s grounds of appeal, it is very clear from a reading of the evidence presented in the court *a quo* that the appellant’s reference to “authority” had nothing to do with the provisions of s 183 of the Act. This in reality explains why the learned trial judge made no reference to s 183 and determined the matter on the basis of ostensible authority, which she was satisfied the respondent properly relied on in seeking to hold the appellant to its acceptance of his offer. The learned judge *a quo*, in my view, correctly analysed the evidence as follows:

“The letter of 18 February 2005 purporting to withdraw the acceptance of the offer was signed by all three of the company directors. In that letter ^e the three directors acknowledge that they were aware that the property was on sale, that a party had offered to buy the property at \$765 million and that they had accepted the offer but they now wish to resile from the contract. They do not raise the issue of lack of authority. The applicant was entitled to have assumed that the directors, who signed the acceptance form, must have authority in one form or another to bind the company and ^f that all acts of internal management or organisation on which the exercise of such authority is dependent may, in terms of the *Turquand*² rule be assumed by a *bona fide* third party to have been properly and duly performed.”

Except for her reference to “directors” having signed the irrevocable offer form, I find the reasoning and decision of the learned judge *a quo*, based as ^g it was on the evidence that was presented before her, to be correct. In any case, it is irrelevant, in this respect, whether one or two directors signed the acceptance form. The appellant therefore cannot, as it now seeks to do, be heard to argue that the court *a quo* erred by ordering specific performance

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when to do so would contravene s 183 of the Act. Nor is there any basis for ^a the appellant to argue that the court *a quo* erred in finding that the *Turquand* rule prevailed over s 183 of the Companies Act. The *onus* was on the appellant in the court *a quo* to draw the learned judge’s attention to s 183 and its possible effect on the transaction complained of. The appellant did not do so, and the judge proceeded to determine the matter on the basis of the evidence that was placed before her. ^b

As a general rule, an applicant’s case falls or stands on the evidence that he or she places before the court. While the court might, *mero motu*, properly go outside of this evidence to consider other legal aspects pertinent to the dispute before it, it is not in every case that the failure by the court to do so amounts to a misdirection at law. ^c

I am satisfied, when all is told, that the court *a quo* properly determined the matter on the basis of ostensible authority. Consequently, I find there is no merit in the appellant’s first ground of appeal.

Having said this, however, I am mindful of the fact that one may raise a point of law at any stage of the proceedings in dispute before the court, including ^d the appeal stage. The applicability or otherwise of s 183 of the Companies Act is a point of law. It is on this basis, and in order to put the

matter beyond any doubt, that I will consider the merits or demerits of the appellant's argument that the order of specific performance granted by the court *a quo* would offend against the provisions of s 183 of the Companies Act.

Section 183 of the Companies Act, from a closer reading thereof, is contravened ^E when the directors of a company go behind the back of its shareholders and dispose of the undertaking of the company or of the whole or the greater part of its assets. Where the directors, in so doing, purport to act on the basis of a company resolution, their actions shall be null and void unless the resolution in question, "in terms", specifically authorises the transaction.

In the case at hand, it is not in dispute that the directors of the appellant who, ^F according to the evidence before the court, were three in number, commissioned an estate agent to advertise for sale, and sell, on their behalf, the property in question. After the respondent offered to buy the property on certain payment terms, the offer was accepted in writing on behalf of the appellant. Even though the appellant now disputes that the irrevocable offer form was signed on its ^G behalf by two of its directors, what is relevant and significant is that at some point not specifically indicated, but to be inferred from para 1 of their letter of 18 February 2005, all the three directors of the appellant ratified and confirmed the acceptance.

The effect of this ratification in the light of s 183 of the Act is that all three directors of the appellant purported to dispose of an asset of the company. ^H

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^A What has not been established, because that information was not placed before the court *a quo* nor was the point argued, was what percentage of the total assets of the appellant was represented by the immovable property in question. The argument, which, in my view, is valid, is made on behalf of the respondent that without an indication of the extent of the appellant's assets, it is not possible for the court to ascertain, for purposes of s 183 of the Act, ^B whether the property constituted the whole or a greater part of the assets of the company.

I interpret para 1(b) of s 183 to mean that the directors of a company can properly dispose of minor assets of the company without the authority of the shareholders. Therefore, in order to establish that the asset in question ^C constitutes a quantity the disposal of which would contravene the section, it is, in my view, necessary to place before the court evidence concerning the full extent of the company's assets. This the appellant has not done. The fact that the appellant already owned one immovable asset did not of itself mean it did not own other assets, both movable and immovable. As long as it has not been, and cannot on the papers be, established that the property in ^D question constitutes a percentage of the assets that s 183(1)(b) provides should not be disposed of without authorisation, s 183(1)(b) will not apply. If that paragraph does not apply, it follows that s 183(2), which provides for specific authorisation of the transaction in question, does not apply. The authorisation relates only to the quantity of assets specified in subs (1). It is evident therefore that the order for specific performance, that the court *a quo* ^E made, would not have offended against s 183(1)(b) of the Companies Act.

However, even had the appellant placed before the court evidence to show that the property in question was the whole or a major part of its assets, I am not persuaded it would have succeeded in its attempts to resile from the agreement of sale. I am in this respect persuaded by the respondent's ^F contention that the doctrine of unanimous assent would have been successfully invoked against the appellant. It is not disputed that, while calling themselves directors, the three signatories to the letter of 18 February 2005 were also the only shareholders of the appellant. Indeed, Mr *Moyo*, for the appellant, was not able to submit that there were other shareholders of the appellant besides the three. In their joint capacities as directors and shareholders, the three ^G commissioned the estate agent concerned to sell the property in question on their behalf.

It has been submitted, and not disputed, that all the three directors/shareholders were present during the viewing of the property by prospective buyers who included the respondent. After the latter made an offer for the property and ^H one of the directors accepted it in writing, the rest of the directors, as I have

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found, ratified his actions, thereby and effectively giving their authority in a retrospect. I am indebted to Mr *Mangena* for the respondent, who has cited, in his heads of argument, authorities for the proposition that a provision like s 183 would not make any transaction entered into without the approval of a company in a meeting, null and void, so long as it was capable of ratification by the shareholders ³. Further, that there was nothing in the Companies' Act to prohibit the authority required for purposes of the provision being given b retrospectively.

The situation in which the only directors of a company have disposed of the major assets of the company without the resolution referred to in the Companies Act, was dealt with in *Sugden v Beaconsfield Properties (Pvt) Ltd & Ors* 1963 (2) SA 174 (E). The principle of mutual assent was described as c follows:

"In my view, where the only two shareholders and directors express – whether at the same time or not – their joint approval of a transaction contemplated by s 70(2) [equivalent of our s 183(1)(b)] their decision is as valid and effectual as if it had been taken at an effective general meeting convened all the formalities prescribed by the Act." d

Applying these words to the circumstances of the case at hand, it cannot be disputed that all the three directors/shareholders approved the sale of the property in question, albeit at different times. They later sought to rescind such approval. On the basis of the authorities cited, they clearly cannot do so. Their approval has the same effect as compliance with s 183(2). e

The respondent, I find, is correct in his submission that the purpose of s 183 of the Act is to protect the shareholders of a company against unscrupulous directors who might wish to dispose of its assets at will, and to the shareholders' detriment. Its purpose is not to provide the directors of a company with the means to resile from an agreement they would have validly entered into with an innocent party, when they realise that they may have made a bad bargain. f

Therefore, even if the property in question constituted the sole asset of the appellant as envisaged in s 183 of the Act, the appellant would still not have been able to avoid the consequences of having retrospectively approved the sale of the property to the respondent.

THE SIGNATURE(S) ON THE OFFER FORM g

I will now consider the appellant's second ground of appeal, which concerns the signature affixed on its behalf, to the irrevocable offer form. The appellant

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Gwaunza JA

A charges that the court a quo erred by finding that two of its directors signed the irrevocable offer form.

A perusal of the irrevocable offer form shows there is one space for the signature of the seller. That space is clearly filled in by Dr Innocent Muchenje's signature. The relevant portion of the offer form reads as follows: "*The above offer is hereby accepted by me ...*" and leaves space for the details of the seller b to be filled in. Into this space it is indicated that the offer was accepted by Dr I Muchenje and Mordeline Nedziwe, on behalf of the appellant. Despite the reference to Mordeline Nedziwe it is evident that she did not sign the offer form, as the only other signature was affixed to the space marked "witness". A comparison of this signature with that of Mordeline Ndeziwe, as it appears c in the directors' letter of 18 February 2005, makes it clear that the signature is not hers. To put the matter beyond doubt, the signature does not resemble that of the other director of the appellant Mr I Muchenje, again as it appears at the end of the letter of 18 February 2005.

Even if Mordeline Ndeziwe, who was apparently Dr Muchenje's spouse, was in the company of the former when he signed the offer form at the offices of d the estate agents, and despite her name being printed on the form, it is evident that she herself did not sign the form. Therefore, for what it is worth, I find there is merit in the appellant's ground of appeal alleging misdirection on the part of the court a quo, when it found that two directors of the appellant had signed the irrevocable offer form.

e This finding, however, is not of much help to the appellant. It is, in my view, irrelevant whether one or two directors signed the offer form. What is relevant and crucial is the fact that, even by their own admission, the other two directors ratified the actions of Dr I Muchenje.

Taking all of the foregoing into account, I am satisfied there is no merit in the f appeal.

It is in the result, ordered as follows:

“The appeal be and is hereby dismissed with costs.”

SANDURA JA & ZIYAMBI JA concurred.

g *Kantor & Immerman*, appellant’s legal practitioners

Wintertons, first respondent’s legal practitioners

1 See for instance, *Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) and *Farmers’ Corp Ltd v Borden Syndicate (Pvt) Ltd* 1961 R&N 28 (FS)

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

3 See, among others, Tett & Chadwick, *Zimbabwean Company Law* 2 ed on p 117; *In re Olympus Consolidated Mines Ltd* 1958 (2) SA 381(SR)

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/MATSINDE v NYAMUKAPA 2006 (2) ZLR 200 (H)

MATSINDE v NYAMUKAPA 2006 (2) ZLR 200 (H)

2006 (2) ZLR p200

Citation	2006 (2) ZLR 200 (H)
Case No	Judgment No. HH-102-06
Court	High Court, Harare
Judge	Makarau J
Heard	28 June 2006
Judgment	4 October 2006
Counsel	Mrs J Pratt, for the applicant L Kabote, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Administration of estates — executor dative — appointment as — eligibility c — widow of customary law marriage — not disqualified from appointment — Master of the High Court — duty to appoint executors of deceased estates

Administration of estates — executor dative — claims made on behalf of estate — causes of action which survive the deceased — personal claims d — claim of former wife to an equitable share in matrimonial property after divorce — cannot be transmited to estate of wife after her death

Administration of estates — executor dative — removal — application for — should be made to the Master in the first instance, not to the court — power to remove or retain executors vested in the Master subject to E review by the High Court

Family law — husband and wife — divorce — claim for distribution of joint estate — not founded on common law — personal claim peculiar to husband and wife — intended to achieve justice as between former spouses — cannot be transmitted to the estate of deceased's spouse — upon death of one of the parties the claim is incapable of transmission F even after *litis contestatio*

Practice and procedure — transmissibility of rights or actions upon the death of the holder — rights in *rem* and rights in *personam* — *litis contestatio* — not all personal actions transmissible after *litis contestatio* upon death of the holder G

Headnote

The removal of an executor is an administrative function in the hands of the Master. It is therefore to him that allegations of unbecoming conduct by an executor should be made in the first instance. The decision of the Master to remove or to retain the executor after complaints have been H

2006 (2) ZLR p201

Makarau J

A lodged with him is then brought on review to the High Court on the recognized grounds of review of an administrative function.

The transmissibility of rights or actions depends on whether they are rights or actions in *rem* or in *personam*. Real rights are transmissible even where the holder dies before *litis contestatio* whereas personal rights die with the holder. The situation is different where the holder of personal rights B dies after *litis contestatio*. While actions for general damages for personal injury may survive the plaintiff if the plaintiff dies after *litis contestatio*, not all personal claims can survive the plaintiff even after *litis contestatio* has been reached. Claims, mainly in the realms of family law, die with the plaintiff. Claims such as claims for divorce, maintenance, C custody and guardianship of minor children clearly do not survive the claimant and cannot be pursued by the executor (*dicta per* Chatikobo J in *Ex p Masimbirembwa* 1995 (1) ZLR (H) 144 at p 148D followed.)

The distribution of the estate of a spouse, which is provided for in s 7 of the Matrimonial Causes Act [Chapter 7:13] is a personal claim that is peculiar to husband and wife or former husband and wife. It is not a cause D of action founded on a principle of common law. It is an action created by parliament to achieve justice as between husband and wife in an area where the strict application of the principles of property law may work an injustice on those spouses who contribute towards the acquisition of asset registered in the other spouses name.

In 1993, D obtained a divorce from his wife E. In granting the divorce, the court E gave E permission to return to court so as to lead evidence as to the value of the former matrimonial home of the parties. The court would then be in a position to consider the contribution made by E during the course of the marriage. However in 1999 and before this could be done, D died. E died six months later. At the time of his death, the former matrimonial home still remained the property of D. On his deathbed D married the F respondent who thereafter laid claim to the house and was appointed executrix dative of the deceased estate of D. In 2000, the applicant was appointed executrix detive of the deceased estate of E. She sought to set aside the respondents appointment as the executrix of D's deceased estate as well as an order setting aside her marriage to D. In seeking her G removal as executor, applicant relied on the fact that the respondent drew up a distribution plan, which did not take into account E's alleged share in the estate, particularly the house.

Held, that it was not necessary to determine the validity of D's marriage to the respondent in order to determine whether the respondent should be removed as the executrix of the deceased estate. This was the real point H at issue between the parties.

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Makarau J

Held, further, that there was no basis in law for impeaching the distribution A plan drawn up by respondent. A claim for the distribution of a matrimonial estate cannot be transmitted to the estate of the deceased's spouse. It remains incapable of transmission even when one of the parties dies after *litis contestatio* has been reached.

Held, further, that in the circumstances, the application for the removal of the **B** respondent as executrix dative to the deceased estate of the late **D** must be dismissed.

Cases cited

Ex p Masimbirembwa NO 1995 (1) ZLR 144 (H) **C**

Legislation considered

Matrimonial Causes Act [*Chapter 7:13*], s 7

Case information

Mrs *J Pratt*, for the applicant

L Kabote, for the respondent **D**

Judgment

MAKARAU J: In October 1993, one David Zhuwaneti issued summons out of the magistrates' court, seeking a decree of divorce against one Ebba David (Zhuwaneti). At the end of the hearing, the trial court made the following order:

"Divorce is granted on grounds of irretrievable breakdown of the marriage with the consent of both parties. House No. 2388, Kambuzuma to remain **E** with the applicant. Further evidence to be led on its value for the court to consider contributions made by respondent. Respondent is awarded all the movable property. Each party bears his or her costs."

As fate would have it, both David Zhuwaneti and Ebba David died before the parties returned to court to lead further evidence on the value of the immovable property to enable the court to assess Ebba's contribution in the immovable **F** property. The property "remained" with David until his demise on 1 March 1999.

On the date of his death, David "married" the first respondent in terms of the Marriages Act [*Chapter 5:11*]. Prior to the civil marriage, the parties were in a customary union that subsisted from 1995. The marriage between David and **G** the first respondent literally on his deathbed was the subject of an investigation by the Registrar-General whose findings are unknown. For reasons that I shall detail later, it is not necessary, in my view, that I make a determination on the validity of this marriage.

Upon the demise of David, the first respondent, armed with her marriage certificate to David, had the estate registered and in terms of intestate **H**

2006 (2) ZLR p203

Makarau J

A succession, was entitled to inherit all the property in the estate. This included the immovable property that had been the subject of litigation in the divorce proceedings of 1993 between David and Ebba.

Ebba passed on in September 1999, six months after the death of David. On 17 May 2000, the applicant was appointed executrix dative in the estate of Ebba **B** David, also known as Ebba Tagarira. In her capacity as such, she filed this application seeking an order setting aside the appointment of first respondent as the executrix dative of the estate of David Zhuwaneti, and also seeking to set aside the marriage under the Marriages Act of the first respondent to David.

The application was opposed on the grounds that the first respondent was **C** validly married to David and that the applicant's mother passed on before she had led further evidence before the trial court.

I now turn to consider the issues rising from this application.

During the hearing of the application, it was argued by the applicant that the first respondent was not legally married to the late David Zhuwaneti as she **D** allegedly married him on the same day that he passed away at a city hospital. In my view, there is a basis for the concerns raised by the applicant. Certain other irregularities attendant upon the alleged marriage were brought to the attention of the Registrar of Marriages by one of his officers in a statement, a copy of which was attached to the applicant's papers. On the basis of these irregularities, the applicant has prayed for an order that I set aside the marriage.

¶ I hesitate to make a definitive pronouncement on the validity of the marriage in these proceedings. Firstly, there is evidence before me that the Registrar of Marriages, a competent authority to do so, investigated the marriage. Whether such investigation has been completed and with what result, I have not been told. In the absence of an indication as to the stage at which the ¶ investigation is, I would withhold the court's inherent jurisdiction to allow the Registrar to make his findings known.

A marriage relates to one's status and a pronouncement on its validity or otherwise binds the world at large. Such a pronouncement should not be lightly made, in my view. It should be made on the clearest of evidence and after a thorough investigation of all the relevant facts.

¶ Further, it is not necessary for the disposal of the matter before me that I make a finding on the validity of the first respondent's marriage to David. The first respondent was in a customary union with David before the alleged marriage. Thus, even if she was not a wife at common law, she was a wife at customary law and thus a surviving spouse and eligible to be appointed executrix of ¶ David's estate in that capacity. Wives at customary law are not disqualified

2006 (2) ZLR p204

Makarau J

from appointment as executrices of their deceased husbands' estates. A

Thus, it is my finding that the validity of her marriage certificate has no direct bearing on her appointment at executrix dative and cannot be used as a ground for having such an appointment set aside.

I now turn to consider whether there is any other basis for removing the first respondent as executrix of the estate. B

From a reading of the applicant's affidavit, it would appear that the applicant desires to have the first respondent's removed as executrix because she drew up a distribution plan that did not take into account the alleged share of Ebba in the estate especially in respect of the immovable property, the subject of the dispute. The issue of the validity of the first respondent's marriage to C David is also brought in as a further ground for the removal of the first respondent as executrix of the estate. I have already expressed my views on the validity of the first respondent's marriage to David and its materiality to the dispute before me. It is the issue raised by the other ground that, in my view, raises an interesting legal point. This relates to whether the first respondent erred in disregarding the alleged share that Ebba had in the immovable D property forming part of David's estate.

I pause here to observe that the removal of an executor dative, in my view, should primarily be done by the Master on good ground shown. The appointment of an executor is an administrative function in the hands of the Master. It is therefore, to him that allegations of unbecoming conduct by an executor should be made in the first instance. The decision of the Master to E remove or to retain the executor after complaints have been lodged with him is then brought on review to this court on the recognized grounds of review of an administrative decision.

None of the above procedure was observed in the application before me. On that basis alone, I would dismiss the application. F

Assuming that I have erred in holding that the application to have the first respondent removed from office has been improperly brought, I still would have dismissed the application on its merits.

Mrs Pratt for the applicant argued passionately that the applicant should be authorized to file a claim on behalf of her late mother's estate, to quantify her G mother's contribution to the immovable property that is part of David's estate. She vividly described the injustice that will result should the court disallow an action by the applicant to proceed to lead evidence as to the contribution made by her late mother towards the acquisition of the property. She was quite clear in her argument that what was being sought at this stage was not a distribution of the matrimonial estate of the late David and Ebba in terms of H

2006 (2) ZLR p205

Makarau J

A s 7 of the Matrimonial Causes Act but a *declarator* allowing an action by the applicant to quantify a claim that was recognized by the lower court. She placed the claim on the same level as a real right that the late Ebba had in terms of the lower court's judgment and one that the applicant could

proceed to enforce. She labeled the right an “economic value” as opposed to a personal right. I understood her argument to be that the share Ebba was held to have in the immovable property is an asset in her estate; one that the applicant can collect.

Mrs *Pratt*’s argument in this regard is quite compelling and rooted in equity and common sense. It is however, not legally sustainable for a number of reasons.

c As correctly observed by Mrs *Pratt*, some causes of action survive the deceased and can be continued by the executor. As observed by Chatikobo J in Ex p *Masimbirembwa* NO 1995 (1) ZLR 144 (H) at p 148D:

“It would appear that the transmissibility of rights or actions depends on whether they are rights or actions in *rem* or in *personam*. Real rights are transmissible, even where the holder dies before *litis contestatio*, whereas d personal rights die with the holder. The situation appears different where the holder of personal rights dies after *litis contestatio*.”

It would appear to me that the above remarks by Chatikobo J are a reflection of the correct common law position under Roman Dutch Law for under English law, it would appear that through the intervention of statute, all causes of e action subsisting against or vested in the deceased survive against or for the benefit of his estate. ¹

While actions for general damages for personal injury may survive the plaintiff if the plaintiff dies after *litis contestatio*, it is my understanding of the law that not all personal claims can survive the plaintiff even after *litis contestatio* had been reached. Claims mainly in the realms of family law appear to me to die with f the plaintiff. Such claims as claims for divorce, maintenance, custody and guardianship of minor children quite clearly do not survive the claimant and cannot be pursued by the executor.

Claims for the redistribution of matrimonial property pose some difficulties especially where the plaintiff dies after *litis contestatio*. In Ex p *Masimbirembwa* g NO *supra*, Chatikobo J held that such a claim is not transmissible even if the plaintiff dies after *litis contestatio*. In coming to this conclusion, the judge reasoned thus at p 151F-G:

“I now have to grapple with the most difficult aspect of this case, does the

2006 (2) ZLR p206

Makarau J

fact that Georgina died after the proceedings had reached *litis contestatio* A mean that, if I am satisfied on the evidence that she was entitled to a property adjustment order, I should proceed to make such an order as if she was still alive? If so, how do I satisfy the criteria laid down in s 7(3) of the Act, which enjoins me to ‘endeavour as far as is reasonable and practicable and having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a b normal marriage relationship continued between the spouses’? Georgina is not alive to be placed in that situation.”

It is necessary, in my view, that the nature of the claim that the applicant alleges to have against the respondent be examined in detail. To her credit, she does not seek to complete the divorce proceedings between the two deceased spouses. She seeks to be authorised to claim a share in the immovable c property, based on the observation by the lower court that the late Ebba had contributed to the acquisition of the immovable property and further evidence had to be led on the value of the property to enable the court to quantify the late Ebba’s contribution.

In my view, the observation by the lower court did not amount to a grant of d a real right to Ebba. It did not confer on her rights of ownership. It simply recognized her right in equity to be awarded a share in the property so as to achieve the purpose intended by s 7 of the Matrimonial Causes Act [Chapter 7:13]. In my view, it remained a finding of fact that would have converted to a right in equity under the Matrimonial Causes Act had sufficient evidence been led before the lower court. It remained a personal right that Ebba could e have enforced against David. It was not a debt that her successors in title could collect after her demise.

Whilst it appears attractive to hold that after Ebba’s contribution had been accepted by the court, that finding had value in favour of Ebba, which value she and her estate were entitled to benefit from. However, that position, in my f view, is fraught with many legal problems.

Firstly, it would seek to elevate the considerations of equity under s 7 of the Matrimonial Causes Act into principles of property law in that where the court finds that a spouse contributed towards the acquisition of an asset, then that finding amounts to a grant of ownership in that asset. In my view, that was not the intention of the legislature in enacting s 7. As observed by Chatikobo J g at p 149E,

a spouse who claims for an order of redistribution is not claiming what belongs to her, but in essence, is asking the court to make a property adjustment order to strike a balance between her assets and those of the other spouse.

Secondly, in my view, the distribution of the joint estate of spouses is a ^h

2006 (2) ZLR p207

Makarau J

A personal claim that is peculiar to husband and wife or former husband and wife. It is not a cause of action founded on a principle of common law. It is an action created by Parliament to achieve justice as between husband and wife in an area where the strict application of the principles of property law may work an injustice on those spouses who contribute towards the acquisition of assets registered in the other spouse's name. It is not a right that can be enforced ^b against a creditor for instance or shield the property from attachment in execution. It is not a preferred claim at liquidation. It remains a personal right that one spouse can enforce against the other.

It is thus my view that a claim for the distribution of a matrimonial estate cannot be transmitted to the estate of the deceased's spouse. It remains incapable of ^c transmission even when one of the parties dies after *litis contestatio* has been reached.

I am keenly aware of the injustices that my finding appears to work on the heirs of the deceased's spouse. The remedy for the injustice, in my view, does not lie in us distorting the existing principles on the transmissibility of claims but in granting spouses real rights in all assets of the matrimonial estate during ^d their lifetime so that husband and wife are joint owners of their joint estate. Anything short of this reform in the law, in my view, will not do away with the injustices such as have been graphically described by Mrs *Pratt*.

While I feel constrained to dismiss the application, in my view, it will be onerous on the estate of the late Ebba that I burden it with an award of costs ^e in the circumstances of this matter. The applicant fails due to a palpable injustice wrought by the law itself and where equity and common sense decree that there be redress. I will therefore, order that each estate shall bear its own costs.

In the result, I make the following order: ^f

1. The application is dismissed.
2. Each party shall bear its own costs.

Mushonga & Associates, applicant's legal practitioners

^g *L M Kabote*, first respondent's legal practitioners

1 See The Law Reform (Miscellaneous Provisions) Act 1934.

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Source:

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MAZIBUKO v COMMISSIONER OF POLICE & ANOR 2006 (2) ZLR 208 (H)

2006 (2) ZLR p208

Citation 2006 (2) ZLR 208 (H)

Case No Judgment No. HB-94-06

Court High Court, Bulawayo

Judge	Ndou J
Heard	28 September 2006
Judgment	5 October 2006
Counsel	<i>S Chamunorwa</i> , for the plaintiff <i>D Vundla</i> , for the defendants
Case Type	Application for postponement
Annotations	No case annotations to date

Flynote

Practice and procedure — *trial* — *postponement* — *application* — *when c may be granted* — *when appropriate order as to costs will suffice to grant postponement*

Headnote

The plaintiff, a legal practitioner, was suing the defendants for damages for assault, *injuria* and impairment of dignity. Although the defendants *D* were defending the claim, they did not bother to attend either the round table conference, the two pre-trial conferences or finally the trial itself. At all those proceedings, they were merely represented by their legal practitioners. When the matter was referred to trial, the Deputy Registrar gave the parties four months' notice of the trial dates. When the trial began, counsel for the defendants sought a postponement in terms of *r* 217 of the High Court Rules. The first ground for the application was that the defendants were not present; the second ground was that she had not taken instructions as she had not seen the defendants. Cumulatively, the defendants claimed that they were simply not ready in spite of having had over four months' notice.

Held, that the rule gives the court a wide discretion when an application for *r* alteration of set down is made. The basis upon which such an application rests is that unless the postponement is granted, the applicant will suffer prejudice.

Held, further, that matters properly set down are not postponed through mere correspondence but it is imperative that a litigant personally presents *g* himself at court. If he has to be excused, that indulgence does not come from his legal counsel but from the court itself. An application for postponement is not automatically granted. It can either be granted or refused. Once it is refused, the trial must proceed (*dicta per Bere J in Hunda v Hunda* HB-56-06 followed). *h*

2006 (2) ZLR p209

Ndou J

a *Held*, further, that the granting of an application for postponement is in the nature of an indulgence and it lies entirely in the court's discretion to grant or refuse the application. Such discretion must be exercised in a judicial manner. The court should be slow to refuse to grant a postponement where the reason for the party's non preparedness has been fully explained, where the party's unreadiness to proceed is not due *b* to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case.

Held, further, that an applicant cannot, as of right, claim a postponement on the ground that any prejudice his opponent might suffer can always and sufficiently be overcome by an appropriate order as to costs.

c *Held*, further, that *in casu*, there was a bare allegation that the defendants would be prejudiced as they intended to defend the matter. Such a bare allegation was insufficient. By their own conduct, the defendants had not shown a serious desire to defend. This was not a case where an applicant for postponement could claim that any prejudice his opponent might suffer could be overcome by

an appropriate order as to costs. The ^D defendants had exhibited a cavalier approach to their application. Their stated unreadiness was mere delaying tactics.

Cases cited

Hudson v Hudson (1926) 8 PH F45 (C)

Hunda v Hunda HB-56-06

£ *Madnitsky v Rosenberg* 1949 (2) SA 392 (A)

Murphy v SAR & H & Anor 1946 NPD 642

Myburgh Tpt v Botha 1991 (3) SA 310 (NmS)

Prinsloo v Saaiman 1984 (2) SA 56 (O)

Shapiro v Shapiro 1904 TS 673 (T)

Legislation considered ^F

High Court Rules 1971 (RGN 1047 of 1971), rr 214, 215(2) & 217

Case information

S Chamunorwa, for the plaintiff

£ *D Vundla*, for the defendants

Judgment

NDOU J: Briefly, the plaintiff, a legal practitioner, practising from a Bulawayo legal firm, issued out summons claiming \$1 000 000 (revalued), being damages for assault, *injuria* and impairment of dignity. The summons was issued out on 30 July 2003. The defendants are defending the claim. A round table ^H conference of the parties was held. None of the defendants attended, but their

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Ndou J

legal practitioner did attend. A pre-trial conference was later set down. None ^A of the defendants attended. Their legal practitioner attended and sought the judge's (and plaintiff's) indulgence for postponement. They tendered wasted costs. The hearing of the pre-trial conference was postponed to a fresh date. When the pre-trial conference was set down again, the defendants did not turn up but their legal practitioner did. Once more, the judge indulged them and held the pre-trial conference in their absence. This defeated the objective of ^B holding a pre-trial conference in the first place. Nevertheless, the matter was referred to trial. By his (undated) minute the Deputy Registrar of this court allocated the dates 28-29 September 2006 for the case to be heard, thus giving the parties notice of the date in terms of Order 31 r 215(2) as read with r 214 of the High Court Rules, 1971. Although this notice was undated, it is common ^C cause that it was received by the plaintiff's legal practitioners on 19 April 2006 at 1554 hours and the defendants' legal practitioners on the same date at 1538 hours. There is written proof of such service. In any event, on 12 April 2006, both parties' legal practitioners had already signed a "Consent Notice to Set Down" which was filed on 17 May 2006. This gave each party at least four months to prepare for trial. When the trial commenced, Ms *Vundla*, for the ^D defendants, sought a postponement. The first ground for the application is that the defendants are not present. The second ground is that she had not taken instructions as she has not seen the defendants. In fact, she communicated with the defendants through the Civil Division of the Attorney General's Office. Cumulatively, the defendants are simply not ready and seek a postponement to prepare for the trial notwithstanding their knowledge of ^E the trial date for over four months. Recently, in *Hunda v Hunda* HB-56-06, Bere J observed (at pp 3-4 of his cyclostyled judgment):

"Matters properly set down are not postponed through mere correspondence but it is imperative that a litigant personally presents himself at court and if he has to be excused, that indulgence does not come ^F from his legal counsel but from the court itself. An application for postponement is not automatically granted. It can either be granted or refused. Once it is refused, the trial must proceed."

I agree. Alteration of set down is done in terms of r 217, which provides:

"Where a case has been set for trial or argument any party may apply to the court or judge to have the set down set aside and for good cause ^g shown the court or judge may set it aside and fix another day for the trial or argument or make such other order as it or he, as the case may be, considers just:

Provided that with the consent of all parties and with the approval of the registrar a set down may be altered without application to court or to a judge." ^h

2006 (2) ZLR p211

Ndou J

^a See also *Nezi v Matiza* HH-103-03.

The proviso does not apply to the facts of this case, as the application is opposed. It is clear that ^r 217 gives the court wide discretion when an application for alteration of set down is made. The question here is whether the defendants have shown good cause in order for me to set aside this set down and fix another. The granting of such an application is in the nature of ^b an indulgence and it lies entirely in this court's discretion to grant or refuse the application. But such discretion must be exercised in a judicial manner. The court should be slow to refuse to grant a postponement where the true reason for the party's non-preparedness has been fully explained, where the party's unreadiness to proceed is not due to delaying tactics, and where justice ^c demands that he should have further time for the purpose of presenting its case: *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 399; *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS); *Prinsloo v Saaiman* 1984 (2) SA 56 (O) and *Shapiro v Shapiro* 1904 TS 673. The basis upon which such an application rests is that unless the postponement is granted, the applicant (defendants *in casu*) will suffer prejudice in the case. *In casu*, there is a bare ^d allegation that the defendants will be prejudiced as they intend to defend the matter. Such a bare allegation is insufficient. By their own conduct, the defendants have not shown serious desire to defend. As alluded to above, they did not bother to attend the round table conference, two pre-trial conferences and finally this trial. One would understand if one of them appeared on behalf of all three of them. For four months after the trial date had ^e been agreed upon, they did nothing to prepare for trial. If there is any prejudice, it is really of their own making. See *Hudson v Hudson* 1926 (8) PH F45 (C) and *Murphy v SAR&H & Anor* 1946 NPD 642.

The defendants have not fully explained the true reason of their non-preparedness. The fact that first defendant is now posted in a remote area is ^f not a satisfactory explanation in view of the four months period the defendants knew about the trial date. In any event, the defendants did not make a substantive application. They exhibited a cavalier approach to their application. It seems to me that the unreadiness is due to delaying tactics. The interests of justice do not justify that they be given further time.

^g In such an application, I also have to consider the prejudice to the respondent (i.e. plaintiff *in casu*). It is trite that an applicant cannot as of right claim a postponement on the ground that any prejudice his opponent might suffer can always and sufficiently be overcome by an appropriate order as to costs: *Estate Norton v Smerling* 1936 OPD 44 and *Vollenhoven v Hoenson & Mills* ^h 1970 (2) SA 368 (C). The matter commenced in 2003, almost four years ago.

2006 (2) ZLR p212

Ndou J

There is a need to bring it to finality. The plaintiff is a practising legal ^a practitioner in the city where the conduct complained of allegedly took place. There are obviously other aspects of prejudice evident from these facts that cannot be cured by mere payment of wasted costs as the defendants have tendered (but not paid) in all previous applications for indulgence. Looking at the circumstances of the case, I feel that this is a case where the application ^b for alteration of the set down date should be refused.

Accordingly, I refuse the application for postponement and order that the trial will proceed on 29 September 2006 at 1000 hours.

Calderwood, Bryce Hendrie & Partners, plaintiff's legal practitioners

Dube & Partners (instructed by the *Civil Division of the Attorney-General's* ^c *Office*) defendants' legal practitioners

Document 29 of 55**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/EXPORT LEAF TOBACCO CO OF AFRICA (PVT) LTD v GWAVAVA 2006 (2) ZLR 213 (S)

EXPORT LEAF TOBACCO CO OF AFRICA (PVT) LTD v GWAVAVA 2006 (2) ZLR 213 (S)**2006 (2) ZLR p213**

Citation	2006 (2) ZLR 213 (S)
Case No	Judgment No. S-45-06
Court	Supreme Court, Harare
Judge	Gwaunza JA (in chambers)
Heard	13 September 2006
Judgment	6 October 2006
Counsel	<i>H Zhou</i> , for the applicant <i>E W W Morris</i> , for the respondent
Case Type	Application for leave to appeal
Annotations	No case annotations to date

Flynote

c Appeal — Labour Court — appeal to Supreme Court — point of law — what is — requirement for employee to disclose conflict of interest in a particular form — statement that no conflict of interest existed — whether such statement constituted misconduct involves a point of law

Headnote

▫ The respondent was dismissed from her employment with the applicant. An appeal to the Labour Court resulted in her dismissal being set aside. The Labour Court refused leave to appeal to the Supreme Court on the grounds that the appeal did not involve a point of law.

The case against the respondent was that she had failed to disclose, in the manner prescribed by the applicant, her interest in enterprises which dealt with her employer and was therefore guilty of dishonesty or deliberate misrepresentation and corruption as defined in the applicant's code of conduct. She and other senior employees had been required to complete a form indicating, *inter alia*, whether or not they had "conflicts of interest" in relation to enterprises which dealt with the applicant. The respondent filled in the form and indicated she had no conflicts of interest. It was not disputed that the relationship between the respondent and two other companies constituted a conflict of interest *vis-à-vis* her relationship with her employer. It could be accepted that before the form was completed the applicant's senior management not only knew, but had actually instigated, these dealings.

Held, that the question of whether, in the face of the express conditions of employment which required disclosure of interests in a particular form, the conduct of the respondent in stating that she had no interest, constituted the misconduct charged was a point of law, as was the additional

issue of whether such a conflict could be excluded by imputing ^h knowledge of the respondent's interests upon some managers. Questions

2006 (2) ZLR p214

Gwaunza JA

of law do not cease to be such merely because they are underpinned by ^a factual findings.

Case information

H Zhou, for the applicant

E W W Morris, for the respondent ^d

Judgment

GWAUNZA JA (in chambers in terms of r 5 of the Supreme Court Rules): This ^b application is made in terms of s 92F(3) of the Labour Act [*Chapter 28:01*]. It follows the refusal by the Labour Court to grant leave to the applicant to appeal to this court against the lower court's judgment of 20 January 2006. The applicant therefore seeks the leave of this court to file the appeal in question.

In dismissing the application for leave to appeal against its judgment, the ^c Labour Court was satisfied that the intended appeal was not on a point of law, as required by s 92F(2) of the Labour Act [*Chapter 28:01*]. The applicant being of the opposite view, it now falls to this court to determine the matter.

The case against the respondent in the court *a quo* was that she had failed to disclose, in the manner prescribed by the applicant, her interest in enterprises ^d which dealt with the employer and was therefore guilty of dishonesty or deliberate misrepresentation and corruption as defined in the applicant's code of conduct.

At the time this dispute arose, the respondent was employed by the applicant as its financial director. It is common cause that the respondent was also the corporate secretary and co-director of a company called Pickhill Enterprises. ^e This company provided accounting services to Kwik Courier, a company that was engaged in business with the applicant. The court *a quo* accepted the respondent's evidence that upon Kwik Courier's request, the managing director of the applicant authorised her, as a signatory to the applicant's cheques, to henceforth uncross or open all cheques issued in favour of Kwik Courier in payment for its services to the applicant. The court also accepted ^f the evidence of the respondent that she, the applicant's managing director and Kwik Courier later agreed that these cheques would be deposited into the bank account of Pickhill Enterprises.

It is not in dispute that the applicant, in early February 1998, required its senior employees to complete a form indicating, *inter alia*, whether or not they had ^g "conflicts of interest" in relation to enterprises which dealt with the employer, i.e. the applicant. The form was to be completed by 16 February 1998. Nor is it disputed that the respondent filled in such a form on 13 February 1998 and indicated she had no conflicts of interest.

The applicant's case against the respondent was, therefore, that, by completing ^h the form in the manner she did, the respondent had deliberately failed to

2006 (2) ZLR p215

Gwaunza JA

^a disclose certain interests that she had in an enterprise that dealt with her employer. The enterprise in question was Kwik Courier, whose cheques were deposited into Pickhill Enterprise's account.

There seems to be no dispute that the relationship between the respondent, Kwik Courier and Pickhill Enterprises constituted a conflict of interest *vis-à-vis* the respondent's relationship with her employer. What was in dispute was ^b whether or not the respondent had disclosed this interest to the employer. The finding of the court *a quo*, which undoubtedly was a factual finding, was that she had done so. This was because the court *a quo* found that the respondent's dealings with Kwik Courier had been at the request of the applicant's senior management. It becomes evident from this that the respondent, as did the ^c court *a quo*, interpreted "disclosure" in its wider, general sense. The applicant, on the other hand, relied on a narrower definition of the word, that is, disclosure in the specific manner prescribed by the applicant.

As already indicated, the court *a quo* dismissed the application for leave to appeal, on the basis that the intended appeal was on points of facts, not law.

The applicant argues that its grounds of appeal raised issues of law, in particular, whether, in the face of the express conditions of employment which required disclosure of interests in a particular form, the conduct of the respondent in stating that she had no interest, constituted the misconduct charged. The applicant argues further that even the additional issue of whether such a conflict could be excluded by imputing knowledge of the respondent's interests upon some managers, was a question of law, not fact.

I am persuaded by these contentions. The respondent cannot have failed to appreciate that a conflict of interest arose from her dealings with the applicant on one hand, and Kwik Courier on the other. It may be accepted as a matter of fact, as found by the court *a quo*, that the applicant's senior management not only knew, but had actually instigated, these dealings. What, however, is in my view relevant is that at a later date, the applicant required of its employees that they recorded any interests they had, in writing. It is not in dispute that the respondent did not so disclose her interests. Her evidence was that her superiors had advised her not to disclose the interest in the form, since such interest was known to management. In other words, she did not disclose the interest, not because she did not have it, but because she was advised not to.

The issue to be determined in the circumstances of this case as outlined, is whether disclosure of an interest made in any other manner than that prescribed by the applicant, i.e. in writing, absolved the respondent from effecting the disclosure in the prescribed manner.

2006 (2) ZLR p216

Gwaunza JA

Put differently, the issue is whether the respondent's failure to disclose her interest, in the manner prescribed by her employer, constituted the misconduct charged. This is clearly a question of law. I am persuaded by the applicant's submission that questions of law do not cease to be such merely because they are underpinned by factual findings.

I am satisfied the applicant's main ground of appeal raises a point of law and not fact. The applicant is therefore entitled to the relief sought. Since the applicant has indicated it will not seek costs against the respondent, no such order shall be made.

It is in the premises ordered as follows:

1. The applicant be and is hereby granted leave to appeal to this court against the judgment of the Labour Court in case No. LC/11/198/2005.
2. There shall be no order as to costs.

Gill Godlonton & Gerrans, applicant's legal practitioners

T H Chitapi & Associates, respondent's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/KAZINGIZI v DZINORUMA 2006 (2) ZLR 217 (S)

KAZINGIZI v DZINORUMA 2006 (2) ZLR 217 (S)

2006 (2) ZLR p217

Citation 2006 (2) ZLR 217 (S)

Case No Judgment No. HH-106-06

Court High Court, Harare

Judge	Mararau J & Patel J
Heard	9 February 2006
Judgment	11 October 2006
Counsel	<i>J Mambara</i> , for the appellant Respondent in default
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

c Appeal – decision of court a quo – reasons for – need for court to give reasons for its conclusions – effect of failure to do so

Headnote

Every trier of fact has to give reasons for his decision. A judicial decision that is not explained easily leaves itself open to criticisms of being arbitrary ^D or capricious or both. Where the litigants have presented their competing facts and arguments before the trial court, they have a legitimate expectation to know whether their version of the facts and their argument have been received and, if not, why. So fundamental is the legitimate expectation of the litigants in our law that the legislature saw it fit to make it one of the duties of administrative authorities to give reasons for their ^E decisions. See s 3(1)(c) of the Administrative Justice Act [*Chapter 10:28*]. The giving of reasons for a decision after a court hearing is thus a compulsory imperative, not only to fulfil the legitimate expectations of the litigants but also to inform them on the competing facts and arguments used as the basis of the decision for purposes of appeal or review. In the absence of reasons, the notice of appeal becomes guesswork and may ^F arguably be held to be an appeal against the order and not the judgment.

A written judgment in an appeal is imperative as it guides the appeal court in determining whether the attack on the whole or part of the judgment is legally sustainable. Without it, and in the absence of concessions made on appeal by the respondent, the appeal cannot be determined and ^G is doomed. One could even argue that the failure to give reasons for judgment is a gross misdirection which vitiates the order given. In trials, as opposed to interlocutory matters and some applications, it is not only the order that matters; the reasons for arriving at that decision are equally important. The integrity of the order lies in the procedure used to reach ^H that order and the reasoning employed to opt for a particular result.

2006 (2) ZLR p218

Mararau J

Cases referred to ^A

Fox & Carney (Pvt) Ltd v Sibindi 1989 (2) ZLR 173 (S)

Kashiri v Muvirimi 1988 (1) ZLR 270 (S)

Legislation considered

Administrative Justice Act [*Chapter 10:28*], s 3(1)(c) ^B

Case information

J Mambara, for the appellant

Respondent in default

Judgment

MAKARAU J: On 14 February 2005, the appellant and the respondent appeared before the magistrates court in an application for the downward ^c variation of a maintenance order against the appellant from \$1 000 000 (old currency) to \$300 000 per month for one minor child. The trial court dismissed the application, but without giving reasons. Dissatisfied, the appellant noted an appeal to this court.

In his grounds of appeal, the appellant, in the main, attacked the decision of the trial court on the basis that insufficient weight was attached to the ^d appellant's personal circumstances and, further, that the trial magistrate accepted, as proof of earnings, the inflow of deposits into appellant's business account. In the absence of reasons, one can only surmise that the appellant felt that his version of the application had been rejected and that the respondent's assertions had been accepted. Thus, he has formulated his own ^e basis for the decision and has then set on attacking that perceived *ratio decidendi*.

The absence of reasons for the judgment gave us great cause for concern.

It is trite that every trier of fact has to give reasons for his or her decision. A judicial decision that is not explained easily exposes itself to criticisms of being arbitrary and/or capricious. Where the litigants have presented their competing ^f facts and arguments before the trial court, they have a legitimate expectation to know whether their version of the facts and their argument have been received and, if not, why. So fundamental is the legitimate expectation of the litigants in our law that the legislature saw it fit to make it one of the duties of administrative authorities to give reasons for their decisions. See s 3(1)(c) of ^g the Administrative Justice Act [*Chapter 10:28*].

In *Kashiri v Muvirimi* 1988 (1) ZLR 270 (S), Korsah JA was faced with a similar situation as the one that was before us, where the trial court did not give reasons for awarding maintenance in respect of the respondent's children. It also made no finding as to credibility in a suit where intimacy between appellant and respondent was denied. At p 273D-E, the learned judge of appeal ^h

2006 (2) ZLR p219

Mararau J

^a expressed his concern at the absence of reasons for the decision, as we do *in casu*. In his words:

"This case highlights the need for courts to give reasons for their decisions because, as Wessels JA reminds us in *National Employers Mutual General Insurance Association v Gany* 1931 (AD) at 189 –

'Where there are two stories mutually destructive, before the onus is ^b discharged, the court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false'."

From a reading of the judgment, it is clear that the proceedings were saved before the Supreme Court and ultimately resolved in favour of the respondent ^c on the basis of a concession made by the appellant that there had been a finding of sexual intercourse between him and the respondent about a year and a half after the birth of one of the children. Without that concession, the respondent's case would have been "doomed", as the learned judge of appeal observed at p 273F.

The giving of reasons for a decision after a court hearing is a compulsive ^d imperative, not only to fulfill the legitimate expectations of the litigants but also to inform them on the competing facts and arguments used as the basis of the decision for purposes of appeal or review. Hence, in the absence of reasons, the notice of appeal becomes guesswork and may arguably be held to be an appeal against the order and not the judgment.

^e As observed by Dumbutshena CJ in *Fox & Carney (Pvt) Ltd v Sibindi* 1989 ZLR (2) 173 (S) at 179G-H:

"In a contested matter in which issues, facts and law are disputed, there must be a judicial decision or determination on some question of law or fact in dispute. The merits and demerits of each party's case must be stated, so that the parties understand how the disputed issues or ^f questions were determined. A written judgment is the foundation upon which a litigant builds his hopes for success on appeal or losses hope of succeeding on appeal."

To these remarks, I would respectfully add that a written judgment in an appeal is imperative as it guides the appeal court in determining whether the attack on the whole or part of the judgment is legally sustainable. Without it, and in ^g the absence of concessions made on appeal by the respondent, the appeal cannot in my view, be determined and is doomed. One could very well argue

that the failure to give reasons for judgment is a gross misdirection on the part of the trial court and one that vitiates the order given at the end of the trial. It is my further view that in trials, as opposed to interlocutory matters and some ^H applications, it is not only the order that matters. The reasons for arriving at

2006 (2) ZLR p220

Mararau J

that decision are equally important. The integrity of the order lies in the ^A procedure used to reach that order and the reasoning employed to opt for a particular result.

On the basis of the foregoing, I feel constrained to set aside the proceedings in the court *a quo*.

There is, however, one other issue that exercised our minds during the hearing ^B of this appeal. Due to the ravages of inflation, the amount of maintenance in dispute between the parties became irrelevant, as the sum of the order sought to be varied by the appellant was barely adequate to maintain one child at the date of the hearing of the matter. The value of the amount of the order has since further depreciated. In setting aside the decision of the trial court we are not suggesting that the amount of the maintenance set at \$1 000 000 was ^C inappropriately high. Thus, in our view, it will make a mockery of the justice delivery system for us to direct at this stage that reasons for the decision be supplied. In this regard, we are guided by the fact that maintenance proceedings are not trials where one side emerges victorious and the other vanquished, but are inquiries for the benefit of the minor children or dependants. Thus, where ^D in a trial we would have remitted the matter to the trial court for reasons to be supplied, we are in this matter of the view that both parties should be granted leave to approach the court *a quo* for a fresh inquiry under s 8 of the Maintenance Act [Chapter 5:09] into the appropriate level of maintenance payable.

Although we are allowing the appeal, in view of the fact that the basis of our ^E decision is on a point that we brought up *mero motu*, we shall not award costs in favour of the appellant.

In the result, we make the following order:

1. The appeal is allowed.
2. The order of the trial court dated 14 February 2005, is hereby set aside. ^F
3. The matter is remitted to the trial court for an inquiry at the instance of either party to be held in terms of s 8 of the Maintenance Act.
4. The appellant shall bear his own costs.

J Mambara & Associates, appellant's legal practitioners ^G

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S v SIBANDA 2006 (2) ZLR 221 (H)

2006 (2) ZLR p221

Citation	2006 (2) ZLR 221 (H)
Case No	Judgment No. HB-102-06
Court	High Court, Harare
Judge	Cheda J & Ndou J
Heard	18 July 2005;

Judgment	12 October 2006
Counsel	<i>K Ncube</i> , for the appellant <i>Ms B Wozhele</i> , for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

^c **Criminal procedure (sentence)** — *general principles* — *factors to consider* — *prevalence of offence* — *trivial offence* — *relevance of prevalence*

Headnote

The appellant, a foreign currency dealer, was appealing against a sentence of three months imprisonment, one month suspended on a conviction of obstructing free flow of (human) traffic.

▯ *Held*, that while the prevalence of an offence is a relevant factor in sentencing, it is not the overriding factor. It is not the function of the court to try to control crime by imprisoning people accused of crimes which the legislature, in its wisdom, considers trifling. While the courts should never be seen by the public to be trivialising serious offences, courts are equally enjoined not to make trivial cases serious. Either scenario is as ^e much unjust as the other. The sentence was set aside and replaced with a fine.

