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ROWLAND ELECTRO ENGINEERING (PVT) LTD v ZIMBABWE BANKING CORPORATION 2007 (1) ZLR 1 (H)

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Citation	2007 (1) ZLR 1 (H)
Case No	Judgment No. HH-3-07
Court	High Court, Harare
Judge	Gowora J
Heard	10 January 2007
Judgment	10 January 2007
Counsel	<i>R M Fitches</i> , with him <i>P Machaya</i> , for the plaintiff <i>H Zhou</i> , for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

c Contract — breach — damages — general and special damages — distinction between — what plaintiff must show when special damages are claimed — loss must be within contemplation of parties — loss of profits — may be claimed as special or general damages, depending on circumstances

Damages — assessment — breach of contract — general and special damages — distinction between — plaintiff's duties when special damages claimed — loss of profits — whether general or specific damages may be claimed

Headnote

The plaintiff held a banking account with the defendant bank. Over a period of two months in 2001, large sums of money were withdrawn from the **ε** plaintiff's account and paid to a third party. The plaintiff claimed that there had been no written authorisation for the withdrawals, but the evidence did not show that a written authorisation was required. The defendant claimed that the withdrawals were made on the verbal authorisation of a representative of the plaintiff. The plaintiff claimed that it would have utilized the monies thus withdrawn in its foreign currency business and generated profits which it would have ultimately invested on the money market and gained a profit. It alleged further that the unauthorized withdrawals have made it impossible for it to utilize the money as alleged at a profit and thus it has suffered loss, which it claimed from the defendant.

About a year after the events which the plaintiff complained about, the Minister of Finance revoked the licences of all *bureaux de change*. It therefore became necessary, according to the plaintiff, that it should find some other business in which to invest. It chose to place its money in the fast growing and phenomenal asset management companies that were offering interest rates that were hitherto unimagined. The plaintiff claimed that, if it had not lost the money that was debited against its **η** account, it would have generated much more profit with it in the foreign

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currency business and hence had a greater base to invest in the money **α** market. It claimed general damages for loss of profits and loss of income, alternatively, special damages for loss of profits and loss of income, in respect of the sums withdrawn from its account. It claimed that the loss of profits from the alleged unauthorized withdrawals flowed generally from the breach by the defendant and as a result such loss constituted general damages. It also claimed special damages for the loss of investment **β** income after the closure of the *bureaux de change*.

Held, that the rationale for awarding damages to an aggrieved party based on a breach of contract is to place that party in the position he would have occupied had a breach not occurred by the payment of money and without causing undue hardship to the defaulting party. A comparison is made between the patrimonial position that the plaintiff would have **γ** occupied had the breach not occurred and the position that exists as a result of the breach. The plaintiff would therefore be entitled to the difference where the former exceeds the latter.

Held, further, that an assessment of damages, whether *ex contractu* or *ex delicto*, is fraught with difficulty. *In casu*, it was rendered even more difficult by the manner in which the plaintiff approached the claim. There **δ** was no suggestion from the plaintiff that, once the account was debited, the plaintiff stopped operations and shut down. In view of the claim for additional damages subsequent to the shutting down of the *bureaux de change*, the plaintiff continued in business. The claim for damages was premised on the loss of profit suffered by the plaintiff as a result of the unauthorized withdrawals in favour of the third party. No books of **ε** account, or even extracts therefrom, were produced in proof of the profits that it was allegedly making from the business of the *bureaux de change*. All that was produced were schedules which detailed the returns the plaintiff would have made in purchasing foreign currency with the amounts that were withdrawn.

Held, further, that a contractual duty to pay damages can arise only if the **φ** wrongdoer's conduct, in addition to other requirements, factually caused the harm suffered by the plaintiff. Consequently, conduct can be described as a damage-causing event only with reference to the damage actually flowing from such an event. Without factual causation, no duty to pay damages can arise. Factual causation on its own, however, is not **ζ** sufficient as it is undesirable to hold a person liable for all the damage which he has caused. A second enquiry then arises: whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether the loss is too remote.

Held, further, that general damages are the loss which a plaintiff suffers as a direct result of a breach of contract, or the intrinsic loss suffered by the ^H

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^A plaintiff due to the diminution of the value of the subject matter of the contract or the impairment of its use. Special or extrinsic damages ^B constitute loss flowing indirectly from the breach of the contract and extend to all the property. In the normal course, special or extrinsic damages are regarded as being too remote to be recovered unless, in the special circumstances attendant upon the conclusion of the contract, it ^B can be deduced that the parties actually or presumably foresaw that they would probably flow. In a claim for special damages, it must be alleged in the pleadings and established by evidence that the loss being claimed was within the contemplation of the parties. The onus lies upon the plaintiff. *In casu*, no such averment was made by the plaintiff. It was also not established by evidence that it was within the contemplation of the ^C parties that the government would close down all *bureaux de change* and that when that happened the plaintiff would put its money on the money market at phenomenal and unbelievably high interest rates and that in the event that the defendant unlawfully paid out some of the plaintiff's funds the plaintiff would incur huge losses as a result of not having earned money on those investments.

^D *Held*, further, that a claim for damages in the form of loss of profits is not necessarily special damages. Such loss of profits may be general damages. It depends on the circumstances of each case and, in particular, on the type of loss of profits being claimed. Damages for loss of profits can only be awarded when such loss is the direct, natural or contemplated result of non-performance. The plaintiff must establish that such damages were in the contemplation of the parties when the contract was concluded.

Cases cited

BAT Rhodesia Ltd v Fawcett Security Organisation (Salisbury) (Pvt) Ltd 1972 (2) RLR 22 (G)

Collective Self Finance Scheme v Asharia 2000 (1) ZLR 472 (S)

^F *Gloria's Caterers (Pty) Ltd t/a Connoisseur Hotel v Friedman* 1983 (3) SA 390 (T)

Case information

R M Fitches, with him *P Machaya*, for the plaintiff

H Zhou, for the defendant

Judgment

^G **GOWORA J:** In terms of an amended summons and declaration filed with the registrar of this court on 17 December 2004, the plaintiff claimed the following amounts from the defendant:

- (a) payment of the sum of \$28 445 150 ^H
- (b) payment of the sum of \$123 647 760 068 as on (*sic*) 31 October 2004, and

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Gowora J

further sums of money reckoned from 1 November 2004, computed on the ^A basis of a return on investment on the said sum of \$123 647 760 068 on financial instruments with the Zimbabwe Development Bank maturing every seven days, until payment in full.

- (c) Costs of suit.

At the commencement of the trial, Mr *Fitches* moved for an amendment to the ^B summons and the declaration. There being no opposition to the application, the amendment was duly granted. The sum of \$123 647 760 068 in para 10(b) of the declaration was therefore deleted and substituted with \$8 009 993 144. The plaintiff also claimed further damages in the sum of \$249 156 977 706.

The background to this claim is that the plaintiff and its directors had a number ^C of operational accounts with the defendant's various branches. During the period 12 September to 8 November 2001, some money was withdrawn from the plaintiff's account at the defendant's Angwa Street

branch. The withdrawals were effected through bank cheques payable to one George Nyandoro. Whilst the plaintiff maintains that such withdrawals were unauthorized, the contention by the defendant is that the withdrawals were effected on the verbal instructions of the plaintiff's representative. As a result of the withdrawals, it is the plaintiff's contention that it would have utilized the monies thus withdrawn in its foreign currency business and generated profits which it would have ultimately invested on the money market and gained a profit. It alleges, further, that the unauthorized withdrawals have made it impossible for it to utilize the money as alleged at a profit and thus it has suffered loss, which it is then claiming from the defendant.

Each of the parties called one witness. Thomas Mutano, who gave evidence on behalf of the plaintiff, was a controlling shareholder and managing director for the plaintiff. The witness for the defendant was one Cynthia Marowa, who was employed as a transaction controller at the time of the trial. During the period that the payment to Nyandoro was effected she was employed in the same position at the branch where the plaintiff's accounts were located. I will examine the evidence adduced on behalf of both parties according to the issues agreed upon at the pre-trial conference.

The plaintiff's claim is premised on an alleged agreement between itself and the defendant for the defendant to pay out money only upon receipt of written instructions from the plaintiff. It is common cause that, at the time that the account in question was opened, the plaintiff had, in accordance with the requirements of the defendant, provided specimen signatures for those of its officers authorized to execute documents on behalf of the plaintiff. This document has not been exhibited for my perusal and scrutiny and I am hence

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Gowora J

A not in a position to state whether or not its purpose was to regulate the dealings of the parties, apart from providing specimen signatures of those authorized to execute documents on behalf of the plaintiff in its dealings with the defendant.

In the declaration filed on behalf of the plaintiff, a specific averment was made that it was a condition of the banking arrangement between the parties that the defendant would pay out monies on the plaintiff's written instructions signed by any of the authorized signatories, or that, alternatively, it was a rule of banking practice that no withdrawals could be made without signed authorization from the account holder. Given the fact that both parties to this dispute are corporate entities, one assumes that if there is an arrangement between a bank and its customers, who are account holders, such arrangement would be in writing. I have not been furnished by either party with a document spelling out the terms and conditions under which the instructions from the customer were to be executed. Indeed, it is the case by the plaintiff that there was a document which spelt out the terms upon which the parties had to deal with each other. It was, therefore, for the plaintiff to prove the terms allegedly contained in the document. If the defendant had the document, it chose not to produce it. Nor can it be suggested by the plaintiff with conviction that the document in question, referred to as the "mandate of signature form" by the plaintiff's representative, would be the one to contain such conditions. Can a document whose main purpose is to confirm the signatures of the signatories to an account be the operative document detailing the manner of dealing between the parties and containing important details such as how instructions from the account holder should be communicated to the paying bank? According to the evidence of Thomas Mutano, this form would show who was entitled to sign on behalf of the plaintiff or to give instructions on the account. He gave no further details on its contents. The witness was referred to a document in the bundle which is at p 271 thereof, entitled "customer information questionnaire" which requests for details on signatories for a company account holder. The significance of the document in proving the plaintiff's case escapes me. If it is meant to prove that the plaintiff and defendant had agreed that no transactions could be executed against the account without written instructions from the authorized signatories, it, the questionnaire, does not do so. Instead, it merely advises the bank of the company's details and the names, the official positions and signatures of authorized personnel.

The plaintiff's witness also referred me to letters on pp 32 up to 36 of the bundle of documents as proof of the fact that all withdrawals and transfers were to be effected only on written instructions. On closer scrutiny of the documents, they all related to transfers from the plaintiff's account in Harare to the

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Gowora J

accounts held by the plaintiff in various branches country wide. The instructions ^Awere to deal with electronic transfers between accounts. The written instructions were confirmed by the bank raising documents which are reflected on pp 40, 41 and 42. I note that, although they should have been completed and signed by the customer, they were in fact not signed. None of the documents I have been referred to specifically addressed the issue as to whether or not ^Bthe plaintiff had been requesting the issuance of bank cheques in writing. On pp 80, 81 and 82, the plaintiff has exhibited written requests for the defendant to issue bank cheques in favour of G T Nyandoro. The first two letters were written during the period when money was allegedly withdrawn from the plaintiff's account without authorization. The last request was made in December 2001, which was subsequent to the period in question. According ^Cto the plaintiff's witness this was the valid manner in which requests for bank cheques were done between the parties.

In the plea filed on its behalf, the defendant denied that the arrangement between the parties was that it, the defendant, would only pay out money on plaintiff's written instructions. The defendant averred that as a longstanding customer of the defendant, the plaintiff had routinely given verbal instructions ^Dfor the transfer of monies to various persons. The defendant further averred that the payments to Nyandoro were authorized by the plaintiff. On 18 December 2001 the defendant, through its Angwa Street branch manager, addressed a letter to the plaintiff's directors requesting that all requests for transfers, telegraphic transfers and bank cheques be in writing with effect from ^Ethat date as it had been noted that the plaintiff had been making verbal requests for such transactions and, in some cases, in respect of large sums of money. The suggestion is made by the plaintiff that this letter was only written after the dispute over the unauthorized bank cheques had arisen and does not reflect the correct position between the parties.

In the absence of documentary proof as to the arrangement between the ^Fparties on the conduct of the accounts belonging to the plaintiff, it means, therefore, that I can only decide this issue on the evidence of the parties regarding the course of dealing that was between them. On at least three occasions, the plaintiff gave written instructions for bank cheques to be issued. The letter from the defendant's Angwa Street branch manager is clear ^Gthat these requests should be in writing. Whether or not there was an arrangement between the parties and whatever its terms, it appears not to be in dispute that it was standard procedure within the defendant that requests for bank cheques had to be in writing. The bank accepts this and in the letter to the plaintiff states in categorical terms that these requests should always be in writing. The witness called by the defendant stated that the standard ^H

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Gowora J

^Aa procedure for having bank cheques issued was that a client would either complete a form to have the cheque issued or bring in a signed cheque with details of the payee and request that a bank cheque be issued. She indicated, however, that based on the relationship between the personal banker and the client, the bank could accept instructions either through the telephone or by e-mail. Although the plaintiff failed to prove that there was an arrangement ^Bbetween itself and the defendant that the bank could only issue bank cheques upon written instructions, it is my conclusion on the evidence before me that there was a requirement in terms of the defendant's own banking procedures that bank cheques should be issued through written instructions. This requirement could, however, be dispensed with based on the relationship between the defendant and its client, in which case verbal or other forms of ^Cinstructions could be employed by the parties.

As far as the banking practice that the plaintiff alleged existed in the manner of having bank cheques issued, the plaintiff led no evidence. Mr Mutano, who sought to address the issue of prevailing bank practice, has no experience or expertise in banking. There was no evidence placed before me as to what such ^Dbanking practice was. It was incumbent upon the plaintiff to establish the exact nature of the banking practice that it sought to rely on and as well as the extent of its application. It would also, in my view, have been appropriate in the circumstances to advise the court whether or not such practice was known among the general public who deal with banks and the effect that non-compliance of such practice would have on both the bank and its clients. As ^EI have stated above, I have no evidence before me of any banking practice and the plaintiff therefore cannot rely on such to prove that the bank cheques were not authorized. Even though I have found that the defendant had a standard procedure for the issuing of bank cheques, I am not convinced that this standard procedure within the defendant's *modus operandi* proves the ^Fexistence of a

banking practice requiring that bank cheques and money transfers be effected only on the basis of written instructions. Not only has the plaintiff failed to prove that an arrangement existed between itself and the defendant, it has also not established that there was a banking practice requiring the defendant to only issue bank cheques on written instructions from the plaintiff's authorized signatories.

¶ In their written submissions, Messrs *Fitches* and *Machaya* submitted that the defendant owed the plaintiff a duty of care to ensure that safeguards against abuses by personal bankers were put in place. The declaration filed on behalf of the plaintiff does not allege the existence of a duty of care on the part of the defendant, nor is there an averment that the defendant was guilty of the breach of such a duty in the manner that the bank cheques were issued. The defendant

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Gowora J

was not asked to plead to the breach of a duty of care as paying banker against an account of the plaintiff's. It is correct that the defendant's witness was cross-examined at length on what safeguards existed where verbal instructions were being relied on in transactions, but my view is that these questions could not have been sufficient for the plaintiff to base its claim on the breach of a duty which the defendant had not been asked to answer to. Nor was it ever alleged to the defendant what it was that it had failed, omitted or neglected to do in respect of the cheques which form the subject matter of the dispute between the parties. Since the pleadings did not refer or mention negligence or duty of care, this was not one of the issues agreed for determination at the trial. Nor was any evidence led on the part of the plaintiff regarding the question as to whether or not there was a duty of care on the part of the defendant. Whether or not the defendant would have owed a duty of care to the plaintiff is, therefore, not an issue for my consideration in this matter.

The first bank cheque drawn against the plaintiff's account in the sum of \$6 038 000 was dated 11 September 2001. It was deposited into the account of one George Nyandoro on 12 September 2001. There is no indication on the papers before me as to how it found its way from the defendant to Nyandoro. ¶ A cheque for \$5 376 000, again drawn in favour of Nyandoro, was issued on 17 October 2001. According to the defendant's cheque delivery book, it was collected by K Hofisi on the same day. This same cheque was deposited into Nyandoro's account with Standard Chartered Bank on the same day. On 6 November 2001, yet another bank cheque in the sum of \$15 467 400 was drawn in favour of Nyandoro against the plaintiff's account. It was collected on the same day by K Hofisi and was deposited into Nyandoro's account on the same day. The last cheque for \$1 563 750 was drawn on 8 November 2001 and was collected by K Hofisi. It was deposited in Nyandoro's account on the same day.

As part of its documentary evidence, the defendant has produced a handwritten note from one Rusike, a manager at the defendant's Angwa Street branch who was the plaintiff's account manager at the branch. The note is an instruction to "ledgers" to do a bank cheque for \$5 376 000 in favour of Nyandoro against the plaintiff's account as per client's instructions. The note is dated 17 October 2001, and also bears the defendant's official date stamp of that day. ¶ A copy of the cheque in that amount and for that date is also produced. The cheque is in favour of G T Nyandoro. The defendant has also produced debit waste entries for the two cheques issued on 6 and 8 November 2001. The information on the debit waste entries tallies with what appears on the bank statements. ¶

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Gowora J

¶ It is common cause that the plaintiff employed K Hofisi at the time as an accountant. I did not hear the plaintiff's witness state that Hofisi had no mandate to collect cheques on its behalf or that the cheques in question were not collected by Hofisi. Although the plaintiff's witness insisted that the defendant was obliged to issue cheques only on the basis of written instructions, it was obvious that the defendant had issued bank cheques against the plaintiff's account where no written instructions had been given. The plaintiff's witness was referred to cheques issued to Muzvidziwa for \$3 500 550 and Modern Furnishers in the sum of \$98 550 for which no written instructions for their issuance was exhibited to the court. The letter to the plaintiff dated 18 December 2001 clearly spelt out that the plaintiff's directors had, at times, given verbal instructions for transfers, telegraphic transfers or bank cheques and, in most cases, for huge amounts. The plaintiff was requested to make written requests thereafter. The letter was not responded to by the plaintiff's directors. The plaintiff's

witness was unable to give a cogent reason for not responding to the letter if it did not state the correct position. The plaintiff is aware that the money ended up with George D Nyandoro, yet there has been no attempt to sue Nyandoro for its recovery nor was there any effort made to join him to these proceedings. K Hofisi, who allegedly collected the cheques, was not called by the plaintiff to confirm the plaintiff's position that the withdrawals had not been authorized. Hofisi was the plaintiff's accountant and the plaintiff should have placed before the court evidence to explain his dealings with cheques, their collection and movement E to Nyandoro in the absence of instructions to the bank to have them issued. The plaintiff suggests that there was fraud on the part of the defendant in issuing the cheques but it has not explained the part Hofisi played in the scheme.

The claim by the plaintiff's witness that written instructions were necessary F in respect of cheques with a large face value were negated by the cheques issued under written instructions for the following amounts: \$775 000, \$2 000 000, \$2 296 000 and \$13 297 284. I have also considered that, for the major part of the period in question, the plaintiff's account was overdrawn. I accept the submission by Mr Zhou that it is more likely to pick up a fraud perpetrated against an overdrawn account than one with a healthy balance. The other G factor is that all the cheques were drawn in favour of Nyandoro with whom the plaintiff had a business relationship, not to mention the personal relation between plaintiff's Thomas Mutano and the said Nyandoro. Taking all the circumstances of this case into consideration, it is my view that the probabilities favour the defendant. It is not inconceivable in the circumstances that verbal H instructions were given to the defendant's Mr Rusike to have the cheques

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Gowora J

issued without written authorization from the plaintiff. I find that the payments A to G T Nyandoro were authorized by the plaintiff.

In the event that I am not correct on the issues I dealt with above, I turn now to consider the question of the damages being sought by the plaintiff. According to the evidence of Thomas Mutano, the plaintiff is a different entity to Sita Sound Forex Services (Pvt) Ltd, hereinafter referred to as Sita Sound. B The plaintiff has furnished to the court bank statements which show that the two companies maintained separate accounts with the defendant. I note further that the forensic report from Ernst & Young which was the basis upon which the plaintiff sought to sue the defendant was addressed to Sita Sound.

The defendant in its written submissions has taken issue with the plaintiff suing for amounts which should have been sued for by Sita Sounds Forex C Services (Pvt) Ltd. However, the plea filed on behalf of the defendant does not take issue with the *locus standi* of the plaintiff in bringing the suit. From the bank statements that were admitted into evidence and the evidence of Mutano, it is very clear that the two are entirely different entities. Counsel for the plaintiff has contended that, having admitted the identity of the parties in D its plea, the defendant was precluded from raising it in its submissions. In my view, Mr Fitches is correct that the defendant admitted the identity of the parties and could not now take issue at this stage. The plaintiff, however, still bore the onus to establish that it had suffered the losses that it claims from the defendant. The amount of \$28 445 150 was certainly deducted from the plaintiff's account, and therefore it has *locus standi* to sue for the amount E allegedly debited against its account without authorisation.

The evidence of Thomas Mutano was to the effect that the foreign currency transactions were being effected by Sita Sound. The account against which the withdrawals were made was that of the plaintiff, but the entity engaged in foreign currency business, according to the plaintiff's witness, is Sita Sound. No explanation has been proffered as to how it is Rowland Electric sues for F damages arising out of an inability to trade in foreign currency due to the alleged unauthorized withdrawal when the plaintiff was not engaged in such business. Sita Sound, which was the entity running the business of foreign currency trade, did not have any of its money withdrawn from its account by the defendant. It is the evidence of the plaintiff's witness, Mutano, that the G company which operated the bureaux was Sita Sounds. The bank cheques in issue were debited against the current account of the plaintiff and not Sita Sound.

As far as the damages claim is concerned, the plaintiff has not established a *locus standi* to sue on behalf of Sita Sounds, given the status of both companies. There is also no evidence placed before me to show that the H

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Gowora J

A plaintiff was in the business of trading in foreign currency and, further, that the account from which the funds were withdrawn was the account used for trading in foreign currency, given that the plaintiff was itself in the business of motor rewinding. It is my view that the plaintiff is non-suited and on the basis stated above the claim should be dismissed with costs. Although I have found that the plaintiff has no *locus standi* to sue for damages, it is nevertheless necessary that I undertake the assessment of the damages being claimed.

It is common cause that about a year after the events which the plaintiff complains about, the Minister of Finance revoked the licences of all bureaux de change. It therefore became necessary, according to the plaintiff, that it find some other business in which to invest. It chose to place its money in the fast growing and phenomenal asset management companies that were offering interest rates that were hitherto unimagined. The case for the plaintiff is, therefore, to the effect that if it had not lost the \$28 445 150 that was debited against its account it would have generated much more profit with it in the foreign currency business and hence had a greater base to invest in the money market. I have been referred by Mr Zhou to a passage in *Law of Damages* by P J Visser and J M Potgieter. The learned authors state at p 238-239:

"No legal system holds a defendant liable without limitation for all the harmful consequences suffered by the plaintiff. There is general agreement that some means must be found for limiting the defendant's liability. The question of legal causation arises whenever one must determine for which of the damaging consequences actually caused by the wrongdoer's wrongful, culpable act, or breach of contract, or any other legal fact creating a duty to pay damages, he should be held liable; In other words which harmful consequences should be imputed(attributed) to him. Because this subject is fully dealt with in standard textbooks on the law of delict and the law of contract, only the most important principles will be discussed here.

A delictual and contractual duty to pay damages can arise only if the wrongdoer's conduct, in addition to other requirements, factually caused the harm suffered by the plaintiff. Consequently, conduct can be described as a damage causing event only with reference to the damage actually flowing from such an event. Without factual causation, no duty to pay damages can arise. Factual causation on its own, however, is not sufficient as it is undesirable to hold a person liable for all the damage which he has caused. In *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700, the court stated as follows:

'Demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz., whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the

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Gowora J

loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play apart. This is sometimes called legal causation.'

Stated differently, legal causation is determined by evaluating the nature and quality of factual causation on the basis of relevant criteria."

Referring now to the claim by the plaintiff, apart from the claim for \$28 150 000 (old currency), the claim by the plaintiff is in two parts viz.:

1. (i) general damages for loss of profits between September 2001 and November 2002 in the sum of \$6 992 095 306 (old currency), plus interest thereon at the prescribed rate of interest from the date of summons;
- (ii) alternatively, special damages for loss of profits between September 2001 and November 2002 the sum of \$6 992 095 306 (old currency) plus interest *a tempore morae* from the date of summons;
2. (i) special damages for loss of investment income (after closure of the *bureaux de change*), in the sum of \$139 694 923 251 926 from December 2002 up to 31 October 2004 (being the date claimed in the amended summons), plus interest *a tempore morae* from the date of summons;
- (ii) alternatively, special damages for loss of income (after the closure of the *bureaux*), in the sum of \$217 494 845 071 from December 2002 up to 31 October 2005 (being the date immediately before trial), plus interest *a tempore morae* from the date of summons.

I turn now to deal with the issue of damages under each of the specific headings. The amount of \$6 992 095 306 has been claimed as general damages or, in the alternative, special damages. In

written submissions, Messrs *Fitches* and *Machaya* contended that the loss of profits from the alleged unauthorized withdrawal of \$28 445 150 flowed generally from the breach by the defendant and as a result such loss constitutes general damages. They sought reliance on *Gloria's Caterers (Pty) Ltd t/a Connoisseur Hotel v Friedman* 1983 (3) SA 390 (T). At p 393E-394A, [¶] Nestadt J stated as follows:

"... A claim for damages in the form of loss of profits is not necessarily special damages. Such loss of profits may be general damages. It depends on the circumstances of each case and in particular the type of loss of profits being claimed. In the *locus classicus* on the subject, namely *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte G Mines Ltd* 1915 AD 1, Innes CJ at 22 said:

'Such damages only are awarded as flow naturally from the breach, or as may reasonably be supposed to have been in the contemplation of the contracting parties as likely to result therefrom ... Moreover, it is the duty of the complainant to take all legal steps to mitigate the loss consequent on the breach ... It follows that damages for loss of profits can only be [¶]

2007 (1) ZLR p13

Gowora J

a awarded when such loss is the direct, natural or contemplated result of non-performance'."

General damages are the loss which a plaintiff suffers as a direct result of the breach of the contract, or is the intrinsic loss suffered by the plaintiff and is due to the diminution of the value of the subject matter of the contract or the impairment of its use. On the other hand, special or extrinsic damages constitute loss flowing indirectly from the breach of the contract and extend to all the property. However, in order to hold a debtor liable for special damage, a plaintiff needs to show that the damage was within the contemplation of the parties when the contract was concluded.

The claim by the plaintiff for the sum of \$6 012 015 209 is in respect of the period ^c extending from the second week in September 2001 to November 2002. The schedule prepared on behalf of the plaintiff under the head of general damages starts off with a base amount of \$6 058 000. Using a purchasing rate of Z\$60 to the USD, the plaintiff assumes a profit margin of Z\$5 per every USD purchased. The plaintiff assumes that an amount of \$121 160 is earned as income on the transaction. The amount thus raised is added to the base ^d amount thereby achieving a trading capital of Z\$6 683 993 for the next transaction the following week. Again, purchases of the USD are claimed at the same rate as the previous week with the same profit margin being indicated and at the end of the week a trading capital of Z\$7 374 673 is achieved. By the first week of October 2001, the plaintiff on its schedules has achieved a trading capital of Z\$8 977 517. Week two in October starts with a trading capital of ^e Z\$14 353 517 which has taken into account the sum of Z\$5 076 000. By week two in November 2001, the plaintiff has accounted for the entire sum allegedly removed without its authority and has calculated a trading capital of Z\$44 023 353. This amount is thereafter the basis for the calculation of a total sum of Z\$6 012 015 209.

[¶] The rationale for awarding damages to an aggrieved party based on a breach of contract is to place that party in the position he would have occupied had a breach not occurred by the payment of money and without causing undue hardship to the defaulting party. A comparison is made between the patrimonial position that the plaintiff would have occupied had the breach not occurred and the position that exists as a result of the breach. The plaintiff would ^g therefore be entitled to the difference where the former exceeds the latter. An assessment of damages whether *ex contractu* or *ex delicto* is fraught with difficulty. In this matter, it is rendered even more difficult by the manner in which the plaintiff approached the claim. There is no suggestion from the plaintiff that once the account was debited with the sum of \$28 445 150 the ^h plaintiff stopped operations and shut down. If one goes by the claim for

2007 (1) ZLR p14

Gowora J

additional damages subsequent to the shutting down of the *bureaux de ^a change*, the plaintiff continued in business.

The claim for damages is premised on the loss of profit suffered by the plaintiff as a result of the unauthorized withdrawals in favour of Nyandoro. It is common cause that the plaintiff has produced no books of account in proof of the profits that it was allegedly making from the business of the bureaux de ^b change. Even extracts from its books of account would have sufficed. Instead, what has been produced are schedules which detail the returns the plaintiff would have made in purchasing foreign currency with the amounts that were withdrawn by way of the bank cheques made out in favour of Nyandoro.

Although the plaintiff sought to state that the running expenses had been catered for in its figures, no proper explanation was advanced as to how those c expenses had been factored. It is not evident, even from the bank statements produced before the court, that the business conducted by the plaintiff at the time the cheques were issued was generating returns on the investments that would justify this court to conclude that the plaintiff was generating profit. Such proof would have formed the basis of its claim that the profit thus d generated used as seed money then was responsible for creating the massive profits that plaintiff later on obtained by investing in the money market. Put differently, what the plaintiff should have shown as the first rung to its claim was that the business of running a *bureau de change* generated so much by way of profit. That, in my view, can only have been done through the admission into evidence of books showing a profit and loss account for a e period, which would have been properly audited and produced before the court. The schedules produced on its behalf are mere schedules and are not sufficient for me to conclude that the plaintiff was actually making the profits reflected thereon.

It is trite that a plaintiff seeking to claim damages based on breach of contract f has a duty to mitigate his loss. The plaintiff has claimed damages from September 2001 to November 2002. Somewhere in between those dates it, the plaintiff acquired knowledge that money withdrawn from its account had somehow been paid to Nyandoro by the defendant. There was no demand from the plaintiff, to Nyandoro for the reimbursement of the money. The plaintiff could have recovered its money in the event that he was not entitled g to it. In this way it would have drastically reduced its claim against the defendant. The plaintiff made no such effort and even up to the date of trial its claim was still being computed.

Counsel for the plaintiff have made specific references to the bank statements furnished to the court in evidence. Pages 4 to 15 of the bundle of exhibits h

2007 (1) ZLR p15

Gowora J

A comprises bank statement from a number of current account in the name of the plaintiff or T Mutano. They all appear to be ordinary current accounts. From pp 16 to 22 the statements are rand denominated accounts in the name of Sita Sounds or T Mutano. There are none bearing the plaintiff's name. Pages 23 and 24 are statement for US dollar accounts in the name of T Mutano. There are no foreign denominated accounts in the name of the plaintiff. The b statements thus referred to reflect transactions in foreign currency. Thus they confirm that the owners of the statements were engaged in foreign currency trade. There is no proof before me that the plaintiff was similarly engaged. The plaintiff also had to adduce evidence to establish that the money withdrawn from its account by the defendant would have been used in the running of the *bureaux de change* and as a result would have generated the profits being c spoken of. The plaintiff would have also to show that as a result of the cheques being deducted it actually sustained a loss in the amounts being reflected on the schedules. That has not been proved. The plaintiff did not draw my attention to any deposits in the bank statements which could be said to have been profits earned from the *bureaux*. I agree with the submission by counsel d for the defendant that an examination of the bank statements does not lead one to conclude that the plaintiff was conducting a brisk business as is implied. In my view, in the absence of proof that the plaintiff actually suffered a loss, I cannot see how the plaintiff can claim that it then went on to suffer damages as a result of the cheques withdrawn from its account by the defendant. The event that would have given rise to the damages would be the loss of profits e sustained as a result of the illegal and unauthorized withdrawal from its account.

Even assuming in favour of the plaintiff that it did suffer a loss of profit in the sum of \$6 992 095 306 from its inability to utilize the \$28 445 150, can it establish that the consequence of that was the special damages being claimed as a result of the closure of the *bureaux de change* by the Government? It is common f cause that the plaintiff states that it only embarked on investing money in the money market a year after the alleged wrongful withdrawal. The reason for it embarking on the investments was because of the closure of and withdrawal of licences for the *bureaux de change* by the Government in line with a new fiscal policy by Government. At the time that the *bureaux* were stopped from operating, the plaintiff and defendant had long since stopped doing business g together. It was in itself an event that would have been completely unexpected, given that the decision was made following a change in fiscal policy. The plaintiff's witness, in answer to a question during cross-examination, admitted that this would never have been contemplated by the

parties, that any profit earned by the plaintiff would be placed in very profitable interest earning investments. To succeed in the claim for extrinsic damages the plaintiff had

2007 (1) ZLR p16

Gowora J

to show that it was the kind of damage that the parties to the contract contemplated as being a natural consequence in the event of a breach. *Wessels The Law of Contract* by A A Roberts has the following statement at paras 3223 and 3224:

"Although we allow the injured party to claim profits, we do not allow it in every case. In some cases, as pointed out by Innes C J in *Victoria Falls Power Co v Consolidated Langlaate Mines Ltd*, *supra* at p 22, the whole motive for the contract is to obtain profits, as where a person undertakes to thresh corn with his thrashing machine, or to do some work or sell a quantity of maize, etc. In these cases the profits which must necessarily or naturally result from the fulfillment of the contract, and which are the direct and immediate fruits of it, are considered to have been in the contemplation of the parties when the contract was made, and therefore the court ought to award to the injured party the loss of these profits as damages (see *Masterton v Mayor of Brooklyn* 42 Am Dec. 38 at p 42; *Bhayla v Cassim* 1945 NPD 208).

In other cases, however, where the profits are necessarily speculative, contingent or conjectural, our law, like the law of England, refuses to take them into consideration (Voet 45.1.9). If, however, it can be proved to the court that the profits were reasonably to be expected, and would certainly have been realized, but for the breach of contract, they form as much a part of the damages as any other loss (*Victoria Falls Power Co v Consolidated Langlaagte Mines*, *supra* at 22; *Dold v Gilson* 1914 E DL 44). Where profits do not depend upon the chances of trade, the fluctuating value of goods or freights, or matters of an uncertain character they should be allowed; but where they are entirely dependant upon the fluctuations of markets or the chances of business, they ought to be rejected as of too uncertain a character to have been in the contemplation of parties or expected by them when the contract was entered into (*Griffin v Glover* Am Dec 718)."

"Special" or extrinsic damages would only be recoverable if in the special circumstances attending the conclusion of the contract the parties actually or presumptively contemplated that they would result from its breach. According to Christie *The Law of Contract*, the question of special damages presents two difficulties. The first is that, at the time that the parties conclude the contract, it is unlikely that they would contemplate breach on either side which would result in one party suffering damages from the breach. Thus any inquiry into their contemplation is artificial. The second difficulty postulated by Christie is whether it suffices to show that the damages were in the contemplation of the parties or whether it must be shown that the payment of such damages in the event of breach was a tacit term of the contract. The inquiry into whether or not special damages were in the contemplation of the

2007 (1) ZLR p17

Gowora J

A parties was formulated in these terms by Beck J (as he then was) in *BAT Rhodesia Ltd v Fawcett Security Organisation (Salisbury) (Pvt) Ltd* 1972 (2) RLR 22 (G) :

"It seems to me ... that it is the type, kind or order of harm that must have been in the contemplation of the parties ... and not the exact concatenation of circumstances which might, in an individual case, immediately bring into being the harm of the type, kind or order that was contemplated."

The question, then, is whether or not the damages that the plaintiff claims as special damages were within the contemplation of the parties when the contract was concluded. The submission is made on behalf of the plaintiff that the defendant was aware of nature of the business that the plaintiff conducted and, further, that the defendant even traded with the plaintiff at times. As such, the loss of profits by the plaintiff was contemplated by the parties. The account operated by the plaintiff would generate a profit for the defendant. Equally, as the plaintiff was a business entity, it stands to reason that it could only have opened the account in order to run a profitable business. However, was the kind of loss allegedly suffered by the plaintiff within the contemplation of the parties when the account was opened? It is contended on behalf of the defendant that the money was in an account which was held with the defendant, and that therefore any loss in relation to that account would have been the interest that would have accrued to the account. I am not persuaded by this argument, as the account was a current account which at the time did not appear to attract any interest for credit balances.

ε As these damages are special (extrinsic), the plaintiff had an onus to establish that such damages were in the contemplation of the parties when the contract was concluded. In the normal course, special or extrinsic damages are regarded as being too remote to be recovered, unless in the special circumstances attendant upon the conclusion of the contract, it can be deduced that the F parties actually or presumably foresaw that they would probably flow In a claim for special damages it must be alleged in the pleadings and established by evidence that the loss being claimed was within the contemplation of the parties. See *Collective Self Finance Scheme v Asharia* 2000 (1) ZLR 472 (S). No such averment was made by the plaintiff. It was also not established by evidence that it was within the contemplation of the parties that the government G would close down all *bureaux de change* and that when that happened the plaintiff would put its money on the money market at phenomenal and unbelievably high interest rates and that, in the event that, the defendant unlawfully paid out some of the plaintiff's funds, the plaintiff would incur huge H losses as a result of not having earned money on those investments.

2007 (1) ZLR p18

Gowora J

In simple terms, what the plaintiff would have to show is that the harm that A befell it is the type, kind or order of harm that must have been within the contemplation of the parties when the contract was concluded. In my view, the defendant might have contemplated that the plaintiff's business might suffer a loss from its purchase and sale of foreign currency if, by a breach on its part, it caused moneys to be withdrawn from the plaintiff's account. It B cannot have been within the contemplation of the parties that the plaintiff would have placed its money on the money market and achieved the profits that it says it did. However, an examination of the investment certificates produced before the court reveals that they are either in the name of Sita Sound or T Mutano. None bear the plaintiff's name. It seems to have escaped the attention of the plaintiff's directors and its legal practitioners that Rowland C Electro Engineering (Pvt) Ltd and Sita Sound Forex Services (Pvt) Ltd are two different legal entities and are not interchangeable. There is no evidence before me that the plaintiff ever invested in the money market. This part of the plaintiff's claim also fails.

In my view, the plaintiff's entire claim is not well-founded and the claim is D therefore dismissed with costs.

Musunga & Associates, legal practitioners for the plaintiff

Gill, Godlonton & Gerrans, legal practitioners for the defendant E

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/CHAHWANDA v DUBE & ANOR 2007 (1) ZLR 19 (H)

CHAHWANDA v DUBE & ANOR 2007 (1) ZLR 19 (H)

2007 (1) ZLR p19

Citation	2007 (1) ZLR 19 (H)
Case No	Judgment No. HB-6-07
Court	High Court, Bulawayo
Judge	Ndou J
Heard	18 November 2005
Judgment	11 January 2007

Counsel	<i>Ms A Masawi</i> , for the applicant <i>T Moyo</i> , for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

c Practice and procedure — judgment — default judgment — not a decision on the merits — decision not a final one — effect of execution — mere fact of execution does not render court *functus officio*

Headnote

The defendant obtained judgment against the applicant and the judgment ^b was executed. Thereafter the applicant sought rescission of the judgment. The respondent argued, *inter alia*, that the court was *functus officio*.

Held, that it is a general principle that once a court has duly pronounced a final judgment, it has itself no authority to correct, alter or supplement it. The court becomes *functus officio*, its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter ^e ceases.

Held, further, however, that *in casu*, the order was granted by default. The judgment was not given on the merits, so it could not be final. The fact that the judgment had been executed did not make order a final one. The court had not fully and finally exercised its authority on the matter and ^f mere execution did not render the court *functus officio*.

Cases cited

Firestone SA (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A)

Modeley v Zeeman & Ors 1968 (4) SA 639 (A)

Sayprint Textiles (Pvt) Ltd & Anor v Girdlestone 1983 (2) ZLR 322 (H); ^g 1984 (2) SA 572 (Z)

West Rand Estates Ltd v New Zealand Insurance Co Ltd 1926 AD 173

Legislation considered

^h High Court Rules 1971 (RGN 1047 of 1971), r 327

2007 (1) ZLR p20

Ndou J

Case information

Ms A Masawi, for the applicant ^a

T Moyo, for the respondent

Judgment

NDOU J: This is an application for condonation of the late filing of an application for rescission of a judgment granted against the applicant in his absence. The salient facts are that the judgment that the applicant seeks to ^b rescind was granted on 13 January 2005. The applicant's case is that he became aware of it on 12 February 2005. This application was filed on 9 March 2005, after the judgment had been executed. The Deputy Sheriff had executed the judgment earlier on the same day. It seems that this application was in response to that. ^c

1. IS THIS COURT *FUNCTUS OFFICIO*?

The first respondent has raised a point *in limine* that after such execution, this court is now *functus officio*. It is common cause that the execution was done before this application was filed and that the applicant did not seek a stay of execution. It is, therefore, common cause that the disputed property has suffered the execution of a valid court order which had not been appealed ^D against or subjected to review at the time of execution.

Further, the applicant did not apply to set aside the writ. See *Modelay v Zeeman & Ors* 1968 (4) SA 639 (A) and Order 40 r 327 of the High Court Rules, 1971. The question is whether this court is now *functus officio*. We are dealing here with an order granted by default by this court and executed. The judgment ^E was not given on the merits, so it cannot be final. It is a general principle of our land that once a court has duly pronounced a final judgment, it has itself no authority to correct, alter or supplement it. The court becomes *functus officio*. Its jurisdiction in the case having been fully and finally exercised its authority over the subject matter ceases. See *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 176; *Firestone SA (Pty) Ltd v Genticuro A.G.* 1977 (4) SA 298 (A) and *Sayprint Textiles (Pvt) Ltd & Anor v Girdlestone* 1984 (2) SA 572 (ZH). There are, however, a few exceptions to this general rule e.g. the rule does not apply to interlocutory orders or corrections made pursuant to the provisions of the Rules of this court. Ms *Masawi* for the applicant, has argued that since the judgment was granted by ^G default, it is not final. In other words, it is argued that this court has not fully and finally exercised its jurisdiction in the matter: it still enjoys its inherent power to supplement, clarify or correct its own judgment. My understanding of Mr *Moyo's* argument is that he does not contend that the order made on account of the default of the applicant is final. He is saying that final or not, the order has been executed upon by the Deputy Sheriff resulting in the ^H

2007 (1) ZLR p21

Ndou J

A property being transferred into the names of the first respondent. In other words, once such order is executed upon, this court becomes *functus officio*. I think this argument would make sense where the order executed was a final one. As this court has not fully and finally exercised its authority on the matter, mere execution will not render this court *functus officio*. On this basis, the point *in limine* raised by the first respondent must fail.

^B [The court then considered other matters not relevant to this report and concluded.]

Accordingly, I find that the applicant failed to establish a case for rescission and I dismiss the application with costs.

^C *Masawi & Assocaites*, applicant's legal practitioners

Hwalima, Moyo & Associaties, first respondent's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/BUBYE MINERALS (PVT) LTD & ANOR v RANI INTERNATIONAL LTD 2007 (1) ZLR 22 (S)

BUBYE MINERALS (PVT) LTD & ANOR v RANI INTERNATIONAL LTD 2007 (1) ZLR 22 (S)

2007 (1) ZLR p22

Citation	2007 (1) ZLR 22 (S)
Case No	Judgment No. S-60-06
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Ziyambi JA

Heard	17 October 2006
Judgment	18 January 2007
Counsel	<i>E W W Morris</i> , for the appellants <i>E T Matinenga</i> , for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Practice and procedure — judgment — summary judgment — founding affidavit — must be based on personal knowledge, not on hearsay

Headnote

In an application for summary judgment, which was granted by the court *a quo*, a senior official of the respondent company (then the applicant) deposed in the founding affidavit that he had personal knowledge of the facts stated in the affidavit. It emerged that the official was not employed by the company at the relevant time and that his knowledge was obtained from company records and correspondence.

Held, that the affidavit did not comply with the requirements of r 64(2) of the High Court Rules. The official's allegations were hearsay. If material allegations in the affidavit are hearsay, the affidavit is defective and the application is bad.

Cases cited

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

Mowschenson & Mowschenson v Mercantile Acceptance Corp of SA Ltd 1958 (3) SA 362 (W)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 64 and 67

Case information

E W W Morris, for the appellants

E T Matinenga, for the respondent

Judgment

CHEDA JA: The first and second appellants are both companies duly incorporated according to the laws of Zimbabwe. The respondent is also a company duly incorporated according to the laws of Zimbabwe.

2007 (1) ZLR p23

Cheda JA

A On 18 November 2004, the respondent issued summons against the appellants claiming as follows:

- Payment in the sum of US\$30 000 in respect of monies lent and advanced to the defendant in or about September 2001, at the defendant's instance and request and which amount despite demand the defendant has failed or neglected to pay;
- Interest on the sum of US\$30 000 at the rate of 7.5 per cent *per annum* calculated from 10 October 2002 to date of payment in full; and
- Costs of suit.

The appellants entered appearance to defend this claim.

In December 2004, the respondent applied for summary judgment against the c appellants. On 14 September 2005, the High Court granted the application for summary judgment. The appellants have now appealed against that judgment.

At the hearing of the application for summary judgment, the appellants raised as one of their points of opposition to the application the fact that the deponent to the applicant's founding affidavit could not swear positively to the facts as he was never party to the negotiations leading to the agreement d on which the claim was based.

Unfortunately, the court, in its judgment, dealt with the other points raised and proceeded to grant summary judgment. This particular point was only referred to but not dealt with or determined by the court.

The appellants have now raised this point *in limine* in their appeal in addition e to other grounds. I now proceed to deal with the point *in limine* to establish its effect on the case before this court.

Applications for summary judgment are regulated by Order 10 r 64 of the Rules of the High Court ("the Rules"). The rule provides as follows:

"Summary judgment

64. f Application for summary judgment

- (1) Where the defendant has entered appearance to a summons, the plaintiff may make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs. g
- (2) A court application in terms of subrule (1) shall be supported by an affidavit made by the plaintiff or by any other person who can swear positively to the facts set out therein, verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no *bona fide* defence to the action."

In this case, one George Kantsouris, (herein after referred to as "Kantsouris") h deposed to the founding affidavit. He stated as follows:

2007 (1) ZLR p24

Cheda JA

I am the Chairman's Personal Assistant/Majority Shareholders' A Representative and in the employ of Rani International Ltd and as such I am authorised to make this affidavit and the facts stated *herein are within my personal knowledge*" (my emphasis).

The opposing affidavit was sworn to by one Adele Farquhar (herein after referred to as "Farquhar") on behalf of the then respondents. She said she was a director of the first and second defendants (in the application) and was b authorised to depose to the affidavit.

She said she had had occasion to question Kantsouris' knowledge of the facts that he professed to have and could safely say that he had no knowledge of any of the pertinent facts as he was not employed in any capacity by the plaintiff when the events giving rise to this case arose and did not know what c he was talking about. She detailed the nature of her dealings on the matter with a Mr McCann and not Kantsouris, sometime in October 2001. This was a clear challenge to the claim by Kantsouris that he had personal knowledge of the facts of the matter.

On appeal, the respondent did not deal with this point in detail but simply d dismissed it as irrelevant. It was argued on behalf of the respondent that Kantsouris had access to the records of the respondent and had full consultations with its employees. While that may be correct, it is certainly not enough.

In *Mowschenson and Mowschenson v Mercantile Acceptance Corp of SA Ltd* 1958 (3) SA 362 (W) one Henry Barton Myers, who was an attorney, was e authorised to institute action against the defendant and proceed to the final end and determination thereof. His authority to swear to the founding affidavit was challenged as follows:

"I further deny that the said Myers has any personal knowledge of the facts deposed to and/or verified by him and further state that the defendant company has had no dealings with the said Myers in regard to the f transaction on which summons was based, nor was the said Myers party thereto.

I submit that such information or knowledge as the said Myers may have can only be hearsay.

I further respectfully submit that the said Myers is in no position to form g any opinion as to the *bona fides* of the defendant's defence to the action nor as to the purpose for which appearance has been entered to

defend the action.”

The court stated that:

“... the verifying affidavit goes to the question of the court’s jurisdiction. If the affidavit does not comply with the requirement of the rule (which H

2007 (1) ZLR p25

Cheda JA

A in England is substantially the same as ours) the court would have no jurisdiction to grant summary judgment. If material allegations in the affidavit are hearsay, the affidavit is defective and the application is bad.”

The court also stated that it was open to a respondent in summary judgment proceedings to attack the validity of the application on any aspect, including the admissibility of evidence tendered in the verifying affidavit. If Myers, who B was an attorney for the applicant, and who had been properly instructed, was not within the category of persons who could swear to the founding affidavit and verify the facts, then Kantsouris could be either. The facts known to him were not based on personal knowledge but from records and correspondence of the company.

C In *Chiadzwa v Paulkner* 1991 (2) ZLR 33 (S), the court held that a relative of the applicant, who was not present at the negotiations for the sale of property but gained knowledge of the facts from an agreement of sale and letters written by the parties and what he was told by the plaintiff, was not shown to be a person who had personal knowledge of the facts. It was pointed out also that a useful test would be to ask whether the deponent to the affidavit would be D a competent *viva voce* witness to the facts were he to be called to testify.

I now turn to compare the affidavit of Kantsouris with the cases I have referred to. Myers was an attorney for the applicant. He had been given detailed instructions, obviously in order to initiate action. He had all the facts on which the case was based. He was, however, disqualified from deposing to the E affidavit.

Kantsouris is an employee of the applicant. It was not disputed that at the time of the transactions he was not in the employ of the applicant. It was submitted on appeal that he had access to the records of the company and also consulted the company’s employees. Clearly, what knowledge he got was obtained as a result was hearsay.

F Rule 67 of the Rules says:

“No evidence may be adduced by the plaintiff otherwise than by the affidavit, of which a copy was delivered with the notice nor may either party cross-examine any person who gives evidence *viva voce* or by affidavit.”

G This clearly shows that the evidence on the affidavit of the applicant should be based on personal knowledge and not on hearsay.

It follows that the affidavit of Kantsouris was not based on personal knowledge but on hearsay.

The effect is that there was no proper affidavit founding the application and H therefore no valid application before the court.

2007 (1) ZLR p26

Cheda JA

Accordingly, the decision of the court *a quo* is set aside and substituted with A the following:

“The application for summary judgment is dismissed with costs.”

SANDURA JA & ZIYAMBI JA concurred. B

Joel Pincus Konson & Wolhuter, appellants’ legal practitioners

Costa & Madzonga, respondent’s legal practitioners C

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Document 5 of 53**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/TRIPLE C PIGS & ANOR v COMMISSIONER-GENERAL, ZIMBABWE REVENUE AUTHORITY 2007 (1) ZLR 27 (H)

**TRIPLE C PIGS & ANOR v COMMISSIONER-GENERAL, ZIMBABWE REVENUE AUTHORITY
2007 (1) ZLR 27 (H)**

2007 (1) ZLR p27

Citation	2007 (1) ZLR 27 (H)
Case No	Judgment No. HH-7-07
Court	High Court, Harare
Judge	Gowora J
Heard	27 November 2006
Judgment	18 January 2007
Counsel	<i>J C Andersen SC</i> , for the applicants <i>M Sinyoro</i> , with him <i>R Matsikidze</i> , for the respondent
Case Type	Chamber application
Annotations	Link to case annotations

Flynote

Practice and procedure — *application* — *urgent* — *what constitutes urgency* — *when court should allow matter to be heard as a matter of urgency*

Headnote

- Every litigant appearing before the courts wishes to have his matter heard on an urgent basis, because the longer it takes to obtain relief, the more it seems that justice is being delayed and thus denied. Equally, the courts, in order to ensure the delivery of justice, would endeavour to hear matters as soon as is reasonably practicable. This is not always possible, ^ε however, and in order to give effect to the intention of the courts to dispense justice fairly, a distinction is necessarily made between those matters that ought to be heard urgently and those to which some delay would not cause harm which would not be compensated by the relief eventually granted to such litigant.
- A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. The courts have to consider, in the exercise of their discretion, whether or not a litigant wishing to have the matter treated as urgent has shown the ^g infringement or violation of some legitimate interest, and whether or not the infringement of such interest, if not redressed immediately, would not be the cause of harm to the litigant which any relief in the future would ^h render a *brutum fulmen*.

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Gowora J

Cases cited ^A

Dilwin Invstms (Pvt) Ltd v Jopa Entprs Co (Pvt) Ltd HH-116-98

Document Support Centre (Pvt) Ltd v Mapuvire 2006 (2) ZLR 240 (H)

General Transport & Engineering (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd 1998 (2) ZLR 301 (H)

Case information

J C Andersen SC, for the applicants ^B

M Sinyoro, with him *R Matsikidze*, for the respondent

Judgment

GOWORA J: On 18 January 2007, I issued an order dismissing this application and ordering costs against both the applicants jointly and severally. I have been requested to give my reasons and these are they.

The two applicants entered into a contract of supply, the exact nature of which ^C is now a subject of an appeal before the Fiscal Appeal Court. Arising from the contract between the parties, the respondent made a decision on the nature of the goods being supplied in terms of the contract and, in consequence thereof, made an assessment on value added tax to be paid, a penalty of 40 per cent and levied interest on the amounts so assessed. An appeal to the ^D respondent was noted by the applicants on 8 November 2006. Upon receipt of the notice of appeal, the respondent addressed a letter to the applicants' legal practitioners, advising that unless payment of the penalties and interest levied on the principal amount was made by 21 November 2006, collection measures would be effected against the applicants. This then necessitated the application before me. ^E

Before I can delve into the merits of the dispute before me, it is necessary to dispose of two preliminary issues raised by the respondent. In the first, the respondent challenges the urgency of this matter. The respondent takes the point that the applicants have not advanced any cogent reasons on the papers as to why the matter should be regarded as urgent. ^F

The legal practitioner for the applicants has filed, as is the norm in urgent chamber applications, a certificate of urgency. It is the practice of these courts as provided for in our rules of court to afford relief to those litigants who seek such relief on an urgent basis. Whether the matter should be treated as urgent and set down for hearing is entirely within the discretion of the judge, upon being satisfied on the papers that the matter is indeed urgent. In terms of Order ^G 22 r 244, where a chamber application is accompanied by a certificate from a legal practitioner in terms of r 242(2)(b) to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge who shall consider the papers forthwith. The certificate attached to these papers is phrased thus: ^H

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Gowora J

^A "That I consider that the matter should be heard urgently because, on the face of it, the respondent should have issued a directive to the applicants that, pending the appeal to the Fiscal Appeal Court, payment of the disputed amount should not be effected and that her decision refusing to do so is likely to be set aside on review. The respondent has however, advised that if payment is not made by Tuesday of next week, collection ^B procedures will be put in place. In practice, this means that the second applicant's banking account will be effectively garnisheed and the disputed amount paid over to the Zimbabwe Revenue Authority. This is a type of enforced execution without any order of court, which would not have occurred had the respondent made the directive which she should have made."

^C The basis on which the respondent should have made the directive is not given in the certificate, nor is any, attempt made to convince the court why the alleged failure on the part of the respondent to issue such directive would necessitate the matter being heard on an urgent basis. There is no averment on the part of the legal practitioner to amplify on the statement that collection procedures would be put in place by the respondent. There is no allegation ^D that this action would constitute an illegality on the part of the respondent, or that the respondent was not empowered in terms of the Value Added Tax Act [*Chapter 23:12*] (hereinafter referred to as the Act) to put such measure into effect. At issue in the main dispute is the applicants' alleged or assessed indebtedness to the Zimbabwe Revenue Authority for unpaid value added tax in terms of the Act. In terms of s 36 of the Act, the obligation to pay and the ^E right to receive and recover any tax, additional tax, penalty or

interest chargeable under the Act shall not be suspended pending an appeal unless the Commissioner so directs. The Commissioner has not issued such a directive, but that refusal standing alone and in the circumstances of this case and in the absence of other factors cannot constitute urgency. The consequences of such failure or refusal on the applicant have not been indicated, leaving the court in the dark as to how urgency would arise therefrom. Sight should not be lost that the court relies on the certificate of urgency in order to hear the matter outside the normal periods set in the rules. The rules require that the certificate provide reasons for urgency. The court, therefore, expects that the view expressed in the certificate that the matter be viewed as urgent is well grounded and premised on sound reasons. Those reasons do not appear in the certificate.

In his oral submissions, Mr *Andersen* argued that the garnishee would put the taxpayer out of business as it, the garnishee, would deprive the applicants of working capital. It is assumed and indeed expected that, if the Commissioner's decision to effect collection measures is to have this effect on the applicants'

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Gowora J

working capital, the deponent of the founding affidavit would himself have been alive to the impending disaster and would have brought it to the court's attention. That would, after all, be the reason for approaching the court on an urgent basis. The founding affidavit is silent on this and, more importantly, the certificate of urgency, which should contain the reasons for the urgency, is silent on this factor as well.

The statement in the affidavit that garnishee procedures would be in effect a form of enforced collection without a court order, in my view, requires a comment from the court. Mr *Andersen* did not address it and naturally in the circumstances, Messrs *Sinyoro* and *Matsikidze* also did not address the point. I am therefore very loath and hesitant in the absence of full argument from counsel on the same to make pronouncements which may touch on the interpretation of the Commissioner's powers in terms of the Act. I hasten to add, however, that these are powers bestowed on the Commissioner by the Act.

Mr *Sinyoro* suggested in argument that, in order to succeed in having the matter considered as urgent, the applicants would have to show imminent danger to existing rights and, more importantly the possibility of irreparable harm. He cited no authority.

It is obvious, that in so far as the applicants are concerned, the day of reckoning had arrived. They were being called upon to pay what was required by the Zimbabwe Revenue Authority or dire consequences would ensue. Clearly, from their perspective, the matter was urgent in that they were being put on terms to pay what the respondent claimed to be legally due by them. They are clearly intent on stopping all efforts to make them pay the sums thus demanded until the appeal lodged with the Fiscal Appeal Court is determined. That in itself does not is not sufficient to justify granting the applicants the privilege of jumping the queue and having their matter heard ahead of a host of other litigants. When a court is considering whether or not a matter is urgent, each case is judged according to the circumstances surrounding the matter. The test for urgency is, however, not subjective. See *Document Support Centre (Pvt) Ltd v Mapuvire* 2006 (2) ZLR 240 (H). Makarau JP stated therein that the test for urgency is not subject but objective.

Naturally, every litigant appearing before these courts wishes to have their matter heard on an urgent basis, because the longer it takes to obtain relief, the more it seems that justice is being delayed and thus denied. Equally, the courts, in order to ensure delivery of justice, would endeavour to hear matters as soon as is reasonably practicable. This is not always possible, however, and in order to then give effect to the intention of the courts to dispense justice fairly, a distinction is necessarily made between those matters that ought to

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Gowora J

be heard urgently and those to which some delay would not cause harm which would not be compensated by the relief eventually granted to such litigant. As courts, we therefore have to consider, in the exercise of our discretion, whether or not a litigant wishing to have the matter treated as urgent has shown the infringement or violation of some legitimate interest, and whether

or not the infringement of such interest, if not redressed immediately, would not be the cause of harm to the litigant which any relief in the future would render a *brutum fulmen*.

I would however, in closing, wish to quote respectfully the remarks of Gilliespie J in *General Transport & Engineering (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd* 1998 (2) ZLR 301 (H) at 302. Quoting from his own remarks in *Dilwin Investments (Pvt) Ltd v Jopa Enterprises Co Ltd* HH-116-98 the learned judge stated that:

“A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it.”

In my view, this is the irreparable harm that Mr *Sinyoro* argued should be established by the applicants in order to justify that the matter be treated as urgent. Good cause would have been shown by the applicants establishing that the Commissioner had, by her actions, threatened or interfered with some *ε* lawful right in a manner likely to result in irreparable harm and that the absence of immediate relief from this court would ultimately render any subsequent relief “hollow”. That is not the case made out by the applicants for urgency, and I conclude therefore that the application should fail on that basis.

In his argument, Mr *Sinyoro* submitted that for this court to direct the *τ* Commissioner to suspend payment of the recovery of payments due under s 36 would be tantamount to the court substituting the Commissioner’s discretion for its own. This, in his view, is not what is contemplated by the legislation, and he submitted that unless there was on the papers before it malice, bias, or some other preconceived prejudice on the part of the Commissioner against an applicant, this court would have no jurisdiction to *σ* usurp the discretion of the Commissioner. Mr *Sinyoro* did not provide any authorities for his submission and I requested that he furnish them to me after the hearing, with the applicants being afforded an opportunity to file authorities in support of their case on the same issue. The applicants have not done so, although their legal practitioners filed heads of argument. The purpose of the *η* heads of argument from their tenor was to enjoin the court not consider any

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Gowora J

submissions by the respondent which were not concerned with the lack of *α* jurisdiction of the court to interfere with the discretion of the Commissioner. I am in agreement with their views thereon.

The authorities cited by Mr *Sinyoro* are all concerned with the powers of a court to review administrative decisions. It is pertinent for me to remark that although the relief sought, were I to grant it, would result in the Commissioner’s *β* decision being suspended pending the determination of a review to have it set aside, this notwithstanding that at the present there is no order setting aside such decision. It is the case of the applicants that the Commissioner has refused to make a direction in terms of s 36 of the Act. If I were then to accede to their request and grant an order that the applicants not pay the disputed amount, such an order would have the effect of reversing the decision of the *γ* Commissioner. Yet I have not been requested to review the decision of the Commissioner. I am mindful of the fact that the respondent has not taken issue with this aspect of the application. It occurs to me that the legal practitioners from both sides failed to exercise their minds and consider the nature of the application placed before me by the applicants. If it is not a review, how then can this court be asked to give an order which has the effect of setting aside *δ* the decision of the Commissioner without such decision having been brought under the scrutiny of the court?

Turning now to the nature of the relief sought in the provisional order annexed to the applicants’ papers, I am required to interdict the respondent from instituting proceedings for the recovery of the disputed value added tax. *ε* Apart from the submission from the applicants’ counsel from the bar that the recovery would affect the cash flow of the applicants, no case is made out that there would be prejudice to the interests of the applicants if the relief were not granted. The right on which the applicants seek the temporary interdict is not adverted to in the affidavit. There is a statement to the effect that the applicants’ constitutional rights would be infringed if they were obliged to pay *τ* the capital amount, penalty and interest before the appeal is heard. There is no averment as to which constitutional rights are being infringed by such action. No section of the Constitution is referred to and the court can only speculate as to what these rights may be. As the Act provides for the collection of these amounts even in the event of a pending appeal, can this court grant an

interdict against an administrative act being exercised properly in accordance ^G with a statutory provision which has not been struck down? The court would in essence be giving sanction to an infringement of the law. It is a court's duty to uphold the law. In the absence of an order setting aside the decision of the respondent to levy and collect the amounts in dispute, I cannot as a court grant an order interdicting her from carrying out her lawful duties. ^H

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Gowora J

^A This application, in my view, is without any foundation or basis. The application is therefore dismissed with costs, which costs shall be borne by the applicants jointly and severally, the one paying the other to be absolved.

Wintertons, applicant's legal practitioners

^B *Sinyoro & Company*, respondent's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/KHUZWAYO v ASSISTANT MASTER OF THE HIGH COURT & ORS 2007 (1) ZLR 34 (H)

KHUZWAYO v ASSISTANT MASTER OF THE HIGH COURT & ORS 2007 (1) ZLR 34 (H)

2007 (1) ZLR p34

Citation	2007 (1) ZLR 34 (H)
Case No	Judgment No. HB-8-07
Court	High Court, Bulawayo
Judge	Bere J
Heard	18 January 2007
Judgment	18 January 2007
Counsel	<i>E T Matinenga</i> , for the applicant <i>M Nyathi</i> , for the third respondent No appearance for the first and second respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Company — winding up — order for winding up obtained from court — staying of winding up proceedings — not necessary to apply for rescission of order — party entitled to proceed under s 227 of Companies Act [Chapter 24:03]

Costs — payment of costs by successful party — court application — dilatory ^D behaviour by applicant — applicant may be required to pay costs notwithstanding the success of his application

Legal practitioner — conduct and ethics — acting without instructions — legal practitioner filing notice of opposition to application without taking instructions from client — impropriety of — legal practitioner's role in relation

to client and court — duty of legal practitioner to obtain E instructions from client — in the absence of specific instructions from client, legal practitioner is not entitled to speculate on the position of his client

Headnote

The third respondent had obtained a default judgment for the winding up of F a company of which he and the applicant were shareholders, there being a dispute over the shareholding in the company. The applicant sought to have the proceedings stayed, in terms of s 227 of the Companies Act [Chapter 24:03]. Counsel for the third respondent, without taking instructions from his client, filed a notice of opposition to the application. He sought to justify his actions on the basis of the urgency of the matter. G He also argued that the confirmed order could only be reversed by way of filing a proper application for rescission of the final order granted.

Held, that legal practitioners are conduits through which litigants' cases are properly put before the courts for determination. They are professional servants of their clients and can only act on specific instructions from such clients. They are the agents through which litigants cases are dealt H

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Bere J

A with because of their assumed expertise in the field of law. A legal practitioner cannot, in the absence of specific instructions from his clients, speculate on the possible line of defence or position of his client. To do so would be to abuse his role vis-à-vis his client, as well as an effort to mislead the court, which looks to him, as an officer of the court, for proper and professional guidance.

B *Held*, further, that with regard to the alleged the urgency of the matter, the rules of practice and procedure have built-in mechanisms to deal with the situation counsel was in. He could have easily sought the indulgence of the court to enable him to take proper instructions from his client. He was certainly not in such a desperate situation as to compel him to violate basic court procedure.

C *Held*, further, that s 227 of the Companies Act [Chapter 24:03] which, in appropriate circumstances, enables a court to stay or set aside the winding up of a company, provides an alternative remedy to an application for rescission of judgment as provided for in the High Court rules. In a proper case, where the winding up of a company is involved and where D the need to stay those proceedings is involved, a litigant has this option at his disposal.

Held, further, that where an applicant seeking to set aside the confirmation of a rule has been dilatory in his handling of the matter, he may be required to pay the costs of the applicant even though his application is successful.

Legislation considered E

Companies Act [Chapter 24:03], s 227

Case information

E T Matinenga, for the applicant

M Nyathi, for the third respondent

F No appearance for the first and second respondents

Judgment

BERE J:

THE BACKGROUND

The third respondent, one Zodwa Dabengwa, made an urgent chamber G application in this court as the applicant in case No. HC 588/06 seeking an order liquidating a company called Langa (Pvt) Ltd. The application was duly served on the now the applicant and no opposition was filed leading to the inevitable granting of the final order on 27 April 2006.

When the liquidation proceedings were in progress, the applicant in the ^H instant case filed an urgent chamber application in this same court seeking an

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Bere J

order to suspend or stay the liquidation process. In doing so, the applicant ^A invoked the provisions of s 227 of the Companies Act [*Chapter 24:03*] (the Act).

After hearing detailed arguments from both counsel, I granted the relief sought and couched my order in the following terms:

"Final Order ^B

Pending the institution of action by the applicant to rectify the register of Langa (Pvt) Ltd (in liquidation) and its determination thereof, it is hereby ordered as follows:

1. The final order liquidating Langa (Pvt) Ltd issued on 27 April 2006 be and is hereby stayed.
2. All process consequent upon the issuance of the order of liquidation ^C referred to in paragraph 1 above be and are hereby suspended or stayed.
3. The applicant is to file an action for the rectification of the membership of Langa (Pvt) Ltd within 10 working days from the date the reasons for this order are given failing which the granted order aforementioned ^D falls away.
4. The current status of Langa (Pvt) Ltd be and is hereby maintained until altered by an order of the court.
5. The applicant and respondents are deemed to have received this order five days after the reasons for judgment are handed down.
6. The costs of this application including the costs of liquidation ^E proceedings to date be and are hereby to be borne by applicant on the ordinary scale."

I indicated then that my reasons would follow. Here are my reasons.

In his founding affidavit, the applicant conceded that he had not timeously sought to oppose the order which he now seeks to have stayed or suspended. ^F He said he did not oppose the third respondent's application in case No. HC 588/06 because he genuinely believed the matter would be resolved amicably and without the hasles of court action. He says he was so advised by his counsel.

The applicant was cautious to maintain that in making this application, he was not making an application for rescission, but was merely making it in terms of ^G s 227 of the Companies Act [*Chapter 24:03*].

The applicant highlighted in his founding affidavit that his bone of contention with the third respondent was on the shareholding structure of Langa (Pvt) Ltd. He contended that the third respondent and the other shareholders had fraudulently allocated to themselves shares in the above referred company ^H

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Bere J

^A and that, because of this, he wanted this issue resolved first before the company could be liquidated. The applicant appreciated that there was likely to be a dispute of facts, hence his desire to proceed in terms of s 118 of the Companies Act.

The matter was brought on urgent basis because the first meeting of creditors ^B towards liquidation was supposed to be held barely a week or so before this application was filed.

It is noted that none of the respondents filed any notice of opposition. What in fact happened was that the third respondent's legal practitioner filed a notice of opposition, purportedly on her behalf. I will come back later in my judgment to deal specifically with the propriety or otherwise of the action ^C taken by counsel.

What clearly runs in counsel's opposing affidavit alluded to is that the applicant, by filing the instant urgent application, was merely trying to bring an application for rescission through unorthodox procedure. Counsel opined that the confirmed order could only be reversed by way of filing a proper application for rescission of the final order granted.

^D It was also the respondent's counsel's contention that the application by the applicant was not merited, as what he sought to achieve could have been done without necessarily interfering with the

liquidation process. Counsel's view was that the shareholding structure which the applicant sought to have corrected was merely an ancillary matter to the dispute faced by the parties.

¶ I will deal with the points in contention in the order counsel raised them.

WAS IT COMPETENT FOR COUNSEL FOR RESPONDENT TO FILE A NOTICE OF OPPOSITION IN THIS PARTICULAR MATTER?

Mr *Matinenga*, who appeared for the applicant, took issue with the approach ¶ taken by the respondent's counsel of filing his notice of opposition, instead of merely seeking the court's indulgence to be granted more time in order for him to take proper instructions from his client, the third respondent. Mr *Matenenga* argued that the respondent's counsel does not stand in the shoes of the third respondent and, more specifically, that he could not be in ¶ a position to deal specifically with the issues at stake, that is the shareholding structure of Langa (Pvt) Ltd.

Mr *Nyathi* sought to counter the attack in his notice of opposition by arguing that there was no reason for him to wait to seek proper instructions from client, the third respondent, because the matter was extremely urgent. To quote from ¶ Mr *Nyathi*, he stated in his submissions in court as follows:

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Bere J

"For the record the application was meant to forestall the creditors meeting A that was supposed to be held on 12 July. There was accordingly extreme urgency and the issues contained were within the personal knowledge of counsel. If I had to sit and wait for third respondent I would have put her in jeopardy because no papers were going to be filed in time."

In my view, there must be something wrong with a legal practitioner who desires to take a client's case as his. Legal practitioners are conduits through B which litigants' cases are properly put before the courts for determination. They are the professional servants of their clients and can only act on specific instructions from such clients. They are the agents through which litigants' cases are dealt with because of their assumed expertise in the field of law. A legal practitioner cannot, in the absence of specific instructions from his client, C speculate on the possible line of defence or position of his client. Doing so would be tantamount to abusing his role to his client and also constitute a stout effort to mislead the court which looks up to him for proper and professional guidance as an officer of the court.

In the instant case, the issues at stake centred on the shareholding structure of a company called Langa (Pvt) Ltd. Only the third respondent and the D applicant could have sworn positively to the shareholding structure of that company. Both counsel could not, under normal circumstances, purport to have independent or personal knowledge of the shareholding structure of that company.

It appears to me that, faced with the instant application, counsel for the third E respondent was naturally obliged to seek instructions from his client, the third respondent instead of groping in darkness as he did. I am far from being persuaded by the argument that he acted in the manner he did because of the urgency of the matter. Our rules of practice and procedure have in them built in mechanisms to deal with the situation counsel found himself in. Counsel could have easily sought the indulgence of the court to enable him to take F proper instructions from his client. Counsel was certainly not in such a desperate situation which compelled him to violate basic court procedure.

The difficulty the third respondent's counsel finds himself in does not end here. His speculative approach is further highlighted by his own submissions in court when he states: G

"I would like to point out that my affidavit was deposed to without me having sight of the draft provisional order sought. See para 8 of my affidavit. I did not know then the exact nature of the order that was being sought. I could only divine the order from the reading of the applicant's founding affidavit and I would like to refer you to para 33 of the applicant's founding affidavit." H

2007 (1) ZLR p39

Bere J

A I find it to be significant that Mr *Nyathi* again did not seek the court's indulgence or at least make an effort to have these dark areas clarified by the applicant's counsel before he offered any response. He appeared to have been in a hurry to indulge in conjectural litigation.

On these two highlighted technicalities, in particular, counsel's deliberate failure to take specific instructions from his client, the third respondent, before ^a acting in the manner he did, I would be persuaded to conclude that, strictly speaking, there was no opposition to the urgent application made by the applicant and would safely grant the relief sought without further ado.

However, I wish to develop the argument further and proceed to consider whether or not there was need for the applicant to formally apply for rescission ^c of the confirmed order.

IMPLICATIONS OF S 227 OF THE COMPANIES ACT [Chapter 24:03]

As already stated, the applicant brought the instant urgent application in terms of the section, cited above, of the Companies Act.

^d The section is couched in the following manner:

"227 Court may stay or set aside winding up

The court may at any time after the making of an order for winding up, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed or set aside, make an order staying or ^e setting aside the proceedings on such terms and conditions as the court deem fit."

In my view, this special provision in the Act is quite explicit and requires no interpretation. It would seem to me that this section does provide an alternative remedy to an application for rescission of judgment as provided for in the High ^f Court rules.

What this implies is that, in a proper case, where the winding up of a company is involved and where the need to stay those proceedings arises, a litigant has this option at his or her disposal. If one decides to opt for this course of action, that litigant cannot be condemned for doing so because such litigant is at liberty to exercise this option.

^g The applicant has been criticised for failing to timeously oppose the confirmation of the liquidation of Langa (Pvt) Ltd. This may be so, but one should not lose sight of the fact that up until the provisional order was confirmed, there was a genuine attempt to resolve this matter by both parties. ^h In fact, in his letter of 25 April 2006 (Annexure "A4"), the applicant through

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Bere J

his counsel clearly highlighted his reservations about the proposed liquidation ^a of the company. In the same correspondence, the applicant proposed that the matter be postponed. Even the third respondent through its letter of 26 April 2006 (Annexure "A5"), which was a response to Annexure "A4", appreciated the need to resolve the shareholding structure of Langa (Pvt) Ltd.

The applicant has made serious allegations against the other shareholders. ^b He alleged that they fraudulently or improperly transferred shares to themselves. The applicant went on to say that:

"Mrs Dabengwa had no *locus standi* to institute the winding up. Mr Dabengwa did not have any shares in the company. Consequently, his proxy could not exercise powers which he did not have."

In my view, these allegations make it necessary to have the shareholding ^c structure of the company clarified or ascertained before the winding up of the company.

In this regard, I am satisfied that the applicant has made a case warranting the relief sought.

THE QUESTION OF COSTS ^d

It has not escaped my attention that, despite making a finding in favour of the applicant, both the applicant and his counsel adopted a dilatory approach in the handling of this matter.

The applicant knew that a provisional order had been obtained and did nothing to prevent the confirmation, of that order by way of filing opposing ^e papers. But for the applicant's casual approach, the provisional order would not have been confirmed, hence the instant application would not have arisen.

For this reason, I am satisfied that an appropriate order for costs against him must be made.

It was for these reasons that I granted the final order earlier on referred to in ^f this judgment.

Mashayamombe & Co, applicant's legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/MUDARIKWA & ANOR v DIRECTOR OF HOUSING & COMMUNITY SERVICES & ANOR 2007 (1) ZLR 41 (S)

MUDARIKWA & ANOR v DIRECTOR OF HOUSING & COMMUNITY SERVICES & ANOR 2007 (1) ZLR 41 (S)**2007 (1) ZLR p41**

Citation	2007 (1) ZLR 41 (S)
Case No	Judgment No. S-56-06
Court	Supreme Court, Harare
Judge	Malaba JA, Sandura JA & Ziyambi JA
Heard	11 September 2006
Judgment	23 January 2007
Counsel	<i>O C Gutu</i> , for the appellants <i>C Phiri</i> , for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — *unfair labour practice* — *failure to promote person from acting to substantive position* — *whether promotion a right* — *legitimate expectation* — *doctrine not applicable where person not qualified for post, irrespective of experience*

Headnote

- ^d The appellants had been acting as district officers in the Harare municipality. A recommendation was made to the second respondent's Executive Committee by the first respondent, their immediate superior, that they be confirmed in their positions but the recommendation was withdrawn when it was found that they did not have the educational qualifications ^e required for the post. The posts were then advertised in the media and a notice inviting applications for the vacancies was circulated internally. The appellants responded by submitting their applications. Some of the applicants were called for interviews but the appellants were not invited to the interview.
- ^f The appellants applied unsuccessfully to the High Court for an interdict preventing the municipality from appointing anyone else to the posts and an order for their promotion. They claimed that even though they did not have the required educational qualifications, they had the experience entitling them to promotion to the posts. They would not have been employed in an acting capacity for so long if they were not qualified for the post. Further, they claimed that they were entitled to be promoted to ^g the posts in which they were acting because other employees in

similar positions had been promoted and that they had a legitimate expectation of being promoted. Finally, should the respondents not be interdicted from appointing any persons other than themselves and ordered to promote them to the posts in which they were acting, they would suffer ^h prejudice in the form of loss of their existing jobs. On appeal:

2007 (1) ZLR p42

Malaba JA

Held, that the appellants did not have a right to be promoted. Promotion was ^a not automatic and did not depend entirely on the duration and competence in the performance of the duties of the office in which the appellants had been acting. They did not have the specific educational qualifications which the first respondent was required to consider when deciding whether or not to recommend their promotion to the Executive Committee. ^b Even if a recommendation had been made that the appellants be promoted, the Executive Committee would not have been bound by it. It would have been free to reject the recommendation. Where, as was the case here, the promotion of an employee is not automatic but is on the basis of educational qualifications-cum-merit so that the employer is free to promote or not to promote, an order to promote cannot be made. The ^c reason is that the promotion is discretionary.

Held, further, that, as to legitimate expectation, there was nothing which the repository of the power to promote did which could constitute an assurance to the appellants that they would be promoted upon recommendation by the first respondent. The second respondent, through the Executive Committee, reserved its right to reject the recommendation that the appellants be promoted. Nor could the appellants derive legitimate expectation to be promoted from the fact that other employees in similar positions had been promoted, if the Executive Committee acted on recommendations made on the basis of a misapprehension by the first respondent of the factors to be taken into account in making them. There could be no legitimate expectation to be appointed to a post for which ^e they were not qualified, irrespective of their experience.

Case cited

Muwenga v PTC 1997 (2) ZLR 483 (S) ^f

Case information

O C Gutu, for the appellants

C Phiri, for the respondents

Judgment

MALABA JA: This is an appeal from a judgment of the High Court delivered on 16 March 2006, dismissing an application by the appellants for an interdict ^g prohibiting the respondents from appointing any person other than the appellants to the posts of District Officer for Warren Park and Glen Norah respectively and for an order directing them to appoint the appellants to the posts with effect from 1 May 2003.

The appellants were employed by the second respondent, City of Harare, as acting District Officers (Grade 6) for Warren Park and Glen Norah. The first ^h

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Malaba JA

^a appellant had been Acting District Officer for Warren Park as from 11 January 2000, whilst the second appellant was the Acting District Officer for Glen Norah as from 1 May 2000. The first respondent was the head of the department in which the appellants were employed. On 10 October 2001, it was decided at a Departmental Works Council meeting that employees who had been serving in acting positions be identified with a view to having them ^b recommended for promotion to the posts in which they were acting. On 12 November, the first respondent made a recommendation to the Executive Committee of the second respondent that the appellants, together with one Sam Tawanaye Sapahla who has not appealed the decision of the court *a quo*, be considered for promotion to the posts in which they were acting. The recommendation was signed by the Town Clerk and the Human Resources ^c Director. The factor that had been taken into account in making

the recommendation was disclosed, *ex facie*, the document as the good performance of the appellants during the time they had been acting in the posts.

The Executive Committee was due to consider the recommendations on 12 November 2001. Before it could do so, the first respondent realised that, in making the recommendation, he and the other officials had omitted to take into account the educational qualifications the appellants were required to have in order to be promoted into the posts in which they were acting. A person promoted or appointed to the post of District Officer (Grade 6) had to be in possession of a good degree in Social Sciences or Administrative Accounting or a CIS. Any other post graduate qualification was considered an added advantage.

On 12 November 2001, the first respondent, with the consent of the Executive Committee, withdrew the recommendation he had made for the promotion of the appellants, as there was no evidence that they possessed the requisite educational qualifications. The posts were then advertised in the local print media and a notice inviting applications for the vacancies was circulated internally. The appellants responded by submitting their applications. Some of the applicants were called for interviews on 17 April 2003. The appellants were not invited to the interview.

On 2 May 2003, the appellants made an application to the High Court for the interdict and the order for promotion on the ground that they had the experience entitling them to promotion to the posts in which they were acting. They alleged that the insistence by the first respondent on the educational qualifications was a ploy to ensure that they were not promoted. Whilst not stating categorically that they possessed the specific educational qualifications required for the post of District Officer, the appellants said that they were nonetheless sufficiently qualified to hold the posts, because they would not

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Malaba JA

have been employed in an acting capacity for so long if were they not qualified for the post. They that said they were entitled to be promoted into the posts in which they were acting because other employees in similar positions had been promoted. They contended that they had a legitimate expectation of being promoted, arising from the manner in which the respondents had treated the other employees. It was their plea that should the respondents not be interdicted from appointing any persons other than themselves and ordered to promote them to the posts in which they were acting, they would suffer prejudice in the form of loss of the job as Acting District Officers.

The respondents contended that the determination of the question of whether the appellants should be promoted or not did not turn solely on their competence in the performance of the duties of the office in which they were acting. Those were attributes expected of every employee. The appellants were required to show that they possessed the requisite educational qualifications for the post. They had failed to do so.

In dismissing the application, the learned judge said:

"It may well be true that there are those of applicants' counterparts who were appointed to substantive grades of District Officer when they did not hold the requisite degree qualifications. The explanation by the Town Clerk is that the new requirement for these posts is that the incumbent holds a degree in social sciences. It follows from that, that those of the applicants' counterparts may have benefited from an old policy. That is not to say the employer is bound to apply that old requirement to the applicants ... At the time of appointment to the acting position, the applicants did not hold the requisite qualifications and therefore could not have reasonably expected to be promoted into these posts."

The grounds of appeal were that:

- "1. The learned judge in the court *a quo* misdirected himself by holding that the appellants should not have benefited from the old policy of promotion notwithstanding the fact that the majority of their counterparts, who were not holders of university degrees in social sciences had been duly promoted to the position of District Officer. The learned judge ought to have considered that it was only fair and reasonable for the appellants to be promoted to the post of District Officers in the same way and manner in which the majority of their counterparts, in almost exactly the same circumstances as the appellants, had been promoted.
2. The learned judge in the court *a quo* erred by holding that there was no legitimate expectation on the part of the appellants to expect to be promoted to the position of District Officer when all the facts in the case clearly confirmed that the recommendation of both the First

2007 (1) ZLR p45

Malaba JA

a respondent and the Town Clerk were to the effect that the appellants were disciplined and hardworking employees who should have been duly promoted to the position of District Officer, especially taking into account the fact that more than 80% of all District Officer within the City of Harare were not holders of university degrees in social sciences nor in any other discipline for that matter."

b The appellants failed to show that they had a right to the promotion they claimed from the respondent and sought to protect by way of an interdict. The order of appointment could not issue against the first respondent at all, because he had no power to appoint anyone to the post of District Officer. The power to promote employees in the appellants' position lay with the Executive Committee of the second respondent. The appellants did not have a right to c be promoted. The promotion was not automatic and did not depend entirely on the duration and competence in the performance of the duties of the office in which the appellants had been acting. In their grounds of appeal, the appellants accept the fact that they did not have the specific educational qualifications which the first respondent was required to consider when deciding whether or not to recommend their promotion to the Executive d Committee. As a result of the inadequacy of their qualifications, the appellants were not called for interviews, and no recommendation was made for their promotion. The appellants were not placed in a situation which would have compelled the Executive Committee to consider their promotion to the substantive post. The pre-condition for the decision by the Executive e Committee whether or not to exercise the power to promote them was not fulfilled.

Even if a recommendation had been made that the appellants be promoted, the Executive Committee would not have been bound by it. It would have been free to reject the recommendation. The Executive Committee was not under a binding obligation to promote the appellants in the exercise of its duty. Where, f as was the case here, the promotion of an employee is not automatic but is on the basis of educational qualifications-cum-merit so that the employer is free to promote or not to promote, an order to promote cannot be made. The reason is that the promotion is discretionary. It is elementary that no-one can be directed by an order of a court to do something which he or she is not under g a binding obligation to do. An order of appointment against the second respondent in the circumstances would have directed the Executive Committee to exercise its discretion in a particular manner, namely, to promote the appellants to the post of District Officer. The court would, in the circumstances, be promoting the employees as its order would be the source of the binding h obligation not imposed on the employer by law.

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Malaba JA

It was contended, on behalf of the appellants, that they had a legitimate a expectation to be promoted. The expectation is said to have arisen from two events, namely, the recommendation made by the first respondent on 12 November 2001 and the promotion of other employees in similar positions as the appellants. Both arguments are based on a misconception of the requirements for the applicability of the principle of legitimate expectation. In the first place, there was nothing which the repository of the power to promote b did which could constitute an assurance to the appellants that they would be promoted upon recommendation by the first respondent. The second respondent, through the Executive Committee, reserved its right to reject the recommendation that the appellants be promoted.

It is clear, in any case, that the recommendation had been made without the c question of whether or not the appellants possessed the educational qualifications required for the post having been considered. It would not have been the recommendation envisaged under the law. At the time the application for the order for appointment was made, there was no recommendation that the appellants be promoted. It must also follow that the appellants could not derive a legitimate expectation to be promoted from the fact that other d employees in similar positions had been promoted, if the Executive Committee had acted on recommendations made on the basis of a misapprehension by the first respondent of the factors to be taken into account in making them.

In *Muwenga v PTC* 1997 (2) ZLR 483 (S), it was held that legitimate expectation to be appointed to a post in which the employee was acting was contingent e upon the employee being qualified or arose from the contract of employment itself. It could not be founded on experience alone. Gubbay CJ said at 485G-487A:

"It was not in contention, and rightly so, that the omission by the PTC to promote the appellant to the post of superintendent despite his long and good service when acting in that capacity, was one of the unfair

labour F practices specified in the legislation. Nonetheless the argument advanced was that the PTC had created a situation which caused the appellant to legitimately expect that he would be promoted to the post in which he was acting.

Even if it be assumed (without in any way deciding the point) that it was permissible for the labour relations officer to accept the appellant's G reference, albeit falling outside those definitive acts or omissions specified as constituting unfair labour practices, the particular facts seem to me to exclude a finding that the appellant had a tangible natural law right to be promoted to the post of superintendent.

Most importantly, at the date the appellant was appointed an acting superintendent, it must have been known to him that he lacked the H

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Malaba JA

A necessary academic level in mathematics to secure the substantive post ... The appellant had the experience but not the academic qualification. How could he, therefore, legitimately or reasonably expect to obtain the appointment?

I would merely emphasise, as cautioned by Corbett CJ [*Administrator, Transvaal & Ors v Traub & Ors* 1989 (4) SA 731(A)], that the need to avoid B undue judicial interference in the administration of public authorities must always be placed in the balance. Indeed, it could be submitted with some persuasion that the promotion of an employee is a privilege, left to the discretion of the employer, to be conferred when deemed fit. It is not a right that an employee is entitled to claim unless, of course, his contract of employment so provides."

C *Muwenga's case supra*, is almost on all fours with the appellants' case on the facts, so that its *ratio decidendi* supports the determination of the issues raised in the grounds of appeal.

The appeal is dismissed with costs.

D SANDURA JA and ZIYAMBI JA concurred.

Gutu & Chikowero, appellants' legal practitioners

E *Mawere & Sibanda*, respondents' legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/S v MHOMHO 2007 (1) ZLR 48 (S)

S v MHOMHO 2007 (1) ZLR 48 (S)

2007 (1) ZLR p48

Citation	2007 (1) ZLR 48 (S)
Case No	Judgment No. S-57-06
Court	Supreme Court, Harare
Judge	Malaba JA, Gaunza JA & Garwe JA
Heard	10 October 2006
Judgment	23 January 2007
Counsel	<i>E T Gara</i> , for the appellant (<i>Pro Deo</i>) <i>J Makwakwa</i> , for the respondent
Case Type	Criminal appeal

Annotations

No case annotations to date

Flynote

Criminal law — murder — defences — justifiable killing — killing of person c attempting to escape lawful arrest — reasonable force — when killing justifiable

Headnote

The appellant, a soldier, had been detailed, along with a policeman, to ambush a spot on the border suspected to be used by persons crossing the border ^b illegally. The ambush was conducted at night. During the evening, the deceased and another person approached the ambush spot and were challenged. The deceased attacked the accused and tried to take away his rifle but he and the other man fled when they saw the policeman. The accused fired a shot in the direction in which he could see the two men fleeing. The shot hit and killed the deceased. The appellant was charged ^e with murder. It was argued for him that the killing was justifiable in terms of s 42(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Held, that at the time the appellant discharged the firearm the deceased and his companion had committed the offence of assault in addition to a contravention of s 42(2) of the Immigration Act [*Chapter 4:02*]. The former offence is a First Schedule offence. However, for the appellant to ^f have invoked the protection afforded by s 42(2) of the Criminal Procedure and Evidence Act (in terms of which the killing would be lawful if the use of force was justifiable), it had to be shown that he had taken other reasonable steps in the attempt to prevent the deceased from escaping before resorting to the use of the force that killed him. This the appellant did not do: he appeared to have simply fired the shot in the direction of ^g the two people just because they were fleeing. He clearly acted precipitately and prematurely took the drastic action of shooting the deceased. He was negligent in that he failed to take reasonable steps to ascertain the whereabouts of the deceased before discharging his firearm and thus should be convicted of culpable homicide. ^h

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Malaba JA

Cases cited ^a*S v Burdett* 1996 (2) ZLR 658 (S)*S v Chikukutu* 1996 (1) ZLR 702 (S)**Legislation considered**Criminal Procedure and Evidence Act [*Chapter 9:07*], s 42**Case information**^b *E T Gara*, for the appellant (*Pro Deo*)*J Makwakwa*, for the respondent**Judgment**

MALABA JA: On 25 October 2003, the appellant was charged before the High ^c Court with murder, it being alleged that on 17 December 2003 at or near Nyamapanda Border Post he unlawfully and intentionally killed one Shorai Domingo by shooting him in the back with a gun. The appellant pleaded not guilty. He proffered the defence of lawful killing in terms of s 42(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the Act") and alternatively prayed that he be found guilty of culpable homicide.

^d The case proceeded on the basis of a statement of agreed facts. The statement read as follows:

- "1. The accused is Francis Mhomho, a private soldier of the Zimbabwe National Army (ZNA) serving with 2.2 Infantry Battalion.
2. On 17 December 2003, the accused was on joint army and police ϵ border patrol duties along the Zimbabwe-Mozambique border near Nyamapanda Border Post.
3. At around 2100 hours, the accused together with constable Leonard Lamazolo laid an ambush at a point which was suspected to be used by illegal border crossers.
4. At the same time, Shorai Domingo (the now deceased) and one ϵ Trymore Chirenje approached the position where the accused and constable Lamazolo were hiding.
5. On seeing the two, the accused ordered them to approach his position. At the same time he moved forward towards them.
6. When they met with the accused, one of them suddenly attacked the accused and tried to wrest his service rifle [from him].
7. ϵ During the scuffle, the accused lowered his rifle and cocked it.
8. On seeing the policeman, the two stopped attacking the accused and fled.
9. In order to stop and arrest them, the accused fired one shot to the side of the direction of flight of the person he was able to see because ϵ of his bright clothing.

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10. After firing the shot, the accused heard somebody cry out and on ϵ investigation, he discovered that the shot had struck the deceased.
11. The other persons in the company of the deceased fled into Mozambique and only returned to Zimbabwe when they heard of the deceased's death.
12. The post mortem report and ballistics report respectively annexed hereto as Exhibit 'A' and 'B' established that the deceased's death ϵ was caused by the shot fired from the accused's rifle."

The bullet entered the deceased's body at the back in the lumbar region and exited from the sternum. It was contended on behalf of the appellant that the facts showed that his acts satisfied the requirements of s 42(1) of the Act entitling him to the protection under s 42(2). Section 42 of the Act provides ϵ that:

- "1. If any person who is authorized or required under this Act or any other enactment to arrest or assist in arresting another person attempts to make the arrest and the person whose arrest is attempted –
 - (a) resists the attempt and cannot be arrested without the use of force; or ϵ
 - (b) flees when it is clear that an attempt to arrest him is being made or resists the attempt and flees;
 the person attempting the arrest may, in order to effect the arrest, use such force as is reasonably justifiable in the circumstances of the case to overcome the resistance or to prevent the person concerned from ϵ escaping.
2. Where a person whose arrest is attempted is killed as a result of the use of justifiable force in terms of subsection (1), the killing shall be lawful if the person was to have been arrested on the ground that he was committing or had committed, or was suspected on reasonable grounds of committing or having committed an offence referred to in ϵ the First Schedule."

The first argument urged on the court was that the offence the deceased and his compatriot had committed was the assault on the appellant, in that they attacked him and attempted to disarm him of his service rifle. Assault is a First Schedule offence. The learned judge was of the opinion that the deceased had committed an immigration offence for which he would have been arrested. ϵ That offence was not a First Schedule offence. The learned judge held that the appellant was in the circumstances not entitled to the protection under s 42(2) of the Act.

The appellant was found guilty of culpable homicide on the ground that, in firing the shot that killed the deceased, to the side of the person he could see without taking any precaution to ensure that the other person he could not ϵ

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Malaba JA

ϵ see, but knew was in that general direction, he acted negligently. The learned judge said:

- " We note that the accused fired only one shot, there was no warning shot fired and that shot was not directed either into the air or onto the ground to constitute a warning shot. He was aware that there were

two people who were fleeing from him and by firing to the side he took a calculated risk that one of the people was not in the direction of this shot."

He was sentenced to five years' imprisonment with labour, of which two years were suspended for five years on conditions of good behaviour. The appellant appealed with leave of the court *a quo* against both conviction and sentence.

c Against conviction, the contention was that the learned judge misdirected herself when she held that the protection under s 42(2) of the Act was not available to the appellant because the offence the deceased would have been arrested for was not a first Schedule offence. The second ground of appeal was that, having found as a fact that the appellant fired the shot to the side of the fleeing person he was able to see, the learned judge misdirected herself d in holding that he acted negligently.

It appears to me that the agreed facts show that at the time the appellant discharged the firearm the deceased and his compatriot had committed the offence of assault in addition to the contravention of s 42(2) of the Immigration Act [Chapter 4:02]. To the extent that the learned judge held that the deceased had not committed a First Schedule offence for which he would have been e arrested, she misdirected herself. I, however, do not think that the finding of a misdirection on the part of the learned judge confers on the appellant the protection afforded by s 42(2) of the Act.

The authorities show that for the appellant to have invoked the protection afforded by s 42(2) of the Act, it ought to have been shown that he had taken other reasonable steps in the attempt to prevent the deceased from escaping f before resorting to the use of the force that killed him. Lansdown and Campbell *Criminal Procedure and Evidence* Vol V at p 205 say that:

"The mere fact that the suspect flees does not justify any person in shooting him. The person endeavouring to effect an arrest must first use other means to capture him, and he can resort to a firearm only if he can use no other means whatever to capture him. If circumstances permit, an g oral warning should be given, then a warning shot into the ground or in the air, and thereafter the arrestor should try to shoot the suspect in the legs. Each case must, however, depend on its merits in order to determine whether the arrestor had acted reasonably in terms of the subsection, the question being whether he could reasonably have prevented the suspect h from escaping otherwise than by killing him."

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Malaba JA

In this case, the appellant did not shoot at a person he was having sight of. a He could not have been firing to prevent a person out of his sight from escaping. The appellant simply fired the only shot into the dark without having taken care to ensure that the person whose escape he would have been entitled to prevent was there or not. He does not say the only shot fired was intended to be a warning shot. It was directed at the level of the chest. There were no shots fired into the air or to the ground. The appellant appears to have simply b fired the shot in the direction of the two people just because they were fleeing. He clearly acted precipitately and prematurely took the drastic action of shooting the deceased.

The learned judge was correct in the finding that the appellant was negligent in that he failed to take reasonable steps to ascertain the whereabouts of the deceased before discharging his firearm. In *S v Burdett* 1996 (2) ZLR 658 (S), c the accused was found to have committed a *bona fide* error of fact in that he had fired a shot in the direction of the deceased believing that the deceased was not there. It was nonetheless held that he acted negligently. See also *S v Chikukutu* 1996 (1) ZLR 702 (S) at 707.

The appellant was correctly found guilty of culpable homicide. The appeal d against conviction must fail.

On sentence, it was argued that the sentence is manifestly excessive as to induce a sense of shock. There is merit in the submission. The sentence has not adequately taken into account the fact that the appellant committed the offence in circumstances in which, had he been less precipitous in his actions, the killing of the deceased would have been lawful. He was on duty at the time, e enforcing the law.