Cases cited

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

S v Gumbo 1995 (1) ZLR 163 (H)

^f *S v Kanhukamwe* HH-200-85

S v Kashiri HH-174-94

S v Mpofu HH-177-85

S v Muketiwa HH-225-01

S v Mupanduki 1985 (2) ZLR 169 (S)

^g *S v Ndlovu* 1994 (1) ZLR 290 (S)

S v Sibanda HB-49-83

S v Sikunyana 1994 (1) SACR 206 (Tk)

S v Sithole HH-50-95

Case information

K Ncube, for the appellant

^h *Ms B Wozhele*, for the respondent

2006 (2) ZLR p222

Ndou J

Judgment

NDOU J: The appellant is a 35 year old married woman with two children. She ^a was convicted by a Bulawayo magistrate of obstructing free movement of people on a pavement in contravention of s 3(g) of the Miscellaneous Offences Act [*Chapter 9:15*]. The brief facts are that on 16 September

2003, the appellant was standing outside some shops in the city centre of Bulawayo. She was standing on the pavement. Her actions, or most probably, the look ^a of them, seem to have attracted the attention of plain clothed police officers. There might have been more, but the facts presented in court are silent. She said she was buying and selling foreign currency [in the street], a simple and common-place practice in this particular area of the city colloquially called "World Bank". According to her counsel, she might have been chanting "*usiphatheleni bhudi/sisi*" (loosely translated "What have you brought us ^c brother/sister" to persons passing, man or woman, a popular chant in the part of the city where the appellant was arrested. Or she might simply have silently rubbed the inside of her forefinger to the inside of her thumb in quick succession in universal sign language depicting money to every person who might as much as have gazed in her direction, even slightly, yet another popular action in that part of the city. No matter. But she seems to have ^d appreciated that whatever it is she had done that had drawn the police to her, was unlawful and criminal because on 29 September 2003 she was arraigned before the Magistrates Court and she pleaded guilty to a charge of obstructing free flow of (human) traffic. She was sentenced consequent upon her plea, to serve three months in prison, one of which was suspended on the usual conditions of good future conduct. She has noted an appeal against sentence ^e only. She appealed, in particular, against an effective term of imprisonment. The respondent does not support the sentence of imprisonment without the option of a fine for such a crime. This concession is properly founded. The trial magistrate over-emphasised the prevalence of fiscal offences involving the illegal exchange of foreign currency and the attendant prejudice to the ^f economy. He, however, overlooked the basic fact that the appellant was not convicted and being sentenced for illegal dealing in foreign currency. Further, while the prevalence of the offence is a relevant factor in sentencing – *S v Muketiwa* HH-225-01; *S v Mupanduki* 1985 (2) ZLR 169 (S) and *R v Makaza & Ors* 1969 (1) RLR 97 (G) — it is not the overriding factor. The magistrate has misplaced faith in what he can achieve by sending offenders to gaol even for ^g relatively non-serious offences like the one for which the appellant has been convicted. That is why he said in his reasons for sentence,

"Fines of \$10 000 would not achieve any deterrence at all accused will pay these and smile it away" [*sic*]. ^h

2006 (2) ZLR p223

Ndou J

^a With respect, it is not the function of the court to "support government and the police in trying to control crimes committed along Fort Street and Hebert Chitepo" by imprisoning people accused of crimes the legislature, in its wisdom, considers trifling.

Whilst the courts should never be seen by the public to be trivialising serious offences, courts are equally enjoined not to make trivial cases serious. Either ^b scenario is as much unjust as the other. The appellant pleaded guilty and showed some measure of contrition. Such a guilty plea merited some credit by way of modest reduction of sentence. Her plea of guilty contributed to the smooth and efficient justice – *S v Mpofu* HH-177-85 and *S v Kanhukamwe*

HH-200-85. It is trite that imprisonment has various destructive consequences, ^c so if some other forms of punishment are available and appropriate they should be used. Every effort should be made to keep first offenders out of prison: *S v Sikunyana* 1994 (1) SACR 206 (Tk), *S v Gumbo* 1995 (1) ZLR 163 (H); *S v Kashiri* HH-174-94; *S v Sithole* HH-50-95; *S v Sibanda* HB-49-83 and *S v Ndlovu* 1994 (1) ZLR 290 (H).

Accordingly, the appeal succeeds and it is hereby ordered that the sentence ^d imposed by the trial court be set aside and substituted as follows:

"\$5 000 [old currency] or in default of payment one month's imprisonment."

CHEDA J concurred.

^e *Job Sibanda & Associates*, appellant's legal practitioners

Criminal Division of Attorney-General's Office, respondent's legal ^f practitioners

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CHIKANDA 2006 (2) ZLR 224 (S)

S v CHIKANDA 2006 (2) ZLR 224 (S)**2006 (2) ZLR p224**

Citation	2006 (2) ZLR 224 (S)
Case No	Judgment No. S-99-05
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Malaba JA
Heard	23 June 2005
Judgment	16 October 2006
Counsel	<i>M J Remba</i> , for the appellant <i>F Chimbaru</i> , for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal law — *defences — diminished responsibility — not a complete c defence — may mitigate sentence — evidence — need for medical evidence to be supported by other evidence — not sufficient to rely solely on medical reports*

Headnote

The appellant, who had had a stormy relationship with his wife, and was living ^d apart from her, came to her house at midnight and stabbed her to death. Shortly afterwards, he grabbed his young child from the arms of her grandmother and stabbed her to death as well. The grandmother said in evidence that he was generally somebody who was not well and did not give respect to elders. He was not mentally normal, though not insane. ^e The medical report on the appellant said there was evidence of unstable abnormal behaviour and a tendency to violence, due to underlying suspiciousness of a paranoid nature. The court made a finding of diminished responsibility. He was found guilty of murder and was sentenced to twelve years on each count, with four years on the second count to run concurrently with the sentence on the first count. On appeal: ^f

Held, that the borderline between criminal responsibility and criminal non-responsibility on account of mental incapacity or illness is not an absolute one, but a question of degree. A person may suffer from a mental illness, yet nevertheless be able to appreciate the wrongfulness of his conduct and to act in accordance with that appreciation. Diminished responsibility only reduces the level of responsibility but does not ^g completely absolve an accused person from his actions. Where the court finds that the accused, at the time of the commission of the act, was criminally responsible for the act, but that his capacity to appreciate its wrongfulness was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into ^h account when sentencing him.

2006 (2) ZLR p225

Cheda JA

^A *Held*, further, that medical reports suggesting that a person may have been suffering from a state of diminished responsibility at the time of the commission of the offence need to be supported by some other evidence. On their own, such reports may not be conclusive. The decision as to whether there is diminished responsibility is to be made by the court and not just by medical experts. Where medical reports of diminished responsibility are not supported by some other facts from the evidence the court is entitled to reject the claim of diminished responsibility if there are other factors which justify that rejection.

Cases cited

^c *S v Chin'ono* 1990 (1) ZLR 244 (H)

R v Walton [1978] 1 All ER 542 (HL)

S v O'Neill S-232-95

Case information

^M *J Remba*, for the appellant

^D *F Chimbaru*, for the respondent

Judgment

CHEDA JA: The appellant stabbed the two deceased persons, a mother and her child, and killed them. He was convicted of murder with actual intent.

The court accepted that there were extenuating circumstances and sentenced him to twelve years on each count and ordered four years' imprisonment with ^Elabour of the second count to run concurrently with the sentence on the first count.

The appellant applied for leave to note his appeal in person against sentence only, but by the time the appeal came for argument he was legally represented and heads on argument filed included argument against conviction as well.

^F The issues raised for argument were as follows:

- "1. whether or not the appellant should have been convicted at all.
2. whether or not the appellant should have been convicted of murder.
3. whether or not the court *a quo* meted out an appropriate sentence."

BACKGROUND FACTS

^G Most of the background facts are common cause.

The appellant lived with the first deceased as his wife for a few years. They had domestic problems which resulted in the appellant moving out of their residence and leaving the deceased with her son and a younger child (the second deceased). The son, aged about 17 years, was not the appellant's ^H child.

2006 (2) ZLR p226

Cheda JA

When the appellant was away, the first deceased's mother came and spent ^A some days with her daughter and grandchildren. She would sleep in a kitchen next to the first deceased's bedroom with the grandchildren.

The appellant came to the residence on the night in question at about midnight, entered the first deceased's bedroom and stabbed her several times. She died as a result. The appellant also stabbed the second deceased, who was his own ^B child, and the child died. He was arrested, charged with murder, and convicted.

On appeal, not much was raised concerning this background. The thrust of the appeal was on the issue of the alleged diminished responsibility of the appellant at the time of the commission of the offence.

EVIDENCE OF STATE WITNESSES ^C

The evidence of the first deceased's mother is that she heard the first deceased's door being kicked open, and she next heard the first deceased calling out that the appellant was killing her.

She woke up the first deceased's son who was in the kitchen with her.

When she confronted the appellant about his killing of the first deceased, he ^D replied in Shona by words to the effect "Is she dead?, Is she dead?"

After walking away for a few steps, the appellant returned, grabbed the young child, (the second deceased) who was with the grandmother and stabbed that child, killing her also.

Questioned about the appellant's general conduct, she said the appellant was ^E generally somebody who was not well and did not give respect to elders. She described him as not being normal because of that behaviour and said he was not mentally normal. She said she could not say that he was insane.

The evidence of Jeffrey Phiri, the first deceased's son ("Jeffrey"), corroborates that of his grandmother on most of the material points. He added that when his grandmother called upon him to wake up he took a hoe handle with which ^F he struck the appellant, after realising that the appellant had stabbed his mother. He returned to the kitchen where he, together with his grandmother, held onto the door and pushed it so that the appellant could not gain entry into the kitchen. The appellant was holding a knife and threatened to attack Jeffrey. He said the appellant asked "Is she dead?" and then returned to the bedroom where he stabbed the first deceased again several times. He said the ^G appellant ran past him, snatched the baby (the second deceased), who was in her grandmother's arms, and stabbed the child three times on the abdomen.

He told the court that the first deceased and the appellant used to fight, and this incident happened when they were about to go to court so that the first deceased could get a peace order against the appellant. ^H

2006 (2) ZLR p227

Cheda JA

^A He also said that prior to this incident there was a time when he woke up at night and found that the appellant was there and telling the first deceased that she would never reject him.

THE APPELLANT'S EVIDENCE

The appellant said he went to drink with his friends on the night in question. ^B He said he drank strong alcohol which he was not used to, and felt very drunk.

He went to the first deceased's residence, got involved with her in an argument, and she insulted him and grabbed his private parts. He then took a knife from on top of the wardrobe and stabbed the first deceased. He said he did not intend to kill her.

He admitted that he used to fight with the first deceased, but he later said that ^C this was how they used to play. He admitted that the first deceased had caused his arrest.

He said the first deceased and he had bought the knife to cut a cake on the birth date of their child.

When it was put to him that the so-called knife was not a knife but a bayonet, ^D he alleged he bought it from a second-hand shop and did not know that it was a bayonet. He said he only saw the knife on two occasions.

I should point out here that he had previously said they bought it with many other knives.

In his evidence, the appellant suggested that he got very angry after his wife ^E grabbed his private parts and he did not know what happened after that.

It is also common cause that after the murder, the appellant took rat poison in an attempt to kill himself, but he was taken to hospital where he got treated and the attempted suicide was not successful.

MEDICAL EVIDENCE ON DIMINISHED RESPONSIBILITY

^F The appellant claimed that he was not in his full senses at the time of the murder. He said he was drunk, he was angry, he was provoked by his wife, she was accusing him of having been with some

prostitutes, and he even alleged at some stage that when he got to the house, the first deceased was with a man who pushed him over and bolted out of the house.

g Most of these allegations are not stated in his defence outline or his evidence in-chief. Even his defence counsel did express some difficulty when it turned out that what the appellant was telling the court was contrary to the instructions he gave his counsel.

While he sought to suggest that he did not know what he was doing, at times he gave details which he could not have appreciated if he had not known what h he was doing.

2006 (2) ZLR p228

Cheda JA

The details were certainly inconsistent with a person who did not know what a he was doing.

Dr Chikara stated in his report that he examined the appellant twice after interviewing his mother. He recorded what she told him. On examining the appellant himself, he reported that he found that his "E E G was normal" (my emphasis). b

The doctor then recorded that, in his opinion, at the time of the alleged offence, Chrispen was suffering from diminished responsibility.

He also said there was evidence of unstable abnormal behaviour and tendency to violence due to underlying *suspiciousness* of a paranoid nature.

The doctor's opinion is not based on any physical examination of the c appellant immediately before or immediately after the incident.

It is based on the history only of the appellant's behaviour. It is based mainly on the interview that he had with the appellant's mother. It is not supported by the factual evidence of what happened at the time of the murders. There is no evidence which points to any strange conduct of the appellant immediately before or after the murders that he committed. d

Even if one accepts that the appellant had consumed alcohol, there is no supportive evidence to suggest that he was so intoxicated that he did not appreciate what he was doing.

The appellant clearly lied about having purchased the alleged knife to cut a cake. The alleged knife was in fact a bayonet. e

He could not give a satisfactory explanation as to how he came into possession of it. He even said he did not know that it was a bayonet.

After he suggested that it was on top of the wardrobe and he knew it was kept there, he was asked, and failed to explain, how he managed to retrieve it from the top of the wardrobe if the first deceased was holding onto his private parts f as he alleged. He even suggested that because of his height he had to get onto a stoep, but could not say how he could do so if the first deceased was holding him by his private parts.

The appellant's attempt to explain what happened betrays him. On the one hand, he suggested that he did not know what happened once he was angered g by his wife. On the other hand, he narrated what he says happened when he got to the house, after walking to the house while feeling dizzy.

He did not explain where he got the rat poison which he took in an attempt to kill himself.

The cross-examination of the State witnesses, which was based on his instructions to his legal practitioner, does not support the claim that he had h

2006 (2) ZLR p229

Cheda JA

a a black-out once he got angry.

His defence outline also contradicts him concerning the events of that night.

Although he claims to have been provoked by his wife, he could not explain his actions in grabbing the child from its grandmother and stabbing it three times. If he had acted on provocation, such provocation would have been from b his wife only and not the child.

He suggested in his statement concerning the child, that he stabbed the child because its mother used the child as a shield when he was stabbing her. This is contradicted by the evidence of the two

witnesses who said he grabbed the child from its grandmother and stabbed it. This was after he had already killed the mother.

c It follows that his defence of not knowing what he was doing is false and must fail.

DIMINISHED RESPONSIBILITY

The *New English Dictionary on Historical Principles* edited by Sir John D Murray, LL.D., Vol III, gives the following definitions of "diminished":

"Made small, lessened, lowered in condition, weakened, lowered in importance"

among other definitions.

The above definition shows that diminished responsibility only reduces the level of responsibility, but does not completely absolve a party from his E actions.

It follows that where the court finds that the accused at the time of the commission of the act was criminally responsible for the act, but that his capacity to appreciate its wrongfulness was diminished by reason of mental illness or mental defect, and then acts in accordance with an appreciation of F its wrongfulness, the court may take the fact of such diminished responsibility into account when sentencing him.

This confirms that the borderline between criminal responsibility and criminal non-responsibility is not an absolute one, but a question of degree.

A person may suffer from a mental illness yet nevertheless may be able to G appreciate the wrongfulness of his conduct and act in accordance with that appreciation. See *Criminal Law* 2 ed by CR Snyman at pp 165-166.

The above comments would appear to be very generous in relation to the H appellant in this case.

2006 (2) ZLR p230

Cheda JA

Other than the medical report and the interview by Dr Chikara, there is nothing A to point at the appellant having been under a state of abnormality at the time of the commission of the crime.

It should be borne in mind that medical reports suggesting that a person may have been suffering from a state of diminished responsibility at the time of the commission of the offence, need to be supported by some other evidence. On B their own, such reports may not be conclusive.

The decision as to whether there is diminished responsibility is to be made by the court and not just by medical experts.

In *R v Walton* [1978] 1 All ER 542, the House of Lords made it clear that where medical reports of diminished responsibility are not supported by some other facts from the evidence the jury is entitled to reject the claim of diminished C responsibility if there are other factors which justify that rejection.

It held as follows:

"In determining whether a defence of diminished responsibility had been established the jury were seeking to ascertain whether at the time of the killing the accused was suffering from a state of mind bordering on but D not amounting to insanity. That task was to be approached in a broad common sense way.

The jury were bound to consider not only the medical evidence but the whole of the evidence as to the facts and circumstances of the case, including the nature of the killing, the conduct of the accused before, at the time of and after the killing and any history of mental abnormality. E

Moreover, since the jury might properly refuse to accept any medical evidence, they were entitled to consider the quality and weight of such evidence. Having regard to the quality and weight of the medical evidence in the instant case, the jury had been entitled to regard it as not entirely convincing and not indicative of a mental state in the appellant bordering on insanity; and in view of the other evidence before them, as to the F appellant's conduct before, during and after the killing, had been entitled to refuse to accept the psychiatrist's opinion that the appellant's mental condition satisfied the statutory definition of diminished responsibility.

The jury had therefore been entitled to conclude that on a balance of probabilities the plea of diminished responsibility had not been established. Accordingly the appeal would be dismissed." G

In the present case, the circumstances, and the conduct of the appellant immediately before and immediately after the killing do not seem to support the defence of diminished responsibility.

The trial court, nevertheless found that the appellant suffered from diminished responsibility, I do not agree with that finding on the facts. ^H

2006 (2) ZLR p231

Cheda JA

^A However, even if that is correct, it is not part of our law that such finding absolves the appellant and entitles him to an acquittal.

In *S v O'Neill* S-232-95, the Supreme Court, after deciding that the appellant suffered from diminished responsibility, set aside the death sentence and life imprisonment was substituted.

^B In *S v Chinono* 1990 (1) ZLR 244 (H), it was held that diminished responsibility was sufficient to establish extenuating circumstances only. In both cases, the verdict of guilty of murder was still upheld.

In this case, the trial court did the same. It took into account its finding on diminished responsibility as an extenuating circumstance, and imposed a term of life imprisonment.

^C Notwithstanding the misdirection on the finding of diminished responsibility, the verdict of guilty of murder was still correct.

There is no merit in the appeal and it is dismissed.

^D SANDURA JA & MALABA JA concurred.

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/CAPITAL ALLIANCE (PVT) LTD v RENAISSANCE MERCHANT BANK LTD & ORS 2006 (2) ZLR 232 (H)

CAPITAL ALLIANCE (PVT) LTD v RENAISSANCE MERCHANT BANK LTD & ORS 2006 (2) ZLR 232 (H)

2006 (2) ZLR p232

Citation	2006 (2) ZLR 232 (H)
Case No	Judgment No. HH-108-06
Court	High Court, Harare
Judge	Patel J
Heard	12 July 2006
Judgment	23 October 2006
Counsel	<i>E Manikai</i> , for the applicant <i>A B Chinake</i> , for the respondents
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Arbitration — *arbitration clause in contract — binding nature of — abandonment of — must be explicit — onus on party alleging clause invalid or incapable of performance*

Practice and procedure — *parties — non-joinder — when non-joinder fatal* ^D — *application not determined — nothing to preclude joinder of party*

Headnote

Having regard to r 87(1) of the High Court Rules 1971 (RGN 1047 of 1971), there is no basis to warrant the striking out of a matter for material non-joinder. Where a party should have been joined to proceedings, a court is entitled, in terms of r 87(2) of the Rules, to order the joinder of such party, ^E either on its own motion or on application so to ensure the effectual and complete adjudication of all matters in dispute.

A clause in a contract to refer a dispute to arbitration is binding on the parties and a party is not at liberty to revoke such a clause at any time he wishes to do so. Once it is established that the dispute falls within the ambit of ^F the arbitration clause, the onus to show why the court proceedings should not be stayed falls on the party challenging the reference to arbitration.

Where parties have entered into an agreement which contains an arbitration clause that is clearly intended to be widely cast, the court should not be astute in trying to reduce the ambit of the arbitration clause. Where an ^G arbitration clause exists in any such agreement, the court is required to give effect thereto in terms of article 8(1) of the Model Law which was adopted as part of our law by the Arbitration Act [Chapter 7:15] (*dicta per* Smith J in *Bitumat Ltd v Multicom Ltd* 2000 (1) ZLR 637 (H) at 639-40 followed). ^H

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Patel J

Cases cited ^A

Abrahamse & Ors v Cape Town City Council 1954 (2) SA 178 (C)

Bitumat Ltd v Multicom Ltd 2000 (1) ZLR 637 (H)

Henry Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 (O)

Independence Mining (Pvt) Ltd v Fawcett Security Operations (Pvt) Ltd 1991 (1) ZLR 268 (H)

^B *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)

Legislation considered

Arbitration Act [Chapter 7:15], First Schedule, art 8(1)

^C High Court Rules 1971 (RGN 1047 of 1971), rr 87(1) and 87(2)

Case information

E Manikai, for the applicant

A B Chinake, for the respondents

Judgment

^D **PATEL J:** The applicant in this matter seeks an order for the transfer of certain shares in First Mutual Ltd (FML) from the respondents to the applicant. It also seeks a declaratory order to the effect, *inter alia*, that its tender of \$15.6 billion to the first respondent in November 2005 was proper and valid and that it fully extinguished its indebtedness to the respondents and to ENG Capital (Pvt) Ltd (ENG).

^E THE FACTS

In November 2003, the applicant acquired 840 000 000 ordinary shares in FML. In order to finance the cost of this acquisition, the applicant entered into a syndicated loan arrangement with several parties. The applicant borrowed a total of \$29.8 billion from the lenders, including ENG and the first respondent. ^F The loan debt was secured through the issue of redeemable debentures and cumulative preference shares as well as the pledge of the FML shares to the lenders in proportion to the amounts owed to each one of them. The security arrangements were consolidated and formalised through a security sharing agreement, a debenture trust deed and a preference share scheme agreement. The first respondent was constituted the trustee, to act on behalf of all the ^G lenders, for the purpose of administering the security arrangements.

In 2004, the applicant found itself unable to declare any dividend or pay any interest on the preference shares and debentures. Subsequently, a dispute arose between the applicant and the lenders as to the satisfaction of the former's indebtedness to the latter. After several meetings and negotiations, ^H the matter was largely resolved through the conclusion of a settlement and

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Patel J

transfer agreement in September 2005. This agreement excluded ENG and its ^A claim against the applicant.

In October 2005, the first and second respondents entered into an agreement with the liquidator of ENG for the cession of his rights in the ENG debt, the ENG debenture and the 112 000 000 FML shares pledged to ENG. Thereafter, in November 2005, the first and second respondents transferred these FML ^B shares to the third and fourth respondents and requested the fifth respondent to register the transfers.

The applicant contends that the first and second respondents did not have any right under the original agreements to appropriate and transfer the FML shares in question. The applicant further contends that its tender in November 2005 in settlement of the ENG debt constituted a proper discharge of that debt and that, therefore, the FML shares in question should be released from pledge and returned to the applicant. The respondents dispute these contentions and assert that the applicant has been lawfully divested of its rights in the FML shares in satisfaction of the ENG debt ceded to the first and second respondents.

PRELIMINARY MATTERS ^D

In their opposing papers, the respondents raised four preliminary objections to the applicant's claims. At the hearing of this matter, Mr *Chinake* for the respondents withdrew two of those objections (pertaining to the *locus standi* of the applicant's deponent and the validity of its cause of action against the first respondent) and confined himself to the principal points relating to non-joinder ^E and jurisdiction.

As regards non-joinder, Mr *Chinake* contends that because the present dispute concerns the ENG debt and the manner in which it was to be settled as well as the validity of the cession of the ENG liquidator's rights, the liquidator should have been joined as a party to these proceedings. As to the question of jurisdiction, he submits that the issues *in casu* involve a dispute ^F that is referable to arbitration in terms of the debenture trust deed and, as such, they cannot be entertained by the court.

For the applicant, Mr *Manikai* submits that the ENG liquidator has no interest in the present matter because he has received full consideration for the ENG debentures. As for jurisdiction, he argues that the present dispute does not ^G arise from the debenture trust deed but relates to the applicant's ownership of the FML shares in question and that, therefore, the dispute falls outside the arbitration clause incorporated in the Deed.

MATERIAL NON-JOINDER

Rule 87(1) of the High Court Rules 1971 provides as follows: ^H

2006 (2) ZLR p235

Patel J

A “No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court may in any cause or matter determine the issues and questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.”

In *Henri Viljoen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151(O), it was affirmed that a party who has a direct or substantial interest in the result of any litigation ^B and whose interests might be prejudicially affected thereby must be afforded the opportunity to be joined as a party thereto. And in *Abrahamse & Ors v Cape Town City Council* 1954 (2) SA 178 (C) at 182-3, the failure to join a contracting party who had a direct, substantial and financial interest in the matter was held to be fatal to the success of the application concerned and resulted in the dismissal of the applicant's appeal.

^CIn *casu*, it is common cause that the ENG liquidator was a party to the original loan arrangement. There is also no doubt that the settlement of the ENG debt and the validity of its cession to the first and second respondents are part of the issues presently in dispute. In the event that the FML shares in contention are restored to the applicant pursuant to the order that it seeks, the first ^D respondent is likely seek recompense from the ENG liquidator. It seems fairly clear, therefore, that the ENG liquidator has a direct and substantial interest in this matter and that he might be prejudiced by the granting of an order in favour of the applicant. It follows that he should have been joined as a party to these proceedings.

In any event, it seems to me that the failure to join the ENG liquidator *in casu* ^E is not necessarily fatal to the present application. The decision in the *Abrahamse* case, *supra*, is clearly distinguishable in that the application in that matter had already been determined and the non-joinder there was held to be fatal at the appeal stage. There is no basis in our Rules, as I read them, to warrant the striking out of a matter for material non-joinder in every case. ^F On the contrary, r 87(1) appears to enjoin quite the opposite result. The application here has yet to be determined and there is nothing peculiar in this matter to preclude the joinder of the ENG liquidator at this juncture. That indeed is the course of action specifically contemplated by r 87(2) which expressly allows the court, either of its own motion or on application, to order the joinder of a party whose presence is necessary to ensure the effectual and ^G complete adjudication of all the matters in dispute.

As I have already intimated, the ENG liquidator should be joined as a party herein and that is the course that ought to be followed if the matter is to proceed further on the merits. However, the failure to join the liquidator from the outset ^H does not, in my view, justify the dismissal of this application *in limine*.

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Patel J

REFERENCE TO ARBITRATION ^A

Article 8(1) of the Model Law (*viz.* the First Schedule to the Arbitration Act [*Chapter 7:15*]) codifies and restates the common law on arbitral agreements as follows:

“A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later ^B than when submitting his first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.”

In *Zimbabwe Broadcasting Corporation v Flame Lily Broadcasting (Pvt) Ltd* 1999 (2) ZLR 448 (H), it was held that a clause in a contract to refer a dispute ^C to arbitration is binding on the parties and a party is not at liberty to revoke this clause at any time if he wishes to do so. In *PTA Bank v Elanne (Pvt) Ltd & Ors* 2000 (1) ZLR 156 (H), it was observed that the question of whether a dispute fell within the arbitration clause in an agreement was primarily a question of interpretation of the agreement and the arbitration clause. Once it is established that the dispute falls within the ambit of the arbitration clause, ^D the onus to show why court proceedings should not be stayed falls on the party challenging the reference to arbitration. See *Independence Mining (Pvt) Ltd v Fawcett Security Operations (Pvt) Ltd* 1991 (1) ZLR 268 (H) at 272.

As to the approach to be applied in interpreting an arbitration clause, it is instructive to consider the decision in *Bitumat Ltd v Multicom Ltd* 2000 (1) ZLR 637 (H), at 639-40, ^E where Smith J stated as follows:

"In my opinion, where parties have entered into an agreement which contains an arbitration clause that is clearly intended to be widely cast, the court should not be astute in trying to reduce the ambit of the arbitration clause. Where an arbitration clause exists in any such agreement, the court is required to give effect thereto – see Article 8(1) of the *F* UNCITRAL Model Law which was adopted as part of our law by the Arbitration Act 6 of 1996 and *Zimbabwe Broadcasting Corporation v Flame Lily Broadcasting (Pvt) Ltd t/a Joy TV* 1999 (2) ZLR 448 (H). It may well be that at some stage after a dispute has arisen, because of changed circumstances, the parties concerned agree that the matter should be determined by a court of law, rather than by arbitration in terms of the *G* agreement in question. In these circumstances, the decision of the parties to abandon the arbitration clause in their agreement must be specific and clearly evidenced. It cannot be implied by the conduct of, or correspondence between the parties – it must be explicit. After all, if the arbitration clause is contained in a written agreement, then the decision to change the agreement must either be in writing or else so clearly *H* evidenced by the conduct of the parties that there is no room for doubt."

2006 (2) ZLR p237

Patel J

A In the present case, clause 11 of the security sharing agreement provides that any dispute between the lenders amongst themselves should, if it cannot be resolved within 21 days, be referred to arbitration in terms of a written agreement and may, failing such agreement, be dealt with by litigation in a court of competent jurisdiction. What is more germane, for present purposes, is clause 14.1.1 of the debenture trust deed, which stipulates as follows:

B "Any dispute (other than where an interdict is sought) arising out of or pursuant to the provisions of this Trust Deed, including, but not limited to, the interpretation, application and/or effect of any of its terms, conditions or restrictions imposed, or any procedure to be followed under this Trust Deed and/or arising out of or pursuant to the termination or cancellation of this Trust Deed or any provision thereof, will be referred C to an expert in accordance with the provisions of this clause 14.1."

Turning to the dispute *in casu*, the papers indicate that it arose in the following circumstances. Following the applicant's failure to fulfil its obligations under the debenture trust deed and the preference share scheme agreement, the first respondent, through its lawyers, wrote a letter to the applicant's directors on D 21 June 2006. The letter indicated that the applicant had failed or neglected to meet the terms of payment timeously and was consequently in breach of the instruments constituting its indebtedness. More significantly, the first respondent, as trustee and acting in the interests of the ENG liquidator, gave notice to the applicant, in terms of clause 10.5.1.4 of the debenture trust deed, to remedy its breach within 14 days. Thereafter, the first respondent convened E a meeting of all the lenders on 19 July 2005 and was authorised to issue a further demand on their behalf. This was duly effected through a second letter written by the first respondent's lawyers to the applicant on 21 July 2005. This letter, written on behalf of all the lenders, including the ENG liquidator, presented a final demand in terms of clause 10.5.3.1 of the debenture trust deed for the F capital and dividends due to the lenders.

The lenders were then convened again on 2 September 2005. At that meeting, they rejected the applicant's proposal for settlement and resolved to enforce their rights by retaining their FML shares in settlement of their respective claims. Eventually, the settlement and transfer agreement was negotiated and concluded on 23 September 2005. As already indicated, this agreement G apparently excluded the ENG debt and the 112 000 000 FML shares pledged to and held by the ENG liquidator. In October 2005, the ENG liquidator ceded his rights in the ENG debt, the ENG debenture and the FML shares to the first and second respondents who later transferred these FML shares to the third and fourth respondents. The applicant now challenges the legality of the H appropriation and transfer of those shares by and to the respondents.

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Patel J

On behalf of the applicant, it is argued that the present dispute relates to the A ownership and vindication of the FML shares transferred by the first respondent. The debenture trust deed deals with the debentures and the security therefor, including the pledged FML shares, but not with the ownership of those shares. The appropriation and transfer of those shares by the respondents, so it is argued, was unlawful and falls outside the purview of the debenture trust deed. B

The applicant's argument, taken from all possible angles and embracing all of its supposed subtleties, is one that I find extremely difficult to comprehend. Its attempt to differentiate between

the debentures forming the subject-matter of the ENG debt and its underlying security in the form of the FML shares is, in my view, as factually spurious as it is legally untenable. ^c

In clause 1.1.21 of the debenture trust deed, the term "Security" is defined to mean the applicant's FML shares and any additional or substituted security given under the deed. It is quite clear, not only from this definition but from the entire loan arrangement between the parties, that the debentures issued to the lenders by the applicant were worthless unless they were secured by ^d the applicant's FML shares. The debentures and the FML shares pledged as security therefor were practically intertwined and they cannot be legally separated for the purpose of interpreting and applying the debenture trust deed.

This necessary linkage is further borne out by the declaratory order sought by the applicant, *viz.* that its tender in settlement in November 2003 fully ^e extinguished its indebtedness under the debenture trust deed to ENG and the second respondent as the current holder of the ENG debenture, that the ENG debenture was fully redeemed upon such tender and that, therefore, the FML shares in dispute are no longer the subject of the pledge constituted in terms of the debenture trust deed.

As for the principal relief that it seeks, the applicant questions the first and ^f second respondents' actions in appropriating and transferring the FML shares. In effect, the applicant challenges the lawfulness of their conduct purporting to enforce their rights in respect of their claims against the applicant pursuant to the provisions of the debenture trust deed. The applicant's contention, in essence, is that the respondents failed to abide by ^g the terms of the debenture trust deed and its concomitant security arrangements.

It is abundantly clear from the foregoing that the material facets of the present matter relate to the interpretation and application of the terms and conditions of the debenture trust deed. The issues in dispute between the parties undoubtedly arise out of and pursuant to the provisions of the deed and ^h

2006 (2) ZLR p239

Patel J

A therefore fall squarely within the scope of its arbitration clause.

The applicant does not contend, and there is nothing before the court to suggest, that the agreement of the parties to submit to arbitration is null and void, inoperative or incapable of being performed. Accordingly, the dispute *in casu* is one that must be referred to an expert for arbitration in conformity with the provisions of the deed.

^b It follows that the respondents' preliminary objection relating to the jurisdiction of this court to entertain this application is sustained. In accordance with Article 8(1) of the Model Law, the proceedings herein are stayed and the parties are referred to arbitration in terms of clause 14.1.1 of the debenture trust deed.

^c As regards costs, although the respondents' papers seek costs on the higher scale, no argument was presented to the court in this regard at the hearing of this matter. In the absence of any specific reason for adopting that course, I am disinclined to make an award of punitive costs. In the result, the present application is dismissed with costs on the ordinary scale.

^d *Dube, Manikai & Hwacha*, applicant's legal practitioners

^e *Kantor & Immerman*, respondents' legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/DOCUMENT SUPPORT CENTRE (PVT) LTD v MAPUVIRE 2006 (2) ZLR 240 (H)

DOCUMENT SUPPORT CENTRE (PVT) LTD v MAPUVIRE 2006 (2) ZLR 240 (H)

2006 (2) ZLR p240

Citation	2006 (2) ZLR 240 (H)
Case No	Judgment No. HH-117-06
Court	High Court, Harare
Judge	Makarau JP
Heard	26 October 2006
Judgment	31 October 2006
Counsel	<i>D Chidziva</i> , for the applicant <i>T K Hove</i> , for the respondent
Case Type	Chamber application
Annotations	Link to case annotations

Flynote

Landlord and tenant — *eviction proceedings — failure to cite as party person in occupation of premises — failure to afford such person a chance to be heard — such failure grounds for dismissal of proceedings*

Practice and procedure — *application — urgent — when matter can be said to be urgent — test — what matters may be subject of an urgent D application*

Practice and procedure — *interdict — application for — interim relief sought being in reality a final order of eviction — not proper to proceed in such a manner E*

Headnote

While some causes of action are incapable of redress by way of urgent application, the nature of the cause of action and the relief sought are important considerations in granting or denying urgent applications. Some actions, by their very nature, demand urgent attention and the law appears to have recognized that position. Thus, actions to protect life ^F and liberty of the individual or where the interests of minor children are at risk demand that the courts drop everything else and in appropriate cases, grant interim relief protecting the affected rights.

Urgent applications are those where, if the courts fail to act, applicants may well be within their rights to suggest dismissively to the court that it should not bother to act subsequently, as the position would have ^G become irreversible to the prejudice of the applicant. The issue of urgency is not tested subjectively. It is an objective one, where the court has to be satisfied that the relief sought is such that it cannot wait without irreparably prejudicing the legal interest concerned.

By way of an urgent chamber application, the applicant sought an interdict against the respondent. It sought an order that the respondent should ^H

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A show cause why it should not be declared that a binding lease agreement in respect of certain premises existed between the parties. As interim relief, it sought an order compelling the respondent and all those claiming occupation through him to give it vacant possession. In anticipation of taking occupation on 1 October 2006, it gave notice to its landlord that it was terminating its lease with effect from the end of September 2006. ^B When it sought to take occupation on 1 October 2006, it found that the premises were occupied by a family, no member of which was cited as a party in its application. In bringing its application upon a certificate of

urgency, it pleaded that it had nowhere to trade from, having terminated its lease with its landlord.

c *Held*, dismissing the application, that the matter should not be treated as one of urgency. The interest lost by the applicant was purely one of convenience as it may have been forced to look for other accommodation and possibly, a financial interest in lost revenue.

Held, further that, in any event, the application should still be dismissed on two other bases. Firstly, the application amounted to an attempt to evict *d* the family in occupation without affording the occupants a chance to be heard. Secondly, in seeking an order giving it occupation of the property, although stated to be interim relief, the applicant was, in fact, seeking a final order.

Cases cited ^E

Kuvarega v Registrar-General & Anor 1998 (1) ZLR 188 (H)

Silver's Trucks (Pvt) Ltd & Anor v Director of Customs & Excise 1999 (1) ZLR 490 (H)

Case information

D Chidziva, for the applicant

^F *T K Hove*, for the respondent

Judgment

MAKARAU JP: The applicant approached a judge in chambers on a certificate of urgency on 5 October 2006, seeking an order calling upon the respondent to show cause why it should not be declared that the lease agreement between the applicant and the respondent exists and is binding between the parties and ^G that the respondent is in breach of the agreement. As interim relief, the applicant sought an order compelling the respondent and all those claiming occupation through him of stand No. 44 Tredgold Drive Belvedere, Harare to give vacant possession of the stand to the applicant upon service of the order.

Upon considering the matter, the judge formed the opinion that the matter was ^H not urgent and made an endorsement to that effect on the application. The

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applicant, as it is perfectly entitled to do, sought audience with the judge to ^A argue on the urgency of the matter. By the time the applicant's request was received, certain other developments had taken place that made it impossible for the judge to deal with the matter. It is in these circumstances that the matter was placed before me 21 days after the date of the filing of the application.

The facts forming the background to this application may briefly be summarized ^B as follows.

The applicant approached the respondent sometime in August 2006 and showed interest in leasing the property in dispute with effect from the end of that month when the current lease was due to lapse by effluxion of time. The applicant alleges that the parties negotiated. The respondent disputes this. A payment for rent was made by the applicant to the respondent on 30 August ^C 2006 by a direct deposit into the respondent's account.

The applicant did not take occupation of the property on 1 September 2006. When it attempted to do so on 15 September 2006, it found the property under renovation. In anticipation of taking occupation on 1 October 2006, the applicant gave notice to its landlord that it was terminating its lease with effect ^D from the end of September 2006. When the applicant sought to take occupation of the property on 1 October 2006, it found the premises occupied. It then brought the above application on a certificate of urgency, pleading that it had nowhere to trade from, having terminated its lease.

At the hearing of the matter, the issue of urgency loomed large. It was ^E contended on behalf of the respondent that, having failed to take occupation of the property on 1 October, 2006, the matter was no longer urgent when, 25 days later, it was argued before me.

I was not persuaded by this argument. It is common cause that the applicant filed its application five days after it failed to take occupation of the premises as anticipated. That a period in excess of 20 days elapsed before the F application could be heard is hardly the fault of the applicant. The delay in setting the matter down for hearing is a delay clearly attributable to the system. On that basis, I overlooked it.

Notwithstanding my opinion that the applicant did not delay in having the matter set down for hearing, the question whether the application as a whole is urgent remained alive. G

In support of his argument that the matter is urgent, Mr *Chidziva* for the applicant referred me to the case of *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H) where in very instructive *obiter dicta*, Chatikobo J, at p 193F, defined what constitutes urgency for the purposes of the rules in the following terms: H

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Makarau JP

A "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, *the matter cannot wait*" (my emphasis).

In coming up with this formulation, Chatikobo J was faced with an applicant who had delayed in approaching the court for relief until the eleventh hour. In my view, while the *obiter dicta* by Chatikobo J may have been prompted B by the late approach to court by the applicant before him, they are of general application in all urgent applications brought in terms of the rules.

Without in any way derogating from the impact of the *dicta* by the learned judge, I hereunder attempt to give my understanding of his remarks and how the remarks would apply to the facts of this application.

C I understand Chatikobo J in the above remarks to be saying that a matter is urgent if when the cause of action arises giving rise to the need to act, the harm suffered or threatened must be redressed or arrested there and then, for in waiting for the wheels of justice to grind at their ordinary pace, the aggrieved party would have irretrievably lost the right or legal interest that it seeks to protect and any approaches to court thereafter on that cause of action will be D academic and of no direct benefit to the applicant.

I need to digress a little at this stage and observe that it further appears to me that it is not every legal interest that is capable of protection by way of an urgent application no matter how compelling the circumstances. Thus, while the general position is that when the need to act arises, an applicant may E approach the court for immediate redress without delay, it is not on every cause of action that such an approach may be made. An example that comes to mind is a spouse who may find her spouse committing an act that renders the continuance of married life insupportable and would want to end the marriage there and then. While the circumstances may be compelling, the aggrieved spouse may not approach the court for a decree of divorce on a F certificate of urgency. The same observation can be made for most cases of damages for defamation, personal injury and /or accident damages to property.

Without attempting to classify the causes of action that are incapable of redress by way of urgent application, it appears to me that the nature of the cause of action and the relief sought are important considerations in granting G or denying urgent applications.

Some actions, by their very nature, demand urgent attention and the law appears to have recognised that position. Thus, actions to protect life and liberty of the individual, or where the interests of minor children are at risk, demand that the courts drop everything else and, in appropriate cases, grant interim relief protecting the affected rights. The rationale of the courts acting H swiftly where such interests are concerned is, in my view, clear. Failure to act

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in these circumstances will result in the loss of life or the liberty of individuals A or the infliction of irreversible physical or psychological harm on children.

It is now accepted that in some cases, even purely commercial interests can be protected urgently in appropriate cases. In *Silver's Trucks (Pvt) Ltd & Anor v Director of Customs & Excise* 1999 (1) ZLR 490 (H), Smith J considered the matter of the release of certain attached

imports on the basis that the ^B applicant would face bankruptcy and its 67 employees would lose their jobs as a result. In my view, the reasoning adopted by Smith J in this regard is still in line with the objective test that had the court waited, there would have been no need for the court to act subsequently. The applicants would have been liquidated and the return to it of the attached imports would not have reversed the effect of non-timeous action by the court. It will be of no further benefit ^C to the applicant to pursue the legal interest.

In my view, urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant.

It is my further view that, the issue of urgency is not tested subjectively. Most ^D litigants would like to see their disputes resolved as soon as they approach the courts. The test to be employed appears to me to be an objective one where the court has to be satisfied that the relief sought is such that it cannot wait without irreparably prejudicing the legal interest concerned.

If I am correct in my understanding of what Chatikobo J meant in the ^E *Kuvarega* case, then the application before me is not urgent. It presents itself clearly to me that if the application is not determined now, the applicant does not irretrievably lose its right to hold the respondent to the lease agreement.

The applicant may well argue that, if the matter is not dealt with urgently, it will lose the right to occupy the property. However, that right is not irretrievably ^F lost.

In the main, the applicant seeks to have the alleged contract of lease upheld. That right has not been lost. It remains open to the applicant and remains open, even if the matter is not dealt with urgently.

In my view, the interest lost by the applicant in this matter is purely one of ^G convenience as it may have been forced to look for other accommodation and possibly a financial interest in lost revenue. If a financial interest has been lost or compromised, it is my further view that such interest is not a financially crippling interest as faced Smith J in the *Silver's Trucks* case. It is no more than the financial interest that every lender suffers when a debt is not paid on time or when a supplier fails to deliver in time, where time is of the essence. ^H

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Makarau JP

^A On this basis, I would dismiss the application with costs.

Assuming that I have erred in my formulation of what constitutes urgency under the rules, I still would have dismissed the application on two other bases.

Firstly, it is common cause that some family is now in occupation of the ^B property. The family or its head was not cited in the application. As it is common cause that the respondent is not in occupation of the property, any reference to the eviction of the respondent and all those claiming through him is clearly in reference to the family in occupation.

Thus, this application is an attempt to evict the occupants of the property without affording them a chance to be heard and the applicant is clearly ^C non-suited on this basis.

Secondly, the applicant is not seeking interim protection. It is seeking an order giving it occupation of the property in terms of the lease. In my view, giving the applicant vacant possession of the property is actually the final order that the applicant is seeking. If the property had not been leased out to a third party ^D and the applicant had sought an order restraining the respondent from leasing out the property pending determination of the validity of the lease between them, I may have been persuaded to protect the applicant's legal interest in that respect.

In the result, I make the following order: ^E

1. The application is dismissed.
2. The applicant is to pay the respondent's cost of suit.

Kantor & Immerman, applicant's legal practitioners

^F *T K Hove and Partners*, respondent's legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/KADENGU & ORS v KADENGU & ORS 2006 (2) ZLR 246 (H)

KADENGU & ORS v KADENGU & ORS 2006 (2) ZLR 246 (H)**2006 (2) ZLR p246**

Citation	2006 (2) ZLR 246 (H)
Case No	Judgment No. HH-113-06
Court	High Court, Harare
Judge	Kudya J
Heard	13 July 2006
Judgment	1 November 2006
Counsel	<i>H Zhou</i> , for the applicants <i>J P Mutizwa</i> , for the first respondent No appearance for the second and third respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Administration of estates — will — alteration of — application — residual c heirs — no right to apply for alteration until they have expectation of benefit

Practice and procedure — parties — locus standi — heirs under a will — residual heirs — no locus standi to seek alteration of will until vesting of rights in them D

Succession — will — alteration of — application — residual heirs — no right to apply for alteration until they have expectation of benefit

Headnote

The applicants were residual heirs under a will. They sought alteration of the will, claiming that the estate could no longer be wound up in terms of the E will as some of the clauses had, with the passing of time, become irrelevant. In terms of the will, after paying off various debts and making two major dispositions, the executor was obliged to liquidate the remainder of the estate and hold the monies in trust, to be applied to such matters as education and maintenance of the residual heirs.

Held, that the applicants' locus standi depended on their having a direct and F substantial interest in seeking variation or alteration or rectification of the will. The executor alone is looked upon as the person to represent the estate of a deceased person. All a residuary heir could do was seek the intervention of the court for the proper performance of the executor's duty or to seek his removal. The interest of the applicants in casu would arise once the trust was formed and once it was liquid. Only then would G they have an expectation of benefit. That was also when they would have vesting. Once vesting was achieved, then would they have a direct and substantial interest in the provisions of the will and would be entitled to claim under the provisions of the will. H

Kudya J

Cases referred to ^A

Clark v Barnacle NO & Ors 1958 R & N 348 (SR)

CIR v Crewe's Est & Anor 1943 AD 656

Fischer v Liquidators, Union Bank (1891) 8 SC 46

Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 (O)

Liquidators, Union Bank v Watson's Executors (1891) 8 SC 300

^B *Smith's Est v Follett's Est* 1942 AD 364

Case information

H Zhou, for the applicants

J P Mutizwa, for the first respondent

No appearance for the second and third respondents

Judgment

^C **KUDYA J:** On 24 March 2003, three of the beneficiaries of the estate of the late Job Bruno Kadengu filed this application seeking the variation of certain clauses of the last will and testament of the testator. The application was served on the respondents on 2 April 2003, 17 April 2003 and 16 March 2005 respectively.

^D The first respondent opposed the application on 18 August 2003 while the second respondent did so on 1 September 2003.

The testator died testate on 25 March 1990. He executed his nine-paged will on 20 February 1990. It contains 20 clauses.

One Gregory Slater of Gollop and Blank legal practitioners of Harare was ^E appointed the executor testamentary and was issued with letters of administration by the Master on 14 June 1990 in line with clause 3 of the will.

Slater attempted to administer the estate DR No. 665/90 but, by 30 September 1998, he had not finished doing so. He fled the country under allegations of misappropriation of funds. Gollop and Blank proceeded to renounce their appointment as executors of and trustees to the estate on 5 September 1997. ^F The Master then appointed the second respondent as executor dative on 2 July 1999.

The new executor failed to remedy the problems that Slater left unresolved. By 28 September 2000, the first and second applicants, together with Martin Kadengu, another beneficiary, wrote to the Master complaining of the ^G inaction of the second respondent and his resultant failure in winding up the estate in accordance with the wishes of the testator. The desired result was not achieved.

The applicants instituted the present application in the belief that:

"This estate can no longer be wound up in terms of the will as some of the clauses have become irrelevant with the passage of time whilst others ^H have been overtaken by events."

Kudya J

They referred to clause 9 which dealt with the formation of a trust whose ^A trustee was to be senior partner in the law firm of Gollop & Blank, which law firm had renounced its appointment as trustees and executors even before the trust had been formed. They pointed out that the beneficiaries had not agreed and could not agree on a suitable substitute. In any event, to them the trust would not achieve its intended purpose, as some of the beneficiaries could ^B not be located while others had left Zimbabwe.

They sought the dispensation of the formation of the trust and the liquidation of the estate in a way consistent with the overall intention of the testator that a commodious enough house be purchased

for the first respondent and the residue be shared equally to all the deceased's children.

The only assets belonging to the estate were given as 4 000 shares in Paradise c Park Motel (Pvt) Ltd and certain piece of land situate in the district of Makoni called Alloa Farm. They therefore prayed for the disposal of the 4 000 shares in Paradise Park Motel (Pvt) Ltd by private treaty, and that clause 6 of the will be implemented for "a large enough and commodious enough house be purchased for first respondent in the northern suburbs of Harare" from the d proceeds and that the residue be shared equally amongst the beneficiaries. They further prayed for the registration of Alloa Farm, in the names of all the beneficiaries, as a family home which would not be sold and that costs be borne by the estate in the event of the first and second respondents did not oppose the application.

On 23 July 2003, a default judgment was entered by this court. It was ordered e that:

1. The Trust which was to be set up in terms of clause 9 of the will be and is hereby abandoned.
2. The deceased's 4 000 shares in the Paradise Park Motel (Pvt) Ltd shall be sold to the best advantage of the beneficiaries. f
3. "A large enough and commodious enough" house shall be purchased for the first respondent and her minor children from the proceeds of the sale of the Paradise Park Motel (Pvt) Ltd. The Master of the High Court (third respondent) shall determine whether or not the house which the estate shall be purchasing for the first respondent and her children is large g enough and commodious enough.
4. After purchasing the house described above for the first respondent and her children, the residue shall be equally distributed among the surviving beneficiaries. The shares of beneficiaries who are outside the country or who are not part of these proceedings shall be deposited with the Master of the High Court. h

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5. The immovable property situated in Makoni District, namely Alloa Farm, held under Deed of Transfer No. 7689/81 shall not be sold. It shall be retained as a family home to be registered in all the beneficiaries' names or to be registered in the name of the nominated beneficiary in trust for the rent of the beneficiaries.
6. The costs of this application shall be borne by the estate.

b Both parties were agreed that this order was rescinded by consent.

The first respondent in her opposition averred that the will was valid and effectual and that the second respondent be afforded the opportunity to administer it and give effect to the deceased's wishes. She averred that improper conduct by Slater or delays and inaction by the second respondent c were not recognized grounds for setting aside the will.

She further averred that the shares in Paradise Park Motel did not belong to the estate, as the deceased had not paid for them at the time of his demise. An open invitation was extended to those beneficiaries willing to participate in the purchase of these shares to do so but only the first defendant responded d positively. She produced a letter written to the applicant's then legal practitioners of 23 April 2002 which indicated that a dispute existed as to the ownership of the shares. Further, she averred that Alloa Farm should be dealt with in terms of the will.

The second respondent, on the other hand, in his opposition noted that the estate was illiquid and this hampered his ability to discharge his mandate. He e believed that the issue of the ownership of the 4 000 shares be determined first before the estate could be wound up.

Three issues were argued before me. These are:

1. Whether or not the estate can no longer be wound up in terms of the will because some clauses have become irrelevant. f
2. Whether or not the 4 000 shares in Paradise Park Motel (Pvt) Ltd form part of the deceased's estate.
3. Whether or not Alloa Farm can still be dealt with in terms of the will.

It seems to me, however, that a more fundamental point, which unfortunately was not addressed, arises. It is whether or not the applicants have *locus g standi*, that is a direct and substantial interest in seeking variation or alteration or rectification of the will.

In *Henri Viljoen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151 (O) at 166H-169H, Horowitz AJP dealt with the question of direct and substantial interest with respect to joinder and discussed at 167C-F the meaning that may be ascribed to the term with reference to a lessor, lessee and sub-lessee. At 169H, he held ^H that:

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Kudya J

“the direct interest required’ by the Appellate Division decision must be ^A an interest in the right which is the subject matter of the litigation and is not merely a financial interest which is only an indirect interest in such litigation.”

In Zimbabwe, as far as I am aware, the question of a beneficiary’s direct and substantial interest in a will was considered by Morton J in *Clark v Barnacle NO & Ors* 1958 R&N 348 (SR). In that case, two executors sued a third executor ^B in the estate of one Henry Douglas Clark to recover assets of the estate. The third executor’s functions as such had been suspended by a court order pending the determination of the suit. The applicant was one of four residuary heirs who sought to be joined in as a co-plaintiff with the other two executors in order to protect his interests. Morton J held that while an executor was ^C the only person who had *locus standi* to bring a vindicatory action relative to property alleged to form part of the estate, the residuary heir could seek the intervention of the court for the proper performance of the executor’s duty or to seek his removal. The application for joinder was dismissed both in terms of common law and Order 12 r 7 of the Rules of Court in existence at the time.

See *Fischer v Liquidators of Union Bank* (1891) 8 SC 46 at 54 and *Liquidators ^D of Union Bank v Watson’s Executors* (1891) 8 SC 300 at 306 where in both cases, de Villiers CJ held that the executor alone is looked upon as the person to represent the estate of a deceased person. In the later case at 306, he stated:

“As between the executor and the heirs he (the executor) acts, in a certain ^E sense, as their mandatory, but towards the rest of the world he occupies the position of legal representative of the deceased, with all rights and obligations attaching to that position.”

See also *Estate Smith v Estate Follett* 1942 (AD) 364 at 383 and *Commissioner of Inland Revenue v Estate Crewe & Anor* 1943 (AD) 656 at 692. In both cases, Watermeyer JA held that an heir or legatee is entitled to claim his ^F inheritance from the executors of the estate after confirmation of the executor’s account. In the latter case, he stated:

“The right to make such a claim no doubt vests in the heirs on the death of the deceased, and may be said to have *dominium* of the right, although it is not immediately enforceable.”

Meyerowitz in *The Law and Practice of Administration of Estates and Estate ^G Duty* (1995) at p 18:12 *in fine* is in agreement with Watermeyer JA’s statement of the law as it applies in South Africa.

It seems to me, therefore, that the applicants *in casu* are obliged to show the direct and substantial interest that they have in the subject matter before me of seeking the variation of certain clauses of the will. In terms of the will, they ^H

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Kudya J

^A are residuary heirs. They will only be able to benefit from the will after clause 9 thereof, has been fulfilled. Clause 9 reads:

“After discharging my debts and taxes and paying the legacies and providing for the aforesaid usufruct and generally dealing with my directives detailed hereinabove, my executor shall sell and liquidate and turn into cash the entire balance of my estate and my executor shall hold ^B the resultant monies in his own name as trustee of a trust fund and he shall apply the income and capital thereof as hereinafter directed. The successor in office as trustee of my trust fund shall be the senior partner for the time being of the said Messrs Gollop and Blank.”

The executor’s primary duty is set out in clause 5. He was to gather all the testator’s property, pay debts and taxes and expenses for administering the ^C estate. This was to be followed up by the purchasing of a large enough and commodious enough house for the first respondent (surviving spouse and her progeny by him) in the northern suburbs of Harare, in the executor’s discretion. The house was to be hers. She was to receive all household furniture and effects in the house they lived in together at time of his death. The executor was to ensure the testator’s mother received all the

farming implements, livestock and other movables at Alloa Farm and that she exercised a life usufruct over the said farm.

He was also to implement the subdivision of the portion of the farm. The clear language of clause 8 indicates that the portion to be hived off the farm was known especially by Mr J R F Walker of Rusape who was involved. It was to be smaller than the remainder. If any difficulties arose, the executor was to have the determining and final say. This hived off portion, together with \$50 000, was to be given to the testator's sister Rosa Chimambo.

The ownership of the farm occupied for life by the testator's mother was to vest in the trustee. The trust would be formed after the payment of debts, taxes and administration expenses and after the purchase of the house for the surviving spouse and her progeny by him. The subdivision of the farm and the life usufruct would not hold up the formation of the trust. It is clear from clause 9 that the trust would be formed from the residue funds which remained after the major bequests had been done. A corollary to that phrase was that if no such residue remained then the trust would have no funds until after death of the testator's mother when the farm was to be sold and the proceeds there from devolved to the trust.

It was envisaged by the testator that the provisions of clause 10 with regards to maintenance, education and advancement of the surviving spouse, his mother, and all his progeny, including the 14 persons mentioned therein, were to be implemented from the income of the trust. Death of the mother, remarriage

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Kudya J

of the surviving spouse and the age of 25 of the minor beneficiaries were to be the outer limits of the maintenance. The surviving spouse was, in addition, to have a reliable motor vehicle from the trust income. If the income was insufficient he could utilize the capital of the trust fund. When the youngest of the minor children reached 25, the trustee was to dissolve the trust and share all proceeds amongst the surviving beneficiaries.

In my view, there is no ambiguity about the clauses relating to the formation, operation and dissolution of the trust. The accession of the envisaged benefits by the beneficiaries was obviously dependant on the existence of surplus income after the major items had been provided for. The interest of the applicants in the present matter would arise once the trust was formed and once it was liquid. It is only in these circumstances that they would have an expectation of benefit. That is also when they would have *vesting*. Once vesting was achieved, it seems to me, only then would they have a direct and substantial interest in the provisions of the will. They would then have the entitlement to claim under the provisions of the will. In other words, before *vesting* was achieved, they had no business seeking the alteration of the will. In my opinion, even at *vesting* they would not have a direct and substantial interest in the alteration of the will. All they would have would be a direct and substantial interest to seek compliance with the provisions of the will, that affected them, by the executor either through the Master or by bringing an application if so advised for review to this court, if dissatisfied by the Master's decision.

I would therefore, dismiss the application on the basis that the applicants did not have *locus standi* to seek the variation of some of or any of the clauses of the will.

In the event that I am wrong in finding that they have no *locus standi*, I proceed to deal with the issues that were extensively argued before me.

(a) *Whether or not the estate can no longer be wound up in terms of the will because some clauses have become irrelevant in particular clause 9.*

Mr Zhou, for the applicant, submitted that clause 3 which appointed Harold Hillel Gollop or the senior partner for the time being of Gollop and Blank, legal practitioners of Harare, executor had been overtaken by events relating to the renunciation of appointment to that office by the law firm in question. On the other hand, Mr Mutizwa, for the first respondent, submitted that an executor dative was appointed by the Master in place of the said law firm. That submission by Mr Mutizwa was common cause. In terms of s 23 of the Administration of Estates Act [Chapter 6:01], all estates in this country are administered by an executor appointed by the Master.

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Kudya J

^A It is accepted that there have been inordinate delays in winding up this estate, but the Act in s 53 permits any interested party to approach this court on one month's notice to the executor for such an executor to show cause why a liquidation and distribution account has not been lodged with the Master within six months after the grant of letters of administration. The Master is empowered to make the decisions on whether or not to grant the executor an ^B extension of time. Where the interested party is unhappy with the Master's decision he may subject that decision on review.

The applicants have not demonstrated that they have approached the Master with such a complaint. In my view, they must first exhaust their domestic remedies by invoking s 116 and if so advised s 117 of the Act before seeking ^C the court's intervention. They should seek that the executor winds up the estate in the manner set out in the Act.

Mr *Zhou* further submitted, with reference to clause 9, that the appointment of a trustee was now a practical impossibility. He submitted that the will envisaged the appointment of Gollop and Blank as trustees. The Master appointed the second respondent as executor. The second respondent ^D cannot assume the office of trustee in terms of the will, therefore the formation of a trust was still-born by the renunciation of Gollop and Blank, so his argument went.

Mr *Mutizwa*, on the other hand, referred to clause 2 of the will which defines executors or executor as "meaning either executors and administrators or trustees or any two or all of these offices as may be appropriate in the ^E circumstances and in the context thereof and the term 'executors' includes the singular and plural" and submitted that the testator foresaw problems such as those experienced in his estate. He further contented that in terms of the will the executor could assume the office of trustee. This was still capable of implementation as the will did not have an expiration date.

^F Mr *Zhou* retorted that the testator wished the appointment of a testamentary trustee as he had certain expectations about that trustee's duties. He maintained that the trustee could only be from Gollop and Blank.

It is clear from clause 3 that the testator preferred the law firm he nominated to hold the office of executor. Clause 4 reads:

^G "Any executor of this my will or any trustee of any trust fund hereinafter created who is by a profession, a legal practitioner or conveyancer or accountant or notary may charge the estate or any such trust fund ..."

This clause should be read in conjunction with the first line in clause 10, clause 15(c), clause 17, 18 and 20. They simply show that the testator did contemplate the appointment of a trustee who was not from the preferred law ^H firm. In fact, particular attention should be paid to the first line of clause 10.

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Kudya J

It reads: "My executor as trustee". The first trustee was to be the first executor. ^A In the second and last sentence of clause 9, the successor in office as trustee was to be a senior partner for the time being of the preferred law firm. My view is, therefore, that, as far as the testator was concerned, the person who was the executor was to be the trustee too. That executor could still appoint a trustee or trustees regard being had to clause 2. ^B

I therefore agree with Mr *Mutizwa* that the appointment of a trustee, even now, is not an impossibility. The will decrees the appointment and spells out how this should be done. The trust is still capable of formation in line with the provisions of the will.

The last clause that the applicants contended was no longer capable of fulfillment was the disposal of Alloo Farm. The fate of the farm rests with the ^C executor to whom *dominium* passes on the death of the testator's mother. The applicants have no power to direct the executor-cum-trustee on how to exercise his untrammelled powers, which are, as regards the farm subject to clause 12 which directs that the farm shall be sold and the proceeds added to the trust fund. I am not satisfied that this wish is incapable of fulfillment.

There is, therefore, in my judgment no basis for seeking to vary the testator's ^D desired intention on the basis of delay or even impossibility of performance. It is true that inordinate delay has occurred. It is however the duty of the beneficiaries to approach the Master for the speedy winding up of the estate.

In so far as my determination of the first issue touches on Alloa Farm, I have disposed of the third issue. I would decide the first and third issue against the ^ε applicants. The last issue for determination revolves on the ownership of the 4 000 shares in Paradise Park Motel (Pvt) Ltd, that is whether these shares are part of the deceased's estate.

The applicants referred to affidavits by the first respondent in which she stated that the shares belonged to the estate. They also attached the first interim liquidation and distribution account laid for inspection on 4 December ^ϕ 1992 and the subsequent first and final liquidation and distribution account of 1 November 1996 in which the shares are reflected as being assets belonging to the estate as proof that they are estate property.

In para 13 of the founding affidavit, the applicants aver that the shares belong to the estate. In response in her opposing affidavit, the first respondent ^ϑ averred that those shares in Paradise Park Motel (Pvt) Ltd had not been paid for at the time the testator died and that he never owned them. She then goes on to state that they never became part of the estate.

Apparently, the sellers of the shares invited interested beneficiaries to participate in Paradise Park Motel (Pvt) Ltd. None was interested save the first respondent, who negotiated transfer to herself and who took transfer. ^η

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Kudya J

^α In their answering affidavit, the applicants insisted that the shares form part of the estate, no doubt on the basis of the earlier statements on oath to this effect by the first respondent. The applicants did not dispute the averment that the letter of 23 April 2002 by Gill, Godlonton and Gerrans was written in response to the one by their then erstwhile legal practitioners, Musunga and Associates, over the transfer of an immovable property associated with ^β Paradise Park Motel (Pvt) Ltd. This letter, on p 74 of the record, indicated that the agreement referred to was entered into between Auto Export/Import (Pvt) Ltd and Auto Import/Export (Pvt) Ltd as purchaser and that transfer could only be effected to Paradise Park Motel (Pvt) Ltd and not the Estate.

The applicants did not lay facts before this court on the status of Paradise Park Motel (Pvt) Ltd other than averments of the first respondent's sworn affidavit ^ϐ to the effect that that she would become co-director with the testamentary executor in this company which was part of her late husband's estate. The letter from Gill, Godlonton and Gerrans seems to suggest that post payments of the purchase price were paid by first respondent. There would be need to lead evidence on the true circumstances surrounding the shares in question. ^δ It may very well be that the shares belong to the estate, notwithstanding that in terms of s 104(1) of the Companies Act [*Chapter 24:03*] the holder of a certificate duly signed and with the seal of the company is presumed to be the owner of the shares on a *prima facie* basis. This, however, is an area where further evidence will be needed. If so advised, it seems to me that this is an issue to be pursued by the second respondent with the motel and the first ^ε respondent.

When the applicants brought the application it must have been in their contemplation from the contents of the letter from Gill, Godlonton and Gerrans that a dispute of fact would arise on the question of shares. They did not cite the company. These factors are fatal to the present application.

^ϕ I would thus dismiss the request to hold that the 4 000 shares belong to the estate in the absence of further evidence.

I however dismiss the application with costs on the basis that the applicants have not established that they have a direct and substantial interest in the subject matter to bring the present application.

It is accordingly ordered that:

^ϑ The application be and is hereby dismissed with costs.

Hungwe & Partners, applicant's legal practitioners

Chihambakwe, Mutizwa & Partners, first respondent's legal practitioners

Document 36 of 55**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/ROGERS v ROGERS & ANOR 2006 (2) ZLR 256 (H)

ROGERS v ROGERS & ANOR 2006 (2) ZLR 256 (H)**2006 (2) ZLR p256**

Citation	2006 (2) ZLR 256 (H)
Case No	Judgment No. HH-116-06
Court	High Court, Harare
Judge	Kamocha J
Heard	27 September 2006
Judgment	1 November 2006
Counsel	<i>J C Anderson SC</i> , for the applicant <i>A P de Bourbon SC</i> , for the first respondent No appearance for the second respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure — *action — dismissal of — application for — c allegation that action is "frivolous and vexatious" — test to be applied — need to show that plaintiff does not have an arguable case*

Will — *validity — undue influence on testator — what amounts to undue influence*

Will — *variation — application to vary provisions of will — general D principles to be applied — save in exceptional circumstances or under statutory authority courts will not authorize a variation where the provisions of the will are capable of being carried out and not contrary to law or public policy*

Headnote

The converse to an application for summary judgment is an application by E the defendant under r 79 of the High Court Rules to dismiss the action on the grounds that it is frivolous and vexatious. Much the same considerations which apply in determining whether or not a court should grant a summary judgment to a plaintiff should apply in deciding whether the court, on the application by a defendant, should stay or dismiss a plaintiff's action. The defendant must satisfy the court that the plaintiff F does not have an arguable case. If the court is so satisfied, then the suit may well be characterized as "frivolous and vexatious" and an unnecessary waste of costs, and the court would be justified in the exercise of its discretion to order that the plaintiff's action be dismissed. (*dicta per* Beadle CJ in *Wood NO v Edwards & Anor* 1968 (2) RLR 212 (G) at 213A-F followed). The action will not be dismissed unless the court G is satisfied that the likelihood of the case succeeding stands outside the region of probability altogether, and becomes vexatious because it is impossible.

The general principle is that, save in exceptional circumstances or under statutory authority, the courts will not authorize the variation of the H

2006 (2) ZLR p257

Kamocha J

^A provisions of a will which are capable of being carried out and are not contrary to law or public policy. No matter how capricious, unreasonable, unfair, inconvenient or even absurd they may be, the courts have to give effect to them.

Where undue influence on a testator by a beneficiary is alleged, the onus is upon the person alleging it to establish both the influence and that it was ^B undue and that it operated at the time of execution so as to result in a will which was not intended. Actual violence need not be proved, but there must be an influence relating to the making of the will itself and over bearing the mind of the testator. The onus is not discharged by showing merely that beneficiary had power unduly to overbear the will or testator; ^C it must be shown that in the particular case the power has been exercised, and that the execution of the will was obtained thereby.

Cases cited

Baudains v Richardson [1906] AC 169 (PC)

Craig v Lamoureux [1920] AC 349 (PC)

^D *Spies v Smith* 1957 (1) SA 539 (A)

Wood NO v Edwards & Anor 1968 (2) RLR 212 (G)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 75 and 79

Case information

^E *J C Anderson SC*, for the applicant

A P de Bourbon SC, for the first respondent

No appearance for the second respondent

Judgment

KAMOCHA J: The applicant and the first respondent are the only surviving children of the late Betty Gray Rogers who died at Harare on 6 November 2004. ^F The deceased made a will on 22 January 2004 in terms of which the applicant was appointed sole executor of the will and the sole beneficiary of the testatrix.

On 24 May 2005, the respondent issued summons seeking the following relief:

- (a) an order declaring the will of the testatrix dated 22 January 2004 to be null and void; ^G
- (b) an order cancelling the letters of administration granted to the applicant by the Master of the High Court; alternatively;
- (c) an order declaring the will executed by the testatrix on 22 January 2004 as only being applicable to her estate situate in Zimbabwe, and only having the effect of cancelling previous wills relating to such estate; ^H
- (d) an order that the applicant shall pay the costs of suit.

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Kamocha J

The respondent alleged in her declaration that the said will had been executed ^A under undue and improper pressure exerted on the testatrix by the applicant and as a consequence the testatrix was not, at that time, capable of executing a will of her free will and her own unfettered discretion. In the result, she concluded that the said will was invalid, not having been executed by the testatrix of her own free will and in the premises, she sought an order from this court to that effect. ^B

The testatrix's estate had been registered with the Master of the High Court who had issued letters of administration to the applicant in terms of the said will.

The testatrix had left another will executed on 6 January 1995 which regulates the distribution of the testatrix's estate in the United Kingdom. ^G

In the alternative, the respondent prayed that if it be found that she was not entitled to the relief sought above, then:

- (i) she averred that the testatrix intended her will dated 22 January 2004 ^d to apply only to her estate situate in Zimbabwe;
- (ii) the testatrix did not intend by executing the will dated 22 January 2004 to revoke the will executed by her in 1995 governing the estate situate in the United Kingdom; and
- (iii) she sought an order to that effect.

In order to enable him to plead, the applicant requested for further particulars as to when, where and in what manner it was alleged that he exerted undue and ^e improper pressure on the testatrix. Further, he asked on what basis it was alleged that the testatrix intended her will dated 22 January 2004 to apply only to her estate situated in Zimbabwe and not her estate situated in the United Kingdom.

In reply to the above requests for further particulars, the respondent declined ^f to provide further particulars as to the undue influence alleged save to say this:

"To enable the first respondent to plead to the plaintiff's declaration, the plaintiff furnishes the following further particulars:

1. Undue and improper pressure was exerted on the testatrix by first defendant at the testatrix's home, where first defendant also resided, cumulatively over a long period of time. The undue pressure came in ^g the form of physical, emotional and verbal harassment, the particulars of which are a matter of evidence which the plaintiff is not obliged to plead at this stage.
2. The testatrix's will of 22 January 2004 specifically refers to the testatrix's property in Zimbabwe and says nothing about the testatrix's estate in the United Kingdom which is governed by the testatrix's ^h

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Kamocha J

^a 1995 will. For the rest, the basis for making this contention is a matter of evidence."

This reply prompted the applicant to file this application, in terms of the provisions of Order 11 of the High Court Rules. Order 11 r 75(1) provides that:

"where a defendant has filed his plea, he may make a court application for the dismissal of the action on the ground that it is frivolous or vexatious."

^b Order 11 r 79 is also relevant for these proceedings and it provides thus

"(1) Unless the court is satisfied, whether the plaintiff has given evidence or not, that the action is frivolous or vexatious, it shall dismiss the application, and the action shall proceed as if no application had been made.

(2) If the court is satisfied that the action is frivolous or vexatious, it may dismiss the action and enter judgment of absolution from the instance with costs."

Order 11 is a counterpart of the rule for summary judgment. Beadle CJ had this to say when dealing with the provisions of the two orders in *Wood NO v Edwards* 1968 (2) RLR 212 at 213A-F:

"Order 43 is designed to assist a plaintiff and provides that, in certain cases, a plaintiff may apply for summary judgment, the effect of which is to prevent the defendant from proceedings with his defence. Order 44 is designed to assist a defendant and provides that, in a proper case, the plaintiff may, in his turn, be prevented from proceeding with his action. It seems to me, therefore, that much the same considerations which apply ^e in determining whether or not a court should grant a summary judgment to a plaintiff should apply in deciding whether the court, on the application by a defendant, should stay or dismiss a plaintiff's action under Order 44.

The grounds on which a court will grant summary judgment are well known. The plaintiff must satisfy the court that the defendant has not an arguable case, and it would seem to me that the same standard might ^f appropriately be applied to applications made under Order 44. If the court is satisfied that the plaintiff has not an arguable case, then his action may well be characterized as 'frivolous and vexatious' and an unnecessary waste of costs, and the court would be justified in the exercise of the discretion, which it undoubtedly has, to order that the plaintiff's action be dismissed.

^g An authority for this approach is to be found in the case of *Ravden v Beeten* 1935 CPD 269 at 276 where Sutton J, quoting with approval from a judgment in an English case, said that the action will not be dismissed unless the court is satisfied that the likelihood of the case which is going to be made out succeeding 'stands outside the region of probability ^h altogether, and becomes vexatious because it is impossible.'

Kamocha J

I shall approach this application on this basis and first deal with the respondent's ^A alternative claim wherein she seeks an order declaring the will executed by the testatrix on 22 January 2004 as only being applicable to her estate situated in Zimbabwe, and only having the effect of cancelling previous wills relating to such estate.

The testatrix worded her will in a clear and unambiguous manner. She stated: ^B

"I BETTY ROGERS of 30 Arundel School Road, Mount Pleasant, Harare, Zimbabwe HEREBY REVOKE all former wills and testamentary dispositions made by me AND DECLARE this to be my last Will.

I APPOINT my son Eliot Grenville Kern Rogers of 30 Arundel School Road, Mount Pleasant, Harare, Zimbabwe to be the sole Executor of this my Will. I GIVE DEVISE BEQUEATH unto my son Eliot Grenville Kern ^C Rogers my fifty percent share of the property 30 Arundel School Road, Mount Pleasant, Harare, Zimbabwe and one hundred percent of the property 15 Carrington Road, Darlington, Mutare, Zimbabwe to my son Eliot Grenville Kern Rogers.

I GIVE DEVISE AND BEQUEATH all my estate both real and personal whatsoever after payment thereof of all my just debts and funeral and ^D testamentary expenses as to one hundred percent to my son Eliot Grenville Kern Rogers."

When the testatrix stated that "I Betty Rogers ... hereby revoke all former wills and testamentary dispositions made by me and declare this to be my last will" can it be argued that she only referred to some wills but the others should ^E remain extant? She even declared the will in issue to be her last will.

Further, can it be argued that the testatrix only intended to bequeath to her son only her estate situated in Zimbabwe and not that situated in the United Kingdom when she stated " I GIVE AND BEQUEATH all my estate both real and personal whatsoever ... One hundred percent to my son Eliot Grenville Kern Rogers?" ^F

In my view, the provisions of this will are clear and unambiguous and a court will not rectify such a will. The authority for that proposition is to be found in Corbett, Hofmeyer and Kahn *The Law of Succession in South Africa* 2ed wherein it is stated, at pp 484-485, that:

"The general principle is that, save in exceptional circumstances or under statutory authority, the courts will not authorise a variation of the ^G provisions of a will which are capable of being carried out and are not contrary to law or public policy. No matter how capricious, unreasonable, unfair, inconvenient or even absurd they may be the courts have to give effect to them.

... this general principle is based on another general principle, that a court cannot make or remake a will for the testator and cannot change the manner ^H

Kamocha J

^A of devolution of the estate provided for by the testator. The testator's wishes and the scheme provided for in the will must be implemented."

I would, in the light of the foregoing conclude that the respondent's contention, that the testatrix's will was not intended to revoke an earlier will dealing with her property in the United Kingdom, is quite unarguable.

I now turn to the respondent's main claim that the will in question ought to ^B be declared invalid as it was allegedly executed under undue and improper pressure being exerted on the testatrix by the applicant, resulting in her being incapable of executing a will of her own free will and exercising her own unfettered discretion. The respondent alleged that the undue and improper pressure was exerted on the testatrix by the applicant at her home, where the ^C applicant also resided, cumulatively over a long period of time. The undue pressure allegedly came in the form of physical, emotional and verbal harassment.

The respondent emphasized in her opposing affidavit that in the main action it would not be ^D, and had never been, her case that the testatrix signed her will under immediate threat or undue influence exercised by the applicant in person at the very moment of the signing of the will. She went on to state that, on the contrary, it was her case that the applicant exercised undue and improper pressure on the testatrix over a long period of time.

The respondent set out a series of allegations in which she attacked the applicant's character. She alleged that the applicant had a dysfunctional ^ε relationship with his family, particularly with his parents when they were alive. She went on to allege that the applicant had been consistently unable to live a life independent of his parents or parental homes. He was unmarried without children and had repeatedly claimed to his parents that he was a homosexual, something which they could not accept. She even alleged that the applicant had for a number of years been a persistent user of illegal narcotic substances. ^ϕ Not only did the applicant have the above problems but, for a number of years, he allegedly had a consistent and serious problem with alcohol.

She then arrived at the conclusion that the cumulative result of the applicant's drug and alcohol abuse and the taking of prescribed medicines had an exceedingly serious effect on his behaviour which was, at all material times, ^ς intermittently erratic, demanding and characterised by physical and verbal abuse to members of his family.

She further alleged that after the death of their father, it fell to the testatrix to bear the brunt of the applicant's behaviour which imposed an exceedingly severe strain upon her, since the two of them were living together on the same ^η property in Mount Pleasant. Furthermore, she alleged that for many years now

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Kamocha J

her relationship with the applicant, her brother, had been very difficult ^α because of his behaviour, not only to the parents, but also to herself and other members of her immediate family, and that had resulted in her and the applicant, in effect, being estranged.

While the respondent made more stinging attacks about the applicant's behaviour and character, she does not say that the applicant visited the ^β testatrix with physical and verbal abuse. The respondent makes bald allegations as to the applicant's behaviour towards the testatrix.

Since the respondent's case is that the applicant exercised undue and improper pressure upon the testatrix over a long period of time, has she got an arguable case at the trial in the absence of allegations that undue and improper pressure was actually brought to bear on the testatrix? Moreso, ^ς when the respondent admitted that when the testatrix signed her will there was no immediate threat or undue influence brought to bear upon her by the applicant at the very moment of the signing of the will.

The respondent's counsel accepted at the hearing that indeed the respondent had a difficult case to prove, but it was not impossible to prove. But I do not ^δ agree that the test is whether or not the case is impossible to prove. The test, as I understand it, is whether or not there is an arguable case. So the court, at this stage, is not being called upon to find that it will be impossible for the respondent to establish undue influence in the execution of the testatrix's will but that whether or not there is an arguable case to that effect.

The respondent conceded that the numerous authorities cited by the applicant ^ε defining undue influence correctly expressed the law.

The respondent did not at any stage allege that the testatrix was not of sound mind at the time she executed her will. Mr and Mrs Hogg, who were witnesses to the execution of the will, stated that the testatrix knew exactly what she was doing. She appeared to be an organised, competent woman. At no time did she ^ϕ appear not to know what she was doing. She was clear in her intention that she had gone to Mr and Mrs Hogg to make her will. At the time of the signing of the will, the applicant was believed to be overseas. What sticks out like a sore thumb is that the testatrix was *compos mentis* at the time she executed her will.

Where undue influence is alleged the onus is upon the person alleging it to ^ς establish both the influence and that it was undue and that it operated at the time of execution so as to result in a will which was not intended. In *Corbett, Hofmeyer and Kahn op cit* at p 93, it is stated that:

"Undue influence has been described as an influence which has –
'caused the execution of a paper pretending to express a testator's mind ^η

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Kamocha J

^α but which really does not express his mind, but something else which he did not really mean'."

In *Baudaines v Richardson* [1906] AC 169 (PC), it was held that:

“Actual violence need not be proved but it must be an influence relating to the making of the will itself and over bearing the mind of the testator.”

A In *Spies v Smith & Ors* 1957 (1) SA 539 (A), the headnote reads:

“A last will can be declared invalid where the testator is moved by artifices of a nature such as to justify their being equated, by reason of their effect to the exercise of coercion or fraud, to make a bequest which he would otherwise not have made and which, therefore, would express another person’s will rather than his own. In such a case, we are dealing, not with c the genuine wishes of the testator, but with the substitution of the wishes of another person, and the will is not maintainable.”

The headnote in *Craig v Lamoureux* [1920] AC 349 (PC) reads:

“When once it is proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence rests on the D person who so alleges. That burden is not discharged by showing merely that beneficiary had power unduly to overbear the will or testator; it must be shown that in the particular case the power has been exercised, and that the execution of the will was obtained thereby.”

In casu, whatever the applicant’s behaviour may have been, it had no influence on the actual execution of the wills as set out in the above authorities. E Mr and Mrs Hogg did not detect any signs suggesting that the testatrix may not have been acting freely. On the contrary, they said she appeared to have approached them freely with the specific intention to execute her will. She did not go there with the applicant. Mr and Mrs Hogg even thought that he may have been overseas at that time.

F I must also point out that the testatrix only died nine months after she had executed her will. She therefore had ample time to change it if it had reflected somebody else’s intentions not hers.

In the light of the foregoing, it seems to me that the respondent has a very difficult and unarguable case. Her action is frivolous or vexatious.

In the result, I would dismiss her action and enter absolution from the instance G with costs.

P *Chiutsi Legal Practitioners*, applicant’s legal practitioners

H *Gill, Godlonton & Gerrans*, first respondent’s legal practitioners.

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Source:

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IN RE ESTATE CHIRUNDA 2006 (2) ZLR 264 (H)

2006 (2) ZLR p264

Citation	2006 (2) ZLR 264 (H)
Case No	Judgment No. HH-119-06
Court	High Court, Harare
Judge	Makarau JP & Chatukuta J
Heard	2 November 2006
Judgment	8 November 2006
Counsel	<i>R Fitches</i> , for the appellant <i>S Hwacha</i> , for the respondent

Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Administration of estates — estate governed by customary law — c determination of who is a surviving spouse — whether Master may make such determination

Headnote

The deceased had divorced his first wife 11 years before his death. At the time of his death, he was living as man and wife with another woman, though ^d the relationship was not formalised in any way. The executor of the estate was unsure whether the woman was a surviving spouse and referred the matter to the provincial magistrate for decision. The provincial magistrate ruled that the woman was a surviving spouse; two of the deceased's children appealed against the decision.

Held, that the magistrate had no jurisdiction to decide the matter. When the ^e Administration of Estates Act [Chapter 6:01] was amended in 1997, the section giving jurisdiction of magistrates in this regard was repealed. The Master was given extensive powers to determine whether an estate is to be dealt with in terms of customary law or not and the plan in terms of which the estate is to be distributed. The amendment also provided that ^f any party aggrieved by the decision of the Master in regard to his powers under the new law may appeal to the High Court. The Act does not specifically provide that the Master is empowered by the Act to make a determination of who is a spouse to the estate or whether such determination is appealable or reviewable by the High Court. ^g

Legislation considered

Administration of Estates Act [Chapter 6:01], Part III A

Case information

R Fitches, for the appellant

S Hwacha, for the respondent ^h

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Makarau JP

Judgment

^a **MAKARAU JP:** The deceased, Amos John Chirunda, passed away in Harare on 8 December 1997. On 23 July 1986, this court granted a decree of divorce between the deceased and Margaret Sumbureru, his wife of some eight years standing. Two children were born of the marriage. At the time of his death, the deceased was living with one Prisca Chinamora, after the manner of husband and wife. The union between the deceased and Prisca was not solemnized in ^b terms of any recognized law.

On 19 April 2005, Wilbert Nyamupfukudza was appointed executor dative to the estate. A dispute then arose as to whether Prisca Chinamora is a surviving spouse in the estate. From the papers filed before us, it is not clear whether the matter was formally referred to the Master for a ruling on the status of Prisca Chinamora. However, by a letter dated 1 July 2005 and addressed to Margaret ^c Sumburero's then legal practitioners, the Acting Deputy Master wrote that the Master's office acknowledged that Prisca Chinamora is the only surviving spouse of the deceased.

The dispute did not die down, prompting the executor to address a letter to the provincial magistrate at Harare, part of which reads:

^d "The above estate is registered with the Master of the High Court and we were appointed Executors by copy of the attached Letter of Administration.

At the time of the death, the deceased is said to have been customarily married per Death Certificate and it is not disputed that he was living with one Prisca Chinamora/Chirunda.

However the deceased's children and most probably other family members seem to be of the view that even though the two were staying together there was no binding (legal) customary marriage to enable her to have the status of surviving spouse.

It is that determination of the deceased's marital status that we are obliged to request this Honourable Court to make" (my emphasis).

¶ The provincial magistrate held an inquiry and on 22 June 2006 ruled that the Master's decision to recognise Prisca as the only surviving spouse in the estate would be upheld. Dissatisfied with that ruling, the two children of the deceased filed an appeal with this court, seeking an order for the ruling to be set aside and for the recognition of Prisca Chinamora as a surviving spouse of the deceased by the Master to be set aside.

¶ One issue exercised our minds in this appeal. It is the jurisdiction of the magistrates' court to hold an inquiry of the nature that it did. That it was invited to hold the inquiry by the letter from the executor that I have largely reproduced above is not disputed. The invitation to the provincial magistrate is in that part of the letter that I have highlighted. What exercised our minds is whether the magistrates court should have accepted the invitation of the executor to hold an inquiry in the matter. ¶

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Makarau JP

It is trite that prior to 1997, the law provided for a manner of settling disputes ^a or controversies arising from the administration of estates of Africans dying intestate in a speedy and less expensive way than ordinary litigation. This was through the provisions of the old s 68(2) of the Administration of Estates Act [*Chapter 6:01*] that used to read:

"(2) If any controversies or questions arise among his relatives or reputed ^b relatives regarding the distribution of the property left by him, such controversies or questions shall be determined in the speediest and least expensive manner consistent with real and substantial justice according to African usages and customs by the provincial magistrate or a senior magistrate of the province in which the deceased ordinarily resided at the time of his death, who shall call and summon the parties concerned before him and take and record evidence of such African usages and customs, ^c which evidence he may supplement from his own knowledge."

The law relating to the administration of estates was radically amended by Act No. 6 of 1997. The amendment to the law saw the deletion and substitution of the entire s 68 dealing with the administration of the estates of intestate Africans. A new Part III A has now substituted the old s 68 of the Act and it ^d now deals with estates of persons subject to customary law where such estates are not disposed of by will.

Apart from the noticeable change in the language employed in the amendment which now progressively refers to "persons subject to customary law" rather than to "Africans", reference of disputes arising from such estates to a provincial or senior magistrate was repealed and was not re-enacted. This may ^e have been by design or was an oversight on the part of the draftsman. A new manner of dealing with questions or controversies arising from the estates of persons subject to customary law has been introduced. A reading of the Act appears to give the Master extensive powers to determine whether an estate is to be dealt with in terms of customary law or not and the plan in ^f terms of which the estate is to be distributed. It also provides that any party aggrieved by the decision of the Master in regard to his powers under the new law may appeal to the High Court.

Whether or not the Master is empowered by the Act to make a determination of who is a spouse to the estate and whether such determination is appealable or reviewable by this court, is an issue that could have arisen in this matter ^g as it is common cause that the Master accepts the respondent as the only surviving spouse in the estate. The issue does not specifically arise in the appeal before us, as the decision on appeal is that of the provincial magistrate. In a future and appropriate case, the issue raised above will have to be determined, as the Act appears to have made no specific provisions on the ^h matters we have highlighted.

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Makarau JP

A In our view, the executor in the estate erred in referring the dispute to the provincial magistrate at Harare. He most probably was proceeding under the repealed s 68 of the Act. Equally, the provincial magistrate erred in accepting the dispute and proceeding to issue a ruling on it. While the appellants were prompted by that ruling to note an appeal to this court, there is nothing to appeal against and therefore nothing for us to preside over, as the ruling by B the provincial magistrate is a nullity. She had no jurisdiction to determine the dispute and make a ruling in the matter. That the respondent's legal practitioner accompanied her on her futile journey does not lend any validity to her ruling. It remains a nothing from which nothing valid can be derived.

When we highlighted our concerns to counsel during the hearing of the C matter, they both graciously conceded the point and for this, we express our appreciation.

After requesting us to declare the purported appeal before us a nullity, Mr *Fitches* then made an oral application for condonation of late noting of an appeal against the decision of the Master acknowledging Prisca Chinamora as the deceased's sole surviving spouse. In support of his application, he D cited the time that has lapsed since the untimely death of the deceased and highlighted that it would be in the best interests of the beneficiaries and indeed of justice that the dispute is resolved and the estate wound up. His argument in this regard is quite compelling.

However, in my view, there is uncertainty surrounding the status of the letter by the Master in which he accepts Prisca Chinamora as the sole surviving E spouse of the deceased. It is not clear to us whether this letter is a decision envisaged in Part III A of the Administration of Estates Act and against which an appeal lies to this court.

Further, as highlighted above, the power of the Master to make such a decision does not appear clearly from a reading of the law and if such a power is to be F inferred from some express provision of the law, in my view, a formal application becomes ideal.

Further, and more compelling, in my view, the Master, whose alleged decision the appellants now wish to challenge is not before us and, as pointed out by Mr *Hwacha*, and correctly so in my view, an informal application for condonation may work an injustice against some of the parties interested in the dispute.

G Based on the foregoing, we decline to entertain the oral application for condonation for the late noting of the appeal against the decision of the Master.

In view of the fact that this appeal turns on a point that was not raised by either of the parties in their arguments, we see no basis for rewarding any party with H an award of costs or of burdening the estate.

2006 (2) ZLR p268

Makarau JP

In the result, we make the following order: A

1. The appeal is dismissed.
2. Each party will bear its own costs.

CHATUKUTA J concurred. B

Hussein Ranchod & Co, appellants' legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/ZIMBABWE STOCK EXCHANGE v ZIMBABWE REVENUE AUTHORITY 2006 (2) ZLR 269 (H)

ZIMBABWE STOCK EXCHANGE v ZIMBABWE REVENUE AUTHORITY 2006 (2) ZLR 269 (H)

2006 (2) ZLR p269

Citation	2006 (2) ZLR 269 (H)
Case No	Judgment No. HH-120-06
Court	High Court, Harare
Judge	Makarau JP
Heard	14 September 2006
Judgment	8 November 2006
Counsel	<i>L T Biti</i> , for the applicant <i>M Sinyoro</i> , with him <i>G Matsikidze</i> , for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Practice and procedure — parties — locus standi — principles — need to have legal interest in subject-matter of the action — Zimbabwe Stock Exchange — bringing action on behalf of stockbrokers — Stock Exchange having no legal interest at stake — stockbrokers not members of Stock Exchange — Stock Exchange having no locus standi

Headnote

The applicant, the Zimbabwe Stock Exchange, is established as a corporate body in terms of s 3 of the Zimbabwe Stock Exchange Act [*Chapter 24:18*]. It is run by a committee.

¶ A dispute arose within the Exchange as to the liability of stockbrokers to pay VAT, the respondent claiming that they were liable. The applicant sought a declaration that stockbrokers were exempt from paying VAT. The court *in limine* considered whether the applicant had *locus standi* to bring the application. The applicant argued that, since it was set up to manage a fair and efficient manner of dealing in listed securities, it had ¶ an interest in the impasse between the respondent and the stockbrokers and thus had a standing in terms of the common law on the basis that it had a direct and substantial interest in the impasse.

Held, that the applicant had taken it upon itself to be the voice of the stockbrokers in the application. There was no provision in the Act entitling it to do so. Under the common law, an applicant must show that ¶ it has a direct and substantial interest in the subject matter and what is required is a legal interest in the subject matter of the action. A public authority or body will have *locus standi* in a suit where it shows that it has a legal interest in the subject matter of the suit and such interest may be prejudicially affected by the decision of the court. The applicant was ¶ not an association of stockbrokers fighting for the cause of its membership.

2006 (2) ZLR p270

Makarau JP

Stockbrokers are not members of the Stock Exchange in the way lawyers ¶ are members of the Law Society. There is a distinction between *locus standi* in public interest litigation and private interest litigation: while a wider approach may be arguable for public interest litigation, a similar wide approach is not so desirable in private interest litigation. The impasse between the respondent and stockbrokers was essentially a ¶ private dispute. The applicant had an interest in how the issue will be resolved, but that interest was not direct and substantial, in the sense that there was no recognizable right at law of the applicant that was at stake. It had no legal interest that was at risk in the dispute between the stockbrokers and the respondent. ¶

Cases cited

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

Deary NO v Acting President & Ors 1979 RLR 200 (G)

Law Soc of Zimbabwe v Min of Justice & Anor 2006 (2) ZLR 19 (S)

Law Soc & Anor v Min of Finance 1999 (2) ZLR 231 (S) ^D

Retrofit (Pvt) Ltd v PTC & Anor 1995 (2) ZLR 199 (S)

Ruwodo NO v Min of Home Affairs & Ors 1995 (1) ZLR 227 (S)

United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972 (4) SA 409 (C)

In re Wood & Anor 1994 (2) ZLR 155 (S) ^E

Zimbabwe Teachers Association & Ors v Minister of Education and Culture 1990 (2) ZLR 48 (H) ^E

Case information

L T Biti, for the applicant

M Sinyoro, with him *G Matsikidze*, for the respondent

Judgment

MAKARAU JP: This is an application for a declarator to the effect that ^F stockbrokers are exempt from paying value added tax in terms of s 11(a) of the Value Added Tax Act [*Chapter 23:12*] for the services they render in the normal course of their business.

Section 3 of the Zimbabwe Stock Exchange Act establishes, as a corporate body, the Stock Exchange for Zimbabwe, wherein securities and shares in ^G listed companies are freely traded. To run the affairs of the Exchange is a Committee set up in terms of the Act. The application before me was founded on an affidavit deposed to by the Chairperson of this committee, on behalf of the applicant. ^H

2006 (2) ZLR p271

Makarau JP

^A BACKGROUND

In May 2006, a misunderstanding arose within the applicant as to the liability of stockbrokers to pay VAT. As a result of this misunderstanding, stockbrokers folded their arms and trading on the bourse came to a complete halt. Trading only resumed on 30 May 2006, when an agreement was reached between the stockbrokers and the government that the accrued tax would not be collected ^B pending determination of the matter by a court. This truce holds.

THE ISSUES

The main issue that falls for determination in this application is easy to formulate. It is whether the law exempts stockbrokers from paying VAT. However, attendant upon this simple issue are three procedural issues. These ^C are:

- (a) whether the application before me is opposed;
- (b) Whether the applicant has *locus standi* to bring the application; and
- (c) Whether this matter is *lis pendens* before another tribunal of competent jurisdiction, namely, the fiscal court.

^D In my view, the second issue, *viz*, whether the applicant has *locus standi* to bring this application overshadows the other two. It presents itself clearly to me that a deliberation on the other two issues can only ensue once I am satisfied that the applicant is properly before me. On the basis of the forgoing, I shall therefore deal with the issue of *locus standi* first.

^E THE LOCUS STANDI OF THE APPLICANT

It is common cause that the applicant itself is not a stockbroker and is not liable to the respondent for VAT. The applicant brings this application on behalf of stockbrokers. From a reading of the applicant's papers, it is quite apparent that the applicant greatly sympathises with the stockbrokers' case and has adopted their stance as if it were its own. It firmly believes that stockbrokers are exempt from paying VAT and has argued so in its application. Noticeably, in its draft order, it does not pray for an order compelling the parties to the dispute to speedily resolve the issue that has disrupted trading on the bourse, but specifically prays that the dispute be resolved in favour of the stockbrokers. The applicant has thus taken it upon itself to be the voice of the stockbrokers in the application before me and the issue that arises is whether it has the legal standing to do so.

The applicant has sought to argue that it has the legal standing to bring this application in terms of both the Stock Exchange Act and at common law.

To dispose of one argument quickly, it is quite clear that the Stock Exchange Act does not provide that the applicant can bring an action of behalf of

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Makarau JP

stockbrokers. To be fair to him, I did not understand Mr *Biti* to be arguing that it does.

I would therefore dismiss the notion that the applicant has any *locus standi* in terms of the Stock Exchange Act to bring this application.

It would appear to me that the net effect of the applicant's argument is that, since the applicant is set up to manage a fair and efficient manner of dealing in listed securities, it has an interest in the impasse between the respondent and the stockbrokers, the brief details of which I have given above. Thus, I understood the applicant to be arguing that it has a standing in terms of the common law on the basis that it has a direct and substantial interest in the impasse.

A review of some of the decisions that have come before this and the Supreme Court on the issue of *locus standi* in public and private interest litigation, though not imperative, may be useful.

Deary NO v Acting President & Ors 1979 RLR 200 (G) appears to have been the first decision in this jurisdiction dealing with the issue. In that matter the *locus standi* in issue was that of a public body that had brought an application on behalf of the citizens of the then Rhodesia against the government of the day. Although the applicant or petitioner is cited as Deary, the application was brought by the Catholic Commission for Justice and Peace, a public authority seeking to protect the rights of the citizenry. The *locus standi* of the applicant was objected to and initially it was contended that the application had been brought for purely political reasons and was vexatious. In holding that the applicant was properly before the court, Beck J (as he then was) had this to say at p 203A-B:

"It must be said from the outset that the court will be slow indeed to deny *locus standi* to an applicant who seriously allege that a state of affairs exists within the court's area of jurisdiction, whereunder people have been or about to be, and will continue to be unlawfully killed. No more pressing need for the protection of the mandatory interdict *de libero homine exhibendo*, or a prohibitory interdict restraining such alleged oppression can possibly be imagined. (See *Wood & Ors v Ondangwa Tribal Authority & Anor* 1975 (2) SA 294 (A). *The non-frivolous allegation of a systematic disregard for so precious a right as the right to life is an allegation of an abuse so intolerable that the court will not fetter itself by pedantically circumscribing the class of persons who may request the relief of these interdicts*" (my emphasis).

It is worth noting that the decision in *Deary* was made in 1979, prior to the enactment of the Constitution of Zimbabwe, and s 24 in particular, which grants certain but limited *locus standi* to public bodies to bring applications such as the one brought in the *Deary* case.

2006 (2) ZLR p273

Makarau JP

In my view, it is instructive to note that even in the *Deary* case, some qualification appears to have been attached to the standing of the CCJP to bring the application and its *locus standi* was not assumed nor was it had for the asking. The right at stake was regarded as precious and compelling the court to act and not to fetter itself by pedantically circumscribing the class of applicants who could request it to protect such a precious right. One can almost discern the birth of s 24 of the Zimbabwean Constitution in these remarks.

The Supreme Court has had occasion in several cases to determine the scope of the right of applicants to bring applications on behalf of others. See *Law Society of Zimbabwe v Minister of Justice & Anor* 2006 (2) ZLR 19 (S), *Law c Society & Ors v Minister of Finance* 1999 (2) ZLR 231 (S), *In re Wood & Anor* 1994 (2) ZLR 155 (S); *Ruwodo v Minister of Home Affairs & Ors* 1995 (1) ZLR 227 (S) and *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe & Ors* 2003 (2) ZLR 236 (S).

In my view, a distinction has to be made between the *locus standi* of applicants to bring applications under s 24 of the Constitution alleging a breach of the Declaration of Rights in respect of another and the *locus standi* of a public body to bring a public interest suit on behalf of another or members of the public or to seek to protect the interest of its members. As observed by Chidyausiku CJ in *Law Society Zimbabwe v Minister Parliamentary & Anor (supra)*, the *locus standi* of a public body to make a direct application to the Supreme Court in terms of s 24 of the Constitution is much narrower than at common law.

WHAT THEN IS THE TEST FOR *LOCUS STANDI* OF A PUBLIC BODY TO BRING A SUIT ON BEHALF OF ANOTHER AT COMMON LAW?

In *Zimbabwe Teachers Association & Ors v Minister of Education & Culture* 1990 (2) ZLR 48 (H), Ebrahim J (as he then was) reviewed earlier decisions where the issue had been determined. Before holding that the applicant before him had the requisite *locus standi*, he summarized the legal position at p 57B

as follows:

G "From these authorities, it is apparent what the legal approach to the issue of *locus standi* should be. The petitioners must show that they have a direct and substantial interest in the subject matter and what is required is a legal interest in the subject matter of the action".

In coming up with this formulation, the learned judge appears to have relied heavily on the remarks of Corbett J (as he then was) in *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C),

2006 (2) ZLR p274

Makarau JP

wherein the same formulation was set out. (See p 57G-H of Ebrahim J's judgment). The remarks in *United Watch and Diamond*, however, came with the qualification that the petitioner must show that its legal interest in the matter will be prejudicially affected by the decision of the court.

It then appears to me, in summary, that a public authority or body will have *locus standi* in a suit where it shows that it has a legal interest in the subject matter of the suit and such interest may be prejudicially affected by the decision of the court. This is what constitutes a direct and substantial interest to found *locus standi* at common law.

In the *Zimbabwe Teachers Association* case, Ebrahim J appears, with respect, to have dropped the requirement that the applicant must show that its legal interest in the matter will be prejudicially affected by the court's decision. The drop of this further qualification by Ebrahim J appears to me to have been deliberate, as the learned judge did not use it to test the direct and substantial interest of the teachers' association that was appearing before him. In coming to the conclusion that the association had *locus standi*, the learned judge held that the association membership was about 42 per cent of the total number of teachers in the country and, in the circumstances, it would be fallacious to conclude that the applicant had no real and substantial interest in the litigation to redress the unlawful dismissal of three teachers.

I make the point at this stage that the facts of the application before me are distinguishable from the facts of the application that was before Ebrahim J and that, on the reasoning of the learned judge, the applicant before me would not have *locus*. It is common cause that the applicant is not an association of stockbrokers fighting for the cause of its membership.

It further appears to me that yet another distinction must be made between purely public interest litigation, where a suit is brought in the public interest and to protect a public right, and private interest litigation for the settling of private disputes. The *Deary* case may be one instance in which the interest at stake involved a large number of victims, such as to constitute a public interest. The parties to the dispute and the nature of the dispute are such as to place the litigation in the public

domain. Litigation to protect the environment is another example that comes to mind in public interest litigation. On the other hand, private interest litigation is where the right or interest sought to be ^g protected is essentially a private interest. The private law of litigation is primarily interested in the settling of private disputes. In my view, the test for *locus standi* in public interest litigation and private interest litigation ought to be separate and different. While a wider approach may be arguable for public interest litigation, it does not appear to me that a similar wide approach is desirable in private interest litigation. From a reading of the authorities on ^h

2006 (2) ZLR p275

Makarau JP

A private interest litigation, it is a settled position that the applicant must show that he or she has a legal interest in the suit that will be affected by the court's judgment. Whether it is a requirement in public interest litigation is a question I shall leave open for discussion in a suitable case.

In my view, the impasse between the respondent and stockbrokers is essentially ^b a private dispute. The applicant has an interest in how the issue will be resolved. That interest is not direct and substantial, in the sense that there is no recognizable right at law of the applicant that is at stake. It has no legal interest that is at risk in the dispute between the stockbrokers and the respondent.

As indicated above, it cannot rely on the question of membership that seems ^c to have influenced the courts in the *Zimbabwe Teachers Association* case and in the *Law Society & Ors v Minister of Finance* case. Stockbrokers are not its members, as lawyers are the members, of the Law Society or as some teachers are members of *Zimbabwe Teachers Association*. The applicant was not joined in the application by any one of the affected stockbrokers, nor was such joinder sought at any stage.

^e **BROAD VIEW OF LOCUS STANDI**

I make the further observation at this point that in cases where the Supreme Court took a "broad view" of *locus standi*, the ^f court took into account additional considerations in the applications before it. In *Retrofit (Pvt) Ltd v PTC & Anor* 1995 (2) ZLR 199 (S), the court held that the applicant has *locus standi* to bring the suit to protect a "commercial self-interest and advantage" that was being threatened by the respondent. In *Law Society & Ors v Minister of Finance supra*, McNally JA, with his usual clarity, remarked that the Supreme Court was disposed to take the broad view of *locus standi* generally as the Class Action Act was not yet in force and he was not disposed to make ^f an order that would hinder the development of class actions. His words at p 243B-C:

"In this jurisdiction, there has not yet been a great deal of development in the field of class actions or representative actions. The Class Action Act 10 of 1999 not is yet in force. But it would not be right for this court to make any ruling which would hinder the development of such actions. Therefore, ^g we are disposed to take a broad view of *locus standi* in matters of this nature, as indicated by the Chief Justice in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Ors* 1993 (1) ZLR 242 (S) ^h at 245A-E."