The evidence placed before the trial court was that the appellant had performed his duties diligently on previous occasions, such that what happened on this day must truly have been out of character and bound to traumatise him so far as it led to a premature termination of a promising career f in the Army.

Whilst there is need to emphasise in the sentence the sanctity of life and the fact that those who carry firearms in the execution of their duties must always remember that these are extremely dangerous weapons, the overall sentence must adequately reflect the appropriate balancing of the interests of society against those of the accused. It appears to me that this is a case in which it was not necessary to suspend a portion of the sentence of imprisonment.

The appeal against conviction is dismissed. The appeal against sentence is allowed and the sentence imposed by the trial court is set aside and substituted with a sentence of eighteen months' imprisonment with labour. H

GWAUNZA JA and GARWE JA concurred.

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/SATE v CHIMBARI & ORS 2007 (1) ZLR 53 (S)

SATE v CHIMBARI & ORS 2007 (1) ZLR 53 (S)

2007 (1) ZLR p53

Citation	2007 (1) ZLR 53 (S)
Case No	Judgment No. S-59-06
Court	Supreme Court, Harare
Judge	Malaba JA, Sandura JA, & Gwaunza JA
Heard	3 July 2006
Judgment	23 January 2007
Counsel	<i>T Batasara</i> , for the applicant <i>T Nyawo</i> , for the first and second respondents No appearance for the third and fourth respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

c **Appeal** — evidence — leading of fresh evidence on appeal — evidence available at time of trial but not adduced due to error of judgment on part of legal practitioner — not a good ground on which to grant leave to adduce such evidence

Headnote

An error of judgment on the part of a litigant or his legal practitioner as to the probative value of a piece of evidence is not a good ground on which an appellate court can grant leave to adduce the evidence on appeal. To do so would be tantamount to allowing a party to re-open a case as opposed to leading further evidence which was not available to the party at the time of trial but was discovered after the trial.

Cases cited ^E

Colman v Dunbar 1933 AD 141

Farmers' Co-op (Pvt) Ltd v Borden Syndicate (Pvt) Ltd 1961 R&N 28

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

Warren-Codrington v Forsyth Trust (Pvt) Ltd 2000 (2) ZLR 377 (S)

Case information

^F *T Batasara*, for the applicant

T Nyawo, for the first and second respondents

No appearance for the third and fourth respondents

Judgment

MALABA JA: This is an application for leave to adduce further evidence on ^G appeal. The appeal against the judgment of the High Court was noted on 11 January 2006.

The facts are these:

The applicant instituted action in the High Court against the respondents, claiming an order of transfer of stand No. 17742 Unit M, Seke, registered in the ^H name of the late Simon James. The ground on which the claim was based was

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Malaba JA

that the applicant entered into an agreement of sale with the deceased during ^A his lifetime, in terms of which the said property was sold to him for \$58 900, which purchase price he had paid in full.

The first respondent is the executor of the deceased's estate, whilst the second respondent once lived with the deceased in an unregistered customary law union as husband and wife. The first and second respondents opposed ^B the claim by the applicant in the High Court.

It was common cause that the deceased and the second respondent lived together in 1963 as husband and wife. They had a child together but later separated. It was also not disputed that in 1981 stand No. 17742 was allocated to Simon James. In 1994, it was transferred into his name under a lease-to-buy scheme established by the fourth respondent. It was further not in dispute that ^C Simon James entered into an agreement of sale with the applicant in terms of which he agreed to sell the stand for \$58 900. He died before transfer could be effected into the applicant's name.

At one time, the applicant successfully had the deceased's rights in the stand ceded to him with the consent of the fourth respondent. The cession was, ^D however, subsequently reversed by the High Court at the instigation of the second respondent who disputed that the deceased had real rights in the stand to cede to the applicant.

The applicant then instituted action in the High Court claiming transfer of the stand into his name, alternatively the refund of the purchase price. The issues before the High Court were agreed by the parties at a pre-trial conference as ^E being:

1. Whether or not there was a valid contract of sale between the plaintiff and the late Simon James.
2. Did the plaintiff pay the full purchase price in terms of the contract of sale?
3. In the event of the court granting the alternative claim, should the plaintiff ^F be refunded the actual purchase price paid or the current open market value of the house?

Apart from the evidence of the agreement of sale, the applicant did not adduce any other documentary evidence of ownership of the stand by the deceased. The second respondent's case was that she applied for the stand. At that time ^G women were not allowed to hold identity documents. The deceased agreed to have his identity document used to get the house for her. His particulars, as reflected on the identity document, were used to complete the application. They were entered in all other documents relating to the house. The deceased signed these documents. She said that although it appeared from the records that the deceased owned the house he never lived in it. It was her house. ^H

Malaba JA

A The learned judge who heard the case found that the second respondent and her witnesses were credible witnesses. He found that the second respondent's story was supported by an affidavit sworn to by the deceased during his lifetime, in which he acknowledged that she had a share in the ownership of the house. At one time he asked the fourth respondent to remove the second respondent's name from the records relating to the house. The learned judge B said that it was unlikely that the deceased could have acknowledged the second respondent's right in the ownership of the house when they had separated from each other a long time ago and were not living together in the house. He found that there was no valid agreement of sale on the basis of which the applicant could be granted transfer of the property. It was also the learned C judge's finding that the applicant had not paid the purchase price. The claim was dismissed with costs prompting the appeal to this court.

In the meantime, the applicant changed legal practitioners. He placed before us documents which he claims contain evidence of ownership of the property by the deceased. These documents are copies of the application for the house made in the name of the deceased. They included the notification of the D decision by the fourth respondent to allocate the deceased the stand, and the agreement of the lease-to-buy entered into between the deceased and the fourth respondent on 8 March 1994.

The applicant now applies for leave to adduce the documentary evidence on appeal to show that the deceased had the right in the stand to cede to him and that the second respondent's claim that the house belonged to her was false. E He has not denied the allegation that the fresh evidence he seeks to adduce on appeal was available at the offices of the fourth respondent and that as public documents they were easily obtainable. The applicant disclosed that at the time he personally perused a file which contained the documents at the fourth respondent's offices. His position was that the evidence was not F adduced during the trial because his erstwhile legal practitioner did not appreciate its probative value in the determination of the issues by the High Court.

The first and second respondents have opposed the application. Their main ground is that the fresh evidence the applicant wants to adduce on appeal was available and easily obtainable from the fourth respondent's offices before G and during the trial. They said that the applicant did not allege that he did not see the documents when he perused the relevant file. It was their contention that the leading of the evidence would not have an important influence on the result of the case.

In considering the application, it is important to bear in mind that this court H has a discretion in the matter. The factors it has to take into account in the

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Malaba JA

exercise of that discretion have been stated in numerous decided cases. These A are whether:

- (a) the evidence could not with reasonable diligence have been obtained in time for the trial;
- (b) the evidence is apparently credible;
- (c) the evidence would probably have an important influence on the result B of the case although it need not be decisive; and
- (d) conditions have changed since the trial so that the fresh evidence would prejudice the opposite party.

See *Farmers' Co-op (Pvt) Ltd v Borden Syndicate (Pvt) Ltd* 1961 R & N 28 (FS) at 31B-C; *Leopard Rock Hotel Co. (Pvt) Ltd & Anor v Walenn Construction C (Pvt) Ltd* 1994 (1) ZLR 255 (S) at 260G and *Warren-Codrington v Forsyth Trust (Pvt) Ltd* 2000 (2) ZLR 377 (S) at 381B.

On the first point, I agree with the first and second respondents that the evidence sought to be adduced on appeal was available and could easily have been obtained by the applicant before and during the trial. The applicant has D not argued that the evidence was difficult to get. He did not say that he did not see the documents containing the evidence at the time he perused the file relating to the house at the offices of the fourth respondent. His contention is that his erstwhile legal practitioner failed to appreciate the relevance of the evidence to the proof of the issues raised at the trial. The statement is an admission that the legal practitioner who was the applicant's chosen agent E deliberately decided not to adduce the evidence because he did not consider it of probative value.

An error of judgment on the part of a litigant or his legal practitioner as to the probative value of a piece of evidence is not a good ground on which an appellate court can grant leave to adduce the evidence on appeal. To do so would be tantamount to allowing a party to re-open a case as opposed to ^F leading further evidence which was not available to the party at the time of trial but was discovered after the trial. In *Kearns v Walters Enterprises S-160-90*, cited in *Warren-Cordrington's* case *supra* at p 381F, McNally JA said:

"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 ^G can try out the issues again on fresh facts if the first set proves to be inadequate."

In *Colman v Dunbar* 1933 AD 141 at 161, Wessels CJ said:

"It is essential that there should be finality to a trial and therefore if a suitor elects to stand by the evidence which he adduces he should not be allowed to adduce further evidence except in exceptional circumstances." ^H

2007 (1) ZLR p57

Malaba JA

^A The documentary evidence the applicant seeks to adduce on appeal does not necessarily disprove the basis of the finding by the learned judge that the second respondent had rights in the stand. The learned judge made the finding on the basis of the affidavit made by the deceased himself and on the credibility of the evidence adduced by the second respondent and her witnesses. Apart from the fact that an appellate court will not lightly interfere with a finding of ^B a trial court on the credibility of witnesses, it is clear that the second respondent gave evidence which supported the contents of the documents sought to be adduced as fresh evidence on appeal.

Without referring to the documentary evidence, the second respondent's evidence was in effect an admission of the fact that the identity particulars of ^C the deceased were recorded in the documents relating to the application for the allocation and ownership of the house. The learned judge, in accepting her story, found as a fact that the identity particulars of the deceased were on these documents because they were contained in the identity document used by the second respondent to apply for the house. It appears to me that the adduction of the documentary evidence which, on the evidence of the second ^D respondent, contained facts that were common cause would not probably have an important influence on the finding by the learned judge on the credibility of the second respondent's evidence as to why the identity particulars of the deceased were on those documents. It appears to me that the adduction of the documentary evidence would probably not have an important influence on the result of the case. Whether the decision of the court ^E *a quo* is correct or not is not for this court to determine at this stage of the proceedings.

The application is accordingly dismissed with costs.

^F SANDURA JA & GWAUNZA JA concurred.

Musunga & Associates, applicant's legal practitioners

^G *Mandizha & Company*, second respondent's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/DEVEN ENGINEERING (PVT) LTD v CHIYANGWA & ORS 2007 (1) ZLR 58 (H)

DEVEN ENGINEERING (PVT) LTD v CHIYANGWA & ORS 2007 (1) ZLR 58 (H)

2007 (1) ZLR p58

Citation 2007 (1) ZLR 58 (H)

Case No Judgment No. HH-01-07

Court	High Court, Harare
Judge	Bhunu J
Heard	12 January 2007
Judgment	24 January 2007
Counsel	<i>R M Fitches</i> for the applicant <i>G N Mlotshwa</i> , for the first respondent <i>A M Gijima</i> , for the fourth respondent
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Contract — *lien* — *right of retention of property as a workman's lien* — *bus surrendered to police in circumstances where the holder of the lien was powerless to resist* — *lien holder entitled to restoration of its lien*

Costs — *legal practitioner and client scale* — *party to civil dispute wrongfully having recourse to criminal law* — *such action reprehensible* ^D — *award of costs on the higher scale appropriate*

Legal practitioner — *conduct and ethics* — *public prosecutor* — *interfering in civil dispute* — *irregular and unbecoming conduct*

Property and real rights — *lien* — *loss of* — *voluntary hand over or surrender of disputed property* — *property being taken by police in contravention of Criminal Procedure & Evidence Act* — *not a voluntary surrender* — *lien restored*

Headnote

The applicant and the first respondent entered into a contract of service in terms of which the applicant undertook to refurbish the first respondent's bus for a fee. Upon completion of the work, there was a dispute as to the ^F exact amount payable for the work done, in consequence whereof the applicant retained the bus, thereby exercising its workman's hypothec or lien. The first respondent, however, seeking possession of its bus complained to the police who took the view that it was not its concern as the matter was purely a civil dispute between the parties. The police did, however, seek the direction of the fifth respondent, the acting public ^G prosecutor. Wrongly, she ordered the police to confiscate the vehicle, saying that it was required as an exhibit. She later ordered its return to the first respondent and the police complied therewith, thereby depriving the applicant its lien. Thereupon, the applicant brought a chamber application, seeking the return of the bus to its possible pending payment ^H

2007 (1) ZLR p59

^A of the amount due it. In opposing the application, the first respondent claimed that applicant could not rely on a lien as it had voluntarily surrendered possession of the bus to the police.

Held, that the law recognizes and protects the retention of property as a workman's lien. The public prosecutor's ignorance and failure to recognise that this was essentially a civil dispute where the applicant was ^B entitled to retain the bus under the workman's lien or hypothec was amazing if not frightening. The fact that the prosecutor was *dominus litis* in respect of criminal trials did not entitle her to negate the applicant's rights in regard to its lien. While the public prosecutor may have been entitled to prosecute, she was certainly not entitled to order the release of the disputed bus to the first respondent with the full knowledge that ^C the first respondent was not disputing that the applicant had a valid lien over the bus in question. By her conduct in this respect she was clearly usurping the functions of the civil courts if not abusing her prosecution powers.

Held, further, that the police did not lawfully dispossess the applicant of its bus in terms of s 49 of the Criminal Procedure and Evidence Act [Chapter 9:07]. They seized the bus in circumstances where they did not believe that it had been used in the commission or suspected commission of any offence. A voluntary hand over and surrender of a lien takes place when the person handing over or waiving his right to a lien enjoys a free choice either to handover or not to do so. Where force, fraud or undue means are used, the lien holder's lien will be restored. Here, the applicant did not voluntarily waive or give up his possession of the lien; he merely succumbed to irresistible superior force. He was therefore entitled to restoration of that right.

Held, further, that in regard to costs, the first respondent's behaviour in having recourse to the criminal law in what was a civil dispute was reprehensible. It was appropriate, therefore, that he should pay the applicant's costs on the scale of attorney and client.

Cases cited

Assurity (Private) Ltd v Truck Sales (Pty) Ltd 1960 (2) SA 686 (A)

Greenspan Bros (Pvt) Ltd v Commissioner of Taxes 1960 (1) SA 454 (FS)

Mafukidze v Mafukidze HH-279-84

Orbit Motors (Pty) Ltd v Reeds (Cape) Ltd 1975 (2) SA 333 (C)

Page v Public Trustee [1926] ChD 842

Legislation considered

^H Criminal Procedure and Evidence Act [Chapter 9:07], ss 49 & 51

2007 (1) ZLR p60

Bhunu J

Case information

R M Fitches for the applicant ^A

G N Mlotshwa, for the first respondent

A M Gijima, for the fourth respondent

Judgment

BHUNU J: In this application, there is no material dispute of facts. The undisputed facts are that the applicant is an engineering company, while the ^B first respondent is a bus operator carrying on business under the style of Jimmy Jimalo Luxury Tours.

Sometime in or around August 2006, the parties concluded a contract of service wherein the applicant agreed to refurbish the first respondent's bus being a DAF registration No. 492-553L for a fee.

Upon completion of the work, there was a dispute as to the exact amount ^C payable for the work done, in consequence whereof the applicant held on to the bus, thereby exercising its workman's hypothec or lien. It is accepted by all the parties concerned, with the exception of the fifth respondent, the Acting Public Prosecutor incharge of Mbare that the applicant was entitled to exercise its workman's hypothec and hold on to the bus as security until it had been ^D paid.

Aggrieved by the applicant's refusal to release the bus, the first respondent made a report at Southerton Police Station.

The police, correctly in my view, took the opinion that this was purely a civil dispute which had nothing to do with them but just to be sure, they consulted ^E the fifth respondent.

The fifth respondent in great haste determined that the applicant and its directors were guilty of attempted extortion. She then ordered the police to confiscate the bus under the pretext that she wanted the bus as an exhibit. However, she inexplicably later ordered the police to release the bus to the first ^F respondent, thereby effectively depriving the applicant of its lien.

The matter was put in its correct perspective at the hearing by Supt Nzombe, whom I must commend for being honest and candid with this court. In his own words, this is what he had to say:

"The investigating officer in his own opinion thought that the dispute was purely civil, so he took the matter to the public prosecutor at the G magistrates court. There he was instructed to charge the applicant with attempted extortion and to take possession of the bus.

The decision to take possession of the bus was that of the public prosecutor, and not the police. There were written instructions from the public prosecutor that the police should actually remove the bus from the applicant to Southerton Police Station. So the police went and removed H

2007 (1) ZLR p61

Bhunu J

A the bus. The removal of the bus was done with the consent of Deven Engineering.

The first respondent later made an affidavit claiming the bus. We contacted the public prosecutor who gave another instruction to release the bus to the first respondent. It was not our decision as the police to release the bus to the first respondent. The police acted B reasonably, that is why we are not opposing this application" (my emphasis).

I am in total agreement with Supt Nzombe, and the police must be commended for the fair and just manner in which they handled the matter but for the public prosecutor's rather unbecoming conduct.

The public prosecutor's ignorance and failure to recognise and appreciate C that this was essentially a civil dispute where the applicant was entitled to retain the bus as a workman's lien or hypothec is indeed amazing, if not frightening.

The mere fact that the prosecution is *dominus litis* in respect of criminal trials does not, in my view, give a public prosecutor the right to negate and ride D rough shod over other people's civil rights with reckless abandon and impunity.

It is trite that, in our law, the courts lean in favour of preserving existing rights rather than deprivation of such rights. Thus, once it was accepted by everyone concerned, except the public prosecutor who had no business meddling in E purely civil matters, that the applicant was entitled to a workmen's hypothec or lien, the public prosecutor ought to have proceeded with extreme caution before depriving the applicant of its existing rights.

While the public prosecutor may have been entitled to prosecute, she was certainly not entitled to order the release of the disputed bus to the first respondent with the full knowledge that the first respondent was not disputing F that the applicant had a valid lien over the bus in question. By her conduct in this respect, she was, in my view, clearly usurping the functions of the civil courts, if not abusing her prosecution powers.

Where possession of an exhibit is the subject of a civil dispute, the prosecutor or the police have no business of ordering the release of the disputed property G to one or other of the disputants. That function should be left to the courts which should make a judicious decision after hearing both parties.

In this case, the police acted properly. They were unwilling to release the bus to the first respondent. They therefore referred him to the public prosecutor. The prosecutor, however, misled them into the wilderness of illegality by H ordering the release of the bus to the first respondent.

2007 (1) ZLR p62

Bhunu J

When it dawned upon her in my chambers that her conduct was irregular, the A public prosecutor began to deny that she had ordered the police to release the bus to the first respondent. Supt Nzombe, to his credit, was able to confront her with her written instructions, whereupon she made an about turn and said that the police exercised their discretion through her instruction to release the bus to the first respondent. B

When I asked her why she ordered the release of the bus in the face of an undisputed valid lien, her response was that she was concerned that the first respondent was losing profit from the bus and that there was no prejudice to the applicant. She was, therefore, deliberately defeating the whole purpose for which a lien is meant. She was, however, unable to explain what would have happened in the event of the bus getting destroyed or the first respondent C disposing of it.

A lien is meant to compel a bad debtor into paying for work done or services rendered. Everyone knows that if you do not pay the cobbler, you do not get your repaired shoe back and that the

prosecutor has no business ordering the release of the shoe without payment. The position cannot be and is not ^D different from a bus or any other property.

The fifth respondent's conduct and decorum in the handling of this matter does not augur well with the due administration of justice in this country. It undoubtedly kills both local and foreign investor confidence. No sane investor will be interested to invest in a legal system where, if he holds onto a valid lien, he will be persecuted and have the lien wrestled away from him ^E and given to the customer by State officials without the due process of law. At the hearing, we were informed that the applicant's other customers were now lining up demanding the release of their vehicles without first paying for services rendered.

Fortunately, I am certain that this is not the law in our country. Our law ^F recognises and protects the retention of property as a workman's lien. Zimbabwean law does not penalize or punish anyone for the application of legitimate force or pressure. It is only illegitimate force or pressure which constitutes extortion. This is a matter of elementary law.

As I have already indicated elsewhere in this judgment, the first respondent acknowledges the existence of a valid lien but argues that since the applicant ^G has already lost the lien, it can now only sue for the recovery of the amount owed. It was argued that the applicant voluntarily surrendered its lien and that the police lawfully dispossessed the applicant of its bus in terms of s 49 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which provides as follows: ^H

2007 (1) ZLR p63

Bhunu J

^A "49. The State may, in accordance with this Part, seize any article –

- (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within or elsewhere; or
- (b) which is on reasonable grounds believed may afford evidence of the commission or suspected commission of an offence ^B whether within Zimbabwe or elsewhere."

It was further argued that the applicant consented to the search and seizure of the property by the police without a warrant in terms of s 51 of the Act which reads:

"1. A police officer may, without warrant, search any person or container ^C or premises for the purposes of seizing any article referred to in section forty-nine and additionally, or alternatively seize such article –

- (a) if the person concerned consents to the search for and additionally, or alternatively, the seizure of the article in question or if a person who may consent to the search of the container or premises consents to such search and additionally, or ^D alternatively, the seizure of the article in question; or ..."

It was then contended by both the first and fifth respondents that the police acted lawfully in seizing the bus. I find no merit in that argument, because the police were seizing the bus in circumstances where they did not believe that it had been used in the commission or suspected commission of any offence. The police's opinion was that this was purely a civil matter which did not ^E warrant invoking the above provisions of law the first respondent having acknowledged that the applicant had a valid lien over the bus.

The first respondent placed heavy reliance on the case of *Orbit Motors (Pty) Ltd v Reeds (Cape) Ltd* 1975 (2) SA 333 (C), whereas the applicant relied heavily on *Assurity (Private) Ltd v Truck Sales (Pty) Ltd* 1960 (2) SA 686 (A).

^F Both cases concerned motor vehicles purchased on hire purchase. The purchasers sent the motor vehicles for repair but failed to pay for the repairs and hire purchase instalments. Both sellers obtained writs of execution against the respective buyers.

When the messenger of court went to execute, the second garage asserted its ^G lien but succumbed to superior force and authority, whereas the first garage voluntarily relinquished possession without first asserting its right of lien over the vehicle.

In the second case, the court restored the lien, observing that as the garage had not voluntarily relinquished possession it was entitled to restoration of ^H the lien.

2007 (1) ZLR p64

Bhunu J

In the first case, the court held that as the garage had voluntarily lost ^A possession of the lien it had irrevocably waived its right.

The crux of the matter is therefore whether or not the applicant voluntarily lost possession of its lien over the bus in question.

Both cases make the same point, to the effect that a voluntary hand over takes place when the person handing over or waiving his right to a lien enjoys a free ^B choice either to hand over or not to do so. See *Page v Public Trustee* [1926] ChD 842 at p 852.

They both held that where force, fraud or undue means are used, the lien holder's lien will be restored.

In this case, the applicant stated without any contradiction in paras 14 to 16 ^C of his founding affidavit that he asserted his right to a lien over the bus but was threatened with arrest and detention by Sgt Mbusa of Southerton Police Station. It is therefore an established fact that the applicant did not voluntarily waive or give up his possession of the lien. He is, therefore, entitled to restoration of that right because he merely succumbed to irresistible superior force. There was nothing he could do. He had to give up possession or risk ^D police detention. He was powerless. One cannot be expected to wage a successful battle against the police.

In the circumstances, the applicant did the only sensible thing: to give up possession and come to court to seek lawful restoration of its lien.

As regards costs, nothing much need be said, as I have already voiced my ^E concern at the unbecoming conduct of the public prosecutor at the behest of the first respondent. It is clear that the first respondent was using the public prosecutor's office as a vehicle for unlawfully wresting the bus from the applicant. Whatever the public prosecutor did, she did it for the benefit of the first respondent. She was not acting as a neutral official of the State.

The general rule is that costs follow the event. See *Mafukidze v Mafukidze* ^F HH-279-84 and *Greenspan Brothers (Pvt) Ltd v Commissioner of Taxes* 1960 (1) SA 454 (FS). There being no special circumstances nor reason to depart from the general rule, I intend to apply the general rule. Having regard to the first respondent's reprehensible conduct in her recourse to the criminal law to solve what is purely a civil dispute, the court can only voice its displeasure ^G by an award of punitive costs on the higher scale. This must necessarily serve as a warning against the abuse of the criminal justice system and state machinery to settle personal scores. For that reason, I have also directed the Registrar to serve copies of this judgment on the Attorney-General and the Police Commissioner. I trust that both officials will take appropriate action to ^H

2007 (1) ZLR p65

Bhunu J

^A restore public confidence in the preservation and enjoyment of the right to hold a lawful lien without State interference in our legal system. Care must be taken to ensure that those who wield State power do not unnecessarily tarnish the country's good reputation.

A provisional order is accordingly granted in the following terms:

^B FINAL RELIEF SOUGHT

1. That the applicant should keep the bus being a DAF 825 with registration No. 492-553L at its premises until satisfaction of its account.
2. That the respondents should pay the costs of this application jointly and severally, the one paying, the other to be absolved.

^C INTERIM RELIEF GRANTED

1. The second respondent be and is hereby ordered to return the DAF 825 bus with registration No. 492-553L to the applicant's premises before the expiry of 24 hours after the service of this order.
2. The first respondent be and is hereby ordered to pay the cost of removing ^D the bus from Southerton Police Station or from wherever it may be found to the applicant's premises and to return the keys to the bus to the applicant before the expiry of 24 hours after service of this order.

3. The first respondent is ordered to pay applicant's costs on the legal practitioner and client scale. [£]
4. The Registrar is directed to serve copies of this order on the Attorney-General and Police Commissioner respectively to ensure compliance with this order.

SERVICE OF PROVISIONAL ORDER

The applicant's legal practitioners be and are hereby given leave to serve this ^F order upon the respondents' ^G legal practitioners.

Honey & Blankenberg, the applicant's legal practitioners

Antonio & Associates, the first respondent's legal practitioners

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

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Source:

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S v NJOBVU 2007 (1) ZLR 66 (S)

2007 (1) ZLR p66

Citation	2007 (1) ZLR 66 (S)
Case No	Judgment No. S-61-06
Court	Supreme Court, Harare
Judge	Ziyambi JA, Gwaunza JA & Garwe JA
Heard	28 November 2006
Judgment	25 January 2007
Counsel	<i>D T Mwonzora</i> , for the applicant <i>V Shava</i> , for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of c Rights — s 24 — referral of matter to Supreme Court — need for court a quo to hold enquiry — need to give written notice to prosecution*

Headnote

Counsel for the applicant applied to the magistrate trying the applicant on ^D a criminal charge for the matter to be referred to the Supreme Court in terms of s 24 of the Constitution on the grounds that the applicant's right to trial within a reasonable time had been infringed. The magistrate

granted the application without hearing any evidence or argument, holding that the court had no discretion other than to refer the case to the Supreme Court. ^E

Held, that the matter was not properly before the Supreme Court. Before permitting the applicant to raise the question of not having been brought to trial within a reasonable time, the lower court should be satisfied that ample *written* notice has been given to the State, with a copy filed of record, of the intention to advance the complaint. The prosecution is entitled to be afforded the time and opportunity to investigate the cause ^F of the delay and to be ready to adduce evidence as to the reasons therefor, if it is considered necessary to do so.

Held, further, that counsel was obliged to call the applicant to give evidence, as it is on the basis of the evidence led in the course of the application in the court *a quo* that the Supreme Court will conduct an inquiry into the ^G constitutionality or otherwise of the delay.

Held, further, that the magistrate is obliged to hear evidence and then refer the question to the Supreme Court for determination if he is of the opinion that the application is not frivolous or vexatious. He can only arrive at this conclusion if he has heard the evidence. ^H

2007 (1) ZLR p67

Ziyambi JA

Cases cited ^A

In re *Mlambo* 1991 (2) ZLR 339 (S)

S v Banga 1995 (2) ZLR 297 (S)

S v Nhando & Ors 2001 (2) ZLR 84 (S)

S v Nkomo S-52-06 (not reported)

Case information

^B *D T Mwonzora*, for the applicant

V Shava, for the respondent

Judgment

ZIYAMBI JA: The matter comes to us from the regional court Harare purportedly in terms of s 24(2) of the Constitution of Zimbabwe which ^C provides as follows:

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

^D It was alleged on behalf of the applicant that his right to a fair hearing within a reasonable time guaranteed by s 18(2) of the Constitution had been violated by the State and, on this basis, a permanent stay of proceedings against the applicant was sought.

The background to this application is as follows:

^E On 17 October 2005, the applicant appeared before the regional court sitting at Harare charged with one count of robbery. The allegations were that on 3 February 2001, in the company of two other men, the applicant had robbed the complainant, at gunpoint, of a Mitsubishi Pajero motor vehicle. The applicant had been arrested on 9 February 2001 whilst driving the stolen vehicle.

^F The applicant, who was at this stage unrepresented, pleaded not guilty and the complainant as well as his mother who was the owner of the vehicle gave evidence. The applicant declined to cross-examine them on the basis that both witnesses stated that they did not know him.

The hearing was adjourned to 24 April 2006. On that date, the applicant, now represented, appeared before the regional magistrate. The legal practitioner ^G expressed her wish to make an application in terms of s 24 of the Constitution for a permanent stay of proceedings on the grounds that the applicant's right to a fair trial within a reasonable time had been infringed by the "duration of the proceedings from the time that they commenced ..." She said the applicant had been placed on remand on 26 February 2001 at Victoria Falls magistrates ^H court. At this stage, the legal practitioner was interrupted by the magistrate

Ziyambi JA

and the following dialogue ensued: A

"Court: Just a moment. This application is made here, but I thought s 24 is for you to make application to another court, not this one?

Legal Practitioner: Indeed, your worship, I do intend to make the application but I want to bring it before the court and request that the Honourable Court refer it to the Supreme Court. But I want you B to understand your Worship that I must bring before the court the reasons why, the basis of the application so that the honourable court can consider it and refer it to the Supreme Court.

Court: Well *prima facie* if there is such an application, the court's hands are tied and the court *a quo* has no right to prevent anybody C going to the Supreme Court. So the application to this court in terms of s 24 will be brought to ..., it is for no purpose for this court to hear it because there is no need to make an application to a court which has no powers to grant or refuse.

Legal Practitioner: Very well your worship, I am guided by the court. D Indeed, your worship, I would also prefer that possibility because I was just trying to prevent the possibility where the court might find that the application is frivolous and vexatious and not refer it, but this is what I was trying to say. But I am indebted if the honourable court does not have that view.

Court: It is a right and not a decision for a court. To apply to the Supreme E Court is a right and it is not for any court to make a decision on.

Legal Practitioner: I am indebted your worship."

The record ends with a bail application in respect of the applicant.

At the hearing before us, Mr *Mwonzora* conceded that this application is not F properly before us by reason of the failure of both the applicant's legal practitioner and the regional magistrate to comply with the law governing applications of this nature. However, he placed most of the blame on the regional magistrate, who, he submitted, prevented the legal practitioner from making the application and placing evidence before the magistrate in support thereof. He submitted that the matter should be remitted back to the regional G magistrate in order that the application may properly be made and considered.

Mr *Shava*, who appeared for the State, opposed an order for remittal on the grounds that the legal practitioner ought to have insisted on making the application and placing sufficient evidence before the court to establish her allegation that there had been a violation of the applicant's rights as enshrined H

Ziyambi JA

A in s 18(2) of the Constitution. Secondly, a remittal, he submitted, would further delay the completion of the applicant's trial which had been interrupted by this application.

There is no doubt that the matter is not properly before us. In the first place, no notice was given to the prosecutor of the applicant's intention to make the application. The prosecution was not therefore afforded the time to which it B is entitled, to investigate the cause of the delay.

See *S v Banga* 1995 (2) ZLR 297 (S) at p 302, where Gubbay CJ remarked:

"It seems to me, also, that before permitting an accused to raise the question of not having been brought to trial within a reasonable time, the lower court should be satisfied that ample *written* notice has been given to the C State, with a copy filed of record, of the intention to advance the complaint. The prosecution is entitled to be afforded the time and opportunity to investigate the cause of the delay and to be ready to adduce evidence as to the reasons therefor, if it is considered necessary to do so" (my emphasis).

See also *S v Nkomo* S-52-06 (not reported).

D Secondly, the legal practitioner was obliged to call the applicant to give evidence. She ought to have stood her ground and directed the magistrate's attention to the law governing the application she was making. She appeared not to be sure of the law in this regard. It is on the basis of the evidence led in the course of the application in the court *a quo* that this court will conduct E an inquiry into the constitutionality or otherwise of the delay. See *S v Banga supra* at p 300.

In *S v Nkomo supra*, the following was said at p 5 of the cyclostyled judgment:

"Generally speaking, in applications of this nature, the length of the delay is the 'triggering mechanism'. If the delay is presumptively prejudicial then the court, going by the evidence on the record before it, will conduct an inquiry into the constitutionality of the delay, taking into account the factors which were set out in *In re Mlambo* 1991 (2) ZLR 339 (S). They are –

1. The explanation and responsibility for the delay;
2. The assertion of his rights by the accused person;
3. Prejudice arising from the delay; and
4. The conduct of the prosecutor and of the accused person in regard to the delay.

See also *S v Nhando & Ors* 2001 (2) ZLR 84 (S)."

Thirdly, the magistrate was wrong in refusing to entertain the application. He is obliged to hear evidence and then refer the question to this court for determination if he is of the opinion that the application is not frivolous or

2007 (1) ZLR p70

Ziyambi JA

vexatious. He can only arrive at this conclusion if he has heard the evidence. ^A

Further, in order to determine the merits of the application, the court would need to carry out an inquiry taking into account the factors outlined above. See *In re Mlambo* 1991 (2) ZLR 339 (S). This it is unable to do because of lack of evidence. The absence of evidence is therefore fatal to the application. See *S v Nkomo supra* and *S v Banga supra*. ^B

Accordingly, it is my view that the proceedings before the magistrate in respect of this application, having been conducted contrary to the law and rules of procedure, were a nullity.

The application is therefore struck off the roll with no order as to costs. ^C

GWAUNZA JA & GARWE JA concurred.

Jessie Majome & Co, applicant's legal practitioners ^D

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/S v CHIBAYA & ORS 2007 (1) ZLR 71 (H)

S v CHIBAYA & ORS 2007 (1) ZLR 71 (H)

2007 (1) ZLR p71

Citation	2007 (1) ZLR 71 (H)
Case No	Judgment No. HH-4-07
Court	High Court, Harare
Judge	Gowora J
Heard	20 November 2006; 21 November 2006; 23 November 2006
Judgment	1 February 2007
Counsel	<i>L Chikafu</i> , for the State <i>D S Mehta</i> , for the first accused <i>C Warara</i> , for the second accused <i>P Takaidza</i> , for third and fourth accused <i>S Machiridza</i> , for fifth accused

Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 18(2) — right to fair hearing — whether accused person has a right of access to investigation diary in police docket*

Evidence — *criminal matter — police investigation diary — whether accused entitled to receive copies of entries in diary*

Headnote

- Ⓐ In the course of a criminal trial, counsel for the accused applied for an order requiring the prosecution to furnish the defence with the transcript of a previous trial involving another person, as well as copies of statements made by witnesses to the police and certain entries in the investigation diary forming part of the police docket.
- Ⓔ *Held*, that the record of the other trial, whether or not it was relevant to the present proceedings, was in the public domain and the accused were entitled to obtain a copy of it. However, it was not under the control of the prosecution, so the prosecution could not be ordered to provide it.
- Held*, further, that the entitlement of the accused to witness statements Ⓕ contained in the police docket is part of our law. He is entitled to be furnished by the State with all information that would enable him to adequately prepare for the trial and mount a defence to the charges confronting him. However, entries in the investigation diary are not evidence that will be produced at the trial. The investigation diary is a running commentary on the efforts by the police to investigate the Ⓖ matter, but unless the court finds that it would be fair for the accused to be given access to the diary, on the grounds that it could provide assistance to the accused in the prosecution of his defence, the accused Ⓗ would not be entitled to access to it.

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Gowora J

Cases cited ^A

S v Sithole 1996 (2) ZLR 575 (H)

R v Steyn 1953 SR 75

R v Steyn 1954 (1) SA 324 (A)

R v Tapera 1964 RLR 197 (A); 1964 (3) SA 771 (RA) ^B

Case information

L Chikafu, for the State

D S Mehta, for the first accused

C Warara, for the second accused

P Takaidza, for third and fourth accused

S Machiridza, for fifth accused ^C

Judgment

GOWORA J: The accused are all facing one count of attempting to defeat or obstruct the course of justice. None of the accused tendered a plea. Instead, an application was launched on behalf of all of them by Mr *Mehta*, with the concurrence of all counsel. In the application the accused seek that the State furnishes them with certain documents which are in its possession. Ⓐ

The background to this matter is as follows. The accused were initially charged, together with the Minister of Justice, Legal and Parliamentary Affairs, on the same charges that they currently face. An application to have the Minister's trial dealt with separately succeeded before the magistrate in Rusape. Thereafter, the accused were arraigned before her worship, Mrs Mukunyadzi in Rusape. The accused then brought proceedings before this court to have those proceedings stayed. On 21 September 2006, this court granted an order setting aside those proceedings and ordering the trial to be set down in the High Court. As a consequence, the accused were then indicted for trial in the High Court on the same charge. The allegations against the accused are based on events which allegedly occurred on 16 January 2006, ^F when they were supposed to have been charged with an offence related to public violence. After the complainants in that matter withdrew the charges, suspicion fell on the accused, leading to their eventual arrest and prosecution.

The accused had sought, as one of the further particulars, the transcript of the trial before Mrs Mukunyadzi. After an initial opposition, the State has conceded that it cannot legally refuse to make the transcript available and has, ^G as a result, released the entire record of those proceedings to the defence. What remains is the transcript of the trial of Mr Chinamasa, the Minister of Justice, Legal and Parliamentary Affairs. The State contends that the transcript of the trial of Chinamasa cannot be furnished to the accused as the proceedings themselves are not relevant to this trial. The charges against Chinamasa are based on events which are alleged to have occurred on 18 December 2005. As ^H

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Gowora J

^A indicated by me earlier, the charges *in casu* are alleged to have occurred on 16 January 2006.

I notice that neither counsel for the defence nor for the State picked up the fact that the trial of Chinamasa was in the public domain. The record of proceedings is thus a public document. See Hoffmann and Zeffertt *South African Law of Evidence* 3 ed at p 486. It may well be that the record is not relevant to the ^B proceedings in which the accused are being charged for an offence, but I cannot find any legal justification for denying the accused access to something which is legally in the public domain. It is obvious that the record in its present form would not be of assistance to the accused, hence the request that they be afforded a transcript of the same.

^C There was, in my view, a concession on the part of Mr *Takaidza* that the transcript is not within the ability of the prosecution to provide, but that the prosecution can assist. The court records are under the control of the clerk of court, and there is no indication that an approach to that office had been made. It seems to me that I cannot order the Attorney-General to provide what he cannot. I therefore venture to suggest that the transcript be furnished to ^D the accused on payment by them of the costs of production of such transcript. I cannot, however, make an order for the provision of the record by the Attorney-General.

The only inquiry now before me relates to the request by the accused for the provision of statements made by witnesses on 16 January 2006 or immediately ^E thereafter but before 15 March 2005 and including any police entries in a diary log from that day up to 15 March 2006.

An accused person facing a criminal charge is entitled to a fair trial by an independent and impartial court established by law. This right is enshrined in our Constitution. It is also trite that a prosecutor, tasked with the prosecution of a criminal offence, owes a duty to the court to conduct the trial in a manner ^F which embraces the concept of providing a fair trial to the accused person. This duty includes the duty to disclose to the court any facts or documents that are in favour of the accused person. In situations where a witness has made statements which are contradictory or are inconsistent with the evidence presented to court, it is incumbent upon the representative of the State to make ^G known these inconsistencies or furnish the defence with the statements concerned. See *R v Tapera* 1964 RLR 197 (A). Our courts have now gone further in the duty to disclose. In *S v Sithole* 1996 (2) ZLR 575 (H) at 593, Devittie J held that, unless the State was able to justify non-disclosure of witnesses' statements on grounds of public interest or some other legitimate basis, the accused ought to be provided with copies of the statements he has ^H requested. Thus the accused's entitlement to information contained in the

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Gowora J

docket has been expanded, subject to certain limitations. The duty to disclose ^A ought not to depend upon a request by the accused but must be premised by considerations of affording an accused person a fair trial, unless non-disclosure is justified or can be justified.

The entitlement of the accused to witnesses' statements contained in the police docket is thus part of our law. He is entitled to be furnished by the State ^B with all information that would enable him to prepare ^C adequately for the trial and mount a defence to the charges confronting him. Considerations of fairness should, I believe, make it imperative that such statements be provided subject, however, to the qualifications referred to by Devittie J in *S v Sithole, supra*.

In the application before me, the accused seek entitlement to statements in ^C addition to what they have already been afforded. There is no dispute that the statements sought by the accused exist, the only dispute being whether or not the accused are entitled to be furnished with copies of them. According to State counsel, the information requested does not pertain to this matter. His submission is to the effect that, when James Kaunye produced an affidavit on ^D 16 January 2006 withdrawing the charges in which he was a complainant, the Director of Public Prosecutions requested him to write a statement narrating what had led to the withdrawal of the charges. This statement was later reduced to an affidavit which was duly sworn on 15 March 2006. Other witnesses were also requested to make statements as part of an inquiry because of the alleged role of the Chinamasa in the matter. Although initially ^E the State had indicated that the statements were irrelevant in so far as the trial of the accused was concerned, the statements, all dated 15 March 2006, were handed over to the accused prior to their trial in the High Court.

It then remains for me to deal with the issue relating to the police diary log for the period 16 January 2006 to 15 March 2006. The *locus classicus* in our ^F jurisdiction on the provision of documents to an accused person facing a criminal charge is that of *S v Sithole supra*. The learned judge therein only considered an application for the provision of witnesses' statements. The question of an accused's entitlement to other information contained in the document did not arise for consideration. Prior to the case of *S v Sithole, supra*, the common law position in our law was that an accused was not entitled, as ^G of right, to demand access to information in the police docket, the rationale being that the contents of the docket were privileged. The position is stated thus by Tredgold CJ in *R v Steyn* 1953 SR 75 at 79:

"...the defence cannot as of right demand to see the statements of the crown witnesses. Disclosure must be left to the discretion of the Attorney-General or his Deputy. The prosecutor stands in a special relation to the ^H

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Gowora J

a court, and where there is a serious discrepancy between the proof (statement) of a Crown witness and what he says on oath at the trial, the court has the right to expect that the prosecutor will, of his own motion, direct attention to the fact, and unless there are special and cogent reasons to the contrary, make a statement available for cross examination... But, on the other hand, a prosecutor is amply justified in refusing ^B disclosure of such a statement where there is no foundation for the suggestion that the witness has materially altered his story. There is no obligation on him, without adequate reason, to open the door to the captions and hairsplitting form of cross-examination, which all too often, is based upon previous statements made by a witness."

An appeal was launched against the judgment of Tredgold CJ, which appeal ^C was dismissed in *R v Steyn* 1954 (1) SA 324 (A). In a judgment rendered by Greenberg JA, the court found that statements that had been obtained from witnesses for the purpose of litigation or which contain details of what the witnesses would say in a trial, were protected against disclosure until the conclusion of the trial. The court found that the privilege attendant upon such statements extended to both civil and criminal trials, as the court found no ^D basis to differentiate between civil and criminal trials. Accordingly, it became established law that the contents of a police docket enjoyed privilege and that an accused could not, as of right, demand access to any witnesses' statements contained in the docket in the prosecution of his defence.

In *S v Sithole supra*, the applicant premised his application on the provisions ^E of s 18(2) of the Constitution. It was argued in that case that the rule in *Steyn's* case *supra* was inconsistent with the provisions of the Constitution. After a consideration of the various Constitutions that have existed in this jurisdiction prior to and post independence, and authorities within this jurisdiction and South Africa, the court considered that it was necessary to keep abreast with developments in other jurisdictions which had adopted a less rigid approach ^F to the provision of information to an accused

person, facing a criminal trial. The learned judge concluded that we ought to adopt a position that entitles an accused person who is indicted for trial, to receive copies of witnesses' statements, subject to certain limitations. Ultimately, however, the overriding principle is whether justice demands that there should be disclosure of witnesses' statements to an accused.

¶ The question of the diary logs made by the police is a different matter. The applicants have not invoked any legal premise upon which an accused facing trial is entitled, as of right, to access to these documents. The diary logs are not evidence that would be produced at the trial. It would appear that the application was launched at the eleventh hour, without any effort on the part of the legal practitioners to research on whether or not their clients were

2007 (1) ZLR p76

Gowora J

entitled to the documents that were the basis of the application. The submissions that were made before me did not indicate why an accused person would be entitled to have access to the police diary log. Given that this is a running commentary on the efforts by the police to investigate the matter, what possible assistance can it provide to an accused person in the prosecution of his defence? It may well be that a court may find that it would be fair for an accused to be given access to the diary log, but such a case has not been made out before me, nor has proper argument been placed before me for me to consider it. My attention has not been drawn to any pertinent authority within our jurisdiction, nor was any reference made in the application to any statutory provision that would be a ground for such application. The accused have not indicated the legal principle upon which the application is premised nor has a proper foundation been laid for this court to inquire into whether or not an accused person is, as of right, entitled to have access to the police diary log for purposes of preparation of, or mounting, a proper defence to the charges facing him.

I must mention that the application launched on behalf of the accused was not properly presented. No case authority was presented to court on the day of the application, authority being presented only when I inquired on the status of the proceedings that were set aside by the High Court. It is the duty of legal practitioners to present arguments which are aimed at assisting the court. An application, such as this, which is devoid of any supporting authorities is still-born, as the court cannot go on a fishing expedition to find authorities in support of the application. In conclusion, none of the accused has established that he is entitled to be furnished with the police diary log.

The application is dismissed.

Muzenda & Partners, legal practitioners for the first accused

Warara & Associates, legal practitioners for the second accused

Takaidza & Company, legal practitioners for the third and fourth accused

Muzangaza, Mandaza & Tomana, legal practitioners for the fifth accused

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/MANDAZA v MZILIKAZI INVESTMENTS (PVT) LTD 2007 (1) ZLR 77 (H)

MANDAZA v MZILIKAZI INVESTMENTS (PVT) LTD 2007 (1) ZLR 77 (H)

2007 (1) ZLR p77

Citation 2007 (1) ZLR 77 (H)

Case No Judgment No. HB-23-07

Court High Court, Bulawayo

Judge	Ndou J
Heard	22 June 2006
Judgment	28 February 2007
Counsel	<i>J Sibanda</i> , for the applicant <i>B Ndove</i> , for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

c Practice and procedure — founding affidavit — who may depose to — legal practitioner — save in exceptional circumstances legal practitioners should not depose to founding affidavits on behalf of their clients

Practice and procedure — process — process must be filed with the Registrar before service on the opposite party — service on opposite party before filing with Registrar not proper service

Headnote

All High Court process must be filed with the Registrar of the High Court. Only thereafter should a copy of such process be served on the other party in the manner set out in the various rules. Service of process on the opposite party before filing process with the Registrar is not properly issued process.

Generally, a legal practitioner should not depose to a founding affidavit on behalf of a client. However he may do so if the facts of the case are within his personal knowledge. Even in such exceptional cases, the practice should be exercised sparingly.

Legislation considered ^F

High Court Rules 1971 (RGN 1047 of 1971), rr 35(1), 165(1) and 242(1)

Case information

J Sibanda, for the applicant

B Ndove, for the respondent

Judgment

^G **NDOU J:** The applicant is the defendant in the main action between the parties. *In casu*, the applicant seeks an order in the following terms:

“It is hereby ordered –

- (a) That case No. 921/06 (X-Ref 483/03) be and is hereby removed from the ^H roll of 22 June 2006.

2007 (1) ZLR p78

Ndou J

- (b) That the applicant be and is hereby ordered to file his application for a rescission of judgment in case No. 921/06 within seven days of this order.
- (c) That if applicant fails to file the said application within seven days, the respondent be and is hereby granted leave to set the matter down for hearing on the uncontested roll.
- (d) The respondent be ordered to pay the costs of this application.” ^B

The applicant’s legal practitioner of record filed a founding affidavit in support of the application. Paragraph 3 of the founding affidavit captures the basis of the application in the following terms:

- "3. On Tuesday 20 June 2006, upon looking at the court roll for the motion court on 22 June 2006, I noticed that enrolled as matter number 5 was c the present matter. The matter was enrolled under 'Default Judgments'. On 21 June 2006, I quickly proceeded to the High Court to find out how the matter was enrolled under Default Judgments when the matter is opposed. There I learnt that on 27 April 2006 the respondent had lodged under case No. 921/06 an application to compel the applicant to file his discovery affidavit. I was totally surprised d because I had never been served as the applicant's legal practitioner with the application compelling the applicant to file his discovery affidavit ... I indeed confirmed from the High Court file that no such service of the application was effected on us."

It is common cause that the application in HC 921/06 was not served on the applicant. One would have expected the parties to have settled this issue e without resorting to these proceedings. But, having obtained a judgment, the respondent was not prepared to compromise. It appears to me that my brother granted the default on the basis of the notice to discover, served on the applicant's legal practitioners of record at 4.00 p.m. on 14 March 2006. Mr Ndove, for the respondent, indeed placed a lot of emphasis on the service of this document. I think this is a case where the respondent should have made f a concession rather than cling to the default judgment and I will show why. The notice to discover relied upon is process as defined by Order 5 r 35(1) of High Court Rules, 1971 in the following terms:

"(1) In this order –

'process' means any document which is required to be served on any g person in terms of these rules."

All process must be filed with the Registrar and *thereafter* a copy served on the other party in the manner set out in the various rules. See *The Civil Practice Handbook* by Mary Welsh at 8/4. This sequence was not followed by the respondent in respect of this notice to discover. What the respondent did, was to serve the notice to discover first, i.e. on 14 March 2006 and thereafter file h

2007 (1) ZLR p79

Ndou J

A it with the Registrar i.e. on 15 March 2006. So, at the time of the service, the notice to discover was not properly issued process. With such a glaring flaw in the issuing of the notice to discover, it was unwise for the respondent to oppose this interlocutory application.

Further, the respondent argues that Order 24 r 165(1), in terms of which he applied and obtained the order, does not state that the chamber application b should be served on the other party. This is correct, but this rule should not be read in isolation. Order 32 deals with all chamber applications. In terms of r 242(1), all chamber applications must be served on all interested parties except in default applications as stated in the sub-rule. The facts of this matter do not constitute such an exception. Even if they did, the founding affidavit c would still have to set out these exceptions in terms of subrule (2)(a) which was not done in the founding affidavit in HC 921/06.

There are reasonable prospects of success on the application for rescission and a case has been made for the relief sought. Before I conclude, I would like to deal with the point *in limine* raised by Mr Ndove on the applicant's legal practitioner deposing to the founding affidavit under a power of attorney. d Generally, I agree with Mr Ndove that a legal practitioner should not depose to a founding affidavit on behalf of a client. This court has previously stated why it is undesirable for legal practitioners to do so. But there is an exception to this general rule if the facts are within the knowledge of a legal practitioner (i.e he may swear an affidavit on behalf of the client). See *Samkange & Anor e v The Master & Anor* HH-63-93. Even in such exceptional cases, the practice should be, in my view, be sparingly resorted to. The facts of this application are within the knowledge of the applicant's legal practitioner. He is, in fact, in better position to highlight the applicant's case as the application is about procedural matters. In the circumstances, the legal practitioner was justified in deposing to the affidavit.

f Accordingly, I grant the application in terms of the abovementioned draft.

Mazangaza & Tomana c/o Job Sibanda & Associates, applicant's legal practitioners

g Marondedze, Nyathi, Majome & Partners, respondent's legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/PLAZA HOTEL (PVT) LTD v MARIMBITA & ANOR 2007 (1) ZLR 80 (H)

PLAZA HOTEL (PVT) LTD v MARIMBITA & ANOR 2007 (1) ZLR 80 (H)**2007 (1) ZLR p80**

Citation	2007 (1) ZLR 80 (H)
Case No	Judgment No. HB-27-07
Court	High Court, Bulawayo
Judge	Bere J
Heard	16 June 2006:23 June 2006:14 February 2007:15 February 2007
Judgment	15 February 2007
Counsel	<i>J Sibanda</i> , for the applicant <i>M Munjanja</i> , for the respondents
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Employment – *Labour Court – exclusive jurisdiction to deal with labour c matters – arbitration award – registration of with High Court – High Court not thereby given power to review award*

Headnote

Arbitration awards made under the Labour Act [*Chapter 28:01*] need to be registered with the High Court in order to be executed. However, this does not mean that where there is a dispute about the validity of such an award the High Court has jurisdiction to deal with the matter. In terms of s 89 of the Act, the Labour Court is given exclusive power to deal with labour matters. This includes exercising the same powers of review as would be exercised by the High Court. E

Case cited

Tuso v City of Harare 2004 (1) ZLR 1 (H)

Legislation considered

High Court Rules 1971 Order 40 r 322

Labour Act [*Chapter 28:01*] s 89(1) & (2) F

Labour Relations Amendment Act, 2002 (No. 17 of 2002) s 89(6)

Case information

J Sibanda, for the applicant

M Munjanja, for the respondents

Judgment

BERE J: Following a labour dispute between the applicant and the first respondent, the second respondent made an arbitration award in favour of the first respondent. The arbitrary award was made in terms of the Labour Act [Chapter 28:01].

Subsequently, the arbitration award was registered in this court to enable the first respondent to execute the order. ^H

2007 (1) ZLR p81

Bere J

^A Before the first respondent had executed the order, the applicant lodged an application in this court seeking the following remedy:

- "1. That the purported arbitration award dated 24 November 2004 allegedly made by the second respondent in a matter between the applicant and the first respondent in terms of which the first respondent is entitled to receive the sum of \$213 082 329 from the applicant be and is hereby ^B declared to be null and void.
2. The first respondent pays the costs of this application."

The first respondent opposed the application made by the applicant and, in doing so, he *inter alia* raised a point *in limine* challenging the jurisdiction of this court in hearing the matter. The first respondent's position was brief and ^C stated in the following words:

"Point in Limine"

I have been advised that procedurally the applicant should not have approached this Honourable Court. He instead should have launched his application in the Labour Court, seeing as the dispute is labour related and he has not exhausted all the avenues open to him under the Labour Act."

^D I directed both counsel to restrict their arguments to the point raised *in limine*, first as I felt it was possible for the matter to be disposed of by addressing that point only. Both counsel made fairly elaborate and instructive submissions on the legal position as perceived. I am grateful to them. I shall now restrict my determination to the point raised *in limine*.

^E In its application to this court, the applicant had sought to challenge the basis upon which the arbitration award was made by the second respondent. In essence, what the applicant sought to do was to re-visit the manner in which the second respondent had arrived at the arbitration award.

Does the High Court have jurisdiction to entertain a labour related matter covered under the Labour Act [Chapter 28:01]?

^F It was argued by Mr *Munjanja* for the first respondent that clearly the High Court has no jurisdiction to hear a labour related matter falling within the purview of the Labour Act. This was so, so it was argued, in the light of the amendment to the Labour Act by the Labour Relations Amendment Act 2002 (No. 17 of 2002).

^G In building his argument, Mr *Munjanja* was leaning on the views of ^Bhunu J in *Tuso v City of Harare* 2004 (1) ZLR 1 (H), which dwelt at length on, among other issues, the implications of ^S 89(6) of the Labour Relations Amendment ^H Act.

2007 (1) ZLR p82

Bere J

It was forcefully argued by Mr *Sibanda* for the applicant, that because the ^A Labour Court does not have its own execution machinery, its orders have to be registered in the High Court and are governed by Order 40 ^r 322 of the High Court Rules, 1971.

The relevant order reads as follows:

"The process for the execution of any judgment ... shall be by writ of ^B execution signed by the registrar ..."

In counsel's view, "once registered with the High Court, a labour order transmogrifies into a High Court process, subject to the powers and control of the High Court. To hold otherwise would make it impossible for the court to control its own process".

The import of counsel's argument was that this court cannot register orders ^C and then lose its jurisdiction when the validity of such orders are put into question.

It was counsel's further view that it was quite in order that any challenge to such orders be heard in this court, so that, in a proper case, the High Court would have the power to nullify its own writ although it would have emanated ^d from the Labour Court.

There is no doubt in my mind that the position taken by the applicant's counsel is persuasive.

I have had the privilege of following the arguments by my brother Bhunu J in an extensively researched and well reasoned judgment which dealt with a ^e number of labour related issues in *Tuso's case supra*:

Perhaps the view adopted by the applicant's counsel in this matter would have been sustainable if s 89 of the Labour Act which deals with the functions, powers and jurisdiction of the Labour Court had not been amended.

As correctly observed by Bhunu J in the *Tuso* case: ^f

"The Labour Court is a special court established in terms of s 92 of the Constitution."

Its functions, powers and jurisdiction are spelt out under s 89 of the Labour Act as modified by the Labour Amendment Act 17 of 2002 and 7 of 2005.

For clarity's sake, s 89(1) of the Labour Act is now couched as follows: ^g

"89 Functions, powers and jurisdiction of Labour Court

- (1) The Labour Court shall exercise the following functions –
 - (a) hearing and determining application and appeal in terms of this Act or any other enactment;
 - (b) hearing and determining matters referred to it by the Minister in terms of this Act; ^h

2007 (1) ZLR p83

Bere J ^A

- (c) referring a dispute to a labour officer designated agent or a person appointed by the Labour Court to conciliate the dispute if the Labour Court considers it expedient to do so;
- (d) appointing an arbitrator from the panel of arbitrators referred to in subsection (6) of section *ninety-eight* to hear and determine an application; ^B
- (d1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters; and
- (e) doing such other things as may be assigned to it in terms of this Act or any other enactment."

It will be noted that s 89 of the Labour Act, as currently framed, is fairly ^c elaborate and exhaustive in dealing with the functions, powers and jurisdiction of the Labour Court. In my view, those powers require no interpretation. They are clear and wide. Section 89(2) focuses on how the Labour Court is supposed to deal with the issues presented to it.

Again, to crown it all and, as observed by Bhunu J:

"Having conferred what are admittedly very wide powers on the Labour ^D Court the Lawmaker proceeded to restrict or exclude the jurisdiction of other courts in related matters under s 89(6) of the Amendment Act which provides that:

'No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1)'."

^EIn my view, the legislature could not have been more explicit in its quest to grant exclusive powers to the Labour Court in dealing with cases falling under its purview. To argue otherwise would be an abortive attempt to violate the clear intentions of the lawmaker.

Whilst accepting that the Labour Court in its present set up does not have its ^F own execution machinery, and that its orders falling within the jurisdiction of this court have to be registered for execution in this same court, I am nevertheless far from being convinced that the mere registration of such an order *per se* is tantamount to depriving the Labour Court of those powers that have been conferred on it by the Labour Act.

^G The matter brought before this court is clearly a labour dispute falling within the purview of the Labour Act and must be dealt with in the Labour Court.

It was precisely for these reasons that, on 23 June 2006, I felt inclined to make the following order:

"It is ordered – ^H

- (a) that this court declines jurisdiction.

Bere J

- (b) that this matter be and is hereby referred to the Labour Court for a proper determination.
- (c) that the applicant be and is hereby ordered to bear the costs of this application."

Job Sibanda and Associates, applicant's legal practitioners ^B

Cheda and Partners, first respondent's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/GRAMMA RECORDS (PVT) LTD & ANOR v CHIMUSORO 2007 (1) ZLR 85 (H)

GRAMMA RECORDS (PVT) LTD & ANOR v CHIMUSORO 2007 (1) ZLR 85 (H)

2007 (1) ZLR p85

Citation	2007 (1) ZLR 85 (H)
Case No	Judgment No. HH-22-07
Court	High Court, Harare
Judge	Gowora J
Heard	13 September 2006; 19 September 2006
Judgment	21 February 2007
Counsel	<i>R Y Phillips</i> , for the applicants <i>Miss N Tiyago</i> , for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Intellectual property — *copyright — ownership of — recording commissioned by artiste — when ownership vests in artiste — lien over recording — whether person making recording entitled to retain it until price paid in full*

Headnote

- The respondent agreed to record a concert given by the second applicant and to produce a DVD of the concert. After the concert, the second applicant attended the respondent's studio to rectify the errors in the audio recording. The applicants paid part of the agreed price and tendered payment of the balance on delivery of the recording. The respondent ^E refused to release the recording to the applicants until he had been paid for the extra studio time as well as the balance of the price of the live recording. He considered that he had a lien on the recording. The applicants argued that they had copyright in the recording and that the respondent had no right to retain it. They contended that by not delivering to them the copyright as demanded the respondent was in ^F violation of ss 51(2)(a)(iii) and 51(2)(b)(iii) of the Copyright and

Neighbouring Rights Act [*Chapter 26:05*], thus entitling the applicants to the remedies provided for in s 52. They further contended that, by his possession of the copyright material, the respondent was in breach of s 59(1)(a)(iii), for which criminal sanctions are provided.

⁶ *Held*, that although under the common law the respondent would have a lien over the recording, the common law is specifically ousted in respect of the law of copyright by virtue of s 128 of the Act. The entire law of copyright is now contained in the Act and no copyright or right in the nature of a lien subsists except as provided for in the Act. When one examines s 14(4) of the Act, it is clear that the Act does not envision the ⁷ existence of a lien. Ownership is assured once one pays or agrees to pay

2007 (1) ZLR p86

Gowora J

for the commissioned copyright. Under s 51(2)(a)(iii), a copyright is ⁸ infringed if a person, in the course of business, possesses it or exhibits it in public or distributes it. There was no evidence that the respondent had exhibited the copyright in public or that he had distributed it. Having produced the copyright material, the respondent's possession of it was lawful until the dispute between the parties was resolved. ⁹

Legislation considered

Copyright and Neighbouring Rights Act [*Chapter 26:05*] ss 14(4), 19, 20, 51(2)(a)(iii), 59(1)(a)(iii) & 128

Case information

R Y Phillips, for the applicants ¹⁰

Miss *N Tiyago*, for the respondent

Judgment

GOWORA J: The second applicant is a well known and, I might venture to say, renowned gospel artist in Zimbabwe. The first applicant is a recording company. From the papers, it is apparent, that for the performance which is the subject matter of this dispute the first applicant was contracted to arrange ¹¹ the recording of Charamba's live show. It seems that the respondent is also in the business of recording live shows and producing from such DVD's and video recordings. I have not been advised as such in specific terms but this is my opinion based on the nature of the contract for determination by me.

On 13 September 2005, the first applicant's managing director, one Alan ¹² Wilson, addressed a letter to Crossline Music & Video for the attention of the respondent. In the letter, mention was made of a prior meeting between the parties and Charamba and one J Howard. The letter then confirms that a live show would be held by Charamba on 1 October 2005 at the Harare International Conference Centre (hereinafter referred to as "HICC"). The writer then details the requirements of the applicant as regards musical instruments and the ¹³ public address system, which issues are not relevant for this matter. The pertinent portion of the letter in so far as it relates to the dispute before me is contained in the paragraphs numbered (4) and (5) on the letter. The said paragraphs read as follows:

24. Track Recording

It was agreed that Crossline would supply and operate the 24 track ¹⁴ recording equipment producing a live recording as set out in your quotation (attached) at a revised charge as follows:

- (a) 2 days rehearsal @ \$3 million (old currency) per day.
- (b) Live show day @ \$70 million (old currency) for the show.

All 24 track recording charges are inclusive of VAT ¹⁵

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¹⁶ DVD Filming and Editing

It was agreed that Crossline would film, edit and supply a finished DVD master of the live recording as set out in your quotation (attached) at a revised charge as follows:

- (a) 2 days rehearsal @ \$38.25 million per rehearsal day. ^b
 - (b) Live show day @ \$85 million for the show inclusive of editing and final DVD master.
- All filming, editing and DVD master charges are inclusive of VAT.

This letter was responded to by the respondent on 18 September 2005. There were no alterations of the pertinent conditions pertaining to the contract ^c except that details of how the contract was to be put into effect were now the subject of discussion therein. The total contract sum was \$372 500, and of this amount \$212 700 was paid by way of deposit before the show. An additional sum of \$159 800 is still outstanding and the applicants have offered payment of this amount against delivery of the items detailed in the draft order. An additional amount of \$18 million for lighting has been agreed between the ^d parties and the applicants have offered to pay this amount as well.

The show was indeed held, but it is obvious now that problems then ensued between the parties. The applicants contend that the respondent has failed to perform his obligations in terms of the contract between the parties. The DVD master which the applicants required the respondent to produce and ^e deliver to them has not been delivered as required in the contract. The applicant's claim that an initial DVD delivered to them does not contain a substantial portion of the live recording. The applicants have accordingly approached this court for an order in the following terms:

IT IS ORDERED THAT:

1. the respondent shall within 48 hours of service of this order effect delivery ^f to the first applicant of the audio visual work and the sound recording in respect of the concert performed by the second applicant on 1 October 2005 at the HICC and all related sound recording.
2. the respondent be and is hereby interdicted from utilizing in any way all or any part of the audio visual work and the sound recording in respect ^g of the concert performed by the second applicant on 1 October 2005 at the HICC and all related recordings.
3. the respondent shall bear the applicant's costs of suit.

The application is vigorously opposed. In addition, the respondent has himself filed a counter-claim, which the applicant, in turn, opposes. In the ^h counter-claim, the respondent contends that as a result of the instruments

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used by the second applicant and other factors to do with the performance, ^a the sound recording of the performance was not up to scratch. He therefore entered into a second contract with the two parties to record a better audio of the songs performed at the live concert to enhance the sound quality and remove what he termed "discords". Apart from claims for \$159 000 000 (old currency) and \$18 000 000 (old currency) the respondent is claiming payment for moneys which are not related to the contract entered into before the concert ^b by the second applicant. The amounts also claimed are not liquid sums and it escapes me why the respondent thought it appropriate to adopt this procedure. I will, however, discuss further on that aspect when I deal with the counter-claim.

The terms of the contract were that the respondent would operate a 24 track ^c recording equipment and produce a live recording of the concert. In addition, the respondent was obliged to film, edit and supply a finished DVD master of the live recording. The respondent has compiled a DVD master which is still in his possession. Although his view is that the sound quality of the live recording is indifferent, he has facilitated the recording of better sound to go with the live recording. It is common cause that he has not been paid for the ^d extra time spent by the second applicant and the band perfecting the sound quality. He is unwilling to release the DVD master until he has been paid for the extra hours. The applicants' attitude is that he has been paid a substantial amount by way of deposit for the live recording and the DVD and he should deliver to the applicants what he was contracted to produce. The attitude of ^e the applicants is that at this stage the sound quality of the live recording is immaterial.

A reading of the case made out by the respondent seems to suggest that what the applicants are requesting is impossible to perform. The second applicant appears to have been on stage for at least three hours if not longer. The respondent suggests that due to the length of the songs performed, the ^f number of songs performed and the time the whole show lasted, it is difficult to produce a two-hour DVD.

Apart from stating that the respondent was to produce a DVD master of the live recording no other specifics were incorporated into the contract. No time limitation was set on the performance which the respondent was contracted ^g to record. It appears that at the live performance it became clear that the respondent's equipment could not record the entire show and arrangements were made for the second applicant's computer to create more storage space on the recording equipment to accommodate the concert. The applicants agree that the respondent's recording equipment had to be boosted to increase its recording capacity. There seems to be no dispute that the second ^h

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A applicant in fact performed more than 24 tracks. It is from this background that this court is required to decide whether or not the applicants are entitled to a DVD master according to the contract.

Neither of the legal practitioners, in argument, sought to deal with the terms of the contract and whether or not same was capable of fulfillment in the specific terms. The contract specified that the respondent provide a 24 track ^b recording equipment for purposes of capturing the live concert. The deponents to the affidavits did not dwell on the implications of this provision in the contract. If I construe the provision in its ordinary and literal sense, it presupposes, in my view, that the applicants would wish to have 24 tracks captured on audio and visual recording equipment. Thus, the obligation on ^c the respondent would be to ensure that he captured 24 tracks of the live performance. I would go further to presume that it is these tracks that would therefore be captured on the DVD master to be produced from the live recording. The applicants rejected the advance copy that was given to them by the respondent. The contention is made that it omitted a large portion of the live performance. The issue is therefore twofold. Firstly, the question is ^d to be decided whether the applicants are entitled to the recording itself and the second rung of the enquiry is what decision I should make in relation to the DVD master.

The applicants contend that the audio and visual recording was commissioned by them and it therefore belongs to them. They are thus entitled to delivery ^e against payment by them of 40 per cent of the outstanding contract amount which they tender. The respondent claims that he has not been paid for the balance of the live recording as well as the extra studio time to rectify the errors in the audio recording and that, until such time as he would have been paid, he has a lien on the live recording.

Section 14 (4) of the Copyright and Neighbouring Rights Act [*Chapter 26:05*] ^f (the Act) which the applicants base their right on provides as follows:

"Where a person commissions –

- (a) the taking of a photograph; or
- (b) the painting or drawing of a portrait; or
- (c) the making of a gravure; or ^g
- (d) the making of an audio-visual work; or
- (e) the making of a sound recording;

and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of the commission, that person shall, subject to ^h subsection (6), be the owner of any copyright subsisting in the work."

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Gowora J

Ownership in the copyright vests in the person who commissions its making ^a once one either pays or agrees to pay for such copyright. Ownership is not qualified and the applicants *in casu* fall squarely within the ambit of the section. They paid part of the fee charged and agreed to pay the balance. They have in fact tendered payment of the balance against delivery to them of the copyright. As a consequence, they own the copyright and the respondent in terms of the Act has no grounds to hold onto the copyright. Non-payment of ^b an amount allegedly due cannot be a bar to the applicants obtaining a right to delivery of the same.

To further augment the rights of an owner in a copyright, the Act, in ss 19 and 20, grants exclusive rights in the owner to reproduce, cause to be published, import or export, sell, let or hire, or make an adaptation of the copyright itself. ^c The respondent is not able I think to dispute that ownership in

the audio-visual recording obtained from the concert belongs to the applicants. He could only defeat their claim if he could show that they have not paid or have not agreed to pay money's worth for the recording. The applicants paid by way of deposit 60 percent of the contract sum with the balance being due when the respondent delivered the recording. The applicants have in fact tendered payment of the balance against delivery and there is, therefore, no defence that the respondent can proffer. I have however, to consider if the respondent can hold onto the recording on the basis of an alleged lien for payment in respect of studio time to polish up the audio recording for the purposes of producing a better quality product.

Any person who is in possession of the property of another on which he has expended money or money's worth may be entitled to a lien over the property in question. The law recognizes two types of liens, namely salvage and improvement liens and debtor and creditor liens. However, these liens exist under the common law. Mr *Phillips* contends, which contention finds favour with me, that our law as regards copyright is now contained in the Act. In s 128, the common law is specifically ousted as pertains to the law of copyright. The section provides:

"Subject to this Act, no copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or any other enactment."

The respondent, apart from submitting that he has a lien over the recording, has not proffered any authority for the submission. The Act does not provide for a lien over a copyright. The entire law of copyright is now contained in the Act and no copyright or right in the nature subsists except as provided for therein. The respondent has not sought to argue that a lien over the copyright exists notwithstanding the clear provisions of s 128. The respondent had the onus to establish the existence of a lien. He has not chosen to do so. In any

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At event, when one examines the provisions of s 14(4) of the Act, it becomes clear that the Act does not envision the existence of a lien. Ownership is assured once one pays or agrees to pay for the commissioned copyright.

The applicants have contended that by not delivering to them the copyright as demanded the respondent is in violation of ss 51(2)(a)(iii) and 51(2)(b)(iii), thus entitling the applicants to the remedies provided for in s 52. The applicants further contend that by his possession of the copyright the respondent is in breach of s 59(1)(a)(iii) for which breach he would be liable to a fine not exceeding level ten or to imprisonment for a period not exceeding two years or to both.

According to s 51(2)(a)(iii), a copyright is infringed if a person, in the course of business, possesses it or exhibits it in public or distributes it. There were no facts placed before me by the applicants to show that the respondent had exhibited the copyright in public or that he had distributed it. What was not in dispute is that he had it in his possession. He was commissioned to produce the copyright, and a dispute has arisen between the parties. The emergence of the dispute prompted him to hold onto the copyright in the hopes of compelling the applicants to pay the amounts that are in dispute. Having produced the copyright, his possession of it was lawful until the dispute between the parties became insurmountable. Apart from a bald submission in the heads of argument and from counsel from the bar, I was not addressed on the meaning to be ascribed to the phrase, "in the course of business, possesses or". I think that the legal practitioners should have made an effort to construe what the word possess in this context means, especially if such possession is likely to result in criminal sanction. I am envisaging a person who acquires possession of the copyright from a person not entitled to possess it. Such person had no hand in its coming into being and has no relationship with the owner and came into possession without the authority of the owner. In my view, such person has infringed the copyright. In so far as the respondent is concerned, it would be necessary that a thorough examination of the meaning to be ascribed to the word "possess" be undertaken. In the circumstances, I am not persuaded that the applicants have established that by holding onto the copyright in an effort to compel payment, the respondent has infringed the copyright. As the offence referred to in s 59(2)(a)(iii) stems from possession of the copyright under s 51(1)(a)(iii), I believe it is unnecessary for me to deal with the question of whether or not such possession renders the respondent liable to conviction under s 59. In the absence of proof that the respondent has infringed the copyright, I cannot find justification for granting an order for an interdict.

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I turn now to consider the counter claim filed by the respondent. The draft ^A order attaching to his papers is in the following terms:

IT IS ORDERED THAT:

1. The counter-respondents are hereby ordered to pay jointly and severally the one paying the to be absolved, the sum of \$159 800 000 (one hundred and fifty nine million eight hundred thousand dollars), being the balance ^B outstanding for the cost of a Digital Versatile Disc (DVD) of the audio visual work and sound recording for the live performance by the second applicant at the Harare International Conference Centre on 1 October 2005 plus interest at the prescribed rate to be charged from 5 October 2005 to date of full and final payment.
2. The counter-respondents shall pay jointly and severally the one paying ^C the other to be absolved, the sum of \$32 000 000 (thirty million dollars) being the amount due for the time spent recording in the counter-applicant's recording studio at 9 Maldon Avenue, Greencroft, Harare and the compact discs on which the material is recorded plus interest at the prescribed rate to be charged from 30 November 2005 to date of full and ^D final payment.
3. The counter-respondents shall pay jointly and severally, the one paying the other to be absolved, the sum of \$492 000 000 (four hundred and ninety two million dollars) being the amount due for the sound recording recorded in the counter-applicant's recording studio at 9 Maldon Avenue, Greencroft, Harare plus interest at the prescribed rate to be calculated from ^E 30 November 2005 to date full and final payment.
4. The counter-respondents shall pay jointly and severally, the one paying the other to be absolved, the sum of \$1 104 000 000 (one billion one hundred and four million dollars) being the cost of all the unedited audio-visual and sound recording for the live performance by the second ^F counter-respondents at the HICC on 1 October 2005 plus interest at the prescribed rate to be calculated from 1 November 2005 to date of full and final payment.
5. The counter-respondents shall pay jointly and severally, the one paying the other to be absolved, the sum of \$18 000 000 (eighteen million dollars) being the cost of the stage lighting used at the live performance by the ^G second counter-respondents at the Harare International Conference on 1 October 2005 plus interest at the prescribed rate to be calculated from 1 November 2005 to date of full and final payment.
6. The applicants shall pay the cost of suit. ^H

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^AIn regard to the claim for payment to him by the applicants in the sum of \$159 800 000, there is no dispute that this money is due and owing. This is the balance owing on the contract between the parties for the recording by the respondent of the live show and the production by him of a DVD master. The applicants have in fact tendered payment on the amount against delivery to them of the contract items by the respondent. The issue of whether or not the ^B respondent would be entitled to interest was not addressed. I cannot therefore, make any order in respect of interest on the said sum. I note that the contract did not address the issue of interest but more than that I cannot say.

As mentioned earlier in this judgment, arising from an agreement between the respondent and the second applicant, the latter spent some time in the ^C respondent's recording studio to enhance the quality of the sound recording captured during the live audience. This contract was entered into subsequent to the live show. According to the respondent, it had been agreed that the applicant would be given an initial 10 hours free usage of the studio. Thereafter the respondent would charge at the rate of \$700 000 per hour for use of the facility. The respondent stated that he sent an invoice to the first applicant ^D by e-mail. The copy of the e-mail he sent has not been attached to his papers.

Both applicants contend that he has not provided them with an invoice in respect of this claim and they are therefore not in a position to consider it. He has not established how much is due against this claim. As he chose to proceed by way of application instead of action I therefore, have no option ^E but to dismiss this claim even though it has not been found that it is not due and owing.

The claim for \$492 000 000 is also for the sound recording at the respondent's studio after the live show. It has not been justified on the papers before me. Again, no invoice is attached, nor does the

respondent establish on his papers that it is due and owing. He has not sent an invoice to the applicants, who have indicated an inability to respond thereto in the absence of an invoice. Again, it suffers the same fate as the last claim and it is accordingly dismissed.

The claim for \$1 104 000 000 is not adverted to in the respondent's affidavit. A perusal of the e-mails sent to the applicants by the respondent does not reveal any mention of this amount. However, it appears that the amount is what the respondent reckons he should be paid as of today for the visual and audio recordings of the live show based on the inflation rate that the country is experiencing. The respondent is legally represented. It is surprising that such a claim could have been made without any justification being made on his papers. Although the parties concluded a written contract, no attempt has been made to link this claim to the contract or to distinguish the two. There is no averment that an additional contract was concluded for extra payment

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on the live recording. The cause of the claim has not been established and consequently it is dismissed.

In so far as the claim for \$18 million (old currency) is concerned, the applicants have indicated in their application that they are willing to pay this amount, subject to the production of an invoice by the respondent. In the premises, there will be an order in the following terms: B

IT IS ORDERED THAT:

1. the respondent shall, against payment to him by either or both applicants of the sum of \$159 800 000 (old currency) effect delivery to the first applicant of the audio visual work and the sound recording in respect of the concert performed by the second applicant on 1 October 2005, at the Harare International Conference Centre and all related sound recording within 48 hours of service of this order.
2. the respondent shall pay the costs of this application.
3. the respondent's counter-claim be and is hereby dismissed with costs.

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

Atherstone & Cook Legal Practitioners, respondent's legal practitioners

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NCUBE v WANKIE COLLIERY CO & ANOR 2007 (1) ZLR 95 (H)

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Citation	2007 (1) ZLR 95 (H)
Case No	Judgment No. HH-8-07
Court	High Court, Harare
Judge	Chatukuta J
Heard	13 February 2006:14 February 2006
Judgment	23 February 2007

Counsel	<i>D T Mwonzora</i> , for the plaintiff <i>Ms N Moyo</i> , for the defendant
Case Type	Civil action
Annotations	No case annotations to date

Flynote

c Delict — negligence — claim — against employer by employee or dependant of employee for injury or death arising during course of employment — limitations on such action — when claim may arise out of vicarious liability

Headnote

▯ The plaintiff's son, who was employed by the defendant, was killed in a motor vehicle accident. The vehicle was being driven during the course of his employment by another employee of the defendant. The driver was subsequently convicted of culpable homicide arising out of the accident. The plaintiff claimed damages from the defendant, averring that the defendant was vicariously responsible for the death of her son. She *ε* stated that she was dependent on the deceased during his lifetime, starting from when her husband died in 1998. The deceased provided for her upkeep and for school fees for his siblings. At the time of his death, he was building a house for the plaintiff. She said that, without his assistance, she could not make a decent living. She produced a document *ϕ* which showed that the deceased had expressed a wish that the benefits under the first defendant's insurance scheme be payable to the plaintiff.

Held, that the plaintiff had no cause of action. In terms of s 8 of the National Social Security Authority (Accident Prevention and Workers' Compensation Scheme) Scheme, 1990 (SI 68 of 1990), no action lay at common law against the defendant. Although vicarious liability forms *α* part of an exception as provided for in s 9 of that Scheme, the driver was not a person entrusted with the management, charge or hiring and firing of workers as defined in the section. The exception applies only where there is a claim for compensation additional to that payable under the Scheme and the plaintiff did not plead such a claim. She had collected the *η* benefits due under the Scheme.

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Held, further, that in order for the plaintiff to sue successfully for loss of *Α* support, she had to prove that she could not support herself and was therefore dependent on the support from the deceased. The duty to support the plaintiff must have arisen during the deceased's lifetime. It is not sufficient for the plaintiff to prove merely that the deceased would have supported her; she also had to prove that he would have been under *Β* a legal obligation to support her, having regard to her own indigence. The only evidence led by the plaintiff related to her incapacity to earn a living after the death of her son. The legal obligation to support a parent cannot arise only at the time of the deceased's demise. The obligation must have existed during the deceased's lifetime. The document signed by the deceased did not create a duty on him to support his mother. *c*

Case cited

Manuel v African Guarantee & Indemnity Co Ltd & Anor 1967 RLR 45 (G)

Legislation considered *▯*

National Social Security Authority (Accident Prevention and Workers' Compensation Scheme) Scheme, 1990 (SI 68 of 1990), ss 4(7), 8, 9(1) & 10

Case information

D T Mwonzora, for the plaintiff

Ms N Moyo, for the defendant ϵ

Judgment

CHATUKUTA J: At the commencement of these proceedings, the plaintiff abandoned its claim against the second defendant. There was no proof of service on the second defendant. The plaintiff indicated that she would pursue the action without the second defendant. The first defendant submitted that it would not suffer any prejudice and therefore did not object to the matter ϵ proceeding without the second defendant.

The plaintiff issued summons in the High Court claiming damages in the sum of \$10 300 000 (old currency) for loss of support, interest *a tempore moare* at the prescribed rate from the date of summons to the date of payment and costs of suit. The plaintiff applied to amend her summons by the deletion of ϵ "\$10 300 000 (old currency)" and substitution of by "\$1 500 000 000 (old currency)". The application was not opposed by the first defendant and was accordingly granted.

The following issues were referred to trial:

- "1. Whether the plaintiff was wholly dependant on the late Bushe Nyaze η

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- α and whether the late Bushe Nyaze had any legal obligation to maintain the plaintiff and whether the plaintiff has a cause of action against first defendant.
2. Whether the second defendant drove the first defendant's vehicle negligently and at excessive speed without due care and attention and whether the first defendant is vicariously liable under the β circumstances.
3. Whether the plaintiff suffered damages.
4. Whether or not the Estate of the late Bushe Nyaze was paid all the benefits and compensation due after the death of Bushe Nyaze."

It is common cause that on 13 January 2002, Bushe Nyaze ("the deceased") β died in a car accident. The deceased was the plaintiff's son. At the time of his death, the deceased was employed by the first defendant as an artisan/motor mechanic. On the fateful day, the deceased was being driven home from work by the second defendant, who was also employed by the first defendant. The deceased's death arose in the course of his duty.

The plaintiff testified that the second defendant was convicted of negligent δ driving by Hwange Magistrates Court. It was, however, clear from the record of proceedings, duly certified by the clerk of court, Hwange, that the second defendant was convicted of culpable homicide. He was sentenced to a fine of \$2 000 and, in default of payment, to 6 months' imprisonment. She stated that, arising from this conviction, the first defendant was vicariously responsible for the death of her son. It was her evidence that she was dependent on the ϵ deceased during his lifetime, starting from when her husband died in 1998. The deceased provided for her upkeep and for school fees for his siblings. At the time of his death, the deceased was building a house for the plaintiff. The plaintiff testified that, without the deceased's assistance, she could not make a decent living. As proof of her dependence, the plaintiff produced a document ϵ captioned "Expression of Wish" in relation to the first defendant's Group Life Assurance Scheme, in which the deceased expressed his wish that the benefits under that scheme be payable to the plaintiff.

The plaintiff produced pay slips reflecting the deceased's earnings for 2001 and 2002. According to the 2001 pay slip, the deceased had earned \$28 186.08 that year. However, the 2002 pay slip was not in the deceased's name and ϵ Ms Moyo objected to its production. She undertook to, and did, produce a pay slip indicating how much the deceased would have earned in January 2006 had he not passed on.

Under cross-examination, the plaintiff testified that she has never been employed in her entire life. Her husband had looked after her and, on his death, η her son, the deceased, took over. Before her marriage she had been looked after

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by her parents. She was 53 years old and, apart from suffering from high blood α pressure, she was in general good health. She stated that she has attempted farming to sustain herself, but due to lack

of resources her attempt failed. She was currently looking after five of her own children. She was paid benefits under the first defendant's Group Life Assurance Scheme as the nominated beneficiary. In 1999, she got her husband's terminal benefits. The plaintiff ^b thereafter closed her case.

The first defendant applied for absolution from the instance on two grounds, namely:

1. The plaintiff did not establish a cause of action against first defendant in view of s 8 of the National Social Security Authority (Accident Prevention and Workers' Compensation Scheme) Scheme, 1990 (SI 68 of 1990) ^c (hereinafter referred to as "the Scheme").
2. The plaintiff did not lead evidence to establish the quantum of damages.

I am indebted to Ms *Moyo* for her comprehensive submissions. Ms *Moyo* submitted that the National Social Security Authority Act [Chapter 17:04] provides for compensation in the event of the death of an employee. Every ^d employer is obliged to join the Scheme which provides for benefits and compensation to employees on injury or death. Section 8 of the Scheme provides that no action can lie at common law against the defendant. It was further submitted that, although vicarious liability forms part of an exception as provided for in s 9 of the Scheme, the second defendant was not a person trusted with the management, charge, or hiring and firing of workers as defined ^e in that section. He was a mere driver. It was submitted that, in any event, the exception applies only where there is a claim for additional compensation and the plaintiff did not plead such a claim. Ms *Moyo* further submitted that the plaintiff did not follow the procedure that is prescribed by the Scheme before instituting a claim for additional damages. She submitted that s 10 of the ^f Scheme requires that notice be given to the general manager or employer of the intention to institute such proceedings

Mr *Mwonzora*, submitted, in response, that the claim against the first defendant is based on the doctrine of vicarious liability. Under that doctrine, the employer is individually liable for the acts of the employee committed while the employee is acting within the scope of his employment. Mr *Mwonzora* ^g submitted that the first defendant therefore falls under the exception in s 9 of the Scheme. He further submitted that the requirements under s 10 of the Scheme apply only in relation to claims for additional compensation by the worker himself and not to those by his dependant. He submitted that the definition of "worker" in the Scheme does not include a dependant. He cited ^h

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^a three formulae used in the calculation of damages

The second ground of the application was that the plaintiff had not led any evidence to prove the quantum of damages. Ms *Moyo* submitted that the plaintiff did not lead any evidence on how she arrived at the amount of ^b \$1 500 000 000 that she claimed as damages. The formula that Mr *Mwonzora* gave from the bar would have assisted the deceased had he been alive and claimed for loss of earnings for himself. It was submitted that the deceased had, during his lifetime, been supporting seven people, that is, the plaintiff, his five siblings and himself. It was submitted that the plaintiff did not lead evidence on her life expectancy, which has been established at law as an essential ^c consideration in the assessment of loss of earnings.

Turning to the main basis upon which the first defendant applied for absolution from the instance, the defendant submitted that the plaintiff did not establish a cause of action against the first defendant in view of s 8 of the Scheme.

Section 8 of the Scheme provides ^d

"8. From and after 1 January 1960:

- (a) no action at common law shall lie by a worker or any dependant of a worker against such worker's employer to recover any damages in respect of any injury resulting in the disablement or death of such worker arising out of and in the course of his employment; and
- (b) no liability for compensation shall arise save under and in accordance ^e with this scheme in respect of such disablement or death; and"

Section 8 is peremptory. It has the effect of ousting the plaintiff's right to a remedy against the employer under common law. The rationale for the provision is better understood from the perspective that the employer is compelled, in Part X of the Scheme to contribute towards the Workers' ^f Compensation Fund from which an employee or his/her dependant will benefit in the event of an injury to the employee or his/her death. The contributions are intended to provide for compensation in the event of injury to, or the death of, an employee. The plaintiff admitted to

having collected the benefits due under the Scheme. This is because of the first defendant's liability in respect of the plaintiff's son's death arising from the deceased's employment. The ^G plaintiff testified that her son died during the course of his employment and as a result of the negligence of an employee of the first defendant. This is an eventuality that is envisaged in the Scheme. The plaintiff, having received compensation under the Scheme, would therefore not be entitled to bring an ^H action for compensation under common law as in this case.

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However, there is an exception in s 9 of the Scheme. Section 9(1) provides: ^A

"9(1) Notwithstanding anything to the contrary contained in this Scheme, if a worker meets with an accident which is due —

(a) to the negligence —

(i) of his employer; or

(ii) of a person entrusted by his employer with the management or ^B in charge of such employer's trade or business or any branch or department thereof; or

(iii) of a person having the right to engage or disengage workers on behalf of his employer;

the worker or, in the case of his death as a result of such accident his representative, may within three years of such accident proceed by ^C action in a court of law against the employer where the employer concerned is an employer individually liable, or otherwise against the employer and the general manager jointly, for *further compensation in addition* to the compensation ordinarily payable under this Scheme" (my emphasis).

Firstly, Ms *Moyo* submitted that the driver who caused the accident in which ^D the plaintiff's son died, did not fall within the class of persons so identified in s 9(1). Mr *Mwonzora* submitted that, since the driver had been acting within the scope of his duty, the employer was vicariously liable and therefore the driver would fall under s 9(1) of the Scheme. I am inclined to agree with the submissions by Ms *Moyo*. Section 9(1) specifically identifies the negligent person to be the employer, a person entrusted with the management or in ^E charge of the business or a person who has the right to engage or discharge workers on behalf of the employer. It is therefore clear that the persons identified are persons who control and run the affairs of the company. It is further my view that s 8 of the Scheme adequately provides for the liability of the first defendant arising from the negligence of driver. That is why the compensation provided for in s 9 of the Scheme is additional compensation ^F to the compensation that the plaintiff would have received under the Scheme.

The second submission was that, assuming that the first defendant would be liable vicariously in terms of s 9(1) of the Scheme (which it is not), the plaintiff was required in s 10(2) of the Scheme to notify the general manager before instituting these proceedings. Mr *Mwonzora* submitted that that section ^G applies only to workers and dependants. He did not read s 10(1)(b)(ii), which provides that:

"in the case of a worker who has died, the amount recoverable in terms of this paragraph shall not exceed the total amount of damages, if any, which, in the opinion of the court, but for this Scheme, would have been awarded ^H

2007 (1) ZLR p101

Chatukuta J

^A to all the dependants of the worker notwithstanding that they may have had separate or distinct claims in respect of such damages."

Most importantly, Mr *Mwonzora* did not read s 4(7) of the Scheme. That section provides that:

"any reference in this Scheme to a worker who has been injured shall, when the worker is dead or is a person under disability, include a reference to ^B his representative or his dependants or to any other person to whom or for whose benefit compensation is payable."

This puts to an end the plaintiff's argument that s 10 of the Scheme does not apply to her.

The last issue which was raised by Ms *Moyo* regarding the Scheme was that ^C the plaintiff never pleaded that her claim was for additional compensation under s 9(1) of the Scheme. Indeed the plaintiff sued the defendant under the principle of vicarious responsibility. Order 3 ^r 11 of the High Court Rules provides what should be contained in a summons and this includes a true and concise

statement of the nature, extent and grounds of the cause of action and of the relief or remedies sought in the action. Order 17 r 109 of the High Court Rules also requires that the declaration contains the same contents. This is intended to assist a defendant to identify the cause of action.

I am of the view that one of the issues for determination is whether or not the deceased had a legal obligation to maintain the plaintiff. G Feltoe *A Guide to the Zimbabwean Law of Delict* 2 ed (1990) states at p 111 that, in order for a plaintiff to be successful in a claim for loss of support, the plaintiff must prove ^ε that the deceased owed a legal duty of support to the plaintiff during the deceased's lifetime. E Spiro in the *Law of Parent and Child* 4 ed of (1985) states that:

"The requisites of the duty of children to support their parents are, *mutatis mutandis*, the same as the corresponding duty of the parents, namely the parent must be unable to support himself or herself, that is to say lack of ^ε means is not sufficient if the parents are able to maintain themselves by working. A parent who claims to be entitled to maintenance must show, it has been said, that he or she is in want of what should, considering his or her station of life, be regarded as coming under the law of necessities ... (see *Oosthuizen v Stanley* 1938 AD 324 at 327-328)."

Therefore, in order for the plaintiff to sue successfully for loss of support, she ^ε must prove that she could not support herself and was therefore dependent upon support from the deceased child. The duty to support the plaintiff must have arisen during the deceased's lifetime. This is clearly stated in Corbett Buchanan & Gauntlett *The Quantum of Damages in Bodily and Fatal Injury Cases* 3 ed (1985). At p 77, the authors state that:

Η "The foundation of all claims for damages for loss of support arising by

2007 (1) ZLR p102

Chatukuta J

reason of the death of a person is a legal duty to provide such support ^Α owed by the deceased during his life time."

Davies J in *Manuel v African Guarantee & Indemnity Co Ltd & Anor* 1967 RLR 45 (G) at 49C-G extends the requirements for a claimant to succeed in a claim for loss of support. He states that:

"To summarise, I consider that, in order to succeed in her claim for general ^Β damages in this case, the plaintiff must establish, on a balance of probabilities, and not merely as a matter of speculation —

- (i) that, since the death of her son, she has been indigent, or that she is likely to become indigent, having regard not merely to her own position but also to her obligations towards her surviving children; ^γ
- (ii) that she has not been able to obtain support from her husband for herself or her children;
- (iii) that the deceased would have been in a position to support her at such time as she might require such support."

However, at 51H he underscored that:

"It is not sufficient for the plaintiff to prove merely that the deceased would ^Δ have supported her, she must also prove that he would have been under a legal obligation to support her, having regard to her own indigence. It is on this aspect of the case that the plaintiff has failed to satisfy me."

In the *Manuel* case, *supra*, the plaintiff had also lost a son aged 14 years old in a car accident. The son had been working as a shop assistant. The plaintiff ^ε had been working and would have been able to continue working for a further period of 10 years. The views by the judge were based on the plaintiff's claim that the deceased had only been working for a year and would have continued to support her had he lived.

The plaintiff did not satisfy me that she was not able to maintain herself during ^ϕ the lifetime of the deceased and after death. The plaintiff did not testify also her incapacity to support herself during the deceased's lifetime leading to the deceased supporting her. She testified that she has always been maintained throughout her life by the men in her life. Before she was married, she was maintained by her father. On marriage, her husband took over from her father, with the deceased taking over on the death of her husband. Her husband died ^ε in 1998. According to her identification card, she was born on 10 October 1953 and was therefore 45 years old when her husband died. According to the letter from the first defendant dated 13 February 2006, the deceased was appointed as an artisan only in 1999. Before then he had been undergoing apprenticeship training. The plaintiff did not testify as to who maintained her during that ^η

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Chatukuta J

A period. She did not indicate why she was not able to work then in order to fend for herself and her other five children. The plaintiff did not state the ages of the children and what the children were doing for a living, and hence establish that she did require the assistance of the deceased during his lifetime to maintain his siblings.

The plaintiff testified that she received terminal benefits in 1999 following her ^B husband's death. She did not indicate how much the benefits were or what she did with them. That would have assisted in proving whether or not she needed support from the deceased and, if so, to what extent. In 2002, when her son died, the plaintiff was 49 years old and, ordinarily, would have been capable of looking after herself. The plaintiff testified that she attempted to ^C farm but failed because of lack of resources. She did not testify on how she is currently, after her failed attempts at farming, fending for her five children whom she stated were not generating any income.

It should be noted that the only evidence led by the plaintiff related to her incapacity to earn a living after the death of her son. The legal obligation to support a parent surely cannot arise only at the time of the deceased's demise. ^D The obligation must have existed during the deceased's lifetime. In support thereof, the plaintiff referred the court to the "Expression of Wish" which identified the plaintiff as a beneficiary to the first defendant's Group Life Assurance Scheme in the event of the deceased's death. As proof that the plaintiff was indeed the deceased's dependant, I assume that the plaintiff ^E relied on the following statement in the "Expression of Wish":

"I, Bushe Nyaze do hereby acknowledge that the Employer shall make the final decision as to which of my dependants shall receive the benefits of the Scheme and I draw attention to the fact that I would wish these benefits to be paid to:

Full names ... LINA NCUBE."

^F I do not believe that the reference in this document to the plaintiff as the deceased's dependant establishes that the deceased had a legal obligation to maintain the plaintiff. Such reference was intended specifically for the purposes of the first defendant's Group Life Assurance Scheme. In any event, it does not assist in explaining why the plaintiff could not work for a living and had to depend on her son for sustenance. It is therefore, in my view, that the ^G plaintiff failed to prove that she was owed a duty of support by the deceased during his lifetime.

The first defendant submitted that the plaintiff did not prove the quantum of damages she seeks. I have not considered it necessary to determine that the ^H issue in view of my conclusions above.

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Chatukuta J

The application by the defendant for absolution from the instance is granted, ^A with costs.

Mwonzora & Associates, plaintiff's legal practitioners

Coghlan Welsh & Guest, defendant's legal practitioners ^B

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Source:

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KARORI (PVT) LTD & ANOR v MUJAJI 2007 (1) ZLR 105 (H)

2007 (1) ZLR p105

Citation 2007 (1) ZLR 105 (H)

Case No Judgment No. HH-23-07

Court	High Court, Harare
Judge	Kudya J
Heard	23 February 2007
Judgment	23 February 2007
Counsel	<i>J B Colegrave</i> , with him <i>A N B Masterson</i> , for the applicant <i>T K Hove</i> , for the respondent
Case Type	Urgent chamber application
Annotations	Link to case annotations

Flynote

^c **Property and real rights** — *spoliation order* — *when may be granted* — *relevance of lawfulness of applicant's possession of the property in question*

Headnote

The applicants were the owners of a farm which was the subject of acquisition by the State. They remained in peaceful and undisturbed occupation of ^d the farm, no attempt being made by the acquiring authority to evict them. The respondent, a senior army officer, forcibly evicted the applicants and took over the farm for himself. He had no court order or other lawful pretext for doing so. The applicants sought a spoliation order.