2006 (2) ZLR p276

Makarau JP

DISPOSITION ^a

No additional considerations presented themselves to me in this matter. I was not referred to any. While generally inclined to widen rather than constrict access to justice by all, it is my view that in so doing, one should not distort the time-tested test that has been used to establish what constitutes a direct and substantial interest for the purposes of private interest litigation. ^b

In the above two matters where a broad view of *locus* was taken, the affected parties were joined in the applications before the court, thereby making the issue of *locus standi* a non-issue in both instances at the end of the day.

On the basis of the foregoing, it is my finding that the applicant has no *locus standi* in this matter. ^c

In view of the finding, I make on the issue of *locus standi*, it appears to me unnecessary that I deal with the other two points raised *in limine*.

In the result, I make the following order:

1. The application is dismissed.
2. The applicant shall bear the respondent's costs. [Ⓛ]

Honey & Blanckenberg, 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 2/CHOTO v COMMERCIAL BANK OF ZIMBABWE & ANOR 2006 (2) ZLR 277 (H)

CHOTO v COMMERCIAL BANK OF ZIMBABWE & ANOR 2006 (2) ZLR 277 (H)

2006 (2) ZLR p277

Citation	2006 (2) ZLR 277 (H)
Case No	Judgment No. HH-126-06
Court	High Court, Harare
Judge	Guvava J
Heard	21 October 2005
Judgment	8 November 2006
Counsel	<i>T Chibwana</i> , for the applicant <i>G B Chadyiwa</i> , for the respondent
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

[ⓐ] **Costs** — *counsel's fees* — *what may be charged* — *whether counsel bound by Law Society tariff*

Legal practitioner — *counsel* — *entitlement of legal practitioner to practice as an advocate* — *fees chargeable by advocate* — *advocate not bound [Ⓛ] by tariff of legal practitioner's fees*

Headnote

At taxation following settlement of an action the applicant did not contest any of the fees claimed by the respondent, save for a claim which was for counsel's fees. The applicant submitted that the respondent was not entitled to claim these fees as they were at a higher rate than the tariff set [ⓔ] out in the High Court (Fees and Allowances) Rules 2000. The taxing officer, after considering the submissions made by both sides, confirmed the award in favour of the respondent and allowed the amount claimed. The taxing officer's decision was brought on review.

Held, that where a legal practitioner obtains the services of counsel to deal [ⓕ] with a case, the legal practitioner must pay out as a disbursement the fees charged by counsel. The taxing officer is authorised under r 308 of the High Court Rules 1971 to allow disbursements which are reasonable, and reasonably incurred. Disbursements on the respondent's bill of costs related to

the actual amount which the legal practitioner had paid out to counsel; the respondent had no choice in the amount charged by ^G counsel.

Held, further, that while the terms “advocate” and “attorney” were repealed in 1981 and a new all-encompassing term “legal practitioner” was introduced for all legal practitioners, the change in terminology did not in any way affect the basic differences between the two types of legal practitioners. The main objective of the amendment was to avail affordable ^H legal representation to all litigants in the High Court and Supreme Court.

2006 (2) ZLR p278

Guvava J

Before the amendment, only advocates had audience in the High Court ^A and Supreme Court, which meant that the cost of litigation was very high. The objective was, therefore, to place all legal practitioners on the same level, without distinction in relation to their ability to appear in the superior courts, but not to take away one’s right to practice as an advocate.

Held, further, that generally, in the taxation of costs as between party and ^B party in respect of work done in connection with judicial proceedings, a taxing officer is guided by the tariff of legal practitioners’ fees prescribed in the High Court (Fees and Allowances) Rules 2000. However, the Rules recognize that there are legal practitioners who represent clients by virtue of being instructed by another legal practitioner. It is also accepted ^C by the Rules that fees charged by legal practitioners who have been so instructed are generally regulated from the bar from which they operate. Once a legal practitioner has been instructed by another, then that legal practitioner is not bound by the tariff as prescribed.

Cases referred to ^D

Bedford Pharmaceuticals Ltd v SA Pharmacy Bd & The Taxing Master 1947 (1) SA 291 (T)

Cone Textiles (Pvt) Ltd v C Pettigrew (Pvt) Ltd & Anor 1984 (1) ZLR 274 (S)

TA Hldgs Ltd v Maceys Consol (Pvt) Ltd & Anor 1988 (2) ZLR 453 (S)

Wellworths Bazaars Ltd v Chandlers Ltd and Others 1947 (4) SA 453 (T)

Legislation considered ^E

High Court Rules 1971 (RGN 1047 of 1971), r 308

High Court (Fees and Allowances) Rules 2000 (SI 82 of 2000), First ^F Schedule, para 8

Legal Practitioners Act 15 of 1981, s 2

Case information

T Chibwana, for the applicant

G B Chadyiwa, for the respondent

Judgment

GUVAVA J: The facts of this matter are common cause and may be summarized ^H as follows. The parties appeared before a judge in chambers on 17 June 2004 for a pre-trial conference. The respondent’s legal practitioner was not available on that date and made arrangements for counsel to appear with the client. The matter was resolved on that date and the court made an award of costs against the applicant. At taxation, the applicant did not contest any of the fees claimed by the respondent, save for a claim for \$300 000 (old currency) which was for ^H

2006 (2) ZLR p279

Guvava J

^A counsel’s fees. It was submitted by the applicant that the respondent was not entitled to claim these fees as they were at a higher rate. The taxing officer, after considering the submissions made by both sides, confirmed the award in favour of the respondent and allowed the amount claimed. The applicant now seeks a review of the decision made by the Taxing Master in terms of the r 314 of the High Court Rules.

It is a well established principle of our law that a court may only review a taxing master's decision where it is shown that he did not exercise his discretion properly or where he has adopted the wrong principle. See *Bedford Pharmaceuticals Ltd v SA Pharmacy Board and The Taxing Master* 1947 (1) SA 291 (T) and *Cone Textiles (Pvt) Ltd v C Pettigrew (Pvt) Ltd & Anor* 1984 (1) ZLR 274 (S). In *Wellworths Bazaars Ltd v Chandlers Ltd and Others* 1947 (4) SA 453 (T), Millin J stated at 457 as follows:

"The law, as I can conceive it to be, is that in general the discretion of the taxing master will not be disturbed unless it is found that he did not exercise a proper discretion, for example, by disregarding factors which were proper for him to consider or by giving a ruling which the court can see no other reasonable person would have given."

In the founding affidavit, the applicant submitted that this court should interfere with the discretion of the taxing master on the grounds that the fee was incurred due to over-caution on the part of the first respondent's legal practitioners, or that the taxing master applied the wrong principle as such fee amounts to a special fee and therefore ought to have been taxed in terms of the prescribed party and party costs tariff.

It is apparent from the heads of argument and submissions made at the hearing that the applicant has not sought to persist in the argument that the respondent was over-cautious. In my view, it was proper to abandon that argument as it was not in dispute that the respondent had in fact failed to secure the services of another legal practitioner. The respondent's legal practitioner was not available on the date of the pre-trial conference and thus sought the assistance of counsel to represent the client. The respondent's legal practitioner explained that he had initially approached two other firms of legal practitioners to assist his clients on that day, to no avail. This explanation was not denied by the applicant's counsel, as can be clearly seen from the applicant's answering affidavit. Thus, the sole issue to be determined is whether the fees paid to the respondent's counsel were reasonable.

Where a legal practitioner obtains the services of counsel to deal with a case, the legal practitioner must pay out as a disbursement the fees charged by such counsel. The disbursements which are allowed are dealt with in r 308 of the High Court Rules 1971 which provides as follows:

2006 (2) ZLR p280

Guvava J

"308 Services rendered, work done and disbursements"

- (1) A taxing officer may tax all bills of costs for services (other than conveyancing) actually rendered by a legal practitioner or by a notary public in his capacity as such, including disbursements made, whether in connection with litigation or not, and whether the work was done before or after the date on which the rules came into operation.
- (2) In the taxation of costs as between party and party in respect of work done in connection with judicial proceedings, a taxing officer shall be guided as far as possible by the tariff of legal practitioners' fees prescribed in the High Court (Fees and Allowances) Rules, 1994.
- (3) ...
- (4) In taxing any costs under the subrule, a taxing officer shall –
 - (a) allow disbursements made when they are reasonable, and reasonably incurred; and
 - (b) ...

In his report, the taxing officer stated that he found the disbursement claimed to be fair and reasonable and within the range charged by other junior counsel. The taxing officer's decision to allow a disbursement is clearly discretionary. The approach adopted by the taxing officer in determining this case is beyond reproach. He applied the proper principle as set out in the rules and found the disbursement reasonable.

In any event, disbursements on the respondent's bill of costs relate to the actual amount which the legal practitioner will have paid out to counsel and the respondent does not have a choice in the amount charged by counsel. In this case, the taxing officer found that the amount charged was reasonable and reasonably incurred and therefore allowed the payment.

It seemed to me, however, that the issue which was weighing in the minds of the parties before me was whether there is, at law, a distinction between an "attorney" and an "advocate", the applicant's argument being that all legal practitioners must now charge fees in accordance with the prescribed tariff, as there is no longer a distinction. In deciding this issue, it is necessary to

examine the Legal Practitioner Act 1981 (the Act) ^{**}. In terms of s 2 of the Act, as amended, the terms “advocate” and “attorney” were repealed and a new encompassing term “legal practitioner” was introduced for all legal practitioners. ^g

2006 (2) ZLR p281

Guvava J

^A This new definition was introduced through SI 277 of 1981 on 5 June 1981. The applicant has submitted that, by repealing these two words, it was the intention of the legislature to do away with the distinction between attorneys and advocates. He relied on *TA Holdings Ltd v Maceys Consolidated (Pvt) Ltd & Anor* 1988 (2) ZLR 453 where the Supreme Court pointed out that the law had been amended to change the terminology applicable to all legal ^B practitioners.

In my view, however, the change in terminology did not in any way affect the basic differences between the two types of legal practitioners. The definition provision in the Act states that “another legal practitioner means a legal practitioner who is instructed by a legal practitioner not of the same association or firm of legal practitioner”. From this perspective, the Act recognizes that ^C there are legal practitioners who represent clients by virtue of being instructed by another legal practitioner. I am also fortified in this view by the fact that the main objective of the amendment was to avail affordable legal representation to all litigants in the High Court and Supreme Court. Prior to the amendment, only advocates had audience in the High Court and Supreme Court and this ^D meant that the cost of litigation was very high. The objective was therefore to place all legal practitioners on the same level without distinction in relation to their ability to appear in the superior courts and not to take away one’s right to practice as an advocate.

It is also accepted that fees charged by legal practitioners who have been so instructed are generally regulated from the bar from which they operate. These ^E fees are not determined by any tariff. That this distinction has been maintained by the legislator may be gleaned from the provisions of First Schedule to the High Court (Fees and Allowances) Rules 2000 (SI 82 of 2000) as amended by SI 195 of 2003, which provides as follows:

“8. When another legal practitioner is instructed he or she shall not be ^F required to adhere to this tariff but shall charge such overall fee as the taxing officer considers fair and reasonable in the circumstances:

Provided that this paragraph shall not apply where a legal practitioner of record is instructed by a country legal practitioner.”

In my view, therefore, there is a recognition by the legislature that there is a class of legal practitioners who are not bound by the tariff set out in the Rules. ^G The only class of such legal practitioners who are not bound by the tariffs are those who have been instructed by another legal practitioner. Therefore, although the distinction in terms of terminology has been removed, once a legal practitioner has been instructed by another, then that legal practitioner is not bound by the tariff as prescribed.

^H In my view, therefore, the applicant has not established a basis upon which

2006 (2) ZLR p282

Guvava J

this court may interfere with the decision of the taxing master. ^A

With relation to costs it was argued by the respondent’s counsel that the application was frivolous and vexatious and that on that basis the applicant should pay costs on a higher scale. I am, however, not persuaded by this submission. The issue relating to the quantification of counsel’s fees has been a problem for a long time. The amendment to the Legal Practitioners Act which ^B sought to use the same terminology for all legal practitioners by removing the terms “advocate” and “attorney” seems to have added to this confusion. In my view, therefore, this application was not frivolous as it sought lay to rest some of the confusion.

Accordingly, I make the following order:

1. The application is hereby dismissed. ^C
2. There shall be no order as to costs.

I E G Musimbe & Partners, applicant’s legal practitioners

Costa & Madzonga, respondent’s legal practitioners ^D

* The High Court (Fees and Allowances) Rules 1994 were repealed and replaced by the High Court (Fees and Allowances) Rules 2000 (SI of 2000). Rule 308 has not been amended accordingly — *Editor*

** Now [Chapter 27:07] —*Editor*

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/ROPA v REOSMART INVESTMENTS (PVT) LTD & ANOR 2006 (2) ZLR 283 (S)

ROPA v REOSMART INVESTMENTS (PVT) LTD & ANOR 2006 (2) ZLR 283 (S)

2006 (2) ZLR p283

Citation	2006 (2) ZLR 283 (S)
Case No	Judgment No. S-38-06
Court	Supreme Court, Harare
Judge	Ziyambi JA, Gwaunza JA & Garwe JA
Heard	24 July 2006
Judgment	13 November 2006
Counsel	<i>F Piki</i> , for the appellant <i>E T Matinenga</i> , for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

C Arbitration — award — finality of — arbitration agreement providing that arbitrator's award would be final and would be registered with the High Court for execution — award not thereby made an appealable decision of the High Court

Headnote

Ⓐ A consent order was issued by the High Court in terms of which the dispute between the parties was to be determined by an arbitrator. The order provided that arbitrator's decision was binding on the parties and would be registered as an order of the High Court for execution. The arbitrator's award was in favour of the respondent. The appellant noted an appeal [Ⓔ] to the Supreme Court; the respondent argued that the appeal was not properly before the Court. The appellant argued that under s 19A of the High Court Act [Chapter 7:06] the arbitrator's award was adopted by the High Court and was thus appealable.

Held, that the dispute was referred to the arbitrator by consent, not in terms [Ⓕ] of s 19A of the High Court Act. It was agreed between the parties that the arbitrator's decision would be final. By registering the decision as an order of the High Court, the decision was in effect a consent order,

which is a final order and not one that can normally be appealed against. The parties' arbitration agreement, that is, the consent order, did not provide for a right of appeal to another tribunal. On the contrary, the order effectively provided that the arbitrator's decision would bring finality to the dispute, by binding the parties.

Legislation considered

High Court Act [*Chapter 7:06*], s 19A

2006 (2) ZLR p284

Gwaunza JA

Case information

F Piki, for the appellant ^a

E T Matinenga, for the respondent

Judgment

GWAUNZA JA: Following an urgent application in which the respondent *in casu* sought to have the appellant interdicted from withdrawing the amount of ZW\$2.3 billion from his Stanbic Bank account, the High Court issued an ^b order in these terms:

"IT IS ORDERED BY CONSENT:

1. (a) That the respondent is hereby interdicted from withdrawing or utilizing the \$2 300 000 000 (Two billion and Three Hundred Million Zimbabwe Dollars) that was deposited by the applicant into his Stanbic Bank Account (No. 012 109014970 1, Belgravia Branch) ^c pending the determination of this matter by Arbitration;
- (b) Stanbic Bank Belgravia Branch be and is hereby directed to invest the amount referred to in para 1 above to best advantage pending finalisation of this matter, by arbitration as set out in para 2 of this order.
2. (a) That the matter shall be referred to an Arbitrator. The Arbitrator's ^d decision shall be binding on the parties and shall accordingly be registered as an Order of this Honourable Court for execution;
- (b) The Arbitrator shall be appointed through the Centre for Arbitration;
- (c) The Arbitrator's terms of reference shall be to determine the party which is entitled to the money in issue; and ^e
- (d) The Arbitrator's decision shall be binding on the parties and shall accordingly be registered as an order of this Honourable Court for execution."

The matter was duly referred to an arbitrator who, on 14 December 2005, made an arbitral award in favour of the respondent.

The appellant seeks to appeal to this court against the arbitral award. ^f

Even though a preliminary issue had been raised by the respondent, that the "appeal" was not properly before this court, we invited argument from both parties, on both the preliminary issue and the merits of the appeal.

I propose to consider the preliminary issue first and, depending on my determination thereon, may proceed to consider the merits of the appeal. ^g

It is submitted for the respondent that the High Court order, which was granted by consent of both parties, clearly stated in its paras 2(a) and (d) that the arbitrator's decision would be final. Further, that such decision would be registered as an order of the High Court for purposes of execution only and not for any other purpose, like the noting of an appeal to the Supreme Court. ^h

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Gwaunza JA

^a The appellant disputes this interpretation of the provisional order and argues that the appeal has been filed in terms of s 19A of the High Court Act [*Chapter 7:06*] as read with the Second Schedule (s 7) of the Arbitration Act [*Chapter 7:02*].

The section provides *inter alia* as follows:

B "19A(1) ...

(2) The High Court may adopt, wholly or partly and with or without modification the report of a referee appointed under subsection (1) or may remit the report to him for further consideration or may take such other action in regard to the report as the High Court considers necessary or desirable.

c (3) Any part of a referee's report which has been adopted by the High Court under subs (2) shall have effect as if it were a finding by the High Court in the civil proceedings in question."

The appellant argues on the basis of this provision that the arbitral award is appealable, since it is deemed an order of the High Court.

I am not persuaded there is merit in this contention.

d The High Court issued an order by consent, to the effect among others, that the arbitrator's terms of reference were:

"... to determine the party which is entitled to the money in issue."

In its paras 2(a) and (d), the consent order stated clearly that the arbitrator's decision was to be *binding on the parties* (my emphasis) and was to be e registered as an order of this honourable court for execution.

From a simple reading of the consent order, it cannot, in my view, be disputed –

- (i) that the dispute between the parties was referred to an arbitrator, not on the basis of s 19A of the High Court Act, but by consent of the parties; f
- (ii) that the parties agreed to be bound by – that is, to accept – the decision of the arbitrator as to which one of the parties was entitled to the money; and
- (iii) that the decision of the arbitrator was to be regarded as an order of the High Court and was to be registered with it for purposes of execution only.

By extension of reasoning, therefore, the arbitrator's decision was to become g a consent order of the High Court. By its nature, a consent order is a final order and one normally does not appeal against such an order. To the extent that s 19A(3) of the High Court Act gives an option to the High Court to either reject or adopt any part of a referee's report, it has, in my view, no relevance to the circumstances of this case. The consent order makes it clear that the High h Court was to have no further say in the matter, after its referral to the arbitrator,

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Gwaunza JA

beyond seeing to the registration and execution of the arbitral award. This is a not the situation envisaged in s 19A(3) of the High Court Act.

In addition to this, I found to be persuasive the submission made for the respondent, that the effect of an arbitral award is to bring to finality the dispute between the parties. The respondent relied for this submission on the following passage set out in Butler and Finsen *Arbitration in South Africa* b *Law & Practice* at p 271:

"The most important legal consequence of a valid final award is that it brings the dispute between the parties to an irrevocable end: the arbitrator's decision is final and there is no appeal to the courts. For better or worse, the parties must live with the award, unless their arbitration agreement provides for a right of appeal to another arbitral tribunal. The issues c determined by the arbitrator become *res judicata* and neither party may reopen those issues in a fresh arbitration or court action."

This position applies with equal force in Zimbabwe. Applied to the circumstances of this case, it is evident that the parties' "arbitration agreement" that is, the consent order, did not provide for a right of appeal to another tribunal. To the contrary, the order in question effectively provided that the d arbitrator's decision would bring finality to the dispute, by "binding" the parties.

As correctly contended for the respondent, s 19A of the High Court Act, which addresses a situation different from the one *in casu*, does not detract from the legal position concerning the effect of an arbitration order. e

I am satisfied, in the light of the foregoing, that the respondent is correct in its contention that the "appeal" is not properly before this court, and must be dismissed.

It is, in view of this finding, not necessary for me to consider the merits of the case. f

It is accordingly ordered as follows:

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

ZIYAMBI JA & GARWE JA concurred.

I E G Musimbe & Partners, appellant's legal practitioners ^g

Lofty & Fraser, respondent's legal practitioners ^h

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/NERGER PROPERTIES (PVT) LTD v R CHITRIN & ORS (PVT) LTD 2006 (2) ZLR 287 (S)

NERGER PROPERTIES (PVT) LTD v R CHITRIN & ORS (PVT) LTD 2006 (2) ZLR 287 (S)

2006 (2) ZLR p287

Citation	2006 (2) ZLR 287 (S)
Case No	Judgment No. S-47-06
Court	Supreme Court, Bulawayo
Judge	Chidyausiku CJ, Cheda JA and Ziyambi JA
Heard	31 July 2006
Judgment	13 November 2006
Counsel	<i>E T Matinenga</i> , for the appellant <i>R M Fitches</i> , for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

^c **Contract** — option — right of first refusal — what is — rights of a holder of option to obtain interdict to enforce his right — rights of option holder same as those of a prior purchaser

Headnote

The right of first refusal is the same as the right of an option. An option is ^d an offer to sell, which remains open during the stipulated period, and if the offer is accepted at any time before the time has lapsed, a binding contract of sell is concluded between the parties. When an option is given by a seller, he is bound and cannot withdraw his offer.

The rights of the holder of an option, or of a pre-emptive right, to interdict ^e the delivery of the thing in question to a subsequent purchaser and to obtain specific performance are the same in law as those of a prior purchaser. The right of the holder of an option or of a pre-emptive right to exercise it remains prior in time to the personal right of a subsequent purchaser, even where latter was ignorant of the option or right of pre-emption.

Cases cited ^f

Archibald and Co Ltd v Strachan & Co Ltd 1944 NPd 40

Boyd v Nel 1922 AD 414

Le Roux v Odendaal & Ors 1954 (4) SA 432 (N)

Sher v Allan 1929 OPD 137

Case information

H *E T Matinenga*, for the appellant

R *M Fitches*, for the respondent

Judgment

CHEDA JA: The respondent was a tenant of a commercial property owned by a company known as Potential Investments (Pvt) Ltd, the sixth respondent in

2006 (2) ZLR p288

Cheda JA

the original High Court case (hereinafter referred to as "Potential"). The A company had five shareholders, one of whom was Mrs Humpage.

The company was generally administered by one of its directors a Mr Raymond Paul Louw, through a company under his control named F & CS Accounting (Pvt) Ltd ("F & CS"). F & CS also administered certain immovable property owned by Potential known as Jameson Buildings, situated at the B corner of Jason Moyo Street and Sixth Avenue, collecting rentals from the tenants and dealing with the tenants and their leases in general.

F & CS employed a bookkeeper named Sheena Zurnamer who dealt directly with Potential's immovable property.

The appellant, Nerger Properties (Pvt) Ltd, entered into an agreement of sale C with the directors of Potential in respect of the shareholdings and loan accounts of Potential.

The respondent contested this sale at the High Court and got a judgment in its favour on the basis that it had a right of first refusal to acquire the property from Potential. The High Court ordered that transfer of the property and its shares to the appellant be stopped. It is against this decision that the appellant D appeals.

At the High Court the respondent's case, according to the founding affidavit of Raphael Howard Chitrin (hereinafter referred to as "Chitrin") was as follows:

He is the director of R. Chitrin & Company Zimbabwe (Pvt) Ltd, a company registered according to the laws of Zimbabwe, which has registered offices E at No. 68, Jason Moyo Street, Bulawayo.

On 28 January 1997, the respondent and Potential entered into a lease agreement in terms of which the respondent hired a portion of Stand No. 188 of Bulawayo Township Lands at the corner of Jason Moyo Street and Sixth Avenue. Potential was represented by Louw who was authorised by a F resolution of Potential's directors.

On 23 April, the respondent received a notice addressed by F & CS Accounting Services to all its tenants, inviting offers for the purchase of the whole of Stand No. 188, Bulawayo Township (hereinafter referred to as "the property"). Chitrin immediately telephoned Louw and reminded him of the fact that previously he had verbally agreed to grant to the respondent the right of first G refusal should the property come up for sale.

Mr Louw had agreed to this a year before. Since he used to deal with Mr Louw on matters pertaining to the property, Mr Louw had agreed that the respondent would have the right of first refusal if the premises ever came up for sale and it was implied that the right could be exercised whether the sale was by way H of a sale of the property or the shares and any loan account in the company.

2006 (2) ZLR p289

Cheda JA

A Mr Louw acknowledged that he had indeed given that right but thought it fair to make an offer to all the tenants. At that time there was no specific time limit within which the offer was to be

accepted and at that stage the offer was for the purchase of the property and not the shares in the company. He later telephoned Louw and asked for a copy of the Deed of Transfer. Louw telephoned a few days later asking about Chitrin's offer and was once again reminded of the right of first refusal. Chitrin also asked for the list of tenants of the property and the rentals they were paying.

On 7 May 2003, Chitrin received from Louw the information that he had requested. Chitrin was also asked to make a proposal, if the respondent was interested in purchasing the shareholding in Potential, within fourteen days.

c Chitrin advised Louw that he was going to South Africa and requested Louw to await Chitrin's return.

On his return, he telephoned Louw and was advised that another tenant was also interested in the property and was pressing Louw on the matter. Louw asked Chitrin to revert to him by Wednesday 25 June 2003.

d On Friday 20 June 2003, Chitrin received a letter from Zurnamer advising that the sellers were looking for at least \$100 000 000 net and would require at least \$130 000 000. In that letter, Chitrin was asked to make an offer before 1 pm that day as the other party was sending a cheque with its offer.

Although Chitrin says this other party turned out to be the sixth respondent, this is obviously an error as it appears this is a reference to the appellant who e was at the time the seventh respondent.

Louw had also advised Chitrin that the appellant's representatives were members of the Affirmative Action Group who were exercising undue pressure on Louw to sell the property to them.

Upon Chitrin's instructions, the respondent's legal practitioners made a f written offer on 20 June 2003 to purchase both the property and the entire shareholding of the company which owned the property for \$151 000 (*sic*).

The letter was delivered by Chitrin personally at about 1 pm on 20 June 2003 to the offices of F & CS Accounting. Chitrin was told by Zurnamer that Louw was in his office with some people at the time. Louw later telephoned Chitrin g about 4.30 pm and confirmed that he had been with members of the AAG (Affirmative Action Group) who had been harassing and intimidating him and his staff and had offered to purchase the property for \$130 000 000.

On Monday 23 June 2003, Louw advised Chitrin that the appellant was only interested in acquiring a small portion of the property and enquired whether Chitrin would consider subdividing the property and selling that portion to h the appellant. This proposal was not acceptable to Chitrin.

2006 (2) ZLR p290

Cheda JA

On Tuesday 24 June 2003, Louw telephoned Chitrin to advise that Mrs a Humpage had decided to accept the appellant's offer because of the intimidation. Chitrin advised Louw that the respondent would go to litigation on the matter.

A meeting was arranged between Chitrin and Humpage, at which she did not deny the respondent's right of first refusal and said she had always contemplated b that the property would be offered to the respondent because it was a tenant. She was advised by Chitrin to consult legal practitioners on the matter but on 25 June 2003, she telephoned to say that F & CS were going to remove the property from the market.

On Wednesday 25 June 2003 at 10 am, she telephoned to say she would really have liked the respondent to have the property, but that they had succumbed c and decided to accept the lower offer of the appellant which was \$21 000 lower than that of the respondent.

Despite their being reminded of the respondent's right of first refusal, Potential and the appellant proceeded to sign an agreement of sale on 24 and 25 June 2003. d

This is the background that led to the litigation which followed. Most of the facts are common cause.

It is not denied that Chitrin asked for and was granted the right of first refusal. Mr Louw does not dispute having done so. Instead he tried to put on it his own interpretation suggesting that it only meant that when the property came e up for sale Chitrin was to be informed. Mrs Zurnamer does not

deny it. Instead, she sought to argue that Louw had no authority to grant it. Mr Louw's mistaken interpretation of the right of first refusal does not change the position.

Mrs Zurnamer's contention that Louw did not have authority to grant it does not assist. Potential had long authorised Louw to deal with the property on F its behalf. Indeed, when Louw granted this right to the respondent, he genuinely believed he was entitled to do so, and similarly, Chitrin was entitled to believe that a right granted by Louw was proper as he always dealt with Louw in matters regarding the property. It does not assist Potential to attempt to place any limitations on Louw's mandate at this stage. Louw was at all G material times an agent of Potential concerning the property.

Mrs Humpage averred that, out of the tenants, she expected Chitrin to be the one most likely to make an offer on behalf of the respondent as she had learnt that the respondent had expressed to Louw an interest in purchasing the property if it ever came up for sale. H

2006 (2) ZLR p291

Cheda JA

A Although she used different words, her averments in this regard confirm Chitrin's claim about having asked Louw for a right of first refusal. She, however, goes on to say she was disappointed that although the respondent, through Chitrin, had expressed an interest, the latter had not made an offer though he had more than enough time to do so. She does not say at what stage it was decided that the respondent had failed to make an offer.

B The respondent's offer was made, not to her but to Louw. If there was a delay in transmitting the respondent's offer to her, such delay should be attributed to Louw.

Although she admitted that Louw advised her that he had on an earlier occasion granted to the respondent the right of first refusal, she denied any knowledge as to what the term meant, and yet it is so simple and self C explanatory. Further, the complaint that the respondent delayed in making an offer is not valid because of the different time limits that were granted to it. Mr Louw had in fact given Chitrin up to Wednesday 25 June 2003 to make an offer on behalf of the respondent.

Having established that the respondent had the right of first refusal, it remains D to examine the legal position regarding the right of the appellant:

"An option is an offer to sell, which remains open during the stipulated period, and if the offer is accepted at any time before the time has lapsed, a binding contract of sale is concluded between the parties.

When an option is given by a seller, he is bound and cannot withdraw his offer ..."

E See *Boyd v Nel* 1922 AD 414.

I should point out here that the right of first refusal is the same as the right of an option.

See also *Mackeurtan's Sale of Goods in South Africa* 5 ed at p 277-17G.1.6, where it is stated as follows:

F "The rights of the holder of an option, or of a pre-emptive right, to interdict the delivery of the thing in question to a subsequent purchaser and to obtain specific performance are the same in law as those of a prior purchaser. The right of the holder of an option or of a pre-emptive right to exercise it remains prior in time to the personal right of a subsequent purchaser, even where the latter was ignorant of the option or right of G pre-emption."

See *Sher v Allan* 1929 OPD 137, *Archibald & Co Ltd v Strachan & Co Ltd* 1944 NPD 40 and *Le Roux v Odendaal & Ors* 1954 (4) SA 432 (N).

These authorities establish very decisively the respondent's right to interdict the sale of the property to the appellant and to seek transfer to itself on H tendering payment of the purchase price that it offered.

2006 (2) ZLR p292

Cheda JA

I find that there is therefore no merit in the appeal and it is dismissed with costs. A

CHIDYAUSIKU CJ & ZIYAMBI JA concurred.

James, Moyo-Majwabu & Nyoni, appellant's legal practitioners B

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/TOBACCO SALES PRODUCERS (PVT) LTD v ETERNITY STAR INVESTMENTS 2006 (2) ZLR 293 (H)

TOBACCO SALES PRODUCERS (PVT) LTD v ETERNITY STAR INVESTMENTS 2006 (2) ZLR 293 (H)**2006 (2) ZLR p293**

Citation	2006 (2) ZLR 293 (H)
Case No	Judgment No. HH-121-06
Court	High Court, Harare
Judge	Kudya J
Heard	18 October 2006; 19 October 2006
Judgment	15 November 2006
Counsel	<i>T S Manjengwa</i> , for the plaintiff <i>R M Fitches</i> , for the defendant
Case Type	Civil trial
Annotations	Link to case annotations

Flynote

C Practice and procedure — exception — when may be filed — must be filed before pleading to the merits — plea in abatement — distinction from exception — when may be pleaded

Practice and procedure — *res judicata* — principles — previous judgment **D** concerning same parties and subject matter — parties not appealing against that judgment — judgment binding unless set aside — not permissible for party to undermine court order by bringing fresh action

Headnote

An exception can only be properly filed before the excipient pleads to the merits of the matter. It is an alternative to pleading to the merits. Once the **E** excipient has pleaded, he is in fact telling the other party that its declaration discloses a cause of action and that it is neither vague nor embarrassing. If it did not disclose a cause of action or was vague and embarrassing, then the defendant would of necessity raise an objection either through an exception or the other recognised ways laid out in the rules of court. After the defendant has pleaded, it becomes difficult to **F** ask the plaintiff to remove the vague and embarrassing averments. It also becomes difficult to except to the cause of action.

A plea in abatement, on the other hand, is a special defence which has as its object either to delay the proceedings (a dilatory plea) or to abate or quash the action altogether (a declinatory plea). The defendant may, **G** either with or without pleading as to the merits, seek to delay the action, by specially pleading that the same cause is pending in another court (*lis alibi pendens*) or seek

to quash the action altogether, by pleading that the same cause of action has been tried and decided upon in another court of competent jurisdiction (*res judicata*). A plea in abatement, unless an exception, may be raised at any time, even after the party has ^h pleaded.

2006 (2) ZLR p294

Kudya J

The plaintiff sought the cancellation of an agreement for the sale of property, ^A plus damages and an order for ejectment, on the basis that the defendant had failed to pay the agreed purchase price. In earlier litigation the defendant had applied for an order authorising the transfer of the property. The plaintiff tendered transfer, subject to the payment of rentals and interest. Judgment was given accordingly. Neither party ^B appealed against the judgment. The plaintiff demanded payment of arrear rentals and interest on the outstanding capital itself and the outstanding rentals. A dispute arose about how much interest was due, the defendant claiming that the figure was a different one from that claimed by the plaintiff. The plaintiff then brought the present action for cancellation. The defendant raised the defence of *res judicata*. ^C

Held, that for the plea of *res judicata* to succeed, it must be established that the judgment given in the prior action concerned the same subject matter; was founded on the same grounds and was either a judgment *in rem*, or was between the same parties or their privies. *In casu*, the parties were the same. The effect of the previous order was that the plaintiff had elected to abide by the agreement and thus had chosen not to cancel it, ^D for if it had chosen to cancel transfer would not have been ordered. Even if the judgment was wrong, as long as it stood, it was binding on both parties. If the plaintiff desired to cancel the sale, then it was obliged to first of all have that judgment set aside. It would be grossly irregular for the plaintiff to undermine an order of court by cancelling the agreement ^E while that judgment was extant. The defendant's plea would be upheld.

Cases referred to

Banda & Ors v ZISCO 1999 (1) ZLR 340 (S)

Guardian Security Svcs (Pvt) Ltd v ZBC 2002 (1) ZLR 1 (S)

Madondo v Fyfe & Ors 1988 (1) ZLR 138 (H) ^F

Mitford's Exor v Ebden's Exors & Ors 1917 AD 682

Owen-Smith v Owen-Smith 1981 ZLR 514 (S)

Towers v Chitapa 1996 (2) ZLR 261 (H)

Wolfenden v Jackson 1985 (2) ZLR 313 (S)

Legislation considered ^G

High Court Rules 1971 (RGN 1047 of 1971), rr 137(1), 138 & 140

Case information

T S Manjengwa, for the plaintiff

R M Fitches, for the defendant

2006 (2) ZLR p295

Kudya J

Judgment

^A **KUDYA J:** On 8 February 2006, the plaintiff issued summons out of this court. It claimed the following relief:

- (a) An order confirming the cancellation of the agreement of sale.
- (b) An order for the ejectment of the defendant, and all those occupying through it, from stand No. 168 Willowvale Township of Willowvale also ^B known as 168 Erith Road, Willowvale Industrial Area, Harare.

- (c) Payment of arrear rentals in the sum of \$273 784 000 together with interest at the prescribed rate from the date of summons to the final payment.
- (d) Payment of holding over damages in the sum of \$38 000 000 per month from 1 February 2006 until the date of ejectment. ^ε
- (e) Interests on holding over damages at the prescribed rate from the first day of every month to the date of ejectment.
- (f) Cost of suit as between legal practitioner and client.

The summons was served on 15 February 2006. On 16 February 2006, the defendant entered an appearance to defend. On 24 February 2006, the defendant sought further particulars which were supplied on 7 March 2006. ^δ It then filed its plea and counter-claim on 10 March 2006. Only the plaintiff filed discovery, but both parties filed their respective pre-trial conference issues and summaries of evidence. The pre-trial conference was held on 12 May 2006 and thereafter the matter was referred to trial on the basis of six issues that are recorded in the joint pre-trial conference minute.

^ε On 22 August 2006, after the ^ε matter had been referred to trial, the defendant filed an exception, and a special plea in abatement. The plea, exception and the plea in abatement were all based in the main on *res judicata*.

At the commencement of trial on 18 October 2006, Mr *Manjengwa* for the plaintiff submitted that the filing of an exception on 22 August 2006, after the matter had been referred to trial on 12 May 2006, was irregular. In any event, so he submitted, it was improper for the defendant to file an exception after it had pleaded over the summons and declaration. He therefore, urged the court to expunge the exception from the record. Mr *Fitches* did not seriously challenge this submission. He however, submitted that the exception should be allowed to stand as our rules in Order 21 are clear in that an exception may ^g be filed at any time.

Rule 137 is entitled "Alternatives to pleading to merits: forms". Subrule (1)(b) of r 137 reads:

"(1) A party may –

- (b) except to the pleading or to single paragraphs thereof if they ^h embody separate causes of action or defence as the case may be."

2006 (2) ZLR p296

Kudya J

Rule 138 deals with the period within which *inter alia* an exception may be set ^a down for hearing either by consent of the parties or through an application. It further makes it clear that in the absence of consent or an application it shall not be set down for hearing before the trial date. Rule 140 requires the excipient to advise the other party by letter of the nature of his complaint to enable that other party to amend his pleadings in order to remove the cause of complaint. ^b

In Herbstein and van Winsen *Civil Practice of the Superior Courts in South Africa* 2 ed at pp 314-315, it is said:

"The true object of an exception is either, if possible, to settle the case, or at least a part of it, in cheap and easy fashion or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception." ^c

It is my view that an exception can only be properly filed before the excipient pleads to the merits of the matter. In terms of the heading of r 137, it is an alternative to pleading to the merits. Once the excipient pleads before filing the exception, he is in fact telling the other party that its declaration discloses a cause of action and that it is neither vague nor embarrassing. Otherwise, if ^d it did not disclose a cause of action or was vague and embarrassing, then the defendant would of necessity raise an objection, either through an exception or the other recognised ways laid out in the rules of court. After the defendant has pleaded, it becomes difficult to ask the plaintiff to remove the vague and embarrassing averments. It also becomes difficult to except to the cause of action. ^e

I would, therefore, agree with Mr *Manjengwa* that the exception filed by the defendant was irregular and should be expunged from the record. I will not refer to it in my judgment.

The defendant also filed a special plea in abatement. This was obviously done in terms of r 137(1)

(a) which reads: ^f

"(1) A party may –

- (a) take a plea in bar or in abatement where the matter is one of substance which does not involve going into the merits of the case and which, if allowed, will dispose of the case.”

Herbstein and van Winsen *op cit* at p 307A highlight that a plea in abatement is a: ^g

“special defence which has as its object either to delay the proceedings, a dilatory plea, or to abate or quash the action altogether, a declinatory plea. Thus, if the defendant is sued on a contract, he may either with or without pleading over on the merits, seek to delay the action by specially pleading that ^h

2006 (2) ZLR p297

Kudya J

A same cause is pending in another court – a plea of *lis penden* – or he may seek to quash the action by specially pleading that the same cause of action has already been tried and decided upon by some other court of competent jurisdiction – a plea of *res judicata*. Neither of these special pleas concern the merits of the action. They merely seek to interpose some defence not apparent on the face of the pleadings up to the time they are raised.”

It seems to me, therefore, that while an exception is apparent from the ^b declaration, a plea in abatement is not. Further, while an exception should be raised before pleading, a plea in abatement may be raised at any time, even after pleading.

I therefore hold that the special plea in abatement was properly raised.

The defendants, however, chose not to argue the special plea at the ^c commencement of the trial. In the result, the plaintiff opened its case and led the evidence of one witness. The defendant also opened its own case and called the evidence of two witnesses. It was in his oral submissions that Mr *Fitches* sought to persuade me to uphold the special plea in abatement.

In *Owen-Smith v Owen-Smith* 1981 ZLR 514 (S) at 517, Lewis JP stated:

^d “Moreover, it is of the essence of the defence of *res judicata* that it ^d must be pleaded. See, for example, *Vooght v Winch* (1819) 106 ER 507; [1814-23] All ER Rep 270.”

In casu, the defendant raised the defence of *res judicata* in its plea. It also raised it in its exception (which I have already removed from the record) and in the special plea in abatement. In the final analysis, the defence of *res ^e judicata* is captured in the first three issues which were referred to trial. No prejudice would arise to either party were the court to determine the matter on the basis of the special plea in abatement or on the basis of the full pleadings of the parties.

The issues that were referred to trial were as follows:

- ^f 1. Whether or not the judgment of Kudya J in case No. HC 1427/05 superceded the parties’ obligations in terms of the agreement or confirmed them.
2. Whether the plaintiff could still demand performance of the defendant’s obligations in terms of the contract. ^g
3. Whether the defendant was in breach of the agreement and plaintiff was entitled to cancel the same.
4. Whether or not plaintiff is entitled to payment of arrear rentals and, if so, in what amounts.
5. Whether or not plaintiff is entitled to holding over damages and, if so, in ^h what amount.

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Kudya J

6. Whether or not defendant is entitled transfer as per the counter-claim. ^a

CASE No. HC 3705/05

The first issue referred to trial gave the case number of the case that I determined on 24 November 2005 as HC 1427/05, when in fact it was HC 3705/05, cross reference case No. HC 1427/05.

In that case, the present defendant applied for an order *inter alia* authorising ^b the conveyancer to proceed with transfer of stand No. 168 Erith Road, Willowvale Township, Harare. I heard the opposed application on 24 November 2005 and delivered a ten-page judgment that day. The respondent in that case was the plaintiff *in casu*. In its opposition, the plaintiff was tendering transfer, subject to the payment of rentals and interest. The full facts of the matter are dealt with in that judgment and will therefore not be set out herein. ^c

I made the following order:

"The respondent should authorise the conveyancer to proceed with the transfer of stand No. 168 Erith Road, Willowvale Township, Harare to the applicant within 14 days of payment of interest calculated at the Barclays Bank rate from 28 July 2004 to the date of judgment, 24 November 2005. ^d The respondent will pay the applicant's costs at the ordinary scale."

In essence, I subjected transfer to the payment of interest. The basis of the order I made is found at pp 9 to 10 of my judgment. I stated thus:

"The respondent was within his rights to withhold transfer pending fulfilment of payment of that interest as set out in clause 5.3 of the agreement of sale. ^e

In its opposing affidavit, the respondent tendered transfer against payment of interest. Even though it requested for the dismissal of the application with costs, it was in essence inviting applicant to pay interest on the terms set out in the agreement for it to fulfil its own part of that agreement.

I will therefore, not order dismissal of the applicant's case, rather I will ^f order transfer but make it subject to the payment of interest at the Barclays Bank rate from 28 July 2004, to the date of judgment."

I thus, determined that the capital amount owing had been paid late but in full and that since the present plaintiff was tendering transfer that this transfer be done on payment of interest by the present defendant from the date that that ^g payment was due which was 28 July 2004 to the date of judgment 24 November 2005.

THE ACTIONS OF THE PARTIES PRIOR TO THE JUDGMENT OF 24 NOVEMBER 2005

In terms of clause 5.2 of the agreement of sale, the present defendant was to ^h supply the conveyancers with three things. These were: the outstanding

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Kudya J

A balance of the purchase price of any bank charges or commission; the amount of all costs of transfer and any other costs or charges that may be due by him; and all information and documents necessary for transfer to be effected. These three requirements were to be supplied to the conveyancers at their request. The conveyancers did make the request and the defendant responded.

The present plaintiff had two choices available to him in terms of the agreement ^b of sale in the event that the defendant breached the agreement by failing to pay the outstanding amounts on time. It could cancel the agreement or it could *in lieu* of cancellation seek the payment of interest. In the papers filed of record in case No. HC 3705/2005, the plaintiff chose the payment of interest and abandoned cancellation. It is in this context that the statement I made on p 6 of ^c the judgment should be understood. I wrote:

"If it is found that this was done on 14 July 2005 (should actually be 14 July 2004) or on a prior date then the respondent is entitled to withhold transfer until payment is made, if it chooses not to cancel the agreement as a possible breach was committed."

It thus seems clear to me that I simply meant that the plaintiff *in casu* could ^d choose either to withhold transfer until the outstanding balance and fees were paid or it could choose to cancel the agreement of sale for that breach. The plaintiff could not possibly lawfully do both. It could not demand and accept payment of the balance, fees and charges levied by the conveyancer and cancel the agreement of sale.

^e THE EFFECT OF THE ORDER OF 24 NOVEMBER 2005

In my view, by ordering transfer but making it subject to the payment of interest, I determined that the plaintiff had elected to be bound by the agreement and that it had abandoned its right to cancel.

THE POST 24 NOVEMBER JUDGMENT EVENTS

^f None of the parties appealed against the judgment. The plaintiff demanded payment of arrear rentals and interest on the outstanding capital itself and the outstanding rentals. It did not advise the defendant how it had arrived, at least for the interest request, at its figures. An exchange of correspondence ensued. The defendant supplied the plaintiff with figures it believed plaintiff was entitled to. The plaintiff rejected these figures and purported to give 14 days' ^g notice to the

defendant to pay the figure it had supplied failing which the agreement of sale was to be deemed cancelled.

The 14-day ultimatum expired. The plaintiff purported to have cancelled the agreement of sale. After the expiration of the 14 days, the defendant offered to pay a higher amount than the one it had initially averred was interest ^h calculated in terms of the November 2005 judgment. The plaintiff was unmoved

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Kudya J

by this offer. It proceeded to issue summons out of this court, seeking the order ^a I have set out at the beginning of this judgment.

THE LAW

In their oral submissions, both Mr *Manjengwa* and Mr *Fitches* were agreed that the first issue for determination was whether the defence of *res judicata* was available to the defendant. ^b

In *Banda & Ors v Zisco* 1999 (1) ZLR 340 (S) at 341G-342E, Sandura JA outlined the essential ingredients of *res judicata* thus:

"The requisites of the plea of *res judicata* have been set out in a number of previous cases. In *Pretorius v Barkly East Divisional Council* 1914 (A) at 409, Searle J set them out as follows: ^c

'As to the first point, the requisites for a plea of *res judicata* have several times been laid down in this court. The three requisites of a plea of *res judicata*, said the Chief Justice in *Hiddingh v Denyssen & Ors* (1885) 3 Menz 424, quoting Voet 44.2.3 are that the action in respect of which judgment has been given must have been between the same parties or their privies, concerning the same subject matter and founded upon the ^d same complaint as the action in which the defence is raised ...

In order to determine the cause of the complaint, the pleadings and not the evidence in the case must be looked at.'

Subsequently, in *Mitford's Executors v Ebdens Executors & Ors* 1917 AD 682 and at 686, Maasdorp JA said the following:

'The question now arises whether that decision was given under the ^e circumstances which preclude the plaintiff from bringing his present action. Are the first defendants entitled to set up that decision as *res judicata* in the present action? To determine that question it will be necessary to enquire whether that judgment was given in an action: (1) with respect to the same subject matter; (2) based on the same ground; and (3) between the same parties' ^f

More recently Gubbay JA (as he then was) commented on the plea of *res judicata* in *Wolfenden v Jackson* 1985 (2) ZLR 313 (S) at 316B-C as follows:

'The *exceptio rei judicata* is based principally upon the public interest that there must be an end to litigation and that the authority vested in judicial decisions be given effect to, even if erroneous. See *Le Roux en 'n Ander v Le Roux* 1967 (1) SA 446 (A) at 461H. It is a form of estoppel ^g and means that where a final and definitive judgment is delivered by a competent court, the parties to that judgment or their privies (or in the case of a judgment *in rem*, any other person) are not permitted to dispute its correctness.' ^h

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Kudya J

^a Finally, in *Beck's Theory and Principles of Pleading in Civil Actions* 5 ed by Isaacs, the learned author specifies in what respects a previous judgment may be *res judicata*. At p 171, he states as follows:

'The previous judgment is only *res judicata* as regards matters between the parties which the judgment actually affects and when the plea is raised, it therefore becomes essential to determine whether the present ^b claim is actually affected by the previous judgment.'"

In *Madondo v Fyfe & Ors* 1988 (1) ZLR 138 (H), Reynolds J also dealt with the special plea of *res judicata*. At 140E he stated:

"It is trite that, in order for the special plea of *res judicata* to succeed, it must be established that the judgment given in the prior action concerned the same subject matter; was founded on the same grounds and was either ^c a judgment *in rem*, or was between the same parties or their privies."

See also Gillespie J in *Towers v Chitapa* 1996 (2) ZLR 261 (H) at 270F-272C.

In applying these principles to the present case, it is clear that the parties in HC3705/2005 were the plaintiff and the defendant. The subject matter was, amongst others, the transfer of the immovable property in question arising out of the agreement of sale. One of the issues which was determined was whether or not transfer could be granted.

The effect of the order was therefore that the plaintiff elected to abide by the agreement and thus chose not to cancel it, for, if it had chosen to cancel transfer, would not have been ordered. See *Guardian Security Services (Pvt) Ltd v ZBC* 2002 (1) ZLR 1 (S) at 6 where Sandura JA quoted Watermeyer AJ in *Segal v Mazzur* 1920 CPD 634 at 644-5. The order was made by a competent court. It was clear that the interest was for the outstanding capital as represented by the post-dated cheques and the rate of interest was given, as was the period that governed the levied interest. It was left to the parties to agree on the actual empirical interest, which was capable of arithmetic calculation. Thus, even if the judgment was wrong, as long as it stood, it was binding on both parties.

It is noteworthy that the effect of the alleged cancellation of the agreement of sale by the plaintiff was to render the judgment of 24 November 2005 nugatory. If it desired to cancel, then the plaintiff was, in my view, obliged to first of all have that judgment set aside. It seems to me grossly irregular that the plaintiff could undermine an order of court by the medium of cancelling the agreement while that judgment was extant. Mr *Manjengwa* was unable to make any meaningful submissions on whether the plaintiff could by cancelling the agreement nullify a valid court order. It is clear to me that the plaintiff could not lawfully do so.

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Kudya J

I am satisfied that the special plea in abatement of *res judicata* succeeds. It is accordingly, upheld.

In the result, it is not necessary for me to deal with the main claim on the merits. It is accordingly dismissed.

It became clear to me that the reason why the defendant counter-claimed and why it deferred and relegated argument on the special plea to the stage that it did after evidence had been led for both the main and counter claim was for the court to make a finding on the exact figure due to the plaintiff as interest pending transfer. The expert witness called by the defendant provided the correct formula for calculating the interest that was due, pending transfer. However, he arrived at the wrong figure. After making their oral submissions, the parties retired and approached me in chambers where they indicated that the empirical figure calculated in terms of the judgment of 24 November 2005 was \$193 473 (revalued). It seems to me that after the defendant has paid this amount, transfer should take place in terms of the order of 24 November 2005, which remains clear and unambiguous. The counter-claim must also fail on the basis of *res judicata*, a basis I raise *mero motu*. See *Towers v Chitapa supra* at 270C .

The defendant's position on *res judicata* has been vindicated. It however asked for costs on the higher scale on the basis that the plaintiff unnecessarily dragged it to court. That may be so, but it seems to me that the defendant could have avoided the costs incurred after it filed its plea if it had, rather than counter, claim raised the special plea, and this would have curtailed the costs associated with the filing of further pleadings and trial. It however emerged during Mr *Fitches'* oral address that the defendant decided to go along with the plaintiff in the hope that this court would determine its counter-claim and put to rest the actual figure of interest that it should pay. By electing to use this tactic, the defendant incurred unnecessary costs which it would have avoided. Had the defendant conducted its case properly, I would have granted its costs on the higher scale. I however deny it its costs on the basis that it aggravated the expense of trial by its failure to curtail the proceedings by timeously setting down the special plea for hearing.

It is my view, that it will be just and equitable if each party were to bear its own costs.

IT IS ORDERED THAT:

1. The defendant's special plea in abatement of *res judicata* be and is hereby upheld.
2. The plaintiff's claim be and is hereby dismissed.

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Kudya J ^A

3. The defendant's counter claim be and is hereby dismissed.

4. Each party shall bear its own costs.

Wintertons, plaintiff's legal practitioners

^B *Nhemwa & Associates*, defendant's legal practitioners

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Source:

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S v MANGA 2006 (2) ZLR 304 (H)

2006 (2) ZLR p304

Citation	2006 (2) ZLR 304 (H)
Case No	Judgment No. HH-122-06
Court	High Court, Harare
Judge	Kudya J
Heard	15 November 2006
Judgment	15 November 2006
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure — *trial* — *sentence* — *passing of* — *when may be passed c by magistrate other than magistrate who convicted accused* — *"in the absence of the magistrate who convicted the offender"* — *meaning* — *time, distance and circumstances to be considered*

Headnote

It cannot be over-emphasized that it is desirable that offenders be sentenced ^D by the judicial officer who convicts them. That being so, the absence of magistrates on transfer or study leave must be so organised as to obviate unnecessary resort to s 334(7) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The provision should be called into play in circumstances of necessity where not to do so would cause accused persons serious prejudice (*dicta per* Chatikobo J in *S v Chivafa* HB-64-95 ^E followed).

Under s 334(7) of the Criminal Procedure and Evidence Act, sentence may, "in the absence of" the magistrate who convicted the offender, be passed by any magistrate of that court. In order to use this provision, the sentencing magistrate must, firstly, note on the record the absence of the trial magistrate and the reasons for such absence. Secondly, the accused ^F must be given the

opportunity of addressing in mitigation. Finally, it is incumbent on the second magistrate to consider the evidence recorded and upon which the verdict is returned. The words "in the absence of the magistrate who convicted" are unqualified by the statute and should be given the widest possible meaning, which is that the magistrate in question could be absent for whatever reason, e.g. retirement, leave, ^g discharge from service, death, or lengthy absence abroad for whatever reason. While these are normal forms of absence, there can be no doubt that any absence for an appreciable length of time would bring into play the provisions of the section, especially if prejudice were to be caused if the convicted person was made to await the return of the magistrate to ^h

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Kudya J

^a the courthouse. Similarly, the fact that the trial magistrate is an appreciable distance away from the court would allow the provision to be invoked. The phrase must thus be measured in terms of the triad of time, space and circumstances.

Cases cited ^b

S v Chivafa HB-64-95

R v Karonga 1960 (4) SA 64 (SR)

S v Mbabvu & Anor 1980 ZLR 515 (G)

S v Ngwenya 1992 (1) ZLR 123 (H)

R v Zvimba & Anor 1968 (2) RLR 278 (G)

Legislation considered ^c

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 334(7)

Judgment

KUDYA J: The way in which the sentencing magistrate assumed jurisdiction from the trial magistrate in this matter reminds me of the exhortation of ^d Chatikobo J in *S v Chivafa* HB-64-1995. He cautioned at pp 4-5 of the cyclostyled judgment that:

"It cannot be over emphasized that it is desirable that offenders be sentenced by the judicial officer who convict them. That being so, absence of magistrates on transfer or study leave must be so organised ^e as to obviate unnecessary resort to s 312(5) of the [Criminal Procedure and Evidence Act]. The provision should be called into play in circumstances of necessity where not to do so would cause accused persons serious prejudice. If the court calendar is prepared with this in mind the need to resort to their provision would be greatly minimised."

The facts in the present matter are as follows: On 12 July 2004, the accused ^f person was convicted on his own plea of housebreaking with intent to steal and theft at Mbare Magistrates Court. He was remanded to 13 July 2004 to enable the State to furnish evidence of any previous convictions he might have had. Apparently this was not done on that date with the result that he was further remanded to 14 July 2004 out of custody on his own recognisance. He defaulted and a warrant for his arrest was issued.

^g He was arrested on 18 May 2006. By that date, the trial magistrate had been transferred to the Harare Customary Law and Civil Magistrates Court at Old Stables in the city centre. The warrant of arrest was duly dealt with by the sentencing magistrate. He cancelled it and remanded the accused person in ^h custody firstly to 26 May 2006, then to 1 June 2006 and lastly to 6 June 2006.

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Kudya J

On the latter date, he confirmed the plea of guilty and the conviction of 12 July ^a 2004 of the accused and sentenced him to 15 months' imprisonment of which one month imprisonment was suspended on condition he made restitution of \$420 000 through the clerk of court Mbare by 30 June 2006.

In his reasons for sentence, the trial magistrate revealed that he had assumed sentencing jurisdiction in terms of subs 7 of s 334 of the Criminal Procedure ^B and Evidence Act [Chapter 9:07]. He further explained therein that he took this course of action because the trial magistrate was not able to come to Mbare Magistrate Court to consider sentence because of pressure of work at his aforesaid new station.

Section 334(7) reads:

"(7) *If, in a magistrates court, sentence is not passed upon an offender, forthwith upon his conviction, or if by reason of any decision or order of the Supreme Court or High Court, as the case may be, on appeal, review or otherwise, it is necessary to add or vary any sentence passed in a magistrate court, or to pass sentence anew in such court, any magistrate of that court may, in the absence of the magistrate who convicted the offender, or passed the sentence, as the case may be, pass sentence on ^D the offender after consideration of the evidence recorded and in the presence of the offender*" (my emphasis).

The precursor to this section was s 312(5) in the Criminal Procedure and Evidence Act [Chapter 59] and before it s 358(5) of the Criminal Procedure and Evidence Act [Chapter 31]. The meaning of the underlined words have ^E received judicial interpretation in this country.

In *S v Mbabvu & Anor* 1980 ZLR 515 at 516D-H, Waddington J stated:

"The proper procedure to adopt when acting under s 312 (5) of the Code has been explained in the case of *R v Kumese*, 1953 (3) SA 797 (ED). This case has been approved in these courts by the decision in *R v Karonga* 1960 (4) SA 64 (SR) and *R v Zvimba & Anor* 1968 (2) RLR 278. The ^F requirements are, firstly, that the sentencing magistrate must note on the record the absence of the trial magistrate and the reasons for such absence ...

Secondly, the accused must be given the opportunity of addressing in mitigation ...

Finally, it was incumbent on the second magistrate to consider the ^G evidence recorded and upon which the verdict is returned."

In the present case, the magistrate did not note on the record the absence of the trial magistrate and the reasons of such absence. These only appear in his reasons for sentence, which, in my view, is substantially compliant with his duty in that regard. He also, considered the essential elements of the offence ^H

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Kudya J

^A and verdict and confirmed them before he provided the accused with the opportunity to address him in mitigation.

My primary concern is whether on these facts, the sentencing magistrate acted as contemplated by the lawmaker "*in the absence of the magistrate who convicted the offender*".

^B In *R v Karonga supra*, at p 66B-C, Quénet J quashed the sentence that was imposed by another magistrate based in the then Salisbury on behalf of the trial magistrate who was at the time also based in Salisbury on the basis that he was not absent therefrom.

In *R v Zvimba & Anor supra*, at 279G-280A, Lewis J highlighted the three requirements later followed in *Mbabvu's* case *supra*. He drew attention to the ^C irregularity by the magistrate, who was based at Macheke, of transferring for sentence in Rusape a case in which he had convicted the accused persons on their respective pleas of guilty but nonetheless confirmed the convictions and sentences on the basis that they were appropriate and that the accused person did not suffer any prejudice.

^D In *S v Ngwenya* 1992 (1) ZLR 123 (H), the accused person was convicted at Inyathi by a magistrate who was on circuit. On the next circuit date, a different magistrate sentenced him. He did so without noting the reasons for the trial magistrate's absence, a failure which in Muchechetere J's view could lead to the quashing of the proceedings of the sentencing magistrate. He however, confirmed the sentence for fear that if he were to set aside the proceedings it ^E would add to the considerable inconvenience and therefore injustice to the accused who would have to be recalled for sentencing in circumstances where the sentence appeared to be fair and appropriate.

The learned judge made the following pertinent remarks at p 125 of the judgment:

^F "I also agree with the views of the Attorney-General's Office that since the words 'in the absence the magistrate who convicted' are unqualified by the statute they should be given the widest possible meaning,

which is, that the magistrate in question could be absent for whatever reason, e.g. retirement, leave, discharge from service, death etc.”

Lastly, in *S v Chivafa, supra*, where the trial magistrate was going to be away ^g from his station for four months while reading law at the University of Zimbabwe and convicted the accused person on his own plea before he left and a different magistrate sentenced him while he was away, Chatikobo J condoned the failure to record the absence and reasons thereof on the basis that the accused person was not prejudiced by these failures. He however felt ^h driven to issue the exhortation adverted to at the beginning of this judgment.

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Kudya J

The importance for me of *Chivafa's* case lies in the attempt by ^a Chatikobo J to define the meaning of the phrase “in the absence of the magistrate who convicted the offender”. He stated at p 3:

“It might be argued that the absence contemplated by the lawmaker is one occasioned by death, serious illness, retirement or resignation from the service or lengthy absence abroad for whatever reason. While these are ^b normal forms of absence, there can be no doubt in my mind that any absence for an appreciable length of time would bring into play the provisions of the section especially prejudice if he were made to await the return of the magistrate to the court house.”

It seems to me that the phrase under consideration must be measured in terms of the triad of time, space and circumstances. While Muchechetere J ^c appeared at first blush to accept that “absence” be interpreted in the widest sense, he narrowed it down to what Chatikobo J described as appreciable length of time, through the examples that he outlined. This would rule out such absences as occasioned by the trial magistrate going out of the courthouse to some nearby shops or taking occasional leave. Even though he would not be “available” in the strict sense of the word, that would not be the type of ^d absence contemplated by the lawmaker. The concept of space is also a relevant aspect which must be taken into account. This relates to the distance that the trial magistrate is from the courthouse. The circumstances would relate to the reasons advanced for the trial magistrate's failure to be at the courthouse to impose sentence.

In my estimation, the Mbare magistrates court and the Old Stables are ^e approximately 8 km apart. There was no justifiable reason why the trial magistrate would fail to proceed to Mbare magistrates court to pass sentence if he was advised that he was required for the purpose on any of the days that the matter was remanded to. The Harare Province is sufficiently resourced to have ensured that the trial magistrate went to Mbare to sentence the accused ^f person. There exists a functional administrative machinery which involves the resident magistrate, Mbare, the provincial magistrate in charge of the Harare civil courts, the overall provincial magistrate in charge of Harare Province and the office of Chief Magistrate which would have ensured that the trial magistrate did his duty as reposed on him by law to this accused person.

I am, therefore, not satisfied that the unavailability of the trial magistrate from ^g Mbare, regard being had to both time, space and circumstance, was such as is contemplated by the lawmaker which permits the sentencing magistrate to intervene. I therefore hold that the sentencing magistrate improperly stepped into the shoes of the trial magistrate.

In my view, the accused person will not be prejudiced in the sense that he ^h

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Kudya J

^a would have to be recalled for sentence as was feared in *Ngwenya supra*. He is in custody. He has already served close to five months' imprisonment. The trial magistrate would have to take this into account in imposing the appropriate sentence on the accused person.

It is my considered view that it is necessary that the proceedings of the sentencing magistrate be set aside as was done in *Karonga's* case *supra*. It ^b is accordingly ordered that:

1. The sentence imposed be and is hereby set aside.
2. The matter is remitted for sentence anew by the trial magistrate, who must take into account the period that the accused had already served.

^c BHUNU J agrees.

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/MIDZI v ESTATE HARRY 2006 (2) ZLR 310 (H)

MIDZI v ESTATE HARRY 2006 (2) ZLR 310 (H)**2006 (2) ZLR p310**

Citation	2006 (2) ZLR 310 (H)
Case No	Judgment No. HH-123-06
Court	High Court, Harare
Judge	Makarau JP & Patel J
Heard	18 July 2006
Judgment	15 November 2006
Counsel	Mrs <i>D Mandaza</i> , for the appellant <i>W T Pasipanodya</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Appeal — *High Court* — *court's powers on appeal* — *may exercise review c powers when faced with patent irregularity or illegality in proceedings of court a quo*

High Court — *powers* — *review powers* — *may be exercised when court acting as appellate court*

Headnote

Section 26 of the High Court Act [*Chapter 7:06*], which provides for the review powers of the High Court over all inferior courts, tribunals and administrative authorities in Zimbabwe, does not confer any new powers that the court does not ordinarily have but simply acts to confirm its inherent jurisdiction. When exercising its appellate jurisdiction, the High Court can also exercise its review jurisdiction when faced with a patent irregularity or illegality in the proceedings of the lower court. The exercise of this power is subject only to the rules of the court as to the need to afford all interested parties a right to be heard before relief is granted following the review. To restrict the High Court, when acting as an appellate court, to the record of the proceedings and the grounds of appeal raised by the appellant would rob the court of its inherent jurisdiction as the sole superior court of first instance to correct injustices whenever it sees them.

Cases referred to

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

Mutukwa v National Dairy Co-op Ltd 1996 (1) ZLR 348 (S) G

Legislation considered

High Court Act [*Chapter 7:06*], s 26

Case information

Mrs D Mandaza, for the appellant

W T Pasipanodya, for the respondent H

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Makarau JP

Judgment

A **MAKARAU JP:** On 1 February 2006, the respondent, represented by one Mary-Ann Kathleen Harry, ("Mary-Ann Cathleen"), acting under a certificate of authority granted to her by the Master of this court on 23 January 2006, filed a court application in the magistrates court sitting at Harare, seeking an order evicting the appellant from certain property called stand No. 11941 Salisbury Township. In the application, Mary-Ann Cathleen Harry alleged that she had B been granted authority by the Master to administer the estate of the late Brian Harry, ("Brian"), and that the late Brian was a one-half share owner of the property, together with one Michael Vincent Harry, ("Michael Vincent"), his brother, also now deceased. She further alleged that the appellant was in unlawful occupation of the property as she had been given two months' notice C to vacate before the application was filed.

The appellant opposed the application on two main grounds. *In limine*, she contended that the respondent had used the wrong procedure in approaching the court by way of a court application instead of issuing summons as there were many disputes of facts arising from the application. Regarding the merits of the matter, she contended that her occupation of the property was lawful D as she had a lease agreement with an agent of the late Michael Vincent which lease was renewed each year.

To her opposing affidavit, the appellant attached a supporting affidavit from one Beatrice Noach who had a power of attorney granted her by the late Michael Vincent during his lifetime. Beatrice Noach averred that after the E demise of Michael Vincent, she continued to lease the property to the appellant with the consent and knowledge of the heir to the estate of Michael Vincent.

After hearing the parties, the trial court granted the application, ordering that the appellant be evicted. Unhappy with that decision, the appellant noted an appeal to this court. In the notice of appeal, the appellant raised three broad F grounds. Firstly, she maintained that the procedure adopted by the respondent in the lower court was improper. Secondly, she argued that Mary-Ann Cathleen had no authority to represent the respondent, as she was not issued with letters of administration for that purpose. Along with this issue was also raised Mary Ann Cathleen's status as the widow of Brian Harry. Finally, the appellant argued that the lower court had erred in finding that the lease G agreement she had with the agent of Michael Vincent was invalid.

I will consider each of the three broad grounds of appeal in turn.

The general rule is that application or motion proceedings should not be used where there is likely to be a material conflict in the evidence deposed to in the H affidavits attached to the application. It is however, not every dispute that

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Makarau JP

is material to the resolution of the legal issues arising in each application. A A court deciding on the application has to assess the materiality of each alleged dispute of fact and, where it believes that it will not work an injustice on any of the parties, will take a robust stance and determine the application notwithstanding the dispute of facts. In appropriate cases, the court may call for oral evidence on the disputed facts and proceed to determine the issue B between the parties. See *Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 232 (H).

In casu, it was contended on behalf of the appellant that there were numerous disputes of facts before the trial court. In her heads of argument, the appellant listed six alleged disputes of facts. While not agreeing with the appellant that all six disputes of facts were indeed material disputes of facts, I agree with the C appellant that the trial court, with respect, erred in its approach to determining the application before it. In proceeding to determine the application, the trial court, on the first page of its judgment observed as follows:

"The respondent contends *in limine* that the procedure used of proceeding by way of notice and not summons in an eviction is wrong. Cognisance having been had on the fact that the applicant is the executrix who is facing D homelessness when she could benefit from the estate persuades this court to allow this application on notice because the applicant's case has established some urgency."

In my view, the trial court allowed improper considerations to persuade it to proceed with the application in the face of disputed facts. Had the court E indicated that it was taking a robust stance in the face of the disputes and was proceeding to determine the matter fully aware of the disputes, I may have been inclined to uphold its stance.

On the basis of the foregoing alone, I would set aside the decision of the lower court on the ground that oral evidence ought to have been led on the material disputes of fact such as to whether the appellant was paying rentals or not F for her occupation of the property, and again, as to whether the respondent was entitled to sole benefit over the entire property.

The second broad ground of appeal by the appellant exercised our minds to some extent. This is in relation to whether the trial court erred in accepting the certificate of authority issued to the respondent's representative in light of G the clear provisions of the law that such certificates can only be issued in respect of estates of a value less than \$60 000 (old currency). Clearly, the estate in this matter exceeds the modest amount stipulated in the Administration of Estates Act [*Chapter 6:01*] and the certificate of authority issued to Mary-Ann Cathleen was issued in contravention of the law and thus cannot stand.

The issue that then arises is whether in exercising its appellate jurisdiction, H

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A this court can also exercise its review jurisdiction when faced with a patent irregularity or illegality in the proceedings of the lower court.

Section 26 of the High Court Act [*Chapter 7:06*] provides for the review powers of this court over all inferior courts of law, tribunals and administrative authorities in Zimbabwe. In my view, this section does not confer any new powers on this court that it does not ordinarily have but simply acts to confirm B the inherent jurisdiction that the court already has. The review powers of this court are without limit. See *Mutukwa v National Dairy Cooperative Ltd* 1996 (1) ZLR 348 (S).

In my view, while it is not necessary for us to make a definitive finding on this issue for the purposes of determining this appeal, this court has jurisdiction C and power to review the proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe at any time, including when it is determining an appeal. The exercise of this power, in my further view, subject only to the rules of the court as to the need to afford all interested parties a right to be heard before relief is granted following the review. To hold otherwise and to restrict this court to the record of proceedings D and the sole grounds of appeal raised by the appellant would be to rob the court of its inherent jurisdiction as the sole superior court of first instance to correct injustices wherever it sees them.

The decision by the Master is highly susceptible to being set aside for the reasons I have given above. The issue having come to our attention during E the hearing of the appeal, it will be remiss of us to turn a blind eye to it and hold, as did the trial magistrate, that unless and until set aside, we are bound to respect it on its face value.

However, as indicated above, it is not necessary that we review the decision of the Master in issuing a certificate of authority to Mary-Ann Cathleen or that we give directions, in exercising the powers granted us by s 31(1)(viii) of the F High Court Act, that the Master be brought before us for the purposes of reviewing his decision as separate proceedings in that regard have already been commenced in this court.

Finally, I turn to the third broad ground of appeal.

It is common cause that the property in dispute was jointly owned by Harry G and his brother Michael Vincent. During his lifetime, Michael Vincent brother granted power of attorney to Noach to lease the property. It does not appear that Brian demurred at this arrangement. This was a valid lease. On the death of Michael Vincent, while it is correct that the power of attorney in favour of Noach lapsed by operation of law, the appellant in our view became a statutory H tenant and remains so if it is proved that she is paying the rentals agreed to

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and is observing all the other terms of the lease as agreed to prior to the death ^A of Michael Vincent. The leading of oral evidence on whether the appellant paid rentals and is still paying such rentals becomes unavoidable in the circumstances.

Further, it is common cause that the property in dispute is jointly owned. It is doubtful in our view whether the respondent is entitled to occupation of the ^B entire property as the order by the trial court implies.

On the basis of the foregoing, we make the following order:

1. The appeal is allowed.
2. The decision of the magistrates court is set aside.
3. The matter is remitted to the trial court for the leading of oral evidence on ^C all the facts in dispute.
4. Costs of this appeal shall be in the cause.

PATEL J concurred.

Muzangaza Mandaza & Tomana, appellant's legal practitioners ^D

Manase & Manase, respondents' legal practitioners

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S v MOYO & ORS 2006 (2) ZLR 315 (H)

2006 (2) ZLR p315

Citation	2006 (2) ZLR 315 (H)
Case No	Judgment No. HB-114-06
Court	High Court, Bulawayo
Judge	Cheda J
Heard	16 November 2006
Judgment	16 November 2006
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Headnote

Sentencing is the most difficult aspect in the conclusion of a trial. The judicial officer has to battle with this aspect in the midst of both philosophical and academic concepts which intrude upon the practical business of sentencing. As much as judicial officers have a duty and determination ^D to deter or eradicate crimes in society, all their efforts in the long run seem to be equally futile. The causes of crime and their solutions lie not only in the legal system but in society itself. Ultimately, therefore, sentences imposed by the courts by and large must have support of concerned and right thinking citizens. But the same citizens can easily be revulsed by ^E the court's imposition of unnecessary lengthy prison terms as they may view them as being out of step with the offences committed, thereby rendering them meaningless. There must, therefore, always be a right proportion between the punishment imposed and the gravity of the offence. It is in that sense that it is said that certain crimes "deserve" certain punishment and not on any theory of retribution.

¶ The sentence imposed on an accused should be shaped and determined by the following factors amongst others:

- (1) the degree of premeditation by the offender;
- (2) the circumstances surrounding the conviction of the offence;
- (3) the gravity of the crime committed, in some instances in regard to ^G which the maximum punishment provided by statute is an indication;
- (4) the attitude of the offender after the commission of the conviction of the crime, as this serves to indicate the degree of criminality involved and throws some light on the character of the participant;
- (5) the previous criminal record, if any, of the offender; ^H
- (6) the age, mode of life, climate and personality of the offender;

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- (7) any recommendation presented to the court as a pre-sentencing ^A report from an official designated to assist in assessing the accused; and
- (8) case authorities in relation to similar offences.

Imprisonment is a rigorous punishment and should therefore be imposed with sympathetic consideration. In some instances, the mere thought of ^B going to prison is more of a deterrent than actually going to prison. Irrespective of how bad an offender is in the eyes of society, he is still entitled to humane treatment, for it is his human right to be so treated. It is for this reason that the sentences imposed should not amount to total condemnation by society. ^C

Cases referred to

Parazango v A-G A-11-78

R v Anderson (1972) 56 Crim App R 863

S v Mberi & Ors S-52-82

R v Sargeant (1974) 60 Crim App R 74

R v Warner & Ors [1946] OR 808 (Ontario Court of Appeal) ^D

Judgment

CHEDA J: The case before me has been forwarded to me in terms of the review procedure.

The salient facts are that the three were charged with seven counts of armed robbery and one count of contravening s 4(1) of the Firearms Act [*Chapter E 10:09*], as read with s 1 of Part LII of the Criminal Penalties Amendment Act No. 22 of 2001, that is, being found in possession a Fabrique Nationale Browning pistol and a Star pistol. They pleaded guilty on some counts and not guilty on others but were, however, convicted on all counts and sentenced as follows:

"Count 1: Each 10 years' imprisonment ^F

Count 3: Each 10 years' imprisonment ^g

Count 4: Each 10 years' imprisonment

Count 5: Each 10 years' imprisonment

Count 6: Accused 1 and 3 – each 10 years' imprisonment

Count 7: Each 10 years' imprisonment

Count 8: Each 5 years' imprisonment

Accused 1 and 3 were sentenced to a total of 65 years, while the accused 2 was sentenced to a total of 55 years' imprisonment. Each accused had 10 years' imprisonment suspended on condition accused does not within five years commit any offence of which dishonesty is an element for which ^h

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Cheda J

^a upon conviction he is sentenced to imprisonment without the option of a fine."

The convictions, in my view, are proper and therefore nothing turns on them. However, it is the sentence which could not escape my attention.

The accused were no doubt notorious armed robbers who instilled deep fear ^b in their victims wherever they struck. Property of substantial value was stolen from the complainants.

I take judicial notice that during the commission of these offences the nation was engulfed by fear and trepidation as the accused reigned terror on the nation. That they deserve to be put away for a long time admits of no doubt. Accused 1 and 3 were sentenced to a total of 65 years, while accused 2 was ^c sentenced to a total of 55 years.

Accused 2 and 3 were sentenced to an effective 44 years and six months, while accused 1 was sentenced to 53 years and six months' imprisonment.

The sentences imposed on these offenders deserve a close examination. It is generally accepted that sentencing is the most difficult aspect in the conclusion ^d of a trial. The judicial officer has to battle with this aspect in the midst of both philosophical and academic concepts which intrude upon the practical business of sentencing. My view is that, in as much as judicial officers have a duty and determination to deter or eradicate crimes in society, all their efforts in the long run seem to be equally futile. The causes of crime and their solutions lie not only in the legal system but in society itself. Therefore, judicial officers ^e should always bear in mind that long terms of imprisonment do not necessary deter would-be offenders. Ultimately, therefore, sentences imposed by the courts, by and large, must have the support of concerned and right thinking citizens. But it is the same society which can easily be revulsed by the court's imposition of unnecessarily lengthy prison terms, as they may view them as being out of step with the offences committed, thereby rendering them ^f meaningless.

While there should be proportionate punishment to be meted out to the criminal, it cannot be done measure for measure. The view was also expressed by the Ontario Court of Appeal in *R v Warner, Urquhart, Martin and Muller* [1946] OR 808 at 815 where Roach JA stated:

^g "It should be said at once that the purpose of punishment for crime is not that, though the medium of a judge who is authorised by law to impose it, vengeance may be wreaked upon the guilty for their crime, as though crime was private in character ... Punishment ... is the expression of the condemnation by the state of the wrong done to society. There must, ^h therefore, always be a right proportion between the punishment imposed

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Cheda J

and the gravity of the offence. It is in that sense that it is said that certain crimes 'deserve' certain punishment and not on any theory of retribution."

Even though the Canadian authorities are not part of our criminal law, it is my view, however, that their decisions help in shaping our own jurisprudence as well. In my view, the sentence imposed on an accused should be shaped and determined by the following factors, amongst others: ^b

1. the degree of premeditation by the offender;
2. the circumstances surrounding the conviction of the offence;
3. the gravity of the crime committed, in some instances in regard to which the maximum punishment provided by statute is an indication;

4. the attitude of the offender after the commission of the crime, as this serves to indicate the degree of criminality involved and throws some light on the character of the participant;
5. the previous criminal record, if any, of the offender;
6. the age, mode of life, climate and personality of the offender;
7. any recommendation presented to the court in a pre-sentencing report from an official designated to assist in assessing the accused; and
8. case authorities in relation to similar offences.

It should be borne in mind that prison life is a rigorous punishment and should, therefore, be imposed with sympathetic consideration. Therefore, the mere thought of going to prison in some instances is more of a deterrent than the going to prison itself. *R v Anderson* (1972) 56 CAR 863 and *R v Sargeant* (1974) 60 CAR 74.

Severe sentences in crimes of this nature have indeed been previously imposed: see *Parazango v AG* A-11-78; *S v Mberi & Ors* S-52-82. There is, therefore, a need to pass harsh sentences, but this should be within reason. In light of the above, and the case authorities above, I am of the view that the totality of the sentences imposed by the regional magistrate are, in the circumstances, out of step with the decided cases. If left as they are, they may negatively affect society which they are supposed to assist.

It should not be forgotten that, irrespective of how bad an offender is in the eyes of society, he is still entitled to human treatment, for it is his human right to be so treated. It is for this reason that the sentences imposed should not amount to total condemnation by society.

The sentences imposed in this matter are, in my view, disturbing and cannot be allowed to stand. The convictions are confirmed but the sentences are set aside and substituted as follows: H

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Cheda J

A Each Accused:	Counts 1, 2, 3, 4, 5 and 7 treated as one for the purposes of sentence: 20 years' imprisonment
Count 8:	5 years' imprisonment
Total:	25 years' imprisonment
Accused 1 and 3:	Count 6 only: 10 years' imprisonment to run concurrently with the rest of the counts.

Total effective imprisonment (each accused): 25 years' imprisonment.

c NDOU J agrees.

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/SINO ZIMBABWE CEMENT CO (PVT) LTD v ZIMBABWE BANKING CORPORATION LTD 2006 (2) ZLR 320 (H)

SINO ZIMBABWE CEMENT CO (PVT) LTD v ZIMBABWE BANKING CORPORATION LTD 2006 (2) ZLR 320 (H)

2006 (2) ZLR p320

Citation	2006 (2) ZLR 320 (H)
Case No	Judgment No. HB-132-06
Court	High Court, Harare
Judge	Kamocha J
Heard	18 October 2006
Judgment	16 November 2006
Counsel	<i>N Mathonsi</i> , for the applicant <i>Mrs P Dube</i> , for the respondent
Case Type	Application for summary judgment
Annotations	No case annotations to date

Flynote

Bank — *liability* — *forged cheque* — *no right to debit customer's account even if contributory negligence shown*

Bills of exchange — *cheque* — *forged cheque* — *wholly inoperative* — *bank having no right to enforce payment of*

Headnote

Employees of the respondent bank ordered a cheque book from the printers who supplied the bank, forged the signatures of directors of the applicant on various cheques, and drew large amounts of money. To support the cheques, they forged the applicant's letterheads and wrote letters which purported to give authority to the bank to cash the cheques. The applicant sought summary judgment for the amount thus stolen. The bank pleaded contributory negligence on the part of the applicant.

Held, that under s 23 of the Bills of Exchange Act [*Chapter 14:02*], a forged or unauthorised signature is wholly inoperative and the bank thus had no right to enforce payment of the cheque. A cheque is not the drawer's mandate if his signature has been forged or appended without his authority. If the bank pays out on such a cheque it is not entitled to debit the drawer's account. This rule applies even where general carelessness by the customer in the conduct of his affairs facilitated the deception – something of which there was no evidence in this case. Summary judgment would be granted. *G*

Case referred to

Holzman v Standard Bank of SA Ltd 1985 (1) SA 360 (W)

Legislation considered

Bills of Exchange Act [*Chapter 14:02*], s 23 *H*

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Kamocha J

Case information

A N Mathonsi, for the applicant

Mrs P Dube, for the respondent

Judgment

KAMOCHA J: The circumstances giving rise to these proceedings are largely common cause. The applicant runs a bank account with the respondent, Zimbank. Some people, most of whom were employees of Zimbank, hatched a plan to steal money from the applicant's account. They went to Typocrafters, a company which manufactures cheque books, and ordered a cheque book similar to the one that the applicant was using in November 2004. Zimbank's tellers which do business on the applicant's account would have known the cheque book in use at any moment. In any case, it is Zimbank, through its employees, which orders cheque books for and on behalf of its customers and must have ordered a duplicate cheque book. The rogues then forged the signatures of Mr Moyo and Mr Wang on the cheques which they presented to Zimbank and drew large amounts of money, totalling \$538 051 080. The signatures on the cheques were forged. Zimbank proceeded to honour the cheques and debited the applicant's account in the sum of \$538 051 080 and therefore prejudiced the applicant by that amount.

Zimbank had no authority or mandate from the applicant to honour the cheques and debit the sum of sum of \$538 051 080 from the applicant's account, and the withdrawal of the funds from the applicant's account was wrongful and prejudicial to the applicant and in the result, the applicant suffered loss in the sum of \$538 051 080.

In order to facilitate the encashment of the cheques, the rogues printed the applicant's letterheads and each time they presented the forged cheques for payment they also wrote instructions to the bank and appended forged signatures of Mr Moyo and Mr Wang on those instructions for the bank to encash the cheques.

Zimbank accepted that the signatures on all the cheques which were used to debit the applicant's accounts were forged and that the cheques themselves did not originate from the cheque book held by the applicant. They originated from the illegitimate cheque book held by Zimbank's employees who in fact have been arrested and are facing criminal charges.

The law on forged cheques is very clear. *In casu*, there is no controversy that both the signatures on the cheques and the letters upon which the purported mandates to encash the cheques were forged. Section 23 of the Bills of Exchange Act [Chapter 14:02] provides as follows:

"Subject to this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative and no right to

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Kamocha J

retain the bill or to give a discharge therefore, or to enforce payment A thereof against any party thereto, can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:

Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to forgery." B

A banker and its customer enter into a contract which is classified as a contract of mandate in terms of which the bank undertakes to execute all orders to pay given to it by the client by means of cheques, provided there are sufficient funds at the disposal of the client. See C J Nagel *et al* *Business Law* 2 ed at p 298. C

In *Business Transactions Law* by Robert Sharrock 6 ed at p 486, it is stated thus:

"A cheque is not the drawer's mandate if his signature has been forged or appended without his authority. It follows that if the bank pays out on such a cheque it is not entitled to debit the drawer's account" (my emphasis). D

The rule relating to forged cheques does even apply where general carelessness by the customer in the conduct of his affairs facilitated the deception.

Nicholas J in *Holzman v Standard Bank of South Africa Ltd* 1985 (1) SA 360 (W) at 363 observed that:

"Merely being careless in controlling access to a cheque book does not E render the customer liable to bear the loss ... nor does a failure to verify bank statements or general carelessness by the customer in the conduct of his affairs."

In casu, not only did Zimbank pay on forged cheques, but the perpetrators were its employees. Despite this fact, Zimbank pleaded contributory negligence which, in my view, would, in any event, be irrelevant. Negligence or carelessness F would not render the client to bear the loss.

More importantly, in this case, there is no evidence to suggest that the applicant was negligent or careless. Instead, the simple sequence of events is that the bank's employees went on to have a parallel cheque book to that of the applicant printed by Typocrafters. All the forged cheques came from ^g that particular cheque book. The cheques were forged by its employees. The suggestion that there could have been employees of the applicant who may have been involved is speculative and will remain so as long as no evidence to that effect is available.

The respondent also alleged that the applicant contributed by not reporting ^h timeously after discovering the fraud. That argument is equally speculative,

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Kamocha J

^a As there is no evidence to indicate that there was a delay in reporting by the applicant. Instead, when the applicant discovered some discrepancies on 10 December 2004, it sent out a letter querying the anomalies. Zimbank took some time to investigate and only responded on 16 December 2004. The response was dismissive and clearly revealed that the investigation was facile as the letter seemed to defend the anomalies that were taking place.

^b The respondent argued that there was a triable, issue in that there must have been some of the applicant's employees who were involved in the fraud. This, as stated above, is speculative as the respondent cannot say which of the applicant's employee is involved. The suggestion remains speculative and can therefore not constitute a triable issue.

^c In the result, I would grant summary judgment in terms of the draft order.

Dzimba, Jaravaza & Associates, applicant's legal practitioners

^d *Gill, Godlonton & Gerrans*, respondent's legal practitioners

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Source:

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NDLOVU & ANOR v MAUNZE & ORS 2006 (2) ZLR 324 (H)

2006 (2) ZLR p324

Citation	2006 (2) ZLR 324 (H)
Case No	Judgment No. HB-137-06
Court	High Court, Bulawayo
Judge	Ndou J
Heard	23 November 2006
Judgment	23 November 2006
Counsel	<i>S Nkiwane</i> , for the applicants <i>B Ndove</i> , for the first and second respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Costs — *counsel's fees — counsel acting pro amico — successful party not entitled to costs of such counsel*

Headnote

Counsel for the applicants had offered to act *pro amico* for them, as they were relatives of his. The applicants turned down this offer out of a sense of pride. Nonetheless, counsel appeared for them gratuitously. When the applicants succeeded, an application was made for the costs of counsel. ^D

Held, that ordinarily the applicants, being the successful parties, would be entitled to their costs.

This fundamental rule should not be departed from except on good grounds. *In casu*, however, notwithstanding the applicants' pride and desire to be regarded as paying clients, for all intents and purposes counsel remained their *pro amico* counsel and for such gratuitous services in court, the applicants were not entitled to ^E costs.

Cases referred to

Ex p de Vos 1953 SR 168; 1953 (2) SA 642 (SR)

Dickinson v Min of Water Development 1971 (1) RLR 141 (A); 1971 (3) SA 71 (RA) ^F

Erasmus v Grunow en 'n Ander 1980 (2) SA 793 (O)

Fripp v Gibson & Co 1913 AD 354

Graham v Odendaal 1972 (2) SA 611 (A)

Re J (an infant) 1981 (2) SA 330 (Z)

Levben Products (Pty) Ltd v Alexander Films (SA) (Pty) Ltd 1957 R & G N 575; 1957 (4) SA 225 (SR)

Marendaz v Smuts 1966 (4) SA 66 (T)

Union Govt v Gass 1959 (4) SA 401 (A)

Case information

S Nkiwane, for the applicants

B Ndove, for the first and second respondents ^H

2006 (2) ZLR p325

Ndou J

Judgment

^A **NDOU J:** On 8 June 2006, Bere J granted the applicants a provisional order in the following terms:

"Terms of final order sought

That you show cause to this honourable court why a final order should not be made in the following terms: ^B

1. That court application No. HC 1212/06 be and is hereby declared null and void and of no force or effect whatsoever.
2. That consequent upon the declaration in para (1) hereof, the court application be and is hereby struck out.
3. That subject to the rights of the substantive parties thereto the proceedings of the Western Region Rent Board scheduled for ^C 11.00a.m on 8 June 2006, or any date to which such proceedings may be adjourned or postponed, shall stand, notwithstanding any interlocutory or appeal proceedings that the first and second respondent herein may institute.
4. That the costs of and incidental to this chamber application be borne jointly and severally the one paying the other to be absolved, on the ^D attorney-client scale, and such costs to include the costs of instructing counsel.

Interim relief granted

Pending determination of this matter, the applicant is granted the following relief: ^E

1. That the Western Region Rent Board proceedings which stand adjourned to 8 June 2006 to commence and continue on that date or any other date suitable to the Board without any let or hindrance from the respondents."

After being served with this order, the respondents did not oppose the provisional order within the prescribed period. Because there was no opposition, ^F the applicants set the matter as unopposed in the motion court. Mr *Ndove*, for the first and second respondents, was fortuitously in attendance when the matter was called on 6 July 2006. There is a dispute between the legal practitioners of record on what transpired before Cheda J on that day. Be that as it may, the matter was postponed to 13 July 2006. There is also a dispute on the reason for the postponement. But, after listening to both parties, it ^G became clear that the confirmation of the provisional order was not entirely in issue; what was in dispute is the issue of costs. I confirmed the provisional order in part by consent and directed that the issue of costs be argued at a later date. When the matter came up for argument, the preliminary issue was raised by the applicants' legal practitioner on whether Mr *Ndove* was properly before ^H the court after the first and second respondents failed or neglected to file

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Ndou J

opposition papers to the provisional order. The first and second respondents ^A were obviously barred. I agree with Mr *Nkiwane*, for the applicants, that because para 4 of the provisional order specifically asked for costs on a punitive scale, the first and second respondents should have filed opposing papers aimed at that paragraph only. They did not do so, so they cannot be heard without the court's indulgence. They have not formally sought for the ^B court's indulgence and I cannot grant an indulgence that the parties did not bother to ask for. In the circumstances, the first and second respondents remain barred. The automatic bar still obtains under r 83 of the High Court Rules 1971.

Coming to the question of costs, it is trite that the award of costs is a matter wholly within the discretion of the court: see *Fripp v Gibbon & Co* 1913 (AD) ^C 354; *Graham v Odendaal* 1972 (2) SA 611 (A) and *Re J (an infant)* 1981 (2) SA 330 (Z). This judicial discretion, however, must be exercised on grounds upon which a reasonable man could have come to the conclusion arrived at – *Levben Products (Pty) Ltd v Alexander Films (SA) (Pty)* 1957 R & N 575 at 577; 1957 (4) SA 225 (SR) at 227B-C and *Herbstein and van Winsen Civil Practice of the Supreme Court of South Africa* 4 ed by van Winsen, Cilliers ^D and Loots at 703-4.

The applicants in this matter are the successful parties, and as such, their success should generally carry the costs. It is a fundamental principle that, as a general rule, the party who succeeds should be awarded costs, and this rule should not be departed from except on good grounds: see *Erasmus v E Grunow en'n ander* 1980 (2) SA 793 (O); *Fripp v Gibbon supra*; *Union Government v Gass* 1959 (4) SA 401 (A) at 413C-E and *Dickinson v Minister of Water Development* 1971 (1) RLR 141 (A); 1971 (3) SA 71 (RA). But are there good grounds for departure in this case? Mr *Nkiwane* has disclosed that it was his intention to appear for the applicants *pro amico*, because the first applicant is his brother-in-law and the second applicant is his younger sister, ^F i.e. the first and second applicants are husband and wife. He actually offered to appear *pro amico* for his sister i.e. second applicant. But his brother-in-law (i.e. the first applicant), in his pride, insisted that he should act for them for a fee. He argued that there is nothing wrong for him to act for his sister for a fee. But was Mr *Nkiwane* justified in accepting the applicants' offer? Should the ^G costs be borne by the first and second respondents after the applicants' turned down his gratuitous legal services in court? *Pro amico* does not admit of a contingency fee arrangement. In *Legal Ethics* by E A L Lewis at p 230, the learned author rightly observed:

"Whether in disputes or non-contentious work the practitioner may not say to his friend or relation 'I shall not charge you, but if what is done is]

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Ndou J

A successful and the other fellow pays then I shall take what is recovered from him."

Because of close relationship i.e. familial relationship with the applicants Mr *Nkiwane*'s initial position of acting for them *pro amico* was perfectly in order. See *Legal Ethics supra* at p 28 para 19 and p 30 para 21.

Notwithstanding the applicants' pride and desire to be regarded as paying *b* clients, it seems to me that for all intents and purposes Mr *Nkiwane* remained the applicants' *pro amico* counsel, and for such gratuitous services in court, the applicants are not entitled to costs. As pointed out by Beadle J (as he then was) in *Ex p de Vos* 1953 SR 168; 1953 (2) SA 642 (SR) at 643E:

"I think it is a clear rule of practice, if not law, that an *amicus curiae* is not *c* entitled to his costs. There is authority for that proposition in the case of *Ex p M* 1946 (1) PH B15 ..."

See also *Marendaz v Smuts* 1966 (4) SA 66 (T) at 75A-C and *Herbstein and van Winsen supra* at p 728.

Accordingly, I order that there shall be no order of costs.

▫ *Mabhikwa, Hikwa and Nyathi*, applicants' legal practitioners

Maroneddze and Partners, first and second respondents' legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/SITHOLE v KHUMALO & ORS 2006 (2) ZLR 328 (H)

SITHOLE v KHUMALO & ORS 2006 (2) ZLR 328 (H)

2006 (2) ZLR p328

Citation	2006 (2) ZLR 328 (H)
Case No	Judgment No. HB-138-06
Court	High Court, Bulawayo
Judge	Ndou J
Heard	17 November 2006
Judgment	23 November 2006
Counsel	<i>S Nkiwane</i> , for the applicant <i>R Moyo-Majwabu</i> , for the first respondent <i>M Nzarayapenga</i> , for the third respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure – application – heads of argument – delivery of to *c* other party – must be done "immediately" after filing heads with Registrar – meaning of "immediately" – delivery must be within a reasonable time, according to circumstances of each case

Headnote

In terms of *r* 238(2) of the High Court Rules 1971, where an application out *▫* has been made and set down for hearing, the party's legal practitioner must file heads of argument with the

Registrar within ten days and “immediately thereafter he shall deliver a copy of the heads of argument to every other party”. Where a statute requires anything to be done “immediately”, that is the same thing as “forthwith” and it implies speedy and prompt action and an omission of all delay; in other words, the thing to be done should be done as quickly as is reasonably possible. What is intended by the rule is that the delivery to any other party should be done within a reasonable time after the filing of the heads with the Registrar’s office. Delivery must, in other words, be within a reasonable time in the circumstances of each case. Delivery a day after the filing of the heads with the Registrar would be within a reasonable time.

Cases referred to

Agim v Regional Controller, ZRA, Beitbridge HB-79-05

Forestry Commission v Moyo 1997 (1) ZLR 254 (S)

Griffith v Taylor (1876) 2 CPD 19 G

Lockhat v Idris 1954 (4) SA 118 (N)

Mpofu & Anor v Parks & Wildlife Mgmt Authority & Ors HB-36-04

R v Aston (1850) 19 LJ MC 236

R v Berkshire Justices (1879) 4 QBD 469

R v Goetz 1952 (3) SA 272 (SWA) H

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^A *R v Paphitis* 1968 (1) RLR 183 (A); 1968 (2) SA 652 (RA)

R v Sikumbuzo 1967 RLR 348 (A); 1967 (4) SA 604 (RA)

Toms v Wilson (1863) 32 LJ QB 382

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 238(2)

Case information

^B *S Nkiwane*, for the applicant

R Moyo-Majwabu, for the first respondent

M Nzarayapenga, for the third respondent

Judgment

NDOU J: This matter was set down for hearing on 17 November 2006. At the commencement of the hearing, Mr *Nkiwane*, for the applicant, raised two points *in limine*. In brief, he submitted that the first and third respondents are barred. I will deal with each point in turn.

IS THE FIRST RESPONDENT BARRED?

The applicant’s heads of argument were filed of record and served on the ^D respondents on 29 June 2006. The *dies induciae* for filing the first respondent’s heads of argument expired on 13 July 2006. The first respondent’s heads of argument, though filed on 13 July 2006, were actually served on 14 July 2006, at 15:50 pm after the *dies*. It is common cause that the first respondent was not out of time as far as the filing of the heads of argument in terms of r 238(2a) ^E of the High Court Rules, 1971. The only issue is whether the first respondent complied with subr (2) of r 238, which provides:

“Where an application, exception or application to strike out has been set down for hearing in terms of subrule (2) of rule 223 and any respondent is to be represented at the hearing by a legal practitioner, the legal practitioner shall file with the registrar, in accordance with subrule (2a), ^F heads of argument clearly outlining the submission relied upon by him and setting out the authorities, if any, which he intends to cite, and immediately thereafter he shall deliver a copy of the heads of argument to every other party” (my emphasis).

This issue hinges on the interpretation of the highlighted words. Where a statute requires anything to be done “immediately”, that is the same thing as ^g “forthwith” and it implies speedy and prompt action and an omission of all delay, in other words, that the thing to be done should be done as quickly as is reasonably possible: *R v Berkshire Justices* (1879) 4 QBD 469; *R v Aston* (1850) 19 LJC 236; *Griffith v Taylor*; *Thatcher v Taylor* (1876) 2 CPD 19.

^h In *Stroud’s Judicial Dictionary* by J S James Vol 3, 4ed at 1283, the learned

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author rightly observed: ^a

- “(1) The word ‘immediately’, although in strictness it excludes all mean times, yet to make good the deeds and intents of parties it shall be construed such convenient time as is reasonably requisite for doing the thing (*Pybus v Mitford* 2 Lev 77). ‘The court cannot say it absolutely excludes all *mesne acts*’ (*R v Francis* ca.t.Hard 115); but ‘immediately’ implies that the act to be done should be done with all ^b CONVENIENT SPEED (*per Rolfe B Thompson v Gibson* 10 LJ Ex 243).
- (2) Thus, as regards a judge’s certificate which any particular statute says shall be given ‘immediately’, that does not mean ten minutes, or a quarter or half an hour; but such a lapse of time as excludes the possibility of other business intervening to alter the impression made ^c on the judge’s mind ...
- (3) ...
- (4) ...
- (5) So, where a statute requires anything to be done ‘immediately’, that is the same thing as ‘forthwith’, and implies ‘speedy and prompt ^d action and an omission of all delay; in other words, that the thing to be done should be done as quickly as is reasonably possible ...”

Looking at the entire ^r 238(2) in context, what is intended is that the delivery to any other party should be done within a reasonable time after the filing of the heads with the Registrar’s office. Delivery must, in other words, be within a reasonable time in the circumstances of each case: see *R v Paphitis* 1968 (1) RLR 183 (A); ^e 1968 (2) SA 652 (RA); *R v Sikumbuzo* 1967 RLR 348 (A); 1967 (4) SA 604 (RA); *R v Goetz* 1952 (3) SA 272 (SWA) and *Lockhat v Idris* 1954 (4) SA 120 (N). Where a statute requires that something shall be done “immediately”, it should be understood as allowing a reasonable time for doing so: *Toms v Wilson* (1863) 32 LJQB 382 and *Maxwell On Interpretation* ^f of Statutes 10 ed by G G Sharp and B Galpin at p 351-2.

The lawmaker restricted the period within which the respondent may file heads of argument to ten days, but did not do so in respect to the delivery of the same heads of arguments to other parties. It chose to use the language “immediately thereafter.” In so doing, the lawmaker left the determination of the period in the hands of the court. Looking at all the circumstances of this case, delivery ^g a day after the filing of the heads with the Registrar is within a reasonable time. In the circumstances, first respondent is not barred and she is properly before me. ^h

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^a IS THE THIRD RESPONDENT BARRED?

Mr *Nzarayapenga*, for the third respondent, has rightly conceded that the third respondent is indeed barred. He, however, sought to make an oral application for condonation and upliftment of the bar. The issue of the bar was brought to the attention of the third respondent well in advance by the applicant’s legal practitioner. The third respondent was also informed that ^b applicant would oppose the upliftment of automatic bar. He had all the time to file a substantive application for the court’s indulgence. He did not do so. This is a grave non-compliance with the Rules. It is the substantive application that triggers the consideration of the condonation. In the absence of a substantive application, there is nothing for me to consider in respect of the ^c condonation: *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S); *Mpofu & Anor v Parks & Wild Life Management Authority & Ors* HB-36-04 and *Agim v Regional Controller, ZRA Beitbridge* HB-79-05. In the circumstances, the third respondent remains barred and cannot be heard.

It is, therefore, ordered that: ^d

1. the first respondent is not barred and is properly before the court.
2. the third respondent’s automatic bar is still operational and he cannot be heard.

Mabhikwa, Hikwa and Nyathi, applicant's legal practitioners

James, Moyo-Majwabu & Nyoni, first respondent's legal practitioners

Dube & Partners, third respondent's legal practitioners

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FUYANA v MOYO 2006 (2) ZLR 332 (S)

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Citation	2006 (2) ZLR 332 (S)
Case No	Judgment No S-54-06
Court	Supreme Court, Harare
Judge	Chidyausiku CJ (in chambers)
Heard	11 October 2006
Judgment	30 November 2006
Counsel	The applicant in person No appearance for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Court — *Supreme Court* — *powers* — *inherent jurisdiction to control c processes and protect itself from abuse* — *vexatious litigant being required to obtain leave for future litigation over disputed subject*

Practice and procedure — *abuse of process* — *penalty* — *applicant barred from litigation without permission from a judge*

Practice and procedure — *application* — *for directions* — *purpose of* — *▷ application not to be used to obtain substantive relief*

Headnote

The applicant, a self-actor, had filed vast amounts of irrelevant material in a series of ill-conceived applications and would-be appeals. In doing so, he had impugned the integrity of all the judges who had handled the case. [£]

In 2000 the applicant applied to a judge of the High Court for an order for directions, seeking the discharge of a provisional order which had already been referred to trial by another judge, although the draft order placed before the court was one for substantive relief (the eviction of the respondent). The application was dismissed. An appeal was filed well out of time, over a year later. The appeal was struck off the roll in 2005 [£] on the grounds that no application for

condonation had been made; until such an application was granted, an appeal itself could not be entertained.

Ten months later, the applicant made an application for condonation. His application for condonation consisted of unwieldy voluminous affidavits, submissions and attached documents, but did not provide the one thing ^g critical to his case, namely the explanation for his failure to file the notice of appeal in the time prescribed by the Rules. The application was inappropriately made because it sought substantive and not procedural relief, and the matter had already been referred to trial. The papers presented to the court gave no clear reason for late filing nor did it provide any argument which could be considered valid grounds for appeal. The ^h

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^a applicant repeatedly filed affidavits without regard to the Rules and furthermore impugned the integrity of the judges handling the case, whether at first instance or on appeal.

Held, that apart from the fact that there was no satisfactory explanation for his failure to file the appeal in time, the original application was one for directions. An application for directions that seeks in its draft order the ^b eviction of the respondent is totally misconceived and should have been dismissed on that basis alone without much ado. Supporting affidavits in an application should contain essential averments in support of the relief claimed. The papers filed in this case bore no resemblance to this requirement.