Held, that whatever the applicants' legal status was in respect of the farm, they were entitled to a spoliation order. In spoliation proceedings it need ^e only be proved that the applicant was in possession of something and that there was a forcible or wrongful interference with his possession of that thing. The purpose of the *mandament van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the *status quo ante* ^f to be restored until such time as a competent court of law assesses the relative merits of the claims of each party. The lawfulness or otherwise of the applicant's possession of the property does not fall for consideration at all. Even a squatter is generally regarded to be in peaceful possession of the place he is squatting on and a proper eviction order must be taken against him for his removal. If the respondent ^g believed that he had better rights to the farm than the applicants then he would have to follow due process to get vacant possession. He must not resort to self-help.

Cases cited

^h *Botha & Anor v Barrett* 1996 (2) ZLR 73 (S)

2007 (1) ZLR p106

Kudya J

Chisveto v Min of Local Govt & Town Planning 1984 (1) ZLR 248 (H) ^a

Davis v Davis 1990 (2) ZLR 136 (H)

Magadzire v Magadzire & Ors S-196-98

Matimbura v Matimbura S-173-98

Nienaber v Stuckey 1946 AD 1049

Case information

J B Colegrave, with him *A N B Masterson*, for the applicant ^b

T K Hove, for the respondent

Judgment

KUDYA J: On 23 February 2007, I delivered a hand written judgment after hearing the parties' submissions in chambers. I made the following order:

1. The respondent, his family, workers and agents are hereby ordered c to return to the applicants the keys and locks to all sheds, barns, workshops, residences and pump houses pertaining to the buildings on the 376 hectare piece of land occupied by the applicants in the Headlands area of the Makoni District (which land is hereinafter called 'the farm').
2. The respondent, his family workers and agents are hereby ordered d to restore Tsitsi Musariri and her children to occupation of the house from which she has been evicted.
3. The respondent, his family workers and agents are hereby ordered to remove all farming equipment and materials that they have on that farm. e
4. The respondent shall forthwith secure the removal from the land of all military personnel presently stationed there together with their tents and belongings.
5. The respondent, his family workers and agents are hereby interdicted and prohibited from occupying or entering upon the farm and from utilizing or occupying any improvements thereon. f
6. The respondent shall likewise make no attempt to cultivate plant or introduce farming equipment or materials onto the farm and is hereby interdicted and prohibited from interfering in any way with the applicants' farming operations on that land or with the applicants' workers and agents.
7. The respondent shall make no further attempt to occupy or utilize any g equipment and materials belonging to the applicants or any part of the Farm or any improvements thereon, either directly or indirectly and he shall not attempt to restrain or control the movement of any person or property onto or off the farm unless and until the applicants are lawfully evicted from the farm.
8. The respondent shall pay the costs of this application." h

2007 (1) ZLR p107

Kudya J

a On 8 March 2007, the parties' legal practitioners of record sought in a joint minute addressed to the Registrar, which came to my desk on 3 April 2004, "to establish whether Mr Justice Kudya considered the second notice of eviction issued against Karori (Pvt) Ltd in January 2007 and the effect of that notice in the light of his order of 23 February 2007." The basis for such a request is not easily comprehensible to me in the light of the reasons I highlighted in b the judgment that I delivered in the matter. I reproduce hereunder those reasons.

This is an urgent chamber application for spoliation filed by the applicants against the respondent on 20 February 2007. On 22 February 2007, the respondent filed his opposing affidavit. The applicants then filed their c answering affidavit just before the hearing of the application on 23 February 2007.

It seems common cause to me that until 4 February 2007, the applicants were in control and had undisturbed possession of the farm. The first applicant was literally in charge of the headquarters of the farm, which were based thereat. Its employees went about their day to day duties carrying out its mandate. d That the second applicant also had occupation is clear from para 41 of the opposing affidavit, wherein it is stated that Tsitsi Musariri was directed to request him to remove his belongings. It is irrelevant in this application for me to consider the issue of absentee landlords, as prayed by the respondent, as this does not arise in the present case.

On 4 February 2007, the respondent forcibly dispossessed the applicants of e the keys to the gate of the security fence to the headquarters complex and the residence of Tsitsi at the farm. This is admitted by the respondent in para 14 of his opposing affidavit.

On 8 February 2007, he commandeered the keys to the storerooms, shed and pump house from the applicants' employees. On 10 February 2007, he placed f his own chains and locks. While in his opposing papers the respondent claims that the employees surrendered them to him, it is clear to me that they were intimidated by the detachment of soldiers that he brought to, and which remains at, the farm. He also did not explain why he stationed these soldiers at the farm. There was, in my view, no voluntary surrender of the premises by the applicants.

g It is also clear from the papers that from 1 September 2006 until 4 February 2007, the respondent had made his intentions to move over onto the farm, through word and deed, clear. This had triggered a flurry of activities by the applicants in which they sought audience with various

government functionaries who are at the helm of the land acquisition programme. These activities appeared ^H to have the desired outcome, until 4 February 2007.

2007 (1) ZLR p108

Kudya J

The applicants launched the present application when it dawned on them that ^A what they required was legal and not political protection. It seems to me that they acted with urgency to reverse what they viewed as the unlawful deprivation of their possessory rights by the respondent. If at all they were required to act earlier than they in fact did, I am satisfied that they have explained that they believed that the political intervention that they were ^B pursuing would bear fruit. These initially promising attempts did not in the end have the desired results.

I also find that an application for spoliation is urgent by its very nature. It exists to preserve law and order and to stop and reverse self-help in the resolution of disputes between parties. Its primary aim is to restore the *status quo ante*. See *Chisveto v Minister of Local Government & Town Planning* 1984 (1) ZLR ^C 248 (H) at 250C. In both form and substance, it is final. It is not temporary in nature and the despoiled must discharge the onus on it on a balance of probabilities. In *Nienaber v Stuckey* 1946 AD 1049 at 1053-4, Greenberg JA observed that:

"Although a spoliation order does not decide what, apart from possession, ^D the rights of the parties to the property spoliated were before the act of spoliation and merely orders the *status quo* be restored, it is to that extent a final order and the same amount of proof is required as for the granting of a final interdict, and not a temporary interdict ... At this stage it is sufficient to say that the appellant must satisfy the court on the admitted or undisputed facts by the same balance of probabilities as is required in every civil suit, of the facts necessary for his success in his application." ^E

It does not seem to me that spoliation can be estopped on the basis of the "dirty hands" doctrine, for to do so would be to shield the despoiler from the consequences of, and reward him for his alleged usurpation of the due process. In this connection, see *Matimbura v Matimbura* S-173-1998 at p 4 and *Chisveto's case supra* at 250D. ^F

It was urged on me by the respondent that the failure by the applicants to join in the acquiring authority in these proceedings was fatal to the application. I do not agree. Firstly, the acquiring authority did not despoil the applicants. It is after all enjoined by the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] to institute eviction processes, if it so desires, to remove such persons as the applicants from an acquired property. Secondly, even if it were ^G necessary to cite the acquiring authority, ^r187 of the Rules of Court permits the court to determine the issues as between the parties before it even where such joinder is required. ^H

2007 (1) ZLR p109

Kudya J

^A While both Mr *Colegrave*, assisted by Mr *Masterson*, for the applicants and Mr *Hove*, made interesting submissions on other issues concerning the ownership of the farm, I am firmly convinced that it is not necessary for me to resolve them in spoliation proceedings and I will not attempt to do so.

There is a plethora of cases on spoliation. In *Chisveto's case supra* at 250A-D, ^B Reynolds J stated that:

"Mr *Mafara*, for the respondent, argued that an action of spoliation was committed only if a possessor was in lawful possession of the property in question when he was dispossessed of that property. His contention was that as the applicant in the present case had been served with a proper notice of termination, he was, therefore, in unlawful occupation of the house on 16 March, and his forcible eviction on that date did not amount ^C to an act of spoliation. This seems to me to be a somewhat surprising submission for, as I understand it, it is a well-recognized principle that in spoliation proceedings it need only be proved that the applicant was in possession of something and that there was a forcible or wrongful interference with his possession of that thing — that *spoliatus ante omnia restituendus est* (*Beckus v Crous & Anor* 1975 (4) SA 215 (NC)). ^D Lawfulness of possession does not enter into it. The purpose of the *mandament van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the *status quo ante* to be restored until such time as a competent court of law assesses the relative merits of the claims of each party. Thus it is my view that the lawfulness or otherwise of the ^E applicant's possession of the property does not fall for consideration at all. In fact the classic generalization is sometimes made that in respect of spoliation actions that even a robber or a thief is entitled to be restored to possession of the stolen property."

In *Davis v Davis* 1990 (2) ZLR 136 (H) at 141B-142A, Adam J covered the issue of spoliation by reference to four South African cases. The sum effect of these ^F cases was that two essential elements must be alleged and proved, that is, that the applicant was in peaceful and undisturbed possession and that the respondent deprived him of it forcibly or wrongfully against his consent; it is not necessary for the applicant to show continuous presence, as long as he proves *animus* — the intention of securing some benefit and *detentio* — the holding of the property, but needs to demonstrate benefit and that that ^G benefit has been taken away from him by another against his consent; and that the court does not decide what their respective rights were before the act of spoliation. At 142B, he concluded by observing that:

“The requirement that the respondent’s act of dispossession was unlawful can be met by showing that the respondent despoiled without recourse ^H to a court of law and without the applicant’s consent.”

2007 (1) ZLR p110

Kudya J

Muchechetera JA in *Matimbura v Matimbura*, *supra*, at pp 3-4 of the ^A cyclostyled judgment, quoted with approval the sentiments of Gubbay CJ in *Botha & Anor v Barret* 1996 (2) ZLR 73 (S) at 79 that:

“It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are:

- a) That the applicant was in peaceful and undisturbed possession of the ^B property; and
- b) That the respondent deprived him of the possession forcibly or wrongfully against his consent.

See *Nino Bonino v de Lange* 1906 TS 120, *Kramer v Trustee Christian Coloured Vigilance Council, Grassy Park* 1948 (1) SA 748(C) at 753; *Davis v Davis* 1990 (2) ZLR 136 (H) at 141C.” ^C

The learned Judge of Appeal further noted at p 4 that “even a squatter is generally regarded to be in peaceful possession of the place he is squatting on and a proper eviction order must be taken against him for his removal”.

The two essential elements of a spoliatory order were also confirmed by Korsah AJA in *Magadzire v Magadzire* S-196-1998. ^D

In the present matter, I am satisfied that the applicants were in peaceful and undisturbed possession of the farm until 4 February 2007 when the respondent forcibly dispossessed them of the same without a court order. He therefore despoiled them. The question of ownership does not arise for determination in spoliatory proceedings. In the event that the respondent believes that he has better rights to the farm than the applicants then he would have to follow ^E the due process to get vacant possession. He must not resort to self-help.

In the result the application is granted in terms of the draft order.

Coghlan, Welsh & Guest, applicants’ legal practitioners ^F

T K Hove & Partners, respondent’s legal practitioners

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SHOKO & ORS v MINISTER OF LOCAL GOVERNMENT & ANOR 2007 (1) ZLR 111 (H)

2007 (1) ZLR p111

Citation	2007 (1) ZLR 111 (H)
Case No	Judgment No. HH-12-07
Court	High Court, Harare

Judge	Makarau JP
Heard	6 February 2007
Judgment	28 February 2007
Counsel	<i>L T Biti</i> , for the applicants <i>Mrs V Mabhiza</i> , for the respondents
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Practice and procedure — review — application — application filed late — no application for condonation made — respondent not making issue of matter — not open to court to extend period *mero motu*

Ⓓ **Practice and procedure** — rules of court — departure from — court's discretion — breach of rules not subject of contention between parties — not appropriate to condone breach without allowing parties to be heard on the point

Review — application — application filed late — no application for condonation made — respondent not making issue of matter — not open to court to extend period *mero motu*

Headnote

The first applicant was the elected mayor of Chitungwiza. He was suspended from office by the respondent Minister. The first applicant brought an application for review of the Minister's action some three months after he had been suspended. The respondent's counsel did not make an issue of the fact that the application was brought late, neither did the applicants' counsel apply for condonation.

Held, that a court is not empowered, *mero motu*, to grant an extension of time within which an application for review may be filed. "Good cause", as stated in r 259 of the High Court Rules 1971 (RGN 1047 of 1971), means good cause shown by the applicant, either in a written application or orally or with the consent of the opposing party. It cannot mean good cause as seen by the court *mero motu*.

Held, further, that although r 4C does not seem to require that an application be made before the court can condone a departure from the Rules, it would not be appropriate to invoke the r 4C on the narrow basis that the respondents may wish to take advantage of the technical lapse by the

2007 (1) ZLR p112

Makarau JP

applicant, and were the court to grant condonation *mero motu*, that would effectively rob them of that chance without affording them an opportunity to be heard.

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 4C and 259

Case information

L T Biti, for the applicants

Mrs V Mabhiza, for the respondents

Judgment

MAKARAU JP: The first applicant was elected as the Executive Mayor of the second respondent on 11 March 2002. On 29 December 2005, he received a letter from the first respondent suspending

him from duty upon certain specific grounds that were detailed in the letter. It was also indicated in the letter that the suspension would be without salary and benefits and accordingly, the first applicant was to surrender all council property in his possession and vacate council premises to allow investigations into the allegations levelled against him to proceed.

Believing that his suspension was irregular, was without foundation in law and was politically motivated, the first applicant filed a court application with this court on 6 March 2006. In the application, he specifically sought an order setting aside the decision of the first respondent to suspend him from duty without salary and that he be paid the arrear salary due to him from the date of suspension to date of judgment.

In the application, the first applicant was joined by the second and third applicants as co-applicants. The second applicant is a voter in the area falling under the municipal jurisdiction of the second respondent. He is a councilor in the second respondent for ward 11. He joined in the application of the first applicant as an interested voter and to challenge the law under which the first applicant was suspended from office as being unconstitutional as it undermines the wishes of the electorate when an elected mayor is dismissed by a single person without consulting the electorate.

The third applicant, as its name suggests, is a voluntary association of the residents and ratepayers within the jurisdiction of the second respondent. It joined in the application to seek a similar declaration that the second applicant was seeking in having the matter referred in terms of s 24 of the Constitution of Zimbabwe to the Supreme Court sitting as a Constitutional Court.

The application was opposed.

2007 (1) ZLR p113

Makarau JP

At the hearing of the matter, the nature of the application was not specifically adverted to as the parties directly went into the merits of the application. I, equally to blame, did not seek the views of counsel on the exact nature of the application before me. I was, however, assured by counsel that I had to first determine the merits of the application and, if I could not grant the application as sought, I was then constrained by law to refer the dispute to the Supreme Court as a constitutional issue. Both counsel were of the shared view that the issue raised in the applicant's papers was not frivolous and vexatious. By the strength of their joint submissions, they were strongly dissuading me from making a finding to the contrary.

It appears to me that the application before me is for review although the grounds for review were not set out on the face of the application as required by the provisions of Order 33 of the High Court Rules. The second and third applicants have joined in the application as co-applicants to co-raise or support the request that I refer the dispute to the Supreme Court as a constitutional issue. They did not file independent applications seeking this order. The importance of this finding, in my view, lies in that should I find that the application of review is not properly before me, then the relief sought by the second and third applicant cannot survive an independent life.

As stated above, the decision to suspend the first applicant as the Executive Mayor of the second respondent was communicated to him by letter dated 29 December 2005. The first applicant accepts in his founding affidavit that he was suspended from duty with effect from the date of the letter.

In terms of the rules, the first applicant must have filed his application for review within eight weeks of the date of the decision. According to my calculation, the eight week period expired around 19 February 2006. The application before me was only filed on 6 March 2006, a week or two after the expiration of the eight week period.

The respondents did not specifically object to the late filing of the review application. The issue was not raised in any of their papers or in the applicants' papers. No application for condonation was therefore made before me.

The issue that has exercised my mind in this matter is whether the court can *mero motu* grant extension of the time within which an application for review may be filed. It is common cause that the court may extend this period on application and upon good cause being shown.¹ The issue before me is whether the court, upon noticing that the application has not been brought within the time limit as set out in the rules, can extend the period *mero motu*

2007 (1) ZLR p114

Makarau JP

and proceed to deal with the merits of the matter. I think not. In my view, “good ^A cause shown”, as stated in r 259 means, good cause shown by the applicant either in a written application or orally or with the consent of the opposing party. It cannot mean good cause as seen by the court *mero motu*.

I have no doubt that had the issue been raised at the beginning of the hearing, the parties may have shown good cause for the extension of the time period. ^B This was however not done.

I have further considered whether I can employ the provisions of r 4C to condone the departure from the rules by the applicant in the interests of justice and in view of the fact that the parties argued the merits of the matter before me without making reference to the technical details of the application. The option appeared to me more attractive as r 4C does not seem to require that ^C an application be made before the court can condone a departure from the rules. I however do not wish to make a definitive finding on this aspect of the rule as the issue is not before me. I however hesitated to use r 4C on the narrow basis that the respondents may wish to take advantage of the technical lapse by the applicant and, were I to grant condonation *mero motu*, I would ^D effectively rob them of that chance without affording them an opportunity to be heard.

As stated above, there is only one application before me. Thus, my finding that the review application is not properly before me precludes me from referring the dispute between the parties to the Supreme Court as a constitutional issue on behalf of the second and third applicants as they do ^E not have independent applications before the court.

On the basis of the above, I must dismiss the application. In view of the fact that I am dismissing the application on a ground that was not raised on behalf of the respondents, I will not make an order as to costs in their favour.

In the result, I make the following order: ^F

1. The application is dismissed.
2. Each party shall bear its own costs.

Honey & Blankernberg, applicants’ legal practitioners

Civil Division of the Attorney-General’s Office, respondents’ legal practitioners ^G

1 Rule 259 of the High Court Rules 1971.

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/CHIDEYA v MAKWAVARARA & ORS 2007 (1) ZLR 115 (H)

CHIDEYA v MAKWAVARARA & ORS 2007 (1) ZLR 115 (H)

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Citation	2007 (1) ZLR 115 (H)
Case No	Judgment No. HH-13-07
Court	High Court, Harare
Judge	Kamocha J
Heard	2 November 2006
Judgment	2 March 2007

Counsel	<i>S Moyo</i> , for the applicant <i>H Zhou</i> , for the first to twelfth respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Local government — *councillors* — *suspension of councillors by Minister c of Local Government* — *appointment by Minister of commissioners to run affairs of city* — *limited nature of such appointment* — *re-appointment of councillors unlawful* — *legislation not meant to allow Minister to avoid having a general election of councillors*

Practice and procedure — *stare decisis* — *obiter dicta* — *what are* — *when d a statement may be said to be obiter* — *persuasive nature of such statements*

Headnote

The applicant was purportedly suspended from his post with the Harare City Council by the first respondent. She was a commissioner, one of a number appointed by the Minister of Local Government to run the affairs of the *E* city after he had suspended the elected mayor and councillors. She also purported to appoint a committee of inquiry into the applicant's suspension. The commissioners had been re-appointed for a fourth consecutive time by the Minister. The applicant sought an order setting aside his suspension and the appointment of the committee of inquiry *F* on the grounds that the appointment was unlawful, null, void and of no force and effect.

The main issues for decision were (a) whether or not the Minister could avoid having a general election of councillors by continually re-appointing the *G* commissioners; and (b) whether or not the judgment of the Supreme Court in *Stevenson v Minister of Local Govt & Ors* 2002 (1) ZLR 498 (S) *G* was *obiter dictum*. That decision, like two decisions of the High Court, was to the effect that *s* 80 of the Urban Councils Act [*Chapter 29:15*], in terms of which the commissioners were appointed by the Minister, was not meant to be a vehicle for the postponement of a general election of councillors, nor to allow the Minister to continually re-appoint *H* commissioners.

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Kamocha *J*

Held, that the re-appointment of the commissioners was unlawful. *A*

Held, further, that the functions purportedly exercised by the first respondent were functions which could only be lawfully exercised by an elected mayor.

Held, further, that *obiter dicta* may be described as judges' opinions upon points of law which may not be necessary for the decision of the case. *B Obiter dicta*, even of the highest tribunal in the land, are not binding on any court, however humble, but if made by an eminent judge they are most valuable as reasoned statements, and they may very well influence the courts on a later occasion. In *Stevenson's* case, the pronouncements of the court were necessary for the issue to be decided.

Held, further, that in any event, even if the Supreme Court's reasoning was *c obiter*, the conclusion reached in that and the other cases was inescapable. The Minister cannot lawfully reappoint commissioners *ad infinitum*. Any such appointment is illegal.

Cases cited

Combined Harare Residents Assn & Anor v Registrar-General HH-210-01 *D*

Petersen v Jajbhay 1940 TPD 182

Stevenson v Min of Local Government & Ors 2002 (1) ZLR 498 (S)

Zvobgo v City of Harare & Anor 2005 (2) ZLR 164 (H)

Legislation considered ^E

Urban Councils Act [*Chapter 29:15*], s 80

Case information

S Moyo, for the applicant

H Zhou, for the first to twelfth respondents

Judgment

KAMOCHA J: The applicant in this matter is seeking a *declaratur* in the ^F following terms:

"It is declared and ordered that –

1. The reappointment of the commission running the affairs of the City of Harare to serve a fourth term was unlawful, null, void and of no force and effect ^G.
2. The appointment of an inquiring committee to inquire into the suspension of the applicant by the said commission was unlawful, null, void and of no force and effect.
3. The first respondent is not, at law, the Mayor of Harare and cannot, consequently, lawfully discharge any of the functions and exercise ^H

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Kamocha J

^A any of the statutory powers given to a mayor of a city or municipality by the Urban Councils Act [*Chapter 29:15*].

4. The purported suspension of the applicant by the first respondent, purporting to discharge the functions and exercise the powers of a mayor of Harare, was unlawful, null, void and of no force and effect.
5. The commission currently running the City of Harare does not have ^B any authority to make any decision adversely affecting the contractual rights, statutory rights and powers of the applicant in his position and capacity as Town Clerk of the City of Harare.
6. The first, twelfth and thirteenth respondents be and are hereby ordered to pay the costs of this application jointly and severally, the one paying, the others to be absolved."

^C The volume and coverage of the parties' papers in this matter, left me with the impression that the contentions of the parties generate more heat than light and may easily keep the vision of the real issues between them obscure to the impartial observer. However the main issues as perceived by this court are these:

- (a) ^D whether or not the Minister could avoid having a general election of councillors by continually re-appointing the commissioners; and
- (b) whether or not the judgment of the Supreme Court in *Stevenson v Minister of Local Govt & Ors* 2002 (1) ZLR 498 (S) was *obiter dictum*.

The applicant averred that the affairs of the City of Harare, in common with ^E the affairs of other cities, are, in terms of the Urban Councils Act [*Chapter 29:15*], meant to be run by an organ elected by residents and ratepayers of the city. There should be an elected council and elected mayor. He asserted that a commission consisting of the first to the eighth respondents which appointed the ninth to the eleventh respondents and on whose behalf the ninth to the eleventh respondents accepted a mandate to carry out an inquiry ^F into his suspension, had its lifespan extended on several occasions and was in fact in its fourth term.

The applicant further contended that the chairperson of a commission could not exercise the statutory powers of a mayor as there were only two ways in which the position of a mayor may be occupied, namely, by election to the ^G position or by the deputy mayor becoming mayor in the event of the mayor being unavailable to discharge his statutory functions for any reasons. Nevertheless, the first respondent purported to exercise the statutory powers of a mayor. She suspended the applicant exercising the powers of a mayor in terms of s 139 of the Urban Councils Act [*Chapter 29:15*] ("the Act"). The Commission was alleged to have appointed members of the inquiring committee ^H to inquire into his suspension. It was applicant's contention that the re-

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Kamocha J

appointment of the commissioners to serve a fourth term, and the appointment ^A of the inquiring committee to inquire into his conduct, were unlawful, null, void and of no force and effect.

Furthermore, the applicant contended that the chairperson of the Commission could not, in any event, exercise statutory suspension powers against him as she had a financial interest in his suspension arising from certain allegations ^B which he outlined, which, in my view, appear to be irrelevant in the main and would serve no useful purpose, except to cloud the issues to be determined. For instance, the allegations that the first respondent claimed accommodation and other expenses incurred by her and another person at Wild Geese Lodge, only 10 km away from her mayoral mansion provided to her as a residence, and that she made purchases of groceries and alcohol for consumption at her ^C residence at the expense of the City of Harare, *et cetera et cetera*, are, to say the least, irrelevant and would not assist the court in the resolution of this matter.

In arguing that the re-appointing of the Commission after the first period of six months was illegal, the applicant relied on decided cases of this court and ^D the Supreme Court – the highest court in the land.

I shall set out the relevant provisions of the Act *in extenso* before dealing with the cases concerned.

"80. Minister may appoint commissioners to act as council

(1) If at any time —

- (a) there are no councillors for a council area; or ^E
- (b) all the councillors for a council area have been suspended or imprisoned or are otherwise unable to exercise all or some of their functions as councillors;

the Minister may appoint one or more persons as commissioners, whether or not such persons are qualified through residence or ownership of ^F property to become councillors, to act as the council in accordance with this section.

(2) ...

(3) A commissioner appointed in terms of subsection (1) shall hold office during the pleasure of the Minister, *but his office shall terminate* —

- (a) as soon as there are any councillors for the council who are able ^G to exercise all their functions as councillors; or
- (b) *six months after the date of his appointment;*

whichever occurs sooner: ^H

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Kamocha J

^A Provided that, if the period of six months expires within three months before the date of the next succeeding general election, the commissioner shall continue to hold office until such general election.

(4) Before the termination of office of a commissioner appointed in terms of subsection (1) otherwise than at a general election or in the circumstances referred to in paragraph (a) of subsection (3), the commissioner shall cause ^B an election to be held on such date as may be fixed by the commissioner to fill the vacancies on the council as if they were special vacancies.

(5) If the Minister is satisfied that, after the termination of the office of a commissioner appointed in terms of subsection (1), there will be no councillors for the council area who shall be able to exercise all their functions, the Minister may re-appoint the commissioner in terms of ^C subsection (1)" (my emphasis).

The above provisions of s 80 of the Act have been the subject of judicial interpretation. In *Combined Harare Residents Assn & Anor v Registrar-General* HH- 210-01, Hungwe J observed at p 9 of the cyclostyled judgment that:

" ^D The matter which gave urgency at the inception of this application, at least from the papers, was that the term of office of the current commissioners expires at the end of December 2001. There is a real danger that should there be no duly elected mayor in office by 31 December 2001, then the City of Harare will grind to a halt as it will not be legally able to expend any money for any purpose. This fear arises from the fact that the Minister ^E cannot lawfully re-appoint commissioners *ad infinitum*. Any such re-appointment is illegal."

Before arriving at the above conclusions, the learned judge examined the provisions of the Electoral Act, in particular s 103 I (4)(b), at some length. He did the same with the provisions of s 80 of the Urban Councils Act and concluded that the first respondent was obliged to have fixed a date for the ^F council general elections for the City of Harare as soon as a vacancy was created in the City of

Harare. He went on to state that it followed, from an examination of the provisions of the law, that the appointment of councillors was meant to be a stop gap measure. It was never intended by the legislature to be used by the Minister to usurp the right of the electorate to elect a body of its choice to govern the local government activities in Harare.

g In terms of s 80(3) of the Act, the term of office of a commissioner expires as soon as there are councillors for the council who are able to exercise all functions, or six months after his appointment, or nine months if a general election is due within 180 days of the expiry of the six months. In the result, the learned judge rejected the argument advanced on behalf of the first, h second and third respondents. See pp 7 to 8 of the judgment.

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Kamocha J

Makarau J, as she then was, had this to say in the case of *Zvobgo v City A of Harare & Anor* 2005 (2) ZLR 164 (H):

"I agree that the re-appointment of the commission after the first six month period was not in accordance with the provisions of the Urban Councils Act and was therefore illegal. No useful purpose will be served by giving further reasons as to why the re-appointment of the commission offends against the provision of the Act over and above sentiments expressed by B Sandura JA and Hungwe J in cases cited above. Further, the parties to the dispute before me have properly, in my view, accepted this as representing the correct position at law."

The provisions of s 80 of the Act were considered by the Supreme Court in the *Stevenson case*, *supra*. After setting out the relevant provisions of s 80 c of the Urban Councils Act Sandura JA, with whom Ebrahim JA concurred, had this to say at 505B-506A:

"As already stated, s 103I of the Electoral Act provides that a general election of councillors shall be held in every fourth year on any day in the month of August fixed by the second respondent. When the Minister appointed the commissioners in March 1999 he must have been aware that d the next general election of councillors was due in August 1999. Since the appointment of the commissioners did not mean that the election was postponed, it should have been held in August 1999, on a date fixed by the second respondent in terms of s 103 I of the Electoral Act.

In any event, in terms of s 80(4) of the Urban Councils Act, before the termination of office of a commissioner, the commissioner is obliged to e cause an election to be held on such date as he may fix to fill the vacancies on the council as if they were special vacancies. However, they did not do so

In my view, the first respondent, being the Minister to whom the President assigned the administration of the Urban Councils Act, should have ensured that the commissioners whom he had appointed carried out their f obligation to cause an election to be held before their term of office expired in September 1999.

Having said that, it is clear beyond doubt that s 80(5) of the Urban Councils Act, in terms of which the commissioners were re-appointed, on two or three occasions, was not meant to be a vehicle for the postponement of a general election of councillors. In fact, the re-appointment of the g commissioners did not in any way whatsoever affect the legal obligation to hold a general election of councillors every fourth year.

I say so because there is no provision in the Electoral Act or the Urban Councils Act which states that, once commissioners are appointed or re-appointed, any general election of councillors which was due is postponed indefinitely. h

2007 (1) ZLR p121

Kamocha J

A Consequently, the Minister could not avoid having a general election of councillors by continually re-appointing the commissioners. In my view, s 80(5) of the Urban Councils Act was not enacted for that purpose. The power given to the Minister by that section was intended for use, as a temporary measure; during the period preceding the holding of elections as required by the Electoral Act. The re-appointment of the commissioners b were, therefore, unlawful."

As mentioned at the beginning of the above passage, Ebrahim JA concurred. Ziyambi JA, who dissented on the issue of *locus standi*, did not indicate her stance on this particular point. Even if it is assumed that she dissented on that point as well, that would not change anything since the judgment of the majority carries the day.

c The respondents contended that the judgment of the court was *obiter dictum*. It therefore did not bind any lower court. They sought to persuade this court to find accordingly and thereafter deal with

the matter as the court saw fit. *Wille's Principles of South African Law* 7ed by J T R Gibson at p 8 describes *obiter dictum* as follows:

"In the course of his judgment, a judge sometimes expresses his opinion ^D upon a point of law which is not necessary for the decision of the case; such an expression is termed an *obiter dictum*. *Obiter dicta*, even of the highest tribunal in the land, are not binding on any court, however humble, but if made by an eminent judge they are most valuable as reasoned statements, and they may very well influence the courts on a later occasion."

^EIn *Petersen v Jajbhay* 1940 TPD 182 at pp 185, Schreiner J (as he then was) had this to say:

"I come now to the argument relating to the remarks made by the Chief Justice and Watermeyer J in *Jajbhay v Cassim*. It is contended that those expressions of opinion were *obiter dicta* and that I should examine ^F the whole question afresh in the light of the actual decision given in that case. Now, there is no doubt that *obiter dicta*, however weighty, are not entitled to be regarded as binding upon any court, however humble it might be. An inferior court – a magistrate's court – is entitled to disagree with an *obiter dictum* in the Appellate Division or in the Privy Council. And indeed, if a magistrate holds a clear view of the wrongness of such ^G a *dictum*, it is his duty, if there are no actual decisions binding him, to give effect to the view he holds."

In the *Stevenson* case, *supra*, Sandura JA first dealt with the issue of *locus standi* and, after determining it, the learned Judge of Appeal proceeded to determine the next issue which was whether or not the first and second respondent should be ordered to hold mayoral and council elections within ^H sixty days from the date of the order, and setting aside the appointments of

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Kamocha J

the commissioner, who where running the affairs of the City of Harare. The final ^A issue to be determined was whether the Minister could avoid having a general election of councillors by continually re-appointing the commissioners. The learned Judge of Appeal's determination was that the re-appointments of the commissioners were, therefore, unlawful.

The respondents contended that, since the learned judge of appeal arrived at ^B that conclusion without having been favoured with the benefit of hearing full argument on the issue, his conclusion was therefore *obiter dictum*. I have had the benefit of listening to both counsel on the same issue and have come to the same inescapable conclusion, without being bound by the Supreme Court's conclusion. The reasoning in the judgment, however, appeals me. That is why I quoted the passage with approval. The same applies to the ^C reasoning of Hungwe J from pp 6 - 9 of the cyclostyled judgment. There is, therefore, no need for me to repeat the same reasons over and over again.

Similarly, Makarau J (as she then was) rejected the argument as to avoidance of vacuum in the *Zvobgo* case, *supra*. See pp 9 - 10 of the judgment where the learned judge had this to say at paras 39 and 41:

"The vacuum sought to be filled by the application of the theory is, in my ^D view, fictional. It was created not by the absence of relevant domestic laws. Domestic remedies in the form of the express provisions of the Urban Councils Act abound on how to fill the alleged vacuum. A commission was allowed to remain in office past its legal mandate, thereby creating the fictional vacuum. It is my view that to legitimise the clearly illegal in the ^E circumstances of this matter would be to offend against the clear letter of the law as contained in the Urban Councils Act, and to usurp the functions of Parliament and seek to legislate from the bench by excusing that which Parliament has decreed illegal.

... It has been submitted by counsel for the first respondent that to unscramble the actions of the illegal commission is simply unimaginable. ^F This is true. Salaries have been paid. Rates have been levied and collected and services have been rendered by the illegal entity. While it is conceded that the illegal commission transacted business for and on behalf of the City of Harare under the genuine but mistaken belief that it had a lawful mandate to do so, the mistaken belief on the part of the commissioners is, in my view, no basis in law for this court to usurp the functions of ^G Parliament and validate that which Parliament has expressly decreed to be illegal. It is my further view that the function properly reposes in Parliament, if it is so minded and so advised, to retrospectively confer validity on the transactions enacted by the illegal commission and which were invalidly done in good faith. The function of this court in this matter ends with declaring the law. It cannot confer validity on illegal acts on the basis that ^H has been alleged."

2007 (1) ZLR p123

Kamocha J

A These sentiments appeal to me and I respectfully associate myself with them.

Turning to the issue of whether the pronouncement by Sandura JA was *obiter dictum*, it seems to me that it may not have been *obiter dictum*, since *obiter dictum* are described as judges' opinions upon points of law which may not be necessary for the decision of the case. *In casu*, the pronouncement of the learned Judge of Appeal was necessary for the issue to be decided. The B Supreme Court had to determine the application which had been filed in this court in the light of the delay to deal with the application in this court. It accordingly determined the issues which were matters of law. In any event, assuming for a while that the learned Judge of Appeal's conclusion was *obiter dictum*, it is highly unlikely that, if the provisions of s 80 of the Urban Councils C Act were to be argued once more in the Supreme Court, a different conclusion would be arrived at.

In the light of the foregoing the application succeeds. I would therefore grant it in terms of the draft.

D Scanlen & Holderness, applicant's legal practitioners

Manase & Manase, respondents' legal practitioners

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Source:

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KANOYANGWA v MESSENGER OF COURT & ORS 2007 (1) ZLR 124 (S)

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Citation	2007 (1) ZLR 124 (S)
Case No	Judgment No. S-68-06
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Gwaunza JA
Heard	7 November 2006
Judgment	6 March 2007
Counsel	<i>O Takaendesa</i> , for the appellant <i>L Mazonde</i> , for the second respondent No appearance for the first, third and fourth respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Practice and procedure — execution — sale — setting aside of — sale confirmed but various irregularities attendant on sale — effect — whether equities nonetheless favoured bona fide buyer

Headnote

The appellant's house had been sold in execution of judgment. The sale took place in January 2002. The sale was confirmed and the second respondent **D** took transfer in July 2002. Five months later, the appellant applied to the High Court for the sale to be set aside, citing such irregularities as failure to advertise the sale in accordance with the rules of court and failure by the messenger of court and magistrate to send notices to the Secretary for Housing, as also required by the rules.

Held, that this was a situation where, on the one hand, there was a judgment **E** debtor who was aware of the impending sale of his property by public auction, even though some requisite pre-sale formalities concerning advertisement of, and the service of certain notices concerning, the sale, were not observed by the relevant officials. Against this, the sale had been successfully concluded and confirmed in accordance with the **F** relevant rules; the buyer in good faith took transfer of the property after duly paying the purchase price and other related charges; and the proceeds were paid to the judgment creditor. Additionally, these events had happened four years earlier. The appellant might, had he made a timeous objection to the sale and its confirmation, have been entitled to the relief that he sought, but in weighing his interests against those of **G** the respondents and a *bona fide* purchaser who had taken transfer of property after the sale had been properly confirmed, the equities clearly favoured the buyer. The appellant was to an extent the author of his own misfortune: the property was under attachment for at least one year, but he took no steps to avert its sale. After the sale, he did nothing to stop **H**

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Gwaunza JA

A its confirmation and subsequent transfer into the name of the second respondent.

Held, further, that the blatant disregard of the rules governing judicial sales, by the officers whose mandate it is to uphold the rules, could not be condoned as it would have the undesirable effect of bringing judicial sales into disrepute. In these circumstances, it would not be fair and just **B** to order the appellant to pay the costs of the other respondents except the second respondent's.

Cases referred to

Maparanyanga v Sheriff of the High Court & Ors 2003 (1) ZLR 325 (S)

c Morfopoulos v Zimbank Ltd & Ors 1996 (1) ZLR 626 (H)

Case information

O Takaendesa, for the appellant

L Mazonde, for the second respondent

No appearance for the first, third and fourth respondents

Judgment

D GWAUNZA JA: The appellant, in the court *a quo*, unsuccessfully sought an order setting aside the sale by public auction, of stand 110 Marlborough Township of Marlborough. The property in question, which, at the time of the sale, was registered in the appellant's name, had been attached in pursuance of a judgment obtained against the appellant and four others. The second **E** respondent, who was declared the highest bidder, in July 2002 took transfer of the property after the sale had been duly confirmed.

In December 2002 the appellant applied to the High Court to have the sale in execution set aside. His main grounds for seeking such an order were:

- (i) that he had not been served with a notice warning him of the sale, by the **F** first respondent;
- (ii) that the first respondent had failed to advertise the sale of the property in the manner prescribed by Order 26 r 7(6)(b) of the Magistrates Court (Civil) Rules 1980 (SI 290 of 1980); and
- (iii) that the first respondent had not sent notices to the magistrate, nor had the magistrate sent a notice to the Secretary of the Ministry responsible **G** for the administration of the Housing and Building Act [*Chapter 22:07*], concerning the attachment and proposed sale of the house, as required by Order 26 r 8(2) and (3) of the Magistrates Court (Civil) Rules.

The appellant argues on the basis of this, and on what he referred to as “a plethora of errors and omissions traceable to court officials”, that the sale was not properly conducted and should be set aside.

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Gwaunza JA

The court *a quo*, which was not swayed by the appellant’s contentions, found ^A that the appellant, who bore the burden of rebutting the inference of regularity in sales in execution, had failed to prove that the sale of the property had been improperly conducted.

In dismissing ground (i) referred to above, the court *a quo* found, “as a fact” that the appellant was aware that his property was going to be auctioned. ^B

I find no fault in the conclusion reached by the court *a quo* on this point.

According to the evidence before the court, the appellant was aware that a number of judgments had been entered against him, jointly and severally with three others. He knew as far back as January 2001 that the property in question had been advertised for a sale in execution. He did not aver that he and his co-debtors ^C had discharged any of the debts that had led to his property, and maybe others, being attached and advertised for sale by public auction. Therefore he must have remained aware of the real danger of his property being so sold. Specific evidence of his awareness of this particular sale is to be found in the letter dated 2 January 2002, copied to the appellant and referred to by the court *a quo*, in which an instruction was given by the first respondent to ^D the auctioneers to advertise, and conduct, the sale of the property on 25 January 2002.

After the property was sold to the second respondent, a letter was written by him to the appellant on 1 August 2002 giving him notice to vacate the property within 30 days. This was followed in September 2002 by an application for the appellant’s eviction from the property. The second respondent was by then ^E the registered owner of the property. These two letters clearly gave the lie to the appellant’s assertion in his founding affidavit that, until he was served with the application for his eviction, he was unaware of the attachment and subsequent sale of the property in question. It is evident that being thus aware of the sale, the applicant was lax in taking appropriate action to protect his ^F interests. His argument that he was not properly served with notice of the sale, in my view, comes rather late in the day. Such argument has, in any case, been effectively countered by the first respondent, who has taken refuge against the consequences of any inadvertence on his part, under r 4A(2) of Order 26 of the Magistrates Court (Civil) Rules. The rule indemnifies the messenger of court and condones any inadvertent failure by him to deliver a notice on the ^G judgment debtor, warning him of the date of the proposed execution of a warrant against his property. It reads as follows:

“An inadvertent failure by the messenger to deliver or leave a notice in terms of subrule (1) shall not invalidate any attachment, sale in execution or ejectment effected in accordance with a warrant.” ^H

2007 (1) ZLR p127

Gwaunza JA

^A The court *a quo* was, in the face of this evidence, quite correct in its conclusion that, despite his denials, the appellant was fully aware of the attachment and subsequent sale by public auction, of the property in question.

There is some merit, however, in the appellant’s assertion that the sale of the property was not properly advertised. No evidence has been placed before the court to show that such advertisement was indeed published. The ^B evidence could, for instance, have been a copy of the advertisement in question. The advertisement which, by his own admission, the first respondent relied on for his submission that the sale was properly advertised, clearly related to a different case to the one *in casu*, even though it advertised the sale of the same immovable property. However, the date on which that sale was ^C to take place was exactly a year earlier than that of the sale at hand. The first respondent does not explain why he would seek to rely on this old and incorrect advertisement when, by letter of 2 January 2002, he directed the auctioneers to advertise the sale of the property for 25 January 2002. In that letter, which, as indicated, was also copied to the appellant, the first respondent correctly cited UDC as the judgment creditor, the appellant and three others ^D as the judgment debtors, and the case numbers pertinent to the dispute in question. If the auctioneers complied with the request to advertise the sale of the property, they would therefore not have failed to set out the details given to them by the first respondent in that letter. Be that as it may, the fact

that the sale might have in fact been properly advertised can be inferred from the fact that on 25 January 2002 prospective buyers, among them the second respondent, attended the auction and bid for the property.

Against this background, the reliance by the first respondent on an outdated advertisement containing the wrong information remains somewhat of a mystery. The learned judge *a quo*, in spite of this anomaly, preferred the evidence of the first respondent over what he referred to as the appellant's " bald unsupported statement" to the effect that the property was not properly advertised. He stated that the appellant should have produced evidence showing that the sale was not properly advertised. There is, in my view, a degree of misdirection on the part of the court *a quo*. The appellant did tender proof to support his assertions. He attached to his founding affidavit an advertisement forwarded to him by the first respondent, which was tendered as proof of a proper advertisement of the sale of the property. The advertisement pertained to a different case altogether.

While inferences can be made to the contrary, I find the fact remains that no evidence was placed before the court to show that an advertisement relating specifically to the case at hand, and involving the parties *in casu*, was published. On the face of it, therefore, the first respondent disregarded the

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Gwaunza JA

provisions of the Magistrates Court Rules specifically requiring him to advertise the sale.

The appellant asserts in ground (iii) that the first respondent and the magistrate, respectively, disregarded subrules (2) and (3) of r 8 of Order 26 of the Magistrates Court Rules. Subrule (2) requires the messenger of the court, in the case where a dwelling house has been attached, to send written notification to the magistrate of the court from which the warrant of execution was issued, that the dwelling has been attached and is to be sold in execution. In turn, the magistrate to whom the notification is sent, is required by subrule (3) to "forthwith" send the same notification to the Secretary responsible for National Housing. Thereafter a response from the latter, as to whether or not he would pay the debt on behalf of the appellant, was to be awaited before the property was sold.

The appellant is correct in his assertion that the only correct reading of the first respondent's response is that it is possible he might have made mistakes but that such mistakes would not be deliberate. It is in this respect pertinent to consider the first respondent's response to these allegations, as it appears in his opposing affidavit:

"6 Ad para 17-18

Save to deny that there were irregularities, I have to state that notices were given, and where these were not, it was no (*sic*) deliberate and I would pray in aid Order 26 r 4A(2)."

As indicated earlier, the rule referred to by the first respondent relates to the service by him, on the judgment debtor, of a notice concerning the imminent sale of the property of the latter, by public auction. That being the case, the first respondent's attempt to hide behind this rule for his failure to send the notice in question to the magistrate, is clearly misplaced. In the face of his failure to tender proof that the notice in question was sent to the magistrate, the inference that no such notice was served, is inescapable. For her part, the magistrate, cited *in casu* as the fourth respondent, has tendered no evidence to show whether or not she received the notification in terms of r 8(2), nor whether she had then forwarded it to the Secretary for National Housing. The fourth respondent, in fact, did not file any opposing papers in this matter. Even though the learned trial judge considered the allegations by the appellant regarding non-compliance by the messenger and the magistrate with Order 26 rr 8(2) and (3) of the Magistrates Court Rules, he was not persuaded by the appellant's contentions and noted:

"These allegations were denied by the first respondent. He said there was no irregularity at all since the requisite notice was given. I am inclined to

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Gwaunza JA

A believe the messenger of court as he is an officer of the court who had no interest in the matter ..."

This reasoning I find is not sustainable on the evidence before the court. The messenger of court failed to adequately explain his failure to comply with r 8(2) of Order 26. The magistrate concerned did not make the effort to enlighten the court as to whether or not she received the notice in question, and forwarded it to the Secretary for National Housing. The provisions in question require that the notices be written and it should not have been difficult for the second and fourth respondents to obtain copies thereof (i.e. if the notices existed) and tender them to the court as evidence of compliance. Without satisfactory explanation, and in the absence of concrete evidence of the fact, it is difficult to see how the first respondent's evidence could have been preferred over that of the appellant. Clearly the appellant's averment of misdirection on the part of the court *a quo* has some merit.

The appellant urges this court to set aside the sale at hand, despite its confirmation, and transfer of the property to a third party having taken place, because "the rules of this court and administrative procedures governing judicial sales were flouted". He relies for this argument on *Maparanyanga v Sheriff of the High Court & Ors* 2003 (1) ZLR 325 (S) where a judicial sale was set aside on similar grounds. The court in that case noted that allowing the sale to stand in those circumstances would bring judicial sales into disrepute. While the sale in *Maparanyanga's* case *supra* was indeed set aside on the basis of blatant disregard of the rules for judicial sales, what distinguishes that case from the one at hand is the fact that *in casu*, there was no collusion between the Sheriff and the purchaser of the property, to disregard the rules in question. In the *Maparanyanga* case, the purchaser's *bona fides* was questionable. *In casu*, the appellant has in fact properly made the concession that the transfer of the property has taken place and that there is no imputation of irregular behaviour alleged against the purchaser, whose purchase was, admittedly, *bona fide*.

What presents itself in the final analysis is a situation where, on the one hand, there is a judgment debtor who was aware of the impending sale of his property by public auction, even though some requisite pre-sale formalities concerning advertisement of, and the service of certain notices concerning, the sale, were not observed by the relevant officials.

Against this, is the situation where:

- (i) the sale by public auction was successfully conducted and the highest bidder declared;
- (ii) the sale was then confirmed by the magistrate as required by the rules of the court;

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- (iii) the said highest bidder – the second respondent *in casu* – in good faith took transfer of the property after duly paying the purchase price and other related charges like auctioneers' fees, council rates and conveyancing fees; and
- (iv) the proceeds of the sale were paid to the judgment creditor, that is, UDC.

Added to all this, is the fact that the sale in question took place some three to four years ago.

Given the situation outlined above, the determination of this dispute, in my view, requires that the interests of the appellant on one side, be balanced against those of the respondents, on the other. In other words, the case must be determined on the basis of equities and balance of convenience. This is what I shall proceed to do.

While the appellant under other circumstances (for instance, a timeous objection to the sale and its confirmation), might have been entitled to the relief that he is seeking *in casu*, I find in the circumstances of this case that, in weighing his interests against those of the respondents and a *bona fide* purchaser who has taken transfer of property after the sale had been properly confirmed, the equities clearly favour a finding in favour of the second respondent.

While I do not in any way condone the disregard of clearly laid down rules for judicial sales by officers of the court, I am nevertheless moved to observe that the appellant was, to an extent, the author of his own misfortune. What is aptly noted by Gillespie J in *Morfopoulos v Zimbank Ltd & Ors* 1996 (1) ZLR 626 (H) at p 634D clearly applies to the appellant *in casu*:

"All too frequently, however, the debtor finds himself in an invidious position relating to the loss of his case precisely because of his own failure to address the problem efficiently at an early stage. Where his own tardiness or evasion has contributed to his problems, a debtor cannot hope to persuade a court that equitable relief is his due."

Despite being aware of the attachment of his property in execution, the appellant, on the evidence before the court, failed to speedily move to protect his interests. The property was under attachment for at least one year, yet he took no steps to avert its sale. After the sale, the appellant did nothing to stop its confirmation and subsequent transfer into the name of the second respondent.

As correctly argued for the second respondent, it is trite that the courts will not readily interfere with judicial sales in execution, in order to protect the efficacy of such sales, especially after confirmation and transfer. The sale itself vested in others — particularly the second respondent — rights that, after

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Gwaunza JA

A being exercised, would be difficult to reverse. Clearly, too much water has, as it were passed under the bridge.

Although it is my finding that the equities do not favour a finding in favour of the appellant, I find it necessary to stress the point that the court does not condone the blatant disregard of rules governing judicial sales, by the officers whose mandate is to uphold the rules. Such disregard does have the undesirable B effect, as correctly noted by the appellant, of bringing judicial sales into disrepute, and should be discouraged in the strongest terms. Given this circumstance, it would in my view not be fair and just to order the appellant to pay the costs (if any) of the other respondents except the second respondent's.

C In the result, I make the following order:

- (i) The appeal be and is hereby dismissed.
- (ii) The appellant shall pay only the costs of the second respondent.

D SANDURA JA & ZIYAMBI JA concurred

Chinamasa, Mudimu, Chinongwenya & Dondo, appellant's legal practitioners

E *Matipano & Musimwa*, second respondent's legal practitioners.

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Source:

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ZIMBABWE MINING & SMELTING CO v ZAKEYO 2007 (1) ZLR 132 (S)

2007 (1) ZLR p132

Citation	2007 (1) ZLR 132 (S)
Case No	Judgment No. S-70-06
Court	Supreme Court Harare
Judge	Chidyausiku CJ, Cheda JA and Malaba JA
Heard	16 May 2006
Judgment	8 March 2007
Counsel	<i>E W W Morris</i> , for the appellant <i>S V Hwacha</i> , for the respondent

Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Agency — agent — duties of agents towards principal — fiduciary nature of — actual or potential conflicts of interest — duty to disclose such conflicts — rule of universal application.

Employment — code of conduct — offences under — theft — definition including unauthorised use — not necessary to prove common law theft or fraud ^D

Employment — employer — employee relationship — duty of employee to disclose conflict of interest to employer — what must be shown — inflexible nature of rule — potential conflict of duty and self-interest suffice to bring employee within the scope of the rule — not necessary that actual conflict of interests occurs ^E

Headnote

In cases of misconduct at workplaces under a code of conduct, duly authorized in terms of the Labour Act [*Chapter 28:01*], it does not matter what label one puts to the facts as long as they establish the conduct, which the parties intended to regulate. Where as in this case, the conduct was described as “theft”, it did not have to embody the essential ^F elements of the common law crime of theft. The parties were at liberty to agree upon a definition of misconduct wider than what would ordinarily be prescribed under common law.

The general rule regarding conflict of interest is that any person who is in a relationship where he has a duty to act in the best interests of the other ^G party is not allowed to put himself in a position where personal interest conflicts, or might conflict, with the interests of one whom he is bound to protect. A corporate body can only act by agents and it is the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. It is a rule of universal ^H

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Malaba JA

^A application that no-one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have a personal interest conflicting or which possibly may conflict with the interest of those whom he is bound to protect (*dicta per* Lord Cranworth LC in *Aberdeen Rly Co v Blaikie* (1854) 1 Macq 401 at 471, followed).

^B The duty to disclose does not depend upon proof of the existence of actual conflict of duty and self-interest only. It is sufficient for the purposes of the enforcement of the rule that there be a potential conflict of duty and self interest arising from the engagement entered into or about to be entered into by the employee. The application of the rule is not confined to situations where actual or potential conflict of interest is by reason of and during the actual execution or discharge of duty by the employee. ^C The rule has its roots in the general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest. As such it has been strictly applied by the courts. Once it is established that, without disclosure, an employee enters into an engagement with a party doing business with the employer where he has a personal interest which is ^D likely to conflict with the interests of his employer, no consideration is to be had of other matters raised as part of the defence to the charge of misconduct. The way to defeat a charge of misconduct is the defence that he entered into such an engagement with the knowledge and informed consent of the employer.

Cases cited ^E

Aberdeen Rly Co v Blaikie (1854) 1 Macq 401

Bray v Ford [1896] AC 44

Parker v McKenna (1874) 10 Ch 96

Phillips v Boardman [1967] AC 46

¶ *R v Sibiya* 1955 (4) SA 247 (A)

Regal (Hastings) Ltd v Gulliver & Ors [1942] 1 All ER 378 (HL)

Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168

Case information

E W W Morris, for the appellant

G S V Hwacha, for the respondent

Judgment

MALABA JA: This is an appeal from a judgment of the Labour Court dated 3 August 2004, by which an appeal by the respondent against the decision of the disciplinary hearing committee finding him guilty of two counts of misconduct under the appellant's code of conduct and ordering his dismissal from employment was upheld and the decision set aside with an order that he

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be reinstated without loss of salary and benefits, failing which damages be A paid by the appellant in lieu of reinstatement.

The respondent was employed by the appellant (hereinafter referred to as "ZIMASCO") as a General Manager responsible for the security and proper use of its assets as from 14 March 2003. He reported to the Chief Operations Officer. B

On 15 July 2003, the respondent was suspended from work and charged with two counts of misconduct under the ZIMASCO Code of Conduct Policy & Procedure No. 82 ("the Code"). He appeared before the disciplinary hearing committee on 22 July 2003 to answer the charges.

The offence with which the respondent was charged in count one arose from C an alleged breach of clause 3.1.1 of the Code, that is to say, applying property or assets belonging to ZIMASCO to wrong use for an unauthorised purpose. The allegation was that he used 30 bags of cement belonging to ZIMASCO to build his own house without having obtained authority to use the property for that purpose from senior management. Clause 3.1.4 of the Code provides that an employee found guilty of breaching clause 3.1.1 is liable to dismissal. D

The offence with which he was charged in the second count arose from an alleged breach of clause 32 of the Code, that is to say, committing an act or conduct inconsistent with the fulfilment of the express or implied conditions of a contract of employment. The allegation was that, without disclosure to ZIMASCO, the respondent entered into an engagement with an organisation doing business with ZIMASCO in which he had a personal interest which was E likely to give rise to a conflict with the discharge of his duty as an employee.

The circumstances which gave rise to count one are these.

ZIMASCO embarked on a project involving the building of a blocking plant at its premises in Kwekwe. The building contractor was JR Goddard Contracting (Pvt) Ltd, which sub-contracted part of the work to "Hippo Pools" ("the sub- contractor F"). ZIMASCO appointed its own project engineer to oversee the progress of the construction. The respondent assumed overall supervision of the project on 1 April 2003.

There was at the time an acute shortage of cement in the market. ZIMASCO gave the sub-contractor money with which to purchase the necessary G building material including cement. The cement was bought from Sino-Zimbabwe Cement Co. (Pvt) Ltd, delivered and stored at ZIMASCO's premises in Kwekwe. On 23 April 2003, the respondent, who knew that the cement had been delivered at the premises, instructed the project engineer, who was his subordinate, to ask the sub-contractor to release 30 bags of cement and have them delivered at a place in Kwekwe where he was building his own house.

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A The respondent said he would replace the cement when he got delivery of his order from Sino-Zimbabwe Cement Co (Pvt) Ltd.

The sub-contractor did as asked and released to the respondent 30 bags of cement which had been bought for use in building ZIMASCO's blocking plant. The respondent used the cement to build his own house. He did not advise senior management at ZIMASCO of what he had done, nor had he B obtained their authority to use the cement for the purpose of building a private residence. At the time the respondent was charged with theft, as defined under clause 3.1.1 of the Code he had not replaced the cement.

In answer to the charge of having applied property belonging to ZIMASCO to an unauthorised use, the respondent told the disciplinary hearing committee C that he thought that the cement belonged to "UNKI Mine" owned by the Anglo-American Corporation. He said that he did not think that the 30 bags of cement could be part of cement belonging to ZIMASCO. Whilst admitting the use to which he was alleged to have put the cement and that he had not sought and obtained authority from ZIMASCO to use it for the purpose of building his house, the respondent's defence was that he did not think the D cement belonged to ZIMASCO.

The disciplinary hearing committee rejected the respondent's story. He failed to give reasons why he thought cement belonging to Unki Mine was on ZIMASCO premises. It found as a fact that the respondent knew at the time he used the cement that it belonged to ZIMASCO. He was found guilty as E charged and dismissed from employment.

On appeal to the Labour Court, the respondent contended that the cement belonged to the sub-contractor. It was argued on his behalf that the cement was a personal loan from the sub-contractor. The learned President of the Labour Court ("the President") accepted the argument and determined that the act of misconduct charged against the respondent had not been proved. F He said:

"An offence in these circumstances could only arise if the allegation is that the appellant fraudulently induced the sub-contractor to part with the cement."

The relevant provisions of clause 3.1.1 of the Code read:

"THEFT OR FRAUD without in any way detracting from the ordinary G meaning of the words mean inducing or attempting to induce any person to perform any corrupt act; *applying or attempting to apply to a wrong use for any unauthorised purpose any funds, assets or property belonging to the company*" (my emphasis).

The ground of appeal was that the learned President misdirected himself in H failing to appreciate that in terms of the wide definition of theft under

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clause 3.1.1 the appellant sufficiently informed the respondent of the essential A elements of the misconduct he was charged with by alleging that he applied the 30 bags of cement belonging to it to an unauthorised use. The question for determination is therefore whether or not it was necessary in the circumstances for ZIMASCO to allege and prove that the cement was fraudulently taken by the respondent from the sub-contractor, to prove his B guilt under the charge of theft as defined in clause 3.1.1. Before I go on to express an opinion on the question, it is convenient to set out the circumstances which gave rise to the charge of misconduct in count two.

ZIMASCO entered into a contract of transport services with Hi-Tech (Pvt) Ltd ("Hi-Tech"), in terms of which the latter agreed to supply heavy duty trucks to move ore and other materials around the premises of ZIMASCO in Kwekwe C at fixed rates per hour for each vehicle used. The respondent knew that Hi-Tech was doing the transportation business with ZIMASCO. He nonetheless entered into a sub-contract with Hi-Tech, in terms of which the latter hired his Leyland Tipper truck for use in the discharge of its obligations to ZIMASCO. The respondent did not disclose to ZIMASCO that he had a personal interest in the transport services rendered by Hi-Tech. At one time, his Leyland Tipper D truck was involved in a collision with a truck belonging to ZIMASCO whilst it was being used to transport ore and other materials for his employer. When a subordinate approached him for information on the whereabouts of representatives of Hi-Tech with whom he intended to discuss the accident, the respondent told him to report to him any incident arising from the E operations of trucks belonging to Hi-Tech on ZIMASCO premises.

When it was discovered that the respondent had entered into the sub-contract with Hi-Tech, he was charged with conduct inconsistent with the fulfilment of the express or implied conditions of his

contract of employment, which was that during the period of employment and without the consent of ZIMASCO he was not to enter into an engagement with any party doing business with F the company where he had a personal interest which conflicted or might conflict with the discharge of his duty. Under clause 4.1 of the Code, "Conflict of interest", which was the substance of the misconduct charged against the respondent, is defined as:

"any personal, financial or family interest which might deter an officer or G employee from acting in the best interest of the company or might give rise to an influence on him that is not in the best interest of the company."

When the respondent appeared before the disciplinary hearing committee to answer the charge he contended that he did not think that the sub-contract he entered into with Hi-Tech was a conflict of interest situation. He said any member of the public could have entered into the sub-contract. He also argued H

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A that he had not taken part in the adjudication of the tender won by Hi-Tech.

Whilst the arguments advanced in defence of the conduct of the respondent were rejected by the disciplinary hearing committee, they were favourably received by the learned President. He said:

"In the present case, the appellant would be paid for the use of his truck by the operator who in turn is paid for transport services by the respondent. B I do not consider that there is a secret profit made by the appellant at the respondent's expense. The respondent is paying what it would presumably pay the operator if the latter was using his own truck. On the other hand, the appellant is being paid what any other operator would pay for the use of the appellant's truck. It is difficult to find a conflict between the appellant's duties and interests in this case. The use of his truck by the C operator does not interfere with execution of the appellant's duties because the appellant has merely hired out the truck. He is not driving the truck himself. The situation would have been different if the appellant were driving the truck during his working hours or if the appellant was involved in the adjudication of bids for the transport service. In that case, one might infer a conflict between his duty to fairly evaluate the operator's D bid and his interest (through the lease of his truck) in the operator winning the bidding. In this case, the appellant was not involved in the adjudication of the bids.

Accordingly, I find that there was no conflict of interest which would necessitate disclosure."

It is clear from the reasoning of the learned President that he was of the opinion E that the appellant had to prove the existence of an actual conflict of interest to establish the grounds of misconduct charged against the respondent. As a result, the ground of appeal was that the learned President misdirected himself in failing to appreciate that failure by the respondent to disclose a potential conflict of interest constituted the misconduct he was charged with.

F I now turn to determine the grounds of appeal, starting with count one. Upon a proper construction of clause 3.1.1, the conduct of "unauthorised use" of the 30 bags of cement belonging to ZIMASCO by the respondent to build his house would, if proved, constitute the offence of theft. The appellant described the misconduct with which the respondent was charged in the language which brought it within the meaning of the offence of theft given in G clause 3.1.1 of the Code. It was not necessary for ZIMASCO in proving that the respondent applied the cement belonging to it to an "unauthorised use" to have alleged that he had fraudulently taken the property from the sub-contractor.

The respondent understood the elements of the misconduct he was charged H with, in that when he appeared before the disciplinary hearing committee he

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did not contend that the charge was fatally defective for omitting to allege that A the 30 bags of cement had been taken from the sub-contractor by means of fraudulent inducement. The ground of his defence was that the cement which he admitted using to build his own house did not belong to ZIMASCO. He said the cement in question belonged to "UNKI Mine" owned by the Anglo-American Corporation. In other words, the respondent appreciated the fact B that, regardless of the manner in which he had taken the property from the sub-contractor, it was the use to which he put it, without having obtained the authority of ZIMASCO, which constituted the misconduct he was being charged with.

It is important to note the fact that the disciplinary hearing committee rejected the respondent's defence and found that he knew at the time he used the 30 c bags of cement to build his house that the property belonged to ZIMASCO, which had not authorised him to use it for that purpose. The finding was not appealed against.

In the absence of an appeal against the finding by the disciplinary hearing committee that the cement the respondent used to build his house belonged d to ZIMASCO, it was a serious misdirection on the part of the learned President to entertain and accept the contention that the cement belonged to the sub-contractor, who gave it to the respondent as a personal loan. In any case, if the cement belonged to the sub-contractor it would not have been necessary for ZIMASCO to allege that the respondent fraudulently induced him to part with the property. e

The finding that the cement belonged to the sub-contractor was fallacious. He clearly did not have a personal interest in the property. He held the property as a result of being a sub-contractor. The cement had been purchased with money disbursed by ZIMASCO for the purpose. It had been bought for the specific purpose of building its block plant. The sub-contractor held the cement for that specific purpose. He would have had no right to allow the f respondent to use the cement to build his own house without the authority of ZIMASCO.

If the sub-contractor held the 30 bags of cement as an agent of ZIMASCO there would have been no need to allege that the respondent fraudulently removed the property from his custody because ZIMASCO would not have granted g him the authority to use the cement to build his house.

What is clear from the record of evidence is that the facts of the misconduct with which the respondent was charged were established. The facts were that he used the 30 bags of cement belonging to ZIMASCO to build his own house without having obtained the authority of senior management of the company h

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Malaba JA

a to do so. He knew at the time that there was no authority from ZIMASCO to use the property for that purpose.

It seems to me it does not matter very much in cases of misconduct at workplaces what label one puts to the facts as long as they establish the conduct which the parties intended to regulate. The conduct in this case did not have to embody the essential elements of the common law crime of theft. b The parties were at liberty to agree, as they did, upon a definition of misconduct wider than what would ordinarily be prescribed under criminal law. Under common law, "unauthorised use" of property belonging to another with the intention of returning it would not constitute the offence of theft and yet under the ZIMASCO code of conduct, it constitutes theft: see *R v Sibiya* c 1955 (4) SA 247.

The court a quo should have found that the disciplinary hearing committee correctly held that the respondent applied the 30 bags of cement belonging to ZIMASCO to his own wrongful and unauthorised use in contravention of clause 3.1.1 of the Code.

On the second count, the general rule, the breach of which founded the ground d of misconduct with which the respondent was charged, is that any person who is in a relationship where he has a duty to act in the best interests of the other party is not allowed to put himself in a position where personal interest conflicts, or might conflict, with the interests of one whom he is bound to protect.

e The rule, which is said to be of universal application, was stated by Lord Cranworth LC in his celebrated speech in *Aberdeen Ry Co v Blaikie* (1854) 1 Macq 401 at p 471. In *Regal (Hastings) Ltd v Gulliver & Ors* [1942] 1 All ER 378 at p 382A, Viscount Sankey quoted with approval from the Lord Chancellor's speech where it was said:

" f A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no-one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting or which possibly may conflict with the interests of those g whom he is bound to protect."

See also *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177-178.

The duty to disclose does not depend upon proof of the existence of actual conflict of duty and self-interest only. It is sufficient for the purposes of ^H enforcement of the rule that there be a potential conflict of duty and self-

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interest arising from the engagement entered into or about to be entered into ^A by the employee.

In *Phipps v Boardman* [1967] 2 AC 46 at p 111, Lord Hodson said:

“... even if the possibility of conflict is present between personal interest and the fiduciary position the rule of equity must be applied.”

It follows that the application of the rule is not confined to situations where ^B actual or potential conflict of interests is by reason of and during the actual execution or discharge of duty by the employee. The rule has its roots in the general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest. As such it has been strictly applied by the courts.

Once it is established that, without disclosure, an employee entered into an ^C engagement with a party doing business with the employer where he has a personal interest which is likely to conflict with the interests of his employer no consideration is to be had of other matters raised as part of the defence to the charge of misconduct.

In *Regal (Hastings) Ltd v Gulliver supra*, Lord Wright quoted at p 393b the words of James LJ in *Parker v McKenna* (1874) 10 Ch 96 where he said: ^D

“... the rule is an inflexible rule and must be applied inexorably by this court which is not entitled in my judgment to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent, for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.” ^E

In *Bray v Ford* [1896] AC 44 at p 51, Lord Herschell said that an official in a senior management position, as the respondent was in this case, is held to the strict application of the positive rule on the duty to disclose actual or potential conflict of interest arising from an engagement he enters into with a party doing business with his employer out of “the consideration that, ^F human nature being what it is, there is danger, in such circumstances, of the person holding” such a position “being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect”.

I now apply these principles of law to the facts of this case. The learned President was of the opinion that ZIMASCO had to establish the existence of an actual conflict of duty and self-interest arising from the engagement the ^G respondent entered into with Hi-Tech. He was, with respect, clearly wrong, as it was sufficient for the purposes of the enforcement of the rule for ZIMASCO to show that there was a potential conflict of interest arising from the engagement. The comments by the learned President that the respondent had not taken part in the adjudication of tenders and was not driving the motor ^H

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Malaba JA

A vehicle himself were meant to show that there was no actual conflict of interest situation. It was not necessary that potential conflict of interest should arise in the course of actual execution of duty.

The respondent’s guilt lay in the mere fact that he entered into an engagement with a party doing business with ZIMASCO where he had a personal interest which was likely to conflict with the interest of the company. The only means ^B by which he could defeat the charge of misconduct in the circumstances was the defence that he entered into such an engagement with the knowledge and informed consent of the employer.

The matters considered by the learned President, on the basis of which the charge of misconduct was defeated, were of no relevance to the determination ^C of the respondent’s guilt. In other words it was immaterial that no prejudice was suffered by ZIMASCO, or no secret profit was made by the respondent or that any member of the public could have entered into the sub-contract with Hi-Tech.

The manner in which the respondent dealt with the report of the collision between his Leyland Tipper truck and the truck belonging to ZIMASCO ^D shows that he had put himself in a position in which personal interest might conflict with the interest of his employer. The interests of ZIMASCO required

that the accident be reported to the appropriate officer and that it be thoroughly investigated. In ordering a subordinate to report all incidents arising from the operations of the trucks supplied by Hi-Tech to him, the respondent was clearly swayed by considerations of personal interest rather than by duty.

The disciplinary hearing committee was correct when it found that the conduct of the respondent was inconsistent with the fulfilment of the express or implied conditions of his contract of employment. It cannot be said on the facts that it was wrong in holding that the respondent's misconduct was of a serious nature going to the root of the employer-employee relationship. The decision of the court *a quo* was therefore clearly wrong.

I would allow the appeal with costs, set aside the decision of the Labour Court on each count of misconduct and substitute in its place the following:

"The appeal from the decision of the disciplinary hearing committee on each count of misconduct is dismissed with costs."

CHIDYAUSIKU CJ & CHEDA JA concurred.

Gill, Godlonton and Gerrans, appellant's legal practitioners

H Dube, Manikai and Hwacha, respondent's legal practitioners

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S v DIKATHOLO 2006 (1) ZLR 142 (H)

2007 (1) ZLR p142

Citation	2006 (1) ZLR 142 (H)
Case No	Judgment No. HB-36-07
Court	High Court, Bulawayo
Judge	Cheda J and Ndou J
Heard	9 October 2006
Judgment	8 March 2007
Counsel	<i>S Mladzi</i> , for the applicant <i>Ms B Wozhele</i> , for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal procedure — trial — conduct of — interpreter — accused being denied use of interpreter conversant with his own language — trial not fair — fatal irregularity

Headnote

The appellant, a Botswana national, was charged with theft by false pretences. He pleaded not guilty. During the trial, he advised the court that he would ^d have been comfortable with a Tswana interpreter, but his request was turned down. The language employed by the magistrate and the tone of his questions was calculated to coerce the accused into accepting to use English, a language he was not proficient in.

Held, that all judicial officers are expected to adjudicate on trials with the cardinal rule in mind that every accused person is entitled to a fair trial. ^e The trial magistrate failed to accord the appellant a fair trial by depriving him of the right to conduct his defence in a language he understood best. This failure was a gross irregularity of ^f so gross a nature that it breached the appellant's constitutional right to a fair trial. The conviction should be set aside and the matter tried again before a different magistrate. ^f

Cases cited

S v Garande 2002 (1) ZLR 297 (H)

S v Naidoo 1962 (4) SA 348 (A)

S v Nyamayevu 1978 RLR 140 (G)

Case information

S Mlaudzi, for the applicant ^g

Ms B Wozhele, for the respondent

Judgment

CHEDA J: This is an appeal against both conviction and sentence.

The appellant, a Botswana national, was charged with theft by false pretences; he pleaded not guilty but was convicted and sentenced to seven years' ^h

2007 (1) ZLR p143

Cheda J

A imprisonment of which two years' imprisonment was suspended on condition he restituted the complainant and a further one year was suspended for five years on condition of good behaviour.

The brief facts are that the appellant entered into an agreement wherein he was to sell to the complainant a Mercedes Benz for \$1 900 000 000 (old currency). The complainant left for Botswana in order to collect the said motor vehicle ^b after the appellant had received the purchase price in Botswana.

On their way to collect the said motor vehicle, they were confronted by members of the Botswana Police who, on searching them, found that they were in possession of money, which money on close scrutiny turned out to be counterfeit.

^c The appellant was then arrested, tried, convicted and sentenced as indicated *supra*. At the trial, the appellant was not represented. He is a Botswana national and is therefore proficient in the Tswana language.

During the trial, he advised the court that he would have been comfortable with a Tswana interpreter, but his request was turned down.

^d On appeal, his legal practitioner, Mr *Mlaudzi*, attacked this denial of his right to a Tswana interpreter among other issues he raised. Some of the issues raised are on the merits. The issue of an interpreter is procedural and it is this aspect of the appeal which I would like to dwell on.

A criminal trial is a very rigorous procedure, as upon conviction may result ^e in incarceration thus depriving an accused of his liberty or at the worst his life. It is for that reason that the State through the prosecutor is burdened with the higher standard of proof beyond reasonable doubt. Further, it is the accused's constitutional right to receive a fair trial. Section 18(3)(b) of the Constitution of Zimbabwe states:

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

- (a) ...
- (b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged ..."

During the trial, the following exchanges between the court and the appellant G and later on, the prosecutor, took place.

"Your worship, is (*sic*) I am not happy about my English."

"About your? ... About my English can you please allow me to use Tswana there are some other word that are I hard for me to hear."

"Which word have you failed to hear? ... Some other words I have H (inaudible)?"

2007 (1) ZLR p144

Cheda J

"But we have been speaking fluently since morning. How did you A communicate with the complainant? Which language did you use and when you came here which language did you use, because you told us you were here last June? I mean, when you came to Zimbabwe in June last year which language were you using ..."

"The last time I came I was using Tswana."

"But everything was clear in the morning up to the afternoon what has B changed? ..."

"Some other words I cannot get the meaning."

"Other words like what? (Inaudible ...) I do not think you are being honest; you speak fluent English better than most of us. Yes, give me another reason not that reason, you are not being honest? ..." C

"I wanted to ask the complainant another question but I could not ask him because I did not know some other words to ask him."

"Where did you attain your education? ..."

"In Botswana."

"Up to what level, and you learn English there? ..." D

"Yes, I learnt English there."

"Mr. Prosecutor? ..."

"I really do not know your worship because even the communication between him and the police and everyone else and his long warned and caution statement were in English."

"You are honestly not being honest so proceed, because if there was any E problem we could have noticed that problem in the morning up to the time we adjourned, but there was no problem at all. You take a seat; this witness will give evidence. If you have any problem will hear of that problem later. May you please answer that question, do not avoid the question? ..."

"It is only that some other questions they are hard to me to say in English, F you find that sentence is hard for me to say it."

"Why would the complainant go to report to the police if the deal was about the printing of fake notes which is illegal? Why would he go to report himself to the police that he was involved in an illegal business of printing fake notes, do you have a reason? ..."

"I cannot answer it, it is hard to me; that is why I am saying some other G questions they are hard to me to say ..."

This is how the trial proceeded. The language employed by the magistrate and the tone of his questions was, in my view, calculated to whip the accused into accepting to use the language he was not proficient in. The reference to the use of the English language in Botswana has no relevance at all in this matter. H

2007 (1) ZLR p145

Cheda J

A One must remember that it is worse to appear in court in a foreign land. This can be exacerbated by the unfriendly attitude and underlying prejudice of the court. It is clear that the appellant had elected to use a language he understood best. This request was turned down. These courts have time without number emphasised the adherence by judicial officers to the principle of treating accused persons fairly. Their right to a fair trial is a constitutional right. See B S v *Garande* 2002 (1) ZLR 297 (H) at 304G where Ndou J remarked:

"It is a fundamental principle of our law and indeed of any civilised society, that an accused is entitled to a fair trial. The basic concept is that the accused must be fairly tried."

This is a true statement of our law and I completely associate myself with it. c All judicial officers are expected to adjudicate on trials with this cardinal rule in mind and its application is to be applied with absolute certainty. In view of what transpired, it is clear that the learned trial magistrate failed to accord the appellant a fair trial by depriving him of the right to conduct his trial in a language he understood best. This failure, therefore, is a gross irregularity of a material nature.

d There are two types of irregularities, one is that which is so gross in nature that it vitiates the trial, while the other is of lesser nature where the court of appeal is able to separate the bad from the good, and to consider the merits of the case, including any finding as to the credibility of witnesses.

This approach was laid down in *S v Naidoo* 1962 (4) SA 348 (A) and was quoted e with approval in *S v Nyamayevu* 1978 RLR 140 (G).

Therefore, this irregularity, is, in my view, of a gross nature as it breaches the appellant's constitutional right to a fair trial. In *Nyamayevu's* case *supra*, it was held that in such circumstances the conviction should be set aside.

I find that this irregularity is so gross that it vitiates the proceedings. In other f words, there is no trial worth mentioning under these circumstances. This is a case where as a result of the gross irregularities committed by the court, the proceedings should be set aside without reference to the merits.

Accordingly, the conviction and sentence are set aside and the matter is referred back for trial *de novo* before a different magistrate.

g Ndou J concurred.

Samp Mlaudzi and Partners, applicant's legal practitioners

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

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/MARCUSSEN & COCKSEGE v DZIKITI 2006 (1) ZLR 146 (S)

MARCUSSEN & COCKSEGE v DZIKITI 2006 (1) ZLR 146 (S)

2007 (1) ZLR p146

Citation	2006 (1) ZLR 146 (S)
Case No	Judgment No. S-72-06
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA and Malaba JA
Heard	21 November 2006
Judgment	19 March 2007
Counsel	<i>F Nyakabau</i> , for the appellant <i>C T Mantsebo</i> , for the respondent
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

Employment — *Labour Court — jurisdiction — court revising upwards amount of award previously granted — previous order not set aside or appealed against — court having no jurisdiction to do so*

Headnote

The respondent was granted a severance package by a retrenchment committee following the termination of his employment. An appeal by the ^D appellant, the respondent's employer, to the Labour Court failed. The appellant accepted the decision. The package was based on the salary prevailing at the time he was employed. No figures were specified; the package was expressed in terms of a number of months' salary. A sum based on the salary prevailing at the time that the retrenchment committee ^E made its recommendation was calculated. However, when the respondent applied to the Labour Court for execution of the judgment, he submitted a figure some 70 times higher, that being based on the inflation rate over that period. He did not consult the appellant about this figure. When the appellant disputed the figure, the Labour Court heard the matter and determined it in favour of the respondent. ^F

Held, that the Labour Court had no authority to do what it did. The matter had previously been resolved before the Labour Court by the Labour Court President. The amount to be paid had been set and accepted by the appellant. What the respondent did was a clear fraud as he purported to act on the order of the court when in fact that was not correct. There was no legal basis for issuing a fresh order when the previous order had not ^G been set aside or appealed against.

Case information

F Nyakabau, for the appellant

C T Mantsebo, for the respondent ^H

2007 (1) ZLR p147

Cheda JA

Judgment

^A CHEDA JA: A severance package dispute arose between the appellant ("the employer") and the respondent ("the employee"). The retrenchment committee resolved the matter by recommending a package in favour of the respondent. The appellant appealed to the Labour Court and, on 29 September 2003, the appeal was dismissed.

The appellant then accepted the decision (by the Labour Court) to pay what ^B was ordered by the retrenchment committee on 14 June 2001.

It is important to point out here that the accepted package did not have figures but only said four months' salary, two months' pay for every year worked, one month's notice, six months' medical aid payment and payment for all the leave days due. In figures this would result in the following payments to the ^C respondent based on the 2000 to 2001 rates:

4 months' salary severance package	<u>\$ 108 000</u>
2 months' salary x 31 years service	<u>\$ 1 674 000</u>
1 month's notice pay	<u>\$ 27 000</u>
Total	<u>\$ 1 809 000</u>

^D The above figures were adjusted by consent to \$1 863 000.

After this order, the respondent proceeded to make his own quantification of what he claimed was due to him. His total was \$57 288 866.96. He submitted this new total to the Registrar of the Labour Court in terms of s 92B of the Labour Act as a judgment of the High Court and sought execution. The respondent's quantification had neither been agreed nor discussed with the appellant. This raised a dispute which resulted in the parties going back to the Labour Court. When the matter was heard the respondent submitted that inflation should be taken into account and that \$1 in 2000 to 2001 is now worth \$70. The Labour Court accepted the submissions made by the respondent and concluded as follows:

" F Having stated the above, I turn to Mr *Mantsebo's* argument that \$1 in the period 2000 to 2001 is now worth \$70. This was not disputed by the employer's representative who failed to argue in the alternative just in case the court was not with it. The affidavit of Moses Chundu has thus remained uncontroverted and must stand.

In the result the employer is to pay the employee the retrenchment G package. The package to be paid is arrived at by multiplying the agreed sum of \$1 863 000 by 70 to cater for the fall in the value of money, the amount payable is thus \$130 410 000 to be paid together with interest at the prescribed rate calculated from the date of this order to the date of payment H in full."

2007 (1) ZLR p148

Cheda J

The Labour Court did not have any authority at all to do what it did. The matter A had been resolved before the Labour Court by one Labour Court President, Mrs Makamure. The amount to be paid had been set and accepted by the appellant. The reason why the matter went to the Labour Court again was because the respondent made his own quantification of what was to be paid and issued a writ for the amount set by himself, which differed from what the B court had ordered. Worse still, he never consulted, or discussed these figures with, the appellant. What the respondent did was a clear fraud as he purported to act on the order of the court when in fact that was not correct. There was no legal basis for issuing a fresh order when the previous order had not been set aside or appealed against.

In a letter dated 7 May 2004, the respondent stated as follows: C

"We confirm that we have now reached a settlement of the matter in terms of the order granted by His Lordship, by consent on 29 April 2004, save for the question of costs in respect of which it has further been agreed between the parties that this will be reserved pending the outcome of the application filed by the applicants before the Labour Court."

It is therefore clear that the Labour Court erred in revising the package that D was agreed to and taking inflation into account as it did.

Accordingly, the appeal succeeds. The respondent was dishonest in trying to get execution on figures which were not awarded him in the judgment. I see no reason why he should not pay the costs of the appeal. The judgment of the Labour Court dated 18 February 2004, is set aside and substituted by the E following:

- "1. The application is granted with costs.
2. The retrenchment package payable by the applicant to the respondent is fixed at \$1 863 000, together with interest thereon at the prescribed rate calculated from the date of retrenchment to date of payment." F

SANDURA JA & MALABA JA concurred.

Gill, Godlonton & Gerrans, appellant's legal practitioners

Mantsebo & Partners, respondent's legal practitioners G

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Source:

ASSOCIATION OF TRUST SCHOOLS & ORS v MINISTER OF EDUCATION & ANOR 2007 (1) ZLR 149 (H)**2007 (1) ZLR p149**

Citation	2007 (1) ZLR 149 (H)
Case No	Judgment No. HH-16-07
Court	High Court, Harare
Judge	Kudya J
Heard	15 March 2007
Judgment	21 March 2007
Counsel	Mrs S F V Jarvis, for the applicants C Muchenga, with him Mrs V Mabiza, for the respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

c Education — school — non-government school — fees which may be charged — whether approval of Secretary for Education required

Words and phrases — “any” (“charge any fee or levy”) — Education Act [Chapter 25:04] — s 21(1)(a) (before 2006 amendment)

Headnote

o S 21(1) of the Education Act [Chapter 25:04], before its amendment in May 2006, provided that the responsible authority for a non-government school should not charge any fee or levy, or increase any fee or levy by more than a prescribed amount or percentage, unless the fee or levy had been approved by the Secretary for Education. Member schools of the ^e applicant’s association had increased fees as they saw fit, there then being no prescribed amount or percentage. The schools used figures based on the consumer price index. The Secretary purported to change the fees, and the Minister also purported to re-set the fees. In view of statements made by the Minister, the applicants sought orders restraining the Minister from closing any schools run by the applicant or any member ^f thereof and from causing the arrest of any person by supposedly violating the Act. They also sought an order preventing the Minister from seizing any fees paid in excess of the figures he had laid down.

Held, that the old s 21(1)(a) of the Education Act [Chapter 25:04] was promulgated to cater for, firstly, the very first application made by a non- government school on its registration for its initial fee or levy or, ^g secondly, the introduction of a new class of fee or levy by an already registered non-government school. There was no legal obligation on the part of the responsible authorities for non-government schools to seek approval from the Secretary for Education for an increase of already existing fees and levies, as there was no prescribed percentage to ^h determine the increase allowable.

2007 (1) ZLR p150

Kudya J

Held, further, that the word “any” bears a wide meaning. In its natural and ordinary sense, unless restricted by the context, it is an indefinite term which includes all of the things to which it relates. In effect, it means “all” and can be substituted by such words as “whole”, “entire” and “every”.

Cases cited ^B

Hayne & Co v Kaffrarian Steam Mill Co Ltd 1914 AD 363

Tribac (Pvt) Ltd v Tobacco Mktg Bd 1996 (2) ZLR 52 (S)

Legislation considered

Education Act [*Chapter 25:04*], s 21 (before its amendment in 2006) ^c

Case information

Mrs *S F V Jarvis*, for the applicants

C Muchenga, with him Mrs *V Mabiza*, for the respondents

Judgment

KUDYA J: On 26 January 2007, in case No. HC 342/07, *Hlatshwayo J inter alia* ordered, by consent, the consolidation of case No. 5883/06 and 7624/06. ^D

THE PROVISIONAL ORDERS

CASE No. 5883/06

On 15 September 2006, the applicants filed an urgent chamber application in which they sought certain relief. A provisional order was granted on 19 ^E September 2006 by Hungwe J. It is couched in the following terms:

A. FINAL ORDER SOUGHT

The respondents shall show any cause why a final order should not be granted in the following terms:

- A1. That the interim relief granted herein is confirmed ^F.
- A2. [If the application is opposed] That those respondents who have opposed this application shall, jointly and severally, pay the applicants’ costs herein.

B INTERIM RELIEF GRANTED

- B1. That the respondents shall not request, instigate or effect the closure ^G of any non-government school that is being maintained by any applicant or by any member of the first applicant.
- B2. That the respondents shall not request, instigate or effect an arrest on a charge under s 21(7) of the Education Act [*Chapter 25:04*] as amended before any August 2006 Consumer Price Index [CPI] has been published by the Central Statistical Office and is known to the ^H

2007 (1) ZLR p151

Kudya J

A second respondent, the relevant pending application under s 21(1) made by an applicant or other member of the first applicant has been duly considered by the second respondent, and any consequential procedures thereafter in accordance with the law have been duly dealt with and determined in terms of the law.

- B3. That upon the issue of the aforesaid CPI, the second respondent shall ^B forthwith consider each and every such pending application and notify the responsible authority of his approval or other decision in accordance with the law without delay.

It is specified that, unless there is some supervening impossibility he shall send his approval or other reply to the responsible authority.

- (a) in respect of any school that offers day only or boarding only and ^C thus cannot be affected by subparas (b) and (c) of subs (2) of s 21 of the said Act within five working days of receiving

- the CPI as aforesaid; and
- (b) In respect of any school that offers both day and boarding options and may thus be affected by subparas (b) and (c) of subs (2) of s 21, within 5 working days of receiving the CPI as aforesaid.
- ▷ Any responsible authority may in addition make arrangement to collect a copy of its approval or other reply from the second respondent's office.
- B4. That should the second respondent decide not to approve of any application, he will provide his written reasons for such refusal to the appropriate responsible authority either with his reply advising it of € that or within 48 hours thereafter.
- B5. That this order shall remain binding pending any appeal, and will not be suspended merely by the noting of an appeal.

CASE No. 7624/06

⌘ On 14 December 2006, Bhunu J issued the following provisional order:

A. FINAL ORDER SOUGHT

The respondents shall show any cause why a final order should not be granted in the following terms:

- A1. The interim relief granted herein is hereby confirmed. ♂
- A2. The first respondent's announcement that he had set fees for ATS schools for term one 2007 is declared to be *ultra vires* and of no force or effect.
- A3. It is declared that any fee or money collected in excess of any fees or levies that may be lawfully determined in accordance with the Education Act [*Chapter 24:05*] as amended will only be reclaimable ♂ by or to be credited to the parent or other person who paid it.

2007 (1) ZLR p152

Kudya J

- A4. Accordingly, the respondents shall not seek to forfeit any of these ♀ for the benefit of the State.
- A5. Upon publication of the December Consumer Price Index and receipt of any applications for approval of fee increases for a school and any calculations referred to hereafter, the second respondent shall forthwith consider every such application and notify the responsible authority of his approval or other decision in accordance with the law ♂ without delay, and at most within 10 working days of such receipt.
- Any responsible authority may also make arrangements to collect a copy of its approval or other reply from the second respondent's office.
- A6. Should the second respondent decide not to approve any application, he will provide written reasons for his refusal to the appropriate ♂ responsible authority with his reply advising it of this, or within 48 hours thereafter.
- A7. [If the application is opposed] That those respondents who oppose this application shall, jointly and severally, pay the applicants' costs herein. ♂

B. INTERIM RELIEF GRANTED

It is hereby ordered by consent that:

- B1. The directive by the first respondent setting fees for ATS schools for term one be and is hereby set aside.
- B2. The second to the third applicants and other members of the first ♂ applicant shall submit any application for approval of increases in fees for term one of 2007 to the second respondent in accordance with s 21 of the Education Act with the available information before 31 December 2006, and the responsible authority shall then notify him of its own final calculation of its fees within two working days of the publication of the Consumer Price Index [CPI] for December 2006, by ⌘ the Central Statistics Office.
- B3. The first respondent is hereby restrained from unlawfully interfering with the functions and responsibilities of the second respondent by issuing directives, publicly purporting to set or prescribe fees, or otherwise interfering with or encouraging or permitting interference with the second respondent in the discharge of his duties under s 21, ♂ save unless and until the relevant responsible authority lodges an appeal with the first respondent in accordance with s 22 of the Education Act.

- B4. The respondent shall not request, instigate or effect any arrest on a charge under s 21(7) of the Education Act before publication of the CPI for November and December 2006, consideration by or any H

2007 (1) ZLR p153

Kudya J

- A application made by an applicant or other member of the first applicant under s 21(1) thereof, and the final determination of any consequential procedures thereafter in accordance with the law.
- B5. The first respondent is interdicted from seizing or purporting to confiscate to the State any fee or other money that may be paid by or for parents to any member of first applicant for fees or levies for B term one 2007.
- B5. This order shall remain binding pending any appeal and until set aside by a competent court and will not be suspended merely by noting an appeal.

THE FACTS

c The facts in both these cases are common cause.

The dispute between the parties can be traced to the confirmation on 17 January 2005 of the provisional order granted by Chiweshe J in the matter between *Christian Brothers College & Ors v Min of Education & Anor* case No. 3286/2004 at the Bulawayo High Court. It was therein declared, firstly, that there was not in existence a prescribed amount of fees as provided in s 21 of D the Education Act [Chapter 25:04] (hereinafter called the Act) relating to any increase in fees and levies and, secondly, that s 4 of the Education (Control of Fees and Levies) (Government and Non-Governmental Schools) Regulations 2003, SI 28A of 2003 was null and void and of no force or effect or, alternatively, remained of force and effect until the end of the third school term in 2003.

Matters came to a heard between the present parties in *Association of Trust E Schools & Ors v Permanent Secretary for Education* case No. 12682/2004. The provisional order that was granted therein by Makarau J, as she then was, was confirmed by Karwi J on 23 February 2005. Karwi J declared, firstly, that the Permanent Secretary acted *ultra vires* s 21 of the Education Act [Chapter 25:04] when he reset the fees that had been applied for by the F applicants instead of approving or rejecting them for these and other responsible authorities for non-government schools in terms of s 21(2); secondly, that the Minister did not act lawfully, reasonably and in a fair manner as required by ss 3 (1) and 3 (2) of the Administrative of Justice Act [Chapter 10:28] in resetting the fees without affording the affected parties an opportunity to be heard; and, thirdly, allowed all the appeals that had been lodged in terms G of s 22 of the Education Act.

In addition he restrained the closure of schools run by the applicants, confirmed the interim relief that had been granted by Makarau J and set aside s 4 of the Education (Control of Fees and Levies) (Government and Non-Governmental Schools) Regulations 2004 (SI 194A of 2004), as being of no G force or effect in regard to any fees payable to any applicant during 2005.

2007 (1) ZLR p154

Kudya J

The effect of the order by Karwi J which, in my view, was permissible under A the then existing subs (2) of s 22 of the Education Act before its repeal and substitution by the present s 22 effective from 12 May 2006, was simply that this court approved the fees and levies that the applicants submitted to the Permanent Secretary for 2005.

In September 2005, negotiations commenced between the present parties for B a new format for charging fees and levies by non-government schools. These were successfully concluded in November 2005. The concept of adopting the CPI, which had been proposed by the applicants in case No. 12682 of 2004, was accepted as the new formula for charging fees and levies by non-government schools.

The Minister, as indicated in the minutes of the inter-ministerial meeting which C was chaired by the Minister of Justice, produced by him as Annexure "D" to his opposing papers, understood the meaning of the use of the CPI in this new format. He was to repeat this same appreciation in the House of Assembly on 6 September 2006, when he stated thus: "Lastly, that Ministry approval of school fees proposals within the CPI, is automatic. But applications must be submitted to enable the Ministry to keep its finger on every school pulse". D

The November 2005 agreement drove the Permanent Secretary to issue, in his Circular Minute No. 1 of 2006 dated 4 January 2006, interim arrangement guidelines on the charging of school fees and levies for term one 2006, pending the promulgation of legislation incorporating the terms of the agreement. This circular was reproduced in a press release of 6 January 2006. It encouraged the use of the CPI in the calculation of fees and levies and set out the mathematical formula for doing so. Term one 2006 fees and levies were to be calculated using the CPI for term three 2005 which in turn would be based on the CPI for term two 2005. The Minister did not prescribe any fees or levies for 2006 as he was mandated to do by the then existing Education Act.

The applicants, on the other hand, understood the import of the November 2005 application of the CPI differently. They applied the year on year percentage rate of 585 per cent to the figures approved by this court in February 2005 in the confirmation proceedings in case No. 12682/2004 to arrive at the term one 2006 fees and levies. Fees for term two 2006 were set by the applicants without the approval of the Permanent Secretary, using the rate of increase in the CPI during term one of 142.65 per cent.

On 12 May 2006, the Education Amendment Act, 2006 (No. 2 of 2006) came into force. It gave specific legislative recognition of the use of CPI in the setting of fees and levies. The parties were agreed that its provisions could only be utilized in the calculation of term three 2006 fees and levies.

2007 (1) ZLR p155

Kudya J

On 26 June 2006, the Permanent Secretary issued Circular No. 7 of 2006 entitled "Policy on charging of school fees and levies in Government and Non-Government schools using the Consumer Price Index (CPI)." It set out the preamble, legal framework, mathematical formula and baseline period for which it would start from, documentation required and a remainder.

The applicants, in their respective submissions for approval, purportedly based on the agreed CPI, disagreed on the calculation of the baseline period and baseline figures and in the interpretation of s 21(2) of the Act with the Permanent Secretary.

On 6 September 2006 they were galvanized into action by the statement issued by the Minister in the House of Assembly, which they deigned to be inimical to their interests. They had the sad events of May 2004 to reflect on, hence the launch of the first of the present applications.

The second application was again a reaction to the Minister's attempt to usurp a function, from which he was disempowered by the Education Amendment Act of 2006, of prescribing fees and levies for non-government schools.

It dawned on the parties that the Permanent Secretary could not deal with the applications for term 1 of 2007 promptly "in accordance with the law" without the resolution of the legal disputes over the applicable baseline figure and the interpretation of s 21 of the Act.

THE AMENDMENT TO THE FINAL ORDER SOUGHT

The applicants seek a final order, in the terms of a draft final order which Mrs *Jarvis* handed from the bar, which incorporates in the first paragraph the confirmation of the two provisional orders and introduces two "new" paragraphs as paras 6 and 7. The justification advanced for introducing the new paragraphs, which I must say is correct, is that the issues they cover were raised in the second application in the Permanent Secretary's opposing affidavit. It is noteworthy that it was only the Minister who filed an opposing affidavit in the first matter. A notice of opposition was filed for both of them. While it would have been desirable for the Secretary to have filed an opposing affidavit, I do not consider his failure to do so fatal to his interest. As was properly noted by Mrs *Jarvis*, for the applicants, there is a convergence of ideas between the Minister and the Secretary whom, in any event the Minister decided to represent.

The respondents did not counter-claim against the applicants. It is therefore legally impracticable for me to make an order in the terms as prayed in the Secretary's opposing affidavit. It may be that if I do not find favour with the applicants' submissions on the points which are in contradistinction, then the implication will be that had the respondents properly counter-claimed, I may have made the orders they seek.

2007 (1) ZLR p156

Kudya J

THE ISSUES ^A

These are common cause. They revolve around the baseline figures and the interpretation of s 21 of the Education Act, both before and after the amendment of 12 May 2006. The resolution of these issues will determine whether all or some of the provisions of the provisional orders should be confirmed. Sub-paragraphs (l) and (m) of para 7 of the draft final order raise ^B the issue of how the Secretary should deal with the applications of those of the first applicant's members who offer both day schooling and boarding services whose applications for an increase that are before him are in excess of the percentage rates set out in sub-paras (b) and (c) of subs (2) of s 21 of the Act, as amended.