^c *Held*, further, that the court had inherent jurisdiction to regulate its own processes, which it can use to protect its process from abuse. In the exercise of that jurisdiction, an order would be issued, barring the applicant from instituting any litigation over the subject matter in dispute without first obtaining leave from a judge of the High Court or of the Supreme Court.

Case cited ^d

de Villiers & Anor v McIntyre NO 1921 AD 425

Case information

The applicant in person

^e No appearance for the respondent

Judgment

Before: **CHIDYAUSIKU CJ** (in chambers, in terms of ^r 31 of the Rules of the Supreme Court)

This is a chamber application for the condonation of the late noting of an appeal. Although the applicant does not specifically aver this, I shall assume ^f that the application is made in terms of rule 31 of the Supreme Court Rules ("the Rules").

On 25 July 2005, Sandura JA, sitting with Malaba JA and Ndou AJA, issued the following order:

"WHEREUPON, after reading documents filed of record and hearing ^g counsel,

It is order that:

The matter be struck off the roll with costs."

The record reveals that both parties were present, and the record of Sandura JA, who presided over the matter, indicates that the matter was ^h struck off the roll because the notice of appeal was filed out of time and no

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application for condonation had been made. Because of the multiplicity of ^a cases involving the same parties, it is important to understand that the court was seized with appeal case No. S-236-00, which was an appeal against judgment No. HB-44-00.

Where an appeal is noted out of time, before the matter can be heard by this court, an application for condonation has to be made and such condonation ^b granted before the appeal can be

entertained. A matter that is set down for hearing without condonation being first granted will be struck off the roll, as happened in this case.

On 14 and 18 July 2000, the applicant filed a chamber application for directions before Kamocha J. He handed down judgment dismissing the application on 20 July 2000. The judgment is judgment No. HB-44-00. ^c

Over a year after the handing down of the judgment on 21 August 2001, the applicant filed a notice of appeal against the judgment of Kamocha J. The headnote of that notice of appeal reads as follows:

“Take notice that the applicant hereby appeals against the judgment of the High Court No. HB-44-00, in terms of which the honourable judge ^d dismissed the applicant’s application for discharge of the provisional order in case No. HC-5207-99 with costs on the grounds and reasons detailed below.”

Apart from the fact that the above notice of appeal does not comply with the Rules, in particular ^r 29(a) and (c) in that it does not give the date when the judgment was delivered nor state whether the appeal is against the whole or ^e part of the judgment, and is therefore invalid, it was filed way out of time. The applicant was appealing against the judgment of Kamocha J (No. HB-44-00) which had been handed down on 20 July 2000 and not any of the other judgments involving the same parties of which there are several. Thus the court was seized with an appeal against judgment No. HB-44-00 and no other matter. ^f

The applicant in his submissions to the court alleges that he filed a notice of appeal against this judgment, No. HB-44-00, on 15 August 2000 and that the above notice of appeal of 21 August 2001 was an amendment to the notice of appeal filed on 15 August 2000. The alleged notice of appeal of 15 August 2000 is not on the record. The notice of appeal of 21 August 2001, cited above, is ^g not an amendment but a notice of appeal on its own. However, even if I were to accept that the applicant did file a notice of appeal on 15 August 2000, that notice of appeal would have been out of time. Judgment No. HB-44-00 was handed down on 20 July 2000 and, according to my calculations, the *dies induciae* for noting an appeal expired on 10 August 2000. Thus, the notice of appeal filed on 15 August 2000 was outside the fifteen days prescribed by the ^h

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^a Rules of the Supreme Court. Thus, whichever of the two dates one accepts as the date for the filing of the notice of appeal makes no difference. Both dates were outside the *dies induciae*. Consequently, the striking off of the matter from the roll admits of no doubt. The applicant contends that the matter should not have been struck off the roll and impugns the integrity of the court for striking the matter off the roll. I shall revert to this aspect of the matter later.

^b Ten months after the appeal was struck off the roll, on 17 May 2006, the applicant filed the present application for condonation of the late noting of an appeal. The Rules of this court provide that condonation for the late noting of an appeal can be granted upon the establishment of a good cause.

It is well settled that the essential elements of a good cause are: ^c

- (a) a reasonable explanation for the failure to file the notice of appeal within the prescribed period;
- (b) some prospect of success on the merits; and
- (c) the *bona fides* of the application.

REASONABLE EXPLANATION FOR THE FAILURE TO NOTE ^d THE APPEAL IN TIME

The applicant’s application for condonation in this case consists of unwieldy voluminous affidavits, submissions and attached documents. The voluminous application for condonation does not provide the one thing that is critical to the applicant’s case, namely the explanation for the applicant’s failure to file ^e the notice of appeal in the time prescribed by the Rules. Without such an explanation it is difficult to see how a judge can grant the applicant the indulgence or condonation sought.

The applicant in para 7.4 of the founding affidavit makes the following averment:

^f “ The appellate judge did not appreciate the fact that judgment No. HB-44-00 was uplifted on 3 August 2000; that the original Notice Of Appeal in S-236-00 was filed on 15 August 2000; that the notice of amendment of the grounds of appeal was filed on 3 August 2001 and the fact that the Appeal Number is S-236-00 and not SCA-236-01.

The appellate judge did not appreciate the fact that the main action matter c No. HC-4295-98 and its allied application No. HC-5207-99 were consolidated into one matter and that condensed arguments in both applications were presented on 14 July 2000. Therefore there was no need to apply for leave to appeal or for condonation to appeal out of time, as there was nothing interlocutory about HC-5207-99 and since the Cheda J (as he then was) Orders and judgments must not have been at all, as the respondent had recovered her \$20 384."

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The applicant suggests the matters between the parties had been consolidated. ^A The record shows no order consolidating the cases. Cases do not consolidate on the mere say so of the litigant. This near meaningless averment is the nearest that can be described as an explanation proffered by the applicant for the failure to file the notice of appeal on time. The above averment falls far short of discharging the *onus* on the applicant to provide a reasonable explanation ^B for his failure to comply with the Rules. In my view, the above averment is no explanation at all. If anything, the suggestion in para 7.4 is that *dies induciae* should run from 3 August 2000 because that is when the applicant became aware of the judgment. That contention is untenable and unacceptable.

The applicant has not provided an acceptable reason for his failure to comply with the Rules and on this basis alone the application for condonation must fail. ^C

However, even if I were to accept that the applicant filed his alleged notice of appeal, which is not on the record, within five days of the *dies induciae*, and therefore should be given some latitude, I would still dismiss this application on the basis that it has no prospects of success on the merits.

PROSPECTS OF SUCCESS ON THE MERITS ^D

As I have already stated, the appeal that was before the court and that was struck off the roll was the appeal against judgment No. HB-44-00. In that judgment Kamocha J dismissed a chamber application for directions by the applicant. Judgment No. HB-44-00 is very brief and to the point. The judgment very ably sets out the facts of this case and the reasoning behind the learned ^E judge's conclusion. I can do no better than refer to it extensively. It reads in part as follows:

"For convenience, the parties in this matter will be referred to as Fuyana and Ntombaza.

On 14 October 1998, Ntombaza obtained a provisional order whose terms *inter alia* barred Fuyana from taking transfer of stand No. 11747 Nkulumane ^F from one William Ndlovu who had allegedly sold the same property to Ntombaza using Fuyana as his agent. Ntombaza was also granted rights to re-occupy the house as she had been in occupation before the said house had been damaged by one Jericho Maphosa.

Fuyana filed his notice of opposition but did not anticipate the return date. Exactly a year later, on 14 October 1999, Ntombaza made an *ex parte* ^G application seeking for (*sic*) an order converting the papers in the first application to pleadings and the matter (to be) referred to trial. The parties were allowed to file further pleadings within fourteen days of the order if they so desired.

This application to refer the matter to trial was served on the legal practitioners of Fuyana on 8 October 1999. There seemed to be no ^H

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A opposition from Fuyana's legal practitioners and the application was granted six days after it had been served. To illustrate the confusion that reigned in Fuyana's camp a belated attempt to oppose the application was made by Fuyana himself, not through his lawyers.

Ntombaza asserted that Fuyana's legal practitioners had agreed that the matter be referred to trial. I am inclined to agree with her because if what ^B she asserted was not true Fuyana's legal practitioners would have filed an affidavit denying that they had agreed to the matter being referred to trial with the terms of the provisional order standing.

When the court granted the application it must have been satisfied that the matter was not capable of being resolved on the papers filed of record. It then issued an order which has not been rescinded. The matter has been ^C settled and yet Fuyana still calls upon the court to interfere.

The court had concluded that a robust approach could not be adopted in this particular case to resolve the matter on the papers in the light of the numerous disputes of fact therein. But Fuyana still lodged this application requesting the court to discharge the provisional order in question. He also wanted Ntombaza and all persons claiming through her ^D to be ordered to vacate stand No. 11747 Nkulumane within forty-

eight hours of service on them of the order, failing which the Deputy Sheriff be ordered to evict them and their possessions.

Fuyana is clearly abusing court process and this court should express its displeasure by ordering him to pay punitive costs.

In the result, the application is dismissed with costs on an attorney/client ϵ scale."

It is difficult to see on what possible basis a court of appeal can interfere with the above judgment, more so having regard to the grounds of appeal contained in the notice of appeal. The reasoning and the conclusion of the learned judge, in my view, are flawless and there is no prospect of an appeal ϵ court differing from the learned judge. The notice of appeal filed by the applicant is no more than a series of senseless assertions that the learned judge misdirected himself on this fact or on that point of law. The notice of appeal raises nothing worth serious comment or consideration.

I would also add that Kamocha J was dealing with an application for directions by the applicant. The heading of the application specifically ϵ indicates that the application before the learned judge was one for directions. An application for directions, as the word implies, is an application seeking directions on how to proceed in the main proceedings, usually the trial. Order 23 and r 152 clearly set out the purpose and content of an application for ϵ directions.

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Chidyausiku CJ

The application before Kamocha J, although headed application for directions, ϵ sought to canvass issues between the same persons referred to trial by another judge. The draft order attached to the application for directions sought substantive and not procedural relief.

In my view, an application for directions that seeks in its draft order the eviction of the respondent from the premises is totally misconceived and should have ϵ been dismissed on that basis alone without much ado. The merits of the case involving the agreement of sale which the applicant is harping on *ad nauseum* could only be resolved properly at a trial. The judge in the previous proceedings was quite correct in referring the issues for trial. This was done with the consent of the applicant's legal practitioner and therefore with the consent of the appellant. The learned judge, in my view, was correct in ordering the ϵ matter to go to trial.

It would appear from the record that the trial did not take place because the applicant was in default. Where a default judgment has been granted, the recourse open to an aggrieved party is to apply for rescission of the judgment. It may well be that the applicant applied for rescission of the judgment – that ϵ is not very clear on the record. But whatever the applicant's grievance may have been in respect of those proceedings, they are totally irrelevant to the filing of an appeal against the judgment of Kamocha J.

I am satisfied that the applicant has no prospects of successfully appealing against the judgment of Kamocha J, No. HB-44-00. On that basis alone, even if I were to forego the failure to note an appeal on time, this application must ϵ fail.

Before concluding, I would like to make the following observations –

Voluminous submissions, affidavits and documents relating to the validity or otherwise of an agreement of sale and the issue and status of the agreement of sale, were filed in this application for condonation. These were totally ϵ irrelevant to the issues I need to determine in this case, namely, whether or not Kamocha J was correct in dismissing an application for directions seeking the discharge of a provisional order which had already been referred to trial by another judge.

It is trite that supporting affidavits in an application should contain essential ϵ averments in support of the relief claimed. The papers filed in this case bear no resemblance to the above requirement. For instance, the founding affidavit and its attachments run into some forty pages, yet there is no explanation as to why the notice of appeal was not filed in time. Further, as part of the application a bundle of documents of about seventy pages headed "Evidence" was filed. Another bundle of documents entitled "Supporting Heads of ϵ

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ϵ Argument", consisting of not less than fifty-five pages was also filed. A good part of the so-called "Supplementary Heads of Argument" is devoted to principles of what the applicant called

"Advocacy", "Advocacy A Code of Conduct", "Objections *in limine*". A long list of the cases that were cited and summarised in the supplementary heads of argument had no bearing on the application for condonation of the late noting of an appeal. There was also ^a another bundle of documents filed in this application headed "Civil Appeal". This bundle of documents amounted to some forty pages and consisted of what the applicant called "Opening Speech", "Consolidated Heads" and "Closing Speech". In brief, this application was overloaded with rubbish.

Worse still, after hearing this matter I reserved judgment. The applicant, ^c without the leave of the judge, filed yet another lengthy document, in which he sought to explain why the notice of appeal was not filed on time and to lecture me on how a Chief Justice should discharge his duties and his intention to write a book about this case. I have completely disregarded this document, as it was improperly placed before me. The application stands or falls on the founding affidavit. It is not open to litigants to file affidavits in complete ^d disregard of the Rules.

Apart from this, the applicant has impugned the integrity of virtually all the judges who handled this case. There is absolutely no basis for impugning the integrity of the judges who have handled this case. This case constitutes the most blatant abuse of court process I have ever come across. This kind of ^e abuse of court process is unacceptable.

It is also apparent from the record that the applicant was imprisoned for contempt of court for refusing to obey a court order in respect of proceedings involving the same parties to this application. The inescapable inference is that the applicant has very little regard for court process.

It is quite apparent from the nature of the documents filed in these proceedings ^f that the applicant is conducting himself in this manner at the instance of or with the assistance of some "bush lawyer" with very limited knowledge of the law and the procedures of the courts. Be that as it may, I hold the applicant accountable for this abuse of court process and warn him of the risk of an order of perpetual silence. In the meantime there is need for the court to protect its ^g process from this kind of abuse.

The court has inherent jurisdiction to regulate its own processes, which it can use to protect its process from abuse. See *De Villiers & Anor v McIntyre* NO 1921 AD 425. In the exercise of that jurisdiction, I will therefore issue the ^h following directive:

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Chidyausiku CJ

"That the applicant is barred from commencing any litigation concerning ^a the disputed sale of stand No. 11747 Nkulumane, Bulawayo, without first obtaining the leave of a judge of the High Court or this court."

For the foregoing reasons, the application is dismissed. There will be no order as to costs as none was asked for. ^b

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Citation	2006 (2) ZLR 341 (H)
Case No	Judgment No. HH-127-06
Court	High Court, Harare
Judge	Patel J

Heard	17 January 2006; 19 January 2006
Judgment	30 November 2006
Counsel	<i>C Mhlanga</i> , for the plaintiff <i>E W W Morris</i> , for the defendants
Case Type	Civil trial
Annotations	Link to case annotations

Flynote

c Damages — assessment of — delictual — actio injuriarum — defamation — factors to be taken into account

Delict — actio injuriarum — defamation — defamatory nature of words used — tests to be applied — defences — privilege — article published in newspaper about prominent public figure — when bounds of privilege D may be exceeded

Headnote

The plaintiff was a medical engineer by profession. He had held various posts in the public sector, and was founder chairman of the Gold Mining and Minerals Development Trust. In that position, he had to deal with all sectors of the mining industry, including the Zimbabwe Miners Federation.

[¶] In 2003, the Federation held a meeting at which five of its members were instructed to investigate press reports over alleged corruption on the part of the plaintiff. Minutes were produced of the meeting. The plaintiff considered the minutes to be defamatory and sued the Federation and its principal office bearers, who settled the case out of court. However, the second defendant, a newspaper publisher, published an article [¶] written by the first defendant. The article set out the contents of the minutes, which the first defendant had obtained from the then Minister of Mines, but did not publish the plaintiff's comments. The plaintiff had advised the first defendant to investigate the matter further before publishing excerpts from the minutes. No comments from the Federation [¶] were requested or included. The minutes that were received were unsigned and unconfirmed. The first defendant contacted the person who took the minutes but did not discuss specific details of the minutes.

The plaintiff claimed that the article was defamatory, in that it was selective in terms of its emphasis and coverage of the minutes and in essence [¶] suggested that he was involved in underhand dealings and corruption.

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The latter suggestion was particularly injurious because of his [¶] involvement in the crusade against corruption.

The defendants claimed that the publication was privileged or justified or both.

Held, that in determining whether or not a person has been defamed, the court should adopt a three-stage approach:

- (a) first by, consider whether the words complained of are capable of [¶] bearing the meaning attributed to them, that is, whether the allegedly defamatory meaning is within the ordinary meaning of the words;
- (b) second by, assess whether that is the meaning according to which the words would probably be reasonably understood; and
- (c) thirdly, decide whether the meaning identified is defamatory. [¶]

Held, further, that the plain meaning of the article was that the plaintiff was being investigated for improper or unethical behaviour and that he had committed acts of corruption rendering him unfit

to hold public office. Its overall tenor suggested that he was already under investigation and that the case against him had overtaken mere allegations of corruption. ^D

Held, further, that applying the tests cited, the words, as understood by the ordinary reader, were defamatory of the plaintiff, in that they cast aspersions on his character, lowered him in the estimation of ordinary reasonable persons and, having regard to the diverse public offices he held, exposed him to public ridicule and contempt.

Held, further, that the defence of privilege requires the defendant to establish ^E that he had a duty or interest in publishing the statement and that the persons to whom it was published had a similar duty or right to receive it. Newspapers have a right to keep their readers informed about matters of public interest involving public figures. Even if the elements of privilege are established, the defence is vitiated if the plaintiff shows that the ^F defendant was actuated by malice or that he abused or exceeded the bounds of privilege. Here, the plaintiff's conduct was a matter of public interest and the defendants' newspaper had a duty to report on his activities as a public figure. However, the contents of the article were published recklessly and exceeded the bounds of privilege, in that:

- (a) the article was unbalanced and selective, reproducing only two out ^G of ten resolutions passed at the meeting and did not include any comment from the Federation itself;
- (b) the defendants acted contrary to the clear advice offered by the plaintiff to withhold publication until they had investigated further; and ^H

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- (c) the article's reference to earlier press reports of alleged corruption on the part of the plaintiff was unsubstantiated.

It could thus not be said that the contents of the article were even partially true, let alone completely or substantially true.

Held, further, that in assessing damages, it is necessary to consider a number ^B of factors, including:

- (a) the content and nature of the publication;
- (b) the plaintiff's standing in society;
- (c) the extent of the publication;
- (d) the probable consequences of the defamation; ^C
- (e) the conduct of the defendant;
- (f) the recklessness of the publication;
- (g) comparable awards in other cases; and
- (h) the declining value of money.

In apply those factors, it must be borne in mind that damages are intended ^D as a *solatium* and should not as a rule be punitive. Here, the defendants' conduct was aggravated by their failure to investigate further before publication; by failing to verify the authenticity of the minutes; by failing to publish any retraction or apology; and by persisting with their denial of liability even after the action was instituted.

Cases referred to ^E

Chinamasa v Jongwe Printing & Publishing Co (Pvt) Ltd & Anor 1994 (1) ZLR 133 (H)

Chinengundu v Modus Publications (Pvt) Ltd HH-135-92

Levy v Modus Publications (Pvt) Ltd 2000 (1) ZLR 68 (H)

^F *Madhimba v Zimbabwe Newspapers (1980) Ltd* 1995 (1) ZLR 391 (H)

Mnangagwa v Nyarota & Anor HH-153-04

Moyse & Ors v Mujuru 1998 (2) ZLR 353 (S)

Mugwadi v Nhari & Anor 2001 (1) ZLR 36 (H)

Musakwa v Ruzario 1997 (2) ZLR 533 (H)

Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Anor 1994 (1) ZLR 445 (H) ^G

Tekere v Zimbabwe Newspapers (1980) Ltd & Anor 1986 (1) ZLR 275 (H)

Thomas v Murimba 2000 (1) ZLR 209 (H)

Zvobgo v Modus Publications (Pvt) Ltd 1995 (2) ZLR 96 (H)

Case information

C Mhlanga, for the plaintiff

^H E W W Morris, for the defendants

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Judgment

PATEL J: The plaintiff in this case claims payment in the sum of \$80 million ^A in respect of damages for defamation arising from the publication of an article written by the first defendant in the 27 August 2003 edition of *The Daily News*. The defendants admit the publication of this article but deny that its contents were defamatory of the plaintiff.

THE ISSUES ^B

The issues for determination in this case are as follows:

- (a) whether or not the publication in question was defamatory of the plaintiff;
- (b) whether the publication was privileged and/or justified;
- (c) the amount of damages, if any, to which the plaintiff is entitled. ^C

THE EVIDENCE

Nhlanhla Masuku (plaintiff)

The plaintiff testified that he is a medical engineer by profession and that he is a member of two professional associations based in the United Kingdom. From 1982 to 1989, he was employed by the Ministry of Health as Chief Medical ^D Engineer. He held the post of President of the Zimbabwe National Chamber of Commerce from 1998 to 2000. In 1999, he became the national spokesman for the National Economic Consultative Forum (NECC) and its Anti-Corruption Task-force. He presently holds directorships in two private commercial companies. Additionally, he was Vice-Chairman of the Industrial Development Corporation Board from 1998 to 2005 and became Chairman of the Zimbabwe ^E International Trade Fair in 2005 for a term of three years.

Lastly, he is the founder Chairman of the Gold Mining and Minerals Development Trust (the Trust), having been appointed to that position in 2001. As Chairman of the Trust, he interacts with all stakeholders in the mining sector, including the Zimbabwe Miners Federation (the Federation). The activities of the Trust, ^F relating to sound mining practices, accountability in mineral trading and the curbing of illegal gold dealings, are all matters of public interest. The Trust's mandate also extends to the activities of the Federation which is a relatively new association formed in 2003.

On 22 August 2003, the Federation held a meeting of its members. The minutes of that meeting were produced by consent (as Exhibit 1). The plaintiff stated ^G that paras (4) and (5) of these minutes were defamatory of himself. He consequently sued the Federation and its principal office-bearers who conceded and settled the case in 2005 by agreeing to pay \$5 million as damages.

The minutes were also carried in an article published on 27 August 2003 in an ^H article written by the first defendant. The latter had been advised by the

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^A plaintiff to investigate the matter further before publishing any excerpts from the minutes. The article was produced in evidence without objection.

According to the plaintiff, the defamatory features of the article are contained in the headline, the caption below his photograph and in paras 1 and 6 of the text. The defendants did not give full coverage to the plaintiff's comments and did not invite or incorporate any comments from the Federation itself. The **B** article is selective in terms of its emphasis and coverage of the Federation's minutes. In essence, the article suggests that he was involved in underhand dealings and corruption. The article was particularly injurious to his reputation because of his involvement in the crusade against corruption.

Soon after the article was published, he received several telephone calls from **C** family members, friends and others who held him in high esteem. He was also questioned at social and business gatherings by various people who regarded the article as being slanderous. His response was to tell these people to ignore the article and to inform them that he had taken corrective measures.

In September 2003, he called a routine press conference as part of his duties as Chairman of the Trust. Although he did respond to questions raised relating **D** to the article, the conference was simply one of such regular meetings and did not specifically relate to the article. It was not called to correct the contents of the article. He, together with his co-trustees, had decided to take the legal route rather than the press route immediately after the article was published. The requisite litigation papers were prepared before the conference was held.

E As regards the quantum of the plaintiff's claim for damages, the original amount claimed in November 2003 was \$5 million. He now claims the sum of \$80 million, applying a multiplication ratio of 18 from November 2003 to December 2005. This ratio accords with the rise in the cost of living index tabulated by the Central Statistical Office as well as the devaluation in the **F** exchange rate of the local currency.

Chris Goko (first defendant)

The first defendant qualified as a journalist in 1999. He worked for *The Sunday Mail* from 2001 to 2002 and then for the Zimbabwe Broadcasting Corporation until March 2003. He joined *The Daily News* at that stage and became its Deputy Business Editor in July 2003.

G He testified that he obtained the minutes of the Federation's meeting from the then Minister of Mines, who was present at that meeting. The latter also provided him with various other relevant documents. He then telephoned the plaintiff who told him not to publish anything for the time being.

On the day before the article in question was published, he contacted two **H** individuals who were present at the Federation's meeting, Pride Masamba and

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Zamayi Sithole. The latter was the person who took the minutes of that **A** meeting. He did not discuss specific details of the minutes with these individuals. Nevertheless, he concluded that the minutes were an authentic record of the proceedings of the meeting. In his opinion, the minutes were a matter of public interest, inasmuch as the Trust and the Federation were involved in gold mining activities funded by the Reserve Bank of Zimbabwe. **B**

After he had compiled the article, it was sent to the newspaper's Business Editor who in turn passed it on to the Editor for final approval. The article was then submitted to the Chief Sub-Editor who allocated it to a sub-editor to frame its headline, photograph and caption.

Under cross-examination, the first defendant accepted that the minutes produced before the court were not signed by anyone as being a true record **C** of the Federation's proceedings. He also conceded that the article did not contain any comments from any Federation official and that para 5 of the article, relating to efforts to obtain such comments, did not reflect the correct position.

He further testified that he wrote the article having regard to the factors of **D** timeliness and relevance and the overriding need to publish matter that is newsworthy. In this respect, he did not heed the plaintiff's advice to await further developments on the subject. Nor did he deem it relevant to publish the other matters contained in the minutes which pertained to the Federation but which did not relate to the plaintiff.

According to the first defendant, *The Daily News* had a wide readership at that **E** time and many people would have read the article in question. He did not think that any retraction or correction was necessary because the story that he wrote was authentic.

When questioned by the court, the first defendant admitted that when he spoke to Masamba and Sithole he did not ascertain what the specific ^F allegations against the plaintiff were and merely relied on previously known allegations. However, he was unable to produce any documents before the court to substantiate those earlier allegations. Again, although the minutes and the article make specific reference to other press reports imputing corruption on the part of the plaintiff, the first defendant failed to produce any relevant press reports to that effect. ^F

Samuel Sipepa Nkomo

This witness is employed by the second defendant as its Chief Executive Officer. He testified that *The Daily News* enjoyed its highest circulation immediately before it was closed down on 12 September 2003. At that time, approximately 90 000 to 95 000 copies of the newspaper were being printed and ^H

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^A sold. Comparatively, *The Herald* was printing and circulating *circa* 50 000 copies.

He stated that he was familiar with procedures regulating meetings and that the minutes of a given meeting are usually only signed and dated after being corrected and confirmed by the chairman of the meeting. As a matter of editorial policy, he would rely on unsigned minutes even though they might ^B be uncorrected and unconfirmed. However, he accepted that such unsigned minutes might contain material errors. In any event, whenever the minutes of a meeting were relied upon for the publication of an article, they would be attached to the draft article for scrutiny up the editorial line.

DEFAMATION

^C According to Feltoe *A Guide to the Zimbabwean Law of Delict* 2 ed at p 33:

"Defamation causes harm to reputation, that is, the estimation in which a person is held by others (his good name and standing). A defamatory statement is one which is published and injures the person to whom it refers by lowering him in the estimation of reasonable, ordinary persons ^D generally; it diminishes his esteem or standing in the eyes of ordinary members of the general public. It may also cause the target of the statement to be shunned or avoided or may expose him to hatred, ridicule or contempt. Finally, a person can be defamed by casting aspersions on his character, trade, business, profession or office."

The approach to be applied in determining whether or not a person has been ^E defamed is a three-pronged one, as enunciated by Bartlett J in *Chinamasa v Jongwe Printing and Publishing Co (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H) at 149, and in *Madhimba v Zimbabwe Newspapers (1980) Ltd* 1995 (1) ZLR 391 (H) at 400. This approach was affirmed by the Supreme Court in *Moyse & Ors v Mujuru* 1998 (2) ZLR 353 (S) at 356, as follows:

"The three stages of the test are that a court must: ^F

- (a) first, consider whether the words as specified are capable of bearing the meaning attributed to them, that is, whether the defamatory meaning alleged is within the ordinary meaning of the words;
- (b) secondly, assess whether that is the meaning according to which the words would probably be reasonably understood; and ^G
- (c) thirdly, decide whether the meaning identified is defamatory."

The article published in *casu* has the headline "Miners' Federation probes Masuku" and a photograph of the plaintiff with the caption "NHLANHLA MASUKU ... under probe over misconduct allegations". The relevant passages in the text of the article read as follows: "The Zimbabwe Miners' Federation ^H (ZMF) has assembled a five-man team to probe allegations of misconduct

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against Gold Mining and Minerals Development Trust (GMMDT) Chairman ^A Nhlanhla Masuku, The Business Daily has established ... According to the minutes of last Friday's meeting, the organisation has mandated 'following continued Press reports over alleged corruption', five of its senior members 'to probe Masuku and, if found fit, to demand his urgent resignation'. The five-man team is supposed to 'compile areas of misconduct to include use of Masuku's consultancy firm USK

Consultancy'. The organisation also said it was concerned by the delay in funding several gold mining projects."

The plain meaning of the article, taken in its entirety, is that the plaintiff is being probed or investigated for improper or unethical behaviour and that he has committed acts of misconduct involving corruption rendering him unfit to hold public office which he should be required to relinquish urgently. c Although the article refers to alleged misconduct, its overall tenor suggests that the applicant is already under probe and that the case against him has overtaken mere allegations of corruption.

Applying the established test cited above, I am satisfied that the words complained of, as understood by the ordinary reader, are defamatory of the plaintiff inasmuch as they cast aspersions on his character, lower him in the estimation of ordinary reasonable persons and, having regard to the diverse public offices that he holds, expose him to public ridicule and contempt.

PRIVILEGE AND/OR JUSTIFICATION

The defence of privilege entails having to establish that the defendant had a duty or interest in publishing the impugned statement and that the person or persons to whom it was published had a similar duty or interest to receive it. It is trite that newspapers have a right to keep their readers informed about matters of public interest involving public figures. The more prominent the personage, the more the public has an interest in his affairs and moral probity. However, even if the elements of privilege are established, the defence is vitiated if it is shown that in making the statement the defendant was actuated by malice or that he abused or exceeded the bounds of privilege. See in these respects *Musakwa v Ruzario* 1997 (2) ZLR 533 (H) at 535-537; *Mugwadi v Nhari & Anor* 2001 (1) ZLR 36 (H) at 41-46.

The burden of proving the requisites of privilege lies on the defendant, while the onus in establishing malice or abuse of privilege shifts to the plaintiff to prove *animus injuriandi*. He can do this by showing that the defendant acted *mala fide*, not only by proving actual malice, but by showing that the defendant was actuated by any indirect or improper motive or that he stated what he did not know to be true, reckless as to whether it was true or false. The evidence of *animus injuriandi* must be affirmative and cogent. See *Mugwadi's case supra* at 42 & 46. H

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A *In casu*, it is indisputable that the conduct of the plaintiff, as Chairman of the Trust, was a matter of public interest and that the defendants' newspaper had a duty to report on his activities as a public figure. However, the contents of the offending article were published recklessly and, in my view, exceeded the bounds of privilege for the following reasons. Firstly, the article is unbalanced and selective, in that it only reproduced two out of the ten resolutions contained in the Federation's minutes and did not include any comment from the Federation itself. Secondly, the defendants acted contrary to the clear advice proffered by the plaintiff to withhold publication of the article until they had investigated the matter further. Thirdly, the article's reference to prior press reports of alleged corruption on the part of the plaintiff was, on the evidence before the court, unsubstantiated and patently unfounded. In publishing the article precipitately and inaccurately, as appears from the first defendant's own testimony, the defendants were motivated by the drive to sensationalise their report in order to render it newsworthy.

Ultimately, the defendants were reckless in relying on the Federation's minutes for several compelling reasons. As was eventually admitted by the first defendant, the minutes were received from the then Minister of Mines and not from the Federation itself. More significantly, the minutes were unsigned and unconfirmed but, nonetheless, the defendants did not attempt to verify the authenticity of the minutes, despite the possibility that they might have been false or incorrect.

The defence of justification requires the defendant to establish not only that the offending statement was true but also that the publication of such true defamatory material was for the public benefit. See *Feltoe op cit* at p 37, where the learned author elaborates as follows:

"The statement does not have to be completely accurate in every single particular detail. It is sufficient that it was substantially true in its major particulars that form the basis of the complaint of defamation.

The publication of that statement in that manner at that time must be of some benefit to the public. Thus, for instance, this requirement would be satisfied if the statement is about the integrity or competence of a

public official.”

As I have already stated, the defendants in this case published the offending ^g article without verifying the authenticity or correctness of the minutes that they utilised to devise their report. Nothing was placed in evidence to establish that the document relied upon was indeed a copy of the minutes of the Federation’s meeting in question. More importantly, there was nothing before the court to show, as imputed in the article, that the plaintiff was in fact ^h being probed by the Federation and that he had conducted himself, either

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allegedly or actually, in an unethical and corrupt manner such as to warrant ^a his immediate resignation from public office. For these reasons, it cannot be said that the contents of the article were even partially true, let alone completely or substantially true.

As for public benefit, it is unquestionably clear that the public have an interest in being informed about the conduct and moral probity of any public figure. ^b However, it is doubtful that statements which are distorted and disproportionate and which therefore serve to beguile rather than enlighten the public, as was the case *in casu*, can be said to be for the public benefit.

It follows from all of the foregoing that the defences of privilege and justification, on the facts before me, cannot be availed to the defendants and ^c must accordingly fail in this case.

DAMAGES

In assessing the *quantum* of damages in a defamation case, it is necessary to consider a variety of factors. As expounded in the cases – for instance, in *Tekere v Zimbabwe Newspapers (1980) Ltd & Anor* 1986 (1) ZLR 275 (H) at 289, *Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Anor* 1994 (1) ZLR 445 (H) ^d at 503, *Levy v Modus Publications (Pvt) Ltd* 2000 (1) ZLR 68 (H) at 70-71 & 73, and *Mnangagwa v Nyarota & Anor* HH-153-04 — these include:

- (a) the content and nature of the defamatory publication;
- (b) the plaintiff’s standing in society; ^e
- (c) the extent of the publication;
- (d) the probable consequences of the defamation;
- (e) the conduct of the defendant;
- (f) the recklessness of the publication;
- (g) comparable awards of damages in other defamation suits; and ^f
- (h) the declining value of money.

In applying the above factors, it must be borne in mind that damages for defamation are intended *qua solatium* to compensate the plaintiff for sentimental loss and should not as a rule be punitive. See *Shamuyarira’s case supra*, at 502-503; *Levy’s case, supra*, at 73; *Thomas v Murimba* 2000 (1) ZLR 209 (H) at 217. ^g

As for comparable awards in other defamation cases in the recent past, the following awards are instructive:

- *Chinengundu v Modus Publications (Pvt) Ltd* HH-135-92 — \$23 000 in 1992 ^h

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- ^a *Chinamasa’s case supra* – \$30 000 in 1994
- *Zvobgo v Modus Publications (Pvt) Ltd* 1995 (2) ZLR 96 (H) — \$20 000 in 1995
- *Mnangagwa’s case supra* – \$5 000 000 in June 2004.

As appears from the plaintiff’s uncontroverted testimony, he is a man who has ^b over the years held several very senior positions both in private enterprise and in the public sphere. Until the publication of the offending article by the defendants, the plaintiff had striven to sustain his reputation and was generally held in high esteem. The nature and content of the article were highly defamatory of the plaintiff, particularly in his capacity as Chairman of the Trust and as national

spokesman for the NECC and its Anti-Corruption Task-force. ^c Moreover, as testified by the second defendant himself, the article was carried in a newspaper which at that time enjoyed wide circulation and would therefore have been extensively disseminated.

As for the defendants' conduct *vis-à-vis* the article, it is aggravated by a number of pertinent factors. At the outset, they did not heed the plaintiff's ^d sage advice to investigate the matter further before publishing the article. They compounded this by not verifying the authenticity and correctness of the minutes that they relied upon to produce the article. After having published the article, they declined to publish any retraction or apology despite the plaintiff's specific demand to that effect. Last but not least, following the institution of the plaintiff's action herein, they persisted with ^e their denial of liability.

Having regard to the cost of living index and the devaluation in the official exchange rate of the local currency, the award in *Mnangagwa's* case *supra*, would as at the time of the trial of this case have equated to *circa* \$80 million. This accords with the amended amount claimed by the plaintiff.

^f Taking all of the above factors into account as well as the rapidly declining value of money, I am satisfied that an award of \$80 million as damages due to the plaintiff is amply justified *in casu*.

ORDER

In the result, it is ordered that:

^g Judgment be and is hereby granted in favour of the plaintiff as against the defendants jointly and severally, the one paying the other to be absolved, for:

- (i) payment of the sum of \$80 000 (revalued);
- (ii) interest thereon *a tempore morae* from the date of judgment to the date of ^h payment in full; and

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- (iii) costs of suit. ^a

Chihambakwe, Mutizwa & Partners, plaintiff's legal practitioners

Gill, Godlonton & Gerrans, defendants' legal practitioners ^b

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/1. DOBROCK HOLDINGS (PVT) LTD v TURNER AND SONS (PVT) LTD & ORS 2. Turner and Sons (Pvt) Ltd v Zambezi Paddle Steamer (Pvt) Ltd & Anor 2006 (2) ZLR 353 (H)

1. DOBROCK HOLDINGS (PVT) LTD v TURNER AND SONS (PVT) LTD & ORS 2. Turner and Sons (Pvt) Ltd v Zambezi Paddle Steamer (Pvt) Ltd & Anor 2006 (2) ZLR 353 (H)

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Citation	2006 (2) ZLR 353 (H)
Case No	HH-128-06
Court	High Court, Harare
Judge	Kudya J
Heard	13 July 2006; 1 November 2006

Judgment	6 December 2006
Counsel	<i>A P de Bourbon SC</i> , for the applicant in case and for the respondents in case No. 2 <i>Mrs J B Wood</i> , for the respondents in case No. 1 and the applicant in case No. 2
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Company — liquidation — provisional liquidation — application for — ^D disharmony between shareholders of small private company — deadlock reached — provisional liquidation just and equitable

Contract — illegality — agreement between parties involving a contravention of Exchange Control Regulations — contract unenforceable — court cannot be a party to such illegality by ordering ^E specific performance

Contract — performance — mora — no time fixed for performance — mora ex persona — demand by creditor necessary to place debtor in mora

Legal practitioner — conduct and ethics — conflict of interest — counsel for one party having previously been arbitrator in matter between ^F parties — no information acquired which could be used to prejudice the other party — proper for counsel to act

Practice and procedure — recusal — application for — recusal of legal practitioner — opposing legal practitioner previously acting as arbitrator between the parties in an unrelated matter — no prejudice to applicant — application for recusal dismissed

Headnote

^G In an application to compel the recusal of the opposing legal practitioner, who had previously acted as arbitrator in an unrelated matter between the parties, the applicant seeking the recusal was unable to show that the legal practitioner had acquired information which could be used to its ^H detriment so as to result in real mischief and prejudice to the applicant.\\

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The application for the recusal of the legal practitioner was therefore ^A refused.

The general rule is that when a contract does not fix a time for performance, there can be no *mora ex re*, only *mora ex persona*, so a demand by the creditor is necessary in order to place the debtor *in mora*.

Where one of the parties to an agreement, being a resident of Zimbabwe and without authority, undertook to make a payment in sterling outside ^B Zimbabwe, and neither of the two exceptions set out in s 11(2) of the Exchange Control Regulations 1996 (SI 109 of 1996) applied, such an agreement contravened s 11(1) of the regulations. On the facts, in making payment outside the country, exact, and not substantial performance, was contemplated by parties who were residents of Zimbabwe. The agreement was, therefore, illegal, invalid and unenforceable and the ^C court could not allow itself to be an accomplice to such an illegality by enforcing the contract as sought by the applicant (*dicta* in *Hattingh & Ors v van Kleeck* 1997 (2) ZLR 240 (S) distinguished).

Where it was established on the papers that the two shareholders in a small domestic private company had had a disharmonious relationship and were in a state of deadlock concerning the company, it was just and ^D equitable that the company be placed in provisional liquidation.

Cases cited

Abreu v Cammpos 1975 (1) RLR 198 (A); 1975 (3) SA 73 (RA) ^E

Adler v Elliot 1988 (2) ZLR 283 (S)

Asharia v Patel & Ors 1991 (2) ZLR 276 (S)

Barker v African Homesteads Touring & Safaris (Pvt) Ltd & Anor 2003 (2) ZLR 6 (S).

Benmac Manufacturing Co (Pvt) Ltd v Angelique Enterprises (Pvt) Ltd 1988 (2) ZLR 52 (H) ^F
Broderick Properties v Rood 1962 (4) SA 447 (T)
Concrete Products Co (Pty) Ltd v Natal Leather Industries (Pty) Ltd 1946 NPD 377
Ebrahimi v Westbourne Galleries [1972] 2 All ER 492 (HL)
Greebe & Anor v Famaps Invstms (Pvt) Ltd & Anor 2004 (1) ZLR 522 (H) ^G
Hattingh & Ors v van Kleek 1997 (2) ZLR 240 (S)
International Who's Who Ltd v Bernstein Clothing (Pvt) Ltd S-28-99
Pertsilis v Calcaterra & Anor 1999 (1) ZLR 70 (H)
Sultan v Freyfem Entprs (Pvt) Ltd & Anor 2000 (1) ZLR 188 (H)
van Diggelen v de Bruin & Anor 1954 (1) SA 188 (SWA)
Young v van Rensburg 1991 (2) ZLR 149 (S) ^H

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Legislation considered ^A

Exchange Control Regulations, 1996 (SI 109 of 1996), ss 11(1) and (2)

Case information

A P de Bourbon SC, for the applicant in case and for the respondents in case No. 2

Mrs J B Wood, for the respondents in case No. 1 and the applicant in case No. 2

Judgment

^B **KUDYA J:** An order for the consolidation of these two matters was granted by Uchena J, by consent with no order as to costs on 2 June 2006 for hearing before me on 7 June 2006 in case No. 3157/06. The first application, case No. HC 5186/05, concerns an order for specific performance while the second one, ^C case No. 5264/05, seeks an order for the provisional liquidation of Zambezi Paddle Steamer (Pvt) Ltd (hereinafter called ZPS).

On 7 June 2006, at the request of the parties, I postponed the hearing to 13 July 2006. When the hearing resumed *Mrs Wood* for Turner and Sons applied for the forced recusal of Mr *de Bourbon* for Dobrocks (Pvt) Ltd on the basis that he had been an arbitrator between these parties in 1994. She referred to ^D *Pertsilis v Calaterra & Anor* 1999 (1) ZLR 70 (H) as authority for the proposition that the legal practitioner who acted for a former client is precluded from representing a different client in circumstances where a conflict of interest is likely to arise between the former and present client. Smith J set out the basis of the rule at 74C as being that:

^E "A legal practitioner who represents 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 interest."

He proceeded to survey American, English, South Africa and Zimbabwean decided cases on the point at pp 74C-77F. While he held that neither a partner nor his employee could represent an opponent of a former client in order to ^F fulfill the adage that justice must not only be done but that it must manifestly and undoubtedly be seen to be done, he nevertheless permitted a partner to represent the opponent on the basis that there was no allegation that the other partner had acquired information from the papers in the possession of his firm which could be used to the former client's disadvantage.

^G *Mrs Wood* contended that justice will not be seen to be done if Mr *de Bourbon* was allowed to represent Dobrock especially on the liquidation case where Turner and Sons allege a deadlock has manifested itself between the joint shareholders, a fact found by Mr *de Bourbon* as arbitrator to exist in his 25 June 1994 ruling. She further foresaw a need to call Mr *de Bourbon* on the ^H deadlock issue in the liquidation case.

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Mr *de Bourbon* countered by contending that he did not represent either ^A Dobrock or Turner and Sons but acted in a quasi-judicial capacity. He knew of no law which debarred him from representing either party as long as he had not possessed confidential information which could be used to the detriment of his client's adversary. He referred to *Benmac Manufacturing (Pvt) Ltd v Angelique Enterprises (Pvt) Ltd* 1988 (2) ZLR 52 (H). In that case, ^B Mr *de Bourbon* accepted a general retainer from Angelique Enterprises in a matter in which that company was involved in a dispute with Albco. He was at that time already seized with a retainer for Benmac Manufacturing in its contest with Angelique Enterprises, *supra*. He had accepted the retainer in the matter against Albco after assurance from his instructing attorney that there would be no conflict of interest. It was accepted in that case by that attorney ^C that he had not come into contact with any confidential information which would prejudice Angelique Enterprises in its contest with Benmac. The Law Society and two other counsel had absolved him of any impropriety but the managing director of Angelique Enterprises, Mr Holland was not satisfied with their findings and advice.

Reynolds J held that Angelique Enterprises had not shown that ^D Mr *de Bourbon* had in fact become acquainted with information that could be used to its detriment which would result in real mischief and real prejudice if he continued to act for Benmac Manufacturing. He did express his reservation on a legal practitioner acting for and against his client in the same or different matters. ^E

Mr *de Bourbon* submitted that he had not acquired any information that he could possibly utilise to the prejudice of Turner and Sons and that his impartiality in 1994 had not been impugned by any of the parties.

I went through the arbitral award. It concerned and dealt with the share of each joint shareholder in the extra costs, which were above the original cost of construction of the large commercial houseboat which ZPS was to own. ^F Turner and Sons was not able to show what information Mr *de Bourbon* accessed which could prejudice its present defence and claim. If anything, I was satisfied that the arbitral award stands on its own and there would be no need to call the arbitrator to testify on it. I accordingly dismissed the application for the forced withdrawal of Dobrock's counsel. ^G

I also postponed the hearing *sine die* and granted by consent authority to Turner and Sons to file a further affidavit in response to Dobrock's supplementary affidavit. I further reserved the question of costs in the provisional liquidation claim to which these additional affidavits pertained. ^H

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^A I eventually, set down the matter for hearing on 1 November 2006. I directed that the parties argue the specific performance case first and thereafter proceed to argue the liquidation case.

On 12 October 2005, Dobrock filed the court application for specific performance against Turner and Sons and two others. It sought the following order that: ^B

1. the respondents jointly as well as severally, the one paying the other to be absolved shall forthwith undertake all that is necessary and required, including making all payments and completion and signing all documents required in order to procure transfer without delay by the first respondent to the applicant of the first respondent's entire shareholding in Zambezi Paddle Steamer (Pvt) Ltd. ^C
2. immediately upon registration of transfer in the share register of ZPS, the applicant shall pay to the first respondent the balance of the purchase price for the said shares such balance being the sum of \$138 million.
3. the respondents jointly as well as severally, the one paying the other to be absolved, shall pay the costs of this application on the scale of legal ^D practitioner and own client.

The application was served on the three respondents on 13 October 2005 (see Peter Dobson's opposing affidavit of 9 November 2005 for which this averment was accepted by Anthony Turner on 2 December 2005). The three respondents filed their opposition papers on 27 October 2005 and prayed for the dismissal of the applicant's case with costs on the higher scale and made ^E reference to the liquidation claim, case No. HC 5264/2005.

Case No. 5264/05 is a court application brought on 17 October 2005 by Turner and Sons (Pvt) Ltd against ZPS and Dobrock. It prayed for the winding up of ZPS and that a liquidator be appointed in the following terms:

1. that the first respondent, Zimbabwe Paddle Steamers (Pvt) Ltd, be ^F provisionally wound up pending the granting of an order in terms of para 3 hereof or the discharge of this order.
2. that Mrs Theresa Grimmel of KPMG Chartered Accountants, Mutual Gardens, 100 The Chase, Emerald Hill, Harare be appointed as provisional liquidator of the first respondent company with the powers set out in s ^G 221 of the Act.
3. any interested party appear before this court sitting at Harare on (a date sixty days from the date of the order) to show cause why an order should not be made placing first respondent's company in liquidation and order ^H that the costs of these proceedings all be costs of the liquidation.

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4. that this order shall be published once in the *Government Gazette* and ^A once in *The Herald* newspaper. Publication shall be in the short form annexed to this order.
5. any person intending to oppose or support the application on the return day of this order shall:
 - 5.1. Give due notice to the applicant at *Messrs Byron Venturas & ^B Partners*, 2nd Floor Tanganyika House, corner Third Street/Kwame Nkrumah Avenue, Harare.
 - 5.2. Serve on the applicant at the address given above a copy of any affidavit, which he files with the Registrar of the High Court.

The application for provisional liquidation was served on the respondents on 17 October 2005, who entered opposition on 31 October 2005 and filed on that ^C day their opposing affidavit by facsimile. The actual opposing affidavit was filed on 9 November 2005.

These two applications were consolidated on the bases that the principal parties were the same and that the fundamental issue in each matter related to the ownership and management control of ZPS.
^D

The pleadings in these consolidated matters are voluminous. The founding, opposing, answering and supplementary affidavits are reinforced by an assortment of attachments which consists of the memorandum of association of ZPS, electronic mail between the parties and other documents raised by various people who worked for the parties in various capacities. I have read all these documents. It is apparent from these documents that there are areas ^E in which the parties agree and others where they are at variance.

It is appropriate that I first deal with the facts as I have determined them to be from the wealth of information that is set out in the pleadings in both these cases.

The preliminary details on the formation of ZPS on 3 April 1989 are set out in ^F detail by Anthony Turner (Anthony) in his founding affidavit in the liquidation matter, case No. HC 5264/05 (Case No. 2). Those details were admitted to by Peter Jameson Dobson (Peter) in his opposing affidavit in that case.

Turner and Sons (Pvt) Ltd (T & S) agreed with Dobrock in 1988 on a joint venture to construct and thereafter operate a "Mississippi River Boat" for commercial use on Lake Kariba. The concept of the "Southern Belle" was ^G created by T & S who approached Dobrock. Dobrock agreed to become its joint partner in the venture and to provide working capital and investment in the project. ZPS was incorporated as the special purpose vehicle through which the large commercial houseboat MV Southern Belle would be owned and operated. ^H

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^A ZPS was incorporated in terms of the Companies Act [*Chapter 24:03*] with an issued share capital of \$30 000 divided into 30 000 shares of \$1.00 each fully paid up. Each of the two joint partners subscribed to 15 000 shares of \$1.00 each in ZPS.

The joint shareholders agreed that T & S would first build a model of the craft and thereafter carry out the necessary construction work and interior design ^B of the vessel at a contracted price. Dobrock would source both local and foreign raw materials for this construction. The total costs of both these operations would be the total cost of the vessel and would be met equally by the joint shareholders. The agreement was reduced to writing and signed on 31 May 1991.

c The arbitral award of 15 June 1994 indicated that the vessel was completed in 1994. The original construction price was set at \$5 950 000. The issue before the arbitrator centred on the amount by which the original contract price increased, which issue he resolved.

ZPS was run for 18 months from the completion of the vessel in 1994 by T & S Dobrock thereafter took over the management control of ZPS and d appointed a managing director, Adamson, to run it. It was common cause that from 2000 the tourism industry went into decline and this affected the profitability of the MV Southern Belle Operations of ZPS.

There is evidence, in the form of electronic mail exchanged between Peter and Anthony, the principal shareholders in Dobrock and T & S respectively, e between 19 January 2003 and 7 April 2004 that the joint shareholders were prepared to sell their respective shareholdings in ZPS to the right suitor, if one came along. On 4 May 2004, the ZPS managing director presented a report which highlighted the difficult circumstances the commercial houseboat operations were in. It required urgent maintenance and refurbishment to attain f its former glittering glory.

On 6 June 2004, Anthony indicated his decision to sell his shares in the commercial houseboat to Peter. This was a clear pointer to his unwillingness to inject funds for maintenance and refurbishment of the houseboat. On 18 June 2004, Peter indicated his willingness to inject \$250 million, for this purpose, provided his shareholding in ZPS increased by 10 per cent while that g of Athony was reduced by the same percentage. He suggested that the houseboat was valued at approximately \$3.5 billion. He followed up this by another e-mail of 25 June 2004. He received a response on that same day (contained in an e-mail wrongly dated as 6 June 2004) from Anthony in which he offered him his shareholding in ZPS for the sum of \$250 million. Peter duly h accepted the offer. He came to Harare and during the period 28 June to 14 July

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2004 discussed with Anthony on the terms of payment of Anthony's entire a shareholding.

He agreed to procure payment where and when Anthony wanted. The purchase price was agreed at \$250 million. It was to be paid by Peter into the account of Anthony's daughter, Jenny, in the United Kingdom, the bank account details of which he received. The following day after the terms of b payment had been agreed, Anthony requested part payment of the purchase price in local currency. Peter alleged that he made out cheque payments to Chitekeshe of \$115 million and to Vretto of \$25 million, as part payment, a total of \$140 million which Anthony used to buy a pick-up truck. This averment was not disputed by Anthony, yet he maintained in his other affidavits that he was paid \$138 million and \$112 million remained outstanding. Peter in his prayer c and in Mr *de Bourbon's* submissions on behalf of Peter's company, accepted that the outstanding purchase price was \$112 million. No cheques or proof of payment in the sum of \$140 million was produced. I am therefore, prepared to hold that Peter paid \$138 million and had an outstanding balance of \$112 million.

Anthony averred in his opposing affidavit that he required £12 000 to import d a new engine for the craft that he was building, known as the "Zambezi Trader". This craft would not be in competition with the houseboat at all and he was building it for his own account with the moral support and blessing of Peter. Peter agreed to pay this amount into his daughter's bank account in the United Kingdom. He repeated this allegation in paras 31 and 32 of his founding e affidavit in case No. HC 5264/05. This was to be in lieu of the balance of the purchase price of \$112 million. In case No. 5264/05, in paras 26 and 27 of his opposing affidavit Peter did not respond to these averments in so far as they refer to the alleged mode of payment in foreign currency.

That payment was to be in foreign currency is clear from Peter's own founding f affidavit. In para 18 he averred that even when he met Anthony by chance at the Borrowdale Race Course in November 2004, he reassured him that notwithstanding the fall in the value of the Zimbabwean dollar against the pound sterling, the amount outstanding as the purchase price remained £12 000, being the amount in pounds in July 2004.

The two gentlemen agreed that the accountant and company secretary of ZPS, g Paul Turner, (Paul) a partner in Ernst and Young Chartered Accountants, would effect the share transfer and receive Anthony's letter of resignation as a director therein.

There was a delay in the transfer of the shares which was occasioned by Paul's attempts to structure a tax avoidance scheme for the benefit and at the h

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A insistence of Anthony. I make this finding based on Anthony's deliberate failure to respond to Paul's affidavit, which was filed in support of Peter's founding affidavit. It was agreed that on 3 August 2004 and 21 August 2004 Peter wrote to Anthony enquiring whether or not he had signed the necessary transfer documents and resigned as a director of ZPS, the two factors which would trigger the payment of the balance of the purchase price by Peter. It also appears that even on 5 November 2004, a date disputed by Anthony who put it as being sometime in September 2004, when the two met at Borrowdale Race Course. Anthony intimated that he had been too busy to visit Paul. The parties reaffirmed that despite an adverse movement of the Zimbabwe dollar since July 2004, the balance of the purchase price would be paid into Anthony's daughter's account in the United Kingdom at the exchange rate agreed in July 2004.

On 17 January 2005, Anthony proceeded to appoint Peter Drummond and Martin King as directors of Turner & Sons, in his stead, who were charged with the responsibility of overseeing Turner & Sons's interests in the Southern Belle. A flurry of e-mails followed which attempted to resolve the issue of the sale of Anthony's shares in the ZPS, who was claiming that the failure by Peter to pay the balance of the purchase price timeously amounted to repudiation of the contract. He therefore regarded himself released from the contract.

The negotiations by the parties culminated in a letter of 23 August 2004 by Turner & Sons's erstwhile legal practitioners to Dobrocks legal practitioners which set out the history of their association. In that letter, T & S indicated that it would seek an order to wind up the company in terms of s 206(g) of the Companies Act, *supra*. Dobrock held the firm belief that it had purchased Turner & Sons shareholding and was therefore the sole shareholder in ZPS. These disagreements resulted in the two applications for specific performance and liquidation that are now before me.

The first issue for determination is whether or not a binding contract of sale was reached between Dobrock and Turner & Sons.

It is, I believe, common cause that an agreement of sale was entered into. In its opposing affidavit, in paragraph 17, Turner & Sons acknowledge that the parties had a loose gentlemen's agreement. Anthony concludes that paragraph 6 by stating that "I believe with respect that the only explanation that is reasonable in the circumstances is that applicant repudiated the contract". Paragraph 49(iii) in case No. HC 5264/05 by Turner & Sons is to the same effect. Turner & Sons's defence was in the main predicated on repudiation by conduct of the contract that was executed between the parties. Indeed, Mrs Wood, for Turner & Sons, in para 2 of her written heads of argument wrote:

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"It is apparent from the applicant's own case that the agreement in question A was very loose even if it was binding between the parties."

Counsel concentrated their submissions on the question whether time was of the essence in the performance by Dobrock of the term relating to payment of the outstanding purchase price. It was on the assumption that it was of the essence that Turner & Sons alleged repudiation. The onus in my view, lies on Turner & Sons to show that time was of the essence and that the failure by Dobrock to act timeously entitled it to rescind the contract.

Turner & Sons blamed Dobrock for the delay in paying the balance of the purchase price. The facts as I find them do not bear out the correctness of Turner & Sons's view. Paul indicated in his unchallenged affidavit that the tax avoidance scheme was initiated at the instance of Anthony, and was for Turner & Sons's benefit. My view is that at that stage, Paul was working as an agent of Turner & Sons. It became, in my finding, the duty of T & S to impress on him to act with speed if time was of the essence to it. It is clear to me that Anthony understood and appreciated that the balance of the purchase price would not be paid out until the share transfer had been effected by Paul, until Anthony had resigned as a director of ZPS and until Anthony had obtained a capital gains clearance certificate from the Zimbabwe Revenue Authority (ZIMRA).

The delay cannot therefore, be attributed to Dobrock. Peter, after all was desirous that transfer be effected with speed as shown by his enquiries of 4 August and 21 August 2004 which Anthony did not acknowledge. Anthony never did challenge the averment that when they met at Borrowdale race course he indicated that he was responsible for the delay for he was too busy to make a follow

up with Paul. Paul after all was acting, as regards the tax avoidance scheme only, as an agent of Anthony. It is therefore my finding on the papers that it was in fact Anthony who was responsible for the delay. He could not, therefore, lawfully repudiate the contract by projecting his own ^F inaction onto Dobrock.

Mrs Wood contended with reference to *Concrete Products Co (Pty) Ltd v Natal Leather Industries* 1946 NP 377 at 380 and *Broderick Properties Ltd v Rood* 1962 (4) SA 447 (T) that the mere fact that the agreement did not provide a particular date of performance did not mean that time was not of the essence. ^G She submitted that to Peter's knowledge Anthony had to purchase an engine for another boat that he was building for £12 000 immediately, that is at the time that they concluded the agreement. In her view though not spelt out in the oral agreement, the nature of that agreement and the purpose to which Anthony wanted to utilise the funds were inherently indicative that both parties contemplated that payment had to be speedily made. Speed payment was ^H

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^A inherent in the agreement itself. The proposition, in my view, conforms with the examples that were highlighted in *Broderick's* case *supra* concerning the purchase of theatre tickets and repairs of a motor vehicle at a garage which are required for use within a set time frame.

The appreciation that I attribute to Anthony of the conditions that had to be fulfilled before payment was made, in my view, removes his case from one ^B relating to *mora ex re* (time set out in the contract) to one of *mora ex persona*, which requires demand before the time limits for performance are reached.

I respectfully associate myself with the statement of law that was propounded by Gubbay CJ in *Asharia v Patel & Ors* 1991 (2) ZLR 276 at 279G-280C. He stated thus:

^C "The general applicable rule is that where time for performance has not been agreed upon by the parties, performance is due immediately on conclusion of their contract or as soon as is reasonably possible in the circumstances. But the debtor does not fall into *mora ipso facto* if he fails to perform forthwith or within a reasonable time. He must know that he has to perform. This form of *mora*, known as *mora ex persona*, only arises if, after a ^D demand has been made calling upon the debtor to perform by a specified date, he is still in default. The demand, or *interpellatio*, may be made either judicially by means of a summons or extra-judicially by means of a letter of demand or even orally; and to be valid it must allow the debtor a reasonable opportunity to perform by stipulating a period of performance which is not unreasonable if unreasonable, the demand is ineffective.

^E Where a debtor has fallen into the *mora ex persona* after demand, the creditor can acquire a right to cancel the contract by serving notice of rescission in which a second reasonable time limit is stipulated, making time of the essence. Both demand and notice of rescission are necessary in order to allow for cancellation for non-performance. The two may be, and commonly are, contained in the same notice. Such notice will then ^F fulfil a double function. It will fix a time for performance after which the debtor will be *in mora*, and create a right in the creditor to rescind the contract on account of the *mora*."

In the present case, payment of the purchase price was not due immediately on conclusion of the contract. It was due as soon thereafter as was reasonably possible in the circumstances. The circumstances related to the transfer of ^G Turner & Sons's shareholding by Paul, receipt by him of Anthony's resignation letter and of a clearance certificate from ZIMRA. It was within Anthony's power to expedite these matters. Indeed that it was not immediate was clearly demonstrated by the use put by Anthony of the part payment which was made ^H of \$138 million. He bought a pick up vehicle. He also was duty bound to place

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Peter in *mora* if he believed that a delay had been occasioned in paying up the ^A outstanding balance of the purchase price.

Christie *The Law of Contract in South Africa* 3 ed (Butterworths 1996) deals with the line of cases culminating in *Broderick supra* at pp 556-557. At p 555, he states:

"The general rule, will be seen in the next section, is that when the contract ^B does not fix a time for performance there can be no *mora ex re*, only *mora ex persona*, so a demand by the creditor is necessary in order to place the debtor *in mora*. Whether there are exceptions to this general rule is a question that

has led to differences of judicial opinion, but the present law can be stated with a fair degree of confidence."

It seems to me that in Zimbabwe, *Asharia v Patel*, *supra* has provided the answer. It confirms the correctness of the general rule as set out by Christie. It appears to me too that the differences of judicial opinion that Christie noted may be resolved by applying the general rule to the particular facts of each matter in order to ascertain its validity to the time frames as contemplated by the parties. It is only after this has been done that a decision on whether *mora ex re* or *mora ex persona*, applies can be made. ^D

I, therefore, hold in the present matter that Turner & Sons could not lawfully repudiate the contract without first placing Dobrock in *mora*.

Mrs Wood further submitted with reference to s 11(1) of the Exchange Control Regulations 1996 (SI 109/96) that on applicant's own case, the agreement was illegal because payment of the balance of the purchase price was to be made ^E outside the country. Mr *de Bourbon*, on the other hand submitted that the contract was not illegal. He contended that there was nothing on the papers to show that the obligations of Dobrock would be met by it. Rather, so he opined, it was only in the nature of assistance between friends, between Peter and Anthony which was permissible in terms of the Exchange Control Regulations. ^F

There is a plethora of cases which have been determined by both the High and Supreme Court which are in point. My starting point is s 11 of the Exchange Control Regulations, *supra*. It reads:

"11(1) Subject to subsection (2) unless otherwise authorized by an exchange control authority, no Zimbabwean resident shall – ^G

- (a) make payment outside Zimbabwe; or
- (b) incur any obligation to make payment outside Zimbabwe.

(2) Subsection (1) shall not apply to:

- (a) any act done by an individual with free funds which were available to him at the time of the act concerned; ^H

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A (b) any lawful transaction with money in a foreign currency account."

Mrs Wood contended that Dobrock was registered in Zimbabwe and was therefore resident in this country. This contention is, in my view, correct, as it reflects the position set out in s 3(1) of the Exchange Control Regulations, *supra*, for artificial persons. She further contended that Dobrock had not shown that it had been authorized by the Exchange Control Authority before ^B it incurred the obligation to make payment outside Zimbabwe. It had not demonstrated that this was a lawful transaction with money in a foreign currency account. She contended further that the free funds exception was applicable to individuals and not to companies, and that Dobrock could not save the agreement on that basis as it was inapplicable to it.

^C In *International Who's Who Ltd v Bernstein Clothing (Pvt) Ltd* S-28-99, Muchechetere JA considered the effect of s 8(1) of the Exchange Control Regulations RGN 399 of 77, where the respondent, a limited liability company registered locally incurred an obligation to pay 20 450 Swiss francs to the appellant, a limited liability company registered in England, in Johannesburg for transmission to Vaduz, Liechtenstein. The respondent raised a point *in limine* averring illegality. At pp 4-5 of the cyclostyled judgment, the learned judge of appeal stated as follows:

"At the outset, I should state that I agree with Mr Moyo's submission that the contract between the parties was illegal, invalid and unenforceable because it was in breach of s 8 (1) of the said Regulations. The provisions of the section are peremptory: see *Abreu v Campos* 1975 (1) RLR 198 (A) ^E and *Swart v Smuts* 1971 (1) SA 819 at 829-30.

As already indicated above, the appellant conceded that no authority had been obtained by the parties from the relevant authority for any payment outside Zimbabwe when the contract was entered into. On the law, see *Macape (Pty) Ltd v Executrix, Estate Forrester* 1991 (1) ZLR 315 (S) at 320C-D where McNally JA said:

^F "In other words, when one is concerned with payments *inside* Zimbabwe (s 7 of the said Regulations) it is perfectly lawful to enter into the agreement to pay. But without authority from the Reserve Bank, the actual payment may not be made. By contrast, when dealing with payments *outside* Zimbabwe (s 8 of the said Regulations) it is unlawful ^G even to enter into the agreement to pay without first obtaining the authority of the Minister which has been delegated to the Reserve Bank"" (my emphasis).

See also *Abreu v Campos supra*; *Young v van Rensburg* 1991 (2) ZLR 149 (S) at 155; and *Adler v Elliot* 1988 (2) ZLR 283 (S) at 287.

The facts in the *Young v van Rensburg* case *supra*, are distinguishable from the present matter. It involved individuals who were foreign residents. Its

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importance, in my view, lies in the sentiments of Korsah JA at p 153G-154A ^a where he agreed with Mr *de Bourbon* in that case that subpara 8(1)(a) which barred a Zimbabwean resident from doing any act, outlawed the doing of even a single act. It is noteworthy that s 8 of the 1977 Regulations is the precursor to s 11 in the 1996 Regulations even though there are some variations in the wording of the two sections in these respective regulations.

In *International Who's Who Ltd* case *supra*, Muchechetere JA agreed with ^b the observation of McNally JA in *Macape's* case *supra* that an agreement to pay outside Zimbabwe by a resident without Exchange Control authority where the resident was not an individual without free funds or where the resident was not utilising money in a foreign currency account, was *void ab initio*. ^c

In *Hattingh & Ors v van Kleek* 1997 (2) ZLR 240 (S), where a foreign visitor to Zimbabwe, van Kleek, who was not aware that the Exchange Control Regulations prohibited local residents from incurring obligations to pay money abroad, agreed to give a loan to a Zimbabwean to be used to develop a safari business and the money loaned was to be paid into that Zimbabwean's ^d bank account outside Zimbabwe, and that Zimbabwean and two other locals signed a promisory note to repay the loan, the High Court then ordered the locals to repay the loan. They appealed on the basis that they acted illegally by incurring an obligation to make payment outside Zimbabwe without the requisite exchange control authority. The appeal was dismissed.

Korsah JA held at p 244D that: ^e

"Section 8 of the Regulations only prohibits, but does not declare void or illegal, the transactions enumerated therein",

and found that the transactions did not contravene s 8 of the Regulations. At p 246B, he stated:

"The cases clearly show that where a contract is on the face of it legal but ^f by reason of a circumstance known to one party only, is forbidden by statute, it may not be declared illegal so as to debar the innocent, party relief, for to deprive the innocent person of his rights would be to injure the innocent, benefit the guilty and put a premium on deceit."

The facts of *van Kleek's* case are distinguishable from the present matter. In addition, *in casu* both parties were aware that their agreement fell foul of the ^g Exchange Control Regulations.

In *Greebe & Anor v Famaps Investments (Pvt) Ltd & Anor* 2004 (1) ZLR 522 (H) ^g Mavangira J dealt with the question whether a local resident could withhold and keep the assets that accrued to him from a sale by another local resident of those assets situated in Zimbabwe in circumstances where no payment was ^h

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^a made abroad as agreed, on the basis that to do so would violate s 11(1)(b) of the Exchange Control Regulations, 1996, *supra*.

She held that while the agreement contravened s 11 of the Regulations, the facts called for a relaxation of the *par delictum* rule for, if she were to decline to do so, she would reward the purchaser by giving him a premium for deceit.

^b In *Adler v Elliot* 1988 (2) ZLR 283 (S), Gubbay JA at 290B recognised that in oral contracts the court had the power to determine whether the terms of that contract required exact performance or the performance of some equivalent act. He stated thus:

"The application of this broad principle [that it is not for the court to remake a contract of the parties in line with Innes CJ in *Ambrose & Aitkens c Johnson and Fletcher* 1917 AD 327 at 343 and the remarks of Beadle CJ in *Holmes v Palley* 1975 (2) RLR 98 (A) at 105C that one party to a contract was not entitled to expect that it will be carried out in a different manner than agreed because of the absence of prejudice] does not, of course, preclude a court from determining whether the parties to an agreement intended that

a particular term thereof was to be fulfilled *in forma D specifica*, that is in the exact manner agreed upon by the parties or *per aequipollens*, that is, by some equivalent act.

Where the agreement is in writing and the language employed is sufficiently clear, the common intention of the parties must be extracted from the agreement itself. But if the language is ambiguous or where the agreement of the parties was oral, then the court is obliged to have regard to the E surrounding circumstances, and to any other admissible evidence in order to ascertain whether the common intention of the parties was to be fulfilled *in forma specifica* or whether performance thereof by some equivalent act would suffice."

In *Adler's case supra*, the parties entered into an agreement of sale in which part of the purchase price was payable abroad in foreign currency and the F remainder at home in local currency. Gubbay JA approved the four factors outlined by Claassen J in *van Diggelen v de Bruin & Anor* 1954 (1) SA 188 (SWA) at 193B-G that:

- "1. If the surrounding circumstances and other admissible evidence afford no clue as to what was in the contemplation of the parties then there is a rebuttable presumption in favour of performance *in forma G specifica*. But the presumption cannot be rebutted where it is clear from the terms of the contract that performance *in forma specifica* had been stipulated.
2. In case if doubt the court will be more likely to find in favour of H performance *per aequipollens* if the manner of performing the term

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is not material and also where performance *in forma specifica* is A impossible through no serious fault on the promissors part.

3. The act or performance tendered *per aequipollens* where such is permissible must be an equivalent act to that stipulated for or be of such a nature that it can make no material difference to the promise.
4. Where the promisor succeeds in rebutting the presumption mentioned above, there may be circumstances falling short of B impossibility and even where there may be some fault on the part of the promisor; a court may be justified in concluding that the promisor's performance or tendered performance amounted to substantial performance."

It seems to me, as appears from Dobrock's averment that the parties C contemplated that payment would be in sterling pounds in England into the account of Anthony's daughter Jenny. Dobrock was willing to pay "where and when" T & S desired it be made. The agreement was sealed when T & S agreed to make payment in foreign currency in England. The parties thus contemplated exact performance and not some substantial performance. That exact performance was however illegal. There is no room for the application D of Claassen J's formulation in *Diggelen's case supra*, in these circumstances.

It is my view that *van Kleek's case supra*, does not apply to the present matter. Dobrock was aware that it was contravening the Exchange Control Regulations when it promised to pay "where and when" and agreed to pay in England. This is clear from the lack of particularity on the decision on the mode of payment that is apparent in its affidavits. I cannot allow this court to be an accomplice E to an illegality by enforcing this illegal contract, as prayed for by Dobrock.

I agree with Mrs Wood that Dobrock's claim on specific performance and other subsequent relief related thereto should be dismissed. After all, Dobrock is not an individual, so the free funds exception would not avail it. The oral agreement was transacted between the parties by individuals who were F representing them respectively. Peter did not aver nor even suggest that he had free funds from which he would pay T and S. Even though he was an individual he was acting for Dobrock. He had no exchange control approval to incur the liability to pay on behalf Dobrock in foreign currency in England. The agreement reached is illegal, invalid, and unenforceable. See also *Barker v African Homesteads Touring and Safaris (Pvt) Ltd & Anor* 2003 (2) ZLR 6 (S). G

THE PROVISIONAL LIQUIDATION CLAIM CASE No. 5264/05

T & S seeks the liquidation of ZPS on the basis that the two shareholders in T & S and Dobrock have had a disharmonious and tumultuous working relationship. H

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A It set out the history of that relationship from the period of the construction of the vessel which culminated in arbitration. Thereafter T and S ran the project until 1996 when Dobrock took over, and appointed a managing director who ran the affairs of ZPS. The tourism industry suffered a downturn after 2000 and the profitability of ZPS plummeted. Anthony and Peter were desirous of disposing of their shareholding.

It is correct, as submitted by Dobrock, that the problems that beset the parties which culminated in arbitration were not catastrophic. The parties operated ZPS in fits and starts up to the conclusion of the illegal oral agreement of July 2004. Until January 2005, it appeared that T and S had given up on the management control of ZPS and had no interest in what was going on. It is also c true that the e-mail exchanged showed decorum and civility until matters came to a head in 2005 as a result of the ill-fated agreement of sale.

In 2005, T and S earnestly sought to be appraised as a shareholder of its interest in ZPS. Dobrock stonewalled and took the attitude that T and S no longer had any interest in the joint venture to warrant its revived attention. The shareholding battle brought out the worst in the two personalities involved. d They maligned each other's personalities and managerial competencies (see Dobrock's letter of 6 October 2005).

That the affairs of ZPS were not being run with the full participation of both shareholders is clear from the contents of the letter of 28 November 2005 which was written by T and S erstwhile legal practitioners requesting copies of all e bank statements from 1995 to date and details of all passengers who travelled on the houseboat, how much it was paid and in what currency.

There were insinuations of financial misappropriations which were denied by Dobrock. A supplementary affidavit was filed by T and S in order to strengthen its application on 23 June 2006. That supplementary affidavit is replete with f allegations of diversion of foreign currency proceeds from ZPS to other sister companies of Dobrock, a fact vehemently denied by Dobrock. It also demonstrated a reluctance by Dobrock to release administrative records in regard to passenger information. It averred the possible misappropriation of foreign currency receipts due to ZPS.

The documentation was eventually supplied to Ernst and Young by Dobrock g on 7 July 2006. It was filed with the leave of this court on 19 October 2006 in the form of an answering affidavit in response to the supplementary affidavit.

The documentation supplied showed that foreign currency generated by ZPS was utilised to pay an offshore loan of Intercontinental Trading (1992) (Pvt) h Ltd.

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Kudya J

Dobrock denied that ZPS had not operated successfully in the 10 years a between 1994 and 2004. It alleged that the relationship between Peter and Anthony was friendly, harmonious, cordial and constructive up to January 2005. It denied managerial deadlock and denied stealing operating revenue, principally foreign revenue, from ZPS.

Its view was that the failure to complain since 1997 to the date of application b showed T and S had been satisfied. It proposed a full audit of all cruises, foreign and local revenue from the records between 1999 to 2004 since those going back beyond a period of seven years were no longer in existence.

It took the view that there were disputes of facts which could not be resolved on the papers. It prayed for the dismissal of the application.

It seems to me that notwithstanding the dispute of facts, I can make a robust c determination of the two issues before me which are whether there is a deadlock and whether ZPS should be wound up. After all, T & S need only to establish on a *prima facie* basis that it is just and equitable that the company be provisionally wound up. It seems to me that a deadlock exists especially after the ill fated contract of sale. Clearly, there is a justifiable lack of confidence d in the conduct of the company's affairs. There are accusations, supported by documentary evidence that foreign currency generated by ZPS has not been utilized for the benefit of ZPS business activities.

ZPS is a small domestic company. In accordance with the principal guidelines set out in *Sultan v Fryfern Enterprises (Pvt) Ltd & Anor* 2000 (1) ZLR 188 which approved the remarks of House of Lords in *Ebrahimi v Westbourne e Galleries* [1972] 2 All ER 492, I find that it is just and equitable that ZPS be provisionally wound up on that ground.

There does not appear to me to be any realistic, sufficient and reasonable remedy other than provisional liquidation. The bickering that has gone on can only be resolved by protracted negotiations whose outcome is uncertain. ^F There is no alternative remedy in my estimation to winding up. The applicant has thus discharged the onus on it to justify the order sought.

I accordingly grant the order sought by T and S in case No. HC 5264/05.

COSTS

Turner and Sons has been successful in both applications. In the specific ^G performance matter, it sought the dismissal of Dobrock's application with costs on the higher scale. It cannot escape culpability for agreeing to an illegal agreement. Its pleadings were based on the principle of repudiation which I have not upheld. It seems to me fair and just that I grant it its costs in case No. HC 5186/05 on the ordinary scale.

As regards the liquidation claim the costs will be determined on the return date. ^H

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Kudya J

^A DISPOSITION

In the premises it is ordered that:

1. The application in case No. HC 5186/05 be and is hereby dismissed with costs.
2. In case No. HC 5264 – ^B
 - 2.1 The first respondent company Zambezi Paddle Steamers (Pvt) Ltd is provisionally wound up pending the granting of an order in terms of paragraph 2:3 or the discharge of this order.
 - 2.2 Mrs Theresa Grimmel of KPMG Chartered Accountants, Mutual Gardens 100, The Chase, Emerald Hill, Harare be appointed as ^C provisional liquidator of the first respondent company with the powers set out in s 221 of the Companies Act [*Chapter 24:03*].
 - 2.3 Any interested party may appear before this court sitting at Harare on 14 February 2007 to show cause why an order should not be made placing the first respondent company in liquidation and the costs of these proceedings all be costs of liquidation. ^D
 - 2.4 This order shall be published once in the *Government Gazette* and once in *The Herald* newspaper. Publication shall be in the short form approved by the Registrar of this Honourable Court.
 - 2.5 Any person intending to oppose or support the application on the return day of this order shall: ^E
 - 2.5.1 Give due notice to the applicant at Messrs Byron Venturas & ^B Partners, 2nd Floor, Tanganyika House, corner Third Street/Kwame Nkurumah Avenue, Harare.
 - 2.5.2 Serve on the applicant at the address given above a copy of any affidavit which he files with the Registrar of the High ^F Court.

Atherstone & Cook, applicant's legal practitioners

^G *Byron Venturas & Partners*, respondent's legal practitioners

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ZVINAVASHE v NDLOVU 2006 (2) ZLR 372 (S)**2006 (2) ZLR p372**

Citation	2006 (2) ZLR 372 (S)
Case No	Judgment No. S-40-06
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA & Gwaunza JA
Heard	31 October 2006
Judgment	7 December 2006
Counsel	<i>K Gama</i> , for the appellant <i>D Dindikwa</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Practice and procedure — judgment — default judgment — application for rescission — applicant in default — application dismissed for want of prosecution — court considering the merits of the matter — unnecessary to do so — consideration of the merits did not make the matter appealable

Practice and procedure — judgment — default judgment — not appealable — can only be set aside by a successful application for rescission — need D for applicant to purge his default

Headnote

A default judgment can only be set aside by a successful application for rescission of the judgment under the rules of the relevant court. The application must be made by the defaulting party himself, as indicated by the expression, “purging his default”. ^E

The appellant had failed to defend an action instituted against him and default judgment had been obtained by the respondent. Thereafter, the appellant had sought a rescission of the default judgment, as well as a provisional order interdicting the respondent from executing on the judgment pending the determination of the application for rescission. The appellant, ^F however, was in default at the application for rescission, which was dismissed for want of prosecution, in accordance with r 62 of the High Court Rules 1971. However, before dismissing the application, the judge considered it “proper and prudent” to deal with the matter on merits and proceeded to do so. On appeal, it was argued on behalf of the appellant that because the judge *a quo* had dealt with his application on the merits, ^G the matter had become appealable.

Held, that the court *a quo* had correctly dismissed appellant’s application for want of prosecution, but that there was no call for the court to consider the merits of the matter. It was unnecessary to do so and, consequently, of no force or effect. It did not convert the default judgment into a judgment on the merits. ^H

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Gwaunza JA

^A *Held*, further, that the “appeal” was not properly before the court and that the matter should be struck off the roll with costs.

Cases cited

Prew v Squire (1851) 10 CB 915; 138 ER 361

B Sibanda & Ors v Nkayi RDC 1999 (1) ZLR 32 (S)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 62

Case information

K Gama, for the appellant

c D Dindikwa, for the respondent

Judgment

GWAUNZA JA: The appellant purports to appeal against a judgment of the High Court, which was granted in default after he, as the applicant, had failed to appear.

▫ The respondent, in the court *a quo*, issued summons against the appellant for recovery or transfer to her of certain items of property acquired during the period in which the two co-habitated. It is not in dispute that the appellant failed to timeously enter appearance to defend the action, leading to a default judgment being entered against him. The appellant subsequently filed two applications; the first one for rescission of the judgment entered in default of *ε* his appearance and the second one for a provisional order interdicting the respondent from executing the judgment pending the determination of the application for rescission.

On the date of hearing of the application for rescission of judgment, the appellant was in default, a circumstance that led to the respondent's legal *φ* practitioner successfully applying for the dismissal of the application for want of prosecution.

It is at this juncture, pertinent to refer to r 62 of the High Court Rules, which deals with just such a situation. It reads:

"62. When on the calling of any case the defendant appears in court personally, or by his legal practitioner, and the plaintiff makes default, the *ϑ* defendant shall be absolved from the said suit or action, unless sufficient cause to postpone the same, or to make some other order therein, appears to the court."

There can be no dispute that the defendant/respondent can only be "absolved" from the suit or action in question, through the dismissal of the plaintiff's – *η* in this case, the applicant's case.

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Gwaunza JA

The court *a quo* did dismiss the application, as it properly was entitled to do *α* so in terms of r 62. The court also discharged the provisional order referred to. However, before dismissing the application, the learned Judge considered it "proper and prudent" to deal with the matter on the merits as they appeared from the papers filed of record.

The appellant does not dispute that he was in default on the day his application *β* for rescission of this judgment was to be heard. Nor does he dispute that, under these circumstances, the court was entitled to enter default judgment against him. He, however, takes issue with the fact that, in dismissing his application, the court *a quo* had delved into the merits of the matter and given its reasons for the judgment against him. He contends the resultant judgment is appealable.

In reality, as is evident from its judgment, the court *a quo*, did not deal only *γ* with the merits of the application for rescission of judgment, it went beyond that to consider the merits of the main dispute between the parties, that is, the action instituted by the respondent *in casu*, for recovery of the property referred to earlier.

Although the parties cited other cases ¹ in support of their respective *δ* contentions, they have both in addition cited the case of *Sibanda & Ors v Nkayi Rural District Council* 1999 (1) ZLR 32 (S), as authority for the proposition that a default judgment cannot be appealed against. Rather the proper procedure is for the aggrieved party to seek rescission of the judgment.

The appellant, however, calls upon this court to "clarify" *Sibanda's* case *supra* in view of the following comments, made by the learned judge therein: *ε*

"That order of 23 May 1997, as I understand it, was effectively a default judgment. The practitioner who appeared for the appellants presented no submissions on the merits. There were no reasons given for judgment. Once postponement was refused the appellants were effectively in default." *φ*

The appellant's contention, therefore, is that the present case, having been determined on the merits, with reasons for judgment being given, was appealable. In other words, the appellant is arguing that the tendering of reasons for the judgment had, somehow, divested what otherwise would have been an ordinary default judgment, of its "default" nature, and left in its place a judgment that was appealable. ^g

I do not find the appellant's argument to be persuasive. The defining feature or essence of a judgment granted after a party fails to appear is the "default"

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Gwaunza JA

^a of the absent party, that is his failure to do what he ought to have done. *In casu*, what the appellant failed to do was to appear and prosecute the application. Hence, a judgment by default has been defined as one obtained by "non resistance" (*per* Jervis CJ in *Prew v Squire* 10 CB 915, cited in *Stroud's Judicial Dictionary* 5 ed at p 659).

Counsel for the respondent contends correctly that a default judgment can ^b only be set aside by a successful application for rescission of the judgment under the rules of the relevant court. The application must be made by the defaulting party himself, as indicated by the expression, "purging his default". It follows that *in casu*, the appellant's default remained unpurged even as the learned judge *a quo* considered the merits of the matter and gave reasons for ^c his judgment. By virtue of ^r 62, the learned judge *a quo* could simply have "absolved" the respondent from the application, that is, dismissed it, as long as he was not considering postponing the application or making any other order. The consideration by the judge *a quo* of the merits of the case, and the giving of his reasons for judgment, therefore had no effect on the status of the judgment given, which remained that of a default judgment.

^d It should be noted that the court normally considers issues like the explanation for a default, the *bona fides* of the applicant and the prospects of success on the merits, within the context of an application for rescission of judgment or condonation of the late filing of papers required by the rules of the court, to be filed within a given time frame. There was, in my view, therefore no call for ^e the court *a quo* to consider such issues in its determination of an oral application for the dismissal, for want of prosecution, of the appellant's application for rescission of judgment. This is because the very same issues would come in for consideration in the event that the appellant *in casu* decides to approach the court *a quo* – as he can still do – for rescission of its judgment dismissing his application.

^f There was, also, no call for the court *a quo* to consider the merits, on the papers, of what in effect was an action which, in the ordinary course of events, fell to be determined upon consideration of oral evidence led during trial.

Be that as it may, the decision by the court *a quo* to dismiss the appellant's application, effectively for want of prosecution, was correct. As has already ^g been explained, that decision remained a default judgment whose setting aside could only follow a successful application for its rescission.

For the avoidance of doubt, it is declared that the giving of reasons for the default judgment in question, by the court *a quo*, was unnecessary and consequently, of no force or effect. It does not convert the default judgment ^h into a judgment on the merits.

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Gwaunza JA

Sibanda's case supra in my opinion, does not need any clarification, despite ^a its reference to reasons for judgment not having been given. Having read that judgment in full, I am satisfied the appellant has misinterpreted the import of the comments cited. In that case, the applicants in an application for rescission of a default judgment sent their legal counsel to appear on the scheduled hearing date, with instructions not to prosecute the application, but to seek ^b a postponement. The court turned down the request for postponement and proceeded to dismiss the application, prompting the applicants to file an appeal to this court.

The learned judge of appeal noted that the judgment was effectively a default judgment which could only be set aside through an application for its rescission. The comments in question, in my view, were made by way of ^c emphasising why the judgment was regarded as a default judgment, as opposed to one that was reached after consideration of submissions on the merits. The absence of

submissions on the merits, and the lack of the resultant reasons for judgment, are characteristics of a judgment given in default. I am satisfied that the comments cannot and should not be, interpreted to mean that a default judgment in which, rightly or not, reasons for judgment are given, is appealable. As I have already made clear, reasons or no reasons, a default judgment remains that until it is set aside in the prescribed manner.

This “appeal” was in reality not properly before this court. I have made reference to “appeal” and “appellant” merely for convenience.

In the result, the appeal, such as it is, is struck off the roll with costs. ^ε

CHIDYAUSIKU CJ & SANDURA JA concurred.

Madzivanzira & Partners, appellant’s legal practitioners

Muskwe & Associates, respondent’s legal practitioners ^φ

¹ *Ramvali Trust’s Trustees v UDC & Ors* 1998 (1) ZLR 110; *Sparks v David Pollack & Co (Pty) Ltd* 1963 (2) SA 491; *Argos Fishing Co Ltd v Friopesca SA* 1991 (3) SA 255

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BECKFORD v BECKFORD 2006 (2) ZLR 377 (H)

2006 (2) ZLR p377

Citation	2006 (2) ZLR 377 (H)
Case No	Judgment No. HH-124-06
Court	High Court, Harare
Judge	Kudya J
Heard	13 February 2006; 15 February 2006; 16 February 2006; 22 February 2006; 24 February 2006; 28 March 2006; 29 March 2006; 30 March 2006
Judgment	20 December 2006
Counsel	<i>A P de Bourbon SC</i> , with him <i>E T Matinenga</i> , for the plaintiff <i>J C Andersen SC</i> , with him <i>J B Colegrave</i> , for the defendant
Case Type	Divorce action
Annotations	No case annotations to date

Flynote

^c **Court** — High Court — jurisdiction — matrimonial matter — Zimbabwean court seized with case — evidential aspects of case falling within area of jurisdiction of courts of another country — jurisdiction not to be surrendered to foreign court

Family law — child — custody — following divorce — joint custody — whether can be awarded — when appropriate

Ⓓ **Family law** — court — jurisdiction — matters to be adjudicated falling within area of jurisdiction of courts of another country — whether Zimbabwean court should surrender its Ⓕ powers in respect of such matters to those courts

Ⓔ **Family law** — husband and wife — divorce — distribution of assets following divorce — parties married in England and identifying more with England than Zimbabwe — English law allowing greater award to be made to wife — English law followed

Headnote

The authority of the court to grant custody of children following divorce is Ⓕ based on the provisions of s 10(1) and (2)(a) of the Matrimonial Causes Act [*Chapter 5:13*]. Custody encompasses two aspects. These are of physical custody and legal custody. The former entails the control of the body, while the latter is concerned with the decision-making authority over that physical body on a day to day basis. On divorce custody is usually granted to only one party, but where the circumstances justify Ⓖ the award of joint custody, the court should not be precluded from making such an award, which would be permissible under s 10(2) of the Act. The prerequisites for a joint custody order would be that: (a) both parents are fit; (b) both desire continuous involvement with their children; (c) both are seen by the children as their source of security and Ⓗ love; and (d) both are able to communicate and cooperate in promoting

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Kudya J

the children's interests. In addition, the court can look to such factors Ⓐ as –

- (a) the parties' ability to deal with the issue in a sensible, mature, responsible and temperamentally stable manner;
- (b) whether the relationship between the parties has been remarkably good despite the collapse of the marriage; Ⓑ
- (c) whether they respected, trusted and remained fond of each other;
- (d) whether they had shared the duties of parenthood amicably and constructively;
- (e) whether they had similar outlooks and values;
- (f) whether compromise rather than altercation had been their way of coping with differences;
- (g) whether they did not disparage each other in the eyes of the children but praised one another in the children's presence; and
- (h) whether they had willingly acted as joint custodians since their separation. Ⓓ

A custody order made by a court is itself an act of clairvoyance. No one can foretell the future. A court is presented with evidence of the past and current situation and a custody order is made on that evidence, experience, and probability and in hope. Such an order anticipates continuance or change but never permanence.

If the parents had used the children as weapons of war to get at each other, Ⓔ or if there was evidence of antipathy on the part of the children to either parent, joint custody would be inappropriate.

The plaintiff had numerous assets in the United Kingdom and was not making a full disclosure to the Zimbabwean court which was hearing the matter. The defendant's counsel argued that the court should surrender its powers to determine the matrimonial assets to the courts in the United Kingdom, on the grounds that those courts were better placed to deal with the matter.

The plaintiff submitted, in respect of the distribution of the matrimonial assets, that the matrimonial property domicile at the time of the marriage should determine the proprietary consequences of the marriage. The Ⓖ parties were domiciled in the United Kingdom at the time of their marriage.

Held, that the courts in this country, like the courts in the United Kingdom, do not abdicate their responsibilities in favour of foreign courts, wherever they may be situated and however competent they may be perceived to be. Ⓗ

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Kudya J

^A *Held*, further, that s 7 of the Matrimonial Causes Act [*Chapter 5:13*] confers a very wide discretion on the court with regard to the distribution of the matrimonial assets. In Zimbabwe, the date of distribution is the date of divorce. Applying the criteria set out in s 7(4) of the Act, and following the case law of Zimbabwe, the defendant would not be entitled to a half share of the assets. However, under the law of England, if the defendant ^B could show that she could not have done more than she did to create or contribute towards the matrimonial estate, she could be awarded ^a one-half share. The approach of the English courts is to achieve equity and justice by placing the parties in the position they would have been had the marriage continued. *In casu*, the parties identified more with England than with Zimbabwe and it would be fair and just to determine ^c the distribution of the marital assets in terms of English law.

Held, further, that because the plaintiff had not disclosed all his assets and income, especially after he had instituted the proceedings, specific disclosed assets would be awarded to the defendant, who would also be allowed to approach the court for an order regarding the distribution ^d of any undisclosed property which she might unearth in the future.

Cases referred to

Baker v Baker [1995] 2 FLR 829 (CA)

Bezuidenhout v Bezuidenhout 2003 (6) SA 691 (C)

Bezuidenhout v Bezuidenhout 2005 (2) SA 187 (SCA)

^E *Corris v Corris* 1997 (2) SA 930 (W)

Courtney-Clarke v Bassingthwaighe 1999 (1) SA 684 (Nm)

Frankel's Est & Anor v The Master & Anor 1950 (1) SA 220 (A)

Galante v Galante (3) 2002 (2) ZLR 408 (H); 2003 (5) SA 396 (ZH)

Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A)

J v V (Disclosure: offshore Corporations) [2000] 1 FLR 1042

^F *Krugel v Krugel* 2003 (6) SA 220 (W)

Maarschalk v Maarschalk 1994 (2) ZLR 110 (H)

Minwalla v Minwalla & Ors [2005] 1 FLR 771

Shenje v Shenje 2001 (2) ZLR 160 (H)

Sperling v Sperling 1975 (3) SA 707 (A)

^G *Takafuma v Takafuma* 1994 (2) ZLR 103 (S)

Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd & Anor 1967 (3) 632 (D)

V v V 1998 (4) SA 169 (C)

Venton v Venton 1993 (1) SA 763 (D)

^H *White v White* [2001] AC 596; [2001] 1 All ER 1 (HL)

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Kudya J

Legislation considered ^A

Interpretation Act [*Chapter 1:01*], s 8(2)

Matrimonial Causes Act [*Chapter 5:13*], ss 7, 10(1) & 10(2)

Case information

A P de Bourbon SC, with him *E T Matinenga*, for the plaintiff

J C Andersen SC, with him *J B Colegrave*, for the defendant ^B

Judgment

KUDYA J: On 4 April 2003, the plaintiff husband issued summons out of this court seeking a decree of divorce and other ancillary relief. The defendant wife filed her plea and counterclaim on 10 September 2003.

On 11 November 2004, at the pre-trial conference, the matter was referred to trial on the plaintiff's issues. These were as follows: c

1. Whether it is in the best interests of the minor children that custody be awarded to the plaintiff or the defendant or that an award of joint custody be made.
2. Dependent upon the award of custody, the *quantum* of maintenance payable in respect of the children. d
3. What order should be made in respect of the children's schooling?
4. The quantum of maintenance payable by the plaintiff to the defendant and the period thereof.
5. What assets constitute the matrimonial estate?
6. The apportionment thereof. e
7. Costs.

The plaintiff gave evidence and called the evidence of a further two witnesses, while two witnesses testified for the defendant. A total of 23 documentary exhibits were produced, some of them consisting of bulky bundles of an assortment of correspondence and forms. In the period preceding the trial, in f an attempt to curtail the proceedings both parties sought interrogatories and made further discoveries and filed supplementary affidavits after the pre-trial conference had been held. In addition, during the course of the 2005 calendar year, the parties subjected themselves to three separate court applications.

It was common cause that this divorce action has been acrimonious. Its effect on the children has been deleterious. The tussle between husband and wife g has given meaning to the East African proverb that: "When two elephants fight, it is the grass that suffers." In the present matter the children have indeed suffered.

It was common cause that, as also appears in the marriage certificate, the parties were married in the church of St Cuthbert's, Lytham Road, South Shore h

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Kudya J

A in Blackpool and Fylde, Lancashire in England on 26 November 1994. Two children were born of the union in England. These are Elsbeth Bridie Beckford, born on 7 August 1996 and Theodore Hugh Beckford, born 9 February 1999.

The parties relocated to Zimbabwe in January 1998 where the plaintiff acquired a home, and abandoned his previous domicile. Notwithstanding the change of domicile, when the defendant became pregnant with the boy in 1998, they b returned to the United Kingdom and rented a house for six months in Blackpool so that the defendant could give birth there and also be close to her family. After his birth, they returned to this country where they have lived ever since.

In his testimony, the plaintiff recognized that even during the three years that the parties lived in England, the union had its fair share of cracks but it was c a relatively happy one until 2002 when it broke down. In his view, it broke down under the heavy burden of the depression that afflicted her, over disagreements on the boy's activities and over financial matters.

The defendant, on the other hand, stated in evidence that she realized in early 2002 that the plaintiff was very unhappy in the union. An Easter holiday excursion by the two, without the children, did not cure the source of his d unhappiness. In October 2002, he accused her of having an affair, which accusation she denied. He then left for England, purportedly to discuss with his lawyers about the divorce. On his return they attempted to paper the cracks but the loss of trust between them could not be repaired. In February 2003, they agreed that they were no longer in love. They tried to work on a divorce e settlement, but to no avail. On 4 April 2003, the day she was to leave for England for a holiday with the children in the evening, she was served with divorce summons at the matrimonial home at 3 p.m. Even though she had spent the earlier part of the day with the plaintiff, he never intimated to her that this was going to happen. She painted him as an insensitive husband.

The parties were agreed that their marriage had broken down beyond repair. F I am satisfied that it has irretrievably broken down to such an extent that a normal marriage relationship can no longer be restored. It must follow that the decree of divorce will be granted.

AMENDMENTS TO PLEADINGS DURING TRIAL

At the resumption of trial on 15 February 2006, the defendant applied to amend G her claim in reconvention. The application was duly opposed. After it had been duly argued, the defendant duly withdrew it.

On 24 February 2006, during the cross-examination of the plaintiff by counsel, Mr *Andersen* moved an amendment of the defendant's counterclaim for the removal of the children from Zimbabwe at the end of July 2007. The application H was opposed on the basis that the amendments were prejudicial and that such

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Kudya J

prejudice would not be cured by a postponement co-joined with an appropriate A order of costs. The plaintiff further contended that the amendments that were sought contradicted other relief and were therefore excipiable.

The plaintiff sought to buttress his submissions by reference to *Courtney-Clarke v Bassingthwaighe* 1999 (1) SA 684 (NM) at 689; *Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd & Anor* 1967 (3) SA 632 (D) at B 641 and *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107E-I.

I declined to exercise my discretion to allow the amendment in favour of the defendant and advised that reasons for so doing would appear in this judgment. It is no longer necessary for me to provide my reasons as on 3 March 2006, the defendant filed a notice to amend her counterclaim. She moved the C amendments on 28 March 2006. They were, this time round, granted by consent, undoubtedly because the defendant had not only given adequate notice of the amendments but also because she had removed the contradictions that were apparent in the relief she sought in her amendments of 24 February 2006. The earlier amendments were, in my view, not only vague and embarrassing but also excipiable. D

On 15 February 2006, the plaintiff moved for the adoption of two amendments for which notice had been given on 23 September 2004 and 11 October 2005.

The notice to amend of 23 September 2004 indicated that the amendments would be sought at the pre-trial conference. The minutes of the pre-trial conference of 11 November 2004 show that the "amendments sought (were) E granted by consent." This appears from the pleadings to have been the only amendment sought.

On 15 February 2006, Mr *de Bourbon* for the plaintiff moved for the amendment of paragraph 2 only of the amendment of 23 September 2004. It is the one which reduced the amount of maintenance the plaintiff offered the defendant from F the Zimbabwe dollar equivalent of US\$1 000 to the equivalent of US\$500.

The second amendment (of 11 October 2005) replaced para 9.2 of the declaration, in which he sought to contribute £200 000 towards the purchase by the defendant of an immovable property in the United Kingdom and to find or purchase a town house or condominium in a secure complex in Zimbabwe for G the defendant. He now sought an order that he "contribute £70 560 (representing 50 percent of the value of the net matrimonial assets in the UK, which took into consideration the proceeds of the sale of 265 Lonsdale Road, Barnes, for which the defendant had already received £36 350 and had negative equity in respect of the other disclosed assets and plaintiff's personal debts) plus 40 percent of the net value of 62A Steppes Road, Chisipite, Harare to be used towards H

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Kudya J

A the purchase by the defendant of an immovable property in the United Kingdom and of a town house or condominium in a secure complex in Harare."

He abandoned para 9.2A which was part of para 3 of the notice of amendment of 23 September 2004, whose contents had been overtaken by events. He could no longer seek the transfer of 265 Lonsdale Road as it had been disposed of by the mutual consent of the parties.

In my view, the amendments that were moved and granted did not materially alter the pre-trial conference issues agreed on 11 November 2004 to the extent that they revolved on custody, the *quantum* of maintenance for the children and the defendant and the identification of the matrimonial assets and their distribution. The amendments by the defendant of 28 March 2006 raised two ^c further issues. These were, firstly, whether in the circumstances it was appropriate for this court to order the removal of the minor children from its jurisdiction and secondly, whether the court could abrogate its jurisdiction to assess matrimonial assets to a foreign court.

I now proceed to deal with the evidence that each party led and how that ^d evidence resolves each of the issues that were raised.

JOINT CUSTODY OR SOLE CUSTODY

[*The learned judge then analysed the evidence in detail and continued:*]

It seems to me that the defendant gave her evidence well. She was not shaken by cross-examination. Her side of story was confirmed by the plaintiff's ^e conduct and Mr de Marigny's ^{*} report and oral evidence. I am satisfied that she is eminently suited for appointment as a custodian parent.

The issue that has presented itself on custody really revolves on whether the court should grant joint custody or sole custody, without the testamentary disposition trappings attached to it, to the defendant.

^f Mr *Matinenga* submitted well prepared written heads of arguments on the issue of custody. I am indebted to the South African case authorities and the textbook writers that he referred to on the issue in bid to persuade me to make an order of joint custody.

Mr *Andersen*, on the other hand, referred me to two local cases in his submissions that joint custody was inappropriate.

^g Both counsel were agreed that the authority of this court to grant custody is now based on the provisions of subss (1) and (2)(a) of s (10) of the Matrimonial Causes Act [*Chapter 5:13*].

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Erwin Spiro in *Law of Parent and Child* 4 ed at p 86 notes the difficulty in ^a providing a definition of custody that is "valid once for all". H R Hahlo in the *South African Law of Husband and Wife* 5 ed at 394 attempted to define it. He wrote:

"Custody is but one incident or sector of natural guardianship. Where as happens in most cases, custody is awarded to the mother and no order ^b is made as to guardianship, the father is left with guardianship minus custody. The mother as the custodian parent is entitled to have the child with her, to control its daily life, to decide all questions relating to its education, training, religious upbringing and to determine what homes or houses the child may or may not enter and with whom it may or may not associate. In case of urgency she can supply the necessary consent to a surgical operation on the child." ^c

See also Hoffman and B K Pincus in *The Law of Custody* and Boberg *The Law of Persons and Family* 2 ed at 661-664.

The definition of custody encompasses two aspects. These are the aspect of physical custody and that of legal custody. The former entails the control of the body, while the latter is concerned with the decision-making authority over ^d that physical body on a day to day basis.

In Zimbabwe, Smith J dealt *inter alia* with the issue of joint custody in *Maarschalk v Maarschalk* 1994 (2) ZLR 110 (H). I agree with the interpretation that he rendered to the provisions of s 10(2) of the Matrimonial Causes Act *supra*, as read with s 8(2) of the Interpretation Act [*Chapter 1:01*] at ^e p 120B-E. At p 120F, the learned judge stated thus:

"To my mind, that provision shows that it was the intention of the legislature that the powers of the court should not be narrowly construed. Under the common law, during marriage, the custody of the children is shared by the parents so the concept of joint custody is accepted. For the reasons spelt out in the cases referred to above, on divorce custody is ^f usually granted to only one party. It seems to me, however, that

where the circumstances justify the award of joint custody, the court should not be precluded from making such an award. As I have tried to point out above, in my opinion, s 10(2) of the Matrimonial Causes Act 1985 permits a court to make such an award."

The law in this country, therefore, permits a court clothed with the necessary ^a jurisdiction to award joint custody.

There does not appear to be a reported case in this country which has done so. Mr *Matinenga*, for the plaintiff, sought to persuade me to follow the line of South African cases which have blazed the trail. He made reference to the following: ^h

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1. An article on joint custody covering part of the inaugural speech by Ivan Schafer as a Professor of Law of Rhodes University reported in the (1987) 104 *South African Law Journal* at 149-164
2. *V v V* 1998 (4) SA 169 (C)
3. *Krugel v Krugel* 2003 (6) SA 220 (W), a case I could not locate ^b
4. *Corris v Corris* 1997 (2) SA 930 (W)

Prof Schafer discussed the factors for and against joint custody and recommended that consideration should be given for such an award. He outlined the prerequisites for a joint custody order as being:

- (a) that both parents are fit; ^c
- (b) that both desire continuous involvement with their children;
- (c) that both are seen by the children as their source of security and love; and
- (d) that both are able to communicate and co-operate in promoting the children's interests.