THE NATURE OF THE PROVISIONAL ORDERS ^C

It is agreed that they are interdicts. Those provisions which seek to bar certain conduct on the part of the Minister are prohibitory interdicts, while those which seek specific deliverables from the Secretary are mandatory interdicts.

In *Tribac (Pvt) Ltd v Tobacco Marketing Bd* 1996 (2) ZLR 52 (S) at 56B-D, Gubbay CJ stated as follows: ^D

"An application for a *mandamus* or 'mandatory interdict', as it is often termed, can only be granted if all the requisites of a prohibitory interdict are established. See *Lipschitz v Watrus* NO 1980 (1) SA 662 (T) at 673C-D; *Kaputuaza & Anor v Executive Committee of the Administration for the Hereros & Ors* 1984 (4) SA 295 (SWA) at 317E. These are:

1. A clear or definite right — this is a matter of substantive law. ^E
2. An injury actually committed or reasonably apprehended — an infringement of the right established and resultant prejudice.
3. The absence of a similar protection by an ordinary remedy. The alternative remedy must (a) be adequate in the circumstances; (b) be ordinary and reasonable; (c) be a legal remedy; and (d) grant similar ^F protection.

The *locus classicus* of the cases which sets out these criteria is, of course, *Setlogelo v Setlogelo* 1914 AD 221 AT 227. See also *PTC Pension Fund v Standard Chartered Merchant Bank, Zimbabwe Ltd & Anor* 1993 (1) ZLR 55 (H) at 63A-C."

It is not necessary for me to apply these three criteria to the prohibitory ^G interdicts sought against the Minister, as these are conceded by Mr *Muchenga*, for the respondents, both in his written and oral submissions. Suffice it to say that it is a matter of clear law, as demonstrated by the Act, that the Minister is not seized with the power or authority to set fees for the Association of Trust Schools as he purported to do for term one 2007. The same Act sets out the ^H

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A fate of any excess fees and levies. These can only be credited to the payee thereof and cannot be forfeited to the State.

The Secretary consents to the confirmation of paras 8, 9 and 10 of the amended final order which deal with the collection of his decision by any applicant, the provision of his reasons in writing within 48 hours in the event that he turns down any application, and together with the Minister that the order that I shall ^B make will remain binding until set aside on appeal and will not be suspended by the noting of an appeal.

The respondents challenge the confirmation of the two orders in certain respects. The onus to justify confirmation on a balance of probabilities, of course, rests on the applicants.

^C THE FIRST APPLICATION

The interim relief granted under B1 and B2 seeks to prohibit the closure of any non-government school that is maintained by any applicant or any member of the first applicant and any arrest of any of these for purportedly violating the Act. The arrest prohibition is predicated on two conditions. The first of ^D these is dependant on the release of the CPI for August 2006 and its receipt by the

Secretary. This was published on 18 September 2006 and on the date on which the interim relief was granted, that is, 19 September 2006, the Secretary was aware of it. This first condition must therefore fall away. The second condition relates to the consideration and determination of the fee and levy application by the Secretary in accordance with the law. This will be ^ε resolved together with B3 and B4 by a determination of the legal issues, already highlighted above.

THE SECOND APPLICATION

At the hearing, the parties agreed that the provisions for determination were paras 5, 6 and 7 as set out by the applicants in the draft document entitled ^ε FINAL ORDER, which fall into the same category as B2, B3 and B4 of the first application.

THE SUBMISSIONS MADE AT THE HEARING

Mrs *Jarvis*, for the applicants, and Mr *Muchenga*, for the respondents, were agreed that the key issue for determination revolved on the interpretation of ^g s 21 of the Act.

Before its amendment on 12 May 2006, it read as follows:

"21 Fees payable at non-Government schools

- (1) No responsible authority shall — ^h
 - (a) charge any fee or levy; or

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- (b) increase any fee or levy by more than the prescribed amount or ^a percentage in any period of twelve months;

in respect of any pupil attending a non-Government school, unless the fee or levy or increase therein, as the case may be, has been approved by the Secretary.

(2) Any responsible authority who wishes to obtain approval for any fee ^b or levy or increase therein in terms of subs (1) shall make application to the Secretary in writing, setting out the details of the proposed fee or levy increase therein, and the basis of calculation thereof."

After the amendment, it now reads:

"21 Fees and levies payable at non-Government schools

- (1) Subject to this subs, no responsible authority shall — ^c
 - (a) charge any fee or levy; or
 - (b) increase any fee or levy;

in respect of any pupil attending a non-Government school, unless it makes prior application therefor to the Secretary in writing, setting out the full details of the fee or levy or increase thereof, and the Secretary has ^d approved the fee or levy or the increase thereof, as the case may be.

(2) The Secretary shall approve any increase of fees or levies if the increase is sought in respect is sought in respect of the next term of the non-Government school concerned and the fees and levies —

- (a) do not exceed the percentage increase in the cost of living from the beginning to the end of the preceding term as indicated by the ^e Consumer Price Index published by the Central Statistics Office; and
- (b) for day school students who are provided with meals are not more than forty *per centum* of the fees or levies paid by boarding students; and
- (c) for day school students who are not provided with meals at the school are not more than thirty *per centum* of the fees or levies paid by ^f boarding students."

Mrs *Jarvis*, for the applicants, submitted that the applicants were not obliged to seek approval for the fees and levies that they imposed in term one and term two of 2006. She contended that they were not charging any new fees or levies but were merely increasing the old fees and levies. They had, so she ^g maintained, charged the fees and levies on registration only and any payments sought and made thereafter were increases. They therefore did not fall foul of the old ^s 21(1)(a). Rather their conduct was governed by the old ^s 21(1)(b). It was common cause that during the twelve month period of 2006, there was no prescribed amount or percentage that was set by the Minister. She therefore ^h

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A contended that the applicants could and did lawfully increase the fees and levies as they saw fit.

Mr *Muchenga*, for the respondents, on the other hand, submitted that the old s 21(1)(a) and (b) are framed in clear and unambiguous language, which obliged the Secretary to approve any fee or levy or any increase thereof. He contended that in the absence of a prescribed amount or percentage by the B Minister, there would be no increase that would take place because there would be no threshold to compare it with and any fee or levy that was imposed was therefore a charge. It was his further contention that the applicants did not therefore fall under the provisions of the old s 21(1)(b) but under the old s 21(1)(a) as they were charging "a fee or levy". They were thus, so he argued, C obliged in terms of the old s 21(2) to seek the Secretary's approval in writing. He maintained the view that the fee or levy charged was not governed by the date of registration of the non-Government school or by the introduction of a new fee or levy. He therefore contended that the fees and levies for term one and term two of 2006 that were charged by the applicants, were unlawful for want of the Secretary's approval.

D There is need to explore in detail the argument made by Mr *Muchenga* as to the meaning and effect of the old s 21(1)(a). The words "charge any fee or levy", at first blush, carry a wide meaning. In support of his contention that the word "any" carries a wide meaning he referred to *Hayne and Company v Kaffrarian Steam Mill Co (Pvt) Ltd* 1914 AD 363 at 371 where Innes JA held that the word E "any":

"In its natural and ordinary sense 'any' — unless restricted by the context — is an indefinite term which includes all of the things to which it relates. A qualification applied 'any' of a certain class must necessarily affect each and all of the class."

Hayne's case was premised on the construction of a broker's note which F formed the basis of the contract of the delivery of maize between the parties. The full remarks of Innes JA, which are instructive on how a court should construe the interpretation of written contracts as well as statutes, at pp 370-371, are couched in the following terms:

"No doubt the first expression is the more general one, but it is by no means uncommon to find in contracts or in statutes, a general statement cut down G by a proviso, in certain eventualities, to vanishing point. And we have to consider what in the present instance the operation of the qualifying clause is. That depends mainly upon the effect to be given to the word 'any.' In its natural and ordinary sense, 'any' — unless restricted by the context — is an indefinite term which includes all of the things to which H it relates. A qualification applied 'any' of a certain class must necessarily

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affect each and all of the class ... It is a question of the plain and ordinary A meaning of language, and the expression 'any of the maize ... in the 200 tons,' are here used, necessarily comprehends each and every ton in that quantity, and, therefore, includes in its scope the whole cargo."

And at p 372, the learned judge of appeal proceeded thus:

"To speak of the word 'any' as being restricted by the earlier provision is B incorrect; because the second clause qualifies the first, not the first the second. Any cutting down of the meaning of that word must be looked for not in the sentence which it qualifies but in the sentence where it occurs, and none has been inserted."

It is thus correct that the word any bears a wide meaning. It means "all" and can be substituted by such words as "whole", "entire" and "every". The full C remarks of Innes JA are instructive in that they encourage a contextual and purposive approach to interpretation of contracts as well as statutes. The context may whittle down the meaning of an originally wide word. Indeed, the words or phrases or clauses which cut down the wide meaning often come after it, and not before it. These could be in the form of other subsequent clauses or provisos in the same section. The purposive approach calls upon the judge D to give the meaning which is in tune with the reason behind the promulgation of the statute under consideration. It is this reason that assists in unraveling the mind of the lawmaker.

In the present matter, the word "any" relates to the nouns "fee and levy". On the other hand, the word "charge" is not a noun but a verb which may be substituted by such words as "demand", "request", "ask", or "debit". The E argument on behalf of the respondents is that, because the applicants were requesting for fees or levies during these two terms, they needed the Secretary's approval before they could effect the request. One has to relate this argument to the context of the

present matter to assess its validity. The context was one that was characterized by the absence of a prescribed amount [¶] or percentage in term one and two of 2006. The last prescribed amount had been the one sanctioned by this court for the 2005 calendar year, which can legally be deemed to be the Minister's by virtue of the confirmation of Makarau J's order wherein in clause 1.3 thereof "all appeals against any such decision in terms of s 22 of the Education Act [*Chapter 25:04*] must be allowed". The 2005 fees and levies were the last prescribed amounts. Now, the [¶] logical conclusion of Mr *Muchenga's* argument is that any fee or levy that was sought by the applicants, for these two terms of 2006, required approval even if the applicants had, for one reason or another, demanded the same amount of, or reduced, the fees or levies that were court sanctioned. In the context, thus postulated, to submit that the applicants required approval would do violence to the intention of the lawmaker in promulgating the old s 21(1)(a). [¶]

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[¶] After all, the purpose of promulgating that section was to prevent the responsible authorities from imposing exorbitant fees or levies. Those already approved would not require a second approval at the commencement of a new calendar year simply because the parents or guardians of the students were being asked to pay fees or levies for that fresh year. It must follow that what sought to be approved were not the old fees or levies but any increase from [¶] the old approved fees or levies. Thus, in my view, s 21(1)(b) qualified the seemingly wide meaning of s 21(1)(a) of the Act.

I find merit in the contention by the applicants that the old s 21(1)(a) in question was promulgated to cater for, firstly, the very first application made by a non-government school on its registration for its initial fee or levy or, secondly, [¶] the introduction of a new class of fee or levy by an already registered non-government school. Such a finding, in my view, is the only one which would give meaning to both the old ss 21(1) (a) and 21(1)(b) of the Act. It would have been unnecessary for the lawmaker to promulgate the old s 21(1)(b) as an increase of any fee or levy above the prescribed amount or percentage in any period of twelve months would still be a demand of any fee or levy. For the [¶] two sub-paragraphs to co-exist, the legislature must have intended that they bear different meanings. This view is further buttressed by the fact that an increase would only be an incremental or additional amount or percentage of an already existing, known and approved fee or levy. In any event the respondents were unable to counter the averment that since the inception of the old s 21(1)(a) in our law through the Education Act No. 5 of 1987 on 8 June [¶] 1986, as amended by the Education Amendment Act No. 26 of 1991, no approval of an existing fee or levy was ever sought by any non-government school or demanded by the Secretary. This is a further pointer to the fact that the respondents did not ascribe the meaning that they now advance in argument to this paragraph.

[¶] I therefore hold that there was no legal obligation, in terms of s 21(1)(a) of the Education Act then in force, on the part of the applicants to seek approval from the Secretary for the increase of the already existing fees and levies that they charged during term one and term two of 2006.

The applicants further contended that the provisions of para (b) of subs (1) of s 21 of the Act, before its amendment on 12 May 2006, did not apply to them [¶] when they increased the fees and levies during these two terms in question. This contention was based on the absence of any prescribed fee or levy in any period of twelve months, by the Minister. They therefore did not have any reference point which would trigger the application for approval. The correctness of this submission cannot be gainsaid. The whole purpose for [¶] prescription was to notify the non-government school of the limit beyond

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which they could not increase fees or levies without seeking authority. It is [¶] noteworthy that one of the major differences between the old and new s 21(1) of the Act lies in the requirement for approval for any level of increase in the new, while in the old approval could only be sought if the level of the increase exceeded the prescribed amount or percentage. There was therefore no need for the applicants to seek approval for an increase in the fees or levies from the Secretary, in the absence of prescription by the Minister. The applicants, [¶] faced with this situation, increased their fees by utilizing the CPI concept that had been agreed upon with the Minister in November 2005, for the first and second terms of 2006. That there was nothing illegal in using this formula, is clear from the attempt by the respondents to decree its use in the Secretary's Circular No. 1 of 2006. I

therefore hold that the increases that the applicants c imposed during these two terms of 2006 were lawful.

THE BASELINE FIGURE FOR TERM THREE OF 2006 AND TERM ONE OF 2007

The baseline figure against which the relevant percentage increase in the consumer price index should be applied is the next bone of contention between the parties. The parties are agreed on the applicable CPI increases of 142.65 d per cent and 159.55 per cent for term three 2006 and term one 2007. The formula for applying these percentages is found in the present s 21(2) of the Act which prescribes the new limit to the percentage increase in the cost of living from the beginning to the end of the preceding term as indicated by the CPI published by the Central Statistics Office. As long as the increase sought does e not exceed the CPI, the Secretary is mandated to give his approval. He has no power, in these circumstances, to reject or amend the fee or levy, save, of course, to correct arithmetical errors.

The respondents seek to use the baseline figure of the fees and levies set by this court in February 2005. They wrongly, in my view, contend that these are the last lawful amounts that were increased by the applicants. I have already f held that the increases of fees and levies by the applicants in 2006 were lawful. It must follow that the correct baseline figure for increasing the fees and levies for Term Three of 2006 is the application of the CPI in terms of s 21(2) of the Act. The appropriate figures would be those that are based on the term two calculations that were done by the applicants, provided the arithmetic is accurate. *A fortiori*, the baseline figure for term one of 2007 is based on the g accurate amounts calculated from the applicants' term three 2006 figures.

It is noteworthy that the respondents' papers reveal their failure to comprehend the meaning of paras (a), (b) and (c) of s 21(2) of the Act with reference to single mode day schools. They suggested that day schools should increase fees and levies at the rate of 40 per cent of the fees and levies of boarding schools. This h

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A was a fallacious suggestion which was sensibly abandoned in argument. For day only schools, para (a) of s 21(2) of the Act would apply. The cost centres of day schools are clearly different from those of boarding schools in certain significant respects but the incidence of our runaway inflation would hit them both equally. There would be no rational reason for basing the calculation of the fees and levies of day schools on those of boarding schools. The words " b the non-Government school concerned" and "at the school" clearly show that these three paragraphs are meant to apply to the same school which offers boarding facilities, meals to day school students and no meals to day school students.

In the event that the calculations for those non-government schools which c offer boarding facilities, and day schooling (with or without meals) exceed the 40 per cent and 30 per cent as mandated in para s (b) and (c) of s 21(2) of the Act, respectively, the applicants seek that the Secretary considers and approves them in terms of s 21(5) of the Act. Further that even though he may reserve his decision, he should not reject the applications until the validity of the ratios set out in the two paragraphs of s 21(2) in question have been d definitively determined by the courts. I see no basis for granting such wide relief in confirmation proceedings.

Section 21(4) of the Act directs those schools in applicants' shoes to make a prior application in writing to the Secretary setting out the full details of the increase and proof that it has been approved by the majority of not less than e twenty *per centum* of all the parents and guardians of the affected students at a meeting of the Schools Parents Assembly. The applicants have not shown on a balance of probabilities that they have made such a written application. Such an application must be consciously and deliberately made and cannot be left to the Secretary to presume that because the application for an increase in terms of subs (1)(b) as read with subs (2)(b) and/or (c) of s 21 of the Act has f failed, then he should automatically and of his own accord invoke the provisions of subs (4) and (5) of s 21 of the Act.

Again, s 21(5) permits the Secretary to consider and grant the application in excess of the ratios set out in s 21(2)(b) and (c). He must apply his mind to the four criteria there set in, always bearing in mind the need to give the affected schools the right to be heard, in accordance with s 3(1)(c) of the Administrative g Justice Act [Chapter 10:28], before he makes any adverse decision. He can approve

the increase, amend the figures to fall to the level of the ratio set in s 21(2) of the Act or reject the application. In the event that he gives an adverse decision, he is obliged to give his reasons for so doing.

It seems to me that the schools which did not comply with the provisions of s 21 (4) of the Act cannot receive this court's protection for such a conscious

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and deliberate failure to follow the clear precepts of the law. If, however, s 21(4) A was complied with then all I can direct the Secretary to do is to exercise his powers in terms of s 21 (5) of the Act. The applicants' papers do not show that the provisions of subs (4) and (5) of s 21 of the Act were complied with. Accordingly, I will decline to make an order which incorporates paras (l) and (m) of the draft final order, as it appears that no such application was lodged with the Secretary. B

CONCLUSION

The three requirements for a final interdict as set out in the *Tribac (Pvt) Ltd* case, *supra*, favour the applicants. In terms of the substantive law, the Secretary is obliged to approve their increases as they are in line with the appropriate rates of inflation for the preceding terms, respectively. They have C established that they have been injured by his failure to implement the letter and spirit of the law. It is not suggested that there is any suitable remedy outside the prohibitory and mandatory interdicts sought. I will therefore confirm the two provisional orders in terms of the draft final order, as amended.

COSTS D

These must follow the event.

DISPOSITION

It is hereby ordered that:

1. The interim relief granted in HC 5883/06 and in HC 7624 be and is hereby confirmed. E
2. The first respondent's announcement that he had set fees for ATS schools for term one of 2007, is declared to be *ultra vires* and of no force and effect.
3. It is declared that any fee or money collected in excess of any fees or levies that may be lawfully determined in accordance with the Education Act F [Chapter 25:05] as amended will only be reclaimable by or can only be credited to the parent or other person who paid it.
4. Accordingly, the respondents shall not seek to forfeit any of these for the benefit of the State.
5. Upon publication of December's Consumer Price Index and receipt of any G applications for approval of fee increases for a school and any calculations referred to hereafter, the second respondent shall forthwith consider every such application and notify the responsible authority of his approval or other decision in accordance with the law without delay, and at most, within 10 working days of such receipt or of this order, whichever is later. H

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6. The order sought by the respondents in para 2.20 of their opposing affidavit is not justified by the law and is hereby refused.
7. In deciding what is in accordance with the law, the second respondent shall ensure that he is guided by the following:
 - (a) Increases in fees by the responsible authorities without the approval of the second respondent before the amendment of the Education B Act [Chapter 25:04] by Act 2 of 2006 were not unlawful, as there was no prescribed maximum amount or percentage for such increases under s 21 as it stood at the time.
 - (b) The responsible authorities did not act unlawfully in voluntarily applying the increases in the Consumer Price Index to their fees to calculate their fee increases before the Education Amendment Act C came into effect.

- (c) The second respondent shall not use the figures he gave in Appendix H to his opposing affidavit as his baseline for applying cost of living increases in line with the in the Consumer Price Index since the Education Amendment Act came into effect.
- (d) ^D The second respondent shall use the fees that were charged for a school when the Education Amendment Act was brought into effect, that is, the fees charged in Term 2 of 2006, as his proper baseline.
- (e) The second respondent shall first deal with each application for his approval of a fee increase for term 3 of 2006, and then with the corresponding application for his approval of fee increases for Term ^E 1 of 2007, dealing with each in turn in accordance with the law
- (f) The second respondent will first establish whether each school offered parents and pupils a choice between day schooling and boarding schooling, or whether that particular school offered only one type of schooling and accordingly only had a fee for day scholars, or only had a fee for boarding scholars.
- (g) ^F If the particular school only had a fee for day scholars, or only had a fee for boarding scholars, the second respondent shall approve –
 - i. any increase sought for its fee for term 3 of 2006 that did not exceed 142.65 per cent of its baseline fee specified above; and then
 - ii. ^G any increase from that fee that is sought for term 1 of 2007 and does not exceed 159.55 per cent the increase in the cost of living shown by the percentage increase in the CPI from 1 September to 31 December 2006.
- (h) The second respondent shall not limit any increase for day schools ^H to a percentage of CPI's increase.

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- (i) The second respondent shall issue such approvals within the aforesaid ^A period of ten days or within any extension thereof accepted in writing by applicants or failing agreement, sought as a variation of this Order and granted by a judge of this court.
 - (j) If he has established that a school offered its parents and pupils a choice between boarding and day schooling, in considering its application second respondent may first determine whether the ratio ^B between the fees charged at that particular school for day scholars and boarders was in line with the relevant ratio stipulated in s 21(2)(b) or (c) of the Education Act [*Chapter 25:04*] as amended.
 - (k) If they were in accordance with the relevant ratio, the second respondent shall deal with them in accordance with para (f) above.
8. Any responsible authority may make arrangements to collect a copy of ^C its approval/section or other replies from the second respondent's office.
 9. Should the second respondent decide not to approve any application, he shall provide written reasons for his refusal to the appropriate responsible authority with his reply advising of this, within 48 hours thereafter.
 10. This order shall remain binding pending any appeal and until set aside by ^D a competent court, and will not be suspended merely by noting an appeal.
 11. The applicants shall deliver to the Commissioner of Police a copy of this order, for information purposes only.
 12. The respondents shall jointly and severally, the one paying the other to be absolved, pay the applicants' costs including the costs occasioned in ^E HC 342/07.

Atherstone and Cook, plaintiff's legal practitioners

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

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/MASIWA v MASIWA 2007 (1) ZLR 167 (S)

MASIWA v MASIWA 2007 (1) ZLR 167 (S)**2007 (1) ZLR p167**

Citation	2007 (1) ZLR 167 (S)
Case No	Judgment No. S-74-06
Court	Supreme Court, Harare
Judge	Ziyambi JA, Gwaunza JA and Garwe JA
Heard	27 November 2006
Judgment	22 March 2007
Counsel	Mrs B Mtetwa, for the appellant H Zhou, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

c **Family law** — husband and wife — divorce — property division — Matrimonial Causes Act [Chapter 5:13] — s 7 — indirect contributions of wife during subsistence of the marriage — what may be included therein — duration of marriage — effect of short duration of marriage on property division

Family law — husband and wife — divorce — property division — direct contribution of spouses — duty of court to set out the method of assessment — duty to have regard to direct contribution, even if minimal — need to have regard to contributions of spouses both direct and indirect

Family law — husband and wife — divorce — property division — mortgage repayments by one spouse — need to balance such payments against that spouse's exclusive occupation of the home after the separation of the parties

Family law — husband and wife — divorce — property division — sale of matrimonial home — normal practice is to claim a percentage — undesirability of awarding specific sum, particularly in an inflationary environment

Headnote

When considering indirect contributions for the purposes of s 7 of the Matrimonial Causes Act [Chapter 5:13], it is generally accepted that such contributions made, in particular, by a wife during marriage include taking care of the household chores, like cooking for and feeding the husband and family, washing, ironing and child minding.

In a divorce action, the sole issue for determination in the High Court was how the matrimonial home was to be apportioned between the parties. The home was jointly registered in the names of the parties but of the purchase price of \$600 000 the respondent (the husband) had paid the entire deposit of \$170 000. He had also paid the mortgage repayments

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from his income. The appellant (the wife) ran a catering business, A received a pension from her late first husband's estate and rentals from her erstwhile matrimonial home. For the purposes of the case, the trial court assessed the duration of the marriage at 2½ years. Having regard to s 7 of the Act, the appellant assessed her contributions to the matrimonial effort at 30 percent and submitted that she was entitled to B this percentage of the value of the matrimonial home.

The respondent, however, put her entitlement at a lower figure. The trial court awarded her the sum of \$340 000 as a one-off payment but without providing any insight as to how it assessed her direct contributions to the marriage. While accepting that she made indirect contributions, it did not indicate what they amounted to. Having regard to the value of the *c* house at the time of the trial court, the award of the trial amounted to 20 percent of the value thereof. Against this award, she appealed. It was pointed out on her behalf that the award did not take into account the fact that the respondent had enjoyed the benefit of staying in the matrimonial home after the breakup of the marriage.

Held, that in expressing her claim in percentage terms, the appellant acted *b* correctly. It accorded with practice in disputes of this nature and was particularly appropriate in a highly inflationary environment. The monetary award as pronounced by the trial court amounted to a misdirection, meriting interference on appeal.

Held, further, that in failing to provide any insight as to the method, if any, used to assess the appellant's share of the property based on her direct *e* contribution, this was also a misdirection. It was wrong to treat direct contributions as amounting to nothing merely because it is regarded as minimal. The trial court should have combined the assessed values of the two types of contribution made by the appellant so as to determine her entitlement. This would have accorded with the spirit of *s* 7 of the Act, *f* which refers to direct and indirect contributions.

Held, further, that the trial court was also in error in failing to take into account the extent to which the mortgage repayments by the respondent had been offset by the fact that appellant had not had any beneficial value of the jointly owned property since the parties separated. This should have been considered, together with her direct and indirect contributions to *g* the matrimonial home, in assessing her share.

Semble, that the shorter the marriage, the more important it is to have made direct contributions.

Held, further, that having regard to the short duration of the marriage, a 25 percent share of the matrimonial home would meet the justice of the case, taking into account the appellant's direct and indirect contributions and *h*

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a the fact that the respondent enjoyed the exclusive benefit of the property after the separation of the parties.

Case cited

Chapeyama v Chapeyama 2000 (2) ZLR 356 (S)

Legislation considered *b*

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

Case information

Mrs *B Mtetwa*, for the appellant

c *H Zhou*, for the respondent

Judgment

GWAUNZA JA: In this divorce action, the sole issue for determination in the High Court was how the matrimonial home was to be apportioned between the parties. At the end of the trial, the court *a quo* ordered the appellant *in casu* to transfer her half undivided share in the property, known as No. 49 Logan *b* Road, Hatfield, Harare, to the respondent. The court further ordered that the appellant be paid, as her share of the net value of the house, the amount of \$340 000. The appellant was aggrieved at the High Court's decision and has now appealed to this court.

It is common cause that the parties lived together under an unregistered *e* customary law union, from October 1996 to October 1998, when the two contracted a civil marriage. Thereafter the parties lived together for four months before they separated. For purposes of apportioning the matrimonial assets between the two in terms of *s* 7 of the Matrimonial Causes Act [*Chapter 5:13*],

the court *a quo* determined the matter, in my view, correctly, on the basis that the marriage had been of two and a half years' duration.

¶ It is also common cause that the matrimonial home in dispute was registered jointly in the names of the parties. The appellant does not dispute that the deposit of \$170 000 which formed part of the purchase price of the house, (\$600 000) was paid by the respondent. Nor does she deny that, thereafter, the mortgage repayments were met from his income. For her part, the appellant had other sources of income apart from her formal employment. She was in receipt ¶ of a pension from her late first husband's estate, received rentals from her former matrimonial home, and ran a catering business that brought in a modest income, the extent of which is, however, in dispute.

The appellant's assessment of her direct and indirect contribution to the matrimonial effort – therefore what she considered to be her rightful entitlement ¶ – was 30 per cent of the net value of the matrimonial home, while the

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respondent, at some point during the trial, submitted he might consider giving ¶ the appellant 20 per cent of the same value of the matrimonial home.

The net value of the property – which is not seriously disputed – was calculated by the court *a quo* to be \$1 700 000. Of this amount, the court awarded \$340 000 expressed, not as a percentage of the net value, but a one off payment, to the appellant. A simple calculation will show that this amount ¶ at that time, constituted 20 per cent of the value of the property.

The appellant on appeal takes issue with the monetary computation of her share on the basis:

- (a) that there was no scientific or determinable basis upon which it could be justified at law and in fact as it received no support from the analysis of ¶ the parties' evidence by the judge *a quo*;
- (b) that it was a clear "thumbsuck" which did not tell this court the percentage that the appellant was entitled to – which would make for easier determination, particularly where an appeal is noted; and
- (c) that therefore the award was incapable of enforcement at this stage as it is not known how it was arrived at, and the appeal court would be unable ¶ to enforce it in the absence of a known percentage.

Mr *Zhou*, for the respondent, argued in response that the suggestion that the award made to the appellant must be expressed in percentage terms is without basis. I am not persuaded by this contention. The appellant, in her counterclaim, did not claim a specific amount of money as her share of the value of the ¶ matrimonial home. She claimed a percentage of such value, that is, 30 per cent. Her claim was properly made, as it accorded with practice in disputes of this nature. It was also appropriate, particularly given the fact that property values in a highly inflationary environment like that obtaining in Zimbabwe, are constantly appreciating.

The appellant is also correct in her submission that the correctness of an award ¶ expressed in terms of a percentage of the value of the property would be easier to determine at the appeal stage than a specific figure, the basis of whose computation has not been explained. The learned judge *a quo* in his judgment noted that the appellant's claim was for a third of the value of the property in question, and yet he proceeded to award a share expressed in monetary terms, ¶ and not a percentage of the value. He gave no explanation for granting an award that differed in nature from the one prayed for.

The amount awarded to the appellant would have been of value to her only if she had accepted it and the respondent, for his part, had paid it soon after the judgment of the High Court was passed. As long as the possibility of either party appealing against the award existed, however, the monetary award was, ¶

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Gwaunza JA

¶ for a number of reasons, inappropriate. In addition to high inflation having greatly eroded the value of the award, changes effected to the Zimbabwe currency in 2005 have rendered the amount incapable of conversion to a rate in value that would equate to the \$340 000 of February 2001 (i.e. the judgment date). Also, while this amount was 20 per cent of the value of the property then,

today the same amount would constitute a very insignificant percentage of ^b the current market value of the matrimonial home.

Clearly, therefore, there is merit in the appellant's contention that the award as pronounced by the court *a quo* was a misdirection meriting interference by this court.

The appellant argues in addition that the court *a quo* failed to properly assess ^c the parties' incomes and obligations during the time they lived together. Further, that the court failed to take into account and consider that the respondent's payments towards the reduction of the mortgage were offset by the fact that the appellant had not had any beneficial value of the jointly owned property since their separation.

It is evident from the judgment of the court *a quo* that the learned judge ^d appreciated the need to consider both the appellant's direct and indirect contributions to the matrimonial effort, as required by ^s 7 of the Matrimonial Causes Act. Concerning the parties' direct contributions, the court made a mathematical calculation involving the parties' income and came to the conclusion that the appellant's direct contributions fell below the 30 per cent ^e claimed by her.

Despite the appellant's protestations at this finding, I do not find the calculation to be so off the mark as to amount to a misdirection. The respondent, even were one to accept the lower salary figures suggested by the appellant, clearly earned substantially more than the appellant's combined income from her salary, rentals, pension and catering business.

^f What, however, cannot be denied is the fact that the respondent also had other, not insubstantial, responsibilities besides contributing directly to the matrimonial effort. He had responsibility for the maintenance of, and payment of, school fees for three of his children, all of whom were at boarding schools. These responsibilities could not have left him with sufficient disposable ^g income to take care of all the other expenses at home. Therefore, as the judge *a quo* correctly pointed out, someone, who could only have been the appellant, had to make up the difference. While acknowledging this fact, the learned judge *a quo* in his judgment did not follow it up with a finding as to his assessment of the appellant's share of direct contributions. All he observed was that such contribution was less than the 30 per cent sought by ^h the appellant.

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Gwaunza JA

In my view, this was a misdirection, inasmuch as it gave no insight into the ^a method, if any, used in assessing the appellant's share of the property based on her direct contributions.

As for indirect contributions, the learned judge does not indicate in his judgment what he considered and accepted to have been the indirect contribution made by the appellant to the matrimonial effort. He however ^b accepted that the appellant had made such contributions, and made the following order:

"... that the plaintiff (the respondent *in casu*) pay her the sum of \$340 000 for that share of her property (*sic*) on the basis that she has made during the short period of time they lived together, indirect contributions and therefore, is entitled to a share in that property." ^c

It has generally been accepted that the indirect contributions made, in particular, by a wife during marriage include taking care of household chores like cooking for and feeding the husband and the family, washing, ironing and child minding. Many studies have been conducted locally and internationally, and books written, about how this type of work is not only unappreciated, but undervalued as well. There is *in casu*, no reason to believe that the appellant's ^d reference to indirect contributions did not relate to this kind of work.

Looking again at the part of the order of the court *a quo* cited, above it would appear that in the final analysis the learned judge *a quo* determined the appellant's entitlement on the basis only of her indirect contributions. This was despite the court's acknowledgment of the fact that the appellant made ^e some direct contributions even though they fell short of 30 per cent.

In my view, this, again, was a misdirection. I am not satisfied a direct contribution counts for nothing when it comes to assessing the parties contribution, merely because it is regarded as minimal. To the extent that the appellant's claim was premised on both direct and indirect contributions, my ^f view is that the court *a quo* should have combined the assessed values of the two types of contribution made by the appellant, in order to determine her entitlement. This would

accord with the spirit of s 7 of the Matrimonial Causes Act which specifically refers to direct and indirect contributions.

I will now consider the other argument advanced by the appellant, that the court should also have considered, in assessing the appellant's share, that ^g the respondent solely enjoyed the benefit of staying in the matrimonial home in dispute, following the parties' separation. The court was referred by the appellant's counsel, Mrs Mtetwa, to *Chapeyama v MChapeyama* 2000 (2) ZLR 356 (S) at 177, where Sandura JA made the following comments:

"Whilst it is true that in March 1996 Valentine paid the sum of \$20 000 being ^h

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Gwaunza JA

^a the balance of the housing loan, the learned judge found that Valentine occupied the matrimonial home for about two and half years after Susan moved out in 1995. He concluded that the occupation of the matrimonial home by Valentine had the effect of setting off the sum of \$20 000 paid by Valentine. In the circumstances, the learned judge concluded that Susan was entitled to half of the value of the matrimonial home. I agree with the ^b judge's reasoning and conclusion reached."

The appellant urges this court to follow the reasoning in *Chapeyama's* case *supra* and find that the mortgage repayments by the respondent have been offset by the fact that the appellant had not had any beneficial value of the jointly owned property since their separation in January 1999.

I find this, on the evidence, to be a persuasive argument. The respondent has ^c indeed enjoyed residence in the disputed property for many years, to the exclusion of the appellant. This argument, as is evident from the record of proceedings in the court *a quo*, was advanced in that court. The learned trial judge, however, made no reference to it in his judgment and, considering the wording of the final part of the judgment – cited above – it is evident that it ^d had no influence on his assessment of the share that he awarded to the appellant.

I am persuaded that this factor should have been considered, together with what was proved to be the appellant's direct and indirect contributions to the matrimonial home, in assessing her share.

^e It is in fact the appellant's argument that these factors should combine to entitle her to 30 per cent of the net value of the matrimonial home. This would, in real terms, translate to 10 per cent more than what the court *a quo* awarded the appellant. Since I find this argument to be persuasive, I would not have hesitated to order accordingly had it not been for the one major factor that, in my view, militates against the appellant's claim, and that is the very short ^f duration of the marriage.

In considering matters concerning direct and indirect contributions in marriage, the question of the length of time during which such contributions were made is, in my view, pertinent. This is particularly so where, as *in casu*, one party's initial contribution far outweighed the other party's. In this case, the appellant made no direct contribution to the deposit and mortgage repayments. From ^g the evidence, her ability to match, both in cash and kind, the financial contribution made by the respondent, was undermined by two factors. These were, firstly, her relatively low income and, secondly and more seriously, the short duration of the marriage. Had the marriage endured longer than it did, there is no telling how much she might have been able to add to the value of ^h her contributions. I find, also that these two factors significantly affect the

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Gwaunza JA

extent of the benefit that she lost to the respondent due to his having ^a continued to reside in the matrimonial home after the separation. It would appear that the shorter the marriage, the more important it is to have made direct contributions.

When all is told, I am satisfied that a 25 per cent share of the matrimonial home, awarded to the appellant, would meet the justice of this case. This is after ^b taking into account the appellant's direct and indirect contributions, as well as the fact that the respondent enjoyed the benefit of the matrimonial home to the exclusion of the appellant after the parties' separation.

It is, in the result, ordered as follows:

1. The appeal be and is hereby allowed with costs. ^c
2. The judgment of the court *a quo* (except for the part relating to movable property) is set aside and substituted with the following –

- (i) The respondent is hereby awarded 75 per cent while the appellant is awarded 25 per cent, of the net value of the house situated at No. 49 Logan Road, Hatfield, Harare, as their sole and absolute property;
- (ii) The value of the said property shall be determined on the basis of a ^D valuation report prepared by an estate agent appointed by the chairman of the Estate Agents Council of Zimbabwe;
- (iii) The respondent shall pay to the appellant the 25 per cent share awarded to her within six weeks of the receipt by the respondent's legal practitioners, of the valuation report referred to in para (ii) ^E above; and
- (iv) Upon receipt of her 25 per cent share, the appellant shall take all steps necessary to effect transfer to the respondent, of her half undivided share in the property;
- (v) Should the respondent fail to pay to the appellant her 25 per cent as ^F specified in paragraph (iii) above, the property shall be sold to best advantage in the open market and the parties shall share the proceeds according to the percentages awarded to them in paragraph (i) above.

ZIYAMBI JA & GARWE JA concurred. ^G

Mtewa & Nyambirai, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners ^H

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/MUFAKOSE HOUSING CO-OPERATIVE SOCIETY v MAGOZORE 2007 (1) ZLR 175 (H)

MUFAKOSE HOUSING CO-OPERATIVE SOCIETY v MAGOZORE 2007 (1) ZLR 175 (H)

2007 (1) ZLR p175

Citation	2007 (1) ZLR 175 (H)
Case No	Judgment No. HH-17-07
Court	High Court, Harare
Judge	Makarau JP
Heard	2 November 2006
Judgment	28 March 2007
Counsel	<i>F Katsande</i> , for the applicant Respondent in default
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Contract — breach — remedies — specific performance — when should be ordered — court's discretion — effect of order would be to compel one person to associate with another against his will — specific performance refused

Headnote

▫ The applicant was a housing co-operative society set up with the objective of providing accommodation to its members. The respondent was a member of the applicant and had been allocated a stand for his occupation. Owing to a shortage of available housing, the applicant issued an instruction to the respondent that he should share the housing unit with ^ε another person, who was a stranger to him. He refused to do so, and the applicant sought an order compelling the respondent to open his accommodation to the person nominated by the society, failing which he would be served with a notice terminating his membership of and expelling him from the applicant.

Held, that although the applicant was a registered co-operative society, it ^ε was essentially a voluntary association and, in terms of legal relationships, the applicant and the respondent were bound to each other in terms of a contract. One of the terms of the contract was that the applicant would make rules for its members and the respondent as a member should abide by those rules. While this was a term to be expected as between the applicant and its members for the proper administration of the applicant, the rule made by the applicant to compel its members to share ^ε accommodation against their will and with persons selected by the applicant was not enforceable or compellable. Sharing a house is a personal matter and calls for some intimacy between the housemates. Certain amenities have to be shared and the means of gaining access into ^ε and out of the house is the same and has to be shared. The court has a

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Makarau JP

discretion in compelling the performance of a personal obligation under ^ε a contract. A court should not compel a citizen to associate with another against his will even if he is so bound in contract. The right to freely associate should be upheld and the applicant should seek alternative remedies for the alleged breach of its rules.

Cases cited ^ε

Lewis & Co (Pvt) Ltd v Pietersburg Co-op BV & Ors 1936 AD 344

National Union of Textile Workers & Ors v Stag Packings (Pty) Ltd & Anor 1982 (4) SA 151 (T)

Santos Professional Football Club (Pvt) Ltd v Igesund & Anor 2003 (5) SA 73 (C) ^c

Case information

F Katsande, for the applicant

Respondent in default

Judgment

MAKARAU JP: As its name implies, the applicant is a housing co-operative society set up with the noble objective of providing accommodation to its ^ε members. The respondent is a member of the applicant. Stand No. 7296 Budiriro 4, is a property developed by the applicant and allocated to the respondent for his occupation.

In February 2004, the applicant issued an instruction to the respondent that he must share the housing unit with one whose name is simply given in the ^ε application as Mr Kanda. The respondent did not accede to the request and is alleged to have dumped Mr Kanda's belongings into a drain, vowing that he would not share the property with him.

In my view, part of the contents of the letters that were exchanged between the parties before the court application was filed and which were attached to the application are instructive. ^ε

In a letter to the applicant, the respondent's legal practitioners wrote in part as follows on 4 March 2004:

"We however categorically state that:

- There is no provision in your Constitution that compels our client or any member for that matter, to provide accommodation for (*sic*) fellow *g* members.
- Whilst it is a noble idea for members with accommodation to share it with members who have not been allocated houses yet, it is not for the co-operative society to impose a tenant on any member.
- Our client is not the only one who can provide accommodation to Mr Kanda as he is not the only member of the co-operative society. *h*

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Makarau JP *a*

- If for divers reasons, our client is not able and willing to let Mr Kanda, or anyone else for that matter, into the house that was allocated to him, his decision and reasons should be respected.”

In response to that letter, the applicant’s legal practitioners wrote on 27 April 2004:

- “1. The above matter refers. The letter you addressed to the Co-operative *b* Society has been referred to us.
2. Stripped to its bare essentials, it is our understanding, with respect, that due to shortage of accommodation the Co-operative Society felt on a balance of convenience that Mr Kanda be permitted to share the quarters occupied by Mr Magozore until such time when the situation stabilized. *c*
3. Mr Magozore seems to think that he has exclusive rights of occupation. If that assessment is correct then Mr Magozore violates the common law principles of the relationship of members in a co-operative society which are among others, to share rights and responsibilities proportionately. *d*
4. Mr Magozore should be advised to get tolerant and offer what accommodation is available in the unit he occupies.”

It would appear that the respondent remained adamant that he would not share the housing unit he was in occupation of, for on 15 March 2005, the applicant filed this court application seeking an order that within four days of being served with the court order, the respondent open his accommodation to *e* Mr Kanda failing which, within a further four days, he be served with a notice terminating his membership of the applicant and expelling him from the applicant. Finally, it was sought that the respondent vacate the property upon receiving notice terminating his membership, failing which the deputy sheriff be empowered to evict him. The draft order ended with the usual prayer for costs.

f The application was duly served upon a subtenant of the respondent by the applicant’s legal practitioner who filed a certificate of service to that effect. The matter was enrolled on the unopposed roll and after a myriad of procedural queries raised by the judges presiding over motion court were attended to, the applicant was requested to file heads of argument addressing the issue *g* whether or not the court could competently issue an order compelling the respondent to share his accommodation with a stranger and against his will. This has since been done.

In my view, although the applicant is a co-operative society registered in terms of the Co-operative Societies Act [*Chapter 24.05*], it is essentially a voluntary *h* association and in terms of legal relationships, the applicant and the respondent

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Makarau JP

are bound to each other in terms of a contract, a contract *sui generis*: *a* *Lewis & Co (Pvt) Ltd v Pietersburg Co-op BV & Ors* 1936 AD 344. It is the applicant’s contention, and one that is correctly held in my view, that one of the terms of the contract is that the applicant shall make rules for its members and the respondent as a member shall abide by those rules. While this is a term to be expected as between the applicant and its members for the proper *b* administration of the applicant, in my view, it is the rule made by the applicant to compel its members to share accommodation against their will and with persons selected by the applicant which may not be enforceable or compellable as I shall indicate below.

In my view, sharing a house is a personal matter and calls for some intimacy between the housemates. Certain amenities have to be shared and the means *c* of gaining access into and out of the house is the same and will have to be shared.

It is a settled principle of contract law that the court has a discretion in compelling the performance of a personal obligation under a contract.

In *Santos Professional Football Club (Pvt) Ltd v Igesund & Anor* 2003 (5) SA 73 (C), Foxcroft J, ^d in a detailed judgment, reviewed the law of contract as it relates to the remedy of specific performance on a contract for personal services. While making a distinction between Roman Dutch law and English law on the matter, the learned judge concluded that the court retains a discretion in the matter. In coming to this conclusion, he relied on the author R H Christie *Law of Contract* 4 ed (2001) where the author reminds us that the ^e tendency to regard it as a rule of law that such contracts would never be enforced was corrected in *National Union of Textile Workers & Ors v Stag Packings (Pty) Ltd & Anor* 1982 (4) SA 151 (T) and concludes as follows at p 613:

"The reasons why the courts have not granted such orders remain as valid ^f as ever, provided that it is remembered that in every case the court has a discretion."

While the facts in the matter before the Cape Provincial Division in the *Santos Professional Football Club* case and the other cases reviewed in the judgment were labour related and sought to distinguish between the wrongfully dismissed servant and an employee unlawfully resiling from a contract, in my ^g view, the principle remains that, in compelling personal performance under a contract, the court has a discretion as to whether to order specific performance or not.

While under contracts of employment to render personal service, the original justification against compelling performance was the alleged inability of the ^h

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Makarau JP

A court to supervise performance, this justification has been brought under attack as being "much exaggerated". ¹

If I am correct that I have a discretion in this matter, then in exercising that discretion, I take into account that the rule by the applicant binding on the respondent in contract imports a personal obligation on the part of the respondent, to enter into a close relationship with a stranger and against his ^b will. I am of the view that a court should not compel a citizen to associate with another against his will even if he is so bound in contract. The right to freely associate, in my view, should be upheld in these circumstances and the applicant should seek alternative remedies for the alleged breach of its rules. This would be my justification for not compelling specific performance in this ^c matter.

It is on the basis of the foregoing that I felt reluctant to issue the order in terms of the draft attached to the application, compelling the respondent to share his accommodation. In my view, the applicant should pursue alternative remedies for the alleged breach of the contractual relationship.

^d In the result, the application is dismissed.

^e *FM Katsande & Partners*, applicant's legal practitioners

¹ *Santos Professional Football Club (Pvt) Ltd v Igesund & Anor supra*.

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/S v TSATSA & ANOR 2007 (1) ZLR 180 (H)

S v TSATSA & ANOR 2007 (1) ZLR 180 (H)

2007 (1) ZLR p180

Citation 2007 (1) ZLR 180 (H)

Case No Judgment No. HB-38-07

Court	High Court, Bulawayo
Judge	Ndou J
Heard	29 March 2007
Judgment	29 March 2007
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure — review — purpose of — no discernable irregularity in proceedings — magistrate having misgivings about arrangements c between prosecution and defence — not a ground for review

Headnote

The accused were placed on remand after the local public prosecutor, who believed there was insufficient evidence, was instructed by the Acting Director of Public Prosecutions to proceed. The accused were represented by a legal practitioner, who consented to the remand. The magistrate had b misgivings about the matter and referred it to the High Court for review.

Held, that, review proceedings are not for investigative purposes when there is discord in the prosecution camp. Review should be used where there is a gross irregularity in the proceedings being reviewed. Once the accused persons' counsel and the prosecutor counsel agreed that the e accused be placed on remand, there was no issue left for determination as far as the placing of the accused on remand was concerned. The role of the court is to adjudicate on real issues and ignore technical and wholly academic points. The fact that the magistrate was suspicious of the arrangements did not make the matter reviewable. The decision as to whether to prosecute or not rests with the Attorney-General or his f delegate and is not subject to interference from any other person. He is the servant of no-one save of the law itself. He is answerable to the law and to the law alone. There was no discernable irregularity in the proceedings. The magistrate himself, notwithstanding his reservations, placed the accused persons on remand. g

Cases cited

Central African Examiner (Pvt) Ltd v Howman & Ors NNO 1966 RLR 75 (G)

Le Grand v Carmelu (Pvt) Ltd 1979 RLR 402 (A)

R v Metropolitan Police Commissioner, ex parte Blackburn (1) [1968] 2 QB 118 h

2007 (1) ZLR p181

Ndou J

Judgment

A **NDOU J**: The matter was referred for review by the Beitbridge magistrate who dealt with the remand proceedings. This is a novel referral, presumably inviting this court to exercise its inherent powers. The background facts are the following. The accused persons appeared before the magistrate on 30 January 2007 on initial remand. They were both represented by a legal b practitioner. At those proceedings, the record reflects:

"PP – *The State applies for an initial remand*. The matter was brought to court yesterday. I read the docket. I was of the view police needed to investigate further. I feel there was need for more evidence to link the accused to the offence. I referred the matter back to the police. There was then apparently a

complaint by the victim's parents to the Acting Director of Public Prosecutions, Mrs Ziyambi. May it be on record that I was given c instructions by the same although she had no relevant papers. She believed I was in error and that I needed to recall the accused persons to place them on remand. Her opinion binds me. She is senior to me. *May I have it noted that the defence does not contest. We agreed that the two be placed on remand on the following conditions. That they be admitted to bail by consent of Mrs Ziyambi in the sum of \$100 000 each ... Those d are the agreed conditions.*

Defence Counsel

I concur with those arrangements. My friend's hands are tied. If I am to oppose I will put him in a fix. We would have opposed the remand. That is all. *We are not opposed to the remand.*

By Court

This sort of application baffles me. It seems against the principles of justice as I understand them ... I maintain my silence. I hope my silence is golden. Accused persons will be placed on remand 'as per agreement' of State counsel on instructions and defence counsel" (my emphasis).

Thereafter, the magistrate referred the matter for review with a memorandum f couched in the following terms:

"I have decided, *mero motu*, to have these proceedings reviewed. I would have simply let the matter rest as it is but I am of the view that it raises lots of issues that must be addressed. I will not pre-empt these issues."

Once the accused persons' and the State counsel agreed that the accused g persons be placed on remand, the issue raised by the magistrate ceased to exist. The role of the court is to adjudicate on real issues and ignore technical and wholly academic points. The criminal courts exist to do justice and not to provide a forum in which technical and wholly academic points are argued – *Le Grand v Carmelu (Pvt) Ltd* 1979 RLR 402 (A) at 405. The accused persons' legal practitioner agreed (he was not obliged to do so) to the arrangement h suggested by the Acting Director of Public Prosecutions. The fact that the

2007 (1) ZLR p182

Ndou J

magistrate seized with the remand proceedings is suspicious of such a arrangement does not make it reviewable. The Acting Director of Public Prosecutions is a delegate of the Attorney-General. The public prosecutor, like the one in Beitbridge Magistrates' Court, is a representative of the Attorney-General but not necessarily his delegate – see s 11 of the Criminal Procedure and Evidence Act [Chapter 9:07]. The decision as to whether to prosecute or not rests with the Attorney-General or his delegate, and is not b subject to interference from any other person. He is the servant of no-one save of the law itself. He is answerable to the law and to the law alone – *R v Metropolitan Police Commissioner, ex parte Blackburn (1)* [1968] 2 QB 118 and *Central African Examiner (Pvt) Ltd v Howman & Ors* NNO 1966 RLR 75 (G).

From the facts of this case, the Acting Director of Public Prosecutions c overruled the local public prosecutor. The public prosecutor, whatever his/her reservation about the suggestion by the Acting Director of Public Prosecutor was, nevertheless made the application to place the accused persons on remand. The accused persons did not oppose the application. They were represented by a legal practitioner, as alluded to above. There was consensual placing of the accused persons on remand. There is no discernable d irregularity in the proceedings. The magistrate himself, notwithstanding his reservations, placed the accused persons on remand. It seems he did so under protest. In my respectful view, review proceedings are not for investigative purposes when there is discord in the prosecution camp. Review should be used where there is gross irregularity in the proceedings being reviewed. Once the parties themselves agreed, there was no issue left for determination as far e as the placing of the accused persons on remand is concerned.

Accordingly I find nothing irregular with the remand proceedings carried out by the Beitbridge magistrate on 30 January 2007. f

CHEDA J concurs. g

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/MUDUKUTI v F C M MOTORS (PVT) LTD 2007 (1) ZLR 183 (H)

MUDUKUTI v F C M MOTORS (PVT) LTD 2007 (1) ZLR 183 (H)**2007 (1) ZLR p183**

Citation	2007 (1) ZLR 183 (H)
Case No	Judgment No. HH-14-07
Court	High Court, Harare
Judge	Patel J
Heard	28 February 2006; 1 March 2006
Judgment	2 April 2007
Counsel	<i>W P Zhangazha</i> , for the plaintiff <i>A J Sibanda</i> , for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

C Contract — *breach — damages — assessment of loss — replacement value of motor vehicle — assessment based on unofficial "parallel" rate of exchange — court refusing to award damages on that basis*

Contract — *term — implied term of contract — when may be imported — implied term to return vehicle in a state not worse than when it was left with repairer*

D Contract — *validity — disclaimer clause — when may be treated as unfair in terms of Consumer Contracts Act [Chapter 8:03] — customer leaving vehicle for repair — not fair to restrict repairer's liability for loss or damage caused*

Headnote

^EThe plaintiff sent his car to the defendant's garage for routine servicing and repairs. He had taken it to that garage on several previous occasions as the defendant was a dealer in the type of car. A job card was completed. It contained a disclaimer clause, in small print, to the effect that "[the defendant] is not liable for loss or damage to [the plaintiff's] vehicle or contents therein". He returned to the defendant's workshop on two ^F occasions. On the first occasion, he found a mechanic strapping the engine wires together because the car had caught fire. On the second, he found that the gear-box had collapsed. About 11 months later, he was told by the defendant's foreman that the engine had seized up and that there was nothing that the defendant could do about it. The vehicle could ^G not be repaired satisfactorily, due to its age and the availability of parts. A valuator assessed the loss at \$900 million, based on the cost of a similar vehicle in South Africa and applying the unofficial, "parallel", rate of exchange, as that was the rate in fact used for most imports in the motor industry. The plaintiff claimed the repair and delivery of his car or, in the alternative, payment in the sum of \$900 million as damages being the ^H replacement value of the vehicle.

2007 (1) ZLR p184

The defendant relied on the disclaimer clause. ^A

Held, that the plaintiff's acceptance of the disclaimer clause immediately above his signature must be inferred from the circumstances even though the clause was not specifically drawn to his attention.

Held, further, that the agreement was one that fell within the ambit of the Consumer Contracts Act [Chapter 8:03], in accordance with the definition ^Б of "consumer contract" in s 2, as being a contract for the supply of services in which the supplier is dealing in the course of business and the user is not. Under s 5(1), a consumer contract may be found to be unfair if it excludes or limits the obligations or liabilities of a party to an extent that is not reasonably necessary to protect his interests. The clause in question did just that. It was also patently contrary to commonly ^С accepted standards of fair dealing. It was unconscionable that a business enterprise engaged in motor vehicle repairs, having agreed to undertake specific repairs to a customer's vehicle and taken custody and charge of the vehicle, could simultaneously renounce all responsibility for any loss or damage to the vehicle or its contents. Such a broad and unqualified exemption is neither reasonably necessary nor congruent with acceptable ^Д standards of fair dealing in the motor repair industry. Further, under s 4, if the contract contains a "scheduled provision", the court may grant relief of various sorts. One class of scheduled provision is one whereby the supplier or services excludes or limits the liability which he would otherwise incur under any law for loss or damage caused by his ^Е negligence. The clause was also impeachable on this ground. In terms of s 4, the exemption clause under review would be cancelled and declared to be null and void for the purposes of interpreting and applying the agreement between the parties.

Held, further, that on the facts, the defendant was entirely responsible for the parlous state of disrepair in which the vehicle ended up. The contract ^Ф between the parties was for the defendant to service and repair the plaintiff's vehicle in accordance with his stated instructions. The exemption clause having been struck down, it was possible to import an implied term to return the vehicle to the plaintiff in a condition not worse than it was in when it was delivered to the defendant's garage. Such a term was necessary for business efficacy and must be implied by trade ^Г usage in the motor vehicle repair industry. It could also be implied from the facts and from the common intention of the parties as inferred from the express terms of their contract and the surrounding circumstances.

Held, further, that the valuation was based on the unofficial parallel exchange rate, which the courts cannot recognise and give effect to and the claim for damages would have to be dismissed. ^Н

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^А *Held*, further, however, that an order for specific performance would be granted.

Cases referred to

Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A)

^Б *Chiviya v Chiviya* 1995 (1) ZLR 210 (H)

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

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

Munhuwa v Mhukahuru Bus Svcs (Pvt) Ltd 1994 (2) ZLR 382 (H)

Tubbs (Pvt) Ltd v Mwamuka 1996 (2) ZLR 27 (S)

Wilkins NO v Voges 1994 (3) SA 130 (A)

^С *Zimbabwe Development Bank v Zambezi Safari Lodges (Pvt) Ltd & Ors* HH-95-06

Legislation considered

Consumer Contracts Act [Chapter 8:03], ss 2, 4, 5 & 8; Schedule, para 2

Case information

^Д *W P Zhangazha*, for the plaintiff

A J Sibanda, for the defendant

Judgment

PATEL J: The plaintiff in this matter claims the repair and delivery of his Audi 200 motor vehicle or, in the alternative, payment in the sum of \$900 million as ^e damages in respect of the replacement value of the vehicle. The defendant disputes liability on the main and alternative claim and, in any event, invokes the owner's risk disclaimer clause in the repair contract as absolving it of any liability to the plaintiff.

EVIDENCE FOR THE PLAINTIFF

^f The plaintiff, Minos Mudukuti, testified that he acquired his motor vehicle in 1990. Since then, he had taken it to the defendant for servicing and repairs on six separate occasions because the latter had a franchise for Audi vehicles.

In November 2001, he took the vehicle to the defendant for servicing and to effect repairs to the vehicle injector, bonnet and radiator. His instructions were ^g reflected on the defendant's job card (Exhibit 1]. The job card was completed as showing that the service had been carried out and that the injector and radiator had been repaired. However, the bonnet cable could not be repaired because the requisite spare parts were not available.

The job card contained a disclaimer clause, in small print, to the effect that "[the ^h defendant] is not liable for loss or damage to [the plaintiff's] vehicle or

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contents therein". The plaintiff stated that he did not see this clause and that ^a it was not brought to his attention.

He returned to the defendant's workshop on two occasions. On the first occasion, he found a mechanic strapping the engine wires together because the car had caught fire and, on the second occasion, he found that the gear-box had collapsed. About 11 months later, he received a telephone call from ^b the defendant's foreman indicating that the engine had seized up and that there was nothing that the defendant could do about it.

The vehicle's engine had been overhauled in December 2000. Apart from the defects listed in Exhibit 1, the vehicle was performing well at the time that it was taken to the defendant's workshop. When the defendant agreed to undertake the stated repairs, the plaintiff was not told of any problem with the ^c engine. At the present time, the vehicle is in a sorry state with its engine and gear-box dismantled and with various other parts damaged or missing.

In January 2003, the plaintiff approached three other reputable firms which declined to take on the job of repairing the vehicle because its engine had been dismantled at the defendant's workshop. Much later, in February 2006, the ^d vehicle was examined by one Botha, the Chief Technical Officer of the Automobile Association. The latter compiled a report in which he concluded that he was "unable to determine actual cause of engine failure" and that the vehicle "would not be repaired satisfactorily, due to the age of the vehicle and availability of parts". The plaintiff then obtained valuations from three motor dealers which estimated the value of the Audi 200 in reasonable condition as ^e being between \$900 million and \$950 million.

John David Kelly is an experienced motor vehicle valuator. He authored Exhibit 3B (one of the valuations) and testified that he valued the plaintiff's vehicle. He took into account, *inter alia*, its year of manufacture and mileage as well as its equivalent value in South Africa. Its current value in South Africa ^f was 15 000 rands. He stated that the Audi 200T is a turbo-boosted vehicle and, as such, it is a much sought after vehicle with a premium value. He valued the plaintiff's vehicle at \$900 million applying the parallel exchange rate, because that was the rate used for most imports in the motor industry. He had seen the plaintiff's vehicle in 2001 and it appeared to be in relatively good condition at that time. ^g

EVIDENCE FOR THE DEFENDANT

Chenjerai Maduma was employed by the defendant in 2001 as its Assistant Workshop Manager. He is a fully qualified motor mechanic and supervises a fairly sizeable workshop. ^h

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A He testified that he supervised the work carried out on the plaintiff's motor vehicle in 2001. When the mechanic assigned to the vehicle tried to force its bonnet open, the bonnet wire snapped and caused a spark resulting in the fire which damaged the bonnet and some wiring and plastic covers under the bonnet. This damage was contracted out for repairs which were effected in January and February 2002. The accelerator and clutch cables were also B damaged and these were replaced by the defendant at its own cost in January 2002. All the necessary repairs to and servicing of the vehicle were completed in April 2002.

Thereafter, between May and September 2002, it was discovered that the gear-box and clutch assembly were worn and faulty. With the plaintiff's agreement, C the clutch was reconditioned and reassembled with the gear-box. The vehicle was taken for a road test by the foreman but the engine stopped turning after a short distance from the defendant's workshop. The engine was then stripped and it was found that the main bearings on the crankshaft were excessively worn.

According to Maduma, the engine had probably not been properly repaired D when it was overhauled or had been insufficiently serviced over the years. The damage to the engine was not caused by the fire or during the defendant's custody of the vehicle. The engine is presently in pieces in stripped condition.

Under cross-examination, this witness was asked to explain the statement in the defendant's summary of evidence to the effect that the fire was caused by E a cable coming into contact with the battery. He conceded that the statement was misleading, as the battery for this particular vehicle was not located under the bonnet but under the rear seat. He was also unable to explain why the clutch and gear-box problems manifested themselves four months after the vehicle had been serviced by the defendant. He further conceded that, when Botha inspected the vehicle in February 2006, he was not shown the worn bearings F on the crankshaft. Lastly, he confirmed that the defendant had previously worked on the vehicle on several occasions. He also agreed with the plaintiff that it was a special car and one of a kind.

THE ISSUES

The issues for determination in this matter are as follows: G

1. Whether the agreement between the parties was subject to the owner's risk disclaimer clause.
2. The legal effect and validity of the said disclaimer clause.
3. Whether the defendant breached the implied warranty to return the vehicle to the plaintiff in a condition not worse than it was in when it was H delivered to the defendant's garage.

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4. If so, whether the plaintiff is entitled to claim specific performance or A payment of damages as pleaded.

WHETHER AGREEMENT SUBJECT TO DISCLAIMER CLAUSE

As is evident from the job card prepared by the defendant, the plaintiff undeniably appended his signature below the disclaimer clause under review. His evidence, however, is that he did not read this clause. B

As a rule, where a party signs a document containing specific contractual conditions, but simply does not bother to read them, he may still be bound by those conditions as having assented to them – unless he can show that he was misled as to their meaning and purport. See *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 470 & 472; Christie *Law of Contract in South Africa* 3 ed at p 196. C

In casu, the plaintiff is an educated man who, through his business experience, is familiar with contracts, including the job cards compiled by the defendant on previous occasions. On these facts, his acceptance of the disclaimer clause immediately above his signature must be inferred from the circumstances, even though the clause was not specifically drawn to his attention. D

LEGAL EFFECT AND VALIDITY OF DISCLAIMER CLAUSE

For present purposes, it is necessary to consider the validity of the disclaimer clause under review in the context of the Consumer Contracts Act [*Chapter 8:03*]. According to its long title, the object of the Act is:

“to provide relief to parties to consumer contracts where the contracts are ϵ unfair or contain unfair provisions or where the exercise or non-exercise of a power, right or discretion under such a contract is or would be unfair; and to provide for matters connected therewith or incidental thereto.”

It is not in dispute that the agreement *in casu*, is one that falls within the ambit of the Act, in accordance with the definition of “consumer contract” in s 2, as $\mathfrak{F}$ being a contract for the supply of services in which the supplier is dealing in the course of business and the user is not.

Under the common law, the dictates of public policy restrict the broad use of oppressive exemption clauses. See *Tubbs (Pvt) Ltd v Mwamuka* 1996 (2) ZLR 27 (S) at 31-32. The provisions of the Act as to what constitutes an unfair contract are manifestly wider in their scope and effect. In terms of s 5(1) of the $\mathfrak{G}$ Act:

“A court may find a consumer contract to be unfair for the purposes of this Act –

- (a) if the consumer contract as a whole results in an unreasonably unequal exchange of values or benefits; or $\mathfrak{H}$

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- (b) if the consumer contract is unreasonably oppressive in all the circumstances; or
- (c) if the consumer contract imposes obligations or liabilities on a party which are not reasonably necessary to protect the interests of any other party; or
- (d) if the consumer contract excludes or limits the obligations or liabilities $\mathfrak{B}$ of a party to an extent that is not reasonably necessary to protect his interests; or
- (e) if the consumer contract is contrary to commonly accepted standards of fair dealing; or
- (f) in the case of a written consumer contract, if the contract is expressed in language not readily understood by a party.”

$\mathfrak{C}$ By virtue of s 5(2) of the Act:

“A court shall not find a consumer contract to be unfair for the purposes of this Act solely because –

- (a) it imposes onerous obligations on a party; or
- (b) it does not result in substantial or real benefit to a party; or $\mathfrak{D}$
- (c) a party may have been able to conclude a similar contract with another person on more favourable terms or conditions.”

For the purpose of assessing the justifiability of a contract s 5(3) provides that:

“In determining whether or not a consumer contract is unfair for the purposes of this Act a court shall have regard to the interests of both ϵ parties and, in particular, shall take into account, where appropriate, any prices, charges, costs or other expenses that might reasonably be expected to have been incurred if the contract had been concluded on terms and conditions other than those on which it was concluded.”

As regards the relief available under the Act, s 4(1) in its relevant portions $\mathfrak{F}$ provides as follows:

“Subject to subsection (3), if a court is satisfied –

- (a) in accordance with section *five*, that any consumer contract is unfair; or
- (b) ...; or
- (c) that any consumer contract contains a scheduled provision;

$\mathfrak{G}$ the court may make an order granting any one or more of the following forms of relief –

- (i) cancelling the whole or any part of the consumer contract; or
- (ii) varying the consumer contract; or
- (iii) enforcing part only of the consumer contract; or $\mathfrak{H}$
- (iv) ...; or

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- (v) ...; or $\mathfrak{A}$
- (vi) ...;

and any such order may be made subject to such conditions as the court may fix.”

The right to relief under the Act in relation to a scheduled provision is excluded in certain instances by s 4(3) which provides that: ^B

"A court shall not grant relief under this section –

- (a) ...;
- (b) solely on the ground that a consumer contract contains a scheduled provision –
 - (i) if the contract was concluded before the provision concerned ^C became a scheduled provision; or
 - (ii) if the court, having regard to the factors set out in section *five*, is satisfied that in all the circumstances the consumer contract is fair despite containing the scheduled provision; or
- (c) ..."

For the purposes of ss 4(1)(c) and 4(3)(b), scheduled provisions are set out ^D in the Schedule to the Act. Of direct relevance to the present case is para 2 which proscribes:

"Any provision whereby the seller or supplier of goods or services excludes or limits the liability which he would otherwise incur under any law for loss or damage caused by his negligence." ^E

Looked at from the perspective of s 5 of the Act and having regard to the interests of both parties *in casu*, the exemption clause under review is challengeable on two separate grounds. Firstly, the clause excludes the liability of the defendant to an extent that is not reasonably necessary to protect its interests as a motor vehicle repairer. Secondly, the clause is patently contrary to commonly accepted standards of fair dealing. It seems to me ^F unconscionable that a business enterprise engaged in motor vehicle repairs, having agreed to undertake specific repairs to a customer's vehicle and taken custody and charge of the vehicle, simultaneously renounces all responsibility for any loss or damage to the vehicle or its contents. In my view, such a broad and unqualified exemption is neither reasonably necessary nor congruent ^G with acceptable standards of fair dealing in the motor repair industry. As such, it operates to vitiate the fairness of the contract in which it is contained. I therefore hold that the agreement *in casu*, if taken with the exemption clause intact, is an unfair contract within the meaning of paras (d) and (e) of s 5(1) as read with s 5(3) of the Act. ^H

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^A The clause under review is also impeachable under s 4(1)(c) of the Act as being a scheduled provision, whereby the defendant purports to exclude the liability which it would otherwise incur under the common law for loss or damage caused by its negligence. Having regard to the factors set out in s 5 of the Act, as the court is enjoined to do by s 4(3), I can find nothing in all the circumstances of this case to persuade me that the contract between the ^B parties is fair despite containing the scheduled provision. As I see it, the objectionable clause renders the agreement *in casu*, palpably unfair and its inclusion in the contract cannot be palliated by the surrounding circumstances.

To conclude this aspect of the case, I find that the exemption clause under review not only renders the agreement as a whole unfair within the meaning ^C of s 5 but is also a proscribed scheduled provision as contemplated in s 4 of the Act. It therefore warrants the intervention of this court by virtue of both paras (a) and (c) of s 4(1) of the Act. Accordingly, the exemption clause under review is cancelled and declared to be null and void for the purposes of interpreting and applying the agreement between the parties.

^D IMPLIED WARRANTY

According to the evidence before the court, the plaintiff's motor vehicle was in a reasonable running state when it was handed over to the defendant for service and specific repairs. The defendant tendered no evidence to the contrary.

Thereafter, the bonnet and some wiring under the bonnet caught fire in ^E circumstances which the defendant was unable to explain satisfactorily. Maduma's evidence in this respect was very unreliable and, in any event, the defendant carried out the requisite repairs at its own cost and initiative. It seems reasonably clear that the fire damage to the vehicle was entirely attributable to the defendant and its staff.

^F Subsequently, the defendant carried out the service and repairs, as stated on the job card, without any indication on the job card or otherwise that the vehicle's engine was faulty. The engine fault

was only “discovered” by the defendant several months later. Maduma’s testimony that this fault predated the handing over of the vehicle to the defendant is clearly inconsistent with the proven facts and cannot be credited.

¶ Having regard to all of the surrounding circumstances and applying the maxim *res ipsa loquitur* to the facts adduced *in casu*, I am amply satisfied that the defendant was entirely responsible for the parlous state of disrepair in which the vehicle was found when it was inspected by Botha in February 2006.

The contract between the parties was for the defendant to service and repair the plaintiff’s vehicle in accordance with his stated instructions. The plaintiff

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contends that the contract was subject to an implied warranty to return the A vehicle to the plaintiff in no worse a condition than it was before the contract. The defendant submits that any such implied warranty cannot be written into the contract because it contradicts the express disclaimer of liability stipulated on the job card. I agree that, ordinarily, an implied term cannot prevail over any express contractual term as that cannot have been intended by the parties. B However, the exemption clause *in casu*, having been struck down in terms of the Consumer Contracts Act, must be treated as being null and void *ab initio*, inasmuch as s 8 of the Act declares that “no agreement to waive any right conferred by this Act shall be of any effect”. This clause must therefore be wholly disregarded in assessing the intention of the parties at the time that they entered into their contract.

C The grounds upon which an implied term may be imported into a contract are elaborated in *Christie, op cit* at p 183. See also *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531-2; *Wilkins NO v Voges* 1994 (3) SA 130 (A).

Having regard to the facts of this case, I am of the view that the defendant did D impliedly contract itself to return the vehicle to the plaintiff in a condition not worse than it was in when it was delivered to the defendant’s garage. I arrive at this conclusion for several reasons. First and foremost, such a warranty is essential to any contract for the service and repair of a motor vehicle. It would be astounding and quite absurd for the owner of a vehicle to hand it over to a motor expert for repairs with the expectation of having the vehicle returned E to him in any worse condition than it was in before the repairs were effected. I am also of the view that the term sought to be implied is necessary for business efficacy and must be implied by trade usage in the motor vehicle repair industry. Finally, I am satisfied that the warranty is implied from the facts *in casu* and can be derived from the common intention of the parties as inferred from the express terms of their contract and the surrounding circumstances. F

Having regard to the finding made earlier that the defendant was responsible for the dysfunctional state of the plaintiff’s vehicle after having assumed custody of it, it follows that the defendant breached its implied warranty to return the vehicle to the plaintiff in a condition not worse than it was in when it was delivered to the defendant’s garage, viz., in a sound and running G condition.

CLAIM FOR DAMAGES

In his closing submissions, counsel for the plaintiff quite startlingly founds the plaintiff’s claim for damages in some future delict which might be committed in the event that specific performance is not fulfilled or rendered H

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A impossible. This contention is clearly misconceived. What the plaintiff has succeeded in doing is establishing a breach of contract on the part of the defendant. He is, accordingly, entitled to damages for breach of contract and not to any delictual damages. Even if the defendant’s conduct did in fact amount to a delictual wrong, this was neither pleaded nor proven as such. The plaintiff must be confined to the facts pleaded in order to prove his claim. See B *Chiviya v Chiviya* 1995 (1) ZLR 210 (H) at 213.

In order to prove his claim, the plaintiff adduced valuations from three different motor vehicle traders. The expert evidence given by one of those traders, Kelly, places the value of the plaintiff’s

vehicle at \$900 million as at the time of the trial. This value was affirmed as approximating the current market value ^c of the vehicle in Zimbabwe, applying the unofficial parallel exchange rate of the Zimbabwe dollar to the South African rand.

The general rule is that damages for breach of contract are to be assessed at the time of the breach of contract, the time of performance or the time of cancellation. See *Munhuwa v Mhukahuru Bus Svcs (Pvt) Ltd* 1994 (2) ZLR 382 (H) at 388, citing Visser & Potgieter *Law of Damages* at pp. 76-7. I ^d apprehend, however, that there will be instances where it becomes necessary to assess the quantum of damages as at the time of trial in order to achieve justice between the parties. This is particularly so in an hyperinflationary environment where the replacement value of the thing in dispute will vary quite substantially from the time of the alleged breach to the time of trial. Be that as ^e it may, it is not necessary for me to delve into or decide this aspect for the purpose of determining the matter at hand.

It is trite that in order for the evidence of an expert witness to be admissible it must be given by a person with special knowledge and skill. Moreover, it must render material assistance to the trial court. See Hoffmann & Zeffertt *South African Law of Evidence* 4 ed at pp 100-104.

^f The three valuations proffered by the plaintiff are not *ipso facto* admissible as such without any verification of the qualifications of the valuers. In this respect, only the valuation tendered by Kelly, premised on his professional experience and expertise, is properly admissible. However, the difficulties that I perceive with Kelly's expert valuation are manifold. Firstly, he did not directly ^g inspect the plaintiff's motor vehicle at the time of his valuation. He simply recalled having seen the vehicle on the road approximately five years before and based his assessment on a reasonable estimate of its current market value. In this fundamental respect, his testimony lacks the probative value that is necessary to justify reliance on any expert evidence. Secondly, he based his valuation on the unofficial parallel exchange rate equivalent of 15 000 South ^h African rands. It is trite that the courts cannot recognise and give effect to the

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illegal parallel exchange rate. See my observations in this respect in *Zimbabwe ^a Development Bank v Zambezi Safari Lodges (Pvt) Ltd & Ors* HH-95-06 at p 10.

For the reasons stated above, the expert evidence adduced on behalf of the plaintiff cannot be relied upon to justify the valuation of the replacement cost of the vehicle that he claims as contractual damages. Accordingly, his claim ^b for damages cannot be sustained and must be dismissed.

SPECIFIC PERFORMANCE

It is trite that an aggrieved party is entitled to claim specific performance of a contract where it has been breached by the other party. The classic statement of this rule is that of Innes JA in *Farmers' Co-operative Society v Berry* 1912 AD 343 at 350: ^c

"*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, as far as is possible, a performance of his undertaking in terms of the contract."

In the instant case, the defendant has breached its implied warranty to return ^d the vehicle to the plaintiff in a sound and running condition. Consequently, the plaintiff is entitled to demand specific performance of that warranty, insofar as such performance is possible.

Botha, in his terse report, states as follows:

"It is my contention that the vehicle in its present condition would not be ^e repaired satisfactorily, due to the age of the vehicle and availability of parts."

Botha's report is extremely brief to the point of being laconic and, in my view, does not exclude the possibility of having the engine repaired by the defendant. According to Maduma, the defendant firm specialises in repairs to Audi vehicles and has serviced and repaired the plaintiff's vehicle on many ^f occasions. At the end of his testimony, he indicated that the defendant would attempt to repair the vehicle engine, if this is possible.

On balance, I am satisfied that the plaintiff is entitled to claim specific performance, albeit not in the terms prayed for. As he has succeeded in his alternative claim, he is also entitled to his costs. ^g

In the event that the defendant fails for any practical reason to comply with the decree for specific performance, the plaintiff will be at liberty to institute a new action to recover damages. See Kerr *The Principles of the Law of Contract* 3 ed at p 416. ^H

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^A **ORDER**

In the result, judgment is entered in favour of the plaintiff as against the defendant, as follows:

- (i) The defendant be and is hereby ordered, at its own cost and expense, to repair the plaintiff's motor vehicle, an Audi 200 Turbo (Reg. No. 358-449S), ^B and to deliver the vehicle to the plaintiff in a sound working condition.
- (ii) The defendant shall commence the aforesaid repairs within five days of the date of this order and shall deliver the vehicle to the plaintiff within a period of three months thereafter.
- (iii) The defendant shall pay the costs of suit.

^C *Chinamasa, Mudimu, Chigowenya & Dondo*, plaintiff's legal practitioners

Mawere & Sibanda, defendant's legal practitioners

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CHIKWENENGERE v CHIKWENENGERE 2007 (1) ZLR 196 (S)

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Citation	2007 (1) ZLR 196 (S)
Case No	Judgment No. S-75-06
Court	Supreme Court, Harare
Judge	Cheda JA, Gwaunza JA and Garwe JA
Heard	19 September 2006
Judgment	3 April 2007
Counsel	<i>J C Andersen SC</i> , for the appellant <i>C Warara</i> , for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Appeal — divorce — jurisdiction — court *a quo* wrongly deciding that it *c* lacked jurisdiction to entertain the matter — matter remitted to court *a quo* to determine it

Family law — husband and wife — divorce — domicile — domicile of choice — requirements for acquisition of domicile of choice — change of domicile — onus of proof — onus upon party suggesting such a change ^D upon a balance of probabilities — domicile — loss of — when domicile of origin can be said to be abandoned — mere fact of residence in another country not proof of intention to remain indefinitely

Family law — husband and wife — divorce — jurisdiction — jurisdiction of court to entertain matter depends on the domicile of the husband at the ^E time the divorce action is instituted — domicile distinguishable from citizenship

Practice and procedure — jurisdiction — divorce case — court in doubt as to the existence of jurisdiction to entertain the matter — matter not raised by either of the parties — court should raise the matter *mero motu* ^F

Headnote

The appellant, a Zimbabwean citizen by birth, went to the United Kingdom in 2002 after securing a visa for that country. He was accompanied by his minor children and they all joined the respondent, his wife, who had earlier entered the United Kingdom. His visa was valid until 2007 but in terms of the law in that country he was eligible to apply for indefinite leave ^G to remain in the country or citizenship after having remained there for four years. He was employed in the United Kingdom and purchased a property to accommodate himself and the minor children who were attending school in that country. He and the respondent were the joint owners of an undeveloped stand in Harare. It was his intention to develop the stand in Harare so that when he came back, he would have ^H

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^A somewhere to come back to. It was also his evidence that his desire was that his children remain Zimbabwean.

Some three years after his arrival in the United Kingdom, he instituted an action in the High Court, Harare, for divorce. The court *mero motu* found that it did not have jurisdiction on the grounds that the only inference to be drawn was that the appellant had decided to abandon his Zimbabwean ^B domicile and settle in the United Kingdom indefinitely.

Held, that where a court, in matrimonial proceedings, is in some doubt as to whether it has the necessary jurisdiction to hear the matter, it should, if necessary, raise the matter *mero motu*.

Held, further, that the common law position in Zimbabwe is that jurisdiction in divorce matters depends on the domicile of the husband at the time ^C when the action is instituted. In this regard the relevant date is the date of service of the summons and not the date of the issue thereof. Even if the husband were to change his Zimbabwean domicile after the commencement of divorce proceedings, the court would still have jurisdiction

^D *Held*, further, that the question of domicile is clearly distinguishable from that of citizenship. There are three varieties of domicile, being domicile of origin, domicile of dependence and domicile of choice. As far as domicile of choice is concerned, it is acquired by a person who, having the necessary legal capacity, in the exercise of his free will, establishes a residence in a place with the intention of remaining there permanently ^E. To acquire this domicile three requirements must be satisfied. These are:

- (a) the factum of residence; and
- (b) the *animus manendi*, or intention of remaining permanently; and
- (c) freedom of volition.

Mere residence in a particular place is not, in the absence of an intention to ^F permanently stay in that place, proof of an intention to adopt a domicile of choice. In order to establish a domicile of choice it must be established that the person concerned has abandoned his domicile of origin and has in fact acquired a domicile of choice in another place, by arriving at that place and intending to remain there. He must intend to reside in the place of his choice indefinitely; he must not have the present intention of ^G leaving on the occurrence of some feasible or reasonably likely event. A change of domicile is a serious matter and may involve far-reaching consequences in regard to succession and distribution and other things that depend on domicile.

Held, further, that there is usually a strong presumption or probability against ^H a person abandoning his domicile of origin for a foreign origin. As far as

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Garwe JA

the change of domicile was concerned, it now appeared to be settled law ^A that the onus on the party suggesting such change is no more than on a balance of probabilities. The facts did not support the conclusion that the appellant had formed an intention to permanently stay in the United Kingdom. In this day and age persons leave their countries and stay in other countries for years whilst pursuing their education or professional ^B careers. His desire to keep the children in the United Kingdom if granted custody was not in order to stay there permanently, but rather to ensure that his children's education was not disrupted. The acquisition of a house did not on its own establish an intention to abandon his domicile of origin and acquire a new domicile.

Held, further, that the court *a quo* had concluded wrongly that it lacked the ^C jurisdiction to enter the divorce proceedings. However, the Supreme Court, on appeal, would not grant the divorce and the ancillary relief but instead would remit the matter to the court *a quo* for determination.

Cases cited

Boswinkel v Boswinkel 1995 (2) ZLR 58 (H) ^D

Bowie (or Ramsay) v Liverpool Royal Infirmary [1930] AC 588

de Jager v deJager 1998 (2) ZLR 419 (H)

Ley v Ley's Executors & Ors 1951 (3) SA 186 (A)

Senior & Anor v Comr for Inland Revenue 1960 (1) SA 709 (A)

Winans & Anor v Attorney-General [1904] AC 287 ^E

Legislation considered

Immigration Act [Chapter 4:02], s 3

Case information

J C Andersen SC, for the appellant ^F

C Warara, for the respondent

Judgment

GARWE JA: The respondent in this matter instituted an action in the High Court on 15 February 2005 against the appellant seeking a decree of divorce and other ancillary relief. In April 2005, the appellant filed his plea and counterclaim. The matter was subsequently set down on the continuous roll ^G before the High Court. On the date of hearing, the respondent withdrew her claim as well as her plea and defence to the appellant's counterclaim. The appellant elected to proceed with his counterclaim and urged the court to dispose of the matter on an uncontested basis. The court *a quo*, *mero motu*, raised the issue of jurisdiction and directed both parties to file heads of argument on the question whether or not the court had jurisdiction to entertain ^H

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^A the matter. The court *a quo* reached the conclusion that the appellant was no longer domiciled in Zimbabwe and for that reason the court lacked jurisdiction to hear the matter. Dissatisfied with this ruling, the appellant appealed to this court seeking an order setting aside this finding and a further order granting a decree of divorce and other ancillary relief.

That the court *a quo* was correct in *mero motu* raising the issue of jurisdiction ^B there can be no doubt. In *Boswinkel v Boswinkel* 1995 (2) ZLR 58 (H), Chatikobo J remarked at p 60C-D:

"Indeed, if it were to appear to the court either from the pleadings or from evidence led that the question of domicile was in doubt, then in such event the court itself would *mero motu* raise the question of domicile in order ^C to satisfy itself that the basis of jurisdiction relied upon has been established: see *Smith v Smith* 1962 R & N 469 (FS) at 470G."

See also *de Jager v de Jager* 1998 (2) ZLR 419 (H).

The issue that falls for determination is whether the court *a quo* was correct in coming to the conclusion that, the appellant was no longer domiciled in Zimbabwe and that consequently, the courts in Zimbabwe lacked jurisdiction ^D to deal with the matter.

The facts of this case are to a large extent common cause or at least not seriously in dispute. The appellant in this matter is a Zimbabwean citizen by birth. He went to the United Kingdom in 2002 after securing a *visa* for that country. He was accompanied by his minor children and they all joined the respondent who had earlier entered the United Kingdom. His *visa* was valid until the year 2007 but in terms of the law in that country he was eligible to apply for indefinite leave to remain in the country. It was common cause in the court *a quo* that after establishing a presence in that country for a period of forty seven (47) months, he would have been entitled to apply for citizenship. There appears to be some dispute as to whether in his evidence he said he had already made such an application. Since he had not spent forty seven months in the United Kingdom at the time he gave evidence, the suggestion in his heads of argument that he did not say he had already applied for such citizenship appears to be more likely. It was also his evidence in the court *a quo* that he was employed in the United Kingdom and that he had purchased an immovable property to accommodate himself and the minor children who are attending school in the United Kingdom. He further told the court that he and the respondent are the joint owners of an undeveloped stand in Waterfalls, Harare.

In coming to the conclusion that the court did not have jurisdiction, the trial judge found that the appellant's circumstances were such that, taken singly or collectively, the only inference to be drawn from those circumstances was

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that he had decided to abandon his Zimbabwean domicile and settle in the United Kingdom indefinitely.

The common law position in this country is that the jurisdiction of the court in divorce matters depends on the domicile of the husband *at the time* when the action is instituted. There are various authorities to the effect – see for example, *de Jager v de Jager* 1998 (2) ZLR 419 (H) at 420E. ^B

The position appears now settled that it is the date of service of the summons and not simply the date of issue which is relevant: *Boswinkel v Boswinkel supra* p 66B-C. In this case, however, nothing turns on this as appearance to defend was entered on the same day the summons was issued.

The position is also settled that even if the husband were to change his domicile after the commencement of divorce proceedings, the court would still have jurisdiction because the operative date is the date when the action was instituted. See *Boswinkel v Boswinkel supra* p 66B-D.

The question that arises for determination before this court, therefore, is whether, as at 15 February 2005, the appellant (as husband) was domiciled in Zimbabwe or as the court *a quo* found, he had formed an intention to permanently settle in the United Kingdom. In order to resolve this question, it is necessary to look at the law on domicile.

There are three varieties of domicile. These are domicile of origin, domicile of dependence and domicile of choice. The issue before this court concerns the latter. Domicile of choice is acquired by a person who, having the necessary legal capacity, in the exercise of his free will establishes residence in a place with the intention of remaining there permanently. To acquire this domicile, three requirements must be satisfied. These are:

- (a) the *factum* of residence;
- (b) the *animus manendi* or intention of remaining permanently; and ^F
- (c) freedom of volition.

See Boberg *The Law of Persons and the Family* p 68.

The requirement of *animus manendi* has given the courts considerable difficulty. On the authorities, it appears settled that in order to establish a domicile of choice, it must be established that the person concerned has abandoned his domicile of origin and has in fact acquired a domicile of choice in another place by arriving at that place and intending to remain there. See *Boberg supra* p 71. The person must intend to reside in the place of his choice indefinitely; he must not have the present intention of leaving on the occurrence of some feasible or reasonably likely event – at p 70.

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A The Immigration Act [Chapter 4:02] provides in s 3 that a person shall be regarded as being domiciled in a country if he resides permanently in that country or that country is the country to which he returns as a permanent home. It must be the country where in the settled routine of life, the *de cuius* regularly, normally or customarily lives. See *Boswinkel v Boswinkel supra* p 62E.

B A change of domicile is a serious matter and may involve far-reaching consequences in regard to succession and distribution and other things that depend on domicile. See *Winans & Anor v Attorney-General* [1904] AC 287 at 291. For this reason, some decided cases had previously suggested that a party suggesting change of domicile bore a heavy *onus*. In *Senior & Anor v Comr for Inland Revenue* 1960 (1) SA 709 (A), it was argued that there is usually a strong presumption or probability against a person abandoning his domicile of origin for a foreign origin. The position now appears settled that the *onus* is no more than on a balance of probabilities. See *Ley v Ley's Executors & Ors* 1951 (3) SA 186(A) at 192H; *Senior & Anor v Comr for Inland Revenue supra* at p 714A.

D On a careful analysis of the factors highlighted by the court *a quo* in reaching its decision, it is clear that, whilst the *factum* of residence was common cause, an intention on the part of the appellant to abandon his domicile of origin was never established. It is also apparent that the court *a quo* took into account circumstances that may have arisen well after the commencement of the divorce proceedings. For reasons already given this is, of course, not proper as the important question is whether the court had jurisdiction at the time of commencement of the divorce proceedings.

Both parties to this matter were agreed in their pleadings that the appellant was domiciled in Zimbabwe. That in itself is, of course, not conclusive. The appellant frequently comes back to Zimbabwe. He has both movable and F immovable property in Zimbabwe. After a stay of four years in the United Kingdom, so he told the court, a person in his position could apply for citizenship or indefinite leave to remain in the country. It is common cause that at the date of commencement of the proceedings he had been in the United Kingdom for only three years. The four year period was still to expire. Although the record seems to suggest that he told the court that he had G already applied for citizenship, this would appear to be incorrect as he had not yet achieved the minimum stay necessary for such application to be made. It is also apparent that the possibility of applying for citizenship was mentioned in the context of ensuring that the education of the children was not H interrupted. In his evidence he told the court *a quo* that it was his intention

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Garwe JA

to develop the stand in Harare so that when he comes back he has somewhere A to come back to. It was also his evidence that his desire is that his children remain Zimbabwean.

These assertions do not lend support to the conclusion reached that the appellant had formed an intention to permanently stay in the United Kingdom. In this day and age, persons leave their countries and stay in other countries B for years whilst pursuing their education or professional careers. In these circumstances one must, as stated by Lord McNaughten in *Winans & Anor v Attorney-General supra* at p 294:

"Look very narrowly into the nature of a residence suggested as a domicile of choice before you deprive a man of his native domicile."

The factors taken into account by the court *a quo* did not, whether singly or C cumulatively, suggest an intention on the part of the appellant to abandon his domicile of origin. First, the court *a quo* found that if granted custody the appellant "will perforce have to apply to extend his stay indefinitely in the United Kingdom". This is a development that would have taken place long after the commencement of the proceedings and which would not affect the D jurisdiction of the court as at the commencement of the proceedings. In any event, mere residence in a particular place is not, in the absence of an intention to permanently stay in that place, proof of an intention to adopt a domicile of choice. In *Bowie (or Ramsay) v Liverpool Royal Infirmary* [1930] AC 588 at 595, the House of Lords concluded that a thirty-five-year stay by Bowie in Liverpool merely established the *factum* but was insufficient to infer the E *animus* in the sense of a definite intention to abandon his domicile of origin and to acquire a new one.

Secondly, the court *a quo* found that the appellant had indicated that he was eligible to apply for citizenship and had already submitted his application. This finding similarly relates to circumstances that were to occur long after the date ^F of commencement of the proceedings. The fact that this may have been the position in November 2005, when the appellant gave evidence, has no effect on the question whether as at February 2005 the High Court in Zimbabwe had jurisdiction. In any event, the position is now settled that domicile is clearly distinguishable from citizenship. As *op cit* notes at p 55:

“... it is by no means unusual for a person to be domiciled in one country ^G while having the citizenship of another ...”

The appellant in any event denies that such an application was made. Even if it had, this would not by itself be conclusive evidence of an intention to permanently settle in the United Kingdom. ^H

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Garwe JA

^A Thirdly, the court *a quo* found that the appellant did not intend to disrupt the educational environment of the children and for that reason wanted to keep the children in the United Kingdom if granted custody. It is clear that he was doing this, not in order to stay permanently in the United Kingdom, but rather to ensure that his children's education was not disrupted. That was his intention.

^B Fourthly, the court *a quo* found that he had purchased a house in the United Kingdom. The house was intended to accommodate the appellant and the children. The acquisition on its own did not establish an intention to abandon his domicile of origin and acquire a new domicile particularly when regard is had to the appellant's evidence that he still had plans to develop a stand in ^C Waterfalls, Harare.

In all the circumstances, the evidence before the court *a quo* did not establish an intention on the part of the appellant to stay in the United Kingdom permanently. Indeed, Mr *Warara*, who appeared for the respondent, conceded that the evidence did not conclusively show an intention on the part of the appellant to abandon his domicile of origin. The court *a quo* therefore erred ^D in dismissing the appellant's counterclaim for want of jurisdiction. That decision must therefore, be set aside.

One further matter calls for comment. In his notice of appeal, the appellant seeks an order setting aside the decision of the court *a quo* and for another order granting a decree of divorce and other ancillary relief. In their oral ^E submissions before this court, both counsel urged this court to grant the relief sought, but refer the issue of custody of the minor children to the trial court for determination.

I have some difficulty with this suggestion.

The trial judge heard evidence from the appellant. She was in a position to ^F conclude the matter but reached the decision that she lacked jurisdiction to hear the matter. She then dismissed the matter for lack of jurisdiction. For reasons given in this judgment, that decision was wrong. Since this court has now determined that the trial judge did in fact have jurisdiction to hear the matter, the proper course would be for the matter to be referred back to the trial court for finalisation. The issues of divorce and other ancillary relief that the ^G appellant would like this court to deal with were never determined by the trial court. Clearly, therefore, there would be no basis upon which this court could grant the decree of divorce and ancillary relief that is sought.

On the question of costs, it is common cause that the respondent withdrew her claim and tendered costs. The matter thereafter proceeded on an ^H uncontested basis. The appellant then appeared before the court *a quo* and

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Garwe JA

gave evidence. It was the court *a quo* that *mero motu* raised the question of ^A jurisdiction and instructed both parties to file heads of argument on the matter. This is the same matter that is before this court.

In the circumstances, it seems fair that the respondent pays the costs of the proceedings up until the time she filed her notice of withdrawal. Thereafter, each party should pay his or her own costs.

^B

Accordingly, it is ordered as follows:

- “1. The order of the High Court dismissing the appellants’ counter claim for want of jurisdiction be and is hereby set aside.
2. The matter be and is hereby remitted to the trial court for determination.
3. The respondent is to bear the costs of the proceedings up until the c date of withdrawal of her claim and thereafter each party is to bear its own costs.”

CHEDA JA & GWAUNZA JA concurred.

Mbidzo, Muchadehama & Makoni, appellant’s legal practitioners ▯

Warara & Associates, respondent’s legal practitioners

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Source:

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GLOBAL ELECTRICAL MFRS v NEXBAK INVSTMS (PVT) LTD & ORS 2007 (1) ZLR 205 (S) 2007 (1) ZLR p205

Citation	2007 (1) ZLR 205 (S)
Case No	Judgment No. S-76-06
Court	Supreme Court, Harare
Judge	Malaba J, Gwaunza JA & Garwe JA
Heard	9 October 2006
Judgment	3 April 2007
Counsel	<i>F M Katsande</i> , for the appellant <i>A A Debwe</i> , for the first and second respondent No appearance for the third respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Legal practitioner — *conduct and ethics* — *use of intemperate language* — *need to use appropriate language to attack decision of judge a quo*

Headnote

Whilst legal practitioners act on instructions, the use of intemperate language is not in keeping with the ethics of the profession and must be censured. ▯ To suggest that the trial judge “irrationally” upheld the other party’s claim or that he “undeservedly” found for the other party has no place in a courtroom. Whilst legal practitioners are entitled to attack court decisions they are not happy with, they should employ appropriate language in the process. To suggest that a judge has acted

irrationally ^εis to make a most serious allegation. The need for legal practitioners to moderate their use of language becomes even more pronounced in a case where the attack is found to be completely without foundation.

Case information

F M Katsande, for the appellant

A A Debwe, for the first and second respondent

⌘ No appearance for the third respondent

Judgment

GARWE JA: At the conclusion of the trial of this matter, the High Court dismissed with costs the appellant's claim for an order compelling the first two respondents to pass transfer to it of stand No. 62 Mbuya Nehanda Street, Harare. The court found that it was highly improbable that an agreement had [Ⓒ]been reached in terms of which the appellant was to take transfer of stand No. 62 Mbuya Nehanda Street, Harare. The court also found that the appellant had not contributed financially towards the purchase of stand No. 63 Mbuya Nehanda Street, Harare. The appellant now appeals against this decision and [Ⓜ]for judgment to be granted in its favour with costs.

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Garwe JA

The appellant's version in the court *a quo* had been that he was offered stand [Ⓐ]No. 63 for a price of \$4 000 000. The appellant had been leasing the stand in question but was then given the right of first refusal. The appellant paid the required deposit of \$2 000 000 but was not able to raise the balance of \$2 million. The appellant then approached the second respondent who agreed to pay the balance of the purchase price but insisted that the property be [Ⓑ]transferred into the first respondent's name as requested by his bank. The second respondent was a director of the first respondent. The second respondent thereafter indicated that the first respondent had also acquired stand No. 62 Mbuya Nehanda. That stand is opposite stand No. 63. After a discussion it was agreed that the appellant would become owner of stand No. 62 *in lieu* of its share of stand No. 63. [Ⓒ]

The second respondent gave a different version. That version was as follows. The first respondent shared stand No. 63 with the appellant. The stand in question was owned by the Fernandes Brothers. The appellant's director, a Mr Mahlatini, advised that the Fernandes Brothers were selling the stand for \$4 million and invited the respondents to participate in the purchase in equal shares with the appellant. The first and second respondents paid the sum of [Ⓓ]\$2 187 500 on 7 July 2000 but the appellant was not able to raise its share of \$2 million. As a result, the two parties signed a further agreement in which the appellant acknowledged receipt of \$2 million. The balance, agreed as \$2 500 000, was to be paid by the first respondent on transfer. The sum of \$2 500 000 was subsequently paid to the seller's legal practitioners. Although the second [Ⓔ]respondent accepted during the trial that the appellant had been given the right of first refusal he maintained that the latter had failed to raise the money. It had then been agreed that the first respondent would pay the amount in full, after which transfer would be effected in its favour. Thereafter the first respondent also acquired stand No. 62 and the appellant was requested to move and occupy a portion of that stand. *In lieu* of such occupation, the [Ⓕ]appellant was to pay the rates and other charges due to the City Council. Matters came to a head when the appellant was asked to move from Stand No. 62.

On the above evidence, the trial court was asked to determine two issues. These were, firstly, whether the appellant occupied stand No. 62 as owner [Ⓖ]pursuant to an agreement between it and the first respondent and, secondly, the parties' respective contribution towards the purchase of stand No. 63 Mbuya Nehanda Street. At the conclusion of the trial, the court *a quo* found in favour of the first and second respondents and dismissed the appellant's claim with costs. [Ⓜ]

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Garwe JA

[Ⓐ]The appellant has attacked the judgment of the court *a quo* on three main grounds – firstly, so it was contended, the appellant never repudiated its right of first refusal and the original agreement of sale remained in force; secondly, that the appellant is entitled to take transfer of stand No. 62 pursuant to the agreement entered into between the parties; and thirdly that the trial court erred in

holding that the first and second respondents had paid the purchase price in full and that the appellant had not contributed at all to the acquisition of stand No. 63.

I will deal firstly with the question whether or not the court *a quo* was correct in finding that the appellant did not make any payment towards the purchase of stand No. 63 Mbuya Nehanda Street, Harare. Mr *Katsande*, who appeared ^c for the appellant, submitted that the trial judge “irrationally upheld the first respondent’s claims that they had financed the full purchase price”. For reasons that will follow shortly, this submission is not supported by the evidence.

The appellant’s evidence was that it paid the deposit of \$2 million in respect of stand No. 63 and that the first respondent paid the remaining \$2 million. ^d However no documentary proof of any kind was tendered to confirm the payment of the sum of \$2 million by the appellant. No attempt was made to call the appellant’s erstwhile legal practitioners, Dube, Manikai & Hwacha, to confirm that indeed they received this sum from the appellant and that they paid it to the sellers. On the contrary, the evidence led before the court *a quo* ^e suggested that the entire purchase price had been paid by the first and second respondents. The sum of \$2 187 500 represented the proceeds from the sale of the second respondent’s two properties. The two receipts issued in respect of this sum – for \$450 000 and \$1 750 500 – indicate that the money was intended for the Fernandes Brothers. It is common cause that the Fernandes Brothers were the sellers. It is also clear from the appellant’s letter dated 10 ^f July 2000 that of the sum of \$2 187 500 the sum of \$2 000 000 went towards purchasing the property whilst the remaining \$187 500 went towards other expenses. Further it is not in dispute that the first respondent made a payment of \$2 500 000. This sum must have been paid pursuant to the agreement signed between the appellant and the first respondent on 20 September 2000. Indeed, in para 2.2 of the agreement, the appellant acknowledges that the first ^g respondent had paid the sum of \$2 million into the trust account of Honey & Blanckenberg (the seller’s legal practitioners) and that there remained a balance of \$2 500 000. In terms of that agreement, the sum of \$2 500 000 was payable by 4 October 2000. Two bank cheques with a face value of \$2 500 000 were made out in favour of Honey & Blanckenberg on 3 October 2000. On 31 ^h October 2000, Dube, Manikai & Hwacha, who were the appellant’s legal

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practitioners, wrote to the seller’s legal practitioners advising that: ^a

“the funds to purchase the property were sourced from Nexbak Investments. Global Investments does not have the capacity to repay the amount of the purchase price to Nexbak and the two have agreed that the property be transferred to Nexbak Investments ...”

Then on 18 October 2004, the appellant’s legal practitioner wrote to the first ^b respondent demanding transfer of stand No. 62, Mbuya Nehanda Street. In para 3, the legal practitioner says that:

“Nexbak advanced a *loan facility* of \$4 000 000 (four million dollars) (‘the loan’) to Global Investments to pay for the purchase of stand. As consideration for the loan Global authorised the registration of stand in Nexbak’s name ...” (emphasis is mine). ^c

In its heads of argument, the appellant does not suggest that it paid \$2 000 000 as deposit for the purchase of stand No. 63. The heads of argument suggest that the appellant was entitled to “co-ownership of stand No. 63, by virtue of its right of pre-emption” and that:

“the right of pre-emption conferred an asset for the appellant which it ^d traded in exchange for acquisition of stand No. 62.”

The court *a quo* was satisfied on the evidence that the first and second respondents had paid the purchase price in full. That conclusion was consistent with the facts. Not only had the appellant failed to show that it had paid the deposit of \$2 000 000, but the probabilities and the documentary evidence produced by the first and second respondents clearly established ^e that the appellant had not made any financial contribution towards the acquisition of stand No. 63 Mbuya Nehanda Street. The learned trial judge found it highly improbable that the appellant’s managing director, being an experienced estate agent, would have agreed to forego his half share of stand No. 63 and become sole owner of stand No. 62 without reducing such an agreement to writing. In my view, the court *a quo* was correct in finding that ^f no such contribution took place. The suggestion made that the trial judge misdirected herself in this regard has no merit.

The second issue raised, namely whether there was an agreement between the two parties in terms of which the appellant was entitled to take transfer of stand No. 62 Mbuya Nehanda Street, Harare,

is interlinked with the issue whether ^G or not the appellant contributed financially to the purchase of stand No. 63. Having found, quite correctly, that there was no such contribution, and considering that the alleged agreement was never reduced to writing, the trial judge found that the appellant had not proved the existence of such an agreement on balance. I am satisfied that the trial judge was correct in arriving at this conclusion. Nowhere in the evidence was there anything to suggest ^H

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Garwe JA

^A that such an agreement had been reached. The instruction to the City Council for rates to be forwarded to 62 Mbuya Nehanda Street, Harare cannot by any stretch of imagination be said to be evidence of such an agreement.

In general, the court *a quo* was correct in finding that the appellant's version was full of improbabilities and inconsistencies and further that the appellant's witness was not credible.

^B Turning to the last issue raised, namely whether the appellant repudiated its right of first refusal, it is apparent that the appellant's submissions in this regard are muddled. It appears to have been the appellant's case at the beginning that it is entitled to transfer of stand No. 62 pursuant to an agreement it reached with the first and second respondents in terms of which the ^C appellant was offered stand No. 62 *in lieu* of its half-share of stand No. 63. However, the appellant's heads of argument seem to suggest that this is not in fact the position. In the heads of argument, the appellant says that it had the right of first refusal in respect of stand No. 63. The appellant further says that the right of pre-emption conferred on it an asset which asset "it traded ^D in exchange for the acquisition of stand No. 62". The appellant further says:

"The appellant's right of pre-emption has commercial value akin to goodwill or other intellectual property. The appellant traded that commercial value entitling the first and second respondents to acquire full ownership of stand No. 62..."

The suggestion in the heads of argument appears to be that the appellant is ^E entitled to take transfer of stand No. 62, not because it was entitled to a half-share in stand No. 63, but rather because by agreement with the respondents it traded its right of first refusal in respect of stand No. 63 for stand No. 62.

Although the trial court did not specifically deal with the appellant's right of first refusal in its judgment, it is clear that the court accepted that the right had been waived by the appellant and that the first respondent had been allowed ^F to take transfer of stand No. 63 after paying the full purchase price to the sellers.

There can be no doubt on the facts that the appellant expressly repudiated its right of first refusal. The appellant wrote letters to this effect and indeed facilitated the transfer of stand No. 63 to the first respondent. The appellant accepts that it gave instructions to transfer stand No. 63 to the first respondent. ^G By so doing, the appellant expressly repudiated its right of first refusal.

The appellant seems to suggest that, notwithstanding the fact that it allowed the first respondent to take transfer of stand No. 63, it nevertheless retained its right of first refusal. The appellant goes further and says only when the appellant and seller of the property in question "have dissolved their ^H relationship can a third party contractually supercede the appellant". I do not

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Garwe JA

understand this submission. If one has a right of first refusal and instead of ^A exercising that right allows the seller to transfer the title to another person who has effected payment of the purchase price, one repudiates that right. The right comes to an end the moment one agrees that transfer should go to someone else. One cannot allow title to pass to someone else but still retain the right of first refusal. In other words, one cannot enforce a right of first ^B refusal after instructing the seller to pass transfer to someone else. If the appellant's claim that it still retains a right of first refusal were to be accepted for a moment, such a right would be enforceable against the seller and not a third party. The seller is not a party to these proceedings and no relief has been sought against him. It is clear however that the seller acted on the appellant's specific instructions to transfer the property to the first respondent. That was ^C the end of the matter.

In all the circumstances, I am satisfied that this appeal has no merit and that it cannot succeed.

Before concluding, however, one further matter calls for comment and that is the language used by the appellant's legal practitioner in attacking the ^D decision of the trial court. Whilst it is accepted that legal practitioners act on instructions, the use of intemperate language is not in keeping with the ethics of the profession and must be censured. The suggestion that the trial judge "irrationally" upheld the first and second respondents' claim; that the trial judge "undeservedly" found for the first and second respondents; that had she "judicially conceptualized" (whatever this means) has no place in a ^E courtroom. Whilst legal practitioners are entitled to attack court decisions they are not happy with, it is obvious that they should employ appropriate language in the process. To suggest that a judge has acted irrationally is to make a most serious allegation. The need for legal practitioners to moderate their use of language becomes even more pronounced in a case, such as the present, where the attack is found to be completely without foundation. ^F

The appeal is dismissed with costs.

MALABA JA & GWAUNZA JA concurred.

F K Katsande & Partners, appellant's legal practitioners ^G

Debwe & Partners, first and second respondent's legal practitioners ^H

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/TARUMBWA v TARUMBWA 2007 (1) ZLR 211 (H)

TARUMBWA v TARUMBWA 2007 (1) ZLR 211 (H)

2007 (1) ZLR p211

Citation	2007 (1) ZLR 211 (H)
Case No	Judgment No. HH-19-07
Court	High Court, Harare
Judge	Makoni J
Heard	7 December 2006
Judgment	4 April 2007
Counsel	<i>P Kawonde</i> , for the plaintiff
Case Type	Unopposed divorce action
Annotations	Link to case annotations

Flynote

Practice and procedure — *appearance to defend* — *matrimonial case* — *defendant not entering appearance to defend* — *should be given opportunity to purge his default and plead*

Headnote

c In ordinary cases, a defendant can apply for rescission of a default judgment without any difficulty. The same cannot be said of matrimonial matters. d A party would have moved on and maybe contracted another marriage. What, then, would be the effect on such a marriage when the other party applies for rescission of the default judgment? Granting a default judgment would be an injustice to the defendant.

The new Form 30A, which is used when proceeding in terms of r 269A of the High Court Rules, does not state a date of set down or invite the e defendant to plead if he wishes to defend the matter. What this means is that, just as with the ordinary summons, if the defendant in a matrimonial action does not enter an appearance to defend, the plaintiff can obtain a default judgment. This was clearly an oversight on the part of the draftsman. If a divorce action is initiated under r 272, the court is required f to ensure that the defendant in a divorce instituted ordinarily is given every opportunity to defend the action, including being given an opportunity to appear in court on the set down date and to defend the action at that late hour. It is anomalous that the court cannot afford the same rights and protection to a defendant served with a Form 30A summons, when such a summons now has no features safeguarding the g protection afforded by r 272 (as used to be the case before the form was amended). Pending revision of the form, the court can fall back on its inherent powers to control its own procedures and fulfil its core mandate of doing justice to all, and order that the defendant be served with a notice h to plead in terms of r 272.

2007 (1) ZLR p212

Makoni J

Cases cited ^A

Khunou & Ors v M Firher & Son (Pty) Ltd 1982 (3) SA 353 (W)

Ncoweni v Bezuidenhout 1927 CPD 130

Szedlucsek v Szedlucsek 2000 (4) SA 147 (E)

Zikiti v United Bottlers 1998 (1) ZLR 389 (H)

Legislation considered ^B

High Court Rules 1971 (RGN 1047 of 1971), rr 269A & 272(1)

High Court Amendment Rules 2000 (SI 80 of 2000)

Case information

P Kawonde, for the plaintiff

Judgment

MAKONI J: On 17 October 2006, the plaintiff issued summons in this court c claiming the following:

- (a) A decree of divorce.
- (b) An order dividing the movable property of the parties in terms of paragraph 8 of the declaration. d
- (c) That each party pays its own costs.

The defendant was served personally with the summons on 20 October 2006. She did not enter appearance to defend. The *dies induciae* expired and the matter was set down on the unopposed roll. On the day of hearing, I directed that the defendant be served with a notice to plead in terms of r 272. e

Rule 272(1)(b) provides:

"272(1) In an action for restitution of conjugal rights, divorce, judicial separation or nullity of marriage where the defendant failed to enter appearance:

- (a) ...
- (b) if the declaration has been served with the summons, the plaintiff f wishing to obtain judgment shall file and deliver the aforesaid notice to the defendant and after the *dies induciae* as calculated in the proviso to r 119."

The notice referred to is a notice in accordance with Form 30 calling upon the defendant, if he wishes to defend, to purge his failure to enter appearance and to plead, answer or except or make a claim in reconvention commonly referred to as the notice to plead.

Mr *Kawonde* contended/submitted that in terms of r 269A, service of notice to plead was not necessary as the defendant had been served with a Form 30A summons. I requested that he files heads of argument in support of his contention. In his heads of argument, he clearly sets out the position before

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Makoni J

and after the amendment of the rules by SI 80 of 2000. Before the amendment to the rules, a party had an option to issue either an ordinary summons or a Form 30A summons. This was provided for in r 269A which read as follows:

"The summons commencing an action mentioned in this order may, at the option of the plaintiff, be issued in Form 30A, in which case the provisions of r 272 shall not apply to such action."

The then Form 30A had a provision for a set down date. The relevant section read:

"And, further, require the defendant to take notice that, if he/she fails to enter appearance as aforesaid, the plaintiff's claims as set out in the declaration will be heard and adjudicated upon by the High Court of Zimbabwe sitting at on the day of 19 without further notice to the defendant."

If a party chose to issue a Form 30A summons, it follows, logically, that there would be no need to serve the defendant with a notice of plead as the defendant would have been advised of the set down date.

SI 80 of 2000 introduced the following changes:

- (i) r 269A was amended by the insertion after 30A of "to which a copy of the plaintiff's declaration shall be annexed."
- (ii) Form 30A was repealed and substituted with the current Form 30A.

The main difference between the repealed and the current Form 30A is that the current Form 30A no longer has the set down date on the face of the summons. In effect, there is now no difference between Form 30A and Form 2, which is the ordinary summons. The current Form 30A contains a clause to the effect that, if you do not enter appearance to defend, the plaintiff's claims will be heard and dealt with by the High Court without further notice to you. What this means is that, just as with the ordinary summons, if the defendant does not enter an appearance to defend in a matrimonial action, the plaintiff can obtain a default judgment.

I think it was an inadvertent error on the part of the drafter of the High Court Rules to omit the date from the face of Form 30A as the absurd result is that there is no distinction between the ordinary summons and the "special" Form 30A sought to be created by r 269A. Further, it appears anomalous that the same court would be required under r 272 to ensure that a defendant in a divorce action instituted ordinarily, as opposed to a defendant served with a Form 30A summons, is given every opportunity to defend the action, including being given an opportunity to appear in court on the set down date and to defend the divorce action at that late hour, yet not afford the same rights and protection to a defendant served with a Form 30A summons, when such

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Makoni J

summons has no features safeguarding the protection afforded by r 272, as used to be the case.

The plaintiff can obtain a default judgment without the defendant being given an opportunity to purge his failure to enter appearance to defend, to plead or to exercise the other options provided by r 272(1)(a). This could not have been the intention of the legislature, considering that we are dealing with matters which have the effect of changing the status of the parties. If that was the intention of the legislature, it would have repealed r 272. As the rules stand, one would ask in which circumstances would r 272 apply. Such orders in default will also have the effect on the parties' future marital and proprietary rights and the legitimacy of the children born after such orders. In ordinary cases, a defendant can apply for rescission of the default judgment without any difficulty. The same cannot be said of matrimonial matters. One party would have moved on and maybe

contracted another marriage. What then would be the effect of such a marriage when the other party applies for rescission of the default judgment?

It is clear that the amendment to Form 30A created an anomaly which needs ^D rectification. It is my recommendation that the Rules Committee urgently addresses the anomaly by amending the current Form 30A to indicate the date of the set down on the face of the summons.

Before the amendment to the Rules I have suggested, the court can fall back on its inherent powers to control its own procedures and fulfil its core mandate of doing justice to all – see *Khunou v M Fihner & Son (Pty) Ltd* 1982 SA (3) 353 (W) at 355E-H ^E per Slomowitz AJ.

“Of course the Rules of Court, like any set rules, cannot in their very nature provide for every procedural situation that arises. They are not exhaustive and appropriate to specific cases. Accordingly, the superior courts retain an inherent power exercisable within certain limits to regulate their own procedure and adapt it, and, if need be, the Rules of Court according to ^F the circumstances.”

It is trite that Rules of Court are here for the court and not the other way round – see *Szedlacsek v Szedlucsek* 2000 (4) SA 147 (E) at 149, where it was held *per* Leach J that:

“It is trite that Rules are there for the court, not the court for the Rules and ^G this court must zealously guard against its Rules being abused, particularly by the making of unnecessary procedural related applications which are not truly required in order for justice to be done or for the speedy resolution of litigation, but which appear to be designed mainly to inflate costs to the advantage of a practitioner’s pocket.” ^H

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Makoni J

^A The power of this court to issue directives in its quest to see that justice is done is beyond dispute. It is an inherent power that is reinforced by the Rules. The Rules are not an end in themselves, and should not be obeyed slavishly and blindly, especially where such observance will lead to an injustice in the form of differential treatment between the same class of litigants. The same observation was made by Gillespie J in *Zikiti v United Bottlers* 1998 (1) ZLR 389 at 393G and 394A where he said: ^B

“It might seem anomalous that the High Court should, by an exercise of ^C discretion, withhold jurisdiction from any party who, on established authority, is entitled to claim relief. Although not expressed, the jurisprudential basis for such discretion is not hard to find. It is an instance of inherent jurisdiction of this court to regulate and control its own ^C proceedings so as to prevent injustice or abuse of process. This equitable discretion underlies many recognized instances where the court will stay or dismiss proceedings.”

In conclusion, I could do no better than borrow from Gardner JP’s words in *Ncoweni v Bezuidenhout* 1927 CPD 130 where he said:

“^D The rules of procedure of this court are devised for the purpose of administering justice and not of hampering it, and where rules are deficient, I shall go so far as I can in granting orders which would help to further the administration of justice.”

In view of the above, granting a default judgment in this case would be an injustice to the defendant.

^E In the result, it is ordered that the plaintiff serves the defendant with a notice in terms of r 272(1) (b).

^F *Kawonde & Co.*, plaintiff’s legal practitioners

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Source:

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MANGWENDEZA v MANGWENDEZA 2007 (1) ZLR 216 (H)

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Citation	2007 (1) ZLR 216 (H)
Case No	Judgment No. HB-45-07
Court	High Court, Harare
Judge	Ndou J
Heard	24 July 2006
Judgment	5 April 2007
Counsel	<i>K I Phulu</i> , for the plaintiff <i>J Tshuma</i> , for the defendant
Case Type	Divorce action
Annotations	Link to case annotations

Flynote

Family law — husband and wife — divorce — division of matrimonial assets c — company run by one spouse — when may be included among matrimonial assets

Headnote

While a company duly incorporated is a distinct legal entity with its own *persona*, the veil of incorporation may be lifted when it is necessary to prove who is responsible for the activities, decisions and control of the company. Where a company was incorporated, expanded and flourished due to the activities of one partner to a marriage, resulting in a high standard of living being enjoyed by the parties to the marriage, the court has a discretion as to whether to include the company among the parties' assets and to allocate a portion thereof. ^Ε

Cases referred to

Beaumont v Beaumont 1987 (1) SA 967 (A)
Little v Little [1990] SLT 785
Marimba v Marimba 1999 (1) ZLR 87 (H)
Mashave v Chinyowa HH-115-01 ^F
Masimiremba NO v Chipembere 1996 (2) ZLR 378 (S)
Miller v Miller [2006] UKHL 24
Minton v Minton [1979] AC 593; [1979] 1 All ER 79 (HL)
Ncube v Ncube 1993 (1) ZLR 39 (S)
Salomon v Salomon & Co Ltd [1897] AC 22
Sibanda & Anor v Sibanda 2005 (1) ZLR 97 (S) ^G
Takawira v Takawira HC 924/97 (not reported)
Wachtel v Wachtel [1973] 1 All ER 829 (CA)

Case information

K I Phulu, for the plaintiff
J Tshuma, for the defendant ^H

Ndou J

Judgment

A **NDOU J:** The parties were married out of community of property in accordance with the laws of Zimbabwe, on 23 February 1991, and the marriage still subsists. Prior to the civil marriage, the parties had been married to each other under customary law and started living together in 1987. There are two children born of the marriage, namely, Tinotenda, now a major, born 25 February 1988, and Takudzwa, a minor, born 26 September 1991. Tinotenda was doing his "A" ^B level at Christian Brothers College at the time of trial in 2006 and Takudzwa was a boarder at Midlands Christian College. The parties agreed that, in addition to paying school fees, buying school uniforms and providing for all school activities, including extra-curricular activities, the plaintiff will pay a sum of \$10 000 per month as contribution for Tinotenda for his transport to school.

c The contested issues are the following. First, whether or not the plaintiff should contribute any amount in addition to the school fees, school uniforms and all school expenses, including extra-curricular activities, in the case of Takudzwa, and if so, how much.

Second, how the movable assets of the parties should be divided. Third, how the immovable assets of the parties should be divided. Fourth, whether or not ^D the assets of Adjustable Potty Products (Pvt) Ltd in which the defendant is a shareholder were absorbed by Asphalt Products (Pvt) Ltd. If the above contention is correct, whether as consequences thereof, the defendant is entitled to compensation. The first and only witness for the plaintiff is the plaintiff himself.

£ [The learned judge then reviewed the evidence given by the parties, and continued:]

FINDINGS OF FACT

The factual issues in this matter depend mainly on the findings of credibility. In this case, it is the word of the plaintiff against that of the defendant. I am ^F satisfied that the plaintiff is not a truthful witness. To illustrate, in his particulars of claim and subsequent pleadings and his synopsis of evidence he never mentioned that his son Emmanuel was the cause of the breakdown of the parties' marriage, yet in his testimony he made it out to be the main cause. This alleged ill-treatment of Emmanuel was clearly an afterthought. The plaintiff did not deal with the court with candour as he did not state the effect ^G of his relationship with a girlfriend on the marriage. This open infidelity was obviously the main cause of the breakdown. He secretly set up a home with a girlfriend. They were in love to such an extent that they took photographs showing romantic kisses. The photographs ended up with the defendant and the plaintiff's son. Obviously, the plaintiff tried to conceal his involvement ^H with the girlfriend as being the cause of their marital problems. Even if I accept

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Ndou J

that defendant ill-treated Emmanuel, I do not see how that is relevant to his ^A infidelity with another woman who is not even Emmanuel's mother. Overall, the plaintiff made a very poor showing as a witness. I am, however, satisfied that the defendant is a credible witness. She did not seek to exaggerate her testimony. Her version was consistent throughout.

CLASSIFICATION AND DISTRIBUTION OF MATRIMONIAL ^B ASSETS

As alluded to above, it is common cause that the marriage has irretrievably broken down. The only issue left is the determination of matrimonial assets and their distribution between parties. This issue is not necessarily determined by my findings on credibility. The findings of fact provided the basis on which ^C the issue is to be resolved.

ASPHALT PRODUCTS

There is no doubt in my mind that, whatever its origin, the company has grown a life of its own. It is a separate legal entity with a life of its own. But there is no doubt it is in a way part of the net worth value of the Mangwedenza estate. ^D I must, however, state that I will give due recognition of

the legal *persona* that constitute the estate. Unless it is absolutely necessary, a court will endeavour to make an apportionment that does not interfere with the right of parties who are not part of the proceedings. It is trite that a company duly incorporated is a distinct legal entity endowed with its own legal personality: *Salomon v Salomon & Co Ltd* [1897] AC 22. However, the veil of incorporation may be ^εlifted where necessary in order to prove who determines or who is responsible for the activities, decision and control of a company. See *Sibanda & Anor v Sibanda* 2005 (1) ZLR 97 (S). In this case, the plaintiff was selective in disclosing company records in his custody as the managing director and shareholder. In matrimonial matters, where the court enjoys vast discretion in the apportionment of assets, I believe it is important that litigants approach ^ϕthe court with candour and utmost good faith. Each party must disclose to the court every material fact, whether for or against him or her, for the court to be able to make a fair and just assessment. There is always a temptation to mislead the court. This should be discouraged as it affects the proper exercise of the discretion by the court. This discretion should result in the fair apportionment ^ϑof the fruits of a marriage partnership. From the credible evidence, there is no doubt that Asphalt Products was incorporated then expanded and flourished as a result of activities undertaken, by the plaintiff for the most part, during the period of the marriage. Plainly, the accretion to the plaintiff's wealth during the marriage as a result of the work he did during the marriage was substantial indeed. In the result, I am entitled to regard the high standard of living enjoyed ^η

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Ndou J

^αby the parties during the marriage as a key feature. That is not a standard of living the defendant would likely want to achieve for herself. As alluded to above, division of matrimonial property in terms of the Matrimonial Causes Act [*Chapter 5:13*] is essentially a matter of discretion, aimed at achieving a fair and practicable result in accordance with common sense. See *Little v Little* [1990] SLT 785. From the credible evidence in this matter, the couple's finances ^βhad become ever-more inter-linked and inter-dependent. The parties also owed one another duties of support, so that what started as individual income was used for the benefit of the whole family. Gender roles were flexible within the parties' marriage, with bread-winning and bread-making responsibilities being shared and changing over time. This is evinced by the responsibility the defendant shouldered in raising funds for the purchase of the Killarney ^γproperty and the resultant role she played in the liquidation of the bond. So the parties' financial arrangements also became flexible and changed over time. This is a marriage where it has become less and less relevant to ask who technically is the owner of what. The defendant bore both home-making and bread-winning responsibilities. At divorce, my powers must also be flexible. ^δThey clearly can no longer be based on the assumption that there is one male breadwinner to whom all or most of the resources belong and one female home-maker in need of his support, and entitled to it only as long as she remains deserving. I have to take into account all the parties' resources from every source and exercise my wide range of discretionary powers to reallocate all these resources in terms of ss 7 and 9 of the Matrimonial Causes Act. Further, ^εit would be unfair not to acknowledge that the defendant did not seek to end the marriage, nor did she give the plaintiff any remotely sufficient reason for doing so. The plaintiff fell in love with another woman and decided to terminate the marriage. I am, therefore, entitled to take into account that plaintiff was to blame for the breakdown of the marriage, even though his conduct would not ^ϕmerit advancing under the Matrimonial Causes Act. I should take into account the obvious and gross misconduct of apportionment. See *Beaumont v Beaumont* 1987 (1) SA 967 (A); *Watchel v Watchel* [1973] 1 All ER 829 (CA); *Marimba v Marimba* 1999 (1) ZLR 87 (H); *Miller v Miller* and *McFarlane v MacFarlane* [2006] UKHL 24 and *Takawira v Takawira* HC-924-97 (unreported and undistributed). This is a long marriage of around nineteen years. This has ^ϑto be taken into account. With all this in mind, I find that the defendant is entitled to a share of Asphalt Products. Her claim of \$10 billion is based mainly on the assets of the company and the nature of operations. I have already dealt with the lack of co-operation by the plaintiff and his selective production of company records. In the circumstances, I find a claim of \$10 billion as fair and ^ηas one which will not adversely affect the other shareholder (if any at all). This

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Ndou J

lump sum payment represents the financial closure of the parties' failed ^αmarriage as succinctly expressed by Lord Scarman in his familiar words in *Minton v Minton* [1979] AC 593 at 608:

"An object of the modern law is to encourage [the parties] to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down."

The uncooperative conduct of the plaintiff has made the present value of ^B Asphalt Products inestimable and its future value unfathomable. Estimating the value of the moveable assets such as motor vehicles and trucks, a payment of \$10 billion will not bring the company to its knees.

THE KILLARNEY PROPERTY

The plaintiff's proposal is that the parties remain joint owners. This proposal ^C offends against the clean break principle as alluded to above. I have already highlighted the undesirability of continuing the ties between the parties. The most practicable apportionment is one suggested by defendant i.e. she is awarded 100 per cent of the Killarney property and the plaintiff 100 per cent the Willsgrove property. The latter, in my view, part of the plaintiff's estate. ^D Even if the plaintiff shares the Willsgrove property in equal shares with his girlfriend, his own half share will still be far more valuable than the entire Killarney property. I base this on the conspicuous disparity in the sizes and the improvements on the two properties.

Section 7(4) of the Matrimonial Causes Act gives this court considerable ^E discretion but such discretion has to be judicially exercised. It has a broad guideline to the court for trying to achieve fairness between the parties: *Takafuma v Takafuma supra*; *Ncube v Ncube* 1993 (1) ZLR 39 (S); *Masimiremba NO v Chipembere* 1996 (2) ZLR 378 (S) and *Mashave v Chinyowa* HH-115-01. This court is enjoined to take factors set out in s 7(4) of the Act and try, as far as it is practicable and reasonable, to place the spouse and the children of the ^F marriage in a position they would have been had a normal marriage relationship continued. In this case, the defendant and the parties' two children have to stay at the Killarney property. That is the only home they have. The defendant has abandoned her claim to the Willsgrove property as she views it as the plaintiff's home. From the evidence, she was entitled to lay claim to the Willsgrove property, notwithstanding the plaintiff's deceit in registering it in ^G his girlfriend's name. The parties' two sons are of school going age. I am of the view that it is practicable and reasonable that the defendant and the two sons remain in occupation of the Killarney property and the plaintiff continues with his alternative arrangement at the Willsgrove property. ^H

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Ndou J

^A MOVABLE ASSETS

It is clear that the plaintiff is entitled to some, but not all of the assets claimed in para 10 of his declaration. Some of the items he is claiming, he already has similar items at the Willsgrove property. I find that he has made out a case for the award of defendant's stepson's bed, book cabinet, all his personal tools ^B and equipment and his personal records and CD collections.

ADDITIONAL CONTRIBUTION TOWARDS TAKUDZWA

As far as providing for his children, the plaintiff has not been found wanting. He has carried out his paternal responsibilities well and I do not think there is justification for the order sought in this regard.

^C Accordingly, I make the following order:

It is ordered that:

- (a) a decree of divorce be and is hereby granted;
- (b) the custody of the minor child Takudzwa Mangwedeza, born 26 September 1991, be awarded to the defendant, with the plaintiff enjoying ^D reasonable visitation rights;
- (c) the defendant is awarded all the movable assets in the Killarney property as her sole and exclusive property, save for the defendant's stepson's bed, book cabinet, the plaintiff's personal tools and equipment and the plaintiff's records and CD collection which be awarded to the plaintiff as his sole and exclusive property; ^E
- (d) the defendant be and is hereby awarded the property known as No. 120 Iona, (Marvel), Killarney, Bulawayo as her sole and exclusive property;

- (e) the plaintiff pays the defendant the lump sum of current revalued equivalent of \$10 billion (old currency) as a once and for all payment [£] for her interest in Asphalt Products (Pvt) Ltd;
- (f) Each party is to bear its own costs.

Coghlan & Welsh, plaintiff's legal practitioners

[£] *Webb, Low & Barry*, defendant's legal practitioners

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Source:

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ISMAEL v REGISTRAR-GENERAL & ANOR 2007 (1) ZLR 222 (H)

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Citation	2007 (1) ZLR 222 (H)
Case No	Judgment No. HH-25-07
Court	High Court, Harare
Judge	Makarau JP
Heard	29 March 2007
Judgment	25 April 2007
Counsel	<i>D Foroma</i> , for the applicant <i>C Muchenga</i> , for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure — *stay of proceedings* — *court's inherent jurisdiction c to stay proceedings* — *stay of proceedings in order to allow an administrative function or decision to be completed*

Headnote

The applicant was granted citizenship of Zimbabwe in 1987, having entered the country in 1980. He was issued a passport which was still valid at the [£] time of the proceedings, though nearly full. In 1996, the Minister of Home Affairs (the second respondent), having received certain information from security agencies, served the applicant with a notice depriving him of his citizenship. On the same day the notice was served, the applicant launched an application for an order compelling the respondents to issue him with a new passport within five days of the granting of the order. The [£] application was opposed on the basis that the second respondent had deprived the applicant of citizenship. A month later the applicant challenged the procedure by which the notice depriving him of his citizenship had been issued. The second respondent then commenced fresh procedures against the applicant, which procedures were still [£] under way at the date of the hearing of the application.

Held, that pending conclusion of the deprivation procedures against the applicant, the applicant remained a citizen and was entitled to remain in possession of the passport issued to him. He was also entitled to be issued with a new passport.

Held, further, that the issue of a passport is an incidence of and is ancillary ^g to citizenship and cannot be compelled independent of an inquiry into the citizenship of the applicant. *In casu*, the status of the applicant as a citizen was under review and was actually threatened by the second respondent.

Held, further, that the court had inherent jurisdiction to stay its own proceedings in appropriate cases, pending the completion of some ^h

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Makarau JP

^a administrative function and decision. In exercising that power, the court may, in the interests of justice, place a period within which the administrative function and decision must be undertaken and completed. *In casu*, a period of 60 days would be adequate for the second respondent to lawfully complete the procedures he had commenced against the applicant.

Cases cited ^b

Commercial Farmers' Union v Min of Lands & Ors 2000 (2) ZLR 469 (S)

FTCK Consultants CC & Ors v Shoprite Checkers Ltd 2004 (2) SA 504 (T)

Nick's Fishmonger Holdings (Pvt) Ltd v De Sousa 2003 (2) SA 278 (SE)

Western Cape Housing Development Board & Anor v Parker & Anor ^c 2005 (1) SA 462 (C)

Case information

D Foroma, for the applicant

C Muchenga, for the respondents

Judgment

^d **MAKARAU JP:** The facts of this matter are not in dispute. I set them out.

The applicant entered Zimbabwe in 1980. At the time, he declared he was born in Arusha, Tanzania. In 1982, he applied for Zimbabwean citizenship. His application was declined. He made a second application in 1987 which was successful. In the second application, he declared that he was Somali and was the holder of a Somali passport whose number was given and recorded. In ^e consequence of his gaining Zimbabwean citizenship, the applicant was issued with a passport by the first respondent. His current passport is valid until 2013.

Following the receipt of certain adverse reports on the applicant from national security agencies, the second respondent on, 20 December 2006, served the ^f applicant with a notice depriving him of Zimbabwean citizenship.

On the same day, he was served with the deprivation notice referred to above, the applicant filed this application. In the application, he seeks an order compelling the respondents to issue him with a new passport within five days of the granting of the order. The order concludes with the usual prayer for costs.

^g In the founding affidavit attached to the application, the applicant alleges that he is a business executive whose job entails extensive travel. As a result, his passport pages are almost full with only two pages remaining for endorsements with visas and other immigration stamps. He further alleges that he has had ^h to curtail his international trips to save the remaining pages in his passport.

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Makarau JP

At the time of the application, his son was ill in Malaysia and he expected to ^a travel to and from Malaysia to visit his indisposed son.

The application was opposed on the basis that the second respondent had deprived the applicant of citizenship.

In January 2007, the applicant challenged the procedure by which the notice of 20 December 2006 had been issued. The second respondent then commenced ^b fresh procedures against the applicant, which procedures were still under way as at the date of the hearing of the application.

It is apparent that the opposition to the application was premised on the defective deprivation order of December 2006 which has since been retracted by the second respondent. At the hearing of the matter, it was, however, conceded on behalf of the respondents, that the second respondent had ^c retraced his steps and had commenced the deprivation process afresh after the challenge from the applicant's legal practitioners on the procedures that had been adopted to deprive the applicant of his citizenship.

The above then represents the state of affairs when the matter was argued before me. ^d

At the hearing, it was the accepted position by both counsel, and correctly so in my view, that pending conclusion of the deprivation procedures put in motion by the second respondent against the applicant, the applicant remains a citizen of this country and is entitled to remain in possession of the passport issued to him. This explains why the first respondent has again, correctly and ^e commendably in my view, not sought to have the passport issued to the applicant withdrawn or retrieved.

The sole issue that exercised my mind in this matter was whether with full knowledge of the fact that the second respondent has commenced citizenship deprivation procedures against the applicant, I should still proceed to compel the respondents to issue the applicant with a new passport. ^f

It is trite that the issuance of a Zimbabwean passport is an incidence of and is ancillary to the citizenship of this country. It cannot be compelled independent of an inquiry into the citizenship of the applicant. *In casu*, it is common cause that the status of the applicant as a citizen is under review and is actually threatened by the second respondent's efforts to deprive the applicant of the ^g same.

In my view, it is further trite that the competency of the second respondent to review and revoke the citizenship of the applicant is beyond dispute. That is his administrative preserve. Until he has completed his inquiries and taken a decision on the matter, the courts will be slow to interfere with the exercise of his administrative powers. Even when he is done, the courts will only ^h

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Makarau JP

^a interfere with his decision if such is tainted with illegality, irrationality or procedural impropriety.

With the above in mind, I have considered whether this is an instance where I could *mero motu* use the inherent jurisdiction vested in me to stay proceedings in this matter pending the completion of the deprivation process under way ^b against the applicant. In doing so, I am mindful that the applicant is a citizen of this country until the deprivation process against him is completed and results in him being deprived of his citizenship. I am also mindful that the possession of a passport is necessary for a citizen to exercise freedom of movement and is therefore a right that the courts should guard against its possible erosion. Against these considerations, I have kept myself aware of ^c the fact that justice should be practical and must aim at finality. It must always strike a common sense balance between competing legal interests. I am also of the view that while the courts have ultimate control over administrative actions and decisions of the respondents, the exercise of that power must not be used to interrupt or disrupt such processes unless such interruption is imperative in the interests of justice.

^d That this court has inherent jurisdiction to stay its own proceedings pending the completion of some other process is beyond dispute. The court can stay proceedings pending the payment of costs incurred in previous proceedings between the same parties (*Western Cape Housing Development Board & Anor v Parker & Anor* 2005 (1) SA 462 (C); pending arbitration in terms of an ^e agreement between the parties or inherently (*Nick's Fishmonger Holdings (Pvt) Ltd v de Sousa* 2003 (2) SA 278 (SE); and pending the exhaustion of domestic remedies in review proceedings.

Superior courts enjoy the inherent power to stay their own proceedings pending the completion of administrative processes and arrangements. The inherent powers of the superior courts to stay their

proceedings pending the ^F completion of some other administrative arrangements was used and thereby endorsed by the full bench of the Supreme Court in *Commercial Farmers' Union v Min of Lands & Ors* 2000 (2) ZLR 469 (S) when the court issued an order in favour of the applicants interdicting the respondents from further acquiring land under a programme that the court had ruled to be unworkable, to allow the respondents to work out and put in place a workable plan of land ^G acquisition and to satisfy the court that the rule of law had been restored in the farming area. On the basis of its inherent powers, the court suspended the operation of its own interdict for a period of six months.

A similar exercise of jurisdiction was exercised by the court in *FTCK Consultants CC & Ors v Shoprite Checkers Ltd* 2004 (2) SA 504 (T) where the court held ^H that, in the interests of justice, it would stay the proceedings before it pending

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Makarau JP

certain administrative decisions to be made by the relevant government ^A minister or the Special Court on appeal against the decision of the minister. A time limit of 15 months was placed on the stay in the interests of reasonableness, to be extended on good cause.

While the above stay was not an exercise of the inherent powers of the court but was a stay granted in terms of a statute, in my view, the case is important ^B in illustrating the inherent power of the court to limit the period of the stay of proceedings in the interest of reasonableness. (The statute in question did not prescribe that a stay be for a given period.)

Being guided by the above authorities, I would venture to suggest that this court has inherent jurisdiction to stay its proceedings in appropriate cases, pending the completion of some administrative function and decision. Further, ^C I will hold that in exercising that discretion, the court may, in the interests of justice, place a period within which the administrative function and decision must be undertaken and completed.

Applying the above to the facts of the application before me, while I agree with Mr *Foroma* for the applicant that pending the deprivation of his citizenship, ^D the applicant is entitled not only to hold his current passport but to be issued with a new passport with fresh pages where visa and other immigration information may be endorsed, I believe that in the interests of finality to litigation, I would want to give the second respondent a limited time within which to lawfully complete the procedures he has commenced against the applicant to deprive him of Zimbabwean citizenship. To safeguard the ^E applicant from tardiness or undue delays on the part of the respondents, I would say that it is in the interests of reasonableness that I put a time frame to the stay in proceedings so that, after the period limited in the stay, the applicant may approach the court for suitable relief.

In casu, I take note of the fact that the applicant prudently approached the ^F court before all the pages in his passport have run out. He thus will be able to travel for some time. At the same time, the second respondent has commenced procedures that must be completed within a given time frame in terms of the Citizenship of Zimbabwe Act [Chapter 4:01]. Taking all these factors into account and especially of the fact that the deprivation procedures commenced against the applicant in January 2007, a further period of 60 days ^G should in my view see the completion of the procedures.

In the result, I make the following order:

1. the decision in this matter is stayed for a period of 60 days reckoned from the date of this order. ^H

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2. the applicant shall be entitled to set this matter down on the same papers for suitable relief after the expiration of the 60 day period referred to in 1 above.
3. the costs of this application are reserved.

^B *Sawyer & Mkushi*, applicant's legal practitioners

Civil Division of the Attorney-General's office, first and second respondent's legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/STANDARD CHARTERED BANK ZIMBABWE LTD v ZIMBABWE REVENUE AUTHORITY 2007 (1) ZLR 228 (H)

STANDARD CHARTERED BANK ZIMBABWE LTD v ZIMBABWE REVENUE AUTHORITY 2007 (1) ZLR 228 (H)

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Citation	2007 (1) ZLR 228 (H)
Case No	Judgment No. HH-26-07
Court	High Court, Harare
Judge	Kudya J
Heard	22 February 2007
Judgment	25 April 2007
Counsel	<i>J C Andersen SC</i> , for the applicant <i>A B C Chinake</i> , for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Bills of exchange — *Treasury bills — nature of*

Revenue and public finance — *income tax — gross income — interest accruing on Treasury bills — interest not actually received — when income earned thereon accrues to taxpayer for the purposes of payment — acquisition of a right by holder of Treasury bill to claim payment in the future — such right accruing in the year of assessment — such accrual subject to tax in the year of assessment*

Revenue and public finance — *income tax — Treasury bill — accrual of right to claim payment in the future — reliance by taxing authority on taxpayer's own accounting procedure — not decisive in determining when income accrues*

Revenue and public finance — *Treasury bills — meaning and purpose thereof — freely negotiable bearer debt instruments which are sold at a discount of their face value — discount and interest — two sides of the same coin — discount no more than disguised but deferred interest*

Words and phrases — *"discount" — discount and interest — two sides of the same coin — discount is no more than disguised but deferred interest*

Headnote

Treasury bills are freely negotiable financial instruments, which fall into the same class as promissory notes, bankers acceptances and bills of exchange. They are freely negotiable bearer debt instruments, which are sold at a discount of their face value. They are used to finance commercial operations from their sale at a discount and payment is made at their face value on maturity.

Discount and interest are two sides of the same coin. While interest is often received before the capital is redeemed, that is separately; discount is

A receipted on redemption, that is, indivisibly with the capital. Interest is often associated with a loan, while discount is concerned with the purchase by the holder of the treasury bill of a contingent right. Both the seller of the original treasury bill and the borrower receive an immediate sum of money, while the holder of the bill and the lender receive an entitlement or right to the future fruits of the bill and the loan. The object ^B of the holder of a bill and the lender is the same. Both desire to make a profit from their respective capital transferred to the drawer and the borrower respectively.

In the context of all freely negotiable bearer debt instruments such as Treasury bills, a discount, is as a matter of hard fact, in reality no more than a disguised but deferred interest. The word "discount" carries a ^C technical meaning, which is synonymous with interest.

The applicant sought a *declarator* that the income earned by a purchaser of a Treasury bill only accrued for tax purposes on its maturity date. The only issue for determination was whether the face value of Treasury bills and other similar financial instruments accrued to the holder on the day ^D of issue or on the date of maturity. Section 8(1) of the Income Tax Act [*Chapter 23:06*] defines gross income by the use of the words "received by or accrued to or in favour of a person ... in any year of assessment". Having regard thereto, it was argued on behalf of the applicant that the amount only "accrued" to it when it was entitled to payment on the Treasury bill; that is on the date of its maturity, which was the condition ^E of its entitlement to payment.

It was argued on behalf of the respondent, however, that the maturity of the Treasury bill was only a condition of payment and not an accrual of interest and, therefore, the applicant as holder of the Treasury bill became entitled to the income therefrom on the date of purchase. The respondent drew attention to the fact that the applicant's own accounting procedures ^F reflected earned but not yet received discount. This was inconsistent with the applicant's argument that the amount due to it only accrued to it when it was entitled to payment on the treasury bill.

Held, that the respondent could not rely wholly on the applicant's accounting procedures. A taxpayer's accounting procedures did not create a right which otherwise did not exist.

^G *Held*, further, that the respondent's argument was otherwise correct. While the applicant had not become entitled to a right to claim payment of the debt in the year of assessment, it had acquired a right to claim payment of the debt in the future. This right had vested in the applicant. It had accrued to the applicant in the year of assessment and was a valuable ^H right which the applicant could turn into money if it wished to do so. The

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value of that right had, therefore, to be included in the applicant's gross ^A income for taxation purposes.

Held, further, accordingly, that the applicant's application for a *declaratur* must be dismissed with costs.

Cases cited

Abbot v Philbin [1960] 2 All ER 763 (HL) ^B

Barclays Bank of Zimbabwe v Commissioner-General, ZRA 2005 (2) ZLR 1 (H)

Barclays Bank of Zimbabwe v ZRA 2004 (2) ZLR 151 (H)

Barclays Bank of Zimbabwe v ZRA 2006 (2) ZLR 181 (S)

Building Contractors v CoT (1941) 12 SATC 182 ^C

CIR v Cactus Invstms (Pty) Ltd (1997) 59 SATC 1 (T)

CIR v Delfos 1933 AD 242

CIR v Peoples Stores (Walvis Bay) (Pty) Ltd 1990 (2) SA 353 (A)

ITC 1068 (1965) 27 SATC 141

ITC 1488 (1991) 53 SATC 56

ITC 1557 (1993) 55 SATC 218 ^D

Lategan v CIR 1926 CPD 202

Mooi v Secretary for Inland Revenue (1971) 34 SATC (A)

Sub-Nigel Ltd v CIR (1948) 15 SATC 381

Tucker v Ginsberg 1962 (2) SA 58 (W)

Willingale (Inspector of Taxes) v Intl Commercial Bank Ltd [1976] 2 All ER 468 (ChD) ^E

Willingale (Inspector of Taxes) v Intl Commercial Bank Ltd [1977] 2 All ER 618 (CA)

Willingale (Inspector of Taxes) v Intl Commercial Bank Ltd [1978] 1 All ER 754 (HL) ^F

Legislation considered

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

Case information

J C Andersen SC, for the applicant

A B C Chinake, for the respondent ^G

Judgment

KUDYA J: On 12 July 2006, the applicant instituted proceedings in this court seeking the following relief:

It is ordered that:

1. That by way of a declaration of an existing and future right, that the income ^H

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^A earned by a purchaser of a Treasury Bill only accrues for tax purposes on the maturity date of the Treasury Bill.

2. That the respondent shall pay the applicant's costs on the higher scale.

The *declaratur* in question was opposed by the respondent.

Counsel, for the parties were agreed that the facts which gave rise to these ^B proceedings were common cause, and that it was not necessary for me to canvas them. It was further agreed that in the event that the application fails, then the matter should be remitted to the respondent for further consideration, as there was insufficient information on the papers to deal with the issue of the applicable penalties and interest.

^C THE ISSUE FOR DETERMINATION

Both counsel were agreed that, as costs on the ordinary scale would follow the event, and as the respondent abandoned, in its heads of argument and confirmed at the hearing, the preliminary issue that it had raised which challenged the procedure used by the applicant in launching this matter in this court, the only issue for determination was whether the face value of treasury ^D bills and other similar financial instruments accrues to the holder on the date of issue or on the date of maturity.

THE NATURE OF TREASURY BILLS

These are freely negotiable financial instruments which fall into the same class as promissory notes, bankers' acceptances and bills of exchange. They are ^E freely negotiable bearer debt instruments which are sold at a discount of their face value. They are used to finance commercial operations from their sale at a discount and payment is made at their face value on maturity. They may, of course, further be sold for less than their face value by any holder before maturity.

^F In the present matter, the applicant purchased and held onto the treasury bills, the subject of the dispute, beyond the tax year of assessment in which it purchased them during the period from 2000

to 2005. There is a plethora of legal literature on treasury bills from textbook writers and in court decisions. Chorley *Law of Banking* 4 ed 98 states:

"To discount a bill is in effect to buy it, and if the names on it be good and the price favorable, such purchases are a remunerative type of business which has been carried on by merchants and merchant bankers from very early times."

Willis *Banking in South African Law* Juta (1981) p 143 also deals with the subject of discounting bills in these terms:

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"The discount of a bill is in fact a sale and not a loan agreement. This nature of a discount is very clearly set out in *Tucker v Ginsberg* 1962 (2) SA 58 (W), approved in *Enger & Ors v Omar Salem Esqa Trust* 1970 (1) SA 82 (N)." [At p 145, the learned author reminds us that] 'it is clear then that a money lending transaction dressed up as a discount remains a money-lending transaction, but a discount remains a sale'."

The American legal writer, J T Morse in volume 1 of his treatise published in 1888, *The Law of Banks and Banking* at p 133, treats a discount as a purchase. He wrote thus:

"The word 'discount', by the usage of the commercial world and the common voice of all the dictionaries, means simply to buy at a reduction, and a loan is only one species of a discount."

For our purposes, the nature of a bill is set out in *Tucker's* case, *supra*. In that case, Trollip J sought to determine whether the transaction before him was one of money lending or discounting a bill. He distinguished the two in the following way at 62A:

"The object of both discounting a bill and lending money on the strength of it is the same, namely, to provide the one party with ready money, but the nature of the two transactions is fundamentally different; according to the authorities such difference is 'distinct and palpable'. See *de Villiers v Roux* 1916 CPD 295 where the English cases are collected, and *Maser v Meiring* 1931 OPD 74. In so far as they are relevant to the present dispute, the points of difference are as follows: in the former transaction, the object is achieved by the party selling the bill before its due date for an amount in cash that is less than the amount of the bill (the difference being known as the 'discount' or 'discount charges'), and on negotiation of the bill to the discounter, he becomes the owner of all the rights given by it against the various signatories thereto according to the relevant Bills of Exchange statute. The seller does not undertake to repay the amount of the bill on due date. His only obligation is to negotiate the bill to the discounter, and when he has done that, he is not under any further obligation *qua* seller to the discounter. He may, of course, be liable to the discounter as one of the signatories of the bill, if he too signed it, but that is on the bill *qua* signatory and not *qua* seller. The discounter is compensated for so laying out his money by the 'discount' that he receives when the bill is finally paid. In the latter transaction, the object is achieved by the party borrowing the money from the lender and undertaking to repay an equal amount on due date, the bill being negotiated or delivered to the lender merely as security for the repayment of the loan. The borrower, whether or not he too has signed the bill, is principally liable to repay the amount borrowed, but the lender is secured by having his rights of recourse under the bill against the signatories in case the borrower defaults. The lender is compensated for so laying out his money by the 'interest' that he

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a charges the borrower. This interest can, of course, be paid in advance when the loan is made.

As each party has given the transaction a different label, I think that it is appropriate to add here that the label used is not decisive. Despite the label, the court must look to the nature of the transaction and not its object because, as stated above, the object is the same in both cases."

The learned judge emphasized the need to have regard mainly to the substance and not the form of the nature of the transaction and to scrutinize the whole course of the parties conduct. I have not lost sight of the fact that the issue that confronts me and the one before Trollip J is different. His sentiments on discount and interest are in agreement with those expressed by the textbook writers and other judges. It seems to me that discount and interest are two sides of the same coin. While interest is often received before the capital is redeemed, that is, separately discount is receipted on redemption, that is, indivisibly with the capital. Interest is often associated with a loan, while discount is concerned with the purchase by the holder of the treasury bill of a contingent right. Both the seller of the original treasury bill and the borrower receive an immediate sum of money, while the holder of the bill and the lender receive an entitlement; the right to the future fruits of the bill and the loan. In the words of Trollip J, the object of the holder of a bill and the lender is the same.

Both desire to make a profit from their respective capital transferred to the drawer and the borrower respectively. There remains the answer to the question whether the nature of a treasury bill and a loan, on close scrutiny, are in substance rather than form really different. That is the sub-question that I have to answer in determining whether a discount accrues on the date of issue of the Treasury bill or on its maturity.

During the month of June 2005, the respondent conducted a tax audit for the period 2001 to 2005 on the applicant. The result of the audit was the letter of 16 June 2006, in which the respondent sought audience with the applicant with a view to agree on the validity of income tax adjustments and settlement terms thereof which arose from its findings. The audit revealed a provisional non-declaration of taxable income and a liability for additional tax on treasury bills and other financial instruments of the same genre in the sum of \$803 095 918 160.82 (old currency), inclusive of interest and penalties. A flurry of correspondence between the parties failed to resolve the issue that now confronts me. The applicant took the firm view that:

" (treasury bills) do not bear interest. They are only payable on maturity and then to the bearer and the only income that is earned on Treasury bills is the income which one receives by way of a discount once the bills are paid out on maturity date. The bills are paid out to the person who is then the owner of those bills, namely, the bearer at maturity, and no income

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accrues to holders of Treasury bills until the maturity date. The applicant does not always hold (them) to maturity and often sells them prior to the maturity date."

The respondent's position was that:

" these instruments accrue interest on a daily basis and, therefore, the applicant also accrues the interest (income) on a daily basis for accounting purposes. When the respondent undertook an audit it was discovered that at the end of each tax year, the applicant reverses the interest accrued, but not yet received, in respect of non-matured financial instruments ... The way the applicant computes the tax results in gross postponement of tax as the reversed amounts are only included in taxable income in the following year. However, in the case of profits being realized in each of the same financial years, the applicant distributes dividends on the total profits, inclusive of the income accrued, but not received, on the non-matured financial instruments. This means that the reversal of income is only done for income tax purposes. However, from the information obtained in the banking sector during the audits conducted, the respondent established that the banks' computerized accounting system automatically accrues interest on each investment as the year progresses. It is therefore, possible for the applicant to determine the interest due up to a certain point; for example, daily, weekly, monthly or yearly even before the full maturity of the financial instrument. Having realized that the applicant was computing tax on various instruments in a way that postpones its payment, adjustments were made with the respective income being taxed on an accrual basis."

It is noteworthy that the applicant accepted the factual aspects of the averments made by the respondent on how it treated the discounts of treasury bills and identical financial instruments in its accounts. It however averred that the requirements of the Income Tax Act [Chapter 23:06] dictated the difference with its statutory accounts from which dividends were paid out after tax. The use of the emotionally charged expletives "extraordinary" and "actually dishonest" by the deponent to the applicant's answering affidavit did not add any value to its averments. Reference to "accounting purposes" in contradistinction to income tax purposes was explained by that deponent in these terms:

"The manner in which accounts are kept does not establish taxable income. It is return made in terms of the Income Tax Act which establishes taxable income, taking account of court decisions on the said Act. For accounting purposes, the discount on treasury bills and like instruments is required to be brought to account evenly over the period from purchase to maturity and the book value of immature instruments adjusted to fair value at financial period ends. From time to time, the applicant has to sell bills prior

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to maturity and the amount then recovered, is, less than the income brought to accounts and the estimated fair value. If the sale has to be done unexpectedly because of an urgent need for liquidity, the amount recovered is often very much reduced. The amount recoverable on a sale before maturity varies in accordance with the market conditions at the time and in our highly inflationary financial environment is not predictable. Certainly, it cannot be said that the amount recoverable on a sale prior to maturity will

equal the amount of the total discount at a particular time reduced proportionately by the amount of unexpired time to maturity date, divided by the total time between the purchase and maturity date. In other words, the discount which accrues on maturity does not accrue evenly on a day to day basis, in reality."

c The applicant's averments, as I will demonstrate in the course of this judgment, lean and rely heavily on the exposition of the law in this field by the English courts in the *Willingale* case, commencing from the decision of the General Commissioners through the High Court and the majority decisions in the Court of Appeal and the House of Lords, respectively. These are conveniently located in the following law reports: d

1. *Willingale (Inspector of Taxes) v International Commercial Bank Ltd* [1976] 2 All ER 468 [Ch D] [the first *Willingale* case].
2. *Willingale (Inspector of Taxes) v International Commercial Bank Ltd* [1977] 2 All E R 618 [CA] [the Court of Appeal decision].
3. *Willingale (Inspector of Taxes) v International Commercial Bank Ltd* e [1978] 1 All 2455 ER 754 [HL] [the final decision of House of Lords decision].

THE ENGLISH APPROACH

The English courts were confronted with the same issue. The facts in the *Willingale* case were these: the taxpayer bank was incorporated in 1967 to f provide medium term finance in world markets to commercial companies. At all relevant times, its business included the discounting of or the purchase of discounted bills of exchange issued by borrowers all over the world. It usually held some of the bills to maturity but sold others prior to maturity. It drew up its annual accounts in the customary manner followed by clearing banks of, including a portion of the profits the bank expected to make if its bills were held g to maturity. It did not change the form of its accounts for assessment to tax. In assessing the bank for income tax for the periods ended 31 December 1967 to 31 December 1970, the inspector of taxes included a proportion expected from profits arising on maturity or sale of the bills.

The case before the General Commissioners for the City Division of London h was whether in ascertaining the profits of the bank for corporate tax purposes

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under Case 1 of Sch D as set out in s 108 of the Income and Corporate Taxes a Act 1970 and s 122 of the Income Tax Act 1952, in the case of bills of exchange (including promissory notes) discounted or bought by the bank and held until maturity or sale, a proportionate part of the expected profit on maturity or sale referable to the accounting periods in question fell to be included in the computation of the assessable profit of the bank during the tax year in which b they were discounted or purchased by the bank.

The General Commissioners, as reported in the first *Willingale* case at p 470F-H, scrutinized the nature of the discounted bills and notes and held that the inclusion by the bank in its accounts of the unrealised appreciation in the value of the bills and promissory notes was not in accordance with the principles of income tax law for the computation of profits and that these c anticipated profits could not be assessed for corporation tax.

The taxman took the decision on appeal to the Chancery Division. Walton J upheld the decision of the General Commissioners. At p 474E, the learned judge recognized that "over a period of time the whole of the profits on any particular bill must be caught in one way or the other for tax purposes; but by d postponing liability (if they are in fact entitled to do so) the bank obviously improves very considerably its cash flow, and that is what this case is all about". The nub of the matter, in his view, lay in whether in law, in general accountancy practice or in bank accounting practice there was a distinction between earning interest throughout a period and earning discount throughout a period.

I found his rendition of the differences between interest and discount e illuminating. At p 474G-J, he observed that:

"A bill is the embodiment of an obligation on the part of X to pay a sum of £Y at a future date. If, of course, the bill carries interest, then that interest will be dealt with in the normal manner, on an accrual basis, and so may for present purposes be left entirely out of account. That obligation is one f which remains the

same the whole time; it does not in any way change, nor have anything added thereto, nor produce any fruit. All that happens is that, as the years roll by, its value becomes closer and closer to the full amount of £Y. In the summary of the bank's balance sheets, the Crown have labeled one section 'Bills included above (with accrued discount)'. But this appears to me to be a misconception. Discount does not in any way accrue. What happens is that the value of the bill increases by reason of the closer approach of the maturity date; the discount diminishes. If it is an accrual at all, it is a negative accrual."

He saw nothing untoward in the manner in which the bank had prepared its accounts as this was the conventional method used by clearing banks. Such a method, was a better economic indicator which showed shareholders that

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At the money that was disbursed in the purchase of the bill was not an idle expense but was steadily making a profit for them. The most important question, which to him was a pure matter of fact, was to determine when the bank does make a profit out of the purchase of the bill. The only answer was that it does so when it sells or holds it to maturity. He held that from the nature of the discounted bills, no part of the anticipated profits on maturity were subject to corporation tax in the tax years of assessment in question and thus upheld the General Commissioners' decision.

The decision of Walton J was taken to the Court of Appeal by the taxman. The majority (Ormrod LJ and Sir John Pennycuick) confirmed the decision of the lower court, while Stamp LJ dissented and found for the taxman.

Stamp LJ at 622E regarded the nature of the bank's discounts (or premiums at which they were made payable) as interest or the reward for capital lent. He saw no objection in the law relating to income tax treating the reward as being earned and accruing over the period (life of the bill-tenure) while the money advanced is outstanding. Having treated the discounts as interest, he came to the conclusion that the bank had earned a *pro-rata* share of the discounts and was therefore amenable to corporation tax for it in the year of assessment.

Ormrod LJ at 628E-G used the specimen transaction highlighted in argument where the bank bought for £1 000 a bill of the face value of £1 500 payable in five years. The bank's contention was that the profit would be realized when the bill is redeemed or sold and should be brought into account in the year of the sale or redemption, while the taxman contended that on acquisition the taxpayer becomes entitled in law to the payment of its face value in five years time but is required to account for the *pro-rata* share of profit in each year of assessment over the five years.

He also recognized that the proposition advanced by the taxman was that "as money earns interest in the latter case, so in the former it earns discount". At p 628H-J, he made short shrift of this contention in the following manner:

"This is like saying that because two roads run from A to B, they are the same road. Money 'earns' interest the lender becomes entitled to it during the year of account; in the instant case the bill appreciates in value in the bank's safe, very much as stock-in-trade may increase in value in the trader's stores. The bank holds a single large debt, not a succession of five small ones. On this view, the difference is ultimately one of fact, which may account for the difficulties in expressing it in terms of legal principles."

Sir John Pennycuick, with whom Ormrod LJ agreed, dealt with the distinction between interest and discount at 630E in this way:

"It is worth while to make one or two observations with regard to interest. Plainly, interest has many features in common with discount, but it differs

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from discount in this critical respect that interest accrues from day to day and is usually paid at periodical intervals in each year, whereas nothing accrues or falls due for payment under a discount transaction before maturity."

The taxman took the matter to the House of Lords, where the majority (Lord Salmon, Lord Fraser of Tullybelton and Lord Keith of Kinkel) held that the taxpayer was not liable for corporation tax on the discounts in question. Lord Diplock and Lord Russell of Killowen dissented.

The dissenting Law Lords adopted the approach of Stamp LJ that the transaction entered into by the bank was a loan of money repayable by a larger sum at some future date and not an acquisition of

an asset similar to any chattel. Their opinion was that the essential nature and content of the discount on the c bills was no more than disguised deferred compound interest, which was conveniently reflected in the taxpayer's accounts in linear form.

Lord Fraser of Tullybelton provided, at 758C, the wording of the section in the relevant English statute that they were discussing. It reads:

- "1. Tax under this Schedule shall be charged in respect of: (a) the annual d profits or gains arising or accruing ... (ii) to any person resided in the United Kingdom from any trade, profession or vocation ..."

Lord Salmon held that a bill may not be taxed until it was realized. In his opinion, realized did not mean "received" but meant "ascertained and earned". The tax would be levied in the fiscal year of sale or maturity notwithstanding that the drawer defaults and the discounter does not receive any cash. e

Lord Keith of Kinkel at p 766A-H, had regard to the nature of the transactions of the bank. He stated thus:

"In each case, a sum of money is paid out by the bank in a particular year and in return for it the bank receives a bill of exchange, a chose in action. The bill obliges the issuer to pay the bank a larger sum at the expiration of a number of years. The situation presents some analogy to the purchase f by a trader of goods, which he expects later to sell at a profit, so that one might have expected to see the bank in the year of purchase enter the cost of the bill in its profit and loss accounts as a debit, in subsequent years to enter as a debit the cost or market value of the bill whichever was the less, and in the year of maturity to enter as a credit the face value of the bill, whether or not it was actually paid in that year. But here the cost of g the bill does not enter the profit and loss account; it goes into the balance sheet. It is only the difference between the cost and the maturity value of the bill which ever finds its way in the profit and loss account in annual fractions over the period to maturity. *There can be no doubt from the beginning that the issuer of the bill is under a present obligation to pay the bank a sum certain on a particular future date. So there is attraction* h

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a in the view that under the principles to which I have referred the bank, since it has by the transaction received in return for its payment the present right to receive a larger payment at a future date, should bring into its profit and loss account on the credit side the value of that right, suitably discounted, the payment out being likewise brought in on the debit side. But that again is not what was done, nor is it suggested that b it should have been done. Nor has the amount of profit expected been brought at a valuation or at a discount. The reason why accounts prepared in the manner adopted by the bank show a true and fair view of its profits over the years is that, in order to have funds available for its bills at exchange transactions, the bank borrows money at interest. The interest payable each year goes into the debit side of the profit and loss account and it is with the object of showing what benefit there is to c counterbalance these payments that a fractional part of the discount on the bills is taken into the account on the credit side in each year. But it is not accurate to say that the interest payments are earning these fractional parts of the discount. The borrowing transactions and the bill of exchange transactions are separate and distinct from each other. It is the bill of exchange transactions on which attention must for present purposes be d concentrated. The substance as well as the form of these transactions are such, in my opinion, that the bank is by them acquiring assets which in the future it expects to realize at a profit. It is not reasonably to be regarded as rendering services to the issuers of the bills for which the latter there and then become liable to pay. The case stated speaks of the bank making a profit when the bills reach maturity, and I think that is in accordance with e the plain common sense of the matter. What goes into the profit and loss account each year is a fractional part of what it is hoped the profit will ultimately be, although it is found in the case stated that the amount of the profit is not ascertainable, due to a number of circumstances, until the bill is sold or reaches maturity. So, I am of the opinion that the *assessment of the bank to corporation tax on the basis of account made up in this f way does contravene the rule that a profit may not be taxed until it is realized*" (my own emphasis).

Lastly, Lord Fraser of Tullybelton also dealt with the nature of the bills of exchange in question. The bank used the terms "accrued discount" and "earned discount", which the learned law lord described as being "no more than convenient short hand descriptions ... obviously not accurate, for g discount, unlike interest, does not accrue and is not earned, and (such) expressions (were) apt to be misleading". He saw the use of the epithet "accrued discount" during the tenure of the bill as no more than the anticipation of profits awaiting realization.

After all, his view was that interest accrues from day to day or at fixed intervals, h while discount does not. At p 760D-H, he provided two distinctions between

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interest and discount. These were that interest is realized from time to time and ^a can be calculated in advance, discount is not realized until the bill is sold or matures leading to the postponement or roll up of profits and is virtually impossible to calculate profit on any given date while the bill is still extant. He observed that the bank's discounts were in reality an acquisition of assets (not a rendering of service) and that, so long as these were held, the bank could ^b not realize any profit or loss.

THE SOUTH AFRICAN APPROACH

It all starts from *Lategan v Commissioner for Inland Revenue* 1926 CPD 202. A wine farmer sold wine in May 1920 for £5 924, of which £3 500 was payable in the year of assessment ended 30 June 1920 and the balance in the following ^c year of assessment. The taxman claimed that the whole purchase price was part of his gross income for the existing year of assessment ended 30 June 1920. The taxpayer contended that the instalments payable in the following tax year should be excluded.

The matter was referred as a stated case by the Special Income Tax Court to the Cape Provincial Division. The relevant question being: that seeing that ^d appellant, a farmer, during the year of assessment sold his harvest subject to conditions which stipulated payment should be effected in instalments, some of which fell due subsequent to the year of assessment, should the instalments which in terms of the agreement were not payable during the year of assessment, be regarded as gross income within the meaning of s 6 of Act 41 ^e of 1917? "Gross income" was defined in s 6 as:

"The total amount received by or accrued to or in favour of any person other than receipts or accruals of a capital nature ..."

Watermeyer J, with whom Benjamin and Louwrens JJ concurred, at p 208 distinguished receipts from accruals. Receipts were not limited to the tax year in which the work was carried out or capital employed. The time of receipt was ^f paramount. For earnings which were due but not received, the time when the work was done was looked to and not the time of receipt. He observed that the "same sum of money may accrue in one year and be received in another", but was categorical that "it could never have been intended that income tax should be paid twice over". He further noted that an amount may both accrue and be received in one year, even for work done in another year. ^g

He held firstly that the taxpayer's taxable income included not only the cash which he has received or which has accrued to him but also the value of every other form of property he has received or has accrued to him, including debts and rights of actions. ^h

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^a At p 209-211, he dealt with the treatment of a debt payable in the future in the following way:

"It was argued, on behalf of the appellant, that a debt payable in the future was not an amount of money 'accrued to' the taxpayer, and consequently it was not part of his 'gross income', and a number of cases were cited on the meaning of the word 'accrue'.

^b In my opinion, the words in the Act, 'has accrued to or in favour of any person', merely mean 'to which he has become entitled'.

*So far as a debt is concerned which is payable in the future and not in the year of assessment, it might be difficult to hold that the **cash amount** of the debt has accrued to the taxpayer in the year of assessment. He has not become entitled to a right to claim payment of the debt in the year ^c of assessment, but he has acquired the right to claim payment of the debt in future. This right has vested in him, has accrued to him in the year of assessment, and it is a valuable right which he could turn into money if he wished to do so.*

According to what has been stated above, the value of this right must, in my opinion, be included in the taxpayer's gross income for taxation ^d purposes.

There are, no doubt, difficulties in the way of this interpretation of the Act. There are, for example, many cases in which the court has held that unpaid debts are not 'income'. See, for example, *St. Lucia Usines v St. Lucia (Colonial Treasurer)* [1924] AC 508 and certain Australian cases referred to by Rydge *Commonwealth Income Tax* p 144, decided on the meaning ^e of a section of the Commonwealth Act which is very similar to s 9 of Act 41 of 1917. But the Acts upon which those cases were decided were in terms different from the South African Act.

The main difficulty which I feel in the way of the view which I have expressed, is caused by the terms of s 21(2)(e) of the Act. This section, ^F while it supports the view that unpaid debts are 'gross income', makes it appear that unpaid debts must be brought up in the return of 'gross income' at their face value, and not at their actual value, but that a deduction can be made for bad and doubtful debts to arrive at the 'taxable income'.

If this is so, then 'debts owed to the taxpayer' from an apparent exception ^G to the general principle that 'gross income' consists of the 'value' of the taxpayer's earnings, whatever their form may be.

But the exception may be more apparent than real, if s 21(2)(e) is construed not as a section creating a new deduction in addition to those contained in s 17, but as a section merely providing a method for fixing the value of the debts to be brought up as 'gross income' before any deduction is made ^H to arrive at taxable income.

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In my opinion, therefore, the answer to the first question in the special ^A case is that the instalments must be regarded as gross income, but something must be deducted from their face value to allow for the fact that they are not payable at the close of the year of assessment. Assuming that the right to receive the instalments was not converted into money by the sale or otherwise during the year of assessment, the value to be fixed (apart from any question whether the debt was good or bad) would ^B be the present worth of the instalments at the end of the year, i.e., 30 June 1920" (my emphasis).

This case has been followed in many cases in South Africa. In *ITC 1488* (1991) 53 SATC 56, the Cape Special Court (*per* Howie J) was in large measure influenced by this case in equating accrual with entitlement, and held that where a taxpayer makes an election to exercise one of a number of benefits that ^C arise on resignation of employment, that benefit accrues to him not on the date of resignation but on the date that his election is accepted.

In *Commissioner for Inland Revenue v Cactus Invstms (Pty) Ltd* (1997) 59 SATC 1 (T), a case concerned with the issue of whether in a fixed period loan agreement (where the loan was paid over and interest was payable on due date ^D at the end of the fixed period) interest accrued to the taxpayer on the date on which the loan agreement was transacted or on the due date. The taxpayer ceded the interest before the due date to various financial institutions that in turn ceded their rights to dividends in certain of their investments to it. The principles that were enumerated in the *Lategan* case were applied. At pp 12-13, Southwood J (with the concurrence of Ginsburg AJ, Wunsh J coming ^E to the same conclusion but for different reasons) stated that:

"In order to accrue in terms of the Act, a right must be unconditional (*Ochberg v Commissioner for Inland Revenue* 1933 CPD 256 at 264; *Hersov's Estate v Commissioner for Inland Revenue* 1957 (1) SA 471 (A) at 481H-482A; *Mooi v Secretary for Inland Revenue* 1972 (1) SA 675 (A) at 684B-G). The words 'received by or accrued to or in favour of' in the ^F definition of 'gross income' mean a receipt by or an accrual to or in favour of the taxpayer on his own behalf or for his own benefit."

It was held at p 17 that the taxpayer's right to claim interest was not subject to any further performance of any obligation by it, but to a time provision. It vested in the taxpayer on the day each investment was made and therefore ^G accrued to it on that date as gross income in terms of s 1 of the Act. Wunsh J came to the conclusion at p 34 that the interest accrued on the maturity date during the same year of assessment that the loan agreements were transacted but as the rights to the interest were ceded before they accrued, the interest due was not gross income in the respondent's hands. ^H

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^A The last South African case that I will refer to is *Commissioner for Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A). It concerned the application of gross income as defined in s 1 of the Income Tax Act, 58 of 1962, which stated as follows:

"'gross income' in relation to any year or period of assessment, means, in the case of any person the total amount, in cash or otherwise, received ^B by or accrued to or in favour of such person during such year or period of assessment from a source within or deemed to be within the Republic, excluding receipts or accruals of a capital nature ..."

The respondent taxpayer sold its wares to its customers for cash and on credit. The bulk of the credit sales were under a six-month-to-pay revolving credit ^C scheme. At the 1983 tax year end there remained outstanding a sum of money which represented instalments whose payments dates

fell in the succeeding tax year. The taxman assessed them to tax in the year of sale. The taxpayer appealed to the Special Court, in the main on the basis that these instalments were not an amount in cash or otherwise, received by or accrued to or in favour of itself and, in the alternative, that they ought not to have been included in ^D its gross income at their face value but rather at the present market value of the right to receive them in future. The special court held that these instalments were properly assessed to tax as gross income and that these outstanding debts had to be valued at their market value. The taxman appealed against the alternative ruling while the taxpayer cross-appealed against the main ruling.

Hefer JA, who wrote the judgment of the full court, extensively quoted, ^E approved and applied the *Lategan* case. He accepted that the word "amount" covered "every form of property earned by the taxpayer, whether corporeal or incorporeal, which has a money value ... including debts and rights of action." He further accepted that "any right (of a non-capital nature) acquired by the taxpayer during the year of assessment and to which a money value ^F can be attached forms part of the gross income irrespective of whether it is immediately enforceable or not, but that its value is affected if it is not immediately enforceable". He thus determined that "accrued to or in favour of" meant "to become entitled to" and not even the narrower "due and payable" ascribed to it in *Commissioner for Inland Revenue v Delfos* 1933 AD 242.

^G THE ZIMBABWEAN APPROACH

Mr Andersen referred me to three local cases: *Building Contractors v CoT* (1941) 12 SATC 182; *ITC 1068* (1965) 27 SATC 141; *Barclays Bank of Zimbabwe v ZRA* 2006 (2) ZLR 181 (S) (a limited appeal in *Barclays Bank of Zimbabwe v ZRA* 2004 (2) ZLR 151 (H)). Mr Chinake referred to two local cases: ^H *Barclays Bank of Zimbabwe v ZRA* 2004 (2) ZLR 151 (H); and *Barclays Bank*

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of Zimbabwe v Commissioner General, Zimbabwe Revenue Authority 2005 (2) ZLR 1 (H). ^A

The *Building Contractors* case, *supra*, involved *inter alia* the determination of the stage at which retention money that was released on the strength of an engineer's certificate of no defects, in terms of the contract, three months after the completion of construction, accrued to the building contractors. That is, ^B whether it accrued on the date when construction was completed or on the date the no defects certificate was issued. Construction was completed in a different tax year while the certificate which triggered the release and the payment were both done in the succeeding tax year. The taxman assessed the retention payment during the latter year. The building contractors appealed to this court on the basis that the retention money had accrued to them during ^C the tax year in which construction was completed.

Hudson J, at p 186, dealt with the issue in the following manner:

"It will thus, be seen that the first ground of appeal depends on the application of the words 'has accrued to or in favour of any person' appearing in s 9(1) of the Income Tax Act. The meaning of the words has ^D been considered in various cases decided in the courts of South Africa. In *Lategan v Commissioner for Inland Revenue* 1926 CPD 203 Watermeyer J defined them as meaning 'to which he has become entitled'. While this meaning was adopted by Wessels CJ in *Commissioner for Inland Revenue v Delfos* 1933 AD 242, de Villiers and Stratford JAA, in the course of their judgments in the latter case, expressed the view that 'accrued' means 'due and payable'. If the latter ^E view is correct then, as Mr *Greenfield* admitted, the appellants' first ground for appeal must fail. Though there is much to be said in favour of applying the meaning 'due and payable' to 'accrued' — particularly the use of the former expression in s 10 of the Act — I propose to adopt for the purpose of this case the meaning enunciated in *Lategan's* case."

The learned judge held that, as in terms of the contract there would be no final ^F ascertainment of the amount of the final payment until the engineer had given his final quittance, the retention money accrued on the date on which the no defects certificate was issued. It was at that stage that the building contractors became entitled to the retention money. (It is worth recording that the interpretation that Hudson J rendered to the words "due and payable" in s 10 ^G of the Act then in force later found resonance with the reasoning of Hefer JA in the *People's Stores (Walvis Bay)* case *supra*, half a century later).

In *ITC 1068*, a consultant engineer gave his services in 1948 in the erection of thermal power stations to the then Electricity Supply Commission of Southern Rhodesia at a discount predicated on

condition that all the contracts would be carried out and he would be the consultant engineer for all of them. ^H

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^A A change in legislation in 1954 resulted in the breach of the condition and the termination of the consultancy by the ESC in 1956. The engineer sued ESC for the discount he had provided it over the eight year period. An out of court settlement was reached and he was paid out a certain amount during the tax year ending 31 March 1963. The taxman included this amount in his gross income and assessed it to income tax in the year of receipt. He appealed to the ^B Special Court on the basis that the amount paid had accrued to him in each of the eight years in which he had given the discount and should not have been assessed in the year of receipt. The learned acting President equated "accrued" with "due and payable" and held that the engineer became entitled to the amount that was paid out to him "only when liability was determined in the settlement reached in the 1962-3 tax year". In any event, he went on to find that ^C as the amount had not been assessed to tax before, the taxman was entitled to assess it either on the basis of accrual or receipt. While the decision was correct as regards assessment premised on receipt, the definition favoured for "accrual" conflicts with the one given in the *Lategan* case. It would appear that the settled amount accrued on the date on which ESC breached the ^D contract by making the decision to terminate his services.

The three *Barclays Bank* cases *supra* raise interesting points which are apposite in the resolution of the issue before me. In the 2004 High Court determination, Makoni J dealt with five main areas of contention of withholding taxes; management share option scheme; restraint of trade; non-residents tax on interest and excessive penalties on the amounts conceded by ^E the taxpayer. The taxpayer appealed against the determination on the management share scheme only, thereby limiting the focus of the Supreme Court to that issue. Both counsel highlighted as forceful and valid reasoning the words of Denning LJ in *Abbot v Philbin* [1960] 2 All ER 763 (HL) at 777F-778C, quoted with approval by Ziyambi JA in the Supreme Court *Barclays* ^F case. They sought to extrapolate the poetic prose of the non- taxability of a bird in the bush as against the taxability of one in the hand to the question whether a discount before maturity was a bird in the bush or in the hand. As I understood both Ziyambi JA and Denning LJ, the pith of their proposition was that a share option accrues to an employee when he or she accepts the offer (and receives the shares) and not before. No real guidance, however, ^G emerges in resolving the issue before me, as no similar issue was before the Supreme Court and the House of Lords in the share option scheme cases.

Makoni J, however, did deal with the issue of whether the discounted value received by the borrower and the face value of the bill of exchange was discount earned and not interest for the purposes of the 16th Schedule of the ^H Income Tax Act. On the basis of the facts before her, the learned judge felt

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inhibited by the failure of the taxpayer to attach all the tobacco lines of credit ^A loan agreements and all the general offshore lines of credit agreements, as the samples that were before her depicted different positions, to determine the true nature of the transaction, that is, whether the benefit that accrued therefrom was an interest yield or a discount yield. Notwithstanding this constraint, by reference to the definition of interest in the *Concise Oxford Dictionary*, she ^B held that "discount earned" bore the same meaning as "interest". This was because "in paying the face value of the bill, on the date agreed, the borrower pays an advantage or profit over and above the value he actually received in exchange of the bill". In arriving at that decision, she differentiated the meaning of interest ascribed in the 21st Schedule by the amendment as relating to that section and believed that she could interpret the same word which ^C appears in different sections differently too.

In *Barclays Bank of Zimbabwe v The Commissioner General* 2005 (2) ZLR 1 (H), sitting as the Special Court for Income Tax Appeals, Hlatshwayo J was confronted with the same issue of whether a discount accrues on date of issue or maturity. He was there dealing with a promissory note, and he made a specific finding that the documents that purported to be a promissory note ^D was not "a true bearer promissory note". He did not specify what it actually was but implied that it was a loan agreement to which the taxpayer "had become entitled to the interest accruing from the instruments up to the end of each year of assessment", as demonstrated by the acknowledgement in its letter to the taxman of 19 July 2002 "that it raised interest accrual entries in compliance with ^E International

Accounting Standards". If I am correct that this is what was implied, then that implication would be based on weak ground as the taxpayer's commercial accounting procedures do not override the language of income tax legislation and decided cases on the point. See *Sub-Nigel Ltd v CIR* (1948) 15 SATC 381.

Hlatshwayo J did however consider the meaning of ss 8(1) and 10(7) of the F Act. At 3F-4B he stated thus:

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

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A Can it be said, therefore, that the facts of this case fall within the circumstances where the taxpayer's entitlement remains so conditional that there is no accrual in that year? The answer to this question depends on whether the instrument in issue is a true bearer promissory note with capital and interest redeemable only at maturity or some other evidence of indebtedness. The taxability before the date of redemption of interest B earned on a true bearer instrument would appear to be insupportable by the language of the Act and case law unless some element of discounting of such interest to its value at year end was undertaken."

The learned judge concluded by stating that maturity was only a condition of payment and not a condition for accrual, thereby holding that a discount accrued on issue and not on maturity. I must confess that I was not able to C find "the force and validity of the reasoning upon which the order is based," to use the formulation of Rumpff JA in *Mooi's* case at p 686.

The effect of the two subsections clarifies in our legislation that "accrued to" is at times not only distinct and separate from but may occur earlier in time than both "received by", and "due and payable". Section 10(7), in my view, underscores the correctness of the meaning ascribed to "accrued to" in D *Lategan's* case as "to become entitled to".

THE COMPETING SUBMISSIONS

The applicant submitted that an amount only accrues in terms of s 8 of the Act when an entitlement to payment arises. Further, that where payment is subject to conditions, an entitlement to payment only arises when the conditions are E fulfilled. Lastly, that those accounting procedures which may be followed by a taxpayer do not create a right which does not otherwise exist.

The respondent countered these submissions by contending that the maturity of the Treasury bill and other related financial instruments is only a condition of payment and not an accrual of interest and therefore the holder of the bill F becomes entitled to income from it from the date of purchase. It argued that the fact that the applicant had in its commercial accounts credited earned but not yet received discount demonstrated that it had in truth and in fact calculated the income represented by the *pro-rata* amount of the discount received for each year of assessment despite the fact that actual maturity dates for the various investments would occur later.

G THE RESOLUTION

It is not necessary for me to cite in full the provisions of ss 8(1) and 10(7) of the Income Tax Act. The first defines "gross income" by the use of the words "received by or accrued to or in favour of a person or deemed to have been H received by or accrued to or in favour of a person in any year of assessment

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...", while the latter clarifies that where a taxpayer becomes entitled to an A amount in the first year of assessment, which is due and payable in a future year, he is deemed to have accrued it in that first year.

The parties are agreed that a discount accrues. The dispute is centred on whether this occurs on the date of purchase or on the date of maturity. The applicant averred that a discount is not interest and should not therefore be treated in the way that interest is treated. The respondent says it is interest and should therefore be treated in the same manner as interest.

I am, of course, not bound by either English or South African case law. They, however, would be persuasive authority. I am also not bound by the decisions of Makoni J, who has concurrent jurisdiction with me nor by that of Hlatshwayo J, in the Special Court, but both carry persuasive authority too. There is no available Supreme Court decision on the point to guide me on which direction to take.

The English position, enunciated in the *Willingale* case, is that discount is not interest. This also appears to be the position in South Africa, regard being had to the exposition in *Tucker v Ginsberg*. The local position, as enunciated in the *Barclays Bank* cases, is that the two are the same. Makoni J arrived at this conclusion by reference to the definition of "interest" found in the *Concise Oxford Dictionary*.

The word "discount" neither appears nor is it defined in the Act. The *Shorter Oxford Dictionary* defines it in the following ways:

"Discount, *sub* 1. an abatement or deduction from the amount or from the gross reckoning of anything.

2.Commerce a. a deduction made for the payment before it is due or prompt payment, of a bill or account; any deduction or abatement from the nominal value or price. **b. the interest charged for discounting a bill of exchange or promissory note; 3. the act of discounting a bill ... at less than nominal value, below par; Bankers or merchantile discount: interest on the amount of a bill for the time it has to run; true discount: interest on the present worth of a bill.**

Discount, **verb** — to reckon as an abatement or deduction from a sum due; to deduct; **2.** to give or receive the present worth of (a bill or note) before it is due ..." (my own emphasis).^g

The *Concise Oxford Dictionary* defines the word as "deduction from amount due or price of goods in consideration of its being paid promptly or in advance; deduction from amount of bill of exchange by one who gives value for it before it is due; ... Give or get present worth of (bill not yet due)".

It would appear that when regard is had to the definition in the *Shorter Oxford Dictionary* with reference to bills and promissory notes by bankers and

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As merchants, the word "discount" carries a technical meaning which is synonymous with interest. It would appear therefore that Makoni J's finding, in the context that confronted her, may have been correct. She preferred "interest" to mean advantage or profit and ignored the other dimension in the definition of interest in the same dictionary of "money paid for use of money lent or for forbearance of debt;" This other dimension also reveals the similarities between interest and discount. A discount would also be money paid for use of money lent. It seems to me, with respect, that the distinctions made by Ormrod LJ at 628H-J and Sir John Pennycuik at 630E in the Court of Appeal; and Lord Fraser of Tullybelton at 760D-H in the House of Lords was of form rather than substance. A discount, from its definition, is as a matter of hard fact; in reality no more than disguised but deferred interest. That, in my view, is the true nature of all the freely negotiable bearer debt instruments such as treasury bills. It is on this basis that I find that the dissenting decisions in the English Court of Appeal and House of Lords on the point provide more persuasive reasoning than the majority ones.

Mr Chinake's submissions were tailored along the reasoning of Stamp LJ in the Court of Appeal at 622D-F. He regarded the discount or premium as a reward given by borrowers for the use of capital, earned and accruing over the period that the advanced money was outstanding. At 622F, the learned Lord Justice stated thus:

"The principal and discount can be disentangled, because the principal is the amount paid for the bill, and the discount represents interest compounded annually at a fixed rate over the whole period of the bill. Similarly, the amount of discount attributable to each year over the period until maturity can be readily ascertained."

In his view, the taxpayer had done all that was required of it to earn the money payable. It was this reasoning that both Lord Diplock and Lord Russell of Killowen found persuasive in their dissenting opinions in the House of Lords. Lord Russell equated the payment on maturity with the payment of

deferred interest in a straight forward loan agreement and thus held that it would have been earned on purchase and not on maturity.

In our law, as in both English and South African, the position is the same as regards the primacy of the language of the Act over the accounting preferences ^g of the taxpayer in compiling its tax returns. See the *Sub-Nigel* case at p 389, referred to by Hlatshwayo J in the Special Court case involving *Barclays* bank. I therefore accept Mr *Andersen's* submission that the taxpayer's accounting procedures do not create a right which otherwise does not exist. The manner in which the taxpayer compiled its statutory accounts in order to ^h demonstrate a true and fair view to its shareholders may not have been

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indicative of the discount that it, in truth and in fact, had earned. Walton ^a J, in my opinion correctly, recognized that banks often hold these instruments to augment their cash flow from the perceived tax savings shown in the commercial accounts as "discount accrued" which, in the matter *in casu*, were then reversed in each succeeding tax year. The other reason for posting such entries on the credit side of the profit and loss account was accurately ^b explained by Lord Keith of Kinkel at p 766, which is, to show to the shareholders that the money lent is not idle but is working towards the production of the discount payable on redemption.

Mr *Andersen* further contended that the discount did not accrue on purchase but would do so when the applicant became entitled to payment, at the latest on maturity or on any earlier date of disposal. He forcibly argued that the ^c condition precedent to entitlement was the agreed date of payment. Mr *Chinake* was in agreement that the date of accrual was dependent on entitlement, not of payment but of the discount itself. He appeared to concede that the suggestion proffered by Hill *Income Tax in Zimbabwe* that "where, however, a taxpayer's entitlement to an amount remains at a year end ... on the basis of *Mooi v SIR* there will still be no accrual in that year". Hlatshwayo J ^d agreed with the learned author and held that the taxability before the date of redemption of interest earned on a true bearer instrument would appear to be insupportable by the language of the Act and case law unless some element of discounting of such interest to its value at year end was undertaken.

I read the phrase "entitlement to an amount" to mean accrual of the amount. ^e I do not understand it to mean entitlement to payment. The *Building Contractors* case and *ITC 1557* (1993) 55 SATC 218 (a South African case) demonstrate the meaning of entitlement to an amount as a condition precedent. The *Building Contractors* case sets out the meaning of a condition precedent in relation to the accrual of gross income. It clearly demonstrates that the fact that the taxpayer has carried out all his obligations in terms of an agreement ^f is not the decisive factor in determining his entitlement to the fruits of the contract. Where he has carried out all the obligations expected of him, his entitlement to the fruits may often be triggered by the agreed commissions or omissions of the other party to the agreement. In the *Building Contractors* case, the entitlement took place on a date three months after the taxpayer had ^g perfectly carried out all his obligations only because until a certificate of no defect was issued, the amount due to it would not be ascertainable. That certificate was the condition precedent. The same position is also evident in *ITC 1557, supra* where the issue revolved on when the conveyor of passengers became entitled to claim the payment of a subsidy. In that case, the Department of Transport (the subsidor) had rules which obliged it to pay only after it had ^h

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^a carried out and received an audit certificate. It carried out and thus had the audit certificate in the tax year following the one the taxpayer had conveyed the passengers. Melamet J held that the taxpayer was entitled to the subsidy in the year the subsidor issued the audit certificate.

It seems to me that notwithstanding my agreement with Stamp LJ and Lord Russell on the congruency between discount and interest, I do not share the ^b view that entitlement to the discount would occur at the date of purchase. I take cognizance of the views of Watermeyer J, in *Lategan's* case which were approved in the *People's Stores* case. These views have been adopted by Mr *Chinake* in his submissions. These are that:

"so far as a debt is concerned which is payable in the future and not in the c year of assessment, it might be difficult to hold that the *cash amount* of the debt has accrued to the taxpayer in the year of assessment. He has not become entitled to a right to claim payment of the debt in the year of assessment, but he has acquired the right to claim payment of the debt in future. This right has vested in him, has accrued to him in the year of assessment, and it is a valuable right which he could turn into money if he wished to do so.

D According to what has been stated above, the value of this right must, in my opinion, be included in the taxpayer's gross income for taxation purposes".

It is noteworthy that Watermeyer J was alive to the difficulties posed by his formulation above. He went on to discuss the decisions that held that E unpaid debts were not part of the gross income, and disagreed with their conclusions. He accepted that the cash amount of the debt would not accrue in the year of assessment as the taxpayer would not be entitled to a right to claim payment of the debt in the year of assessment. He held that all he was entitled to was the *value* of the acquisition of the right to sue on the debt in future, a valuable right which vested in and accrued to him in the year of F assessment. It was the *value* to the right to sue for a debt in the future that had to be included in the gross income as opposed to the right to the cash payment of the debt due in the future.

I must confess that at first I was unable to discern the distinction in that formulation. I then had regard to Lord Keith of Kinkel's words at 766 that:

" G There can be no doubt from the beginning that the issuer of the bill is under a present obligation to pay the bank a sum certain on a particular future date. So there is attraction in the view that under the principles to which I have referred *the bank, since it has by the transaction received* in return for its payment *the present right to receive a larger payment at a future date, should bring* into its profit and loss account on the *credit side the H value of that right*, suitably discounted, the payment out being likewise

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Kudya J

brought in on the debit side. But that again is not what was done, nor is A it suggested that it should have been done. Nor has the amount of profit expected been brought at a valuation or at a discount."

The meaning of the Watermeyer J formulation became crystal clear. He was in agreement with Mr *Andersen* that payment does not accrue on purchase but on prior sale or on maturity. The learned judge had earlier in his judgment B defined "amount" with reference to value. He therefore found that what accrued to the wine farmer was not the payment due for the wine that had been sold, but was the present worth of the debt due to him in future. That, in my view, is what Lord Keith of Kinkel observed might have been what the Inspector of Taxes' argument might have been, but was not. The correctness of this finding is borne out by the other meaning of "discount" which is C common to both the *Shorter Oxford Dictionary*, and the *Concise Oxford Dictionary* of giving or getting the present worth of a bill not yet due.

In essence, therefore, the value of the right appears earlier in time to the redemption of the discount. In my estimation, it takes place where the taxpayer still holds the bill, at the end of the first and at the end of all subsequent tax years in which the tax payer holds the bill. It seems to me that the formula that D is used to calculate the discount could be useful as a starting point to calculate the bill's present worth, also known as its present market value, at the time of disposal (which takes place before the end of the tax year) or at the end of the tax year. It does not have to be *pro-rata* to the value of the discount.

In these circumstances, the question of a condition precedent does not E therefore, arise. Entitlement occurs before maturity, on the date of each tax year end. The respondent is therefore operating within the proper terms of its legal mandate to assess as to income tax on all treasury bills and all kindred freely negotiable bearer debt instruments on the basis that they "accrued to or were in favour of" the applicant.

The parties were agreed that that if I dismissed the applicant's claim, I should F remit the matter to the respondent for reconsideration of the issue of the penalties and interest.

In the result, it is ordered that:

1. The application be and is hereby dismissed with costs.
2. By consent of both parties, the matter be and is hereby remitted to the G respondent for the reconsideration of the issue of penalties and interest.

Atherstone and Cook, applicant's legal practitioners

Kantor and Immerman, respondent's legal practitioners

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MTETWA & ANOR v MUPAMHADZI 2007 (1) ZLR 253 (S)

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Citation	2007 (1) ZLR 253 (S)
Case No	Judgment No. S-35-07
Court	Supreme Court, Harare
Judge	Sandura JA, Gwaunza JA and Garwe JA
Heard	8 May 2007
Judgment	8 May 2007
Counsel	<i>L Mawuwa</i> , for the appellants <i>T G Kasuso</i> , for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Arbitration — *award* — *setting aside of* — *application* — *may only be made c in terms of the Model Law* — *three month time limit* — *no extension possible*

Headnote

In terms of Article 34(1) of the UNCITRAL Model Law, which is the first Schedule to the Arbitration Act [*Chapter 7:15*], recourse to a court against an arbitral award may be made *only* by way of an application for D setting aside in accordance with paras (2) and (3). In terms of para (3), an application to set aside an award may not be made more than three months after the party seeking to have it set aside has received the award. Article 34 does not provide for a possible extension of the period for good cause shown or on any other ground. If the application is not made within F the three month period, the right to have the award set aside is irrevocably lost.

Although there was nothing in Order 33 r 256 of the High Court Rules 1971 that prevented the appellants from making the application in question under that order art 34 is part and parcel of a statute and should therefore hold dominance over Order 33 of the High Court Rules, which is F subsidiary legislation. In any case, as correctly found by the court *a quo*, the application in question failed to satisfy even the provisions of Order 33.

Judgment of Makarau J (as she then was) in *Courtesy Connection (Pvt) Ltd v Mupamhadzi* 2006 (1) ZLR 479 (H) upheld.

Legislation considered ^G

Arbitration Act [*Chapter 7:15*], First Schedule, Art 34(1)

Case information

L Mawuwa, for the appellants

^H *T G Kasuso*, for the respondent

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Gwaunza JA

Judgment

GWAUNZA JA: At the conclusion of the appeal hearing in this matter, we ^A dismissed the appeal with costs and indicated that the reasons would follow. These are the reasons.