^d In *Venton v Venton* 1993 (1) SA 763 (D), Didcott J considered the following:

- the parties' ability to deal with the issue in a sensible, mature, responsible and temperamentally stable manner;
- whether the relationship between the parties has been remarkably good, despite the collapse of the marriage; ^e
- whether they respected, trusted and remained fond of each other;
- whether they had shared the duties of parenthood amicably and constructively;
- whether they had similar outlooks and values;
- whether compromise rather than altercation had been their way of coping ^f with differences;
- whether they did not disparage each other in the eyes of the children but praised one another in the children's presence; and
- whether they had willingly acted as joint custodians since their separation

In *Corris v Corris supra*, where the parties had lived apart for a year and had ^g two girls aged 6½ and 8 years, the court awarded joint custody because they were not only co-operative but also resided in close proximity to each another. Kuper AJ was not deterred by the two objections that were raised against joint custody, that is:

- (1) the one captain of the ship concept; and
- ^h (2) the fear of the prospect of future litigation prejudicial to the children.

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He relied on the opinions of experts that any future disagreements between ^a the parties would be resolved amicably and in the children's best interests and that there was no real risk of any acrimonious and irresolute disagreements arising which would immobilize the operation of the joint custody order.

In applying these principles, I bear in mind the caution in *Corris v Corris supra* at 934C-D that: ^b

"Now any custody order made by a court is itself an act of clairvoyance. No one can spell the future nor do I think does a court imagine it can. Hence the caution. A court is presented with evidence of the past and current situation and a custody order is made on that evidence, experience, and probability and in hope.

Such an order anticipates continuance or change but never permanence. Life is risk. Should circumstances change, parties c are at liberty to approach the court for variation. They do and not infrequently."

In *V v V supra* at 191F-G, Foxcroft J, in awarding joint custody, noted:

"In my view, the fact that a child should know where it stands is not the only consideration of importance. It is part of the pattern for a child's future which a court attempts to construct which has to be balanced d against the great benefits to be obtained when both parents contribute on a regular and reasonably equal basis to the upbringing of the child. I have no doubt that most children who love their parents as deeply as the children in this case appear to would always choose to have this kind of contact with both parents which they have enjoyed before divorce. If that contact will inevitably lead to further instability in the lives of the children e it should not be permitted. No one can predict the future or say that deadlock between plaintiff and defendant will inevitably arise. They have both retained a measure of respect for each other which was evident during the proceedings before me and I am hopeful that when the traumatic events of the past two years have faded a little they will be able to resume their lives for the benefit of the children. I feel reasonably certain f they will get on with their lives.

There is no evidence that they have ever used the children as weapons of war to get at each other. Joint custody in such a situation would be unthinkable.

In the present case, the children seem to want to protect their parents for whom they have sympathy. There is no evidence of antipathy against g either as was the case in *McCall v McCall*."

In the present case, the attitude of the plaintiff is one in favour of joint custody while the defendant is totally against it. The plaintiff relies on the court order of 26 July 2005 as the basis for his views that the parties co-operate. The defendant's attitude is that the order is working but maintains that dealing with the plaintiff, to her, is like walking on eggshells. She viewed it as a temporary h

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A agreement through which the plaintiff left the matrimonial home and reduced the emotional and physical trauma on the children.

The plaintiff does, however, not trust the defendant and that feeling is mutual. She stated that she only respects him as the father of her children.

Communication between the parties is abnormal. They resort, even after the b consent order, to the use of the short message service on their cellular phones. At other times, they do so through their legal practitioners.

Before the consent order, both parents used the children as weapons of war to get at each other. After the consent order, the plaintiff continued to use the girl by requesting her to provide inappropriate reports about her mother. Mr de Marigny testified that even on 20 February 2006 the girl complained to c him over her father's bid to curry favour with her while disparaging her mother. The plaintiff does not cast the defendant in positive terms to the children.

The parties have different parenting styles which could in the long run confuse the children. The plaintiff is cast out as harsh while defendant is shown as soft. They do not agree on the doctor who should counsel the girl. d They hold diametrically opposed views on the nature and intensity of the boy's extra-mural activities. The defendant believes that the boy is involved in too many sporting activities which are not beneficial to his holistic growth. Her conclusions are buttressed by Mrs Hammutter's report and the failure by the boy's sports teacher to recognize that he suffers from any gross motor skill challenges. The plaintiff believes he is not overloaded and that he still needs e these activities. He is supported in this view by Mr Austin and Mrs Middleton.

The parties also hold divergent views over the future education of the children. The plaintiff believes that the children should continue to attend school in Zimbabwe, while the defendant believes that they should relocate to England which offers better educational prospects. At one time, the plaintiff f wanted to remove the children from both Heritage and Zimbabwe without notice to defendant and she protested. During the trial, the defendant firmly expressed her intention to remove the children from this country, amid shrill protests from the plaintiff.

I am satisfied that there exists a real danger than the children will be further emotionally damaged by the tug of war which is likely to persist between the g parties. They do not even agree on the meaning of clause 6 of the consent order, that is, whether "all issues" bears a literal meaning or whether it simply means major issues.

I agree with Mr de Marigny that joint custody would, in appropriate circumstances, be the first prize. In the present case, the past has been ^H acrimonious. During the trial, the plaintiff attempted to soften his position but

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he could not resist the temptation of taking pot shots at the defendant by ^A describing her as a financial mercenary who believed he had a pot of gold. I am satisfied that the facts and circumstances of this case militate against an award of joint custody.

It seems to me, regard being had to the preferences of the children as elicited in the de Marigny report, that the defendant is the most suitable custodian ^B parent. The plaintiff would have to be content with reasonable access.

The defendant sought to remove the minor children permanently from Zimbabwe after 31 July 2007. The plaintiff, who submitted that it was premature to seek such relief, did not seriously oppose it.

In her testimony, the defendant justified the need to prepare the girl for middle school in England. She demonstrated that she did not have any support ^C system in this country. She also cited the deteriorating economic environment in this country.

In para 15 of his draft order, the plaintiff postulates the possibility of either party relocating to the UK with the minor children, with the consent of this court. It is clear to me that at one point the plaintiff contemplated such a move. ^D The defendant would like to do so. She has taken into account the recommendation of the educationists and Mr de Marigny. The plaintiff has already prepared the children for relocation by showing them a house, they may live in the UK. That the children have lived in Zimbabwe for the greater part of their existence is not in doubt. They were both born in the UK. Indeed, after the defendant conceived the boy, the parties temporarily moved to the ^E UK for her to be closer to both their families. Clearly, the parties have close links to the UK and have always contemplated the possibility of going back home.

It is for these reasons that I feel obliged to grant the defendant the relief that she seeks in this regard.

As long as they remain in Zimbabwe, while the defendant has been awarded ^F custody, the plaintiff's rights of reasonable access, pending her departure, shall be regulated in terms of paras 2, 3, 4, 5 and 6 of the consent order of 26 July 2006.

MAINTENANCE ^G

[The learned judge dealt with the issue of maintenance and continued:]

It seems, to me, that since the order of maintenance that I will make will be in terms similar to those that are found in the consent order and, since the maintenance order and her request for fuel are for the limited duration of her stay in this country I will accede to her prayer for the delivery of 200 litres of diesel to her every month. ^H

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A MATRIMONIAL ASSETS

The plaintiff led evidence on matrimonial assets on 16 and 17 February 2006. There was no dispute as regards the local matrimonial assets. The dispute rather centered on the foreign assets that constitute matrimonial assets.

[The learned judge then considered the plaintiff's evidence and continued:]

^B It seemed to me that the plaintiff was an evasive and dishonest witness. He simply was not prepared to disclose his assets fully. I agree with observations of Mr *Andersen* that the plaintiff was an utter liar who manipulated the situation and avoided producing documents such as the completion statements. He appeared bent on denying the defendant her entitlement.

The defendant also testified on the matrimonial assets. She prayed that the ^C proceeds from the sale of the matrimonial house and the furniture be distributed equally between the parties.

[The learned judge then considered the defendant's evidence and continued:]

Mr Andersen, on the other hand, submitted that exhibit 6 was not a correct depiction of the assets. The whole thrust of the defendant's evidence ^D demonstrated that the plaintiff had not made full disclosure of the properties and the bank accounts and statements. He therefore sought that the court surrenders its power to determine matrimonial assets to the UK legal system, which he contended was more competent and better placed to deal with such cases.

^EI may remark in passing that the cases, which he referred me to, of *Baker v Baker* [1995] 2 FLR 829, *J v V (Disclosure: Offshore Corporations)* [2004] 1 FLR 1042 and *Minwalla v Minwalla and DM Investments SA, Midfield Management SA and CI Law Trustees Ltd* [2005] 1 FLR 771 demonstrate that the Family Division in the UK is familiar with schemes such as the ones that the plaintiff was involved in. These courts, however, have not surrendered or ^F abandoned their jurisdiction to determine these issues even in those cases where the evidence was unclear. See the *Minwalla* case *supra* at p 776 para 15. The English courts have drawn adverse inferences against the spouse who has used complex corporate undergrowth to hide matrimonial assets.

The defendant took three years to assess her case. At one time, in her ^G interrogatories of 10 November 2005, she threatened to seek letters of request from this court to the High Court in England in terms of the English Evidence (Proceedings in other Jurisdictions) Act 1975 as read with order 70 of the Rules of the Supreme Court.

This demonstrates that the defendant appreciated that the courts in this ^H country do not abdicate their responsibilities in favour of foreign courts,

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wheresoever situate and however competent they may be perceived to be. ^A

I am satisfied that I cannot make the order sought by the defendant in that regard. I agree with the submission that was advanced by *Mr de Bourbon* that while s 7 of the Matrimonial Causes Act gives this court a wide discretion to divide, apportion and distribute the assets of the spouses it does not allow this court to abrogate its jurisdiction to another court. ^B

THE COMPETING CLAIMS OF THE MATRIMONIAL ASSETS

The plaintiff averred in his declaration, as amended, that it was just and equitable that the matrimonial assets should be distributed as follows:

- (a) that the defendant be awarded 40 percent of the matrimonial estate, in the sum of £70 560; ^C
- (b) that she be awarded 40 percent of the value of 62A Steppes Road, Chisipite, Harare;
- (c) that she keeps all the movables from 265 Lonsdale Road, Barnes, London;
- (d) that she keeps the Mazda 2.5 motor vehicle.

The defendant initially counter-claimed for a 50 percent share of all the ^D matrimonial assets. In her amended counter-claim of 3 March 2006 that was granted on 28 March 2006, she sought the following:

- (a) an order for the sale of 62A Steppes Road, Chisipite, Harare and the contents thereof on her permanent departure from Zimbabwe and an equal division of the proceeds between the parties; ^E
- (b) all of the proceeds of the sale of the Lonsdale Road property;
- (c) the movables from the Lonsdale Road property and their delivery at the plaintiff's cost to a designated address in London;
- (d) an order for the dismissal of the plaintiff's claim for the distribution of the matrimonial assets. ^F

The amendment by the plaintiff of 11 October 2005, to the extent that it sought to prescribe how the defendant would use the £70 560 and 40 percent of the sale of the matrimonial home that he was offering her, was presumptuous and paternalistic.

The plaintiff assumed the obligation to give and deliver the contents of 265 Lonsdale Road from storage to an address of the defendant's choice in London.

THE ASSETS

I agree with the submission by Mr *de Bourbon* that the foreign assets that the defendant identified for distribution are captured in part C of her letter of 20 ^H

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^A September 2005. There were in existence two foreign registered immovable properties at the hearing of this matter. The plaintiff failed to disclose the income that he received from his business transactions. He also failed to provide a credible account of what he did with that income. I am satisfied that he hid his income in complex corporate undergrowth.

The defendant was concerned by these deliberate non-disclosures. She felt ^B cheated of her fair share of the matrimonial estate. The evidence showed that the plaintiff did not dispose of his beneficial interests in Coralsands. He thus benefited from the income he received from the sale of the properties that belonged to Coralsands, before he wound it up on 4 February 2005. The assets, therefore, that are available for distribution are those that are listed in ^C Exhibit "6".

THE DISTRIBUTION

The plaintiff submitted that the matrimonial property domicile at the time of the marriage, the *lex domicilii matrimonii*, determines the proprietary consequences of the marriage. See *Frankel's Estate & Anor v The Master & Anor* 1950 (1) SA 220 (A) at 251, *Sperling v Sperling* 1975 (3) SA 707 (A) at ^D 716E-H, which was followed in *Galante v Galante* 2002 (2) ZLR 408 (H) at 423; 2003 (5) SA 396 (ZH) at 409. He contended that I could apply English law to appropriate the matrimonial assets. The defendant pleaded as much in its amendment of 28 March 2006 in para 4:10 where it stated "The parties were domiciled in the UK at the time of the marriage and accordingly, their property ^E rights should be determined in accordance with the laws of the United Kingdom".

It appears from the plaintiff's statement with reference to *Bezuidenhout v Bezuidenhout* 2003 (6) SA 691 (C) which was taken on appeal and is reported in 2005 (2) SA 187 (SCA). At p 195-196, the Supreme Court of Appeal set out the English position with reference to the House of Lords decision in *White F v White* [2001] 1 AC 596; [2001] 1 All ER 1 (HL). It is to the effect that a spouse needs only to show that he or she could not have done more than he or she did to create or contribute to the matrimonial estate, before he or she can be awarded at least a one-half share in the estate.

In essence, the plaintiff contended that the defendant was a housewife and ^G mother who fulfilled that traditional role. He contended that she contributed in the purchase of the Lonsdale property to which she was entitled to a 50 percent share. He did not suggest that she could have done more than she did during the period of her stay in Zimbabwe. I take it that the plaintiff conceded that if I were to apply English law, she would be entitled to a one-half share ^H in the matrimonial assets at the dissolution of the marriage.

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The plaintiff further submitted that I could utilize the provisions of s 7 of ^A Matrimonial Causes Act [Chapter 5:13] which deals with the financial consequences of the dissolution of a marriage for both property rights and maintenance.

The provisions of s 7 are couched in very wide terms and they confer on me an equally wide discretion. It is correct that *Ncube v Ncube* 1993 (1) ZLR 3A ^B (S) at 42C-D sets the date of apportionment, division or distribution as the date of divorce. McNally JA in *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) at 106B-E set out the methodology of determining apportionment based on the his, hers and theirs criteria and then apportioning the distribution by using the criteria set out in the current s 7(4) of the Matrimonial Causes Act *supra*. The desired outcome is to place the spouses in the position they would have ^C been had a normal marital relationship continued.

In terms of Zimbabwean law, I would be obliged to consider her contribution to the matrimonial estate and apply each of the criteria set out in s 7(4) of the Matrimonial Causes Act. See *Shenje v Shenje* 2001 (2) ZLR 160 (H).

It is clear to me that if I were to do so, save for the purchase of the Lonsdale D property, she did not directly contribute to the business and financial affairs of the plaintiff. Under Zimbabwe law, even applying the criteria in *Shenje v Shenje supra*, she would not be entitled to a half share. The 40 percent share that has been offered by the plaintiff would be generous.

I have no reason to doubt that the position in English law is as was set out by the plaintiff. In the *Minwalla* case *supra*, Singer J referred to the criteria E that are set out in s 25 of the English Matrimonial Causes Act, 1973. The approach that he adopted is set out from p 797 para 80 to p 802 para 105. He took into account the income earning capabilities, the needs and obligations, the health, the length of the marriage, the standard of living, the ages and the contributions of the parties. He then measured them against the notional F dictates of fairness, equity and justice. The manner in which he dealt with the criterion of contribution confirmed the accuracy of the observations of the English position that were made in the *Bezuidenhout* case, *supra*. He stated at p 798 para 88 as follows:

"As to contributions: it is acknowledged that the sole financial contribution has been from H. On the other hand, there does not seem to be any dispute G but that W played her part as wife and as supporter to H in his business activities throughout their relationship. This is not a case in which there is any basis for differentiation between the spouses in the area of their respective contributions."

See also the approach of Coleridge J in *J v V supra* at 1052-1062. H

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A In my view, the English position achieves equity and justice by placing the parties in the position they would have been had the marriage continued. It is only fair and just that I determine the distribution of the marital assets in terms of English law. After all, the parties identify more with England than with Zimbabwe. It is not necessary for me to apply the criteria found in English law to the facts of this case. This is because the plaintiff accepted that if I were B to apply English law, the defendant would be entitled to, at the least, a one-half share of the matrimonial estate. I am satisfied that the defendant is entitled to, at the least, a 50 percent share of the matrimonial assets.

I, however, find that the plaintiff did not disclose all his assets and income, especially after he instituted these proceedings. The consequences of his C attitude are summed up in the English court of appeal by Butler-Sloss LJ in *Baker v Baker supra*, at p 835, in these words:

"Mr *Posnansky* pointed to an utterly false case and asked us to consider why the husband was lying and what did he have to hide. If the cupboard was bare, it was in his interests to open it and display its meagre contents. But on the contrary, the husband, despite his protestations to the D contrary, continued to live the life of an affluent man. I agree with the submissions from Mr *Posnansky* that if a court finds that the husband has lied about his means, and failed to give full and frank disclosure, it is open to the court to find that, beneath the false presentation, and the reasons for it, are undisclosed assets."

I will use this fact against him in distributing the assets that he disclosed. It E is fair, just and equitable that I award to the defendant all the money that is held in the joint account of their respective English solicitors. I have agonized over the appropriate order to make concerning the distribution of the immovable properties that the plaintiff disclosed which are registered in England.

In making the order that I have come to, I have been influenced in great measure F by the plaintiff's failure to make full and frank disclosure, the size of the business transactions that were carried out by Coralsands and the concomitant income that must have accrued to him, the benefit that accrued to him from the disposal of 7A Granville Road to Nicky Morris on 10 November 2005, the concerted programme that he undertook in asset-stripping the matrimonial estate to his benefit and to the impoverishment of the defendant of which the G registration of a charge in favor of his parents for £67 000 against 390 Sutton Common Road was part of, his financial acumen and resourcefulness and his apparent disdain for the integrity of the legal process. I will order that the two disclosed properties be transferred into the defendant's name while the plaintiff shall remain responsible for the discharge of all the encumbrances H such as the mortgages and restrictions registered against them.

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I also believe that the justice of this case requires that I leave the door open A for the defendant to approach this court for the distribution of any property, properly regarded as matrimonial property,

which was not disclosed on the date of divorce, which she may unearth in future.

I see no reason why the local immovable property and the contents thereof should not be divided in equal shares between the parties and to their mutual ^B advantage. In that regard I will adopt the suggestions made by the plaintiff in his draft order.

Lastly, I will award to the plaintiff the money held in the Cyprus account, in the Lloyds TSB Debit Card account, the Jewel Bank account and the 180 000 British Airways air miles and the Kia Sorrento motor vehicle and distribute the Mazda 2.5 motor vehicle to the defendant. She will retain her pension, Sun Life ^C Canada policy and other income as shown in Exhibit 6.

COSTS

The defendant abandoned her claim to the costs that she incurred in her UK investigations. Mr *Andersen* conceded that such costs, which are not associated with the calling of an expert or qualifying expenses, are not ^D claimable under r 307 of the Rules of this court as read with the High Court (Fees and Allowances) Rules 2000. The defendant sought costs of suit, inclusive of the qualifying expenses of Mr de Marigny. The plaintiff on the other hand submitted that each party should be ordered to meet its own costs.

It seems to me that the two most contentious issues between the parties ^E revolved around custody and the disclosure of the matrimonial assets. The defendant's case on both these issues has largely been vindicated. She has not been in employment for the past nine years and has been dependant on the plaintiff for her livelihood except for the period from April 2003 to July 2005 when she survived on the largesse of her parents and grandmother. It was also essential that she call the expert opinion of Mr de Marigny, which was ^F invaluable to this court in the determination of the custody issue.

In my view, she is entitled to her costs of suit for both the main and counter claims, and including the qualifying expenses of Mr de Marigny.

It is for these reasons that I would dismiss the plaintiff's claim.

IT IS ACCORDINGLY ORDERED THAT: ^G

1. A decree of divorce be and is hereby granted to the defendant.
2. Custody of the two minor children of the marriage, namely Elsbeth Bridie Beckford, born on 26 November 1996, and Theodore Hugh Beckford born, on 9 February 1999, be and is hereby granted to the defendant.
3. The defendant be and is hereby granted leave to remove the minor ^H

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^A children from Zimbabwe to the United Kingdom permanently on or after 31 July 2007.

4. The plaintiff shall vacate the property at 62A Steppes Road, Chisipite, Harare, and the defendant shall have the unfettered right to continue residing upon such property with the two minor children of the marriage. The plaintiff shall be responsible for the costs reasonably and necessarily ^B incurred in the maintenance and repair of the improvements on such property. The plaintiff shall be consulted on all proposed expenditure and he shall have the right to call for quotations in respect of any work that may be required.
5. The plaintiff shall have the right for the children to stay with him – ^C
 - 5.1 During school terms, on alternate weekends from lunchtime on Friday until Monday morning, when he will drop them off at school;
 - 5.2 When the plaintiff has had the children stay with him for the preceding weekend the following provisions will apply:
 - 5.2.1 He will take the children to school on Monday, Wednesday ^D and Friday;
 - 5.2.2 He will collect the children from school on Tuesday when he will return them to the defendant by 6:00 p.m;
 - 5.2.3 He will collect the children from school on Thursday when he will have them overnight. ^E

- 5.3 When the plaintiff has not had the children stay with him for the preceding weekend the following provisions will apply:
 - 5.3.1 He will take the children to school on Tuesday and Thursday;
 - 5.3.2 He will collect the children from school on Monday when he will return them to the defendant by 6:00 p.m. ^F
 - 5.3.3 He will collect the children from school on Wednesday when he will have them overnight;
 - 5.3.4 He will collect the children from school on Friday when the provisions of Clause 5.1 above will apply;
- 5.4 One-half of each school holiday; ^G
- 5.5 alternate Christmas and Easter periods, other alternate public holidays and Elsbeth's birthday;
6. When the children are with one of their parents, the other parent shall be entitled to reasonable telephone access to the children. ^H
7. In the event that the plaintiff is absent from Zimbabwe for any reason

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during the school term, the defendant will allow the plaintiff to make up ^A for the time that he has missed with the children over a weekend, subject to him giving reasonable notice of his return date to the defendant and further subject to him not spending more than two consecutive weekends with the children.

8. The parties shall jointly decide all issues relating to the education and ^B health of the children, any change in their religious denomination, special needs activities for Theo and the children's extra-curricula activities
9. The plaintiff shall pay the following household and other expenses incurred in the running of 62A Steppes Road, Chisipite, Harare direct to the suppliers thereof strictly by due date: electricity, water, rates, Tel-One telephone account, vet bills, DSTV subscriptions, insurance of house and ^C contents, third party insurance, licensing and reasonable maintenance and repair costs together with the procurement and payment of 200 litres of diesel per month of the motor vehicle in the defendant's possession, security guard costs, wages of two domestic workers at the prescribed rate. ^D
10. The plaintiff shall pay maintenance for the defendant and the children in the sum of ZW30 000 per month (as revalued at 1 August 2006) with effect from 1 September 2005 per month, such maintenance to be subject to review every three months by reference to the increase in the Consumer Price Index for the preceding three months produced by the Central Statistical Office. ^E
11. The plaintiff shall pay the children's school fees, costs and charges, school and reasonable casual clothing and footwear, extra-mural activities including all accessories and sporting equipment and clothing.
12. The plaintiff shall at his cost retain the children and the defendant on a local medical aid scheme and pay all medical and dental shortfalls incurred ^F under such scheme and furthermore the plaintiff shall be solely responsible for any emergency medical treatment the defendant and the children may require outside the country.
13. The plaintiff shall pay the children's airfares to enable them to travel to London every school holiday together with an allowance in the sum of £75 per child per week, plus the cost of Elsbeth's ice-skating lessons to ^G a maximum of three hourly lessons per week during such school holidays when the children are with the defendant. In addition, the plaintiff shall pay every school holiday for the children to travel from London to Blackpool by rail and fly from Manchester to London by economy fare. ^H

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Kudya J ^A

14. Clauses 4 to 13 of this order shall only apply during the period that the defendant and the children remain in Zimbabwe pending their permanent relocation to the United Kingdom, and thereafter the plaintiff's rights of access to the minor children and the rights of the minor

children and the defendant to maintenance shall be by agreement between the parties or failing which by order of a court of competent jurisdiction. ^B

15. Upon the permanent departure of the children and the defendant in terms of Clause 3 of this order:
 - 15.1 the house situated at 62A Steppes Road, Chisipite, Harare, or the shares in the company holding such property, shall be valued within 30 days of this order by an independent valuer to determine the likely ^C market value of the shares or the property, and the plaintiff shall elect within 14 days of such a determination whether to sell the shares or the property or to do neither.
 - 15.1.1 If the shares or the property is sold, the defendant shall receive 50 per cent of the gross proceeds of the sale (less any assessed payment in respect of capital gains tax and the cost ^D of the independent valuer).
 - 15.1.2 If the plaintiff elects not to sell shares or the property, he shall pay to the defendant 50 percent of the market value of the shares or the property within 30 days of such a determination by the valuator, whichever is the greater, as assessed by the ^E independent valuer (less the costs of the independent valuer).
 - 15.2 The defendant shall sell the contents of this property for their market value and the proceeds of the sale shall be divided equally between the parties.
16. The plaintiff shall transfer against payment by him of the transfer costs ^F his rights, title and interest in the property situated at 45 Leinster Avenue, London SW14 7JW, Title Number-SGL67648, to the defendant free of any encumbrances, mortgages or other obligations duly existing or duly registered by law over the property.
17. The plaintiff shall transfer against payment by him of the transfer costs his rights, title and interest in the property situated at 390 Sutton Road, ^G Sutton, SM3 9PH, Title Number-SGL637408, held under the name of Glencora Resources Ltd, to the defendant free of any encumbrances, mortgages or other obligations duly existing or duly registered by law over the property.
18. The defendant shall receive all the funds presently held in a bank account ^H in the joint names of R B M Davies and Partners and Fladgate Fielder

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Kudya J

Solicitors, such funds being the net proceeds of the sale of the property ^A at 265 Lonsdale Road, Barnes, London SW13 9QL.

19. The defendant be and is hereby awarded all the movable items that were formerly at the Lonsdale Road, Barnes, London property and it is further directed that they shall be delivered by the plaintiff at his cost to such address as may be designated by her in London. ^B
20. The plaintiff shall transfer into the name of the defendant the Mazda 2.5 motor vehicle presently being used by her.
21. The plaintiff is awarded the following property:
 - 21.1 The Kia Sorrento motor vehicle;
 - 21.2 all the money in the Lloyds TSB Debit Bank account, in the Barclays ^C Bank in Cyprus account, in the Jewel Bank account, and all the British Airways air miles.
22. The plaintiff's claim be and is hereby dismissed.
23. The plaintiff shall pay the defendant's costs of suit, including any costs reserved for determination in this matter and the qualifying fees and ^D expenses of Mr de Marigny.
24. Either party shall have the right to register and seal this order with the High Court of Judicature of England and Wales, subject to the rules and practice of such court.

Honey and Blanckenberg, plaintiff's legal practitioners ^E

Atherstone and Cook, defendant's legal practitioners ^F

* A clinical psychologist — *Editor*

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Source:

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INDUSTRIAL DEVELOPMENT AUTHORITY v SARUCHERA 2006 (2) ZLR 399 (H)

2006 (2) ZLR p399

Citation	2006 (2) ZLR 399 (H)
Case No	Judgment No. HH-129-06
Court	High Court, Harare
Judge	Bhunu J
Heard	5 December 2006
Judgment	20 December 2006
Counsel	Mrs <i>M Valla</i> , for the applicant <i>J C Andersen SC</i> , for the respondent
Case Type	Application for leave to execute pending appeal
Annotations	No case annotations to date

Flynote

c Court — High Court — officials – Sheriff and his deputies — duties — duty to execute writ issued by High Court — Sheriff having no discretion in the matter

Headnote

The applicant had obtained a writ of execution against two directors of a company which was indebted to the applicant, the directors being personally liable for the company's debts. The respondent was appointed liquidator of the company.

Acting on the writ, the Deputy Sheriff attached one of the director's share certificates in another company. Shortly thereafter, the two directors were "specified" in terms of the Prevention of Corruption Act [Chapter 9:16] and the respondent was appointed as investigator in terms of the Act. The Deputy Sheriff then unilaterally decided to stop the sale in execution of the share certificates and instead forwarded them to the respondent in his capacity as investigator. The applicant obtained an order from the High Court, requiring the respondent to return the share certificates to the applicant for sale in execution, alternatively, to pay the applicant the market value of the shares. The respondent noted an appeal and the applicant sought leave to execute pending appeal.

Held, that in terms of s 20(1) of the High Court Act [Chapter 7:06], the Sheriff and his deputies are obliged to execute all writs and other process issued by the High Court and make a return to the court. Accordingly, when presented with a valid writ of execution, the Deputy Sheriff's office is merely an enforcement vehicle which is not entitled to question the enforceability of the writ. The Deputy Sheriff is duty bound to obey, without question, all orders and writs emanating from the

High Court. The Deputy Sheriff thus grossly erred when he unilaterally stopped and reversed he execution process. His conduct amounted to a gross defiance of a court order, the validity of which had not been challenged.

^H *Held*, further, that as the respondent did no dispute his liability, there was

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Bhunu J

no need for further negotiation. If the sale in execution raised more than ^A the judgment debt, any excess would be dealt with in terms of the rules of court.

Held, further, that the applicant had shown that the respondent's prospects of success on appeal were virtually nil and that the appeal was frivolous and vexatious, calculated to buy time. In view of the high inflation rate, ^B if the application were not granted, the applicant would suffer irreparable harm. Further, if the court were to extend leniency to the respondent, it would do so at the expense of a litigant who had already established his right and title to the claim in open court.

Cases referred to ^C

Chibanda v King 1983 (1) ZLR 116 (H)

Madaka v Dredge HB-116-89

Legislation considered

High Court Act [*Chapter 7:06*], s 20(1) ^D

Case information

Mrs *M Valla*, for the applicant

J C Andersen SC, for the respondent

Judgment

BHUNU J: ENG Asset Management (Pvt) Ltd is a duly incorporated asset management company whereas Nyasha Watyoka and Gilbert Muponda are its directors among others. ^E

Owing to the fraudulent activities of its directors, ENG Asset Management Co fell upon hard times with the result that it had to undergo forced liquidation. The respondent Reggie Francis Saruchera was duly appointed Liquidator of the ENG Group of Companies.

On 18 February 2004, under case No. HC 107/04, Nyasha Watyoka and Gilbert ^F Mupondi were held personally liable for all debts and liabilities owed to the applicant by ENG Asset Management (Pvt) Ltd, in consequence whereof the applicant obtained a writ of execution against ENG and the two directors in the sum of \$499 782 022.90. The writ is dated 10 March 2004.

On the strength of the writ of execution, the Deputy Sheriff proceeded to attach ^G Muponda's share certificates for 100 shares in Aronvi Investments (Pvt) Ltd.

Shortly thereafter, both Watyoka and Muponda were specified in terms of the Prevention of Corruption Act [*Chapter 9:16*] with the respondent being appointed investigator in terms of the act.

When the Deputy Sheriff learnt of the specification he unilaterally stopped ^H

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Bhunu J

^A the sale in execution of the shares and forwarded the share certificates to the respondent.

Despite demand, the respondent has steadfastly refused to surrender the share certificates in terms of the court order under case No. HC 107/04 for enforcement.

^B The dispute came before Gowora J under case No. HC 10819/04 wherein the learned judge made the following order:

"IT IS ORDERED THAT:

1. The respondent shall within ten days of service of this order return the share certificate for 100 shares in Aronvi Investments (Pvt) Ltd to the applicant for sale in execution. c
2. In the event that the respondent fails to deliver the said shares referred to in paragraph 1 above the respondent shall pay to the applicant the open market value of the 100 shares in Aronvi Investments (Pvt) Ltd as determined by the Sheriff of the High Court at the date of this order.”

Shorn of its legal jargon and niceties, it is clear that her ladyship’s order endeavoured to restore the *status quo ante* to enable the applicant to effect execution in terms of the writ of execution obtained under case No. HC 107/04 dated 10 March 2004.

Aggrieved by the decision of Gowora J, the respondent noted an appeal to the Supreme Court prompting this application for leave to execute pending appeal.

In determining the issue at hand, I note in passing that the applicant having obtained a writ of execution under case No. HC 107/04 from a competent court of competent jurisdiction it was entitled to enforce the order through the deputy sheriff without any further ado.

¶ The functions of the Deputy Sheriff are spelt out under s 20(1) of the High Court Act [Chapter 7:06]. It reads:

- “(1) Subject to section *nineteen* and to rules of court, the Sheriff *shall* by himself or his deputy or an assistant deputy, execute all sentences, decrees, judgments, *writs*, summons, rules, orders, warrants, commands and other process of the High Court and *shall* make a *g* return thereof to that court together with the manner of the execution thereof” (my emphasis).

It is plain that the above section is couched in peremptory terms, admitting of no exception or discretion on the part of the Deputy Sheriff. When presented with a valid writ of execution, the Deputy Sheriff’s office is merely *h* an enforcement vehicle which is not entitled to question the enforceability of

2006 (2) ZLR p402

Bhunu J

a valid writ of execution. Thus, the Deputy Sheriff is duty bound to obey all *a* court orders and writs emanating from the High Court without question.

That being the case, it is my considered view that the Deputy Sheriff grossly erred when he unilaterally stopped and reversed the execution process by returning the attached 100 shares to the respondent instead of selling them in execution as ordered by the court. The Deputy Sheriff’s conduct in this *b* respect amounted to a gross defiance of a court order especially in circumstances where the validity and enforceability of the writ had not been challenged.

Viewed from that angle, I can perceive no error in Gowora J’s determination which sought to regularize the Deputy Sheriff’s irregular defective conduct to facilitate the enforcement of a lawful court order. c

It is also pertinent to note that the respondent’s appeal in the Supreme Court rests on a rather shaky foundation. It is also material to note that the respondent does not question the issue of liability at all. Thus, at this hearing, counsel for the respondent advised the court that the respondent has tendered payment of the full judgment debt which offer was rejected by the *d* applicant but the offer remains open.

The applicant admitted that the offer was made but was rejected on the basis that it was insufficient to problem in the disposal of the shares he shall render a report according to law.

In my view there is no need for further negotiations. Payment should simply *e* be made to the Deputy Sheriff who shall then determine the sufficiency of the amount paid in terms of the writ of execution.

Execution is done in terms of the rules. In the event that the sale of the shares raises excess amounts the excess amounts are to be dealt with in terms of the rules. The respondent’s fears of prejudice in this regard are therefore unfounded. Should the Deputy Sheriff encounter any problem in the disposal of the shares *f* he shall render a report according to law.

It is trite that the noting of an appeal automatically suspends the decision appealed against. This is however a rule of practice rather than a rule of law such that the court has discretion as to whether or not to grant leave to execute pending appeal. It is an equitable remedy where the court is

constrained to weigh the balance of convenience. The parameters for consideration were laid down by Blackie J in *Madaka v Dredge* HB-116-89 as including:

- “1. The potentiality of irreparable harm or prejudice sustained by the appellant on appeal (the respondent in the application) if leave to execute were to be granted. H

2006 (2) ZLR p403

Bhunu J A

2. the potentiality of irreparable harm or prejudice being sustained by the respondent (the applicant in the application) if leave to execute were to be refused.
3. The prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the B judgment but with some indirect purpose to gain time or to harass the other party.
4. Where there is the potentiality of irreparable harm or prejudice to both the appellant and the respondent, the balance of hardship or convenience as the case may be.”

The applicant bears the onus of establishing that the court should exercise C its discretion in its favour.

In this case as I have already demonstrated elsewhere in my judgment the applicant has amply demonstrated that the respondent’s prospects of success on appeal are virtually nil.

The appeal in my view, is frivolous and vexatious calculated to buy time at the D applicant’s irretrievable loss and prejudice.

In these high inflationary times, where the court’s prescribed rate of interest of 30 per cent *per annum* is lagging far behind the rate of inflation, I am convinced that the applicant will continue to suffer irreparable harm if the application is not granted.

E The court is also constrained to take into account that if it were to extend mercy and leniency to the respondent it will be doing so at the expense of a litigant who has already established his right and title to the claim in open court. See the head note in *Chibanda v King* 1983 (1) ZLR 116 (H). Although the case was dealing with an application for stay of execution pending appeal, which is the opposite of leave to execute pending appeal, the remarks are apposite.

F Having said that I am satisfied that the applicant has established on a balance of probabilities that it is entitled to execute its claim pending appeal. That being the case it is ordered that:

1. Leave to execute judgment in High Court case No. 10819/04 pending appeal be and is hereby granted. G
2. the respondent be and is hereby ordered to pay costs of suit.

Hussein Ranchod & Co, applicant’s legal practitioners

H *Atherstone & Cook*, respondent’s legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2006/Volume 2/ZIMBABWE BANKING CORPORATION LTD v TRUST FINANCE LTD & ANOR 2006 (2) ZLR 404 (H)

ZIMBABWE BANKING CORPORATION LTD v TRUST FINANCE LTD & ANOR 2006 (2) ZLR 404 (H)

2006 (2) ZLR p404

Citation 2006 (2) ZLR 404 (H)

Case No HH-130-06

Court High Court, Harare

Judge	Mavangira J
Heard	18 May 2006
Judgment	20 December 2006
Counsel	<i>E T Matinenga</i> , for the applicant <i>A Moyo</i> , for the first respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Practice and procedure – application – court application – affidavit – authorization of deponent – failure to allege in founding affidavit that deponent was authorized to depose thereto – not necessarily fatal – deponent's authorization to represent applicant not previously challenged in earlier and related proceedings ^D

Practice and procedure – process – founding affidavit – who may sign – party a company – party's legal practitioner – when maybe regarded as duly authorised to act on behalf of company

Practice and procedure – review – of taxation – separately provided for – procedures and time limits applicable different from those for general ^E reviews

Practice and procedure – taxation – powers of court to alter rulings of taxing officers – grounds for interference – common law rights of review – duty of court to interfere if it is satisfied that a taxing officer was wrong in regard to some item ^F

Headnote

The review of taxation by a taxing officer is clearly and separately provided for in r 314 of the High Court Rules, 1971 (RGN 1047 of 1971). Rule 257 of the Rules has no application to such reviews.

The court has power to interfere with or alter a taxing officer's ruling on two grounds: firstly, on the application of common law rights on review which ^G involves a finding that he was grossly unreasonable or erred on a point of principle or law. It should not be overlooked that even when such grounds for interference exist, it need not follow that the taxing officer's decision must necessarily be set aside or altered. He may have arrived at the correct decision for the wrong or improper reason. Secondly, ^H

2006 (2) ZLR p405

Mavangira J

^A regardless of the absence of any common law grounds for interference, the court has a duty to interfere if satisfied that the taxing officer was clearly wrong in regard to some item. In such a case, the court will substitute its own opinion for that of the taxing officer even if it is a matter involving degree (*dicta per* Goldin AJA in *Cone Textiles (Pvt) Ltd v C Pettigrew (Pvt) Ltd & Anor* 1984 (1) ZLR 274 (S) at 278 followed).

^B In his founding affidavit, on behalf of the applicant, a legal practitioner averred that he had acted for the applicant in litigation, which had given rise to the present application. However, he omitted to state that he had been authorized to depose to the affidavit. In the opposing affidavit, the first respondent challenged his capacity and authority to depose to it. In the answering affidavit, the legal practitioner confirmed that he had ^C been authorized by the applicant to depose to the founding affidavit as well as to answering affidavit in his capacity as the applicants legal practitioner.

Held, that the omission in the founding affidavit of the allegation that he was duly authorized was not fatal, particularly in view of the history and ^D background to the application. He had acted for the applicant in the proceedings, which subsequently led to the review of taxation, which was the

subject of the present application. His authority to act on behalf of the applicant in these earlier proceedings had not been an issue.

Cases cited ^E

Air Zimbabwe Corp & Ors v ZRA 2003 (2) ZLR 11 (H)

Carlis v Hay 1903 TS 317

Cone Textiles (Pvt) Ltd v C Pettigrew (Pvt) Ltd & Anor 1984 (1) ZLR 274 (S)

Eastview Gardens Residents Assn v Zimbabwe Reinsurance Corp Ltd 2003 (2) ZLR 388 (H)

^F *Eskom v Soweto City Council* 1992 (2) SA 703 (E)

Griffiths & Inglis (Pty) Ltd v Southern Cape Blaster (Pty) Ltd 1972 (4) SA 249 (C)

Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347 (C)

Nyandoro v Sithole & Ors 1999 (2) ZLR 353 (H)

Thorn v Retail Traders Inquiry Bureau & Anor 1936 TPD 310

Legislation considered ^G

High Court Rules, 1971 (RGN 1047 of 1971), rr 257 & 314

Case information

E T Matinenga, for the applicant

^H *A Moyo*, for the first respondent

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Mavangira J

Judgment

MAVANGIRA J: This is an application for a review of taxation. The founding ^A affidavit was deposed to by Simon Sadomba who stated that he is a "legal practitioner ... within the firm *Gill Godlonton and Gerrans* the applicant's legal practitioners of record." The first respondent challenged the deponent's capacity and authority to depose to an affidavit on behalf of the applicant. In his answering affidavit, Sadomba then stated.

"In my founding affidavit, I omitted to state that I had been authorised by the applicant to depose to that affidavit. I confirm having been authorised by the applicant to depose to that affidavit and also this replying affidavit in my capacity as legal practitioner for applicant."

The deponent acted for the applicant in the litigation giving rise to this application. Although the case is not quite in point, it was stated in *Eskom v c Soweto City Council* 1992 (2) SA 703 (E) at 705E:

"The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his ^D own attorney."

It was held in *Thorne v Retail Traders Inquiry Bureau & Anor* 1936 TPD 310 that where an application is made by an agent on behalf of a principal, a statement in the petition that the applicant is acting in his capacity as agent for the principal in question is a sufficient allegation that he is authorised to make the application, and he may sign the petition in his own name without ^E qualification.

In *Griffiths & Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd* 1972 (4) SA 249 at 252F-G, Corbett J stated:

"In the present case, the founding affidavit makes no express mention of authorisation by the company acting through its board of directors. The ^F question of authority has been challenged in the opposing affidavit, and thus the onus is upon the applicant to show that the application has been authorised by the directors of the company. In as much as no contrary evidence has been placed before the court by the respondent, the 'minimum evidence', to use the words of Watermeyer J, in *Mall's* case, will suffice." ^G

In *Mall (Cape) (Pty) Ltd v Merino Ko-Operasie Bpk* 1957 (2) SA 347 (C), it was held:

"The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that form of proof is necessary in every case. Each case must be considered on its own merits."

2006 (2) ZLR p407

Mavangira J

A and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf."

In *Air Zimbabwe Corporation & Ors v Zimbabwe Revenue Authority*

2003 (2) ZLR 11 (H), it was held that the deponent to the applicant's affidavit had authority to act for and on behalf of the applicants after the court took into account the prior dealings between the parties and it was further stated by Chinhengo J at 16:

"I may in passing, observe that is often that litigants take objection to the other party's *locus standi* to institute proceedings. I do not think that it is proper for any litigant to do so especially where, from prior dealings, he should be aware that the challenge to his adversary's *locus standi* will not succeed."

In *Eastview Gardens Residents Association v Zimbabwe Reinsurance Corporation Ltd* 2003 (2) ZLR 388 (H), Paradza J stated:

"In the case of *Direct Response (Pvt) Ltd v Shepherd* 1993 (2) ZLR 218 (H), Adam J considered the circumstances under which a litigant may successfully challenge the authority of the person who purports to act for another person, in that case a company. He concluded that where a deponent does not state that he or she is duly authorised to depose to that affidavit on behalf of others the court will not readily conclude that such person had no authority to so depose to an affidavit. The court should consider each case on its own merits in arriving at a conclusion. E Watermeyer J in the case of *Mall (Cape)(Pty) Ltd v Merino Ko-operasie Bkp* 1957 (2) SA 347 (C), stated that in the case of an artificial person coming before the Courts like a company or co-operative company, *albeit* an association as in the case of the applicant – 'There is judicial precedent for holding that that objection may be taken *if there is nothing before the court* to show that the applicant has duly F authorised institution of motion proceedings. Unlike an individual an artificial person can only function through its agent and it only takes decisions in the passing of resolutions *in the manner provided by its Constitution ...* The best evidence that the proceedings have been properly authorised would be to provide by an affidavit made by an official by the company annexing a copy of the resolution but I do not H consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigant and not some unauthorised person on its behalf'" (my emphasis).

I agree with the applicants' counsel's submission that it is trite that a legal practitioner is his client's agent. See para 4 of his heads of argument. I do not,

2006 (2) ZLR p408

Mavangira J

therefore, consider the omission in the founding affidavit of the allegation that A the deponent was "authorised", to be fatal, particularly also, in view of the history or background to this application. This same legal practitioner acted for the applicant in the proceedings which subsequently led to the taxation now sought to be reviewed and in which the issue of his authority was not an issue. I am satisfied that the deponent's averment in the founding affidavit B is sufficient in the circumstances of this matter, to show his authority to depose thereto and therefore find that the deponent was duly authorised by the applicant as he states.

The respondent also raised another preliminary point which I now deal with. It is contended that the application does not comply with rr 257 and 314 of this court's rules. I have no hesitation in agreeing with the applicant's submission C that whilst r 257 falls under Order 33 which deals with reviews generally, it is not referred to or incorporated in any way in r 314. Rule 314 provides:

"314 Review of taxation

(1) A party aggrieved by the decision of a taxing officer may apply to court within four weeks after the taxation to review such taxation. The D application shall be by court application to the taxing officer and to the opposite party, if such opposing party was present at the taxation or if the court decides that such opposite party should be represented.

(2) The court application shall specify the items forming the subject of the grievance."

Rule 257 requires that: ^ε

"The notice shall state shortly and clearly, the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for."

The review of taxation is thus clearly and separately provided for in the Rules. The time limits and format applicable are clearly and separately stated. It is, ^ε in my view, clear that r 257 has no application in reviews of taxation and that the stated ground would not be a sound and justifiable reason for finding that the application cannot be heard by this court.

In the result, I find against the respondent in respect of both preliminary issues. This application is therefore properly before this court.

MERITS ^G

It is common cause between the parties that the law governing interference with a taxing master's ruling is as set out by Goldin AJA in *Cone Textiles (Pvt) Ltd v Pettigrew (Pvt) Ltd & Anor* 1984 (1) ZLR 274 (S) at 278 as follows:

"In my view, the correct position is, therefore, that the court has power to interfere with or alter a taxing master's ruling on two grounds. Firstly, on ^H

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Mavangira J

^A the application of common law rights on review which involve a finding that he was grossly unreasonable or erred on a point of principle or law. It should not be overlooked that even when such grounds for inference exist it need not follow that the taxing master's decision must necessarily be set aside or altered. He may have arrived at the correct decision for the wrong or improper reason.

^B Secondly, regardless of the absence of any common law ground for interference, the court has a duty to interfere if satisfied that the taxing master was clearly wrong in regard to some item. In such a case the court will substitute its own opinion for that of the taxing master even if it is a matter involving degree.

It is emphasized, however, that the court must be satisfied that the taxing ^C master was clearly wrong and not merely that in his place it would have come to a different decision."

The dispute between the parties emanates from the interpretation placed by the Taxing Master on the words in my ruling of 4 August 2005 in the earlier matter involving these same parties' matter in which the defendant was awarded the "costs of this date's hearing and should properly bear the ^D defendant's said costs on the higher scale" (emphasis added).

In his heads of argument the first respondent's legal practitioner made this pertinent submission:

"... when considering an order as to 'costs of the day' caused by a postponement, see the case of *Carlis v Hay* 1903 TS 317 at 318, per Innes ^E CJ:

'I take it that when a party obtains a postponement and is ordered to pay costs of the day, he is liable to pay those extra costs which are caused by the postponement.'

Further 'costs of the day' are defined in *Van Zyl's Judicial Practice* 2 ed at ^F p 785 as:

'Such unnecessary or extra costs as have been or may be incurred, owing to a party to a suit applying for or causing the postponement or delay of the trial or hearing which costs would not have been incurred but for such Delay.'"

It is the defendant's contention that each and every item on the bill of costs ^G is consequent upon and incidental to the applicant's application for a postponement, which application the court heard on 27 July 2005 leading to the ruling already referred to above.

The first respondent's legal practitioner submitted in heads of argument that on a generous interpretation the applicants' purported grounds for review ^H could be extracted from paras 11 to 14 of the founding affidavit. In my view

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Mavangira J

these stated paragraphs, in compliance with r 314(2) specify the items forming ^A the subject of the grievance.

The applicant states in the founding affidavit that it is aggrieved by the Assistant Taxing Officer's decision to allow costs reflected in items 1 to 11 and 17 to 24 of the bill of costs on the ground that

these were incurred before and after 27 July 2005 and were not in the contemplation of the judge when the ^B ruling of 4 August 2005 was made. The deponent to the founding affidavit further states that the applicant was not accorded an opportunity to address the Assistant Taxing Officer on the nature and grounds of its queries. The following startling statement is then made:

"The Assistant Taxing Officer simply took a ruling from somebody else without affording the parties an opportunity to address that person on ^C the issue, which was a serious misdirection on her part."

I say "startling" in view of the undisputed statement in the first respondent's opposing affidavit that Mr Sadomba, who deposed the applicants' affidavit was not present at the taxation of 6 September 2005. In fact, Mr Sadomba in his answering affidavit carefully avoids discussing the events of 6 September ^D 2005 and seeks to create the impression that the taxation was adjourned to and continued on 9 September yet that is the date on which the Assistant Taxing Officer gave her determination of the items on the bill of costs. It is also undisputed that on the first day of the taxation on 6 September 2005, he sent a clerk from his firm to attend and that all the contents of his affidavit in relation to that date are therefore based on hearsay. ^E

However, even assuming that he had personal knowledge of the same, in my perusal of items 1 to 11 on the bill of costs, it appears that all the items claimed were in preparation of the hearing of 27 July 2005, particularly as the argument before the court when the applicant sought a postponement was whether or not a contested provisional sentence matter could be set down on, and or ^F postponed to the unopposed or the opposed roll.

With regards to items 18 to 24, although Mr *Matinenga* had no instructions to concede in relation to them, he was not in a position to make any submission justifying why they should not have been allowed. A ruling having been handed down, the first respondent's legal practitioners necessarily had to make inquiries with a view to uplifting a copy, I have no hesitation therefore, ^G in finding that the Assistant Taxing Officer was justified in allowing these items as well.

The applicants' legal practitioners general conduct in his handling of this matter and specifically in his depositions in the founding affidavit leaves a lot to be desired. He should be hesitant, if not the last person to purport or attempt ^H

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Mavangira J

A to throw stones at the first respondent's legal practitioners, as he does in his answering affidavit at pages 33 and 34 of the record. He borders on conduct that would earn the applicant an award of costs on the higher scale and even possibly against himself *de bonis propriis*. He, however, only borders thereon. In my view, his conduct is not of the level as in *Nyandoro v Sithole & Ors* 1999 (2) ZLR 353 (H) where a legal practitioner was visited with an order ^B of costs *de bonis propriis* for arrogant and impolite language used in reference to the opposing practitioner. I am ^C unable to grant the first respondent costs at the level indicated in its heads of argument as being the appropriate level, by reason of the applicant's legal practitioner's language in reference to the first respondent's legal practitioner. While costs will follow the result I am unable to grant the first respondent costs at the level sought in heads of argument.

For the above reasons, it is ordered as follows:

The application is dismissed with costs.

^D *Gill, Godlonton & Gerrans*, applicant's legal practitioners
Kantor & Immerman, first respondent's legal practitioners

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