Subsequent to the signing by the parties of an agreement for the sale of a certain piece of land and the construction thereon of a house by the appellants, a dispute arose between the parties. The dispute was referred to Mr C A Banda ^B ("Banda") for arbitration. In his award, Banda upheld the agreement of sale and construction, and ordered the appellants to transfer to the respondent the piece of land in question. The appellants were also ordered to complete the construction of developments on the piece of land, as per the parties' agreement. The award was subsequently registered with, and became an order of, the High Court. The appellants were ordered to pay costs on the legal ^C practitioner and client scale. A notice to tax the costs ordered by the court *a quo* was served on the appellants and set down for 8 November 2005. On 10 November 2005, the appellants filed an application in the court *a quo* entitled "Application for Review and Leave to Apply Out of Time". In the application, the appellants sought to have Banda's arbitral award set aside on the basis ^D that it was "grossly unreasonable".

The court *a quo* dismissed the application on three main grounds, that:

- (1) the application should have been made in terms of Article 34 of the Model Law as set out in the First Schedule to the Arbitration Act [*Chapter 7:15*];
- (2) the applicants, who filed the application in question more than three months after receipt of the arbitral award, contrary to para (3) of Article ^E 34 of the Model Law, had by reason of such delay, irrevocably lost the right to have the award set aside; and
- (3) in any case, the applicants had proffered no good explanation for the delay in filing the application to set aside the arbitral award.

The learned judge also made an adverse finding regarding the merits of the ^F application.

I can find no fault with the learned judge's findings and conclusions in this matter. In the court *a quo*, the applicant sought an order that "the arbitration order in this matter and the order of the High Court registering it be and are hereby set aside". It is contended for the appellants that they were perfectly ^G within their rights to file an application for review/setting aside of the decision of the arbitrator, in terms of Order 33 r 256 of the High Court Rules, since there is nothing in that rule which precluded them from bringing such an application. This contention, I find, has no validity. As discussed below, the Model Law, in its Article 34(1), makes it clear that recourse to a court against an arbitral award may be made *only* by an application for setting aside in accordance with ^H

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Gwaunza JA

^A paras (2) and (3) thereof. Specifically, the relevant provision reads as follows:

"ARTICLE 34

Application for setting aside an exclusive recourse against arbitral award

- (1) Recourse to a court against an arbitral award may be made *only* by ^B an application for setting aside in accordance with paragraphs (2) and (3) of this article" (my emphasis).

The use of the words "exclusive" and "only", in my view, suggest that there is to be no compromise when it comes to an attempt to have an arbitral award set aside. The application must be made in terms of the provision cited. That provision quite simply and effectively precludes the applicants

from filing c their application for the setting aside of an arbitral award, otherwise than in terms of paras (2) and (3) of Article 34.

Even had the appellants sought to file their application in terms of Article 34 of the Model Law, such application would have fallen short of the requirements set out in that article. Paragraph (2) of the article provides that an arbitral award d may be set aside by the High Court only if:

- (i) a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law;
- (ii) the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings; e
- (iii) the award deals with a dispute not contemplated by or falling within the terms of the submission to the arbitration;
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

Additionally, Article 34 in its para 2(b) provides that the High Court may set aside an arbitral award if the subject matter of the dispute is not capable of f settlement by arbitration under the law of Zimbabwe or the award is in conflict with the public policy of Zimbabwe.

One does not need to analyse closely the application filed in the court below to realize that it did not satisfy these requirements.

One other significant hurdle that the appellants would have had to tackle in g their application was that posed by para (3) of Article 34 of the Model Law. As the judge a quo found, the clear meaning of this provision is that an application to set aside an award may not be made more than three months after the party seeking to have it set aside, received the award. It is not in dispute that the application in question was filed some 14 months after the appellants h had received the arbitral award in question. The learned judge a quo, I find,

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Gwaunza JA

correctly noted that Article 34 does not provide for a possible extension of the a period for good cause shown or on any other ground. I can also find no fault with her conclusion, based on the authorities cited, that the right to have the award set aside was irrevocably lost when the appellants failed to file their application on or before 1 December 2004, the last day of the three months' period stipulated in the Arbitration Act. b

The appellants' contention that there is nothing in Order 33 r 256 of the High Court Rules that prevented them from making the application in question under that order calls for further comment. Article 34 is part and parcel of a statute, the Arbitration Act, and should therefore hold dominance over Order 33 of the High Court Rules, which is subsidiary legislation. In any case, as correctly found by the court a quo, the application in question failed to c satisfy even the provisions of Order 33. Rule 256 of Order 33 makes it imperative (as indicated by the use of the word "shall") for an applicant to "direct" his application to the person whose decision is to be reviewed, as well as to all other parties affected. As correctly observed by the court a quo, the appellants in their application did not cite the arbitrator as a party. This, in my view, would have been fatal to the application, even were it to be accepted as an application d for review. Further to this, and as again correctly observed by the learned judge a quo, no grounds for review appeared ex facie the application, as required by r 256.

Thus, having determined that the application should have been filed in terms of Article 34(2) of the Model Law, and also that it failed to meet the e requirements for a review in terms of the High Court Rules, we were satisfied the appeal had no merit.

Hence, our decision to dismiss it with costs.

SANDURA JA & GARWE JA concurred. f

Mutezo & Co, appellants' legal practitioners

Mantsebo & Partners, respondent's legal practitioners g

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Source:

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MOVEMENT FOR DEMOCRATIC CHANGE v THE PRESIDENT OF ZIMBABWE & ORS 2007 (1) ZLR 257 (H)
2007 (1) ZLR p257

Citation	2007 (1) ZLR 257 (H)
Case No	Judgment No. HH-28-07
Court	High Court, Harare
Judge	Makarau JP
Heard	11 October 2006
Judgment	9 May 2007
Counsel	<i>B W Elliot</i> , for the applicant <i>Mrs V Mabhiza</i> , for the first and fifth respondents <i>G Chikumbirike</i> , for the second, third and fourth respondents
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Administrative law — review — grounds for — legitimate expectation — limits of use of such principle — not a basis on which to found a cause of action

International instruments — effect on domestic law — instrument signed by D President but not incorporated into municipal law — no rights given to establish cause of action

Practice and procedure — action — cause of action — whether action may be based on international instrument signed by President but not incorporated into municipal law

E **Practice and procedure** — order — declaratory order — what applicant for such an order must establish — court may not issue order relating to factual issues

Statutes — validity — international instruments — effect on domestic law — no rights given to establish cause of action

Headnote

F At the summit meeting of the Southern Africa Development Community (SADC) held in Mauritius in 2004, certain principles and guidelines governing democratic elections for the member countries were adopted ("the SADC Principles and Guidelines"). The President, acting on behalf of Zimbabwe, approved the guidelines and gave Zimbabwe's assent G thereto. The Zimbabwe Electoral Commission Act [Chapter 2:12] and the Electoral Act [Chapter 2:13] were enacted to give effect to these principles.

In the application brought by the applicant shortly before the general election held in March 2005, some provisions of these Acts and of the Public H Order and Security Act [Chapter 11:17], the Access to Information and

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Protection of Privacy Act [Chapter 10:27] and the Broadcasting Act ^A [Chapter 12:06] were attacked as being inconsistent with the fundamental principles set out in the SADC Principles and Guidelines. The applicant also sought an order that the decision by the Delimitation Commission to reduce the number of parliamentary seats in certain provinces and to increase the number of seats in others be set aside. The applicant sought ^B a declaration that the Electoral Supervisory Commission was not properly constituted in terms of s 61 of the Constitution Zimbabwe and was therefore unlawful.

Held, that there is no legal principle that makes a regional instrument in the nature of the SADC Principles and Guidelines binding on member states. Such an instrument gives no more than guiding principles. They set forth ^C the principles and guidelines upon which election legislation is to be modelled by member countries, but, being a model, the document has no binding nature and cannot be enforced in its format. The agreement entered into by the first respondent and his counterparts in 2004 setting out principles and guidelines for the holding of democratic elections is not a direct source of rights and obligations under our law. While the ^D signing of the agreement by the first respondent acts to indicate to the national and to the international community that his government ascribes to the minimum standards set out in the guidelines, it does not give the applicant or any other citizen of Zimbabwe a cause of action that is enforceable in a domestic law court based on the guidelines.

Held, further, that the doctrine of legitimate expectation, which the applicant ^E argued could be used as a basis for holding that the provisions of the guidelines were relevant and applicable in the court, is primarily used in administrative law to protect procedural fairness before an administrative action is taken.

Held, further, that the applicant failed to establish a factual basis to challenge ^F the decision of the Delimitation Commission. It is not sufficient to simply show that the figures it used may have been incorrect. A basis or ground for review, recognized at law, had to be established before the court could interfere with the discretion of the second respondent. The applicant had to show that the findings of the Commission were tainted by illegality, irregularity or were irrational. No such basis had been laid out. ^G

Held, further, that the Electoral Supervisory Commission having been abolished before the general election, it was not competent for the court to issue a declaratory order. A declaratory order only relates to legal rights and not to factual issues.

Held, further, that an applicant for a declaratory order must show that: (a) it is an interested person; (b) there is a right or obligation which becomes ^H

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^A the object of the inquiry; (c) it is not approaching the court for what amounts to a legal opinion upon an abstract or academic matter; (d) there must be interested parties upon which the declaration will be binding; and (e) considerations of public policy favour the issuance of the order. *In casu*, all the declaratory orders sought did not relate to a right. Nowhere had the applicant, as a political party with the majority of opposition seats ^B in Parliament, contended that its rights were in issue and what those rights were. The court will not give a futile and academic opinion, nor will it give an opinion on matters where there is no dispute between the parties, no matter how topical that issue is. It is not the place or the function of the court to participate in public debates and give opinions on such debates. The court has no opinion other than on the law and on ^C a dispute referred to it. Further, the other interested parties in the form of the serving legislators had not been sufficiently identified in the application and had not been afforded a chance to be heard before an decision on issues that might affect the validity of their tenure in parliament. Finally, the opinions sought from the court by the applicant ^D were not in the interests of public policy considerations. Some legislators had been elected and would want to keep their seats. Candidates who lost during the elections challenged the results under the law. In view of the developments that had taken place since the election, it was not necessary that *declaratur*s about what the situation was like be issued as they would serve no practical value.

Cases referred to ^E

Caluza v Independent Electoral Commission & Anor 2004 (1) SA 631 (Tk)

Durban City Council v Assn of Bldg Socs 1942 AD 27

Eagles Landing Body Corporate v Molewa NO & Ors 2003 (1) SA 412 (T)

Electrical Contractors's Assn (SA) & Anor v Bldg Industries Federation (SA) (2) 1980 (2) SA 516 (T)

Family Benefit Friendly Soc v CIR & Anor 1995 (4) SA 120 (T)

Gauteng Gambling Bd v Silverstar Development Ltd & Ors 2005 (4) SA 67 (SCA)

Ex p Ginsberg 1936 TPD 155

Kaunda & Ors v President RSA & Ors 2004 (5) SA 191 (T)

MEC for Local Govt, Mpumalanga v Independent Municipal & Allied Trade Union & Ors 2002 (1) SA 76 (SCA)

Min of State for Immigration & Ethnic Affairs v Ah Hin Teoh FC No. 95/013 HCA 20

R K Footwear Mfrs (Pvt) Ltd v Boka Booksales (Pvt) Ltd 1986 (2) ZLR 209 (H)

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Legislation considered ^A

High Court Act *Chapter 7:06*, s 14

Case information

B W Elliot, for the applicant

Mrs V Mabhiza, for the first and fifth respondents

G Chikumbirike, for the second, third and fourth respondents ^B

Judgment

MAKARAU JP: In August 2004, at the summit of the Southern Africa Development Community held in Mauritius, certain principles and guidelines governing democratic elections for the member countries were adopted. These shall be referred to in this judgment as "the SADC Principles and Guidelines". The first respondent, acting on behalf of the Republic of ^C Zimbabwe, approved of the guidelines and gave Zimbabwe's assent thereto.

Subsequent to and following the summit, the Zimbabwean government initiated and piloted through Parliament, two specific pieces of legislations aimed at regulating the conduct of elections in Zimbabwe in accordance with the SADC Principles and Guidelines. These were the Zimbabwe Electoral ^D Commission Act [*Chapter 2:12*] and the Electoral Act [*Chapter 2:13*].

As part of the domestic law, at the time of the enactment of the two acts, were the Public Order and Security Act [*Chapter 11:17*]; the Access to Information and Protection of Privacy Act [*Chapter 10:27*] and the Broadcasting Act [*Chapter 12:06*], among other pieces of legislation.

In the application before me, some provisions of these Acts were attacked as ^E being inconsistent with the fundamental principles set out in the SADC Principles and Guidelines. I shall deal with this aspect of the matter in due course.

On 13 January 2005, the first respondent caused the publication of Proclamation 1 of 2005 SI 3A 2005. In the proclamation, the second respondent ¹ made its ^F findings known for the purposes of the general elections that were to be held on 31 March 2005. As a result of these findings, the second respondent had reduced the number of parliamentary seats in Harare, Bulawayo and Matebeleland South and, in turn, had increased the seats in Manicaland, Mashonaland East and West provinces. ^G

This exercise of statutory power by the second respondent has also been challenged before me as having been unfounded, as the second respondent allegedly had no good cause for altering the number of parliamentary seats in the affected provinces as it did. ^H

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Makarau JP

A Prior to the enactment of the Zimbabwe Electoral Commission Act, the Constitution of Zimbabwe mandated the third respondent ² to supervise the conduct of elections in Zimbabwe. The composition of the third respondent was provided for in the Constitution.

It was contended on behalf of the applicant that the third respondent was B improperly constituted at the time of the filing of the application.

It is common cause that the Commission was abolished by an amendment to the Constitution on 14 September 2005 and was no longer in existence at the hearing of this matter. Whether it was competent for me at the hearing of the application to deal with the allegations leveled against the third respondent in view of its lawful demise was debated at the hearing. Again, I shall revert C to this point in due course.

On 1 February 2005, the fourth respondent ³ came into being. Prior to 14 September 2005, it was a statutory body created by the provisions of the Zimbabwe Electoral Commission Act. On 14 September 2005, in the amendment to the Constitution that saw the demise of the third respondent, the fourth D respondent became a constitutionally created body.

On 31 March 2005, general elections were held in Zimbabwe. The applicant participated in the general elections and fielded candidates in all the 120 constituencies making up the then unicameral Parliament of Zimbabwe. The elections held on 31 March 2005 were held in terms of the provisions of the newly promulgated Zimbabwe Electoral Commission and the Electoral Acts, E among other existing and relevant legislation.

During the election, the applicant emerged as the majority opposition party in parliament.

THE APPLICATION

On 15 March 2005, 16 days shy of the general elections, this application was F filed. In the application, the applicant sought the following orders:

- "1. **IT IS DECLARED** that the provisions of the Electoral Act [Chapter 2:13] and the Zimbabwe Electoral Commission Act [Chapter 2:12] do not incorporate and make part of the laws of Zimbabwe clauses 2.1.1, 2.1.3, 2.1.5, 2.1.6, 2.1.8, 4.1.3, 4.1.4, 4.1.7, 7.2, 7.3, 7.4, 7.6, 7.7, 7.10, 7.11, and 7.12 of the Principles and Guidelines Governing Democratic G Elections agreed to at the meeting of Heads of Governments of Southern African Development Community meeting in Mauritius in

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August 2004 and signed by His Excellency the President of Zimbabwe A on behalf of Zimbabwe.

2. **IT IS DECLARED** that the SADC Principles and Guideline referred to in paragraph 1 above are incompatible with the following provisions:
 - (a) Part IV of the Public Order and Security Act [Chapter 11:17];
 - (b) Parts XI and XII of the Access to Information and Protection of B Privacy Act [Chapter 10:27]; and
 - (c) Parts III and IV of the Broadcasting Act [Chapter 12:06];

and that the said provisions taken with the manner of their application by the regulatory authority of those statutory provisions are contrary to and in breach of the said s 3 of the Electoral Act [Chapter 2:13] for the holding of democratic elections in Zimbabwe. C
3. **It IS ORDERED** that the findings of the Delimitation Commission as set out in Proclamation 1 of 2005 (SI 3A2005) be and are hereby set aside.
4. **It IS ORDERED** that the Electoral Supervisory Commission is not properly constituted in terms of s 61 of the Constitution of Zimbabwe and is therefore unlawful and of no force and effect. D
5. **IT IS DECLARED** that the Zimbabwe Electoral Commission has failed to undertake the following functions, and thus is in default of its role and obligations in terms of the Zimbabwe Electoral Commission Act [Chapter 2:12]:
 - (a) it failed to direct and control the registration of voters for the E purposes of the general election to be held on 31 March 2005;
 - (b) it failed to compile the voters' rolls and registers for the purpose of the general election to be held on 31 March 2005;
 - (c) it failed to have copies of the compiled voters' rolls available for purchase by members of the public.

(d) it failed to keep the public informed of the matters set out in para (h) F of s 4(1) of the Zimbabwe Electoral Commission Act [Chapter 2:12].

6. The respondents shall pay the costs of this suit.”

The application was opposed by all the respondents. The first and fifth respondents denied that the SADC Principles and Guidelines were legally G enforceable in a domestic court of law. They further denied the allegation by the applicant that Zimbabwe had failed to incorporate into domestic law the essential provisions of the guidelines.

The second respondent averred that it had carried out its functions in terms of the Constitution and had taken into account the factors listed in s 60 (4) of the Constitution before delimiting the country into constituencies. It was H

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A further contended on behalf of the second respondent that the applicant had failed in its application to aver that the second respondent had overshot the parameters set by the Constitution and had thus incorrectly exercised the discretion vested in it by the Constitution.

The third respondent in turn denied that it was improperly constituted at the B time of the filing of the application.

The fourth respondent denied that it had failed to carry out its functions as stated in the Zimbabwe Electoral Commission Act. It was pointed out in the opposing affidavit filed on behalf of the fourth respondent that the body only came into existence on 4 February 2005 and that, prior to that, some of its functions had been carried out by other bodies including the office of the C Registrar-General and the Electoral Supervisory Commission.

While the application was ready for hearing as early as April 2005, the parties by consent declined an earlier set down date and were only ready to argue the matter on 11 October 2006.

I now turn to deal with each of the five substantive orders that the applicant D seeks. For convenience, I shall deal with the first two orders together as, in my view, a determination of these two involves an examination and application of the same legal principles.

THE PLACE OF THE SADC PRINCIPLES AND GUIDELINES IN DOMESTIC LAW

E The applicant has asked me to declare firstly, that the Zimbabwe Electoral Commission Act and the Zimbabwe Electoral Act do not incorporate certain specified sections of the SADC Principles and Guidelines adopted in Mauritius in 2004. Secondly, the applicant requires me to declare that certain specified sections of the Public Order and Security Act, the Access to Information and Protection of Privacy Act and the Broadcasting Act are incompatible with the F provisions of the guidelines and principles referred to in the first order.

It is pertinent to note that the applicant merely seeks the declaratory orders without seeking any consequential relief.

The applicant appears to me to have elevated the SADC Principles and Guidelines to a law and has then placed that law in a position superior to G domestic law. The applicant requires me in the declaratory orders to test some pieces of domestic legislation for compliance against the principles and to hold that others do not fully incorporate the guidelines.

I know of no legal principle that makes a regional instrument in the nature of the SADC Principles and Guidelines binding on member states. To me, the H principles and guidelines are no more than guiding principles. They set forth

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the principles and guidelines upon which election legislation is to be modeled A by member countries. Being a model, the document has no binding nature and cannot be enforced in its format.

It is common cause that the SADC Principles and Guidelines have not been incorporated, as a document, into domestic law and are thus not enforceable by this court in that form. This is a trite position at law. B

In my view the fact that the SADC Principles and Guidelines are not a source of domestic law should mark the end of the inquiry as far as the first two orders are concerned. However, Mr *Elliot*, for the applicant, was of the view that I could use the doctrine of legitimate expectation to hold that the provisions of the guidelines are relevant and applicable in this court. In this regard, he referred me to the Australian case of *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* FC No. 95/013 HCA 20. In that case, the Family Division of the Australian Federal Court had occasion to consider the place in Australian law of the United Nations Convention on the Rights of the Child.

It was argued in the *Teoh* case that the ratification by the Australian Commonwealth Government of the Convention was a statement to the national and international community that Australia recognized and accepted the principles of the Convention. It was further argued that, although the Convention was not part of municipal law, the children in that case had a legitimate expectation that their father's case (for a residence permit), would be treated in a manner consistent with the terms of the Convention safeguarding the best interests of children in all actions concerning children. ^ε

In rejecting the arguments advanced on behalf of *Teoh*, the court held that a treaty that had not been incorporated into municipal law cannot operate as a direct source of individual rights and obligations under Australian law.

I am in total agreement with the above sentiments and am of the view that they hold true of the Zimbabwean legal situation. The agreement entered into by ^φ the first respondent and his counterparts in Mauritius in 2004 setting out principles and guidelines for the holding of democratic elections is not a direct source of rights and obligations under our law. While the signing of the agreement by the first respondent acts to indicate to the national and to the international community that his Government ascribes to the minimum standards set out in the guidelines, in my view, it does not give the applicant ^ς or any other citizen of Zimbabwe a cause of action that is enforceable in a domestic law court based on the guidelines.

Further, I have not been able to come across a case in this jurisdiction where legitimate expectation, as a legal principle, was used to found a cause of action. It would appear to me that the principle is primarily used in administrative law ^η

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^α to protect procedural fairness before an administrative action is taken. See *Gauteng Gambling Board v Silverstar Development Ltd & Ors* 2005 (4) SA 67 (SCA) at 78.

On the basis of the foregoing, I would dismiss the first two orders sought by the applicant.

^β THE DELIMITATION OF CONSTITUENCIES

I now turn to the third order sought by the applicant. In the order, the applicant requires me to set aside the findings of the second respondent as contained in Proclamation 1 of 2005. In other words, the applicant would want me to set aside the delimitations upon which the March 2005 elections were held and all subsequent by-elections have since been held.

^ς As the basis for the above relief, the applicant, in the founding affidavit deposed to by its president, alleges that the figures referred to by the second respondent in its report are inaccurate and thus the second respondent had no good cause for altering the number of constituencies in the affected provinces.

^δ The applicant makes various factual allegations in support of position that the second respondent based its delimitations on incorrect data. It has attached a schedule showing the voter population in each province as at 2000 and has sought to compare this with the report of the second respondent for the 2005 elections. In addition, it has attached a copy of a table compiled by the National Census conducted in 2002, showing that the population of Harare had grown. ^ε It was argued that the population of Harare had thus grown instead of reducing and the number of constituencies in Harare should not have been decreased.

With respect, the evidence proffered by the applicant is insufficient for one to come to the conclusions reached. The growth of a population does not automatically translate into the growth of registered voters by the same rate. ^φ That is common sense. Equally, the number of registered voters as at 2000 cannot be used to challenge the findings of the second respondent as at 2005.

While the point was not argued before me, the applicant should, in my view, have made reference to the voters' rolls used by the second respondent to delimit the boundaries of constituencies and should have been able to point out errors in these. Without showing any errors in the rolls, the applicant's ^a argument was bound to belly flop, as the compiling of voters rolls and their inspection for errors are specific and significant procedures provided for in the law and whose integrity is protected by law.

In my view, for the applicant to sustain its allegation that the findings of the second respondent as to the voter population in each province were inaccurate, ^b it had to proffer more evidence than it did.

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Further, and more to the point, in my view, a basis for my interfering with the ^a discretion of the second respondent has not been properly established in this application. It is not sufficient to simply show that the figures it used may have been incorrect. A basis or ground for review, recognized at law, had to be established before the court could interfere with the discretion of the second respondent. The applicant had to show that the findings of the second ^b respondent were tainted by illegality, irregularity or were irrational. No such basis has been laid out in the application before me.

Apart from making the general averment that the population of Harare must have grown since 2000, the applicant has not made any specific averment that the second respondent deviated from any of the considerations that it is mandated to take into account in delimiting constituencies. As argued by ^c Mr *Chikumbirike*, nowhere in its papers has the applicant alleged and proved that the second respondent overshot the 20 per cent margin of error that is permissible at law. In the absence of such allegations and proof, there is no basis upon which I see myself setting aside the findings of the second respondent as sought.

THE ELECTORAL SUPERVISORY COMMISSION ^d

In the fourth order, the applicant seeks an order that the third respondent was not properly constituted in terms of s 61 of the Constitution and that it was unlawful and of no force and effect.

It is common cause that the third respondent was abolished on 14 September ^e 2005. At the hearing of the matter, I requested counsel to address me on whether, in view of the abolition of the third respondent, it was competent for me to issue the order that the applicant was seeking. Mr *Elliot*, for the applicant, was of the view that it was necessary that I pronounce on the composition of the third respondent even though it is no longer in existence.

I think not. ^f

Firstly, the validity of the acts done by the third respondent during its lifetime can still be attacked in an appropriate action, citing its successor in title. Secondly, it has not been averred before me that the order sought will be of any practical value to the applicant who did not challenge the composition of the third respondent at the relevant time, but participated in the general ^g elections partly supervised by an allegedly improperly constituted body. As correctly submitted by Mr *Elliot*, all I can do now is to issue a declaratory order for which no consequential relief is being sought.

Below, I deal in detail on the nature of the discretion vested in the court in issuing declaratory orders generally. The one point that emerges from the ^h

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^a authorities I refer to below is that a declaratory order only relates to legal rights and not to factual issues.

It appears clear to me that what the applicant seeks under this order is a declaration as to a factual situation and not as to its rights against the respondents. The applicant requires me to declare the fact of the composition of the third respondent and to hold that this was improper in terms of the law. ^b That to me is a declaration as to a fact and not a declaration as to any right that the applicant may have against the third respondent or its successor in title.

For this reason, I decline to issue such a declaratory order.

THE POWER OF THE COURT TO ISSUE DECLARATORY ORDERS

c I now turn to the fifth order that the applicant is seeking. In this order, the applicant requires me to declare that the fourth respondent failed to undertake certain of its functions as set in the Act. In determining whether to issue this declarator, I will discuss generally the power of the court to issue declarators and the remarks I make in this respect relate to all the declarators sought in this d application.

The power of this court to issue declaratory orders is not in dispute. It is one of the inherent powers that this court has as a superior court and which inherent power has been put beyond doubt by provisions of s 14 of the High Court Act [Chapter 7:06].

e The approach that the court must take when faced with an application for a declaratory order appears to me to be settled.

In *R K Footwear Manufactures (Pvt) Ltd v Boka Booksales (Pvt) Ltd* 1986 (2) ZLR 209 (H), Sandura JP (as he then was) was required to issue a declaratory order involving the rights of a lessor to evict a tenant at a future date. After making reference to s 14 of the High Court Act, the learned Judge f President set out two considerations that he had to take into account in determining whether to issue the declarator. These were: firstly whether the applicant was an interested person in an existing future or contingent right or obligation; and, secondly, whether the case was a proper one for him to exercise his discretion. He came to the conclusion that the matter before him g was not a proper one for him to exercise his discretion as, at the time of the hearing of the matter, there was no good and sufficient cause for requiring the order.

The considerations that a court has to take into account before issuing a declarator were, in my view, further expanded and explained in *Family Benefit h Friendly Society v Commissioner for Inland Revenue & Anor* 1995 (4) SA 120

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(T) where, in six comprehensive paragraphs, van Dijkhorst J set out the legal a principles applicable when a declarator is sought and the mental steps that a court must follow in determining whether to issue the declarator. The applicant or plaintiff must show that:

1. it is an interested person;
2. there is a right or obligation which becomes the object of the inquiry; b
3. it is not approaching the court for what amounts to a legal opinion upon an abstract or academic matter;
4. there must be interested parties upon which the declaration will be binding; and
5. considerations of public policy favour the issuance of the declarator. c

The criteria set out by van Dijkhorst J above were cited with approval and applied in *Eagles Landing Body Corporate v Molewa NO & Ors* 2003 (1) SA 412 (T).

In view of the fact that the wording of s 14 of the High Court Act is similar to that of s 19(1)(a)(iii) of the Supreme Court Act 1959 of South Africa, which was d referred to in the above two cases, I am persuaded to follow the reasoning set out in the two South African cases. This process appears to me to be simply an expansion of the two considerations that Sandura JP set out in the *R K Footwear Manufacturers' case*.

Firstly, I note that there was no dispute before me as to the *locus standi* or interest of the applicant to bring this application. I shall therefore proceed on e the basis that the applicant has *locus standi* to bring this application.

Regarding the second consideration, I must be satisfied that there is a right, the subject matter of the inquiry. In dealing with the nature of the right that an applicant for a declarator must show, Nicholas J in *Electrical Contractors' Association (South Africa) & Anor v Building Industries Federation (South f Africa)* (2) 1980 (2) SA 516 (T) had this to say at 519H-520B:

"A person seeking a declaration of rights must set forth his contention as to what the alleged right is. See *O'Neill v Kruger's Executrix and Ors* 1906 TS 342 at 344-5; *Smit v Roussow & Ors* 1913 CPD 436 at 441."

The learned judge then cited with approval the remarks by Watemeyer CJ in *Durban City Council v Association of Building Societies* 1942 AD 27, to the effect that the interest of the applicant must be a real one, not merely an abstract intellectual interest.

In determining the matter before him, Nicholas J held that the applicant had not asserted in any of its papers that it had any rights as against the respondent and did not seek any declaration of rights against the respondent. All it sought

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was a declaration that the circular in issue contained false statements. The learned judge was of the view that the declaration sought was a declaration as to fact and not as to a right.

The same reasoning was applied in *Caluza v Independent Electoral Commission & Anor* 2004 (1) SA 631 (Tk) by Le Roux AJ to hold that the application before him did not relate to a right but bore mainly to a factual situation, viz, that the applicant took a decision and crossed the floor of the Municipal Council Chamber from one political party to another. The applicant had sought a declaratory order to the effect that her "purported" floor crossing from a certain political party to another be declared null and void and of no effect, and an order compelling the first respondent to make the necessary rectification in its records regarding her "purported" floor crossing.

It appears to me, from a reading of the above authorities, that what is required to be contended is a legal right and not the factual basis upon which a right may then be founded.

In casu, all the declaratory orders sought do not relate to a right. Nowhere has the applicant, as a political party with the majority of opposition seats in parliament, contended that its rights are in issue and what those rights are.

I would, therefore, hold that the declarators sought in this application are incompetent as they relate to a factual situation and not to any rights, existing or future, that the applicant has or may have. As has been stated in the authorities, the applicant must set forth its contention as to what the alleged right is. This, the applicant has failed to do. It is not for me to speculate as to what that right is or may be.

Assuming I have erred in my assessment of what the applicant is seeking in the declarators, I still would have dismissed the application after considering the third principle listed above. In my view, the applicant is approaching the court for what amounts to a legal opinion upon an abstract or academic matter. The 2005 election have come and gone. Mixed views have been expressed on whether the elections were free and fair. The topic has now become abstract and academic with the passage of time. It appears to me from a reading of the papers and from arguments advanced by Mr Elliot that what is being sought in the declarators is an *imprimatur* by the court that the general elections of 2005 were conducted in an atmosphere where the playing field was uneven in the manner detailed in the founding affidavit. These all relate to the factual situation on the ground as perceived by the applicant. No legal argument has been raised. No rights of the applicant have been contended as needing definition in the application. It is almost as if the applicant is inviting the court to participate in idle chatter on the 2005 elections and give its opinion on the state of the playing field before the 2005 elections.

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Makarau JP

While it is trite that the court will not give a futile and academic opinion, in my view, the court will also not give an opinion on matters where there is no dispute between the parties, no matter how topical that issue is. It is not the place or the function of the court to participate in public debates and give opinions on such debates. The court has no opinion other than on the law and on a dispute referred to it. See *Kaunda & Ors v President of the Republic of South Africa & Ors* 2004 (5) SA 191 (T) and *Eagles Landing Body Corporate v Molewa NO & Ors* (*supra*).

Again, on this basis alone, I would have dismissed all the declaratory orders sought.

It has been held that before a declarator is issued, the court must be satisfied that there are interested parties upon which the declaration will be binding. By "binding" is meant that the decision of the court operates as *res judicata* between the parties. I am not satisfied that the declarators sought in this application will have the effect of finally deciding the question of the 2005

elections as between the applicant and all interested parties. In my view, the other interested parties, in the form of the serving legislators, have not been sufficiently identified in the application and have not been afforded a chance to be heard before I pronounce on issues that may affect the validity of their tenure in parliament.

Finally, I turn to the last consideration listed above.

I must now consider whether public policy favours the issuance of the declarators sought.

It is my view, that since the 2005 elections have been held, the opinions sought from the court by the applicant are not in the interests of public policy considerations. Some legislators have been elected and would want to keep their seats. Candidates who lost during the elections challenged the results under the law. In view of the developments that have taken place since 31 March 2005, it is, in my view, not necessary that declarators about what the situation was like be issued as they serve no practical value. See *Member of the Executive Council for Local Government, Mpumalanga v Independent Municipal and Allied Trade Union & Ors* 2002 (1) SA 76 (SCA). If the applicant is of the view that it would want the situation improved before other elections are held, then, in my view, it should not seek the declarators that it seeks in this application but proceed to challenge the situation as it exists before each election and timeously prosecute its challenges. Further, the applicant must always contend and set forth the rights that it alleges are involved in the declarators and must not approach the court for what I term "idle chatter" on matters political.

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Makarau JP

I decline to abuse the authority vested in me to issue orders of no practical value to the parties before me. The court, in my view, is a forum for the settling of real disputes between real parties and for issuing practical orders that will declare the rights of the parties and guide the parties in their present and future legal relationships. Academic opinions are best sought from law professors and advocates. As was stated by Greenberg J (as he then was) in *Ex p Ginsberg* 1936 TPD 155 at 157, in limiting the discretion of the court to issue declaratory orders:

"The legislature must have been aware of the fact that there is no dearth of advocates and attorneys competent to advise upon legal problems and there is no reason to think that it intended to set up the courts as consultative or advisory bodies ..."

On the basis of the foregoing, I fail to find merit in the application, which in my view, amounts to an abuse of the court. I am fortified in my view that the application is merely meant to abuse the court by the delay it has taken the applicant to prosecute this application to finality. The application was filed in March 2005 and efforts to have it set down for hearing early were in vain as both parties agreed to have the matter postponed. It therefore appears to me that the application was not meant to procure any practical relief from the court. Had costs been asked for on the higher scale against the applicant, I would have found ample justification for awarding such.

In the result, I make the following order:

1. The application is dismissed.
2. The applicant is to pay the costs of the application.

Coghlan, Welsh & Guest, applicant's legal practitioners

Civil Division, Attorney-General's Office, first & fifth respondents' legal practitioners

Chikumbirike & Associates, second, third & fourth respondents' legal practitioners

1 The Delimitation Commission — *Editor*

2 The Electoral Supervisory Commission — *Editor*

3 The Zimbabwe Electoral Commission — *Editor*

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/ASSOCIATED NEWSPAPERS OF ZIMBABWE v MEDIA & INFORMATION COMMISSION & ANOR 2007 (1) ZLR 272 (H)

ASSOCIATED NEWSPAPERS OF ZIMBABWE v MEDIA & INFORMATION COMMISSION & ANOR 2007 (1) ZLR 272 (H)

2007 (1) ZLR p272

Citation	2007 (1) ZLR 272 (H)
Case No	Judgment No. HH-29-07
Court	High Court, Harare
Judge	Gowora J
Heard	15 October 2006
Judgment	9 May 2007
Counsel	<i>E T Matinenga</i> , for the applicant <i>Ms M V Chizodze-Chinounye</i> , for the first respondent <i>N Mutsonziwa</i> , for the second respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Administrative law — *administrative decision* — *decision adverse to applicant* — *relief obtainable* — *proceedings under Administrative Justice Act [Chapter 10:28]* — *desirability of*

Administrative law — *review* — *interference by court with administrative actions or decisions* — *when court will interfere* — *failure to place D before court evidence required for exercise of administrative discretion*

Headnote

In terms of the Access to Information and Protection of Privacy Act [*Chapter 10:27*] (AIPPA), any provider of mass media services must be registered as such with the Media and Information Commission. The applicant [£] applied for registration, which was refused. The Administrative Court set aside the decision of the Commission and ordered that the applicant was deemed to have been registered. The Supreme Court held the Administrative Court had misdirected itself in so ordering when it had not determined the allegations by the Commission that the applicant had not complied with the Act. It set aside the Administrative Court's order. [£] Before the application for the registration was made to the Commission, the Chairman of the Commission had written articles describing the applicant as an outlaw and saying that its application would not be considered. Although the Supreme Court found that actual bias had not been established on the part of the Chairman, it concluded that the [£] proceedings of the Commission were voidable on the grounds of bias and ordered that the issue of the registration of the applicant be remitted to the Commission for consideration *de novo*.

The applicant's subsequent application was again refused by a panel of which the Chairman was a member. The High Court set aside this decision and ordered the matter to be heard again *de novo*. It found that not only [£]

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^A was the Chairman biased, but that the entire Commission had exhibited bias against the application. The applicant asked the respondent Minister to appoint new commissioners as the existing ones were disabled from hearing the matter due to their bias. The Minister did not reply or take any action before the applicant applied the court for relief, seeking an order that it be deemed to be registered in terms of the Act. In response ^B to the application, the Minister took the stance that, despite the finding of the court, he retained confidence in the Commissioners and did not wish to replace them.

The applicant argued that there was nothing in the Administrative Justice Act [*Chapter 10:28*] (the AJA) which prevented the court from declaring that the applicant was deemed to have been duly registered in terms of ^C AIPPA. It contended further that a mandatory interdict would be appropriate as the legislation envisages registration except in limited circumstances. From the date that the Supreme Court judgment was handed down, both the respondents were aware that the Commission could not entertain the application for its registration by the applicant. ^D In so far as the applicant was concerned, it was clear that there was no administrative body to deal with the application.

Held, that the Minister's statement, that he retained confidence in the members of the Commission and found no reason to displace them, would be indicative of a disinclination on his part to allow the applicant to exercise its right to apply for registration in terms of the Act. The Supreme ^E Court's and High Court's findings of bias meant that the Minister should have put in place measures for the speedy determination of the application for registration by the applicant.

Held, further, that whilst the AJA does provide for relief against an administrative authority which has not acted in accordance with its statutory duty, it does not exclude an applicant from seeking other ^F appropriate relief from such administrative authority. It is clear that, amongst other rights, the intention of the AJA is to provide for the right to administrative actions and decisions that are lawful and procedurally fair and to provide for relief by a competent court against administrative actions and decisions that are contrary to the provisions of the AJA. The ^G AJA provided the best possible form of relief to a litigant aggrieved by a recalcitrant administrative authority.

Held, further, that there was no reason why the relief provided for in terms of s 4 of the AJA could not be availed to the applicant. Indeed, it would be most appropriate for an order in terms of s 4(2)(c) for the Minister to ^H be directed to take such administrative action as would put in place

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conditions and a legal frame work for the application for registration by ^A the applicant to be considered and determined.

Held, further, that although the Commission did exist, all the Commissioners were effectively disabled by the judgments which found them to be biased against the applicant. However, to contend that there in fact no administrative body in existence was to go too far. The membership of ^B the Commission has the lawful authority envisaged in AIPPA to carry out the administrative acts for which it has been appointed. None of the Commissioners suffered from a legal impediment as envisaged in s 40(3) of AIPPA. Their disability, being specifically to do with the applicant, did not denude the Commission of its lawful authority to do its tasks and perform the functions it was meant to perform in terms of AIPPA except ^C as it relates to the applicant.

Held, further, that the court was being asked to place itself in the shoes of the Commission and make the decision whether or not the applicant should be granted a licence to operate a mass media service. While there was substance in the argument that AIPPA allows no discretion to the Commission to deny a licence save in certain limited circumstances, in ^D order to be granted such licence, an applicant needs to satisfy the Commission that there has been compliance with AIPPA. That issue that had not been determined by the Commission *in casu*. The question was not considered. In order to grant the relief being sought, the court would then have to consider whether the applicant had complied with AIPPA ^E and hence itself become the licensing authority.

Held, further, that as a general principle, the courts will not attempt to substitute their own decision for that of the public authority. If an administrative decision is found to be *ultra vires*, the court will usually set it aside and refer the matter back to the authority for a fresh decision (*dicta per* McNALLY JA in *Affretair (Pvt) Ltd v M K Airlines (Pvt) Ltd* ^F 1996 (2) ZLR 15 (S), followed).

Held, further, that a court will not interfere in the sphere of administrative actions or decisions except in very exceptional situations, but it will normally interfere in the administrative sphere in the following circumstances:

- (a) where the end result is a foregone conclusion and a referral back ^g would be a waste of time;
- (b) where further delay would cause unjustifiable prejudice to the applicant;
- (c) where the statutory tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; and ^h

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Gowora J ^a

- (d) where the court is in as good a position to make the decision itself.

In casu, no evidence had been placed before the court, and thus there was no way the court could know, that there had been due compliance by the applicant with the provisions of AIPPA in order to qualify for the grant of a certificate of registration. That knowledge would peculiarly be in the ambit of the Commission as the administrative authority for purposes of ^b issuing a certificate of registration.

Case cited

Affretair (Pvt) Ltd v M K Airlines (Pvt) Ltd 1996 (2) ZLR 15 (S)
Bonnievale Wine & Brandy Co Ltd v Gordonia Liquor Licensing Board 1953 (3) SA 500 (C)
^c *Director of Civil Aviation v Hall* 1990 (2) ZLR 354 (S)
Econet (Pvt) Ltd v Min of Information & Ors HH-205-97
Johannesburg City Council v Administrator, Transvaal and Another 1969 (2) SA 72 (A)
Kasiyamhuru v Minister of Home Affairs & Ors 1999 (1) SA 643 (W)
Silver's Trucks (Pvt) Ltd & Anor v Director of Customs & Excise 1999 (1) ZLR 490 (H) ^d
T S Masiyiwa Holdings (Pvt) Ltd & Anor v Min of Information 1996 (2) ZLR 754 (S)
Traube & Ors v Administrator, Transvaal & Ors 1989 (2) SA 396 (T)
West Rand Bantu Affairs Administration Board v Jacques 1976 (4) SA 903 (A)

Legislation considered ^e

Access to Information and Protection of Privacy Act [Chapter 10:27] , s 69
 Administrative Justice Act [Chapter 10:28] , ss 3 and 4

Case information

^f *E T Matinenga*, for the applicant
 Ms *M V Chizodze-Chinounye*, for the first respondent
 N *Mutsonziwa*, for the second respondent

Judgment

GOWORA J: The applicant is a company which is duly registered as such in ^g accordance with the laws of this country. It is indisputably a mass media provider. The applicant was the publisher of two newspapers, *The Daily News*, which was a daily newspaper, and *The Daily News on Sunday*. It is not registered in terms of the Access of Information and Protection of Privacy Act [Chapter 10:27] (AIPPA) as a mass media provider and is thus not publishing the newspapers concerned. It has launched these proceedings for an order ^h that it be deemed to be registered in terms of the Act.

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Gowora J

[The judge then dealt extensively with the facts, which gave rise to this ^A application, and continued :]

Both respondents, in their opposing affidavits, have taken issue with the nature of the relief that the applicant seeks. Both opine that this is not a competent prayer to seek before this court and that in fact the court cannot grant the relief as it appears on the draft order as to do so would amount to ^B this court usurping the administrative functions of the Commission. Both are of the view that the High Court does not have the power to grant such relief. They also contend that even the act of deeming the applicant to have been registered is beyond the capacity of this court.

I cannot deny that there is merit in the argument being proffered on behalf of the applicant. Both judgments reaffirmed the inability of the Commission to ^C consider the application, and thus there was no administrative body to deal with the matter of the applicant. Although the bodies are there, all the Commissioners have effectively been disabled by the judgments which found them to be biased against the applicant. However, to contend ^D, as Mr *Matinenga* states, that there in fact no administrative body in existence is to go too far. ^E The membership of the Commission has the lawful authority envisaged in the Act to carry out the administrative acts for which it has been appointed. None of the Commissioners suffer from a legal impediment as envisaged in s 40(3) of the Administrative Justice Act [Chapter 10:28]. In regard to the applicant, the Commission, has however been found to suffer from a disability. Such disability, being specifically to do with the applicant, does not denude its ^F lawful authority to do its tasks and perform the functions the Commission is meant to perform in terms of AIPPA except as it relates to the applicant. In terms of s 2 of the Act, an administrative authority includes a Minister or Deputy Minister of the State. It is therefore not correct that there is no administrative authority in existence to deal with the application. Consequently, there is no reason why the relief provided for in terms of s 4 of the Act cannot be availed ^G to the applicant. Indeed, it would be most appropriate for an order in terms of s 4(2)(c) for the Minister to be directed to take such administrative action as would put in place conditions and a legal frame work for the application for registration by the applicant to be considered and determined. I am therefore not with the applicant when it suggests that there is in fact no administrative ^H body to deal with its application. The bodies currently constituting the Commission have been disabled by the judgments of the Supreme Court and the High Court but it is within the power of the Minister to deal with such disablement as regards the applicant.

Is it a correct submission by the respondents, then, that the relief the applicant ought to have sought is what is provided for in terms of s 4 of the Administrative ^H

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Gowora J

^A Justice Act? Should and can the court, as argued by the applicant issue a mandatory interdict and deem the applicant to be duly registered in terms of the Act? Examining in detail the relief sought by the applicant, it is clear that it is premised on a lack of action on the part of the Commission. What is before me is not the review of a decision made by the Commission. What I have been asked to consider is for this court to place itself in the shoes of the Commission ^B and make the decision whether or not the applicant should be granted a licence to operate a mass media service. This court is in fact being requested to substitute its own discretion for that of the Commission. It might be argued on behalf of the applicant that AIPPA allows no discretion to the Commission to deny a licence save in certain limited circumstances. Whilst this proposition ^C might have substance, it is nevertheless correct that in order to be granted such licence, an applicant needs to satisfy the Commission that there has been compliance with the AIPPA That is an issue that has not been determined by the Commission *in casu*. The application was not considered. The Commission did not make a finding as to whether or not the applicant had complied with the Act. In order to accede to the relief being sought, this court would then ^D to consider whether the applicant has complied with AIPPA and hence itself become the licensing authority.

In *Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S), the court was faced with the question of when or how far a court may go in usurping the functions of an administrative authority. Quoting from Baxter, ^E McNally JA had this to say at p 24D-F:

"The function of judicial review is to scrutinize the legality of administrative action, not to secure a decision by a judge in place of an administrator. As a general principle, the courts will not attempt to substitute their own decision for that of the public authority; if an administrative decision is found to be *ultra vires* the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise 'would ^F constitute an unwarranted usurpation of the powers entrusted [to the public authority]

by the legislature.' Thus it would be said that 'the ordinary course is to refer back because the court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. In exceptional circumstances, this principle will be departed from. The overriding principle is that of fairness.'"

¶ It goes without saying that a court does not exercise administrative functions and that it cannot imbue itself with such power without legal justification. This is why in its draft order the applicant has prayed that this court grant an order declaring that the applicant be deemed to have been registered in terms of the

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Gowora J

Act. If indeed the court had the legal justification to do such administrative acts, except in rare and exceptional situations, the applicant would have sought an order in its draft that the court grants the applicant substantive registration in accordance with the provisions of AIPPA. The fact that it did not and sought instead an order wherein the court would deem it to have been duly registered is an acknowledgment that the court cannot register the applicant as a mass media operator AIPPA. In the event, can the court still deem the applicant as registered in terms of AIPPA? I do not think that the applicant seriously disputes the principle that a court will not interfere in the sphere of administrative actions or decisions except in very exceptional situations. It settled law that a court will normally interfere in the administrative sphere in the following circumstances:

- (a) where the end result is a foregone conclusion and a referral back would be a waste of time;
- (b) where further delay would cause unjustifiable prejudice to the applicant;
- (c) where the statutory tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; and
- (d) where the court is in as good a position to make the decision itself.

In order to do justice to the submissions from counsel, it is necessary that I examine each of the authorities cited in detail.

[The learned judge then considered a number of authorities, which are not germane to this report, and concluded:]

The application therefore fails. Costs should normally follow the result. The reason that the application has not succeeded is not due to lack of merit but rather that the applicant followed the wrong procedure. In the premises I do not believe that an order of costs against it would meet the justice of the case. The respondents are not entitled to an order of costs in view of the manner in which the application for registration was handled. Given the attitude being displayed by the Minister since the dispute arose, it is obvious that he does not intend to put in measures or even change the composition of the Commission in order for the application for the registration of the applicant to be dealt with by an impartial body. Clearly, this would be in violation of the applicant's rights in terms of the Act. The applicant has had to come to court yet again due to the lack of action on the part of one of them and the failure to ensure that they comply with the AIPPA on the part of both.

In the result, I make the following order. The application is dismissed. Each of the parties is ordered to pay his or its own costs.

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Gowora J

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

M V Chizodza-Chineunye, first respondent's legal practitioners

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

1 *Administrative Law* p 681

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/BUBYE MINERALS (PVT) LTD v MIN OF MINES & ORS 2007 (1) ZLR 280 (H)

BUBYE MINERALS (PVT) LTD v MIN OF MINES & ORS 2007 (1) ZLR 280 (H)**2007 (1) ZLR p280**

Citation	2007 (1) ZLR 280 (H)
Case No	Judgment No. HH-31-07
Court	High Court, Harare
Judge	Gowora J
Heard	29 March 2007
Judgment	9 May 2007
Counsel	<i>J T Hussein</i> , for the applicant No appearance for the first, second and third respondents <i>J B Colegrave</i> , for the fourth respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure — *record — application — chamber application c — record of proceedings — what record must consist of — no requirement that extensive recording be made of everything that happens before the judge*

Headnote

Although the High Court, in terms of the Constitution, is a court of record, ^d the High Court Act does not require that all proceedings before a judge be recorded by means of a mechanical device or that in the absence of such device that the judge should record all the proceedings in long hand. In a trial, judicial officers who find themselves presiding at a trial in which the facility of a mechanical recorder is not available have a duty to write down completely, clearly and accurately, everything that is said ^e and happens before them which can be of relevance to the merits of the case. They must ensure that they do not record the evidence in a way which is meaningless or confusing or does not give the real sense of what the witness says; they must remove obscurities of language or meaning whenever possible by asking questions. This is because the record kept by them is the only reliable source of ascertaining what took place and ^f what was said and from which it can be determined whether justice was done.

An application is different. Various documents, including heads of argument, must, in terms of the Rules of the High Court, be laid before the judge. In addition, the rules provide that each of the parties shall be heard in ^g argument unless the judge requires otherwise. Oral submissions, though, are made in support of an application which is before the court and where the evidence has been captured in affidavit form. The practice of the High Court is that the judge listens to counsel in support of their presentations and decides what to record. The discretion is entirely that of the judge. The manner of note keeping is also the preserve of the judge, based ^h

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A entirely on convenience and ability to recall. It cannot have been the intention of the legislature, in decreeing that the court be a court of record, that a duty be imposed upon a judge to record all submissions made before such judge without regard to whether such arguments are relevant to the issues in point or not. Nor do the Rules provide for the extensive recording of everything that happens before a judge in an B application.

Cases cited

S v Davy 1988 (1) ZLR 386

Legislation considered c

High Court Rules 1971 (RGN 1047 of 1971), r 32

Supreme Court Rules 1964 (RGN 380 of 1964), r 15(9)

Case information

T Hussein, for the applicant

No appearance for the first, second and third respondents

o *J B Colegrave*, for the fourth respondent

Judgment

GOWORA J: On 1 February 2006, the applicant herein sought and was granted under a certificate of urgency the following interim relief:

- 1) That the Mining Commissioner for the district of Masvingo be and is hereby interdicted from giving effect to the purported cancellation of the E deed of cession of Special Grant 1278
- 2) That the first respondent is interdicted from representing to any person or authority that the cession of Special Grant 1278 to the applicant is cancelled save in terms of the law.

The provisional Order in terms of which this relief was granted also provided F for final relief in the following terms:

- 1) That the purported cancellation of the cession from the fourth respondent to the applicant by the first respondent is null and void and is accordingly set aside
- 2) The Mining Commissioner for the district of Masvingo be and is hereby G interdicted from giving effect to the purported cancellation of the Deed of Cession of Cession of Special Grant 1278
- 3) That the first respondent is interdicted from representing to any person or authority that the cession of Special Grant 1278 to the applicant is cancelled save in terms of the law H
- 4) That the fourth respondent is hereby interdicted from mining, working or

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Gowora J

extracting minerals from Special Grant 1278 issued on 1 September 1992 A ceded to the applicant

- 5) That the second respondent is interdicted from selling, exporting or in any way dealing with precious minerals from Special Grant 1278 save under the express written authority of the applicant
- 6) That the first respondent restores vacant possession of the area covered B by Special Grant 1278 to the applicant within fourteen days of the date of service of this order
- 7) That the first and fourth respondents bear the costs of this application on a legal practitioner scale, jointly and severally, the one paying the other to be absolved
- 8) That the applicant's legal practitioners, or any employee delegated by C them, be given leave to serve copies of this order upon the respondents or their legal practitioners.

On the return day, the matter came up for argument before Kamocha J on 20 June 2006. On 6 December Kamocha J issued a judgment in terms of which he dismissed the application with each of the parties being ordered to pay his D or her own costs. An appeal has been filed against that

judgment. Consequent to the applicant noting the appeal, its legal practitioners were called upon to inspect the record. The applicant's legal practitioners, convinced that the record was defective requested that certain documents be included in the record. The Registrar, equally convinced that the record was complete and the other documents irrelevant for purposes of the appeal declined to accede to the request. After a letter of complaint was addressed to the Judge President she directed that the parties approach a judge in chambers. The applicant thereafter filed a chamber application for directions to which was attached a draft order seeking relief in the following terms:

1. That the Registrar transcribes the record of proceedings kept by Kamocha J on 21 June 2006
2. That the Registrar include in the appeal record the following:
 - 2.1 Letter to Kamocha J dated 13 September 2006
 - 2.2 Letter from Hussein Ranchod & Company to Makarau JP of 28 November 2006
 - 2.3 Record of proceedings in High Court 1238 of 06(*sic*)
3. That the parties within ten days of this letter agree as to the rectification of the transcript of proceedings in paragraph (1), failing which any party may apply for further directions.

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Gowora J

A The fourth respondent had not been cited but appears to have been served with the application and has filed documents in opposition. The application before me is made in terms of r 15(9) of the rules of the Supreme Court 1964 as amended, which provides that the preparation of a record shall be under the supervision of the Registrar of the High Court. The rule also provides that the parties may submit any matter in dispute on the preparation of the record to B a judge who shall give such directions thereon as justice may require.

The founding affidavit to the application has been deposed to by one Adele Farquhar who is a share holder of the applicant and is also a director in the company. She states that after the judgment was handed down on 6 December 2006, an appeal was noted against the same. Her legal practitioners during the C same month then wrote to the Registrar requesting him to prepare the record. The legal practitioners also requested that the record kept by the judge be transcribed and included in the record. This request also included a letter written to the Judge President subsequent to the hearing before Kamocha J. On 7 February 2006, the Registrar addressed a suitable letter to the applicant's legal practitioners inviting them to inspect the record. This was D done on 9 February 2006. It is apparent that the legal practitioners were not satisfied with the inspection and dispatched yet another letter to the Registrar again insisting that the record include the notes kept by the Judge. The Registrar then responded on 22 February 2007 in the following vein;

"As per your letter dated 9 February 2007 and per letter by Costa Madzonga dated 22 February 2007 (*sic*).

E Please be advised that the judge's handwritten notes cannot form part of the record hence I re-invite you to come and inspect the record within 48 hours failure (*sic*) of which the appeal will be deemed to be dismissed or lapsed."

This letter was authored by Mr Antonio of the Registrar's office. On 2 March F 2007 Mr Antonio again addressed a letter to the applicant's legal practitioners in which he advised that he saw no relevance in the request for the inclusion of the judge's notes and the letters in the record. He stated that the appeal was, therefore, deemed to have lapsed. According to the deponent to the affidavit the letter in question was overruled by the Judge President when she gave a directive that the parties approach a judge in chambers in accordance with the G requirements of r 15(9).

The first, second and third respondents have not opposed the granting of the order sought. Only the fourth respondent has done so. As it is the only party to have entered opposition, I will hereinafter refer to it as the respondent in H this judgment. In argument, Mr *Hussein* sought to draw comfort from the lack

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Gowora J

of opposition from the other three respondents. My view is that this lack of A opposition is understandable, given that none of the three are directly affected by the outcome of the appeal. The dispute concerns the question of rights in a Special Grant in which the applicant and the fourth respondent claim an interest. The inclusion and citation of the other three is that there were decisions made by them which affected those rights and hence in order for the lawfulness or

otherwise of those decisions to be tested and determined, it was ^B necessary that they be brought to court. Other than that, their role is that of administrative authorities who should be impartial in the resolution of the dispute. The lack of opposition is consequently cold comfort in so far as the applicant is concerned.

Mr *Colegrave*, for the respondent, argued that in view of the letter by Antonio ^C on 2 March 2007, the appeal has now lapsed and the letter from the Judge President did not change that position. His further contention was that she was only invited to deal with the matter after the letter from Antonio stating that the appeal had lapsed. He argued that what the applicant had to do was now take the matter on review.

The inspection of the record is at the invitation of the Registrar of the High ^D Court and where an appellant or his legal practitioner fails to inspect the record after being invited, his appeal can be deemed to have been abandoned or lapsed. That is not an issue before me but it seems to me that the Registrar advised the applicant's legal practitioners that the appeal had lapsed. I do not know whether the Judge President had been given sight of the letter written ^E by Antonio when she invited the parties to approach a judge in terms of ^r 15(9). In this application I have not been asked to decide on the status of the appeal. I am not even sure whether or not it is within the ambit of the High Court to make pronouncements on its status. It is not my understanding that the application must needs fail because the registrar of this court had indicated that the appeal had lapsed. I am of the view that I am still able to determine the ^F application until such time as there has been a pronouncement from the Supreme Court that the appeal has lapsed. Accordingly, despite the protestations of the respondent, I will proceed to determine the matter on the merits.

It is correct as stated by counsel for the applicant in argument that the High ^G Court, in terms of the Constitution, is a court of record. The High Court Act does not require that all proceedings before a judge be recorded by means of a mechanical device or that in the absence of such device that the judge should record all the proceedings in long hand. Apart from the Constitution, the applicant has referred this court to *S v Davy* 1988 (1) ZLR 386 (S). The appellant in that case had been convicted on one count of contravening ^s 2(1) of the ^H

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Gowora J

^A Parks and Wildlife (Restriction on Hunting) (No 13) Notice of 1985. The evidence before the magistrate was not recorded by mechanical means. The record of proceedings revealed that the evidence of the principal witness had been taken down in a very summarized fashion. The record was seen to be clearly inadequate. Apart from this the appellant's own defence had not been properly set out on the record. Hence there was an application to rectify the ^B record to reflect correctly the evidence that had been adduced on behalf of the state and the defence at the trial. The application was premised on the requirements set out in Order III of the Magistrates Court (Criminal) Rules 1966. The application was directed to the magistrate and the Attorney-General. In determining the application which had been placed before the ^C Supreme Court as a process of the appeal this is what Gubbay JA (as he then was) stated at p 393C-F:

"Before concluding on this aspect, I wish to sound a note of warning to judicial officers who find themselves presiding at a trial in which the facility of a mechanical recorder is not available. It is their duty to write down completely, clearly and accurately, everything that is said and ^D happens before them which can be of any relevance to the merits of the case. They must ensure that they do not record the evidence in a way which is meaningless or confusing or does not give the real sense of what the witness says. They must remove obscurities of language or meaning whenever possible by asking questions. This is because the record kept by them is the only reliable source of ascertaining what took place and what was said and from which it can be determined whether justice was ^E done. See *R v Sikumba* 1955 (3) SA 125 (E) at 128E-F; *S v K* 1974 (3) SA 857 at 858H. A failure to comply with this essential function, where the deficiencies in the transcript are shown to be substantial and material, will constitute a gross irregularity necessitating the quashing of the conviction."

What was before Kamocha J was not a trial. It was an application, which ^F would have been filed in accordance with our rules of court. The procedures for the filing and determination of applications are laid out in Order 32 of the said rules. An application and a notice of opposition filed in response thereto shall contain an affidavit signed by the person who can depose positively to the facts or averments contained therein. Where any of the parties is legally ^G represented the rules require that the legal practitioners file heads of argument within the periods stipulated in accordance with the rules. The requirement for heads of argument to be filed is to acquaint the judge hearing the matter

with the argument and authorities to be used in support of each of the parties' case or claim whichever the position is. The rules also provide that each of the ^H parties shall be heard in argument unless the judge requires otherwise.

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Gowora J

In casu, all the parties had filed extensive heads of argument. In addition, all ^A the parties to the dispute had filed extensive affidavits on which the evidence was recorded. In so far as the application was concerned, therefore, all that the learned judge needed to determine the issues had already been placed before him. The applicant itself filed heads of argument which ran for some thirteen pages of the record. The respondents' heads of argument in total were ^B spread over sixteen pages. In some instances, the rules provide for the recording of oral evidence if the judge considers it necessary.

What appears to be vexing the applicant is that the entire proceedings were not recorded by mechanical means, which in its view required the judge to meticulously record everything that transpired at the hearing before Kamocha J. The notes that were kept by the judge of the submissions made by counsel ^C were availed to the applicant's legal practitioner. They have in fact been attached to the chamber application. The applicant states that it cannot apply for rectification of the record because 'the record was not meticulous'. The legal practitioner is of the view that the notes are inadequate. In a letter written to all the parties to the dispute he sought confirmation of submissions made by himself and the respondent's counsel which had, apparently in his view, ^D not been correctly captured by the learned judge. It is the view of Mr *Colegrave*, which view I am in agreement with, that the applicant's counsel is seeking a rectification of the notes by the judge. The application before me is, however, not an application to rectify the record but for directions.

There is, however, no legal basis laid in the papers or on the argument ^E presented orally before me to justify the order that the applicant seeks. Oral submissions are what they are. They are made in support of, in this instance, an application which is before the court and where the evidence has been captured in affidavit form. The case of *S v Davy (supra)* is distinguishable, in my view, as the judicial officer concerned had failed to record the evidence adduced at the trial accurately. In such a situation it would be difficult to ^F understand how he could have reached an impartial and carefully considered verdict based on such a poorly kept record. Much as the applicant may wish to have the *dicta* in *Davy's* case interpreted in such a manner as to impose on judges the duty to record everything that is said before them, I do not believe that is the intention in that judgment. The practice of this court is that ^G the judge listens to counsel in support of their presentations and decides on what to record. The discretion is entirely that of the judge. The manner of note keeping is also the preserve of the judge, based entirely on convenience and ability to recall. It cannot have been the intention of the legislature in decreeing that this court be a court of record, that a duty be imposed upon a judge to record all submissions made before such judge without regard to whether

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Gowora J

^A such arguments are relevant to the issues in point or not. The court has provided for rules of court to regulate the manner in which its business is conducted. The rules do not provide for the extensive recording of everything that happens before a judge in an application and I have not been provided with any authority requiring the imposition of such duty. The order for the inclusion of the notes of the learned judge in the earlier application therefore ^B fails.

Mr *Hussein* did not in argument – I kept very extensive notes – address on the issue of the letters he wished to form part of the record, and I will as a consequence not dwell on that aspect. There is further in the draft order, the requirement that the record of proceedings in case No. HC 1238/06 be included ^C in the record. Rule 15 (8) of the Rules of the Supreme Court enjoins the Registrar of the High Court to exclude from the record all documents that are not relevant to the appeal. There is no indication on the applicant's papers that case No. HC 1238/06 is in fact the subject matter of an appeal. The proceedings therein were not before Kamocha J. There has been no justification made out in the papers as to why the pleadings under that case number, the papers of ^D which were not before the learned judge, should form part of the record. Even in his oral submissions, Mr *Hussein* did not seek to justify their inclusion. In my view, they are irrelevant and the Registrar of this court was justified in his refusal to include them.

Counsel for the respondent urged me to award costs against the applicant on the punitive scale. I find no justification for making such an order. Granted, the applicant has taken the parties to court unnecessarily but I cannot overlook the fact that the applicant felt, erroneously as it has transpired, that it was in the right. There is no averment on the part of the respondent that the application was frivolous or vexatious. There was equally no suggestion on the part of the respondent that the applicant had embarked on a course of action calculated to abuse court process. I will therefore order costs on the ordinary scale.

In the result, the application is dismissed. The applicant is ordered to pay the costs of the application.

G Hussein Ranchod & Company, legal practitioners for the applicant

Costa & Madzonga, legal practitioners for the fourth respondent

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ZIMBABWE NEWSPAPERS (1980) LTD WORKERS' COMMITTEE & ANOR v MUSARIRI NO & ORS 2007 (1) ZLR 288 (H)

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Citation	2007 (1) ZLR 288 (H)
Case No	Judgment No. S-78-06
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA and Malaba JA
Heard	10 July 2006
Judgment	17 May 2007
Counsel	<i>S Hwacha</i> , for the appellants No appearance for the first and second respondents <i>J C Muzangaza</i> , for the third respondent
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

Practice and procedure — record — review proceedings — need to obtain record — effect of failure to do so — courses open to court

Headnote

A ruling of the Labour Court was brought on review before the High Court by the appellants. No record of the proceedings in the Labour Court, nor a copy of the order made by the Labour

Court, was placed before the judge. The matter had been previously postponed and the issue of the absence of a record of the proceedings in the Labour Court was brought to the attention of the appellants. Neither counsel addressed the judge on this issue. She dismissed the application for review on the grounds that she was not able to review the proceedings without the record of the ^E proceedings. On appeal:

Held, that a record of the proceedings under review is an essential part of the record required by the High Court in terms of r 260(1) of the High Court Rules. The obligation to prepare the record is placed fairly and squarely on the registrar of the inferior court whose proceedings are under review. If the registrar fails to do so, the remedy available to an applicant for ^F review is to apply for a *mandamus* compelling the registrar of the inferior court to prepare the record. This should be done prior to the hearing of the substantial application for review on the merits. Where an applicant does not follow this procedure but has the matter set down for hearing on the merits, the court has the discretion to postpone the matter pending ^G the provision of the record, dismiss the application or order any other relief. An appeal court will not interfere with the exercise of such a discretion unless the exercise of the discretion was grossly unreasonable. While it might have been preferable to postpone the matter in order to enable the registrar of the Labour Court to place before the court *a quo* a record of the proceedings under review, dismissal of the application ^H

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Chidyausiku CJ

^A was not grossly unreasonable. This was particularly so as this issue had been highlighted when the matter was previously postponed. The appellants should have sought an order compelling the registrar of the Labour Court to provide a record before seeking to argue the case on the merits.

Legislation considered ^B

High Court Rules 1971 (RGN 1047 of 1971), r 260(1)

Case information

S Hwacha, for the appellants

No appearance for the first and second respondents

c J C Muzangaza, for the third respondent

Judgment

CHIDYAUSIKU CJ: This is an appeal against the judgment of Gowora J dismissing an application for the review of proceedings of the Labour Court. The application for review was dismissed on the ground that no record of the proceedings was available or before the judge. The appellants were dissatisfied ^D with that decision and now appeal to this court on the grounds set out in the notice of appeal, which reads in part as follows:

- "1. Having first noted correctly that the matter before it was both 'for a declaratory order' and **separately** for 'a review' the court *a quo* erred and misdirected itself in arriving (at) a decision only on the review and overlooking the *declaratur*. ^E
2. The court *a quo* erred in law and or misdirected itself in the finding that the *declaratur* sought in paragraph 3 of the draft order that 'the summary dismissal of the applicants be and is hereby declared null and void or set aside' was not justifiable in the circumstances.
3. The court *a quo* erred in having not found that –
 - ^F 3.1 The summary dismissal of the applicants by Zimbabwe Newspapers (1980) Ltd without compliance with the Code of Conduct was void and or liable to be set aside.
 - 3.2 The summary dismissal of the applicants was in contravention and in contempt of the Labour Court's disposal order (and?) was void or liable to be set aside. ^G
4. In any event, the court *a quo* erred and or was misdirected in dismissing the entire application on the grounds that there was no record of proceedings and no reasons, whilst acknowledging that the applicants had sought a review of the Labour Court's decision for ^H these very same complaints against the Labour Court.

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Chidyausiku CJ

5. More so, the court *a quo* dismissed the application on those stated grounds without giving either counsel an opportunity to address the court on the issue and or to present available evidence that the applicants had actually asked the Labour Court to provide 'the record'. The parties were not asked to address the court over (on?) the very point on which the application was dismissed.
6. The court *a quo* erred and or misdirected itself, in any event, in considering the matter on the basis that the **only** issue before it was whether or not the decision of the Labour Court was grossly unreasonable and overlooking issues including whether or not the dismissals stood good in law.
7. In all the circumstances, the decision of the High Court *a quo* was in the circumstances grossly unreasonable and irrational. c
8. The court *a quo* erred in ordering that the applicants should pay the costs of suit.

PRAYER

1. The appellants pray for an order setting aside the judgment of the High Court and its substitution with an order that the dismissal of the d applicants be declared null and void or set aside, their reinstatement from the date of suspension without loss of pay and benefits and costs of suit before this Honourable Court, the Labour Court and the High Court."

The facts forming the background to the case are essentially common cause and they are briefly as follows. The appellants were employees of the third e respondent (hereinafter referred to as "the respondent"). On 16 July 2004, the appellants notified the respondent of their intention to embark on a collective job action. On 2 August 2004, the collective job action or the strike commenced. The respondent applied to the Minister of Public Service, Labour and Social Welfare ("the Minister") for a show cause order in terms of s 106 of the Labour Act [Chapter 28:01] ("the Act"). An enquiry into the dispute was instituted f by a labour officer, who made recommendations to the Minister. The then Acting Minister issued a show cause order in terms of which immediate cessation of the collective job action was directed. The appellants appealed to the Labour Court against the issuance of the show cause order. However, they did not cease the collective job action as was required by the show cause order. In this regard, s 110(2) of the Act provides as follows: g

"(2) The lodging of an appeal in terms of subsection (1) shall not affect any order appealed against:

Provided that pending the determination of the appeal, the Minister may give such directions to, or impose such restrictions on, any of the parties as he considers fair and reasonable, taking into account the respective rights of the parties and the public interest." h

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Chidyausiku CJ

A The Minister did not exercise any of his powers in terms of the proviso. Thus, the noting of the appeal against the show cause order did not suspend the operation of the show cause order. Consequently, the continued collective job action by the appellants was unlawful. On 12 August 2004, the appeal against the show cause order was heard and judgment was reserved. The collective job action continued unabated. On 18 August 2004, judgment was b handed down dismissing the appeal against the show cause order.

Following the dismissal of the appeal and the continued collective job action, the respondent summarily dismissed the appellants for, among other things, engaging in an unlawful collective job action, continuing with such collective job action despite a show cause order terminating it, and engaging in riotous behaviour. On 25 August 2004, the appellants filed an urgent application to c the Labour Court for reinstatement. The urgent application was heard by two Presidents of the Labour Court in chambers on 31 August 2004 and was dismissed. On 19 October 2004, the appellants filed an application to the High Court for the review of the Labour Court's proceedings and for a *declaratur*. This application was opposed and the matter was set down for argument on 29 June 2005. On that date, the matter was postponed *sine die*. It was alleged d by the respondent that the court *a quo* pointed out that the papers were not in order, presumably by reason of the non-availability of the record, and the appellants were ordered to pay costs. This is not on the record, but it appears from the respondent's Heads of Argument and was not disputed by the appellants. Argument was then heard on 14 September 2005 and judgment e reserved. The application for review was dismissed.

In the application for review, the appellants sought the following relief from the court *a quo*:

IT IS HEREBY ORDERED AND DECLARED THAT –

1. The dismissal of the applicant and the applicant's members summarily without complying with the terms of paragraph 3 of the disposal order ^f handed down on 20 August 2004 is in breach and contempt of the disposal order.
2. The dismissal of the applicants be and is hereby set aside. The applicants are to be paid all salary and benefits due to them unless they are lawfully dismissed.
3. Should the respondent Zimpapers (1980) Ltd wish to pursue any ^g disciplinary cases against the applicants, it is ordered and directed that disciplinary proceedings be convened in respect of each employee strictly in terms of the code of conduct. If the code of conduct is inapplicable or inappropriate for any reason whatsoever, the respondent is ordered to conduct disciplinary hearings through any ^h other lawful procedure available to it.

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Chidyausiku CJ

4. The disposal order issued by this Honourable Court on 20 August ^a 2004 is hereby varied and or clarified to the extent above.
5. The respondent is ordered to pay the costs of this urgent application."

The judgment reveals that Mr *Hwacha*, who represented the appellants in the court *a quo*, abandoned the relief sought in paras 1-2 of the draft order. The learned judge took the view that it remained for the court to deal with the ^b application for relief sought in the last three paragraphs of the draft order. In this regard, she had this to say at pp 3-4 of the cyclostyled judgment:

"When one has regard to the relief sought by the applicants in the paragraphs remaining it is clear that this court is being requested to review a decision of the Labour Court. The applicants have filed as part of their papers the application they made to the Labour Court to have the summary ^c dismissals set aside. The respondent in that matter, being the employer, also filed papers in opposition of the application. A perusal of the opposing affidavit filed by the respondent in this matter leads me to conclude that the presiding presidents raised or dealt with preliminary issues with the urgent application that was before them. The application was then according to the respondent dismissed on the basis of the ^d preliminary points. The merits of the matter were not debated before the court. Neither the record of the hearing of that application nor the order issued by the court are before me. The Labour Court did not issue a judgment and would appear to have just issued an order. Order 33 ^r 260 requires that the clerk of the inferior court whose proceedings are being brought on review lodge with the registrar of this court the original record ^e of the proceedings being reviewed. This is to be done within twelve days of the date of service of the application upon the inferior court. The applicants are legally represented and the need to have the record of proceedings in the inferior court placed before this court must have been obvious.

The papers filed by the applicants state that the Labour Court did not give ^f reasons for its decision to dismiss the urgent application. The papers also confirm that the matter was heard in chambers. This, however, is not proof that a record of the proceedings does not exist. Although in terms of the High Court Rules the duty to file the record is with the clerk of the inferior court, it was, in my view, incumbent upon the applicants to ensure that the record, such as it was, was placed in the record for this application. There is nothing on the record to show that the applicant(s) even sought ^g that the record be availed to this court. When they appeared before me, neither counsel remarked on the absence of the record. Even the order in terms of which the application was dismissed by the Labour Court was not placed before me." ^h

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Chidyausiku CJ

^a The learned judge then concluded:

"In my view, the absence of the record and the reasons by the lower court as to how it arrived at its decision preclude me from making any conclusion as to the rationality or otherwise of the decision.

In the premises the application for a review fails and it is dismissed. The applicant(s) (are) ordered to pay the costs of this application."

^b Thus, the learned judge dismissed the application for review on the grounds that she was not able to review the proceedings without the record of the proceedings. There is no doubt that a record of the proceedings under review is an essential part of the record required by the High Court. Rule 260(1) of the High Court Rules ("the Rules") provides:

^c **"260 Preparation and lodging of record and fees**

- (1) The clerk of the inferior court whose proceedings are being brought on review, or the tribunal, board or officer whose proceedings are being brought on review, shall, within twelve days of the date of service of the application for review, lodge with the registrar the original record, together with two typed copies, which copies shall ^d be certified as true and correct copies. The parties to the review

requiring copies of the record for their own use shall obtain them from the official who prepared the record.”

The obligation to prepare the record is placed fairly and squarely on the registrar of the inferior court whose proceedings are under review. In this case, the registrar of the Labour Court had an obligation to make the record available. ^E It is common cause that he or she did not prepare the record or make it available. The remedy available to an applicant for review who finds himself or herself in a situation where the record is not available is to apply for a *mandamus* compelling the registrar of the inferior court to prepare the record. This should be done prior to the hearing of the substantial application for review on the ^F merits. In this case, the appellants did not do that. They instead applied for set down and argued the matter on the merits. Faced with that situation, the court *a quo* had the discretion to postpone the matter pending the provision of the record, dismiss the application or order any other relief. The court *a quo* has a discretion as to which course to follow. Where the court *a quo*, in the exercise of its discretion, dismisses the application as opposed to postponing ^G the matter or granting any other relief, this court will not interfere with the exercise of such a discretion unless the exercise of the discretion was grossly unreasonable. *In casu*, the matter had been previously postponed and the issue of the absence of a record of the proceedings in the Labour Court was brought to the attention of the appellants. When the application was set down ^H for hearing, it was incumbent upon counsel to explain why the matter had been

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Chidyausiku CJ

set down despite the absence of the record or lack of compliance with r 260(1) ^A of the Rules. According to the judgment, neither counsel addressed the learned judge on this issue.

While obviously it might have been preferable to postpone the matter in order to enable the registrar of the Labour Court to place before the court *a quo* a record of the proceedings under review, dismissal of the application was not ^B grossly unreasonable. This is particularly so as this issue had been highlighted when the matter was previously postponed. The appellants should have sought an order compelling the registrar of the Labour Court to provide a record before seeking to argue the case on the merits. Accordingly, the first ground of appeal cannot succeed.

It was also contended by the appellants that in paras 4 and 5 of the draft order ^C in the court *a quo* the appellants were seeking a *declaratur*. I am not persuaded by this argument. A careful reading of the draft order reveals that paras 1 and 2 of the draft order sought a *declaratur*. I see nothing in the wording of paras 3-5 that suggests that a *declaratur* was being sought. The court *a quo*, quite rightly in my view, proceeded on the basis that that paras 1 and 2 sought ^D a *declaratur*, while paras 3 and 4 of the draft order related to the review. Accordingly, I am satisfied that there was no misdirection in this regard.

The appellants have also sought, as is apparent from the relief in the notice of appeal, an order from this court declaring the dismissal of the appellants unlawful. The record as it stands reveals that the appellants embarked on a collective job action. The collective job action was initially lawful, as due ^E notice of the strike had been given. The respondent applied for, and was granted, a show cause order in terms of which cessation of the strike action was ordered and thus rendered the continued collective job action unlawful. The Labour Court also ruled that that collective job action was unlawful but despite that the appellants continued with the collective job action. ^F

In this court, the appellants did not contend that such collective job action after the issuance of the above orders was lawful. The appellants' main contention, as I understand it, was that there should have been an inquiry to establish whether or not the appellants should be dismissed. There is no suggestion that the appellants did not take part in the collective job action that became unlawful following the show cause order. It is not clear on the papers ^G as they stand what it is that the inquiry would have sought to resolve. Initiating an inquiry for the sake of an inquiry is an absurdity. There has to be a dispute before an inquiry is called for. The appellants were dismissed for participating in an unlawful collective job action. The Labour Court, after hearing submissions from both parties, held that the collective job action was unlawful. On the papers as they stand, the appellants do not dispute that they participated in ^H

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Chidyausiku CJ

A an unlawful collective job action. The respondent dismissed the appellants for participating in an unlawful collective job action. What, then, is an inquiry intended to determine?

Accordingly, I am satisfied that no case has been made for the issuance of the *declaratur* sought by the appellants.

B Finally, my understanding of the judgment of the High Court is that it did not go to the merits of the matter. The application for review was dismissed for non-compliance with the Rules, in particular the failure to provide a record of the proceedings of the Labour Court. Should the appellants be so minded, it is open to them to resubmit the application for review to the High Court. I am not in any way suggesting that the appellants are absolved from complying with c other requirements of the Rules relating to the time within which an application for review has to be launched. That matter is entirely within the purview of the High Court, to condone or not to condone an application submitted out of time.

Accordingly, the appeal is dismissed with costs.

D CHEDA JA & MALABA JA concurred.

Dube, Manikai & Hwacha, appellants' legal practitioners

E *Muzangaza, Mandaza & Tomana*, third respondent's legal practitioners

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Source:

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NYAGUSE v SKINNERS AUTO BODY SPECIALISTS & ANOR 2007 (1) ZLR 296 (H)

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Citation	2007 (1) ZLR 296 (H)
Case No	Judgment No. HH-32-07
Court	High Court, Harare
Judge	Patel J
Heard	25 January 2007
Judgment	22 May 2007
Counsel	Ms <i>S Mabuye</i> , for the excipients (defendant) <i>S Kachera</i> , for the plaintiff (respondent)
Case Type	Exception
Annotations	Link to case annotations

Flynote

Delict — *Aquilian action* — *liability* — *wrongfulness and fault* — *distinction c between* — *need to aver and prove both*

Headnote

The plaintiff left his motor car with the defendants for repairs. When it was ^D returned, he found the mileage on the odometer was excessive. He issued summons against the defendants claiming, *inter alia*, damages in respect of the excess mileage. The declaration averred that the motor vehicle was wrongfully and unlawfully used, without the authority of the owner, by the defendants or some other person in their employ. The ^E defendants filed an exception, objecting to the plaintiff's claim as embodying no cause of action in the absence of any averment of fault. The principal issue for determination was whether fault is invariably a distinct and separate requirement which must be specifically pleaded and proven in every delictual action. The related and ancillary question ^F was whether or not an averment of fault may be implied in the claimant's pleadings.

Held, that the plaintiff in an Aquilian action for patrimonial loss must establish that:

- (a) the defendant committed a wrongful act;
- (b) the plaintiff thereby suffered patrimonial loss; ^G
- (c) the defendant's act caused the loss suffered by the plaintiff and that the harm occasioned was not too remote from the act complained of; and
- (d) responsibility for the plaintiff's loss is imputable to the fault of the defendant, either in the form of *dolus* (intention) or *culpa* (negligence). ^H

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Patel J

^A Wrongfulness and fault are distinguishable: the requirement of wrongfulness entails proof of a harmful result occasioned in a legally reprehensible or unreasonable manner. The enquiry into fault focuses on the legal blameworthiness or reprehensible state of mind and conduct of the defendant. While wrongfulness is determined by reference to public policy or the legal convictions of the community, fault is determined by ^B reference to the foreseeability and preventability of harm by the defendant in the circumstances in which he actually was. In other words, wrongfulness relates to the reprehensibility of the harmful conduct, while fault is concerned with the blameworthiness of the defendant himself. It is clear, therefore, that wrongfulness and fault are distinct legal ^C concepts requiring specific and separate proof in order to sustain a delictual claim under the *lex Aquilia*.

Held, further, that there are instances of liability in our law, such as damage caused by wild or domestic animals, conduct constituting nuisance and vicarious liability, where it is not necessary to prove any fault, whether by way of intention or negligence, on the part of the defendant. In these ^D cases, fault is not a requisite element by virtue of the very nature of the harmful conduct concerned, and the defendant's liability approximates a form of strict liability. However, where fault forms an essential ingredient of liability, as in most Aquilian actions, fault on the part of the defendant must be specifically pleaded and proven. This must be so even where the plaintiff is able to establish wrongful conduct and consequential harm ^E and then relies on the principle of *res ipsa loquitur* to prove fault on the part of the defendant. Here, although fault might be inferable from the nature and circumstances of the harm occasioned, it would still be necessary for the plaintiff to plead some form of fault, viz. actual intention or negligence, in order to enable a reasonable inference of liability to be drawn from the proven facts. Even if fault can be implied from the peculiar ^F circumstances of the case as a matter of *prima facie* evidence, the defendant's reprehensible intention or negligence must be explicitly articulated as a matter of pleading.

Case information

Ms *S Mabuye*, for the excipients (defendant)

^G *S Kachera*, for the plaintiff (respondent)

Judgment

PATEL J: This is a matter in which the plaintiff left his motor vehicle for repairs with the first defendant in August 2004. When the vehicle was returned to the plaintiff in June 2005, its milometer reflected mileage which the plaintiff ^H considered to be excessive. The matter was reported to the police and the

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Patel J

second defendant was charged with the offence of using a motor vehicle ^A without the owner's consent in contravention of s 57(1)(e) of the Road Traffic Act [*Chapter 13:11*]. The second defendant was then placed on remand awaiting trial.

The plaintiff subsequently issued summons against the defendants in May 2006 claiming, *inter alia*, damages in respect of the excess mileage. In para 9 ^B of his declaration, the plaintiff averred that the mileage recorded showed an increase which:

"proved beyond doubt that the motor vehicle was wrongfully and unlawfully used without the authority of the owner, by the first and second defendants or any other person under their employ to the plaintiff unknown."

On 3 October 2006, the defendants' legal practitioners wrote to the plaintiff's ^C legal practitioners advising that their claim did not state all the requirements for an action in delict. This letter was received by the latter on the 5 October 2006. Thereafter, on 18 October 2006, the defendants filed their exception herein, objecting to the plaintiff's claim as embodying no cause of action in the absence of any averment of fault. On 26 October 2006, the defendants' legal practitioners wrote a further letter to the plaintiff's lawyers highlighting the ^D nub of their exception.

The principal issue for determination herein is whether fault is invariably a distinct and separate requirement which must be specifically pleaded and proven in every delictual action. The related and ancillary question is whether or not an averment of fault may be implied in the claimant's pleadings. ^E

FAULT AND WRONGFULNESS

It is now well-established in our law that the plaintiff in an Aquilian action for patrimonial loss must establish that:

- (i) the defendant committed a wrongful act;
- (ii) the plaintiff suffered patrimonial loss, *viz.*, actual loss capable of ^F pecuniary assessment;
- (iii) the defendant's act caused the loss suffered by the plaintiff and that the harm occasioned was not too remote from the act complained of;
- (iv) responsibility for the plaintiff's loss is imputable to the fault of the defendant, either in the form of *dolus* (intention) or *culpa* (negligence). ^G

See Lee & Honoré *The South African Law of Obligations* 2 ed at pp 196-202; Boberg *The Law of Delict* vol 1 at pp 24-25.

The distinction between wrongfulness and fault is very ably elucidated by Neethling, Potgieter & Visser *Law of Delict* at pp 29, 113 and 143. According ^H

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Patel J

^A to the learned authors, the requirement of wrongfulness entails proof of a harmful result occasioned in a legally reprehensible or unreasonable manner. On the other hand, the enquiry into fault focuses on the legal blameworthiness or reprehensible state of mind and conduct of the defendant. While wrongfulness is determined by reference to public policy or the legal convictions of the community, fault is determined by reference to the ^B foreseeability and preventability of harm by the defendant in the circumstances in which he actually was. In other words, wrongfulness relates to the reprehensibility of the harmful conduct, while fault is concerned with the blameworthiness of the defendant himself. It is clear, therefore, that wrongfulness and fault are distinct legal concepts requiring specific and ^C separate proof in order to sustain a delictual claim under the *lex Aquilia*.

IMPLIED FAULT

There are many instances of liability in our law where it is not necessary to prove any fault, whether by way of intention or negligence, on the part of the defendant. Such instances include damage caused by wild or domestic animals, conduct constituting nuisance and vicarious liability. In all of these ^D cases, fault is not a requisite element by virtue of the very nature of the harmful conduct concerned, and the defendant's liability approximates a form of strict liability akin to certain statutory offences.

However, in those cases where fault forms an essential ingredient of liability, as in most Aquilian actions, fault on the part of the defendant must be ^E specifically pleaded and proven. This must be so even where the plaintiff is able to establish wrongful conduct and consequential harm and then relies on the principle of *res ipsa loquitur* to prove fault on the part of the defendant. Here, although fault might be inferable from the nature and circumstances of the harm occasioned, it would still be necessary for the plaintiff to plead some form of fault, *viz.*, actual intention or negligence, in order to enable a reasonable ^F inference of liability to be drawn from the proven facts.

In other words, even if fault can be implied from the peculiar circumstances of the case as a matter of *prima facie* evidence, the defendant's reprehensible intention or negligence must be explicitly articulated as a matter of pleading. If the averment of fault is not so specified, it becomes extremely difficult, if not ^G impossible, for the defendant to comprehend the case against him and thereafter to formulate and put forward his defence.

THE PRESENT CASE

In the instant case, the plaintiff's declaration clearly imputes wrongfulness on the part of the defendants by stating that the excessive mileage reflected on ^H his motor vehicle can only be attributed to the wrongful and unlawful use of

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Patel J

the vehicle by the defendants or their employees. However, the declaration ^A does not proceed to aver or indicate whether this wrongful use of the vehicle by the defendants was intentional or negligent or otherwise legally blameworthy. Having regard to what I have stated earlier, the absence of any such specific averment of fault renders the declaration fatally defective as not disclosing a valid cause of action. ^B

COSTS

It is clear from the papers before me that the plaintiff's legal practitioners had ample opportunity to address and cure the deficiency in their pleadings. The defect was brought to their attention two weeks before the exception was filed and thereafter remained unattended for three months before the exception was ^C heard in court. Be that as it may, I take the view that the exception *in casu* was not entirely incontrovertible on the peculiar facts of this case and that it merited full argument before the court. I am therefore disinclined to award punitive costs against the plaintiff as prayed for by the defendants.

ORDER

In the result, the defendants' exception is upheld and it is accordingly ordered ^D that the plaintiff's claim be dismissed with costs on the ordinary scale.

Chinyama & Partners, plaintiff's legal practitioners

Muvirimi, Mabuye & Associates, defendants' legal practitioners (at hearing)

Phiri & Partners, defendants' legal practitioners (for further submissions) ^E

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/METALLON CORP LTD v STANMARKER MINING (PVT) LTD 2007 (1) ZLR 301 (S)

METALLON CORP LTD v STANMARKER MINING (PVT) LTD 2007 (1) ZLR 301 (S)**2007 (1) ZLR p301**

Citation	2007 (1) ZLR 301 (S)
Case No	Judgment No. S-82-06
Court	Supreme Court, Harare
Judge	Sandura JA, Malaba JA & Gwaunza JA
Heard	4 July 2006
Judgment	23 May 2007
Counsel	<i>C E Puckrin SC</i> , with him <i>A R Bhana</i> , for the appellant <i>J C Andersen SC</i> , with him <i>G Mitha-Valla</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Partnership — *formation — essentials for an agreement to create a partnership — need to show that business was being carried out for joint benefit of both parties*

Headnote

- ▯ The plaintiff was a Zimbabwean registered mining company and the defendant a South African mining company. Both had separately entered into negotiations with a British company to acquire that company's shares in another Zimbabwean company which owned five mines in Zimbabwe. The plaintiff and defendant met with a view to making a joint bid for the £ shares. They drew up "heads of agreement", most of which were stated not to be binding once a formal contract was concluded. They agreed that the defendant would negotiate with the British company to acquire the shares, while the plaintiff would facilitate matters in Zimbabwe. They agreed that for a period of three months neither would negotiate with anyone else for the purpose of acquiring the shares. The plaintiff claimed ₣ that in spite of the agreement the defendant, after the three month period had expired, acquired the shares for itself. The plaintiff claimed damages for breach of contract but later claimed that the "heads of agreement" constituted a partnership and claimed damages for breach of the partnership agreement. The defendant denied that there was a partnership agreement.
- ▮ *Held*, that in determining whether the heads constituted a partnership between the parties, the only provisions to consider were the legally binding provisions. The rest of the provisions were irrelevant because they were not legally binding on the parties, and the existence of the ₧ partnership was in dispute.

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Sandura JA

Held, further, that the essential ingredients of a partnership agreement are A that (a) each of the partners brings something into the partnership, or binds himself to bring something into it,

whether it be money, or his labour or skill; (b) the business should be carried on for the joint benefit of both parties; and (c) that the object should be to make profit. The second of these ingredients is crucial.

Held, further, that none of the legally binding clauses of the heads indicated ^b that any business was to be carried on for the joint benefit of both parties during the relevant period. The heads were nothing more than a set of principles which formed the basis of the negotiation and conclusion of a future shareholders' agreement.

Held, further, that there being no partnership agreement, the parties had no ^c obligations to each other after the restraint period was over.

Judgment of Omerjee J in *Stanmarker Mining (Pvt) Ltd v Metallon Corp Ltd* 2006 (1) ZLR 306 (H) overruled.

Cases cited

Bester v van Niekerk 1960 (2) SA 779 (A) ^d

Rhodesia Railways & Ors v CoT 1925 AD 438

Case information

C E Puckrin SC, with him *A R Bhana*, for the appellant

J C Andersen SC, with him *G Mitha-Valla*, for the respondent ^e

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court in terms of which the appellant ("Metallon"), a South African company, was ordered to pay to the respondent ("Stanmarker"), a Zimbabwean company, damages for breach of contract in the sum of US\$7 400 000, together with interest on that sum and costs of suit. There is a cross-appeal by Stanmarker in respect ^f of certain expenses incurred by Stanmarker which were excluded from the costs awarded to it.

The background facts are as follows. At the relevant time, Independence Gold Mining Zimbabwe (Pvt) Ltd ("Independence"), a mining company registered in terms of the law of Zimbabwe, owned five gold mines in the country. These were Arcturus, How, Mazowe, Redwing and Shamva. Independence was a ^g wholly-owned subsidiary of Cableair Ltd ("Cableair"), and Cableair was a wholly-owned subsidiary of Lonmin Plc ("Lonmin"). Both Cableair and Lonmin were incorporated in the United Kingdom.

In 2001, Lonmin decided to dispose of its shares in Cableair and, consequently, its interests in Independence as well as the five gold mines. Metallon and ^h

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Sandura JA

^a Stanmarker, acting independently of each other, expressed interest in the acquisition of all the shares in Cableair and, consequently, the five gold mines owned by Independence.

Thereafter, Metallon and Stanmarker decided that it was in their best interest to submit to Lonmin a joint bid for the Cableair shares ("the shares"). Accordingly, they concluded an agreement which they termed Heads of ^b Agreement ("the Heads") on 24 June 2002.

However, before that date, on 20 June 2002, Metallon, acting through an associate company, First Gold Proprietary Ltd ("First Gold"), extended to Lonmin the offer to purchase the shares for 12 million United States dollars. In that offer, First Gold reserved its right to nominate any person, company ^c *etcetera* to replace it as the purchaser of the shares. This provision would have enabled Newco, a company which was to be incorporated by the parties following the signing of the Heads, to become the purchaser of the shares, had the negotiations between Lonmin and Metallon/First Gold been successful.

Subsequently, following the signing of the Heads by both parties, Metallon entered into negotiations with Lonmin in respect of the purchase of the shares. ^d However, by 24 September 2002, the negotiations had not been successful and no agreement had been concluded.

Thereafter, on 26 September 2002, Metallon, acting through another associate company, Pemberton International Investments Ltd ("Pemberton"), negotiated with Lonmin, the purchase of the shares. The negotiations culminated in a written agreement between Lonmin and Pemberton, in terms of which Lonmin sold the shares to Pemberton for US\$15.5 million. That agreement was signed on 28 October 2002.

As a direct consequence of the purchase of the shares by Pemberton, Stanmarker sued Metallon for damages for breach of contract, the broad allegation being that Metallon had used Pemberton and acquired the shares for itself in breach of the provisions of the Heads.

The learned judge in the court *a quo* found that Metallon had breached the provisions of the Heads, and ordered it to pay Stanmarker damages for breach of contract in the sum of US\$7.4 million, together with interest thereon from 28 October 2002 to the date of payment, at the rates prevailing from time to time in the United States of America. Aggrieved by that result, Metallon appealed to this court.

In my view, the learned judge's decision was based on three main findings. The first was that the Heads constituted a partnership between Metallon and Stanmarker. The second was that clause 3.5 of the Heads was legally binding on Metallon, and that Metallon had breached its legal obligations under that

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Sandura JA

clause. And the third was that Metallon had breached its legal obligation after 24 September 2002 to continue negotiating with Lonmin on behalf of Newco until the negotiations were concluded or lawfully terminated.

I will consider the three findings by the learned judge in turn.

DID THE HEADS CONSTITUTE A PARTNERSHIP?

Before answering the question, I would like to set out the relevant provisions of the Heads.

The status of the Heads was set out in clause 2 which, in relevant part, stated as follows:

- "2.1 The parties declare that they are prepared and intend to enter into detailed written agreements incorporating *inter alia* the terms and conditions set out below.
- 2.2 These Heads set out the main principles upon which the parties will negotiate the detailed written agreements referred to herein. These Heads (save for 2.3, 9, 10 and 11) accordingly do not constitute legally binding rights and obligations on the parties hereto. These Heads will fall away and be of no force and effect upon the signing of the detailed written agreements ... "

In my view, it is clear from clause 2.2 of the Heads that the only legally binding provisions of the Heads were clauses 2.3, 9, 10 and 11.

Clause 2.3 stated as follows:

"The parties undertake with effect from the Signature Date and until the expiry of three months thereafter that they will negotiate with each other in good faith in respect of the detailed written agreements and that, subject to 3.5, they will not negotiate with Lonmin or any other person in respect of any matter relating to the acquisition of all or part of the share capital, assets or business of Independence or its immediate holding company."

Clause 9 stated as follows:

"Stanmarker shall use its best efforts to procure that:

- 9.1 all interested parties, relevant government officials and authorities are favourably disposed to Newco's acquisition of Independence or its holding company, such that the acquisition of Independence or its holding company is not unduly hampered, obstructed and/or delayed in any manner whatsoever; and
- 9.2 the Zimbabwean government substantially reduces the current Zimbabwean government dispensation referred to in 3.1 and Stanmarker shall, upon request, inform, hold discussions with and provide satisfactory evidence to Metallon of its progress in this regard."

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Sandura JA

A Clause 10 stated as follows:

"No party shall disclose to any person other than its professional advisors and Lonmin any matter relating to these Heads or the transactions contemplated herein, except with the prior written consent of the other party."

B Clause 11 stated as follows:

"11.1 From the Signature Date and for a period of three months thereafter, neither party shall, without the prior written consent of the other party, engage in or enter into discussions with any other party with an interest in acquiring the share capital or business of Independence or its immediate holding company and/or engage in or enter into discussions with any other party desirous of achieving similar c objectives than, or competing with, Newco.

11.2 Either party shall procure that their respective shareholders and directors shall, within seven days of the Signature Date, provide written undertakings to the other party similar to those set out in 11.1, *mutatis mutandis*."

D And clause 3.5, which was mentioned in clause 2.3 of the Heads, stated as follows:

"Metallon shall, on behalf of Newco, negotiate with Lonmin and make an offer to acquire Independence or its immediate holding company for the amount of approximately US\$12 million or such other amount agreed upon between the shareholders;"

E However, in determining whether the Heads constituted a partnership between Metallon and Stanmarker the only provisions to consider are clauses 2.3, 9, 10 and 11, i.e. the legally binding provisions. The rest of the provisions are irrelevant because they were not legally binding on the parties, and the existence of the partnership was in dispute.

F The essentials of a partnership agreement were set out by Stratford AJA in *Rhodesia Railways & Ors v Commissioner of Taxes* 1925 AD 438 at 465 as follows:

"... I think we are safe if we adopt the essentials which have been laid down in *Pothier on Partnership* ... These essentials are fourfold. First, that each of the partners brings something into the partnership, or binds himself to g bring something into it, whether it be money, or his labour or skill. The second essential is that the business should be carried on for the joint benefit of both parties. The third is that the object should be to make profit. Finally, the contract between the parties should be a legitimate contract."

Subsequently, in *Bester v van Niekerk* 1960 (2) SA 779 (A), the fourth h essential, i.e. that the contract between the parties should be a legitimate

2007 (1) ZLR p306

Sandura JA

contract, was dropped, on the ground that illegality as a ground of invalidation A was part of the general law of contract and was not an essential peculiar to partnership agreements. I entirely agree with that decision.

Thus, in determining whether the legally binding clauses of the Heads constituted a partnership between Metallon and Stanmarker, only three essentials are relevant, i.e. the first three set out in *Pothier on Partnership*. B

I will start by considering the second essential, i.e. "that the business should be carried on for the joint benefit of both parties". This essential is a crucial one.

After examining the legally binding clauses of the Heads, I am satisfied that none of them indicated that any business was to be carried on for the joint c benefit of both parties during the relevant period, i.e. the period extending from the date when the Heads were signed by the parties to the date when the detailed written agreements would have been concluded or signed by the parties, had that stage been reached. The legally binding clauses, i.e. clauses 2.3, 9, 10 and 11, are silent on this. It is pertinent to note that clause 3.5 is not one of the legally binding clauses, although it is mentioned in clause D 2.3. This issue will be dealt with in greater detail later on in this judgment.

In my view, the finding that none of the legally binding clauses indicates that any business was to be carried on for the joint benefit of both parties during the relevant period is fatal to the argument, which appears to have been accepted by the learned judge in the court a quo, that some sort of interim partnership existed between the parties until the stage at which the detailed F written agreements, referred to in clause 2 of the Heads, were concluded.

In the circumstances, it is not really necessary for me to consider whether the other two essentials of a partnership agreement, i.e. the first and third essentials set out in *Pothier on Partnership*, are

present in the legally binding provisions, because their presence would depend upon there being a business to be carried on for the joint benefit of both parties.

Quite apart from the fact that the relevant provisions do not indicate that a business was to be carried on for the joint benefit of both parties, clause 2.2 of the Heads stated as follows:

"These Heads set out the main principles upon which the parties will negotiate the detailed written agreements referred to herein ... "

The Heads were, therefore, nothing more than a set of principles which formed the basis of the negotiation and conclusion of a future shareholders agreement.

In addition, apart from the bald allegation in its replication, filed long after the trial had started, that the relationship between it and Metallon constituted a

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Sandura JA

A partnership, Stanmarker did not allege the existence of a partnership either in its declaration filed in April 2004 or in its further particulars supplied in response to Metallon's request for further particulars filed in June 2004.

The main allegation relied upon by Stanmarker was set out in para 10 of its declaration as follows:

" B In breach of the agreement and during the period of three months, the defendant made a bid for Independence for itself and pursued negotiations with Lonmin for the acquisition of Independence without the plaintiff's prior written consent, pursuant to which it acquired ownership of the shares in Cableair and effective control of Independence for itself to the exclusion of the plaintiff."

c In short, the allegation was that during the three month restraint period Metallon had committed a breach of contract. No allegation of a partnership relationship was made.

On 3 June 2004, Metallon filed its request for further particulars to the declaration. The further particulars sought by Metallon included the following:

"5.1 Does the plaintiff rely on a duty on the part of the defendant to act D in good faith toward it or Newco?

5.2 What does the plaintiff contend was the extent of such duty and where does it arise from?"

In its further particulars filed on 15 June 2004, Stanmarker responded as follows:

E "Ad paragraph 5.1

The plaintiff relies both on the effective terms of the Heads of Agreement and the duty of good faith.

Ad paragraph 5.2

The duty arises *ex contractu* and, in the alternative, is implied, based on F the nature of the agreement between the parties, and in the further alternative, it is implied by operation of the law."

In my view, if Stanmarker genuinely believed that the parties had intended to create and had created a partnership, it would have said so in its further particulars when it dealt with the duty of good faith and where such duty had arisen from.

G In addition, the allegation of a partnership was not made in the amendment to Stanmarker's declaration which was sought and granted in June 2005.

In the circumstances, it seems to me that the allegation of the existence of a partnership was an afterthought on the part of Stanmarker. It was only made in the replication filed in February 2006, after it had become clear that the main H allegation set out in para 10 of Stanmarker's declaration (i.e. that Metallon had

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Sandura JA

breached the agreement during the restraint period of three months) was A unsustainable.

Accordingly, I conclude that the Heads did not constitute a partnership between Metallon and Stanmarker.

WAS CLAUSE 3.5 LEGALLY BINDING ON METALLON AND DID METALLON BREACH ITS OBLIGATIONS UNDER IT? B

The learned judge in the court *a quo* answered both questions in the affirmative. I respectfully disagree with him.

In concluding that clause 3.5 was legally binding on Metallon, the learned judge reasoned as follows:

"It is true that clause 2.2 does not expressly mention clause 3.5 as one of the legally binding obligations of the Heads of Agreement. However, it must not be overlooked that clause 3.5 is expressly mentioned in clause 2.3 and therefore, it forms part of the binding obligations of the Heads of Agreement ...

Simply put, the positive obligation to act in 'good faith' created by clause 2.3 permeates and extends to the defendant's mandate in clause 3.5. This means that the defendant had an express contractual obligation to act in good faith, when negotiating on behalf of the parties, in relation to the acquisition of the Cableair shares ...

In my view, it appears that from very early in the negotiations the defendant failed to disclose or communicate important information and this stance was maintained throughout the three months restraint period ...

In other words, in my view, the defendant was in breach of its duty of good faith as created by the agreement it entered into with the plaintiff."

See *Stanmarker Mining (Pvt) Ltd v Metallon Corp Ltd* 2006 (1) ZLR 306 (H) at 327 (C). ^F

As already stated, it is clear from clause 2 of the Heads that the only legally binding provisions of the Heads were clauses 2.3, 9, 10 and 11. If the parties had intended clause 3.5 to be legally binding they would have said so. The mere fact that reference to clause 3.5 was made in one of the binding clauses (i.e. clause 2.3) did not thereby convert clause 3.5 into a binding clause. Clause 3.5 was merely mentioned as an exception to the restraint set out in clause 2.3. ^G

Although the word "shall" was used in clause 3.5, the word is not always used in a peremptory sense. Its meaning would depend upon the context in which it is used. At times it could mean that there is a requirement to do something, and at other times it would not mean that, although the word usually carries a peremptory connotation. ^H

2007 (1) ZLR p309

Sandura JA

^A However, if the manifest intention of the parties to an agreement so requires, a departure from the peremptory connotation of the word "shall" is justified. That is so in the present case. The manifest intention of the parties appears in clause 2.2, from which it is clear beyond doubt that the parties did not intend to make clause 3.5 legally binding.

In addition, to regard the word "shall" in clause 3.5 as peremptory would result ^B in an absurdity and a contradiction within the Heads, because clause 3.5 is not one of the legally binding clauses set out in clause 2.2.

In the circumstances, Metallon was not legally obliged to negotiate with Lonmin for the acquisition of the shares on behalf of Newco. Accordingly, it did not have any legal obligations in terms of clause 3.5.

^C It therefore, follows that the second question posed earlier, i.e. whether Metallon breached its obligations under clause 3.5, falls away.

DID METALLON HAVE A LEGAL OBLIGATION AFTER 24 SEPTEMBER 2002 TO CONTINUE NEGOTIATING WITH LONMIN ON BEHALF OF NEWCO AND DID IT BREACH SUCH AN ^D OBLIGATION?

The learned judge in the court *a quo* answered both questions in the affirmative. I respectfully disagree with him.

In my view, the learned judge was influenced by his finding that the Heads constituted a partnership. From that premise, he proceeded to find that ^E Metallon was under a legal obligation, after the restraint period expired on 24 September 2002, to continue with the negotiations which it had commenced with Lonmin during the restraint period until the negotiations were finalised or lawfully terminated.

However, since I have already determined that the Heads did not constitute a partnership, the learned judge's reasoning is inapplicable, and I need not ^F comment on its applicability to

partnership transactions.

In my view, it is very clear from clauses 2.3 and 11.1, both of which have already been set out in this judgment, that the restraint was for a period of three months only, i.e. from 24 June to 24 September 2002. After that period, neither party was precluded from acquiring the shares for itself to the exclusion of the other.

¶ Metallon did not, therefore, have a legal obligation after 24 September 2002 to continue negotiating with Lonmin on behalf of Newco. Consequently, the second question falls away.

The appeal must, therefore, be allowed, but the cross-appeal must be dismissed.

¶ In the circumstances, the following order is made:

2007 (1) ZLR p310

Sandura JA

1. The appeal is allowed with costs of two counsel. ^a
2. The order of the court *a quo* is set aside and the following is substituted –
“The plaintiff’s claim is dismissed with costs of two counsel.”
3. The cross-appeal is dismissed with costs.

MALABA JA & GWAUNZA JA concurred. ^b

Gill, Godlonton & Gerrans, appellant’s legal practitioners

Kantor & Immerman, respondent’s legal practitioners ^c

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Source:

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RATEYIWA v KAMBUZUMA HOUSING CO-OP & ANOR 2007 (1) ZLR 311 (H)

2007 (1) ZLR p311

Citation	2007 (1) ZLR 311 (H)
Case No	Judgment No. HH-52-07
Court	High Court, Harare
Judge	Gowora J
Heard	5 April 2007
Judgment	23 May, 2007
Counsel	<i>T Manjengwa</i> , for the applicant <i>W P Zhangazha</i> , for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

▯ **Practice and procedure** — application — grounds for — domestic remedies available under relevant legislation — when court will withhold jurisdiction — legislation providing adequate procedures to resolve dispute

Statutes — Co-operative Societies Act [Chapter 24:05] — s 80 — sale of society's property without Registrar's approval — unlawfulness of — s 115 — dispute between society and member — requirement to refer dispute to Registrar for decision

Headnote

The applicant was a member of the respondent housing co-operative society. He was suspended, then expelled from membership of the society on the grounds that he had, while chairman of the society, sold one of the stands ^ε being developed by the respondent without knowledge of the general membership. The sale was in effect to himself. He applied for an order for specific performance to enforce the sale. In addition, he claimed that his expulsion was improper. The respondent argued *in limine* that in view of the provisions of s 115 of the Co-operative Societies Act [Chapter 24:05], the matter should have been referred to the Registrar of ^ε Co-operative Societies and that therefore the applicant had approached the wrong forum and should have exhausted his domestic remedies before approaching the High Court. The respondent also argued that the sale was illegal in terms of s 80 of the Act.

Held, that a claim by a member for a debt, whether admitted or not, is a dispute ^ε for the purposes of s 115. It followed that the claim for specific performance was a dispute within the ambit of the operation of s 115 and therefore should be dealt with in accordance with the requirements of the section. Section 115(1) provides in no uncertain terms for a dispute between the society and its members to be referred to the Registrar for his decision. The dispute envisaged under the section is that of the claim, not the ^ε expulsion. The referral of the dispute to the Registrar is provided for in

2007 (1) ZLR p312

terms which are peremptory in and admitting of no discretion in the ^ε manner in which the dispute is to be resolved.

Held, further, that the Act did not, however, specifically oust the jurisdiction of the court. The court had the discretion to withhold its jurisdiction to a litigant even where there was no ouster of jurisdiction. In deciding whether or not to withhold its jurisdiction and insist that a litigant first exhaust the domestic remedies provided for, the court has to have regard ^ε to a number of factors. Amongst these are the subject matter of the statute, the body of persons who make the initial decision and the bases on which it is to be made, the body of persons who exercise appellate jurisdiction and the manner in which that jurisdiction is to be exercised including the ambit of any rehearing on appeal, the powers of the ^ε appellate tribunal, including its power to redress or cure the wrongs of a reviewable character, and whether the tribunal, its procedures and powers are suited to redress the particular wrong of which the applicant complains.

Held, further, that procedures provided for in the Act were adequate to resolve the dispute. The powers conferred upon the Registrar in resolving ^ε the dispute were quite wide and gave him the discretion to effectively conduct a hearing on the circumstances surrounding the dispute. The procedures were also informal and would provide a cheaper and more effective remedy than was available in the application procedure. The Registrar also had the power to refer the matter to arbitration. There was an appeal process provided for in the Act. This was therefore an ^ε appropriate case for the court to withhold its jurisdiction.

Held, further, that s 80(1) of the Act prohibits the sale of any movable or immovable property owned by a co-operative society without the prior approval of the Registrar. The property sold by the applicant did not fall within any of the exceptions set out in subs (2) and the sale was thus ^ε unlawful.

Cases cited

Lawson v Cape Town Municipality 1982 (4) SA 1 (C)

Moyo v Forestry Comm 1996 (1) ZLR 173 (H)

Schierhout v Min of Justice 1926 AD 99 ^ε

Zikiti v United Bottlers 1998 (1) ZLR 389 (H)

Legislation considered

Co-operative Societies Act [*Chapter 24:05*], ss 80,114, 115(1)(2) & (5)

High Court Act [*Chapter 7:06*], s13 H

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Gowora J

Case information

A *T Manjengwa*, for the applicant

W P Zhangazha, for the respondent

Judgment

GOWORA J: The first respondent is a cooperative body set up in terms of the Co-operative Societies Act [*Chapter 24:05*], ("the Act"). The second respondent is the local authority responsible for the maintenance and B administration of urban land. Although it was cited and served with the application, it has not seen fit to respond thereto. The appellation "respondent" will therefore in this judgment, be taken to refer to the Kambuzuma Housing Co-operative Society. The applicant was one of its members. In 2001, certain allegations were leveled against him as a result of which he was suspended from being a member of the respondent. Further allegations were made in 2002 C that he had authorized an agreement of sale of one of the stands being developed by the respondent without knowledge of the general membership. The sale was in effect to himself. On 4 June 2006, he was again suspended from being a member of the respondent. He was thereafter called to attend a meeting to decide his membership. He did not attend and a decision was made to eject D him from the respondent. The meeting was held on 23 July 2006 and on 25 July 2006 a suitable letter was written to the applicant advising him of the decision. There is some dispute as to whether he is a member or whether he was properly relieved of his membership.

In my view, the resolution of this matter does not turn on the status of the applicant as regards the membership within the respondent. The issue as to E whether or not the applicant was properly expelled from the membership of the applicant is irrelevant in determining whether or not the applicant is entitled to the prayer for specific performance. The prayer for specific performance is premised on an alleged agreement of sale to the applicant which would have been concluded prior to his expulsion. I did not understand his claim to be based on continued membership of the respondent.

F *Mr Zhangazha*, on behalf of the respondent, raised two points *in limine*. The first was that in terms of the provisions of s 115 of the Act, where there is a dispute between a co-operative society and a member, and such dispute concerns the business of the co-operative society, then the dispute shall be referred to the Registrar of Co-operative Societies. He argued that therefore G the applicant had approached the wrong forum and should have exhausted his domestic remedies before approaching the High Court. On the other hand, *Mr Manjengwa*, for the applicant, appeared not to have addressed the provisions of the enabling Act. He was, as a consequence, unable to proffer any meaningful response to the contention made by *Mr Zhangazha*. His emphasis was based on the *dicta* in *Moyo v Forestry Commission* 1996 (1) ZLR 173 (H). H

2007 (1) ZLR p314

Gowora J

Section 115 provides as follows: A

"1. If any dispute concerning the business of a registered society arises –

- (a) within the society, whether between the society and any member, past member or representative of a deceased member, or between members of the society or the management or any supervisory B committee; or
- (b) (not relevant)

and no settlement is reached within the society or between the societies, as the case may be, the dispute shall be referred to the Registrar for decision."

A claim by a member for a debt, whether admitted or not, according to the C meaning ascribed to the term in s 115 (2), is a dispute for the purposes of s 115. It then follows that the claim by the

applicant for specific performance is a dispute within the ambit of the operation of s 115 and, therefore, should be dealt with in accordance with the requirements of the section.

The cardinal rule in construing statutes is that words and phrases should be given their ordinary meaning unless to do so would lead to or result in an absurdity. Section 115(1) provides in no uncertain terms for a dispute between the society and its members to be referred to the Registrar for his decision. The dispute envisaged under this section is that of the claim and not the expulsion. The referral of the dispute to the Registrar is provided for in terms which are peremptory and admitting of no discretion in the manner in which the dispute is to be resolved.

Mr *Zhangazha* sought to distinguish the situation in *Moyo v Forestry Commission supra* from the present on the basis that what was at issue in the former was the operation of domestic remedies within an internal process provided for in a code of conduct, whereas *in casu* the statutory requirements are contained in an Act of Parliament, and that since the section is expressed in peremptory terms, then the requirements of the provision must be complied with. It is correct, as argued by Mr *Zhangazha*, that the section is peremptory. I did not, however, hear him argue that the jurisdiction of this court has necessarily been ousted in determining the dispute. In terms of s 13 of the High Court Act [Chapter 7:06], this court has full jurisdiction over all persons and over all matters in Zimbabwe. Such jurisdiction is ousted only when Parliament has specifically provided for its ouster. Even where an Act seeks to provide for the ouster of the jurisdiction of this court, this court will only admit to such ouster where the legislation in question ousts the jurisdiction in no uncertain terms. It is trite that the High Court, being a superior court with original jurisdiction justifiably, and rightly so, guards such jurisdiction jealously. In

2007 (1) ZLR p315

Gowora J

In my view, the Act with which I am concerned about does not oust the jurisdiction of this court.

However, having said that, it is obvious that the legislature intended that in s 115 to create domestic remedies for the speedy resolution of disputes concerning the business of the societies, without the parties necessarily having to approach the courts for such relief. It is necessary to determine whether or not the applicant should have exhausted the domestic remedies provided for in the Act before approaching this court for relief. This court has the discretion, where such a course is found to be warranted, to withhold its jurisdiction to a litigant even where there is no ouster of jurisdiction. In *Zikiti v United Bottlers* 1998 (1) ZLR 389 (H) at 393 (G), Gillespie J stated as follows:

" It might seem anomalous that the High Court should, by an exercise of discretion, withhold jurisdiction from a party who, on established authority, is entitled to claim relief. Although not expressed, the jurisprudential basis for such discretion is not hard to find. It is an instance of the inherent jurisdiction of this court to regulate and control its own proceedings so as to prevent injustice or abuse of process. This equitable discretion underlies many of the recognised instances where the court will stay or dismiss proceedings. The defence of *lis pendens* is itself such an instance. Other examples include staying of proceedings pending an arbitration or pending payment of accrued costs, and the dismissal of frivolous or vexatious proceedings. The power is, of course, sparingly exercised since the courts of law are open to all, and it should be only in exceptional circumstances that these doors will be closed upon a litigant. See Solomon JA in *Western Assurance Co v Caldwell's Trustees* 1918 AD 262 at 273. The existence of such a discretion in the present specific instance is recognized by the Supreme Court: *Cargo Carriers (Pvt) Ltd v Zambezi & Ors* 1996 (1) ZLR 613 (S) at 617H-618C."

An examination of s 115 shows that the Act gives the registrar very wide powers in relation to the resolution of the dispute. The registrar may refer the dispute to arbitration, to the Minister, or settle it himself. If he settles it himself, under s 114 of the Act he has to summon a member, officer, employee or agent to provide information and or produce a document or books of accounts. The procedure provided for therefore is akin to a hearing of the matter. I would go as far as saying that the section gives the registrar the powers of a hearing officer. Section 115(5) provides that the Arbitration Act applies to a matter referred for arbitration by the registrar under this section. An appeal against a decision by the registrar lies to the Minister or the arbitrator in settlement of a dispute.

The applicant has stated in his affidavit that he had not referred the matter to the registrar as he had already found that the applicant had not been guilty

2007 (1) ZLR p316

Gowora J

of misappropriating funds belonging to the respondent. It is obvious that the ^A examination of the books of accounts by the registrar was in all probability conducted in terms of s 114 of the Act. Such examination in my view, did not constitute a dispute as envisaged in s 115 of the Act. It is pertinent to note that the applicant has not taken the court into his confidence and indicated why he has not referred his dispute with the respondent to the registrar. There is thus no explanation before me from the applicant as to why this dispute was ^B not referred to the registrar for resolution.

In deciding whether or not the court should withhold its jurisdiction and insist that a litigant first exhaust the domestic remedies provided for, a court, has to have regard to a number of factors. Amongst these are the subject matter of the statute, the body of persons who make the initial decision and the bases ^C on which it is to be made, the body of persons who exercise appellate jurisdiction and the manner in which that jurisdiction is to be exercised, including the ambit of any rehearing on appeal, the powers of the appellate tribunal, including its power to redress or cure the wrongs of a reviewable character, and whether the tribunal, its procedures and powers are suited to redress the particular wrong of which the applicant complains. See *Lawson D v Cape Town Municipality* 1982 (4) SA 1 (C) at 6-7. The procedures provided for in the Act would have adequate remedies to resolve the dispute between the applicant and the respondent. In the instant case, the powers conferred upon the registrar in resolving the dispute are quite wide. Such powers give him the discretion to effectively conduct a hearing on the circumstances surrounding the dispute. More often than not parties to disputes, taking into ^E account the formal and restrictive nature attendant upon procedures brought before the courts, are opting for resolution of disputes through the informal and cheaper arbitration process. From the provisions of s 114, it is clear that the powers bestowed on the registrar in determining the dispute, are so wide that there would be no room for a party to allege a dispute of fact as has been ^F averred in this instance. The procedures are also informal and in my view would afford the parties to the dispute a cheaper and more effective remedy than is available in the application procedure adopted by the applicant instead. The Act does not state what forms of relief are available when a dispute is settled by the registrar but it is not the case by the applicant that there is no effective relief afforded under such process. Section 115 permits ^G the registrar to refer the matter to arbitration. In the event that he decides not to settle the dispute himself he has the further discretion to refer such dispute to an arbitrator or to arbitrators, in which event the provisions of the Arbitration Act [*Chapter 7:02*] would apply. An appeal against a decision of the registrar or arbitrator, as the case may be, lies to the Minister. A final appeal against the decision by the Minister lies with the Administrative Court. ^H

2007 (1) ZLR p317

Gowora J

^A The remedies provided for in terms of the Act are, in my view, more than capable of providing adequate redress to an aggrieved party. They are also in my view a cheaper form of dealing with disputes arising between the parties, which is commendable given that the intent in having formalities attaching to co-operative societies was an appreciation that they served those in society without adequate means to embark on projects requiring capital outlay ^B without assistance. It is, in my view, proper that in this instance the court withhold its jurisdiction on the basis that the applicant has not exhausted his domestic remedies. There is, however, a further point *in limine* raised on behalf of the respondent which I believe ought to be decided.

It is contended on behalf of the respondent that the transaction on which the ^C applicant bases his claim for relief is an illegality in terms of the Act. The applicant seeks to enforce the terms of a contract of sale relating to a plot of land, wherein the respondent represented by the applicant in his capacity as chairman of the respondent, sold the plot to the applicant. The applicant not only signed as buyer, he was also the signatory for the seller. The respondent argues that the applicant, in seeking to enforce the agreement, is not relying ^D on an allocation of plots done by the respondent but on the alleged sale.

Section 80(1) of the Act is in the following terms:

“Subject to subsection (2) no registered society, and no member or employee of any such society, shall sell, donate or otherwise dispose of any movable or immovable property owned by the society without the ^E prior approval of the registrar.”

There is no suggestion on the papers that the property allegedly purchased by the applicant was property held by the respondent for purposes of disposal or as security for a debt or that it was

stock in trade. As such, the sale was illegal and null and void from inception. Anything done contrary to the direct ^F prohibition of the law is void and of no legal effect. See *Schierhout v Minister of Justice* 1926 AD 99 at 109.

In the premises the applicant is non suited and the application must fail. The application is therefore dismissed, with the applicant being ordered to pay the costs of the application.

^G *Wintertons*, applicant's legal practitioners

Chinamasa, Mudimu, Chinogwenya & Dondo, respondent's legal ^H practitioners

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MUTYASIRA v GONYORO & ANOR 2007 (1) ZLR 318 (S)

2007 (1) ZLR p318

Citation	2007 (1) ZLR 318 (S)
Case No	Judgment No. S-80-06
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Malaba JA
Heard	11 September 2006
Judgment	28 May 2007
Counsel	<i>I E G Musimbe</i> , for the appellant <i>G C Chikumbirike</i> , for the first respondent No appearance for the Master
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Administration of estates — executor — appointment of — estate governed c by customary law — procedure for appointment — letters of administration not required

Headnote

In 1976, the deceased married the first respondent in terms of the African Marriages Act [*Chapter 238*] (now the Customary Marriages Act ^D [*Chapter 5:07*]). The deceased died intestate in 2002 and his widow had his estate registered at the Harare Magistrates Civil and Customary Law Courts. An edict meeting subsequently was held, presided over by the provincial magistrate. The first respondent was appointed the executrix dative and a document to that effect was issued to her by the magistrate, setting out her duties. A letter was also issued to her to enable her to get ^E a statement from the deceased's bank.

Just under three years later, when no distribution plan had been presented to a magistrate, the second respondent (the Master) wrote to the first respondent, requesting her to attend a special meeting to discuss all matters concerning the estate. She and the other beneficiaries of the estate attended the meeting. At the end of that meeting the Master ^F appointed the appellant as a *curator bonis* in the estate. Thereafter, the Master, purportedly acting in terms of s 25(1) of the Administration of Estates Act [*Chapter 6:01*] ("the Act"), gave notice of an edict meeting to be held at his office. The first respondent and the other beneficiaries of the estate attended the meeting, at the end of which the appellant was ^G appointed executor dative. The High Court, on the application of first respondent, interdicted the appellant from disposing of any of the assets of the estate and to set aside his appointment as executor dative. On appeal, it was argued for the appellant that ss 23 and 25 of the Act apply to the estates of all persons, including persons subject to customary law, ^H

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Sandura JA

^A and that as the first respondent was not issued with letters of administration in terms of s 23 of the Act her appointment was invalid.

Held, that ss 23 and 25 are in Part III of the Act, which is headed "Estates of Deceased Persons" and governs the estates of persons who are not subject to customary law, that is, those governed by the general law of the land; whilst Part IIIA, which is headed "Estates of Persons Subject ^B to Customary Law", governs the estates of persons subject to customary law. It being common cause that the deceased's estate was governed by customary law, it followed that the deceased's estate was governed by Part IIIA of the Act. Accordingly, no letters of administration were required in respect of the first respondent's appointment, which was ^C made in terms of s 68B of the Act. In terms of that section, the Master, with the concurrence of the relatives present at a meeting summoned in terms of subs (1), shall appoint a person to be the executor of the estate of the deceased person. In terms of s 68(1), the definition section in Part IIIA of the Act, "Master", for the purposes of Part IIIA, includes a magistrate or other person designated by the Minister of Justice in terms ^D of s 68I; and "executor" means a person appointed as executor of an estate in terms of s 68B. The first respondent's appointment by the magistrate was thus valid. The appointment of the appellant was invalid, as the first respondent had not been removed from office in terms of s 117(1) of the Act, and so there was no vacancy to fill.

Legislation considered ^E

Administration of Estates Act [*Chapter 6:01*], ss 23, 25(1), 68, 68B & 117(1)

Case information

I E G Musimbe, for the appellant

G C Chikumbirike, for the first respondent

^F No appearance for the Master

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court which nullified the appointment of the appellant ("Kenias") as the executor dative of the estate of the late Muchineripi Rishon Gonyora ("the deceased"), and ^G confirmed the appointment of the first respondent ("Barbra") as the executrix dative.

The factual background is as follows. In 1976, the deceased married Barbra in terms of the African Marriages Act [*Chapter 238*] (now the Customary Marriages Act [*Chapter 5:07*]). Three children, Roy, Yvone and Sandra, were born of the marriage. The deceased had two other children from a previous ^H marriage. The deceased died in Harare on 13 August 2002 and Barbra had the

2007 (1) ZLR p320

Sandura JA

deceased's estate registered at the Harare Magistrates Civil and Customary ^A Law Courts. On 17 October 2002, an edict meeting was held and was presided over by the provincial magistrate, Mr V Ruombwa ("the magistrate"). The meeting was attended by Barbra and two of her children, and by

the deceased's brother. At the end of that meeting, Barbra was appointed the executrix dative and a document to that effect was issued to her by the magistrate, setting out ^b her duties, which included ascertaining and verifying the assets and liabilities of the deceased, preparing a plan of how the deceased's estate was going to be distributed among the beneficiaries, and presenting that plan to a magistrate for approval. Also issued to Barbra on 17 October 2002 was a letter addressed to Barclays Bank, where the deceased had an account, stating that Barbra had been appointed the executrix dative of the deceased's estate, and requesting ^c the bank to furnish her with a bank statement showing the balance on the deceased's account in order to facilitate the administration of the estate.

Subsequently, on 25 August 2005, when no distribution plan had been presented to a magistrate, the second respondent ("the Master") wrote to Barbra requesting her to attend a special meeting on 30 August 2005 to discuss all matters concerning the estate. She and the other beneficiaries of the estate ^d attended the meeting. At the end of that meeting, the Master appointed Kenias as a *curator bonis* in the estate.

Thereafter, on 28 September 2005, the Master, purportedly acting in terms of s 25(1) of the Administration of Estates Act [*Chapter 6:01*] ("the Act"), gave notice of an edict meeting to be held at his office in Harare on 5 October 2005. ^e The notice, which was supposed to be gazetted before 5 October 2005, was gazetted on 7 October 2005, two days after the meeting was held. Nevertheless, Barbra and the other beneficiaries of the estate attended the meeting as they had been notified of the meeting by other means. However, what happened at that meeting is not common cause, although it is common cause that at the end of the meeting, Kenias was appointed executor dative. Thereafter, Kenias ^f embarked upon his duties.

About three weeks later, on 28 October 2005, Barbra filed a court application in the High Court (case No. HC 5567/05) against Kenias and the Master, seeking the nullification of the appointment of Kenias as the executor dative of the deceased's estate, and the confirmation of her own appointment as the ^g executrix dative. Thereafter, Kenias attempted to sell some of the assets of the estate, with the Master's concurrence, in order to meet certain financial obligations of the estate. That prompted Barbra to file an urgent chamber application in the High Court on 16 January 2006 (case No. HC 221/06) against Kenias and the Master, seeking a provisional order, with the final relief sought being the same as that sought in case No. HC 5567/05, and interim relief in the ^h

2007 (1) ZLR p321

Sandura JA

A form of an interdict restraining Kenias from disposing of any of the assets belonging to the estate. The urgent chamber application was heard on 25 January 2006, and an order was granted with the consent of the parties. The order, *inter alia*, consolidated case No. HC 5567/05 and case No. HC 221/06, and interdicted Kenias from winding up the estate pending the determination of case No. HC 5567/05. The two consolidated cases subsequently came ^b before the learned judge in the court *a quo* on 19 May 2006. Kenias' appointment as the executor dative was declared null and void, whilst Barbra's was declared valid. Aggrieved by that result, Kenias appealed to this court.

There are three main issues to determine in this appeal. The first is whether the court application, i.e. case No. HC 5567/05, was a review application ^c disguised as an application for a declaratory order. The second is whether Barbra's appointment as the executrix dative of the deceased's estate was valid. The third is whether the appointment of Kenias as the executor dative of the estate was valid. I shall deal with the issues in turn.

WHETHER THE COURT APPLICATION WAS A REVIEW APPLICATION

^d This issue is important because if the answer is in the affirmative then, in terms of r 259 of the High Court Rules, the application should have been instituted within eight weeks after the appointment of Kenias as the executor dative of the estate.

The learned judge in the court *a quo* came to the conclusion that the court ^e application was not a review application disguised as an application for a declaratory order. In his judgment, he said the following:

"It is clear to me that it is not a review; she has not sought to impugn the procedural steps that the first respondent took to appoint the Master. She simply says that she had been appointed and had not been

removed. Therefore the latter appointment should be declared a nullity, her F appointment be confirmed and consequential relief that flows from that declaration be granted in her favour."

I entirely agree with the learned judge. The application was not concerned with the decision-making process which led to the appointment of Kenias as the executor dative. Instead, it was concerned with the appointment itself, which G was allegedly null and void, and Barbra sought a declaratory order to that effect, as well as consequential relief flowing from that declaration.

WHETHER BARBRA'S APPOINTMENT WAS VALID

This question was answered by the learned judge in the affirmative. In my H view, the learned judge was correct.

2007 (1) ZLR p322

Sandura JA

The argument that was advanced on behalf of Kenias was that ss 23 and 25 A of the Act apply to the estates of all persons, including persons subject to customary law, and that as Barbra was not issued with letters of administration in terms of s 23 of the Act, her appointment was invalid.

I shall set out the relevant provisions of both sections.

Section 23 of the Act reads as follows: B

"The estates of all persons dying either testate or intestate shall be administered and distributed according to law under letters of administration to be granted in the form B in the Second Schedule by the Master to the testamentary executors duly appointed by such deceased persons, or to such persons as shall, in default of testamentary executors, be appointed executors dative to such deceased persons in manner C hereinafter mentioned."

And s 25(1) reads as follows:

"When any person has died without having by any valid will or codicil appointed any person to be his executor, or where any person duly appointed to be the executor of any deceased person has predeceased him or refuses or becomes incapacitated to act as such, or within such D reasonable time as the Master considers sufficient, neglects or fails to obtain letters of administration, then and in every such case, the Master shall cause to be published in the *Gazette*, and in such other manner as to him seems fit, a notice calling upon the surviving spouse, if any, and the next of kin, legatees and creditors of the deceased to attend at his office, at the time therein specified, to see letters of administration granted E to such person or persons as may then be appointed by him executor or executors, to the estate of such deceased person."

It is pertinent to note that ss 23 and 25 are in Part III of the Act, which is headed "Estates of Deceased Persons". It is also pertinent to note that Part IIIA of the Act is headed "Estates of Persons Subject to Customary Law". What this F means is that Part III of the Act governs the estates of persons who are not subject to customary law, i.e. those governed by the general law of the land; whilst Part IIIA governs the estates of persons subject to customary law.

It was common cause that the deceased's estate was governed by customary law. That being the case, it follows that the deceased's estate is governed by Part III A and not by Part III of the Act. As ss 23 and 25 of the Act are in Part G III, which does not govern the estates of persons subject to customary law, the provisions of both sections do not apply to the deceased's estate. No letters of administration were, therefore, required in respect of Barbra's appointment, which was made in terms of s 68B of the Act. H

2007 (1) ZLR p323

Sandura JA

A Section 68A, which is in Part IIIA of the Act, reads as follows:

"(1) Subject to subsection (2), this Part (i.e. Part III A) shall apply to the estate of any person to whom customary law applied at the date of his death.

(2) This Part, other than section *sixty-eight C*, shall not apply to any part of an estate that is disposed of by will."

B And s 68B, which is in the same Part of the Act as s 68A, reads as follows:

"(1) Upon the death of a person referred to in subsection (1) of section *sixty-eight A*, the Master shall summon the deceased person's family, or such members of the family as are readily available, for the

purpose of appointing a person to be the executor of the deceased person's estate.

c (2) The Master, with the concurrence of the relatives present at a meeting summoned in terms of subsection (1), shall appoint a person to be the executor of the estate of the deceased person referred to in that subsection:

Provided that –

- (i) if the relatives are unable to agree upon a person to be appointed as executor, the Master shall appoint a person as provided in ^b section twenty-six, which section shall apply, *mutatis mutandis*, in relation to any such appointment;
- (ii) no person shall be appointed as executor under this subsection unless he is:
 - (a) registered under the Estate Administrators Act [*Chapter E 27:20*]; or
 - (b) a member of the deceased person's family."

In terms of s 68(1), the definition section in Part IIIA of the Act, "Master" includes a magistrate or other person designated by the Minister of Justice, Legal and Parliamentary Affairs in terms of s 68I; and "executor" means a person appointed as executor of an estate in terms of s 68B. In the circumstances, ^f bearing in mind the factual background in this matter, and the provisions of ss 68(1), 68A and 68B, already set out in this judgment, there can be no doubt that Barbra's appointment was valid.

I say so for the following reasons.

At the time of his death, the deceased, who died without leaving a will, was ^g a person to whom customary law applied. In terms of s 68A(1) his estate was governed by Part III A of the Act. After the deceased's death the Master, as defined in s 68(1), summoned the deceased's family to a meeting for the purpose of appointing an executor ^{dative} for the deceased's estate, as he was obliged to do in terms of s 68B(1). Thereafter, at the meeting held on 17 October ^h 2002, the Master, with the concurrence of the deceased's family, appointed

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Sandura JA

Barbra the executrix of the deceased's estate, and issued to her a document ^a stating that fact, and setting out her duties. In addition, she was given a letter addressed to the deceased's bank which I have already mentioned in this judgment. Finally, as already stated, Barbra did not require letters of administration before she administered and distributed the deceased's estate, because the estate was governed by Part IIIA of the Act. ^b

WHETHER KENIAS' APPOINTMENT WAS VALID

I have no doubt in my mind that it was not. That is so because Barbra's appointment was valid, and she had not been removed from her office in terms of s 117(1) of the Act, which in relevant part reads as follows:

"The Master may apply to a judge in chambers for the removal of an ^c executor ... from his office ... and the judge may, upon such application, remove the executor ... concerned from his office or make such other order as he sees fit."

As Barbra had not been removed from her office, there was no vacancy, and Kenias' appointment was incompetent.

Finally, as far as the costs of this appeal are concerned, I see no reason for ^d departing from the principle that as a general rule the successful party is entitled to his costs.

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

ZIYAMBI JA & MALABA JA concurred. ^e

I E G Musimbe & Partners, appellant's legal practitioners

Chikumbirike & Associates, first respondent's legal practitioners ^f

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/FIRST MUTUAL LIFE ASSURANCE LTD v MUZIVI 2007 (1) ZLR 325 (S)

FIRST MUTUAL LIFE ASSURANCE LTD v MUZIVI 2007 (1) ZLR 325 (S)**2007 (1) ZLR p325****Citation** 2007 (1) ZLR 325 (S)**Case No** Judgment No. S-9-07**Court** Supreme Court, Harare**Judge** Cheda JA, Ziyambi JA & Malaba JA**Heard** 23 January 2007**Judgment** 29 May 2007**Counsel** *H Zhou*, for the appellant
Respondent in person**Case Type** Civil appeal**Annotations** [Link to case annotations](#)**Flynote**

Employment — contract — termination — unlawful — damages in lieu of reinstatement — quantification by Labour Court — what Court is required to do — need to specify, in figures, the amounts that must be paid

Headnote

In an application for quantification of damages, the basic principle in the assessment of damages is that the plaintiff should be placed in the position he would have been had the contract been fully performed. The Labour Court is required to assess and determine the monetary value (*quantum*) of each claim that is to be awarded to the employee. The employer is meant to be advised what exactly it is supposed to pay to the employee in figures. A mere reference to awards being made is not quantification. What is required are specific monetary awards in respect of each claim so that the employer would know how much it has to pay. Any enforcement of the order will depend on what the order says, so the order of the court should be clear enough to stand on its own.

Case information*H Zhou*, for the appellant

Respondent in person

Judgment

CHEDA JA: The appellant was the respondent's employer. The appellant dismissed the respondent from its employment. The matter went to the Labour Court and it determined the matter in favour of the respondent in judgment No. LC H/163/04.

The appellant appealed to this court against the Labour Court's decision.

On 15 March 2004, this court (Chidyausiku CJ) in judgment No. S-62-03 ^{*} dismissed the appellant's appeal and issued an order, part of which read as follows:

"(1) ...

(2) That the respondent be and is hereby ordered to reinstate the

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Cheda JA

appellant with no loss of salary and benefits with effect from the date A of suspension.

In the event that reinstatement is no longer an option, the respondent is ordered to pay the appellant damages in lieu of reinstatement the amount of which the parties may agree upon failure of which the party may refer the issue to the Tribunal for quantification."

The parties failed to agree on the amount of damages in relation to all the claims B raised by Muzivi, the respondent in this appeal.

In May 2004, the respondent filed an application to the Labour Court for quantification of back pay and damages.

The matter was heard by President Hove of the Labour Court, and an order was made listing damages that the Labour Court held should be awarded to C the respondent as follows:

The order of the court is therefore that the employer pays to Muzivi the following:

- "(1) Back pay calculated from the date of suspension to 7 April 2004. The salary scale applicable for purposes of calculating back pay is that of a managerial grade as estimated by Muzivi on pp 10 and 11 of his D final submissions. These amounts are to be paid together with interest at the prescribed rate calculated from the date each amount fell due to the date of payment in full.
- (2) That the employer pays commission in relation to the sale of two policies each month from the date of suspension to 7 April 2004. The amounts should also be paid with interest at the prescribed rate of E payment in full.
- (3) Cash in lieu of leave and notice pay as stated in the body of my decision with interest calculated from April 2004 to the date of payment in full.
- (4) Annual bonus paid to other employees as stated in the body of my decision. The amounts are to be paid together with interest at the F prescribed rate calculated from the date each amount fell due.
- (5) Pension withdrawal benefits as outlined in the body of my decision. All amounts due in this regard is to be paid together with interest at the prescribed rate from the date of this order to the date of payment in full.
- (6) Three months' medical aid contributions as originally agreed between G the parties and proven medical expenses in terms of my decision. These amounts are to be paid with interest at the prescribed rate from the date each amount becomes due to the date of payment in full.
- (7) Gratuity in terms of the body of my decision paid with interest calculated from the date of this order to the date of payment in full.
- (8) Insurance benefits in terms of the body of my decision. The amounts H

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Cheda JA

A are to be paid together with interest at the prescribed rate calculated from the date of this order to the date of payment in full.

- (9) A house of comparable value to the Kadoma house belonging to Muzivi which was sold by the employer. The house is to be paid on the same terms as originally agreed between the parties.
- (10) Fees disbursed by Muzivi for his children's fees as outlined in the B body of this decision.
- (11) Muzivi to be refunded the amounts he paid in relation to the courses he attended as per the body of my decision.
- (12) 9 933 353 shares as outlined in the body of my decision.
- (13) A car as outlined in the body of my decision. C
- (14) Offer Muzivi items that were in his office as outlined in my decision if these items are no longer available, items of similar value.
- (15) Two years' salary as damages for loss of employment at current rates. This amount is to be paid together with interest at the prescribed rate calculated from the date of this judgment to the date of payment in full. D
- (16) The employer is to make the following deductions from all the amounts due to Muzivi –
 - (a) what the employer has already paid;

(b) net earned by Muzivi from his association with Choice Quality Performance Management.”

¶ I now turn to examine whether the Labour Court complied with the order of the Supreme Court.

The *Concise Oxford Dictionary* gives the following definition of quantify:

“Quantify – to determine quantity of; measure or express as quantity.”

In the very first sentence of its judgment, the Labour Court stated as follows:

“ ¶ This is an application for quantification of damages. The basic principle in the assessment of damages is that the plaintiff should be placed in the position he or she would have been had the contract been fully performed.”

Having started by stating correctly what the application before it was about in the very first sentence, it is not clear why the Labour Court ended up not doing what it was clearly directed to do.

¶ The Labour Court was supposed to assess and determine the monetary value (*quantum*) of each claim that was to be awarded to the respondent (the employee). The employer was supposed to be advised what exactly it was supposed to pay to the employee in figures. What the Labour Court did was not quantification at all. What was required were specific monetary awards in ¶ respect of each claim so that the employer would know how much it was to

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pay. A mere reference to awards being made is not quantification. How much A should he get by way of back pay? What is the employer to pay him by way of commission? How much is due as cash in lieu of leave? How much was to be paid as gratuity? How much was to be paid as fees for children?

The Labour Court should have dealt with each claim and established the exact amount. It did not do that. B

Further to that, the Labour Court failed to observe certain clear principles taken into account in quantifying damages. For example, an award for an unknown amount of fees is not appropriate. The employee was supposed to prove what he spent as children’s fees, then claim to be refunded that amount. In the absence of such determination, what happens if he demands a figure which the employer disputes? The matter may have to go to court again for C determination of that amount.

The suggestion that the employer failed or refused to furnish the respondent with the appropriate salary scale suggests a wrong approach to the issue.

It is the respondent who had the *onus* to prove his claims.

If he was dismissed when he was in a certain grade, it was for him to tell the D court what salary scale applied to him at the time of his dismissal. He could not just claim that he was in a certain grade whose salary scale he did not know. This would suggest that he did not know what he was claiming.

Payment of an annual bonus is generally discretionary on the part of the employer. It could not be said that the employee would have been awarded a bonus under all circumstances. A bonus would have depended on a clear E record of performance. Having been suspended, it could not be said that the employee performed so well that he would have been entitled to a bonus.

On pension withdrawals, it is not clear what the employee’s entitlement is. What were the withdrawal benefits? Who was to withdraw the benefits and from whom? This issue remains vague, leaving the employer unclear as to what F it is to pay.

Reference to what the President says is “as outlined in the body of my decision” does not inform the employer what it is to pay as no figures were given in the body of her decision. In any case, a court order should set out the payments clearly and not refer to the body of the decision.

Any enforcement of the order will depend on what the order says and not what G was said in the body of the decision, which may not be easy to ascertain even if one reads the judgment. The order of the court should be clear enough to stand on its own.

The employee would have been entitled to the use of a car in the performance of his duties. Once he was suspended the benefit of the use of a car would H

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Cheda JA

A under normal circumstances fall away. The order that a car be purchased for the employee is without legal basis. Worse still, should he be given a new or used car? What make or model of a car is he to get? Is he to get a Toyota or Mercedes Benz?

Commission in relation to policies depends on the number of policies sold and the monetary value of the policies. In the absence of any policies proved to B have been sold, any award of commission is incompetent.

The award for medical aid contributions is also unclear. If the employee incurred any medical expenses during the period of suspension, then such expenses should be proved before reimbursement is ordered.

It is not clear on what legal basis an employee who has been dismissed from C a company should be awarded shares in the company and be allowed to take away office furniture from it. Further, there is no logical basis for awarding an employee a salary at current rates as opposed to the rates applicable at the time of suspension.

The award of a house is unreasonable. If the employee wishes to recover the D cost of his house sold by the employer this would be the subject of a different claim for the recovery of that amount and not a claim under the Labour Relations Act.

I have outlined some of the awards made in order to illustrate the fact that the Labour Court failed to apply basic principles governing the quantifications of damages.

E As things stand, the Labour Court's decision remains so vague that neither the employer nor the employee is properly informed of what the damages to be paid are in monetary terms.

Accordingly, the order of the Labour Court is set aside.

The matter is remitted to the same court for it to make an appropriate F assessment and quantification of damages in accordance with the ruling of the Supreme Court in judgment No. S-62-03.

Since the failure to properly quantify the damages was that of the Labour Court, I do not consider it appropriate to make an order for costs against either party.

G There will be no order as to costs.

ZIYAMBI JA & MALABA JA concurred.

H *Atherstone & Cook*, appellant's legal practitioners

* See *First mutual Life Assurance v Muzivi* 2004 (1) ZLR 287 (S) — Editor

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NGATIBATANEYI (PVT) LTD v MOYO & ANOR 2007 (1) ZLR 330 (S)

2007 (1) ZLR p330

Citation	2007 (1) ZLR 330 (S)
Case No	Judgment No. S-13-07
Court	Supreme Court, Harare

Judge	Sandura JA, Ziyambi JA and Malaba JA
Heard	5 March 2007
Judgment	29 May 2007
Counsel	<i>U Sakhe</i> , for the appellant <i>C Kwaramba</i> , for the first respondent No appearance for the second respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Company — director — acts by — validity — disposal of greater part of assets of company — requirement for specific approval of company in general meeting — directors having no power to dispose of such assets under internal regulations — Companies Act [Chapter 24: 03] — s 183 — intention behind the section — protection of assets of a company from disposal without knowledge and consent of shareholders — limitation of powers of directors — s 12(a) — interrelationship with s 183 — s 183 not subservient to s 12(a) — section of the Act not to be construed as part of the internal regulations of a company

Headnote

The appellant company had two shareholders, H and P, both of whom were directors. In March 2005, without the consent of P, H instructed an estate agent to sell appellant's only asset, which was a stand, situated in Harare. Thereafter, the following month, H signed an agreement of sale in which she purported to sell the stand to the first respondent for \$125 million. Falsely, she indicated therein that she had been duly authorized by a resolution at an extraordinary board meeting by the directors (of whom she was one) to sell the stand. However, before transfer could take place, H repudiated the agreement of sale on the ground that P had not given her permission and still refused to agree to the sale.

The first respondent rejected her repudiation and brought an application to the High Court seeking to compel the appellant to effect transfer of the stand against tender of the purchase price. Relying on s 12(a) of the Companies Act [Chapter 24:03] (which embodies the rule in *Royal British Bank v Turquand* (1856) 1 ER 886), the first respondent claimed that he was entitled to assume that H was duly authorized to act on behalf of the appellant as she had claimed to be. The appellant, however, relied upon s 183(1) of the Act, which places restrictions on powers of the company directors to dispose the whole or greater part of a company's

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assets. It argued that without the approval of the company in a general meeting, which had not taken place, the stand could not be sold. The court *a quo* accepted the argument of first respondent that s 183 of the Act amounted to no more than part of the internal regulations of the company and that s 12(a) of the Act, being intended to protect third parties such as first respondent, saved the transaction between the parties. The court thereupon found for the first respondent and ordered appellant to effect transfer of the stand. On appeal:

Held, that the intention behind s 183 was to protect the assets of a company from disposal without the knowledge and consent of the shareholders. It places the disposal of the whole or greater part of the assets of a company outside the ambit of the application of the *Turquand* rule, which is embodied in s 12(a) of the Act.

Held, further, the court *a quo* erred in construing s 183 of the Companies Act [Chapter 24:03] as part of the internal regulations of a company and therefore subservient to s 12(a) of the Act. If s 183 formed part of the internal regulations of the company, giving rise to the inference under s 12(a) of the Act by anyone dealing with the company, that its requirements had been complied

with, there would have been no need for s 183 to open with the words "Notwithstanding anything in the articles ..." Those words could only mean that, notwithstanding the authority given to directors of a company by the articles of association (which ordinarily contain the internal regulations of a company), the directors have no power to dispose of the whole or greater part of the ^E assets of the company without first complying with the mandatory requirements of s 183. In other words, the disposal of the whole or the greater parts of the assets of a company is not a function falling within the authority customarily given to directors under internal regulations. That authority can only be obtained from a general meeting of the company in the form of a resolution approving in its terms the specific ^F transaction. The construction by the court *a quo* would defeat the object of the legislature in enacting s 183 and promote illegal transactions in cases where the express authority of shareholders at a general meeting, required to have been given to directors in the specific form prescribed in that section, had not been obtained.

^G *Held*, further, allowing the appeal, that the sale of the stand was invalid.

Cases cited

Farren v The Sun Service SA Photo Trip Management (Pty) Ltd [2003] 2 All SA 406 (C)

^H *Royal British Bank v Turquand* (1856) 119 ER 886

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Legislation considered ^A

Companies Act [*Chapter 24:03*], ss 12(a) and 183

Case information

U Sakhe, for the appellant

C Kwaramba, for the first respondent

No appearance for the second respondent ^B

Judgment

MALABA JA: This is an appeal from an order of the High Court dated 29 May 2006 granted with costs directing the appellant company to have all necessary documents signed on its behalf to effect transfer of stand No. 579 Bluff Hill Township 11 of Lot 1 of Lot 8A Bluff Hill into the first respondent's name, failing which the Deputy Sheriff be authorized and directed to sign all such ^C documents and do all such things as are necessary to effect transfer of the said property to the first respondent.

The appellant is a limited liability company incorporated on 7 April 1989 in terms of the laws of Zimbabwe. It has two shareholders who are its directors. These are Florence Hlatywayo and Judith Paradzai, who is currently ordinarily ^D resident in the United States of America where she is pursuing her studies. Florence Hlatywayo has been the active director of the company. She is also its secretary.

The appellant owns stand No. 579 Bluff Hill Township 11 of Lot 1 of lot 8A Bluff Hill which is a vacant piece of land ("the stand"). The stand is the only asset of the appellant as it does not seem to have carried on any business since ^E incorporation.

On 8 March 2005, and apparently without the consent of the other shareholder, Florence Hlatywayo signed a mandate instructing Foresthill Real Estate ("the estate agent") to sell the stand on behalf of the appellant. On 20 April 2005, whilst purporting to be representing the appellant she signed an agreement ^F of sale in terms of which the appellant purported to sell the stand to the first respondent for \$125 million payable upon transfer by means of a loan obtained from Intermarket Building Society ("the Building Society") against a first mortgage bond on the property.

The agreement of sale indicated that the seller of the stand was the appellant, ^G represented by F Hlatywayo in her capacity as secretary. Words to the effect that she was "being duly authorized hereto by resolution of an extraordinary board meeting of Directors of the said company held at Harare on 8 March 2005" followed.

The first respondent successfully applied to the building society for the loan. Before transfer could take place, Florence Hlatywayo wrote to the estate agent ^h

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^a on 15 September canceling the agreement of sale on the ground that, when she purported to enter into the agreement on behalf of the appellant, she had not obtained the consent of the co-shareholder who had since refused to grant the consent to have the stand sold.

The first respondent rejected the repudiation of the contract by the appellant. On 11 November 2005, he made an application to the High Court for an order ^b directing the appellant to transfer the stand into his name against tender of the purchase price and transfer fees. He indicated in the founding affidavit that Florence Hlatywayo had, as a director of the appellant and its secretary represented to him that she had the authority to sell the stand on behalf of the company. He made specific reference to the words in the agreement of sale to ^c the effect that she had been "duly authorized hereto by resolution of an extraordinary board meeting of Directors of the said company held at Harare on 8 March 2005". He said that he had acted on the representation of authority to sell by the director of the company. The appellant was therefore estopped from denying that Florence Hlatywayo had authority to sell the stand on its behalf.

^d He relied on s 12(a) of the Companies Act [*Chapter 24:03*] ("the Act") which provides that:

"12 Presumption of regularity

Any person having dealings with a company or with someone deriving title from a company shall be entitled to make the following assumptions, ^e and the company and anyone deriving title from it shall be estopped from denying their truth –

(a) that the company's internal regulations have been duly complied with."

The appellant opposed the application. It relied on the affidavits of the two shareholders. Florence Hlatywayo averred in the opposing affidavit that, at ^f the time she signed the agreement of sale, she had not been authorized by the company in a general meeting by a resolution to sell the stand. She said no general meeting of shareholders had taken place. No meeting of the board of directors took place on 8 March 2005. She said she did not know where the person who drafted the agreement of sale got the idea that she had been ^g authorized by a resolution of a meeting of the board of directors to sell the stand.

Judith Paradzai, in the supporting affidavit, denied ever attending a general meeting of shareholders where approval of the proposed sale was granted to Florence Hlatywayo by a resolution to sell the stand to the first respondent. ^h She averred that she did not want the stand sold.

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Malaba JA

The appellant relied on s 183 of the Act which provides that: ^a

"183 Prohibition of allotment of shares to directors save on same terms as to all members, and restriction on sale of undertakings by directors

- (1) Notwithstanding anything in the articles, the directors of a company shall not be empowered, without the approval of the company in general meeting – ^b
 - (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 (b) of subsection (1) unless it authorizes, in terms, the specific transaction proposed by the ^c directors."

The court *a quo* proceeded on the basis that it was common cause that there was no resolution passed by the appellant at a general meeting authorizing the sale of the stand to the first respondent on the terms stipulated in the agreement, as required by s 183 of the Act. The arguments before the court ^d *a quo* centred on the question whether s 12(a) of the Act, which embodies the common law principles of estoppel enunciated in the case of *Royal British Bank v Turquand* 1856) 119 E R 886 (generally known as the *Turquand* Rule), governed the determination whether the transaction had legal effect and was enforceable. The contention advanced on behalf of the first respondent was that s 12(a) was applicable to the determination of the validity and enforceability ^e of the transaction. It was argued that s 183 was a part of the internal regulations of

the company. It was contended on behalf of the appellant that s 183 was not part of the internal regulations of the company. Its requirements override those in s 12(a) where the transaction involved the sale of the whole or a greater part of the assets of a company. The argument was that s 183 governed the determination of the issue whether the purported sale of the stand to the first respondent by one of the appellant's directors was valid. As it was common cause that no resolution was passed by the company in a general meeting approving the disposal of the stand in terms of the purported agreement, the transaction was of no legal effect as it was concluded in contravention of s 183 of the Act.

The learned judge accepted the argument that s 183 was part of the internal regulations of the company. He held that s 12(a) was intended to protect the rights of third parties dealing with companies. He also found as a fact that Florence Hlatywayo, in her capacity as a director and secretary of the company had made the representation to the first respondent through the statement recorded in the agreement of sale to the effect that she had been authorized

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Malaba JA

by a meeting of a board of directors on 8 March 2005 to dispose of the stand on behalf of the appellant. The first respondent was, on the basis of s 12(a) of the Act, entitled to assume that the company had granted her the authority to sell the stand. He determined that the transaction was valid and enforceable.

The first question to be decided on appeal is whether the learned judge was correct in holding that s 183 is part of the internal regulations of the company subservient to s 12(a) of the Act. The learned Judge misdirected himself on this point. If s 183 formed part of the internal regulations of the company giving rise to the inference under s 12(a) of the Act by anyone dealing with the company, that its requirements had been complied with, there would have been no need for the legislature to open its provisions with the words, "notwithstanding anything in the articles ..." The words can only mean that, notwithstanding the authority given to directors of a company by articles of association which ordinarily contain the internal regulations of a company the directors would have no power to dispose of the whole or greater part of the assets of the company without first complying with the mandatory requirements of s 183. In other words, the disposal of the whole or the greater parts of the assets of a company is not a function falling within the authority customarily given to directors under internal regulations. That authority can only be obtained from a general meeting of the company in the form of a resolution approving in its terms the specific transaction.

The intention behind s 183 was to protect the assets of a company from disposal by directors without the knowledge and consent of the shareholders. Section 183 forbids the disposal by directors without the knowledge and consent of the shareholders. Section 183 places the disposal of the whole or greater part of the assets of the company outside the ambit of the application of the *Turquand* rule embodied in s 12 of the Act. I accept the submission by Mr Sakhe for the appellant that a construction which renders s 183 part of the internal regulations of a company and, therefore, subservient to s 12(a) of the Act would defeat the object of the legislature in enacting s 183 and promote illegal transactions in cases where the express authority of shareholders at a general meeting, required to have been given to directors in the specific form prescribed in s 183, had not been obtained. The effect of upholding the application of s 12(a) in the circumstances would be to render enforceable that which s 183 has in the public interest declared illegal or invalid.

In this case, it was common cause that no general meeting of the shareholders was held at which a resolution authorizing Florence Hlatywayo to dispose of the stand to the first respondent in the terms of the agreement of sale was passed. The other shareholder was in the United States of America at the time the transaction was entered into between Florence Hlatywayo, purportedly

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Malaba JA

representing the appellant, and the first respondent. As the subject matter of the transaction was the disposal of the whole asset of the appellant in the form of the stand it was obligatory for Florence Hlatywayo to obtain the approval of the other shareholder. There was no approval by the other shareholder of the transaction before it was entered into by Florence Hlatywayo nor was there a ratification of it after it had been entered into. Even if it were accepted by the learned judge that

Florence Hlatywayo represented in the statement recorded in the agreement of sale that she had been authorized by a board of directors at a meeting of 8 March 2005 to sell the property on behalf of the appellant, that decision would not constitute valid authority for the purposes of s 183. There was no suggestion that Judith Paradzai was present at that meeting.

It is clear to me that the agreement entered into by Florence Hlatywayo on c behalf of the appellant with the first respondent was in contravention of s 183 of the Act. It had no legal effect. Section 12(a) of the Act could not save the transaction. See *Farren v The Sun Service SA Photo Trip Management (Pty) Ltd* [2003] 2 All SA 406 (C).

The appeal succeeds with costs. The judgment of the court *a quo* is set aside ^D and in its place substituted the following order –

“It is ordered that the application be dismissed with costs.”

SANDURA JA & CHEDA JA concurred.

Kantor & Immerman, appellant’s legal practitioners ^E

Mbidzo, Muchadehama & Makoni, first respondent’s legal practitioners

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Citation	2007 (1) ZLR 337 (S)
Case No	Judgment No. HH-33-07
Court	High Court, Harare
Judge	Makarau JP & Bhunu J
Heard	29 May 2007
Judgment	29 May 2007
Counsel	Appellant in person Respondent in person
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Family law — husband and wife — divorce — distribution of assets — unregistered customary law marriage — approach to be followed in c magistrates courts

Headnote

Trial magistrates should not approach the distribution of assets of parties in an unregistered customary union as if they are apportioning the assets of a couple that is divorcing in terms of the Matrimonial Causes Act [Chapter 5:13]. Legal practitioners should always plead a recognized cause of action for the distribution of assets of parties in an unregistered customary union. Where one party to an unregistered union seeks to have the joint estate distributed before a magistrates court, a justification for not applying customary law must be made and accepted by the court, using the choice of law considerations listed in s 3 of the Customary Law and Local Courts Act [Chapter 7:05]. When the general law is the correct choice, a recognized cause of action must be pleaded. Such a cause of action may be unjust enrichment, a tacit universal partnership or joint ownership. An averment merely to the effect that the parties were in an unregistered customary union is not sufficient to found a cause of action at general law. Trial magistrates must be wary of this procedural aspect of the matter. If the court is to entertain the matter on the basis of any of the above principles, then its general monetary jurisdiction limits apply. It therefore becomes imperative for the court to be aware of the value of the estate involved and to then ascertain whether it has the requisite jurisdiction in the matter.

Cases cited ^G

Jengwa v Jengwa 1999 (2) ZLR 121 (H)

Marange v Chiroodza 2002 (2) ZLR 171 (H)

Mashingaidze v Mugomba HH-3-99

Matibiri v Kumire 2000 (1) ZLR 492 (H)

^H *Mtuda v Ndudzo* 2000 (1) ZLR 710 (H)

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Legislation considered ^A

Customary Law and Local Courts Act [Chapter 7:05] s 3

Customary Marriages Act [Chapter 5:07]

Magistrates Court Act [Chapter 7:10] s 11(b)(iv)

Matrimonial Causes Act [Chapter 5:13] s 7

Case information

Appellant in person ^B

Respondent in person

Judgment

MAKARAU JP: On 12 December 2005, the respondent issued summons out of the magistrates' court at Harare claiming division of certain property and costs of suit. In the claim, the respondent alleged that she was in an ^C unregistered customary union with the appellant which has since dissolved. She further alleged that during the subsistence of the union, she and the appellant jointly acquired certain movable property which she listed in an annexure to the summons. She averred that it would be just and equitable for the property so listed to be distributed as between the parties.

The claim was resisted. ^D

On 5 January 2006, the parties appeared before the trial magistrate and led evidence in support of their respective claims and defences. The respondent testified that during the subsistence of the union, she was a hairdresser and occasionally would raise some money with which she helped the appellant to purchase the movables in question. The respondent then called as a witness ^E one *Nomalanga Matika*, her sister whose testimony as to the acquisition of the property was largely hearsay, being what her sister had told her. Such evidence should not have been admitted at the trial of the matter.

In turn, the appellant testified that the respondent did not contribute towards the acquisition of the movables as she was not gainfully employed while he was. He denied specifically that she was a hairdresser during the subsistence ^F of the union. He further testified that some of the items of property in dispute had been given to him by a friend. He admitted that the respondent had purchased some stools and a push-tray which he stated could be granted to the respondent as her sole and absolute property.

After hearing the parties, the trial magistrate awarded the bed, kitchen unit, ^G radio, two plate stove, wardrobe, four stools and a push-tray to the respondent. To the appellant he awarded the lounge suite, a mountain bicycle, a color television set, a mobile phone, a bag, a fan, a television stand and a coffee table.

In his reasons for judgment, the trial magistrate noted that the parties had been in an unregistered customary union for eight years and that the items in ^H

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^A dispute were all acquired during the subsistence of the union. He also held that the respondent as "a wife" had indirectly contributed to the acquisition of the items. He also referred to the decision of this court in *Mtuda v Ndudzo* 2000 (1) ZLR 710 (H) before making the award that he did. This is what he had to say in his rather terse reasons for judgment:

"In *Mtuda v Ndudzo* 2000 (1) ZLR 710 (H), the court remarked that generally ^B speaking the various judgments which have emanated from the higher courts are to the effect that a wife in an unregistered customary law union is entitled to protection in the event that the two part way and that considerations such as her level of contribution, duration of union etc would be pertinent."

^C Dissatisfied with the decision, the appellant noted an appeal to this court. In the notice of appeal, the appellant raised seven grounds of appeal. In the main, he argued that the distribution had failed to take into account some other property already in the possession of the respondent, that some of the property included in the distribution was actually state property and that in making the award, the trial court had awarded him certain items that were not ^D his. On the whole, he argued that equity was not achieved in the distribution order made by the trial court.

At the hearing of the appeal before us, both parties were not represented and so the legal issues that arise in this appeal were not argued. This judgment therefore represents our views without the aid of argument from counsel.

^E It can however be presumed from his stance in the notice of appeal that the appellant is not denying that there is at law some basis for distributing the items acquired during the subsistence of his union to the respondent. He further appears to be arguing that the legal basis for such a distribution must be ownership as he argues that he was erroneously awarded some items that are not his.

^F On the other hand, the respondent appears to have approached the court for a distribution of the assets on the basis of equity and the fact that these were jointly acquired during the subsistence of the union. She further contends that she contributed towards the purchase of some of the items. It is however, not clear from the pleadings whether she is averring joint ownership of the property or she is simply bringing her claim on the grounds of equity as is ^G provided for under s 7 of the Matrimonial Causes Act [*Chapter 5:13*].

The issues arising in this appeal will continue to dog this and other courts for some time to come. The distribution of the assets of parties in an unregistered customary union by the magistrates' court presents three main legal issues that all trial magistrates must be wary of. Firstly, an unregistered customary ^H union is not a marriage in terms of the Matrimonial Causes Act and thus the

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provisions of s 7 of the Act have no direct application in distributing the assets ^A of such parties. Further, the provisions of s 11(b)(iv) of the Magistrates Court Act [*Chapter 7:10*] which grants magistrates courts jurisdiction in divorce actions of persons married in terms of the Customary Marriages Act [*Chapter 5:07*] do not apply to unions that are not registered under the Act. The court has jurisdiction to apply customary law and can apply such law to ^B the distribution of the assets of

the parties who were in such a union. If however the court for some legitimate reason is not applying customary law, then two further issues arise. Firstly, for it to have jurisdiction, then the value of the assets to be distributed has to be ascertained, for the ordinary monetary jurisdiction of the magistrates courts will apply. Secondly, for a claim based on common law, a recognized cause of action must be pleaded. ^c

Due to the ambivalence with which the law treats unregistered customary unions, the jurisdiction of magistrates courts to distribute the assets of such persons must be carefully founded within the provisions of customary law or common law as neither the Customary Marriages Act nor the Matrimonial Causes Act apply to such "marriages".

As correctly pointed out by the trial magistrate, decisions of this court and ^d of the Supreme Court on the issue have shown judicial activism on the part of the courts in an effort to find a remedy where none exists at law. It is now the accepted position at law that general law has made no direct provisions for the distribution of estates of persons in unregistered customary unions even if for some purposes, the law recognizes the unions as marriages. Neither ^e has statute law made such provision. While the decisions of this and the Supreme Court are clear that some remedy has to be fashioned for the benefit of women in the position of the respondent, the courts have not been unanimous on the basis of such a remedy.

It is trite that customary law applies to the distribution of the movable assets ^f of parties to an unregistered union. Some judges have, however, said that the remedy available at customary law will lead to injustice, as this does not take into account the indirect contributions of the wife and restricts her to claim only that property that directly vests in her in terms of customary law. See *Matibiri v Kumire* 2000 (1) ZLR 492 (H). Others have accepted that the principle of a tacit universal partnership is applicable. See *Mtuda v Ndudzo* ^g *supra*; *Mashingaidze v Mugomba* HH-3-99 and *Marange v Chiroodza* 2002 (2) ZLR 171 (H). Some have suggested that the common law principle of unjust enrichment could be used to achieve equity as between former parties in such a union. It is trite that the principles of joint ownership remain applicable between such parties. See *Jengwa v Jengwa* 1999 (2) ZLR 121 (H). Each of the common law principles that have been suggested and used to achieve equity ^h

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^a as between parties to an unregistered union have peculiar essential elements that have to be proved if alleged and result in different distributions of the assets in issue being effected by the court. However, it is the agreed position at law that whatever legal vehicle is used to try and achieve equity between the parties, some legal principle must be pleaded. The union itself is not a cause of action at common law.

^b I am not clear as to where the confusion on the part of the trial magistrate and indeed on the part of many others whose judgments have been the subject of appeals before this court arises from.

In my view, trial magistrates faced with a claim for the distribution of assets of parties to an unregistered union may seek guidance from the remarks of ^c Gwaunza J (as she then was) in *Mashingaidze v Mugomba supra*. On p 21 of the judgment, she had this to say:

"However, while I would support the view that a proven unregistered customary law union should be treated like any other marriage when it comes to dissolution and division of assets jointly acquired by the parties during its subsistence, *such a view is currently not supported by the law*" ^d (emphasis is mine).

Thus, the current legal position is such that trial magistrates should not approach the distribution of assets of parties in an unregistered customary union as if they are apportioning the assets of a couple that is divorcing in terms of the Matrimonial Causes Act [*Chapter 5:13*].

^e This court has on a number of occasions exhorted legal practitioners to always plead a recognized cause of action for the distribution of assets of parties in an unregistered customary union. See *Mashingaidze v Mugomba supra* and *Jengwa v Jengwa supra*.

I repeat that exhortation herein to all trial magistrates before whom a claim as ^f the one in this appeal comes. It is this: where one party to an unregistered union seeks to have the joint estate distributed before a magistrates' court, a justification for not applying customary law must be made and accepted by the court using the choice of law considerations listed in s 3 of the Customary Law and Local Courts Act [*Chapter 7:05*]. When general law is the correct choice, then a recognized cause of action must be pleaded. Such a cause of ^g action may be unjust enrichment, a tacit

universal partnership or joint ownership. An averment merely to the effect that the parties were in an unregistered customary union is not sufficient to found a cause of action at general law. Trial magistrates must be wary of this procedural aspect of the ^H matter.

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Finally, if the court is to entertain the matter on the basis of any of the above ^A principles, then its general monetary jurisdiction limits apply. It therefore becomes imperative for the court to be aware of the value of the estate involved and to then ascertain whether it has the requisite jurisdiction in the matter.

The trial magistrate in the matter before us fell into all three errors.

Firstly, he did ^B not advert to the choice of law considerations before he decided to apply general law to the dispute before him. The parties were essentially in a customary law relationship and had terminated their relationship using customary law rites and practices. They are thus to be presumed to have elected customary law as the law governing their relationships. A justification for departing from customary law had to be established and stated in the ^C judgment.

Secondly, having chosen to apply general law to the dispute, the trial magistrate accepted the fact of the union as a cause of action. It is not. He then proceeded to apply the considerations mentioned in s 7 of the Matrimonial Causes Act as if this Act is of direct application to such unions.

Thirdly, as the trial magistrate was clearly not applying customary law or ^D proceeding in terms of s 11(b)(iv) of the Magistrates Court Act, he had to be satisfied that the value of the estate that he was distributing fell within his monetary jurisdiction. This he did not do.

In the absence of clarification as to the cause of action that the respondent was relying on in the lower court and the value of her claim, we cannot ^E determine whether the trial court had jurisdiction in this matter and whether it erred in its findings error or not as this will largely depend on the cause of action that the respondent would have pleaded before the trial court.

On the basis of the foregoing, we would allow the appeal, set the decision of the trial magistrate aside and remit the matter to the magistrates' court for a ^F trial *de novo*, preferably before a different magistrate.

BHUNU J concurred. ^G

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EXECUTIVE HOTEL (PVT) LTD v BENNETT NO 2007 (1) ZLR 343 (S)

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Citation	2007 (1) ZLR 343 (S)
Case No	Judgment No. S-77-06
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Ziyambi JA
Heard	20 June 2006
Judgment	31 May 2007

Counsel	<i>A P de Bourbon SC</i> , for the appellant <i>E W W Morris</i> , for the respondent
Case Type	Details not supplied
Annotations	No case annotations to date

Flynote

Contract — *formation* — *mental capacity of contracting party* — *tests for whether party had requisite mental capacity*

Practice and procedure — *application* — *motion proceedings* — *desirability of deciding matter without hearing evidence*

Headnote

The deceased was an elderly man who had suffered two strokes, was affected by Parkinson's disease and was blind. His speech and his motor movement were impaired and he needed twenty-four hour nursing ^D services. There was medical and other evidence that he suffered from alternating periods of clarity and mental confusion. From November 1999, shortly before he died, he was on a sedative that might have contributed to his lack of reasoning ability and would have made him drowsy. His doctor considered that the deceased was incapable of handling his own affairs. The doctor's evidence was in the form of an ^E affidavit. Supporting affidavits were filed from other persons, including the deceased's wife and a nurse.

The deceased was the majority shareholder in a company which owned a piece of land on which was erected a hotel. The hotel was leased to, and run by, the appellant. In January 2000, two months before he died, the deceased attended a meeting at which he purported to sell all his shares ^F in the company which owned the land to the appellant. He did so for a price considerably below the market value. The deceased was not assisted at the meeting, whereas the appellant was represented by two directors and its legal practitioner. The executor of the deceased estate obtained an order setting aside the contract on the grounds of the deceased's mental incapacity to contract. The judge *a quo* resolved the ^G matter on the papers, without calling for oral evidence. Her decision to do so was attacked on appeal.

Held, that the question of whether the deceased had the requisite mental capacity at the time of signing the agreement of sale was a question of fact, to be decided by the court. It would have been over fastidious for ^H the judge to insist that the doctor's evidence be tested by cross-

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examination. It was expert evidence which had not been challenged. No ^A other expert evidence had been introduced to cast any doubt on its veracity. Faced with such uncontroverted expert evidence, the judge would have been shirking her responsibility not to resolve the dispute of fact in favour of the respondent. While it might have been preferable to hear evidence in regard to the disputed facts in this case, it was ^B possible to take a robust approach to the evidence and reach a conclusion without the risk of doing an injustice to the appellant.

Held, further, that there are three principles for testing the existence or otherwise of mental capacity to make a contract:

- (a) was the state of mind of the contracting party whose capacity is at issue such that he was incapable of estimating what was, or what was ^C not, a fair and beneficial bargain?
- (b) was the state of mind of the contracting party whose capacity is at issue such as would, in common honesty, not make him liable or responsible for such act or contract?; and
- (c) whether the contracting party whose capacity is at issue was of such ^D unsound mind as to be incapable of understanding and appreciating the transaction into which he purported to enter.

The age, blindness and apparent poor health of the deceased, and the ridiculously low purchase price he was asking for the shareholding, should have told the appellant's representatives that all was not well and that it was desirable to have the deceased assisted either by his own legal ^E practitioner or by someone who was managing his business affairs. Failure to appreciate this represented a very serious lapse of judgment. For this reason, it could only be said that the appellant's directors were the authors of the misfortune of the appellant. They should have known better and at least attempted to ensure that a blind man of eighty-eight years, in apparent poor health, was assisted. The deceased was clearly ^F confused, not only as to his shareholding, but also as to whether he had obtained his family's consent to the disposal of the company.

Cases cited

Blamire's Executrix v Milner & Anor 1869 NLR 39 ^G

Pheasant v Warne 1922 AD 481

Raulstone v Radebe 1956 (2) PH F85 (N)

Uys v Uys 1953 (2) SA 1 (E)

Case information

A P de Bourbon SC, for the appellant

E W W Morris, for the respondent ^H

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Chidyausiku CJ

Judgment

^A **CHIDYAUUSIKU CJ:** This is an appeal against the judgment of Makarau JP setting aside an agreement of sale between Barwin Holdings (Pvt) Ltd ("Barwin Holdings") and Executive Hotel (Pvt) Ltd ("Executive Hotel") on the grounds that a Mr Robert Courtney Irwin ("Irwin"), who was the director of Barwin Holdings and represented the company, and is now deceased, lacked capacity to contract by reason of lack of *compos mentis* and, alternatively, on ^B the ground that the agreement of sale was void *ab initio* because of a common mistake in respect of the *merx*.

The facts forming the background of this case are succinctly set out in the judgment of the court *a quo* and they are as follows:

During his lifetime, Irwin was a director and shareholder of Barwin Holdings. ^C He held 59 999 Class A voting shares, while three other persons related to him and a Trust held the remainder of the 150 000 issued shares. The issued share capital of Barwin Holdings of 150 000 shares was made up of 90 000 Class A shares that carried voting rights; and 60 000 Class B shares that were non-voting. Irwin held 59 999 of the Class A shares, while the now late Mrs A T Irwin, his wife, held one Class A voting share. The remaining 30 000 ^D Class A voting shares were held by a Trust known as the Stuart Irwin Trust. A Mrs L J Mihalik and a Mrs G Smitheram held the non-voting shares. They each had 30 000 Class B shares.

Barwin Holdings owned a piece of land on which a building commonly known as Executive Hotel is situated. Executive Hotel is an operating hotel, made up ^E of twenty-eight bedrooms and other facilities ancillary to the running of the hotel business. This property, and liquid assets of \$1.2 million, constituted the assets of Barwin Holdings. Barwin Holdings leased this building to Executive Hotel under a notarial agreement of lease. This lease was to subsist until 28 February 2002. In November 1999, a meeting was held, during which the possibility of renewing the lease was discussed. At this meeting, Irwin ^F allegedly indicated his desire to sell the property after discussing the issue with family members. It was also confirmed at this meeting that Executive Hotel would be interested in buying the property.

On 18 January 2000, an agreement of sale was entered into between Barwin Holdings, represented by Irwin, and Executive Hotel, represented by a Mr ^G Squires ("Squires") and a Mr Levy ("Levy"), both directors of Executive Hotel. In terms of this agreement of sale, the entire shareholding of Barwin Holdings was sold to Executive Hotel for the sum of \$2 million. This agreement was reduced to writing and duly signed by Irwin, on behalf of Barwin Holdings, and by Squires, on behalf of Executive Hotel. At the time of the conclusion of the agreement, Irwin was eighty-eight years old

and had suffered two ^H cerebral-vascular incidents (in common parlance "strokes"), the first of which

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resulted in him being confined to a wheelchair. He was under twenty-four hour ^A nursing care and could not dress, feed or bath himself. His speech was impaired. He was totally blind. Irwin died two months later, on 14 March 2000. Mr Bennett ("Bennett") was in due course appointed executor of the estate of Irwin. He filed an application in the court *a quo* seeking an order setting aside the agreement of sale between Barwin Holdings and Executive Hotel. In his ^B application, Bennett contended that, at the time of the signing of the agreement of sale, Irwin was suffering from mental incapacity to such an extent that he did not appreciate what he was doing and could not have reached a true agreement. The application was opposed.

In support of the application, Bennett filed a detailed basis upon which he relied for his assertion that Irwin lacked capacity to assent to and conclude ^C a binding agreement of sale. He also filed affidavits from six other persons in support of his contention. Among the affidavits filed in support of his contention was one from Irwin's wife, who has since died, and another from Irwin's nurse. The affidavits of Irwin's wife and the nurse gave details of the happenings prior to the day leading to the signing of the agreement of sale. Both women deposed to the fact that Irwin was alone when he signed the ^D agreement of sale, as opposed to Executive Hotel, which was represented by its two directors and its legal practitioner who safeguarded its interests. Mrs Irwin deposed to the fact that after Executive Hotel's representatives had left, after the signing of the agreement of sale, Irwin cried and stated that he did not know what he had done.

Bennett also filed a supporting affidavit from a Dr WA MacDougall, who had ^E been Irwin's doctor from 1975 until his death. According to Dr MacDougall, Irwin exhibited symptoms of Parkinson's disease as early as 1998. The doctor also had it recorded on Irwin's patient card that, after the two cerebral-vascular incidents in 1999, Irwin suffered from alternating periods of clarity and mental confusion. From November 1999, Irwin was on a sedative that might have ^F contributed to his lack of reasoning ability and would have made him drowsy. He concluded that Irwin was incapable of handling his own affairs on the date the agreement of sale was concluded.

Three other supporting affidavits were filed by Bennett. There were two from accountants and financial advisers to Irwin and one from a long-time business ^G associate and personal friend of Irwin. The tenor of the affidavits of these three deponents was that Irwin's mental capacity deteriorated after the two cardio vascular incidents and that he was no longer as attentive and focused as he used to be. In particular, Ms Linda Jane Weedman ("Weedman") filed an affidavit in which she stated that she had visited Irwin on 18 January 2000 at about 3 pm. That was the day the agreement of sale was signed. The purpose ^H

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^A of her visit was to discuss certain business matters with Irwin and his wife. She avers that during the discussions over tea, it became evident to her that Irwin was no longer of sound mind. She gained the impression that Irwin was unable to follow the conversation and did not attempt to initiate any part of the discussions. His attention was limited and on occasions he nodded off. During the course of the afternoon, Irwin asked his wife, on several occasions, ^B how to get out of "the plane" and it was clear to her that Irwin thought he was on an aircraft, wished to disembark and was looking for the door. She also avers that at one point the discussion was on property values in Cape Town and it appeared to her that it was not possible to have a sensible discussion with Irwin. She eventually decided to leave, without having concluded the business which she had come to resolve, as Irwin was unable to make and, to her mind, ^C was incapable of making, a proper decision. She also stated that Mrs Irwin spoke to her privately about her concern regarding the impending visit of Squires and Levy that evening. She advised Mrs Irwin to contact Bennett.

The Executive Hotel denied the mental incapacity of Irwin. Both Squires and Levy, the two directors of Executive Hotel, supported by Mr Alwyn Pichanick ^D ("Pichanick"), Executive Hotel's legal practitioner, deposed to affidavits in which they separately denied that Irwin showed any signs of lack of mental capacity, as detailed in Bennett's application and supporting affidavits. They had all been acquainted with Irwin prior to the two cerebral-vascular accidents in various degrees and they

did not detect any change in him that might have been caused by the two cerebral-vascular accidents and that might have ϵ prevented him from appreciating what he was doing. Regarding the medical evidence of Dr MacDougall, Levy and Pichanick do not comment on the facts deposed to by the doctor. Squires indicated that he was not competent to comment on the medical details reflected in the doctor's affidavit, but maintained that, from his own observations, he found Irwin capable of handling his own affairs.

ϵ It is quite clear that there is a dispute of fact on the papers. However, the learned judge in the court *a quo* came to the conclusion that she could resolve the dispute of fact by taking a robust view of the matter. She resolved the dispute of fact in favour of Bennett and against Executive Hotel. It is quite clear from the judgment that the learned judge was guided by the correct legal principles ϵ in arriving at that conclusion. In this respect, she had this to say at pp 5-6 of the cyclostyled judgment:

"In resolving to be robust in this application, I have been guided by the remarks of Gubbay JA (as he then was) in the case of *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (S) at 339 where he had this η to say —

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It is, I think, well established that in motion proceedings a court should Λ endeavour to resolve the disputes raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently, there is a heavy *onus* upon an applicant seeking relief in motion proceedings, without the calling of evidence, β where there is a *bona fide*, and not merely illusory, dispute of fact.'

In my view, it would be over fastidious of me to insist that the evidence of Dr MacDougall be tested by cross-examination before I can rely on it. It has not been challenged. It is expert evidence. The respondent has introduced no other expert evidence to cast any doubt on its veracity. The doctor has given the basis upon which he concludes that Irwin lacked ϵ capacity to conclude a sale. Not only had Irwin's cerebral activity been affected by the incidents (his speech was impaired, his motor movement was impaired and he needed 24 hour nursing services) but he was also on a drug that would suppress his cerebral activity and make him drowsy. Faced with such uncontroverted expert evidence, in my view, it will be shirking responsibility on my part not to resolve the dispute of fact in δ favour of the applicant. The respondent cannot be allowed to call oral evidence on facts that could have been presented by opposing affidavits. If contrary expert evidence was available to the respondent, it ought to have been placed before the court by way of affidavit."

Thus, the learned judge was alive to the dangers of resolving factual disputes on the basis of affidavits. In this regard, the following observation by the ϵ learned judge at p 6 of the judgment is pertinent:

"In dealing with this dispute of fact on this basis, I am keenly aware that it is highly undesirable to assess affidavit evidence on the same level as oral evidence, as affidavits may be cleverly crafted by their drafters to give an impression that may not be borne out by the witness under cross-examination." ϵ

As I have already stated, the court *a quo* set aside the agreement of sale on the basis that Irwin lacked the mental capacity to conclude the agreement of sale. Executive Hotel was dissatisfied with that judgment and appeals to this court against it on the grounds set out in the notice of appeal, which reads in part as follows: ϵ

1. The learned judge *a quo* erred in finding that the disputes of fact on the papers could be resolved in favour of the respondent.
2. The learned judge erred in finding that even if the agreement of sale could not be set aside on the basis of a lack of mental capacity by the late Robert Courtney Irwin, the agreement of sale was nonetheless null and void due to a lack of consensus *ad idem*, alternatively, was η

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Λ unenforceable. The learned judge should have found that a lack of consensus or unenforceability did not avoid (void) the contract where the lack of consensus and unenforceability arises for (from) one party's misrepresentation."

As I have already stated, the learned judge also found in the alternative that the agreement of sale between the parties was void *ab initio* by reason of a β mutual mistake; the mistake being that both

parties concluded the agreement of sale on the basis that Irwin owned all the shares in Barwin Holdings and was able to transfer those shares, when in fact Irwin owned only some of the shares and could not sell the shares which he did not own.

The notice of appeal raises two issues that fall for determination by this court: c

- (1) Whether the court *a quo* was correct in determining this matter without hearing evidence or referring the matter to trial and resolving the matter in favour of Bennett; and
- (2) Whether the agreement of sale entered into between the parties was void *ab initio* by reason of mutual mistake or common mistake.

I now turn to deal with the issues.

Given the backdrop to the signing of the agreement of sale, and the nature and the complexity of the agreement of sale itself, I am satisfied that the court *a quo* was correct in determining this matter on the papers and in concluding that Irwin lacked the mental capacity to conclude the agreement of sale. The main submission of Mr *de Bourbon*, who appeared for the appellant, as I understand it, was that Executive Hotel should have been given an opportunity to cross-examine Dr MacDougall and that in that cross-examination, it is possible that the doctor might have conceded that Irwin signed the agreement of sale at a time Irwin's mind was lucid. He argued that this was probable, given the evidence contained in the affidavits of Squires, Levy and Pichanick, which the court *a quo* could not dismiss as false. I am not persuaded by this submission. Assuming, for argument's sake, that Dr MacDougall did make such a concession, that concession would not bind the court. The question of whether Irwin had the requisite *compos mentis* at the time of signing the agreement of sale is a question of fact, to be decided by the court. See *Blamire's Executrix v Milner & Anor* 1869 NLR 39. The learned judge would have had to decide whether such a concession was properly made. Given the evidence that is common cause in this case, and which evidence, in my view, is against the making of such a concession, the probabilities are that the court would not have accepted that the concession was properly made. I shall revert to this aspect of the matter later.

Another contention by Mr *de Bourbon* was that, if there had been a trial, the conduct of Irwin in respect to other business transactions carried out at

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around about the time of the signing of the agreement of sale might establish that Irwin had the mental capacity to conclude the agreement of sale. This contention is indeed speculative. The evidence of Weedman is credible and is not speculative. She attempted to do business with Irwin on the same day that the agreement of sale was signed. She attempted to do business with Irwin about two hours before the agreement of sale was signed. She failed to conclude the business transaction with Irwin because he exhibited a lack of mental capacity to do business. Given this evidence, which is credible and from an independent witness, going on a fishing expedition for evidence to the contrary would be an exercise in futility.

I pause here to deal with the issue of what constitutes lack of capacity through insanity or dementia, also often referred to as lack of *compos mentis*. As I have already stated, the issue of whether a contracting party had the requisite capacity is a question of fact. The issue of what constitutes *compos mentis* or lack of it has been considered in a number of cases. In *Blamire's case supra*, Harding CJ had this to say:

"If the jury are of opinion that [at the time of the transaction] Colonel B was in such a state of mental incapacity as to be unable to estimate what was or what was not a beneficial bargain, or if they shall be of opinion that his state of mind was such as would in common honesty not make him liable or responsible for any act or contract, or if they are of opinion that he was [at a certain date] of such unsound mind as to be incapable of managing his own affairs, then they will find a verdict for the plaintiff.

If, on the contrary, they are of opinion that when the shares were sold Colonel B, though strange or eccentric in his behaviour, was still in possession of a knowledge of what was not or what was favourable to his interests, or that he was not of such unsound mind as to render him incapable of managing his own affairs, they will find a verdict for the defendants."

In the case of *Pheasant v Warne* 1922 AD 481 at p 488, Innes CJ made the following observation:

"And a court of law called upon to decide a question of contractual liability depending upon mental capacity must determine whether the person concerned was or was not at the time capable of managing the particular affair in question – that is to say whether his mind was such that he could understand and appreciate the transaction into which he purported to enter."

Pheasant's case supra was approved of and followed in a number of cases, such as *Uys v Uys* 1953 (2) SA 1 (E) and *Raulstone v Radebe* 1956 (2) PH F85 (N). ^H

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^A Three principles of testing the existence or otherwise of *corpus mentis* emerge from the foregoing authorities. I would summarise these as follows:

- (1) Was the state of mind of the contracting party whose capacity is at issue such that he was incapable of estimating what was or what was not a fair and beneficial bargain?; ^B
- (2) Was the state of mind of the contracting party whose capacity is at issue such as would in common honesty not make him liable or responsible for such act or contract?; and
- (3) Whether the contracting party whose capacity is at issue was of such unsound mind as to be incapable of understanding and appreciating the transaction into which he purported to enter.

^C Prof Christie, in his book *The Law of Contract in South Africa* 3 ed, commented on these three tests for determining the capacity of contracting parties and makes the following observation:

"Remembering that the fundamental question is whether there was *consensus*, and that a negative answer to that question has the drastic ^D result of making the contract void *ab initio*, the first of these tests – inability to weigh up a bargain – seems too lenient because such inability is consistent with mere stupidity, which is not enough. The second test, with its reference to common honesty, is a useful reminder of the policy of the law to protect the insane at the expense of other parties to contracts. The third test accords with that laid down by Innes CJ in *Pheasant v Warne* 1922 AD 481 at 488: ... [quoted above].

^E This is the test which, with slight variations of wording, has been applied in most of the cases. But it is not exclusive of other tests ..."

While it might have been preferable to hear evidence in regard to the disputed facts in this case, upon application of the above principles or tests to the evidence *in casu*, that is common cause and the evidence whose veracity is ^F palpable, it is possible, in my view, to take a robust approach to the evidence and reach a conclusion without the risk of doing an injustice to Executive Hotel. I now turn to deal with that evidence.

The evidence that Irwin was of unsound mind on the days leading up to the signing of the agreement of sale is so cogent that the court *a quo* had no choice ^G but to accept it. Dr MacDougall clearly stated that Irwin was incapable of managing his own affairs, although he had lucid moments. The late Mrs Irwin said that Irwin was confused and delusionary during the days leading up to the signing of the agreement of sale. She specifically averred that Irwin sometimes thought he was in prison or on an aircraft when in fact he was not. Irwin had such an illusion only hours before signing the agreement of sale ^H according to Weedman. This evidence establishes beyond doubt that Irwin

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was experiencing delusionary episodes during the period leading up to, and ^A two hours before, the signing of the agreement of sale. Irwin's nurse, Ms Moyo, supports the late Mrs Irwin's evidence. Her observations were to the effect that Irwin was not capable of managing his own affairs. As I have already stated, Weedman visited Irwin with a view to concluding business on the day that the agreement of sale was signed, but she left without concluding the business because, in her opinion, Irwin did not have the requisite *compos* ^B *mentis* to conclude her intended business. At worst, these witnesses can be accused of exaggeration, but their basic allegation that Irwin was delusionary can safely be accepted.

Apart from the above evidence, some of the provisions of the agreement of sale itself are consistent with Irwin being so confused or delusionary as to be ^C incapable of estimating what was or was not a fair and beneficial bargain. In my view, the agreement of sale Irwin concluded is one that he should not "in common honesty" be held responsible for. The probabilities are that it is not the kind of agreement which, if Irwin was capable of managing his own affairs, he would have concluded.

Irwin sold the entire shareholding of Barwin Holdings for \$2 million. Barwin ^D Holdings owned the property, which was insured for the sum of \$11 million but was valued at \$17 million. Barwin Holdings had liquid assets of \$1.2 million. For both the property and the assets, Irwin asked for a purchase price of \$1.5 million. The purchase price that Irwin asked for is simply ridiculous. The

representatives of Executive Hotel, Squires and Levy, ^E appreciated the absurdity of the purchase price, hence they offered to pay \$2 million. The attempt by Squires and Levy to justify the low purchase price for the Barwin Holdings shares on the basis of the Municipal evaluation of the Hotel and what it had cost Irwin to construct the Hotel, in my view, is nonsensical. No serious businessman, least of all Squires and Levy, would evaluate a property they wish to sell on that basis. ^F

Why, then, did Irwin sell the shares of Barwin Holdings, a company with such a valuable property and liquid assets for such a ridiculously low price? The probability, in my view, is that Irwin had become incapable of managing his own affairs. The price which the shares were sold for clearly shows that Irwin was incapable of estimating what was or was not a fair and beneficial bargain to himself or to Barwin Holdings. I am satisfied that common honesty demands ^G that he should not be held responsible for entering into such a prejudicial agreement.

It is also common cause that Irwin owned 59 999 shares of Barwin Holdings and the rest of the issued shares were owned by other people. Yet, in the agreement of sale Irwin represents that he owned all the shares. Why, then, ^H

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^A did Irwin represent to Squires and Levy that he owned all the shares when in fact and in reality he only owned a portion of the shares? Either Irwin was deliberately misrepresenting the facts to Squires and Levy or was confused over the ownership of the shares of Barwin Holdings. I see no reason why Irwin would want to be deceitful to Squires and Levy by misrepresenting his shareholding in Barwin Holdings. The most probable explanation is that he ^B was confused over the shareholding of Barwin Holdings. Given the background and the circumstances of this agreement of sale, confusion is the most probable explanation for Irwin's misstatement that he owned all the shares of Barwin Holdings. In my view, his confusion can only be attributed to the mental condition of Irwin.

^C Not only was Irwin confused regarding his shareholding in Barwin Holdings, he clearly was also confused as to whether or not he had discussed the sale of the shares of Barwin Holdings with members of his family who owned some of the shares. He clearly was also confused as to whether such members of the family holding shares in Barwin Holdings had given him authority to dispose of their shareholding. The evidence of members of the family who are ^D shareholders in Barwin Holdings that they were never consulted over the sale and did not consent to the sale of their shares to Executive Hotel cannot but be accepted. Irwin misrepresented to Squires and Levy that he had their consent and approval. That misrepresentation was due, in my view, to confusion as opposed to deceit.

^E Clause 6 of the agreement of sale provides as follows:

"6. SELLER'S UNDERTAKINGS

THAT the Seller undertakes that as against payment by the Purchaser of the purchase price he shall deliver to the Purchaser the following documents –

- 6.1 The Share Certificates relating to the issued capital, together ^F with the appropriate Share Transfer Forms relating to their transfer, all duly completed and signed by the Seller.
- 6.2 A written Cession of the loan account from the Seller to the Purchaser.
- 6.3 Resolutions passed by the Directors of the company, authorising the transfer of the issued capital from the Seller to the Purchaser ^G and the Cession of the loan account from the Seller to the purchaser.
- 6.4 Letters of resignation from all the Directors of the Company as at the effective date. ^H
- 6.5 The Memorandum and Articles of Association of the Company

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together with the Certificate of Incorporation of the Company ^A together with all such title deeds, agreements, documents, vouchers, tax returns and assessments, minute books, registers and all other correspondence or papers relating to the business and the affairs of the Company and in particular all fiscal and other relevant or necessary returns, payments and any other documents which the company is possessed of and which it is ^B required by law to keep, all properly written up and completed."

In terms of Clause 6 of the agreement of sale, Irwin undertook to do several things, such as to effect transfer and delivery of the Share Certificates; to deliver the resolution passed by the directors authorising the transfer of the issued capital; to deliver letters of resignation from all the directors; to deliver the Memorandum and Articles of Association; and a whole host of other c things. It is common cause that Irwin did not do any of the things required of him in terms of Clause 6 of the agreement of sale. Irwin never made an effort to do any of the things he undertook to do in terms of Clause 6 of the agreement of sale up to the time of his death two months after the signing of the agreement of sale. Why, then, did Irwin undertake to do things which he made absolutely d no effort to fulfil? The probabilities are that Irwin did not fully understand the import of what was required of him in terms of Clause 6 of the agreement of sale by reason of impaired mental condition. If in fact he had fully appreciated the provisions of Clause 6 of the agreement of sale, one would have expected him to take the initial steps to do what was required of him. Instead of initiating the implementation of Clause 6 of the agreement of sale, according to Mrs e Irwin, Irwin cried and confessed that he did not know what he had done as soon as Squires and Levy had left after the signing of the agreement of sale.

It is quite clear from his conduct that Irwin was not capable of estimating what was or was not a fair bargain and that in common honesty he should not be held liable to implement the provisions of Clause 6 of the agreement of sale, f which he obviously did not understand. This evidence clearly shows that Irwin was no longer capable of managing his own affairs.

Finally, there are a number of factors that seriously undermine the credibility of the assertions of Squires and Levy.

Firstly, Squires and Levy insisted on giving instructions to their legal practitioner to draft the agreement of sale during lunchtime because of the g diary constraints of their legal practitioner. They were not prepared to accept the delay that would have been caused by waiting until their legal practitioner was free to see them.

Secondly, Pichanick's secretary was not available to type the agreement of h

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a sale. The services of another typist had to be secured to ensure that there was no delay in the typing of the agreement of sale and consequently a delay in its signing.

Thirdly, after the agreement of sale was typed Pichanick, Squires and Levy went to Irwin's house after 5 p.m. to sign and conclude the agreement. Why b this urgency to finalise the agreement of sale?

The reason given for this urgency by Squires and Levy is that Squires was traveling to South Africa on holiday within a day or two and the agreement of sale had to be concluded before he left. Both Squires and Levy are directors of Executive Hotel and Levy, who was not going anywhere, could easily have represented Executive Hotel and signed the agreement of sale on its behalf. c So the explanation proffered by the appellant for the urgency is not convincing.

Finally, clause 6 of the agreement of sale provides for payment of the purchase price after compliance by the seller with clause 6 of the agreement of sale, yet the purchaser paid the purchase price immediately upon the signing of the agreement of sale before compliance with clause 6. No explanation is offered d for this hurry to make payment before compliance with clause 6 of the agreement of sale. One would have expected Pichanick to advise his client to hold back payment to Irwin until there had been compliance with clause 6 of the agreement of sale. Indeed, one would have expected the purchase price, if it was readily available, to be paid into a trust account pending compliance with clause 6 of the agreement of sale. Elementary prudence would have e prompted Pichanick to advise his client to make payment after compliance with clause 6 of the agreement of sale. If such advice was offered, it is not difficult to imagine why his client did not accept it. It is clear that the rush to conclude the agreement of sale was intended to ensure that the agreement was concluded before any intervention by a relative or agent of Irwin.

In my view, the age, the blindness and the apparent poor health of Irwin and f the ridiculously low purchase price he was asking for the shareholding should have sent warning bells to Pichanick, Squires and Levy that all was not well and that it was desirable to have Irwin assisted either by his own legal practitioner or by someone who was managing his business affairs. Failure to appreciate this represents a very serious lapse of judgment. For this reason, g it can only be said that Squires

and Levy were the authors of the misfortune of the appellant. They should have known better and at least attempted to ensure that a blind man of eighty-eight years in apparent poor health was assisted.

In the result, I am satisfied that the conclusion of the court *a quo*, that Irwin H lacked the mental capacity to enter into the agreement of sale, was correct.

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In view of the conclusion I have reached on the first issue raised in this appeal, A it is not necessary to determine the second issue, namely, whether the agreement of sale *in casu* was void *ab initio* by reason of common mistake.

In the result, the appeal is dismissed with costs.

CHEDA JA & ZIYAMBI JA concurred. B

Wintertons, appellant's legal practitioners

Atherstone & Cook, respondent's legal practitioners C

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S v NKOMO 2007 (1) ZLR 357 (S)

2007 (1) ZLR p357

Citation	2007 (1) ZLR 357 (S)
Case No	Judgment No. S-79-06
Court	Supreme Court, Bulawayo
Judge	Chidyausiku CJ, Ziyambi JA & Ndou AJA
Heard	31 July 2006
Judgment	31 May 2007
Counsel	No appearance for the appellant <i>B Sigauke</i> , for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

c Criminal procedure — jurisdiction — territorial — murder — Zimbabwe national committing murder in neighbouring country — need for some element of the crime, or the harmful effect thereof, to have occurred in Zimbabwe

Headnote

▯ The appellant, a Zimbabwean national, went to Botswana, taking a pistol with him. While there he robbed and murdered the owner of a restaurant, using the pistol. He fled to Zimbabwe, bringing with him some of the money he had stolen from the restaurant, as well as the pistol. He was convicted in the High Court. The High Court referred to the Supreme Court the question of whether it had jurisdiction to try the appellant for murder. The ▯ High Court also referred the question of whether it would have been competent for the Attorney-General to have charged the appellant with robbery, since the proceeds of the robbery were brought into Zimbabwe.

Held, that there is a trend, followed in Zimbabwe as well as other countries, indicating that where the constituent elements of a crime occurred in different countries, the offence may be tried in any jurisdiction where any ▯ of those elements, or their harmful effect, occurred. A more flexible and realistic approach, based on the place of impact, or of intended impact, of the crime, is favoured.

Held, further, that there was no basis for the assumption of jurisdiction on the facts of this case. The connection between the crime and Zimbabwe was far too tenuous to form a basis for assuming criminal jurisdiction by ▯ a Zimbabwean court. None of the essential elements of the offence were committed on Zimbabwean soil. There was no harmful impact or effect on Zimbabwe. The fact that the appellant was a Zimbabwean and that any order given by the court would be effective was not sufficient to found criminal jurisdiction in respect of an offence committed outside ▯ Zimbabwe's borders and having no impact in Zimbabwe. The only link

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or connection with Zimbabwe was that the weapon used in the commission ▯ of the crime originated in Zimbabwe and was found in Zimbabwe after the offence. This, either alone or in conjunction with other factors of this case, was not sufficient to found jurisdiction in Zimbabwean courts for an offence that was committed outside its borders.

Held, further, that the appellant was not charged with robbery or theft, so ▯ there was no basis for the High Court to refer that matter to the Supreme Court.

Cases referred to

S v Kapurira 1992 (2) ZLR 17 (S)

S v Mharapara 1985 (2) ZLR 211 (S) c

R v Treacy [1971] AC 537

Case information

No appearance for the appellant

B Sigauke, for the respondent

Judgment

CHIDYAUSIKU CJ: The main issue that falls for determination in this case is ▯ whether the Zimbabwean court that tried the appellant for a killing that occurred in Botswana had the jurisdiction to do so. The facts of the case that are common cause are as follows.

The appellant is a Zimbabwean national. He lives in the Empandeni area of Plumtree. He once worked in Botswana at a place just on the other side of the ▯ border. On 18 January 1996, the appellant set off to go to Botswana. He had in his possession a loaded pistol. Once in Botswana, he went to a restaurant in an area where he once worked. The appellant was known to the owner of the restaurant and to other people there. He arrived at the restaurant round about 8 pm, just before the restaurant was due to close. He demanded some money from the wife of the owner of the restaurant. The owner of the restaurant ▯ responded by striking him with a sjambok. The appellant moved backwards towards the door and as he did so he took out the pistol and shot the owner of the restaurant, who died a few days later. After the shooting, the appellant took money from the restaurant and returned to Zimbabwe. He was arrested in Zimbabwe with some of the stolen money. The pistol was recovered from a bush area in Zimbabwe where the appellant had hidden it.

He was tried in ^g the High Court of Zimbabwe in Bulawayo. He was found guilty of murder with actual intent. The court found no extenuating circumstances and sentenced the appellant to death.

The trial judge *mero motu* raised the issue of jurisdiction and referred the case to this court in terms of s 25 of the High Court Act [Chapter 21:29]. The referral ^h

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A reads as follows:

“(1) Did the High Court of Zimbabwe have jurisdiction to try the accused for murder?

(2) In the event that it had no jurisdiction, could the Attorney-General charge the accused with some other charges such as robbery or theft since the proceeds of the offence were brought into Zimbabwe?

^b While there seems to be no difficulty with a charge of theft, which is a continuing offence, would the same apply on the charge of armed robbery in view of the circumstances of this case?

I would advise that I have advised both counsel on this move, although they had not raised this issue either before or after the trial. They both agree with this move.”

^c The two issues referred to this court for determination are whether the court *a quo* had jurisdiction to try this case and whether the Attorney-General can charge the appellant with robbery or theft.

Before dealing with the legal issues referred for determination, I wish to note that the appellant in this case was found guilty of murder and sentenced to ^d death. His appeal to this court is automatic. Accordingly, when this matter was heard, counsel made submissions in regard to both the merits of the conviction ^e and sentence and the points of law referred to this court by the court *a quo*.

I will deal first with the issue of jurisdiction as the conclusion I have reached on this issue makes it unnecessary to consider the merits of the conviction and sentence.

THE LAW

The general principle of the common law that criminal jurisdiction of a court does not extend beyond the borders of a country seems to be losing ground. In this regard the learned authors Lansdown & Campbell, in their book *South ^f African Criminal Law and Procedure* vol 5, had this to say at p 9:

“The general principle of the common law that jurisdiction does not extend to acts committed abroad appears to be losing ground in the face of a trend indicating that where the constituent elements of a crime occurred in different countries, the offence may be tried in any jurisdiction where any of those elements, or their harmful effect, occurred. This submission ^g draws strength from the novel approach to the question of jurisdiction adopted by the House of Lords in *R v Treacy* [1971] AC 537, a case in which a blackmailing letter written and posted in England was received by the addressee in Germany.”

The courts in Zimbabwe have accepted the new approach to jurisdiction ^h enunciated in *Treacy's* case *supra*. The case of *S v Mharapara* 1985 (2)

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ZLR 211 (S) was decided on the basis of the approach enunciated in *Treacy's* ^a case *supra*. The facts of *Mharapara's* case were that the appellant was charged with the theft of the equivalent in Belgian francs of Z\$30 499.62. The theft occurred in Belgium while the appellant was based in Belgium and attached to the Zimbabwe Representative Mission. The theft was only discovered after the appellant had left Belgium and returned to Zimbabwe. On ^b a charge of theft being put to the appellant on trial before the High Court of Zimbabwe, an exception to the charge was taken on the ground that the Zimbabwean courts had no jurisdiction to deal with the matter. The exception was dismissed and the appellant appealed. This court dismissed the appeal and concluded that the Zimbabwean courts had jurisdiction. Gubbay CJ at pp 221F-222C, after citing the above passage from Lansdown & Campbell, had ^c this to say:

“With regard to the law of Zimbabwe, I can see no justification for a rigid adherence to the principle that, with the exception of treason, only those common law crimes perpetrated within our borders are punishable. That principle is becoming decreasingly appropriate to the facts of international life. The facility of communication and of movement from country to ^d country is no longer restricted or difficult. Both may be undertaken expeditiously and at short notice. Past is the era when almost invariably the preparation

and completion of a crime and the presence of the criminal would coincide in one place, with that place being the one most harmed by its commission. The inevitable consequence of the development of society along sophisticated lines and the growth of technology have led ^ε crimes to become more and more complex and their capacity for harming victims even greater. They are no longer as simple in nature or as limited in their effect as they used to be. Thus, a strict interpretation of the principle of territoriality could create injustice where the constituent elements of the crime occur in more than one state or where the *locus commissi* is fortuitous so far as the harm flowing from the crime is ^ϕ concerned. Any reluctance to liberalise the principle and adopt Anglo-American thinking could well result in the negation of the object of criminal law in protecting the public and punishing the wrongdoer. A more flexible and realistic approach based on the place of impact, or of intended impact, of the crime must be favoured.

Accordingly, I am satisfied that although all the constituent elements of ^g the theft occurred in Belgium, in particular the obtaining of the money there, the State is nonetheless entitled to proceed upon the present indictment and adduce evidence at the trial, if such is available, to establish the fact that the harmful effect of the appellant's crime was felt by the Zimbabwe Government within this country." ^h

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^a Thus, *Mharapara's* case *supra*, clearly broadens the basis of assumption of criminal jurisdiction beyond territoriality and introduced the principle of impact as a basis of assuming criminal jurisdiction in Zimbabwe.

The case of *Mharapara supra* was approved of and followed in the case of *S v Kapurira* 1992 (2) ZLR 17 (S). The appellant in that case and another ^b person, who were both Zimbabwean citizens, had crossed into Mozambique in order to attend a beer drink there. The appellant attacked his fellow Zimbabwean and fatally wounded him. The victim was returned to Zimbabwe where he died of bleeding from the wound. When the appellant returned to Zimbabwe he was arrested and charged with murder. The High Court decided that it had jurisdiction to try the case and the appellant appealed against the ^c decision. This court dismissed the appeal and observed that generally the courts in Zimbabwe favoured the approach of basing jurisdiction upon place of impact or intended impact. The jurisdiction in this case was, however, assumed on the basis that an essential element of the offence occurred in Zimbabwe. McNally JA, who delivered the judgment of the court, had this to say at p 20:

" ^d I would say there is no simple answer to the question: 'Where was the crime committed?'. One would have to answer: 'The assault was committed in Mocambique, and the consequent death took place in Zimbabwe, so the crime was completed in Zimbabwe'. In the same way, there is no simple answer to the question: 'When was he killed?'. One would have to answer: 'He was assaulted on the one day and he died on the next'.

^e It seems to me, therefore, that it is not necessary to go into the question of what would have happened if –

- (a) The victim had died on the spot;
- (b) The victim had recovered;
- (c) The victim had been a Mocambican; or ^f
- (d) The appellant had remained in Mocambique.

I am content to accept and apply the test laid down by the Chief Justice in *Mharapara supra* when he said, at p 217C-D:

'... the underlying *ratio* was that a court may exercise jurisdiction where either a substantial element of the offence or the harmful effect thereof occurred within its territorial boundaries.'

^g This approach is entirely supported by the extracts cited at p 221 from Lansdown & Campbell *South African Criminal Law and Procedure* vol 5 at pp 9 and 11.

Of the two bases set out by the Chief Justice, I think it might be straining the bounds of language to say in this case that the harmful effect of the ^h offence was felt in Zimbabwe. I will, however, leave that aspect open,

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because it seems to me indisputable that a substantial element of the ^a offence (i.e. the death of the victim) took place in this country."

The learned Judge of Appeal also went on to make the following observation at p 21E, which I respectfully agree with:

"I am wary of attempts to tie down too closely the criteria by which the decision to assume or not to assume jurisdiction is taken. I am satisfied ^b that in our law jurisdiction may be assumed, and in this case was properly assumed, on the ground that an essential element of the crime occurred in Zimbabwe and because of the other supporting factors to which I have referred."

The cases of *Mharapara* and *Kuparira supra* provide useful guidelines or criteria to determine jurisdiction. But the criteria provided are not exhaustive, ^c nor were they intended to be exhaustive.

APPLICABILITY OF THE LAW TO THE PRESENT APPEAL

I am satisfied that none of the criteria in *Mharapara's case supra* or in *Kapurira's case supra* provide a basis for the assumption of jurisdiction in this case. I see no basis for the assumption of jurisdiction on the facts of this ^d case. The connection between the crime and Zimbabwe are by far too tenuous to form a basis for assuming criminal jurisdiction by a Zimbabwean court.

The offence charged in this case was murder. Although the appellant in this case is a Zimbabwean, the victim was not Zimbabwean. The victim died in Botswana. None of the essential elements of the offence were committed on ^e Zimbabwean soil. There was no harmful impact or effect on Zimbabwe.

I accept that the principle of effectiveness is satisfied, given that the appellant is a Zimbabwean and any order given by this court would be effective. However, that alone, in my view, is not sufficient to found criminal jurisdiction in respect of an offence committed outside Zimbabwe's borders and which offence has no impact in Zimbabwe. ^f

As far as the principle of comity, referred to in *Kapurira's case supra* is concerned, that only arises where a court is assuming jurisdiction, lest that assumption may offend another State. In any event, there is an extradition treaty between Zimbabwe and Botswana and the Botswana Government would have had no problem in extraditing the appellant to Botswana to stand ^g trial there.

As far as the crime itself is concerned, the only link or connection with Zimbabwe is that the weapon used in the commission of the crime originated in Zimbabwe and was found in Zimbabwe after the offence. I am satisfied that this, either alone or in conjunction with other factors of this case, is not ^h

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A sufficient to found jurisdiction in Zimbabwean courts for an offence that was committed outside its borders.

In conclusion, I am satisfied that the High Court of Zimbabwe had no jurisdiction to try this murder which was committed outside the borders of Zimbabwe and which had no impact or intended impact on Zimbabwe.

^b The second issue referred to this court raised the question of whether the Attorney-General could charge the appellant with robbery or theft. The appellant was not charged with robbery or theft, so there was no basis for the High Court to refer that matter to this court. Indeed, if the appellant had been charged with those offences, different considerations would have applied. In particular, the fact that theft is a continuing offence and that the proceeds of ^c the theft were brought to Zimbabwe would have made a difference.

However, the decision as to which offence to proffer is entirely up to the Attorney-General. It is not the function of this court to provide legal advice to the Attorney-General.

In the result, the appeal succeeds and the conviction is quashed and the ^d sentence is set aside.

^e ZIYAMBI JA & NDOU AJA concurred.

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S v KATSIRU 2007 (1) ZLR 364 (H)**2007 (1) ZLR p364**

Citation	2007 (1) ZLR 364 (H)
Case No	Judgment No. HH-36-07
Court	High Court, Harare
Judge	Makarau JP and Bhunu J
Heard	28 May 2007
Judgment	31 May 2007
Counsel	<i>E T Matinenga</i> , for the appellant <i>L Phiri</i> , for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Appeal — criminal case — criminal appeal from magistrates court — notice of appeal — duty of trial magistrate to comment on matters raised in notice of appeal — not sufficient simply to adhere to decision without comment

Criminal procedure — evidence — degree of proof in criminal cases — proof beyond reasonable doubt — accused's version might reasonably be true — accused entitled to an acquittal

Criminal procedure — evidence — sexual offence — abandonment of cautionary rule — effect of — courts must exercise special care and diligence when presiding over sexual cases

Criminal procedure — prosecutor — concession by prosecutor — conviction of accused not supported by prosecutor — trial court not bound by concession — duty of trial court to give serious consideration to any such concession — effect of failure to do so

Criminal procedure (sentence) — general principles — public opinion — effect — basic tenets of justice and fairness must be upheld in the face of public outcry — duty of judicial officers not to become emotionally involved

Headnote

When an appeal is noted in a criminal case and the magistrate is asked for his comments, he must not take the easy way out and leave everything to State counsel and the appeal court when it is the correctness or otherwise of his decision at stake. When confronted with a notice of appeal, a trial magistrate is duty bound to make an honest reassessment of his decision in the light thereof. It is helpful to everyone concerned, particularly to the appeal court, to know whether or not the trial magistrate still abides by his decision despite the notice of appeal. If for one reason or another the trial magistrate has had a change of heart, it is more honourable to say so than to adhere to an indefensible decision or take the easy way out.

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A out by declining to comment. Whatever the trial magistrate's position may be, he is duty bound to give brief and concise reasons for his position after considering the notice of appeal. In doing so he may save precious time and costs. The ends of justice cannot be served by prevaricating and being non-committal when the liberty of a citizen is at stake.

B The abandonment of the cautionary rule in sexual cases does not mean a wholesale relaxation of the ordinary standard of proof beyond reasonable doubt, which is meant as a safeguard against condemning the innocent together with the guilty in the difficult course of the due administration

of justice. On the contrary, the courts must exercise special care and diligence when presiding over sexual cases. Proof beyond reasonable c doubt demands more than that a complainant be believed and the accused be disbelieved. It demands that a defense succeeds wherever it appears reasonably possible that it might be true (*dicta per* Gillespie J in *S v Makanyanga* 1996 (2) ZLR 231 (H) at 235 followed).

Notwithstanding the public outcry against offenders in sexual cases, judicial officers should not lose sight of the basic tenets of justice and fairness. d They should remain focused on doing real and substantial justice with out fear or favor.

The appellant was charged with the rape of a 14-year-old girl. At the trial, the appellant argued that he could not have raped her in front of his niece whom he claimed was present at the scene. In the course of their investigations, the police failed to investigate this allegation, nor did the e State seek to rebut it. It also emerged at the trial that the complainant had made two contradictory statements to the police. In the one, she had complained of an indecent assault. In the other, she had complained of rape. Notwithstanding that the evidence of the two police witnesses on the point was contradictory, the State did not impeach either of them but left it to the court to decide which of the two was telling the truth. At the f conclusion of the case, the prosecutor conceded that the State had failed to provide its case. In spite of this and without making any reference to the concession in her judgment, the regional magistrate convicted the appellant and sentenced him to nine years' imprisonment of which two years were suspended, on appropriate conditions, for five years.

Held, that while the court was not bound by the concession made by the g State, it was duty bound to give serous consideration to it. The failure of the court even to mention the concession in its judgment gave the unsavoury impression that it had been ignored.

Held, further, allowing the appeal against conviction, that having regard to the serious inconstancies and contradictions inherent in the State case, h it was not difficult to appreciate why the concession by the prosecutor

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had been made. It was a serious misdirection by the court to convict the a appellant in the face of discredited evidence and the concession by the prosecutor

Cases cited

Chimbwanda v Chimbwanda S-28-02

S v Banana 2000 (1) ZLR 607 (S) b

S v Makanyanga 1996 (2) ZLR 231 (H)

S v Mupfudza 1982 (1) ZLR 271 (S)

R v W 1949 (3) SA 772 (A)

Case information

E T Matinenga, for the appellant c

L Phiri, for the respondent

Judgment

BHUNU J: The appellant is the leader and founding member of the Johanne Masowe Church in Marondera, a well known religious sect, whereas the complainant is the daughter of his former aide, one Perekedzai Rafirakumwe Ziumo. d

He was arraigned before the regional court sitting at Harare charged with and was convicted after a heavily contested trial of raping his former aide's 14 year old daughter on 23 November 2003. For his pains, he was sentenced to nine years' imprisonment of which two years were suspended for a period of five years on appropriate conditions of good behaviour.

Aggrieved by both conviction and sentence, he now appeals to this court for e redress. The appeal is premised on the following grounds of appeal:

"As against conviction

1. The trial court erred and gravely misdirected itself in not considering the *alibi* defence raised by the appellant.
2. The trial court in making a finding that the complainant was a credible F witness when she was not.
3. The trial court erred in finding that the crime of rape had been committed when medical evidence did not support such a finding.
4. The trial court erred in disregarding the evidence of two police details who testified for the State.
5. The court erred in finding that the State had proved its case beyond G a reasonable doubt when in fact the State had established, as conceded by it, a case on a balance of probabilities.

AS AGAINST SENTENCE

The sentence imposed is unduly severe and harsh and out of line with sentences imposed in cases of a similar nature. H

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A WHEREFORE the appellant prays that the judgment of the court *a quo* be set aside and substituted with a verdict that the appellant be found not guilty and acquitted."

When the record of proceedings and notice of appeal were referred to the trial magistrate for her comments in terms of normal procedure, she took the easy way out and simply remarked that she had no comments to make. I must hasten B to point out that when asked for his comments after presiding over a contested case, a magistrate must not take the easy way out and leave everything to the State counsel and the appeal court when it is the correctness or otherwise of his decision at stake. When confronted with a notice of appeal, the trial magistrate is duty bound to make an honest reassessment of his decision in C the light of the notice of appeal.

It is helpful to everyone concerned and particularly the appeal court to know whether or not the trial magistrate still abides by his decision despite the notice of appeal. If for one reason or another, the trial magistrate has had a change of heart, it is more honourable to say so than to fasten onto an indefensible decision or take refuge in the easy way out by declining to comment. Whatever D the trial magistrate's position may be, he is duty bound to give brief and concise reasons for his position after considering the notice of appeal for the benefit of everyone concerned. In doing so, the trial magistrate may save precious time and costs. The ends of justice cannot be served by being prevaricative and non-committal when the liberty of a citizen is at stake.

E Despite the trial magistrate's non-committal attitude, the State has consistently taken a clear and commendable stance declining to support the conviction, giving good and sufficient reasons for that decision. Right from the onset, the trial prosecutor in his closing remarks conceded that the State had failed to prove its case against the appellant beyond reasonable doubt, as is required by law, saying:

" F The State concedes as initially stated that this was a case which was badly investigated. The complainant appears to have been plausible witness and the shortcomings in her evidence has exposed her to be [unreliable] S v *Mupfudza* 1982 (1) ZLR 271 (S)."

While the trial magistrate was not bound by that concession, she was duty bound to give serious consideration to it, yet in her lengthy judgment she G made no reference to the concession thereby giving the unsavoury impression that she ignored the concession. Indeed, it is surprising if not amazing that the trial magistrate proceeded to convict without commenting on the State's apparently valid concession. The tragedy is, however, that the concession at appeal level came far too late to avert gross injustice being done to the H appellant.

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The unfortunate and unconscionable net result is that the appellant has been A languishing in prison since 19 January 2005, that is to say, a period in excess of two years' imprisonment in circumstances where neither the State nor the presiding magistrate are prepared to support the conviction and sentence. In other words, the appellant has been condemned to prison for a period exceeding two years in circumstances where no one believes that he is guilty of the offence charged or any other offence. That in itself can only amount to B a grave travesty of justice, if not gross injustice.

In the ordinary run of things, this should really be the end of the matter without any further ado. But because of the appellant's station in life as a prominent public figure and religious leader, there is need to briefly ventilate what it is that has prompted the presiding magistrate not to support her decision and c the State not to contest the appeal.

It is common cause that the complainant's mother passed away sometime in 1993. At the material time, the complainant was being looked after by a stepmother. Despite being an orphan she was, however, a delinquent problem child who needed counselling. One of her problems was flirting with boys and missing her school lessons such that, at one time, she even missed an d examination. It was then decided that she be referred to the appellant and his wife for counselling. There is controversy as to at whose instance the complainant was supposed to be counselled. The complainant said that it was at her stepmother's instance, whereas her father said it is the appellant who approached him requesting for permission to counsel his daughter.

That contradiction was never resolved. It was, however, not in dispute that e the appellant drove away with the complainant from a prayer meeting to his home for counselling. The complainant then alleged that the appellant raped her when they got within the precincts of his farm before proceeding to the farm house. She alleged that she bled and soiled her underpants when she was raped. She however washed the underpants without anyone having seen the blood stains, thereby destroying the evidence. f

At the farm, she did not make a report to anyone nor did she report at school the following day. She also did not lodge a complaint with her parents when she got home that day. She only made a report to her aunt about six days later.

The appellant flatly denied the charge arguing that he had probably been set up and framed by the complainant's father owing to controversy arising from g religious differences.

He further pointed out that he could not possibly have raped the complainant in the presence of his niece, one Roseline Majiranji, who was with them throughout the journey. The presence or otherwise of Roseline at the scene of the alleged crime was never investigated by the State, which failed to rebut h

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A her evidence confirming that she was present throughout the journey and no rape took place as alleged by the complainant. There being no eye witnesses to the alleged rape, it was a question of the complainant's word against that of the appellant. That being the case, the matter fell to be determined squarely on the basis of the credibility of witnesses bearing in mind always that the onus rested on the State to prove its case against the accused beyond reasonable b doubt.

In convicting the appellant, the trial court adjudged that the complainant was an honest and credible witness worthy of belief. In our law, it is considered that the trial court is in a better position to assess the demeanour and credibility of witnesses. This prompted Ziyambi JA in the case of *Chimbwanda v c Chimbwanda* S-28-02 to remark that:

"It is trite in our law that an appellate court will not interfere with findings of fact made by a trial court and which are based on the credibility of witnesses. The reason for this is that the trial court is in a better position to assess the witnesses from its vantage point of having seen and heard them. See *Hughes v Graniteside (Pvt) Ltd* S-13-84. The exception to this rule is where there has been a misdirection or a mistake of fact or where d the basis the court a quo reached its decision was wrong."

It is therefore incumbent upon us sitting as an appeal court to determine whether or not the trial court's assessment of the credibility of witnesses falls within the above exception. The appellant has attacked the complainant's credibility as a witness basically on the basis that she was inconsistent and e that she contradicted herself on material points of fact. A perusal of the record of proceedings shows that indeed the complainant contradicted herself on some material aspects of her evidence. In exposing the contradictions, we can do no better than refer to the record of proceedings.

The State sought to establish that the accused had sexual intercourse with the complainant without her consent by leading incontrovertible evidence to the f effect that she had been deflowered and was no longer a virgin. The appellant countered that the complainant was a wayward girl of easy virtue who could have been deflowered by any of her boyfriends. This prompted the prosecutor to ask her during the course of her evidence in chief:

"Q. Did you have any boyfriend or did you ever had any sexual intercourse prior to that incident?

- A. ^g To be honest and I swear to God I did not have any boyfriend. To be honest, I never had sexual intercourse with any boy or anyone at all.

BY THE PROSECUTOR TO COURT

Your worship, I intend to show the witness there are some letters which I understand the defence will be asking her questions on. I just wanted ^h her to confirm whether she knows anything about that."

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Under cross-examination, she was then asked by counsel for the appellant: ^a

"Q. So Amai Chiwanda is the same as Nyasha Muwani?

A. What I would want to think is that she could be in love with someone using the surname Chiwanda., but I know her using the name Muwani, but all the same, I also have a boyfriend who is called by the name Chiwanda or who uses that name.

Q. Who has a boyfriend called Chiwanda? ^b

A. Myself.

Q. For how long have you known this Chiwanda?

A. We started our relationship during the time I was still at Nyameni before I transferred to Rukodzi. We were just classmates when it ^c started.

Q. What is his name?

A. Leeroy."

Thus, after having initially vehemently denied having any boyfriend in her evidence in chief, the complainant later relented under cross-examination and confessed that she had a boyfriend after all. The confession only came after ^d she had been shown concrete irrefutable evidence that she indeed had a boyfriend. Her behaviour in this respect can only betray a deliberate mindset to mislead and deceive the court. After the alleged rape, she made two statements to the police. In her initial statement, she complained of attempted rape or indecent assault, saying that the appellant had inserted his finger into her female organ. A few days later, however, she made another statement ^e before a different police officer in which she alleged that the accused had in fact raped her by inserting his male organ into her private parts. The second recording detail explained in court that when he queried the apparent contradiction, the complainant said that she deliberately misrepresented facts in her initial statement because she was shy as there were many people in the ^f room. The first recording detail did not help matters by initially denying his own handwriting which was later conclusively established to be his by expert evidence. In court, the complainant, however, maintained that in fact she had told the first police officer that the appellant had in fact raped her.

Faced with contradictory factual evidence from State witnesses, the trial magistrate chose to believe the one, saying that the complainant had told him ^g that the appellant had in fact raped her, and disbelieve the other. She however accused both police witnesses of attempting to defeat the course of justice. We must, however, hasten to point out that the complainant's conduct at the police station in recording two contradictory statements was consistent with her proven behaviour in court in initially denying that she had a boyfriend, only to make an about turn when cornered. ^h

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^a Despite the thoroughly discredited evidence from the two police officers, the prosecutor did not see it fit to impeach either of the two police witnesses. The net result was that the State relied on two contradictory statements, leaving the trial court to pick and choose which evidence it preferred and the court proceeded to do just that. That in our view constituted a gross irregularity, because the onus was on the State to prove its case beyond reasonable doubt, ^b and not on the court. In fact, the State's reliance on two contradictory statements is evidence of the fact that it did not know which State witnesses to believe and which one to disbelieve.

The weighing and assessment of evidence in cases of a sexual nature can be a difficult business, particularly with recent developments both in the legal ^c sphere and on the social front. On the legal sphere, there has been a decisive shift from the archaic cautionary rule as propounded in the *Mupfudza* case *supra* which treated complainants in sexual cases as suspect or accomplice witnesses.

On the social front, there has been a hysterical demand for the cleansing of society from sexual offenders at all costs. Judicial officers should, however, ^D not lose sight of the basic tenets of justice and fairness or get emotionally involved. They must remain focused on doing real and substantial justice, without fear or favour, to all manner of people regardless of their station in life.

The proper modern approach in handling cases of a sexual nature was laid down in the well known case of *S v Banana* 2000 (1) ZLR 607 (S) where the ^E Supreme Court, the highest court in the land, hold that:

“... the cautionary rule in sexual cases is based on an irrational and outdated perception, and has outlived its usefulness. It is no longer warranted. to rely on the cautionary rule of practice in sexual cases. *Despite the abandonment of the cautionary rule, however, the courts must still carefully consider the nature and circumstance of alleged ^F sexual offences*” (my emphasis).

Thus, on the basis of the ratio laid down in the *Banana* case *supra*, the abandonment of the cautionary rule did not mean a wholesale relaxation of the court’s ordinary standard of proof beyond reasonable doubt which is meant as a safeguard against condemning the innocent together with the guilty in the difficult course of the due administration of justice. On the contrary, the ^G courts must exercise special care and diligence when presiding over sexual cases for the reasons given in *R v W* 1949 (3) SA 772 (A) at 780 where Watermeyer CJ had this to say:

“In rape cases for instance, the established proper practice is not to require that the complainant’s evidence be corroborated before a conviction is ^H competent. *But what is required is that the trier of fact should have*

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clearly in mind that cases of sexual assault require special treatment, ^A that charges of this kind are generally difficult to disprove, and that various considerations may lead to their being falsely laid” (my emphasis).

The required standard of proof beyond reasonable doubt was succinctly expounded in the case of *S v Makanyanga* 1996 (2) ZLR 231 (H) at p 235 when ^B the court observed that:

“A conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of a criminal complaint, but the fact that such credence is give to the testimony does not mean that conviction must necessarily ensue. Similarly, the mere failure of the accused to win the faith of the bench does not disqualify him from an acquittal. Proof beyond ^C reasonable doubt demands more than that a complainant be believed and the accused disbelieved. It demands that a defence succeeds wherever it appears reasonably possible that it might be true.”

In this case, it is common cause that the appellant’s defence to the effect that he could not possibly have raped the complainant in front of his niece Roseline was never investigated nor rebutted. This was a valid reasonable and possible ^D defence which the State was constrained to rebut. This the State did not do. It was therefore untenable, if not grossly unreasonable, for the trial court to convict in the face of an unrebutted valid defence.

Having regard to the serious inconsistencies and contradictions inherent in the State case as demonstrated elsewhere in this judgment it is not difficult to appreciate why the State made the valid concession that it had dismally ^E failed to establish its case against the accused It was therefore remiss and a matter serious misdirection for the trial magistrate to convict the appellant in the face of discredited evidence and a concession from the State that it had failed to establish its case against the accused beyond reasonable doubt. That being the case, the appeal can only succeed. It is accordingly ordered that: ^F

1. The appeal be and is hereby allowed.
2. That the conviction and sentence be and is hereby quashed and set aside.
3. That the trial court’s verdict be and is hereby replaced by the verdict that the accused is found not guilty and acquitted. ^G

MAKARAU JP concurred.

Munangati & Associates, appellant’s legal practitioners

The Attorney General’s Office, respondent’s legal practitioners ^H

Document 50 of 53**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 1/STRINGER v CHRMN, ZIMBABWE ELECTORAL COMMISSION & ORS 2007 (1) ZLR 373 (H)

STRINGER v CHRMN, ZIMBABWE ELECTORAL COMMISSION & ORS 2007 (1) ZLR 373 (H)
2007 (1) ZLR p373

Citation	2007 (1) ZLR 373 (H)
Case No	Judgment No. HH-41-07
Court	High Court, Harare
Judge	Uchena, J
Heard	15 May 2007
Judgment	13 June 2007
Counsel	<i>L Chibwe</i> , for the applicant <i>G Chikumbirike</i> , for the first respondent <i>H Zhou</i> , for the second to ninth respondents <i>J Terera</i> , for the tenth respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Local government — *election — elections of mayor and councillors — when such elections must be held — by-election — distinction from general election — postponement of elections — grounds for — ward and city boundaries not delineated*

▯ **Practice and procedure** — *parties — joinder of — action against Electoral Commission — failure to join Registrar-General not fatal*

Headnote

The applicant, a resident of the City of Harare and a registered voter for an area falling under the City of Harare, was aggrieved by the first respondent's failure to conduct elections for councillors and mayor of the City of Harare, which he claimed should have been held in August 2006, the last election of councillors having been held in March 2002. He sought an order compelling the first respondent to give notice in terms of s 124 of the Electoral Act [*Chapter 2:13*] of the holding of elections for councillors and mayor of the City of Harare. The tenth respondent (the responsible Minister) admitted that elections were not held in August 2006, but said F that elections could not be held due to circumstances beyond his control.

A general election to elect councillors for the City of Harare was held in August 1995. The elected councillors were all suspended by the then Minister in February 1999. In terms of the then existing law the Minister should have caused a general election to be held in August 1999. An G election was not held then, but instead commissioners were repeatedly appointed to run the affairs of the city until March 2002. The councillors and mayor elected at that time were once again suspended and then dismissed by the Minister, who again repeatedly appointed a commission to run the city. In terms of s 121 of the Act, a general election of councillors must be held in every fourth year on any day in August fixed by the H commission

The respondents submitted that the applicant's failure to cite the Registrar- A General, even though he is the officer charged with the responsibility of preparing the voters roll in terms of s 117 of the Act, was fatal to the applicant's application. They also argued that the determining date for fixing a general election of councillors was August 1999 and that elections were thus not due until August 2007, so the application, they B said, was premature. They argued that the March 2002 elections were by-elections, which did not affect the date on which a general election must be held. The Minister argued that, although he was not opposed to the holding of an election, it was not possible to do so as the boundaries of the city had changed and it was necessary to change the boundaries of existing wards. C

Held, that the clear meaning of s 18(2) of the Electoral Act, as read with s 4(1)(b) of the Zimbabwe Electoral Commission Act [Chapter 2:12], was that the Registrar-General performs and exercises his functions under the direction and control of the commission. The non-joinder of the Registrar-General was thus not fatal to the applicant's application as the first respondent could ensure that the Registrar-General D co-operates with it in complying with any order which required it and the Registrar-General to do anything in connection with the holding of an election.

Held, further, that the previous Electoral Act and the current Electoral Act clearly established that the four year periods during which general elections for councillors should have been held should be reckoned from E August 1999, when they were due, because of the lapsing of the four year period from August 1995. The appointment and re-appointment of commissioners did not remove the requirement to hold elections. If the March 2002 elections were a by-election, then they could not be used to reckon the date of the next election. August 1999 could not be used to F reckon the date of the next general election because no general election was held during that period and the four year periods are reckoned from one general election to another general election.

Held, further, that under s 121(3)(c), a by-election can be held to fill vacancies in the seats of all councillors. A by-election is meant to fill a casual vacancy or special vacancy or a vacancy arising from a ward or wards G being added to a council area or the number of councillors per ward or council area being increased. The by-election must be held not less than thirty-five days, nor more than ninety days, after the vacancy occurred. There was no evidence that the vacancies of councillors fell vacant not less than thirty-five days, nor more than ninety days, before the March H

A 2002 elections were held. In fact, no election for councillors was held between August 1999 and the elections held in March 2002. All the seats of councillors were vacant since all the councillors who were elected into office in 1995 had been suspended until their terms of office expired. When the next elections, due in August 1999, were not held, those posts remained vacant. It could not have been intended by the legislature that B if elections are not held in the fourth year, or during the next year by reason of a postponement, then the next elections would remain pending until August of the next fourth year and that by-elections could be held in between, in spite of the posts of councillors having remained vacant. A general election due in August 1999 could lawfully have been postponed to no later than August 2000. No elections were held up to August 2000 C or at any time in 2001. The elections therefore remained due from August 1999 to March 2002, when an election was held. The election held in March 2002 was thus a general election, as the failure to hold elections between August 1999 and August 2000 did not mean a general election could not be held thereafter in any subsequent year. That being the case, D the election should have been held in August 2006, with the possibility of postponement until August 2007.

Held, further, that elections are serious events during which citizens exercise their right to choose their representatives to manage the affairs of their city or country. The citizen's or resident's right to vote can be lost if elections are held at a time when his area is not covered in a constituency E or ward. It can also be lost if his name is not in a voter's roll. The effect of holding elections under such circumstances would be to disenfranchise those whose wards have not been created or made ready for an election. The absence of ward and city boundaries in a city for which local authority elections are due to be held would be a good reason for the Commission to postpone the elections for up to a year in terms of s 123 F and, therefore, a reason for the court not to order that they be held.

Cases cited

Fellner v Minister of the Interior 1954 (4) SA 523 (A)

Stevenson v Min of Local Govt & Ors 2002 (1) ZLR 498 (S)

G Zvobgo v City of Harare & Anor 2005 (2) ZLR 164 (H)

Legislation considered

Electoral Act [Chapter 2:01] s 103I(4)

Electoral Act [Chapter 2:13] ss 18(2), 121(1)(2)(3)(a)(b)(c), 123, 124(1)(b)(c)(d)

⁠ Zimbabwe Electoral Commission Act [Chapter 2:12] s 4(1)(b)

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Case information

L Chibwe, for the applicant ⁠

G Chikumbirike, for the first respondent

H Zhou, for the second to ninth respondents

J Terera, for the tenth respondent

Judgment

UCHENA J: The applicant is a resident of the City of Harare, a joint owner of ⁠ stand No. 285 Mount Pleasant Township 11, of Lot 35 Mount Pleasant, Harare, and a registered voter for an area falling under the City of Harare. He is aggrieved by the first respondent's failure to conduct elections for councillors and mayor of the City of Harare, which he claims were due in August 2006. He seeks an order compelling the first respondent to give notice in terms of s 124 of the Electoral Act [Chapter 2:13] hereinafter called the Electoral Act, of the ⁠ holding of elections for councillors and mayor of the City of Harare.

The first respondent is the Zimbabwe Electoral Commission, a Commission established in terms of section 3 of the Zimbabwe Electoral Commission Act [Chapter 2:12], hereinafter called the Electoral Commission Act. In terms of s 4 of the Act it is charged with the responsibility of conducting elections. ⁠

The second to the ninth respondents are commissioners appointed by the tenth respondent in terms of s 80 of the Urban Councils Act [Chapter 29:15] (hereinafter called the Urban Councils Act) to manage the City of Harare. The second respondent is their chairperson.

The tenth respondent is the Minister of Local Government, Public Works and National Housing. He is the Minister responsible for local authorities, and is ⁠ being jointly sued with the first respondent and the Commission managing the City of Harare for their failure to conduct elections for councillors and the mayor of the City of Harare in August 2006.

THE FACTS

The applicant seeks the following order against the first respondent: ⁠

- "1. the Zimbabwe Electoral Commission shall forthwith cause a general election to be held of Councillors for the City of Harare, and shall cause an election to be held for the Mayor of the City of Harare and in particular shall cause the relevant notices with regard to such elections to be published in terms of section 124 of the Electoral Act [Chapter 2:13] within 7 days of the date of service of this order of ⁠ court; and
2. the costs of this application be borne jointly and severally by the first respondent and any other respondent opposing these proceedings."

The applicant in his founding affidavit submitted that a general election to elect councillors and the mayor of the City of Harare should, in terms of s 121(2) ⁠

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A of the Electoral Act, have been, held in August 2006. The applicant bases his submission on the last elections for councillors and the mayor having been held in March 2002. In terms of s 121(2), a general election for local authorities shall be held in August of the fourth year after the previous general election. The applicant calculated the period of four years from March 2002. The respondents do not dispute that elections were not held in August 2006.

B The first respondent in its opposing affidavit submitted that it postponed the elections and did not give notice of the postponement, as s 123 of the Electoral Act provides that it may give such notice, but it is not mandatory that it should give notice.

The second to the ninth respondents in an affidavit deposed to by their C chairperson submitted that the applicant does not have *locus standi in judicio* to apply for an order compelling the first respondent to conduct elections.

The tenth respondent admits that elections were not held in August 2006, but states that elections could not be held due to circumstances beyond his control. He submitted that the appointment of a provincial governor for the Harare Metropolitan Province resulted in Harare's boundaries being extended, D new wards being created and the boundaries of existing wards being altered. He also said the shortage of surveyors resulted in delays in the creation of new boundaries for Harare and its wards.

The applicant, the first and tenth respondents agreed to incorporate papers filed in an earlier application in the case of *Combined Harare Residents E Association & Anor v Chairperson, Zimbabwe Electoral Commission & Ors* HC 2587/05. This reference file brings the history of elections for the City of Harare into this case. The history is essential as counsel for the applicant and the first respondent agree on the precedent created by the Supreme Court's decision referred to in that case, and the first respondent's submissions on when the elections are due is premised on previous elections referred to in F those proceedings. The second to the ninth respondents seem to be opposed to the incorporation of documents and papers from HC 2587/05 into this case. The second respondent, in her opposing affidavit, which she says represents the views of the third to the ninth respondents, but is not covered by any supporting affidavits from them, seems to protest the inclusion of papers filed G under HC 2587/05 because she does not know the contents of that file. That to me is not a convincing reason for opposing the incorporation. A party is expected to familiarize himself with public documents he is referred to. One cannot simply refuse to look at public documents and expect the court to H uphold such uninformed protest.

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THE HISTORY A

According to documents filed in HC 2587/05, a general election to elect councillors for the City of Harare was held in August 1995. The elected councillors were all suspended by the Minister in February 1999. In terms of s 103(I) of the now repealed Electoral Act [Chapter 2:01] a general election of councillors was to be held in every fourth year on any day in the month of B August. The fourth year from August 1995 can be reckoned to August 1999. In terms of the then existing law, the predecessor of the first respondent should have caused a general election to be held in August 1999. It is common cause that a general election was not held, in August 1999, but instead Commissioners were repeatedly appointed until March 2002 when an election was held. This failure to comply with the law aggrieved Lottie Getrude Bevier Stevenson, who C applied to this court for an order compelling the tenth respondent and others to conduct elections for councillors and the mayor of the City of Harare. She filed her application in October 2000 long after the period within which the Minister (the first respondent in that case and tenth respondent in this case) could have postponed the elections. Her application was dismissed by the High Court which held that she had no *locus standi in judicio*, even though D she had in her founding affidavit stated that she was a resident of the City of Harare and a registered voter. Stevenson appealed to the Supreme Court against the High Court's decision. Her appeal was upheld by the majority decision of the Supreme Court in *Stevenson v Min of Local Government & Ors* 2002 (1) ZLR 498 (S), which held that she, as a resident and registered voter, had an interest in how the affairs of the City of Harare were being managed E by commissioners, and was entitled to be represented by elected councillors. The

Supreme Court therefore held that she had *locus standi*, and proceeded to determine the application, which had been dismissed by the High Court, and granted it.

While the appeal was pending in the Supreme Court, elections for councillors and the mayor of the City of Harare were held in March 2002. These elections ^F were not held as a result of a court order. They were initiated by the executive in circumstances not disclosed to this court. The elected mayor and councillors managed the City of Harare, until the history of this City repeated itself when they, like the Tawengwa Council, were suspended and subsequently dismissed. Commissioners were appointed and have been managing the affairs of the City of Harare to this date. Their terms of office have been repeatedly renewed ^G through reappointments.

In June 2005, the Combined Harare Residents Association and Michael Jeffrey Davies, not being satisfied by the prevailing situation, filed an urgent chamber application (HC 2587/05). The court on 13 June 2005 held that the case was not urgent. The applicants thereafter filed a notice of withdrawal on 5 October ^H

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A 2006. The withdrawal was followed by the filing of the present application on 6 March 2007.

PRELIMINARY ISSUES

Legality of the order sought

Mr *Chikumbirike* for the first respondent submitted that the application ^B should be dismissed because the order sought can not be lawfully granted by this court. He submitted that s 121(2) of the Electoral Act provides for the holding of a local authority's general election in August. He therefore submitted that it would be unlawful to order that elections be held during a period which falls outside the month of August. Mr *Chibwe* for the applicant ^C submitted that the applicant's draft order can be lawfully made an order of this court.

The order sought seeks the publication of a notice in terms of s 124 of the Electoral Act, within seven days of the service of the order on the first respondent.

o Section 124 of the Act provides:

"(1) Not more than sixty-six or less than twenty-eight days before the day appointed for any election, the Commission shall, by notice published in a newspaper and posted at its office –

- (a) ...
- (b) fix a place or places within the council area at which [,] and a day ^E or days, not less than seven or more than twenty-one days after the publication of the notice in the newspaper, on which a nomination court will sit in terms of section *forty-six* to receive nominations of candidates for election as councilor or mayor, as the case may be; and
- (c) fix a day or days, not less than fourteen or more than forty-five ^F days after the nomination day or last nomination day, as the case may be, fixed in terms of paragraph (b), on which a poll shall be taken if a poll becomes necessary; and
- (d) fix a day on which the voters roll shall be regarded as closed for the purpose of accepting the enrolment of voters who may vote at the election, which day may be on or after the day of publication ^G of the notice or not more than thirty-one days before that day."

My understanding of s 124(1) of the Electoral Act is that the first respondent is required to give notice of an election not more than sixty-six or less than twenty-eight days before the day appointed for the election. This means the first respondent has discretion as to the actual date it can set for the election, ^H provided it falls between sixty-six days and twenty-eight days after the

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publication of the notice. The issue for consideration is whether or not it is ^A legally possible for the first respondent to comply with the provisions of s 124(1) of the Electoral Act, and still conduct the elections in August as required by s 121(2) of the same Act. The times and periods mentioned in s 124(1)(b) to (d) need not be considered as they are meant to be triggered by and fall within the sixty-six days or twenty-eight days already mentioned in ^B relation to the publication of a notice and

the day appointed for the election. In his heads of argument Mr *Chikumbirike* had used 2 April 2007 as the date of the granting of the order. If the case had been heard before that date and the court was able to grant its order on that day Mr *Chikumbirike's* submissions would have been correct, as the first respondent would have been required to set the date of elections between 29 May and 9 July 2007. This case was argued on 15 May and assuming the order can be granted by early to mid-June, the period between sixty-six days and twenty-eight days will fall between late July and early September 2007. This means if the first respondent uses its discretion wisely, it can publish a notice setting an election date in August 2007. It is therefore not correct, bearing in mind the date of hearing and the possible date of judgment, that the order which this court might grant if it finds for the applicant will be unlawful. I would, therefore, dismiss the first respondent's preliminary issue.

LOCUS STANDI

Mr *Zhou* for the second to the ninth respondents raised two preliminary issues. He submitted that the applicant has no *locus standi in judicio*, because the Supreme Court's remarks in *Stevenson supra* are *obiter dicta* and, therefore, not binding on this court. In *Stevenson v Minister of Local Government & Ors* 2002 (1) ZLR 498 (S) (the reported version), Sandura JA at p 501D said:

"The appellant's *locus standi* arose from the admitted facts that she resided in Harare and was a registered voter within the area falling under the jurisdiction of the Harare City Council. As a resident of Harare and as a registered voter, the appellant had an interest in the issue of whether the affairs of the City of Harare should be run by a commission appointed by the Minister or by an elected mayor and an elected council."

In developing his argument, Mr *Zhou* submitted that the issue which was before the Supreme Court was that of costs. I do not agree the issue was whether or not the appellant had *locus standi* and was entitled to the order she sought in the High Court. Even though the other respondents were not contesting the appeal and the second respondent was conceding it, the first respondent was contesting it. The court was therefore required to determine

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the issue of the appellant's *locus standi* and it did. After determining the issue of *locus standi*, it proceeded to determine the application and granted it.

The doctrine of *stare decisis* requires inferior courts to follow precedents created by superior courts whose position in the hierarchy of the courts in their jurisdiction entitles them to create precedents. The doctrine also requires superior courts to follow precedents created by courts at their level of jurisdiction but decided by a greater number of judges. This means a judge of the High Court sitting alone is bound by the decisions of two or more judges of the same court and of the Supreme Court. However, inferior courts are not required to follow every decision of superior courts. It is only the *ratio decidendi* (the reason for the judgment) which binds inferior courts. The *ratio decidendi* can also be described as the legal principle on which the court bases its decision. In the case of *Fellner v Minister of the Interior* 1954 (4) SA 523 (A) at p 537 (D), Greenberg JA said:

"It is the *ratio decidendi* of a case which is binding; the phrase literally means 'the reason for the decision' and the 'decision' means the order of court."

On the other hand, *obiter dictum* is a passing statement made by the judge which is not strictly relevant to the judgment. It can be an incidental remark, postulation and answering of a hypothetical question, etc.

Mr *Zhou* further submitted that this court in *Zvobgo v City of Harare & Anor* 2005 (2) ZLR 164 (H) held that the remarks of Sandura JA already referred to above were made *obiter dicta*. My reading of that case does not support that submission, because apart from the use of the word *dicta*, it does not say the remarks were made *obiter*. To the contrary, that case confirms that Sandura JA's judgment was binding as it created a precedent on the issue of the repeated reappointment of commissioners being illegal, a decision it arrived at after finding that the appellant had *locus standi*.

In the *Stevenson* case *supra*, the reason for the Supreme Court's finding that the appellant had *locus standi* was her being a resident of Harare and a registered voter entitled to vote in elections for councillors and the mayor of the City of Harare. The remarks by Sandura JA are therefore clearly not incidental, but are relevant to the court's decision and are the *ratio decidendi*.

g In this case, the applicant is also a registered voter and resident of the City of Harare. The issue has, therefore, been decided by a court of superior jurisdiction whose decision is binding on this court. This case is on all fours with the *Stevenson* case on the issue of *locus standi*; it cannot therefore be distinguished from it. I therefore find no merit in the preliminary issue raised h by Mr Zhou for the second to the ninth respondents it is dismissed.

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THE NON-JOINDER OF THE REGISTRAR GENERAL A

Mr Zhou for the second to the ninth respondents submitted that the applicant's failure to cite the Registrar General, even though he is the officer charged with the responsibility of preparing the voters roll in terms of s 117 of the Electoral Act, is fatal to the applicant's application. The applicant's counsel did not give a meaningful response on this issue. B

There is no doubt that the Registrar-General plays an important role in the preparation of elections for local authorities as is specified in ss 115 to 118 of the Electoral Act. He is the one who prepares the voters roll and calls for its inspection. He is an interested and active participant in issues involving the holding of elections. If his participation in the election sought by the applicant was independent of that of the cited parties, his non-joinder would have been C fatal to the applicant's application.

In this case, the provisions of s 18(2) of the Electoral Act as read with s 4(1)(b) of the Zimbabwe Electoral Commission Act, are relevant. Section 18(2) of the Electoral Act provides as follows:

"The Registrar-General of Voters shall exercise such functions as are D imposed or conferred upon the Registrar-General of Voters by or under this Act and, in the exercise of his or her functions, the Registrar-General of Voters shall be subject to the direction and control of the Commission ..."

Section 4(1)(b) of the Zimbabwe Electoral Commission Act provides as follows: E

"The Zimbabwe Electoral Commission shall have the following functions –

- (a) ...
- (b) to direct and control the registration of voters by the authority charged with that responsibility under an Act of Parliament."

The clear meaning of s 18(2) of the Electoral Act, as read with s 4(1)(b) of the F Zimbabwe Electoral Commission Act, is that the Registrar-General performs and exercises his functions under the direction and control of the Commission. Section 4 of the Electoral Act defines the Commission as follows:

"Commission" means the Zimbabwe Electoral Commission established in terms of section 3 of the Zimbabwe Electoral Commission Act G [Chapter 2:12]".

There is no doubt that the Commission which directs and controls the Registrar-General in the performance of his duties is the first respondent. It is, therefore, my view that the non-joinder of the Registrar-General in these circumstances is not fatal to the applicant's application as the first respondent can ensure that the Registrar-General co-operates with it in complying with H

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A any order which requires it and the Registrar-General to do anything in connection with the holding of an election.

ISSUES ON THE MERITS OF THE APPLICATION

Mr Zhou for the second to the ninth respondents and Mr Terera for the tenth respondent agreed with Mr Chikumbirike's submissions on the merits, but B Mr Terera made an additional submission on the state of Harare's boundaries and wards. The issues arising from the common response by the respondents, represented by Mr Chikumbirike's submissions are:

1. The reckoning of the next election period.
2. Identity of the March 2002 elections. C
3. When were/are the next elections due?

4. Can the elections for the mayor be conducted during the incumbency of a commission in council?

The issue arising from the additional submission by Mr *Terera* is:

1. Can the order sought be granted before the boundaries of Harare and its wards have been established?

RECKONING OF ELECTION YEAR

Mr *Chikumbirike* for the first respondent submitted that the year during which the next general election will be due should be reckoned from the August 1995 elections which were held, leading to Sandura JA holding in *the Stevenson case supra* that the following elections should have been held in August 1999. Mr *Zhou* and Mr *Terera* agreed with him as that is common cause in terms of the historical back ground of general elections for Harare City Council.

Mr *Chibwe*, however, submitted that the date of the next general election should be reckoned from the March 2002 elections. Mr *Chikumbirike*, with the concurrence of Mr *Zhou* and Mr *Terera* submitted that the March 2002 elections were a by-election, therefore the date of the next election should be reckoned from August 1999, meaning the next election from August 1999, was due in August 2003, and thereafter in August 2007. He further argued that the election for which the applicant seeks an order is not yet due, therefore the applicant's application was prematurely made and should be dismissed.

Section 121 of the Electoral Act provides for "when elections for Councillors" should be held. It provides as follows:

"(1) Subject to section 13 of the Rural District Councils Act [Chapter 29:13] and section 12 of the Urban Councils Act [Chapter 29:15], the first election for any council or ward shall be held

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on such date as may be fixed by the Commission in terms of section *one hundred and twenty-four*: Provided that the first election for a council shall be held before the date fixed for the coming into being of the council.

(2) Subject to this part, a general election of councillors shall be held in every fourth year on any day in the month of August fixed by the Commission in terms of section *one hundred and twenty-four*."

My understanding of s 121(1) is that no period is prescribed for the holding of a council's first election, provided that it shall be held before the coming into being of the council.

However, in terms of s 121(2) of the Electoral Act, a general election for councillors shall be held in every fourth year in August. The legislature used the words "subject to this Part" to allow for exceptions, provided such exceptions are provided for in Part XVIII.

Therefore, in terms of s 121(1) and (2), the periods during which the first election and general elections, for councillors should be held are calculated as follows:

- (a) the first election for a council should be held before the council comes into being, on a date to be fixed by the Commission.
- (b) the following general election and subsequent general elections should be held in the fourth year after the initial election, or in the fourth year after the previous general election during the month of August, or on a date on which the election can be held in terms of Part XVIII.

Section 123 of the Electoral Act provides for the postponement of elections. It provides as follows:

"Notwithstanding any other provision of this Part, if the Commission considers that it is necessary to postpone any election –

(a) to enable a voters roll to be prepared or updated; or

(b) for any other reason, to enable the election to be held properly in accordance with this Act:

the Commission may, by notice in the *Gazette*, postpone the election to such later date as it may specify in the notice:

Provided that –

- (i) the date to which the election is postponed shall not be later than one year after the last date on which the election was due to be held in terms of section *one hundred and twenty-one* or *one hundred and twenty-two* as the case may be;

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- (ii) in the case of an election to the office of mayor, the postponement shall not be for longer than three months after the office of mayor of the municipality concerned has for any reason fallen vacant."

My understanding of s 123 is that:

- (a) The Commission has authority to postpone any election, including general elections, and that is one of the exceptions provided by Part XVIII ^c of the Electoral Act, when a general election can be held, after the period of four years has elapsed, and on any date other than during the month of August.
- (b) The postponement should be for the preparation of the voters roll or for any reason connected to the proper holding of an election in accordance ^d with the Electoral Act.
- (c) The postponement shall be to a date not later than one year after the date on which the postponed election was due
- (d) In the case of mayoral elections, the postponement shall not be for longer than three months after the office of mayor fell vacant. ^d
- (e) The Commission can postpone an election notwithstanding any other provision of Part XVIII of the Act. For example, the requirement that general elections be held in the fourth year after the previous one and during the month of August can be disregarded if the election is to be held after the postponement.

^eIn his founding affidavit, the Chairman of the first respondent deposed that the Commission had postponed the election which was due in August 2006. The tenth respondent also conceded that general elections were due in August 2006, but they could not be held due to circumstances beyond his control.

In his heads of argument, Mr *Chikumbirike* seems to have abandoned the first ^F respondent's argument that it postponed the general election which was due in August 2006. If the position conceded by the first and tenth respondents is persisted in, the postponed elections would have been due not later than one year after August 2006, meaning they would have been due between August 2006 and August 2007.

^GThe argument advanced by Mr *Chikumbirike* can not be determined without making reference to the repealed Electoral Act [*Chapter 2:01*], as the events of the periods 1999, 2002 and 2003 he referred to occurred before 1 February 2005, when the current Electoral Act was brought into effect.

It is therefore, important to understand the law which should have governed the 1999, elections which were not held, and the March 2002 elections which ^H were held.

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The law as it was before 1 February 2005 was summarized by Sandura JA in ^A the *Stevenson* case *supra*, at p 503G-H of the reported version where he said

"With regard to the election of councillors, s 103I of the Electoral Act requires a general election of councillors to be held in every fourth year on any day in the month of August fixed by the second respondent in terms of s 103L of the Electoral Act. Since the councillors, all of whom were ^B suspended by the Minister in February 1999, had been elected in August 1995, a general election of councillors should have been held in August 1999.

Although s103K of the Electoral Act allows the Minister to postpone the election of councillors for a period not exceeding one year, when the appellant filed her application in the *High Court in October 2000 that year had already passed. The election of councillors was therefore long ^C overdue and again, no cogent reason was given by the respondents for their failure to comply with the law*" (emphasis mine).

It is clear that the law as to how long after a previous general election another general election should be held and during which month has not changed. The period of four years between general elections and the holding of such ^D elections in August remains un-changed. The law on the postponement of such elections for a period not exceeding one- year also remains unchanged. The Supreme Court however made it clear that the general election was long overdue in October 2000 even though the elections should have been held by not later than August 2000. This means if an election is not held within a year after its postponement it remains due, in spite of the authorities' failure to ^E comply with the law.

The Supreme Court *per Sandura JA* also considered the effect of the repeated appointments of Commissioners on the holding of an overdue general election. At pp 505F-506A of the reported judgment he said:

"Having said that, it is clear beyond doubt that s 80 (5) of the Urban Councils F Act, in terms of which the commissioners were re-appointed, on two or three occasions, was not meant to be a vehicle for the postponement of a general election of councillors. *In fact, the re-appointment of the commissioners did not in any way whatsoever affect the legal obligation to hold a general election of councillors every fourth year.*

I say so because there is no provision in the Electoral Act or the Urban G Councils Act which states that once commissioners are appointed or re-appointed any general election of councillors which is due is postponed indefinitely.

Consequently, the Minister could not avoid having a general election of councillors by continually re-appointing the commissioners. In my view, s 80(5) of the Urban Councils Act was not enacted for that purpose. H

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A The power given to the Minister by that section was intended for use, as a temporary measure, during the period preceding the holding of elections as required by the Electoral Act. The re-appointments of the commissioners were, therefore, unlawful" (emphasis is mine).

The law, as it was before the current Electoral Act and as it is under the current Electoral Act, clearly establishes that the four year periods during which B general elections for councillors should have been held should be reckoned from August 1999, when they were due because of the lapsing of the four year period from August 1995. This should be subject to the effect of the Minister's implied postponement of the August 1999 elections up to August 2000, referred to by Sandura JA and the subsequent continued pending of the general elections. This means if the August 1999 elections were postponed C to any time between August 1999 and August 2000, and had been held during that period, the four-year period could be reckoned from August 2000. As a general election was not held in the fourth year which fell in August 1999, and in the following year up to August 2000 as allowed by reason of a possible postponement, it remained pending and in fact became long overdue as was D observed by Sandura JA in the above quoted paragraph. The four-year period should in these circumstances be reckoned from the date, when the election, which was not held over the periods referred to above, was eventually held.

This, in my view, means the date of the next general election should be reckoned from the March 2002 elections if they can be proved to be a general E election as submitted by Mr Chibwe. If the March 2002 elections were a by-election, as submitted by Mr Chikumbirike, then they cannot be used to reckon the date of the next election. In my view, August 1999 can not be used to reckon the date of the next general election because no general election was held during that period and in my view, the four-year periods are reckoned from F one general election to another general election.

THE MARCH 2002 ELECTIONS

Mr Chibwe for the applicant submitted that these elections were a general election therefore the next general election should have been held in August 2006, as the period of four years reckoned from March 2002 results in the next G general election being due in August 2006. He further submitted that the elections should have been held in August 2006 because s 121(2) of the Electoral Act provides that general elections should be held in August. Mr Chikumbirike whose submissions were adopted by Mr Zhou for the second to the ninth respondents and Mr Terera for the tenth respondent, submitted that the March 2002 elections were a by-election as general H elections are held in August. He referred the court to s 121(3) which provides

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for when general elections of councillors should not be held. He concluded A by submitting that since the March 2002 elections were a by-election for councillors' terms of office which should have started in August 1999, the next general election from August 1999 was due in August 2003 and therefore the next election is due in August 2007, and is not yet due, therefore the applicant's application is premature. B

In view of the provisions of s 121(2) of the Electoral Act already referred to, the fact that the March 2002 elections were not held in August could have given credence to Mr *Chikumbirike*'s submissions if they were held in the fourth year reckoned from the previous general election. The fact that they were held in the seventh year after the previous general election of August 1995 makes the provisions of s 121(2) which provides for election periods from c August of one general election to August in the fourth year of the next general election inapplicable. The provisions of s 121(3) he referred to do not strengthen his argument but weaken it.

Section 121(3) of the Electoral Act provides as follows:

"No general election of councillors shall be held within four years after – d

- (a) the first election of councillors to the council; or
- (b) an initial election of councillors held immediately before the area of another local authority was incorporated into the council area; or
- (c) a by-election held to fill vacancies in the seats of all the councillors of the council concerned."

A reading of s 121(3)(c) makes it clear that a by-election can be held to fill e vacancies in the seats of all councillors. This seems to be what Mr *Chikumbirike* believed was intended to happen in March 2002. All the seats of councillors were vacant since all the councillors who were elected into office in 1995 had been suspended till their terms of office expired. When the next elections due in August 1999 were not held those posts remained vacant. This presents a f challenge to Mr *Chikumbirike*'s submission as, in my view, a by-election cannot be held for posts which were never given a term of office by the election of councillors at a general election. This, in my view, leaves the posts of councillors which were filled in the March 2002 election without a starting point if that election was a by-election. This view is supported by the general election which was due in August 1999, having remained due up to August g 2000 and thereafter up to March 2002. A reading of ss 121(2) and 121(3) of the Electoral Act leaves no doubt that the intention of the legislature was that general elections should be held at intervals of four years and in the month of August. The use of the words "No general election of councillors shall be held within four years after" ... the situations mentioned in (a) to (c) of s 121(3), h

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A clearly means a general election can be held in August of the fourth year and thereafter, after the initial or previous general election, but not before the fourth year. The limiting of the elections to the month of August applies to general elections held in the fourth year. Section 123 of the Electoral Act makes it clear that it does not apply to elections held in the following year after a postponement. It seems to me clear that the legislature, realizing that further b delays are not desirable after a postponement, provided that elections be held at any time between the date of postponement and the lapsing of a period of one year from the time the general election was due. If the general elections to be held soon after a postponement can not wait for the next August, I see no basis for requiring an election being held in the seventh year being required to be held in the month of August.

c It could not have been intended that if elections are not held in the fourth year, or during the next year by reason of a postponement then the next elections would remain pending until August of the next fourth year and that by-elections could be held in between inspite of the posts of councillors having remained vacant. A general election due in August 1999 could lawfully have d been postponed to no later than August 2000. No elections were held up to August 2000 and at any time in 2001. The elections therefore remained due from August 1999 to March 2002 when an election was held. The election held in March 2002 is in all probability a general election as the failure to hold elections between August 1999 and August 2000 does not mean a general election could not be held thereafter in any subsequent year.

e The only reasonable conclusion which can be drawn from the law and the facts established by the applicant's founding and replying affidavits and the respondents' opposing affidavits and the documents filed under HC 2587/05, is that the March 2002 elections were a general election. The first and tenth respondents therefore correctly conceded this point in their opposing f affidavits. There is no legal basis for holding a by-election when the general election remained pending from August 1999 to March 2002. This leaves the by-election hanging on a general election which was never held. A by-election cannot be held before a general election has filled the posts which then fall vacant and can now be filled by it, within a prescribed period. Section 103I (4) of the now

repealed Electoral Act [*Chapter 2:01*], as amended by s 6 of Act No. 21 of 1997, which was the applicable law in March 2002, confirms the view that if that election was a by-election, it is not in legal harmony with any general election. Section 103I(4) provides as follows:

"A by-election to fill –

- (a) a casual vacancy or special vacancy on a council; or
- (b) a vacancy arising from ...

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- (i) any area added to a council area being constituted an additional ward; or
- (ii) the number of councillors of a council area or ward being increased;

shall be held on a date fixed by the Registrar-General in terms of section *one hundred and three L*, which date shall be not less than thirty-five days nor more than ninety days after the date on which the vacancy occurred."

The clear meaning of this section is that a by-election is meant to fill a casual vacancy or special vacancy or a vacancy arising from a ward or wards being added to a council area or the number of councillors per ward or council area being increased.

The by-election must be held not less than thirty-five days nor more than ninety days after the vacancy occurred. There is no evidence that the vacancies of councillors of the City of Harare fell vacant not less than thirty-five days nor more than ninety days before the March 2002 elections were held. In fact, it is conceded that no election for councilors was held between August 1999 and the elections held in March 2002.

I am therefore satisfied that the March 2002 elections were a general election and not a by-election.

THE NEXT ELECTIONS

Mr *Chibwe* for the applicant submitted that the next general elections were due in August 2006. He based his submission on his belief that the March 2002 elections were a general election.

Mr *Chikumbirike*, with the concurrence of Mr *Zhou* and Mr *Terera*, submitted that the next general election is due in August 2007. He based his submission on his belief that the March 2002 elections were a by-election filling all posts of councillors for the City of Harare whose terms of office should have commenced in August 1999.

In view of my finding that the March 2002 elections for Harare City Council were a general election, I find no merit in Mr *Chikumbirike's* submissions. The date of the next election can be reckoned from the March 2002 council elections. The applicant has therefore proved his case that the next general election was due in August 2006. In view of the first respondent's admission that it postponed the holding of that election, the next general election is due by not later than one year from the last date the August 2006 elections were due. This means the next general election for the City of Harare is due by not later than August 2007.

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A THE MAYORAL ELECTIONS AND THE INCUMBENCY OF A COMMISSION

Mr *Chibwe* for the applicant submitted that mayoral elections should have been held at the same time as elections for councillors in August 2006, and are therefore due in August 2007.

Mr *Chikumbirike* for the first respondent submitted that mayoral elections can not be held during the incumbency of a commission managing the affairs of the City. He further submitted that mayoral elections should be held in August 2007 or such other time to which elections for councillors may be postponed. His submission is based on it not being possible to have a mayor who holds an executive post working with a commission which also exercises executive functions.

The Supreme Court in the *Stevenson* case *supra* found that the repeated re-appointment of a commission was unlawful. The same view was also held in several judgments of this court. In

Zvobgo v City of Harare & Anor supra Makarau J (as she then was), after referring to Sandura JA's comments ^D on the unlawfulness of the two or three re-appointments of commissioners, said:

"This court had expressed similar sentiments in *Combined Harare Residents Association & Anor v The Registrar-General* HH-210-01. In that matter, Hungwe J had to determine whether the power granted the Minister to appoint commissioners in terms of the Act could be used to indefinitely postpone the holding of elections for councillors and for a mayor for the ^E City. In useful *dicta*, the learned judge had this to say at p 9 of the judgment:

'The matter which gave urgency at the inception of this application, at least from the papers, was that the term of office of the current commissioners expires at the end of December 2001. There is a real danger that should there be no duly elected mayor in office by 31 December 2001, ^F then the City of Harare will grind to a halt as it will not be legally able to expend any money for any purpose. This fear arises from the fact that the Minister cannot lawfully reappoint commissioners *ad infinitum*. Any such re-appointment is illegal.'

I agree that the re-appointment of the commission after the first six months period was not in accordance with the provisions of the Urban Councils ^G Act and was therefore illegal."

The issue of the legality of a commission appointed after its first six months in office has been resolved by several decisions of this court which I agree with, and settled by the Supreme Court's decision which is binding on this ^H court.

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Uchena J

In view of the settled legal position on the status of the Commission, its ^A incumbency can not be used to prevent the holding of a mayoral election which is due.

If the Commission's incumbency is unlawful, it can therefore not be a bar to the holding of mayoral elections.

CITY'S BOUNDARIES, NEW WARDS AND NEW WARD ^B BOUNDARIES

Mr *Terera* for the tenth respondent submitted that the tenth respondent is not opposed to the holding of a general election for the City of Harare but is not yet ready for such elections in view of the appointment of a Provincial Governor for Harare Province and the extension of Harare to areas which ^C previously fell outside it. In his opposing affidavit, the tenth respondent said new wards had to be created to cover the new areas now under the City of Harare. This also made it necessary to rearrange the boundaries of existing wards. He further submitted that the creation of these boundaries is in progress but is taking long due to the shortage of surveyors in the Surveyor General's office. The applicant did not dispute these facts in his answering ^D affidavit but his counsel argued that they are not a legal basis for not holding a general election.

Elections are a serious event during which citizens exercise their right to choose their representatives to manage the affairs of their city or country. The citizen's or resident's right to vote can be lost if elections are held at a time ^E when his area is not covered in a constituency or ward. It can also be lost if his name is not in a voter's roll. The effect of holding elections under such circumstances would be to disenfranchise those whose wards have not been created or made ready for an election.

Section 123(b) of the Electoral Act provides for the postponement of any election "for any other reason, to enable the election to be held properly in ^F accordance with this Act".

In my view, the absence of ward and city boundaries in a city for which local authority elections are due to be held would be a good reason for the Commission to postpone such elections and therefore a reason for this court not to order that they be held in spite of the circumstances described by the ^G tenth respondent. Holding elections in such circumstances would not be proper and in accordance with the law. In the circumstances, the court should seriously consider whether it would be prudent to order that elections be held in spite of the absence of city and ward boundaries. In my view, doing so in the absence of proof that the boundaries are now in place or an accompanying order that they be put in place before the elections would have the effect of ^H

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Uchena J

A disenfranchising some residents. The applicant has not challenged the tenth respondent's evidence on the issue of boundaries and he has not sought an order compelling the tenth respondent to create them before the holding of the elections. If the order sought is granted in these circumstances it will have the undesirable effect of disenfranchising some residents. The applicant's application can therefore not be granted.

B COSTS

Mr *Chikumbirike* for the first respondent submitted that the applicant should pay the first respondent's costs on the higher scale as one should not lightly sue public bodies causing them to incur unnecessary costs. Mr *Zhou* for the second to the ninth respondents and Mr *Terera* for the tenth respondent c sought costs on the ordinary scale.

Mr *Chibwe* for the applicant submitted that should the court not find in his client's favour costs should not be granted against him on the higher scale as this case raises important issues of public interest on the holding of elections for local authorities. I agree with Mr *Chibwe* that this case raises D issues of public interest. Mr *Chikumbirike* also conceded that the case raised issues of public interest but persisted on seeking costs on the higher scale. I am satisfied that granting costs on a higher scale will have the undesirable effect of deterring residents from challenging authorities in circumstances where they may have a legitimate right to do so. I will, therefore, grant the respondents' cost on the ordinary scale.

E In the result, it is ordered that the applicant's application be dismissed with costs.

Gill Godlonton & Gerrans, applicant's legal practioners

Chikumbirike & Associates, first respondent's legal practitioners

F *Manase & Manase*, second to ninth respondent's legal practitioners

Civil Division of the Attorney-General's Office, tenth respondent's legal H practitioners

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Source:

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S v SANDO 2007 (1) ZLR 394 (H)

2007 (1) ZLR p394

Citation	2007 (1) ZLR 394 (H)
Case No	Judgment No. HH-46-07
Court	High Court, Harare
Judge	Uchena J and Patel J
Heard	14 June 2007
Judgment	14 June 2007
Counsel	<i>T Nyakunikwa</i> , for the appellant <i>R Chikosha</i> , for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Appeal — *criminal case* — *appeal to High Court* — *appeal against conviction* — *Attorney-General not supporting conviction* — *procedure to be followed* ^c

Headnote

Where an appeal in a criminal case (other than an appeal against sentence only) has been noted to the High Court, and the Attorney-General does not support the conviction, the appeal may be disposed of in chambers. The procedure that should be followed is as follows. ^d

The Attorney-General or his representative should:

- (a) read the appeal record and decide whether or not he supports the conviction; and
- (b) if he does not support the conviction, he should give notice of his decision to the Registrar of the High Court, together with his reasons ^e for that decision.

He can give such notice at any time before the hearing of the appeal. The next stage is for the Registrar to place the appeal record and the Attorney-General's notice and reasons before a judge. The judge will read the Attorney-General's notice and reasons, together with the appeal record. If he is satisfied that the conviction cannot stand, he will ^f allow the appeal and quash the conviction without hearing argument from the parties or their legal representatives. The appeal will be allowed without any further participation of the parties.

Legislation considered

High Court Act [*Chapter 7:06*], s 35 ^g

Case information

T Nyakunikwa, for the appellant

R Chikosha, for the respondent

Judgment

UCHENA J: The appellant was charged with and convicted on one count of stock theft. He had pleaded not guilty to the charge. The brief facts of the case ^h

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Uchena J

^a are that the appellant is alleged to have connived with five others to steal the complainant's two oxen from farm No. 195 Rowa West, Zimunya, Mutare. He is alleged to have hired Antony Chinyamutangira to transport two slaughtered oxen from the Zimunya area, to his house. He is alleged to have taken Wedzerai Masunda, Charles Masvosva, Alfred Sando Louis and Paul Feausi to Antony Chinyamutangira's house in Chikanga. Antony Chinyamutangira and the ^b four then proceeded to farm No. 195, Rowa West Zimunya where they parked his Peugeot 504 pick up truck in the bush while the four proceeded to the complainant's cattle pen armed with knives and an axe. They drove out two oxen to the parked motor vehicle. They slaughtered them and loaded them on to the motor vehicle. On their way to Mutare, they were stopped by the police. The four who had accompanied Chinyamutangira to the farm jumped off the ^c motor vehicle. Chinyamutangira stopped the motor vehicle and attempted to run away but was arrested, leading to the arrest of Wedzerai Masunda, Charles Masvosva and Alfred Louis.

The State led evidence from Antony Chinyamutangira who told the court that he was hired by the appellant to transport his slaughtered oxen from Zimunya. ^d He parked his motor vehicle in the bush while the men who had accompanied him brought the oxen to the motor vehicle. He realized he was being involved in a theft but did not leave as his motor vehicle did not have a starter. When they came back and slaughtered the oxen he cooperated because he wanted to be paid after delivering the slaughtered oxen to the appellant. He was clearly an accomplice to the commission of the

offence but the prosecutor did not ^E advise the magistrate of the witness's status and he was allowed to give evidence without being warned in conformity with the directive given in *S v Simakonda* 1956 R & N 463 (SR) at 465B-C. The State led no other evidence to prove its case.

The appellant gave evidence in his own defence, denying any involvement in the commission of the offence. He called three defence witnesses, Wedzerai ^F Masunda, Charles Masvosva and Alfred Louis, who all said the appellant was not involved and did not take any part in the commission of the offence. They were part of the team which was stopped by the Police and were subsequently arrested. Charles Masvosva told the court that the Police assaulted him forcing him to implicate the appellant. His evidence was not challenged by the ^G state.

In his grounds of appeal, the appellant's counsel pointed out the following irregularities, and misdirections:

1. that the prosecutor did not inform the magistrate that the witness was an accomplice and that the trial magistrate did not warn the State's witness ^H even though he was an accomplice in the commission of the offence.

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Uchena J

2. the court misdirected itself by convicting on the uncorroborated evidence ^A of an accomplice.
3. that the State did not lead evidence to prove the commission of the offence.
4. that the State did not lead any evidence to counter Charles Masvosva's evidence that the Police assaulted him so that he could implicate the ^B appellant.
5. the court misdirected itself by failing to accept the evidence of defence witnesses who were exonerating the appellant.

These irregularities and misdirections were repeated in the appellant's heads of argument and in the appellant's counsel's submissions during the hearing ^C of the appeal. Of significance were the State's failure to inform the court that its witness was an accomplice in the commission of the offence; and its failure to lead evidence to satisfy the provisions of s 270 of the Criminal Procedure and Evidence Act [*Chapter 9:06*]. Section 270 provides as follows:

"Any court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment, summons ^D or charge under trial on the single evidence of any accomplice: Provided, that the offence has by competent evidence other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of such court to have been actually committed."

Section 270 requires that corroboration be sought for the accomplice proving ^E the commission of the offence. If no other independent evidence from that of the accomplice proves the commission of the offence, the court can not convict on the single evidence of an accomplice.

Mr *Chikosha* for the respondent conceded that the State did not lead evidence to prove the commission of the offence in spite of the appellant having denied knowledge of the commission of the offence and how the accomplice and ^F others where arrested at a police road block. He also conceded that the accomplice witness was not warned and that the evidence of one of the defence witnesses that he was assaulted by the Police to force him to implicate the appellant was not countered. I am satisfied that Mr *Chikosha* properly conceded that the conviction can not be supported and it should be set aside. ^G

I am, however, concerned that this court's time was wasted in the preparation and hearing of an appeal which was being conceded in spite of the existence of the provisions of s 35 of the High Court Act [*Chapter 7:06*], which could have been used to convert the appeal into a chamber appeal. Out of the four appeals set down for this week, three were conceded and could have been dealt with in terms of s 35 if the respondent's counsels were aware of s 35 and ^H

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Uchena J

^A gave the appropriate notices to the registrar, instead of making concessions in their heads of arguments. We would have been saved the need to prepare and sit for the appeals. Counsel for the parties would have been saved the need to appear before us to argue these appeals. The unnecessary expenses incurred by both parties and the court could have been saved. Section 35 ^B provides as follows:

"When an appeal in a criminal case, other than an appeal against sentence only, has been noted to the High Court, the Attorney-General may at any time before the hearing of the appeal, give notice to the registrar of the High Court that he does not, for reasons stated by him support the conviction, whereupon a judge of the High Court in chambers may allow the appeal and quash the conviction without hearing argument from the c parties or their legal representatives and without their appearing before him."

The procedure created by s 35 in respect of appeals other than those against sentence only is simple. It requires the Attorney-General or his representative to: d

- (a) peruse the appeal record and decide whether or not he supports the conviction;
- (b) if he does not support the conviction give notice of his decision to the registrar of the High Court, together with his reasons for that decision.

He can give such notice at any time before the hearing of the appeal.

e The next stage is for the registrar to place the appeal record, the Attorney-General's notice and reasons before a judge.

The judge will peruse the Attorney-General's notice and reasons together with the appeal record. If he is satisfied that the conviction cannot stand he will allow the appeal and quash the conviction without hearing argument from f the parties or their legal representatives. The appeal will be allowed without any further participation of the parties.

In view of the respondent's concessions, which I am satisfied were properly made, the appellant's appeal is upheld. His conviction and sentence are set aside. He is found not guilty and is acquitted.

g PATEL J concurred

Mugadza Mazengero and Dhliwayo, appellant's legal practitioners

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

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Source:

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STANBIC BANK ZIMBABWE LTD v DURAND 2007 (1) ZLR 398 (H)

2007 (1) ZLR p398

Citation	2007 (1) ZLR 398 (H)
Case No	Judgment No. HH-54-07
Court	High Court, Harare
Judge	Gowora J
Heard	13 September 2006
Judgment	20 June 2007
Counsel	Mrs J B Wood, for the excipient (defendant) E T Matinenga, for the respondent (plaintiff)
Case Type	Exception
Annotations	No case annotations to date

Flynote

Delict — negligence — duty of care — when arises — person recommending c potential customer to bank — whether such person owes duty of care to bank

Practice and procedure — pleadings — declaration — delictual action — claim based on fraudulent or negligent misrepresentations — what declaration must aver — need to aver that misrepresentation induced D plaintiff to act to his detriment

Headnote

The plaintiff bank, acting on the recommendations of the defendant, opened an account for a new customer. Subsequently, a branch manager paid certain sums of money to persons outside the country on the strength of cheques presented by the customer. The cheques were supposedly E drawn against an international account. The cheques were not met and turned out to be fraudulent. The bank sued the defendant for the sums lost, basing its claim on allegedly fraudulent misrepresentations by the defendant, which induced it to open the account.

The defendant excepted to the bank's declaration as disclosing no cause of action. The defendant contended that all that could be read from the F declaration was that the plaintiff was induced into entering into a contract of customer and banker with the customer, yet what caused the loss to the plaintiff was that the branch manager had treated as cash an uncleared cheque. There was no averment that the defendant induced the plaintiff to treat such cheques as cash or that the defendant knew G about the cheques. The plaintiff also relied on a duty of care owed by the defendant.

Held, that a plaintiff who bases his cause of action on a misrepresentation must have been induced to act to his detriment. What the declaration stated was that the plaintiff was induced into entering a contract of banker and customer. Even on the pleadings, that was not the cause of H

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Gowora J

A the plaintiff's loss. What caused the loss was the payment of the cheques without clearance from the paying bank. The loss that the plaintiff alleged it suffered could not be due to the misrepresentations averred, which dealt solely with the manner of opening of the accounts.

Held, further, that a duty of care would arise where there is a legal relationship between the parties which would give rise to an obligation on the part B of the defendant to exercise such duty in relation to the plaintiff. No such relationship was alleged. All that the plaintiff averred was that, there were transactions between the parties, without specifying what those transactions constituted or entailed.

Held, further, that a party is expected to speak when the information he has C to impart falls within his exclusive knowledge (so that, in a practical business sense, the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him would be mutually recognized by honest men in the circumstances.

Cases referred to

D *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA)

Novick & Anor v Comair Hldgs Ltd & Ors 1979 (2) SA 116 (W)

Ruto Flour Mills (Pty) Ltd v Moriates & Anor 1957 (3) SA 113 (T)

Case information

Mrs J B Wood, for the excipient (defendant)

E T Matinenga, for the respondent (plaintiff)

Judgment

E **GOWORA J**: The plaintiff is a registered commercial bank. On 15 October 2003, it issued summons against the defendant. On 1 March 2004, the defendant excepted to the summons and declaration.

The exception was upheld by this court on 31 January 2005. It was granted in default. As a result of the order granted therein the plaintiff filed an amended declaration on 18 February 2005. ^F The defendant then sought further particulars on the amended declaration which particulars were filed on 18 May 2005. On 15 June 2005, the defendant filed an exception to the amended declaration. On 21 July 2005, the plaintiff filed an amendment to para 7 of its amended declaration. The effect of the amendment was to remove a major cause of complaint in the exception. When the matter was called, counsel for the plaintiff moved for the amendment which ^G I granted. I turn now to consider the exception to the extent that the declaration has not been cured by the amendment.

The first issue taken by the defendant (excipient) is that the plaintiff's declaration does not disclose a cause of action. The defendant contends that the allegation by the plaintiff is that the defendant allegedly fraudulently or ^H negligently induced the plaintiff into entering a contractual relationship with

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Gowora J

one Greyling by making certain representations. It is further contended by ^A the defendant that the loss suffered by the plaintiff arose as a result of the plaintiff paying out fraudulent cheques presented to it by Greyling, yet the plaintiff makes no allegation that the defendant had knowledge of the cheques in question or, still less, that the defendant intended to induce the plaintiff to cash the cheques in question. Thus, argues the defendant, the allegations by ^B the plaintiff do not substantiate a claim for fraud on the part of the defendant. The defendant further contends that the mere making of representations by the defendant to the plaintiff about another party does not constitute a transaction conducted between the plaintiff and the defendant. Therefore, the defendant contends, the allegation that the defendant owed a duty of care to the plaintiff not to put the plaintiff at risk of suffering any financial loss as a ^C result of any transactions between the plaintiff and the defendant in the circumstances does not substantiate a claim based on negligence.

Mrs *Wood* submitted that the plaintiff must have been induced by a misrepresentation to act to its detriment, but that *in casu* what the plaintiff was induced to do was to open an account for Greyling. She submitted further that what caused loss to the plaintiff was not the contract it entered into with ^D Greyling, but the payment of the cheques. There was also no averment in the declaration that Ms Martens, the plaintiff's branch manager embroiled in the debacle, was induced to pay out the cheques before they were cleared. She argued that, in its further particulars, the plaintiff averred that the cheques appeared regular. She further contended that the declaration did not contain ^E any averment that the defendant knew that the cheques were fraudulent or that the defendant intended to defraud the plaintiff.

Although not specifically pointed out by the excipient in its submissions, the paragraph dealing with the allegations pertaining to fraud is para 7. The amended para 7 reads as follows:

7. The defendant fraudulently, alternatively, negligently, induced the plaintiff ^F to enter into the aforesaid contractual relationship of banker and customer by representing to Maria Martens, on behalf of the plaintiff, that –
 - (a) he knew Greyling and vouchsafed the said Greyling to enable the said Greyling to open banking facilities with the plaintiff;
 - (b) that the plaintiff was a reputable and responsible businessman and ^G an acquaintance of the defendant (*sic*); and
 - (c) that Greyling was honest and could be trusted.
- 7A. The aforesaid representations were, to the knowledge of the defendant, false. Alternatively, were made negligently, the defendant not knowing or caring whether the statements were true or not. ^H

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Gowora J

^A It is a principle, in dealing with exceptions, that if evidence can be led which can disclose a cause of action, that particular pleading is not excipiable. Equally, where fraud is alleged, it is essential that the pleadings contain particulars of the fraud on which the claim is based. In order to found a cause of action on a claim premised on fraud, it is essential that certain and specific allegations of the fraud be pleaded. The pleadings must allege that the ^B defendant made a representation. The

representation itself must also be pleaded and the declaration must set out whether such representation was express or implied. Next, it must be pleaded that the representation itself was false or that the maker knew that it was false. A party seeking to rely on such representation must also allege an intention on the part of the maker of the representation that such representation was made induce the party to whom **c** it was made to enter into a contract. The plaintiff must further allege that the maker of the representation intended or may be presumed to have intended that the representation be acted upon.

Subsequent to the filing of the exception, the plaintiff filed an amendment to its declaration which alleged that the representation made to Ms Martens by **d** the defendant was false. The amendment therefore cured part of the defects on the declaration. Although the plaintiff has alleged that the defendant made the representations, knowing them to be false or, alternatively, negligently, with the defendant not knowing or caring whether or not they were true, the plaintiff has not alleged that the defendant intended that the representations should be acted upon by the plaintiff. The intent to induce a contract is a **e** necessary element in a claim such as this where fraud is alleged. An intention to deceive lies at the root of every definition of *dolus* and therefore it is to be specifically averred. See *Novick & Anor v Comair Hldgs Ltd & Ors* 1979 (2) SA 116 (W); *Ruto Flour Mills (Pty) Ltd v Moriates & Anor* 1957 (3) SA 113 (T).

f A necessary averment in relation to fraud is that the plaintiff was induced to act upon the misrepresentation to his detriment. The defendant contends that all that can be read from para 7 of the declaration is that the plaintiff was induced into entering into a contract with Greyling, and that the contract concluded with the said Greyling was that of customer and banker; yet what caused the loss to the plaintiff was that Ms Martens, the branch manager employed at the **g** plaintiff's bank, had treated as cash an uncleared cheque. There is no averment that the defendant induced the plaintiff to treat such cheques as cash or that the defendant knew about the cheques. *Per contra*, the attitude of the plaintiff is that the representations by the defendant as to the honesty and reliability of Greyling that induced the plaintiff to open accounts for Greyling were the **h** cause of action. Had it not been for these representations, the plaintiff would

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Gowora J

not have opened accounts for Greyling and would certainly not have dealt **a** with him.

It is correct as submitted by Mr *Matinenga* that in dealing with exceptions a court assumes that a plaintiff can prove the facts set out in the declaration. At this stage of the enquiry, I am not determining the dispute between the parties, but rather examining whether or not sufficient facts have been alleged **b** to found a cause of action. It is not for me, at this preliminary stage, to determine whether the loss was caused by the plaintiff entering into the contract with Greyling or in negotiating an uncleared cheque. All I have to consider is whether the plaintiff has alleged sufficient facts in the summons and declaration to show a cause of action.

The plaintiff has not pleaded that the defendant intended to induce it into **c** contracting with Greyling. In my reading of the authorities, it would seem as though it is not always a necessary element to be pleaded. A plaintiff who bases his cause of action on a misrepresentation must have been induced to act to his detriment. What the allegations against the defendant in the declaration state is that the plaintiff was induced into entering a contract of **d** banker and customer with Greyling. That, even on the pleadings, was not the cause of the loss occasioned to the plaintiff. What caused the loss to the plaintiff was the payment of the cheques without clearance from the paying bank. When one examines the elements of the cause of action that the plaintiff has pleaded in para 7, in so far as the question of fraudulent misrepresentation is concerned, the cause of action does not appear from the declaration. The **e** representations averred in para 7 did not cause any loss to the plaintiff. The introduction of Greyling to the plaintiff's Ms Martens is not the immediate cause of the loss suffered by the plaintiff. The paragraph does not disclose a cause of action but sets out a misrepresentation by the defendant against the plaintiff.

The detriment caused allegedly suffered by the plaintiff that is a necessary **f** element in a claim for fraudulent misrepresentation is pleaded in para 22. It is in this paragraph that the plaintiff pleads that the defendant, acting in concert with Greyling, intended to defraud the plaintiff of the proceeds of the two cheques that Greyling deposited into his account with the plaintiff and drew against simultaneously with the deposits. The plaintiff has not pleaded in **g** connection with para 22 that there was an inducement and a misrepresentation made to the plaintiff's staff before the cheques

were paid out. It is necessary indeed, that the intent to induce the contract be proved, either directly or by inference, and it was necessary that the inducement and misrepresentation in respect of the cheques should have been pleaded in the declaration and included as an element of the cause of action. There is no averment made in ^H

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Gowora J

^A the declaration that the defendant knew that the cheques were fraudulent and that consequently, he intended to defraud the plaintiff. In para 7 of the plaintiff's heads of argument, the submission is made that the defendant must have known that Greyling wanted to conduct business with the defendant. That is, however, a far cry from an averment that the defendant intended to defraud the plaintiff through the relation with Greyling. The plaintiff has not ^B pleaded this.

Paragraphs 7 and 7A cannot be read in isolation of the paragraphs wherein the loss allegedly suffered by the plaintiff is averred. These are paras 10, 14, 17 and 22 of the declaration, as amended. They read, respectively:

- "10. As a consequence of the statements made by the defendant to induce ^C the plaintiff to enter into a contract with Greyling, and as a result of the misrepresentations aforesaid by the defendant, the plaintiff opened a current account and two foreign currency denominated accounts in the name of and for Greyling.
- 14. On the same day aforesaid and relying on the representations made by the defendant as to the trustworthiness of Greyling, and of his ^D dealings with Greyling, the manager of the Minerva Branch aforesaid authorized a debit of US\$70 000 to the United States dollar foreign currency account of Greyling, which sum was thereafter transferred to Standard Chartered Bank of South Africa Ltd to the account of Combined Grain Industries.
- 17. On the same day aforesaid, and relying as aforesaid on the role of the ^E defendant in causing the said account to be opened, and on his representations as to the trustworthiness of Greyling, members of staff of the Minerva Branch of the plaintiff authorized a debt of US\$75 000 to the United States dollar foreign currency account of Greyling, which sum was transferred to Standard Bank South Africa Ltd, to the account of Combined Grain Industries. ^F
- 22. At all times hereto, the defendant acted in concert with Greyling intending to defraud the plaintiff of the proceeds of the two cheques, and to receive the aforesaid reward. In so doing, the defendant rendered himself liable in law to the same extent as Greyling."

The cause of the loss to the plaintiff is detailed in paras 14 and 17 of the amended declaration. The plaintiff's staff accepted deposits by Greyling of ^G cheques supposedly drawn against an international account. The plaintiff's staff allowed Greyling to conduct transactions on the account, treating the cheques as having been cleared. The cheques were not met upon presentation and were found to be fraudulent. The paragraphs dealing with the depositing of the cheques by Greyling do not refer to the defendant in any way, except ^H for the deposit of a total sum of US\$4 000 put in the defendant's account on

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Gowora J

the instructions of Greyling. Clearly, the actions of Greyling were fraudulent, ^A but there is no averment by the plaintiff that, in the presentation of the cheques, there was a misrepresentation to the plaintiff by the defendant or by Greyling himself who, it is accepted, presented the cheques for payment. In fact, the pleadings are deafeningly silent as to the manner in which the cheques were presented to the bank, and how, being cheques drawn against a foreign bank account, they were treated as cash on the same day that they were ^B presented.

It seems to me that the plaintiff, in alleging loss arising out of the transactions relating to the cheques, is relying on a different cause of action to that averred in para 7. The loss that the plaintiff alleges it suffered cannot be due to the misrepresentations averred in paras 7 and 7A. The misrepresentations deal ^C solely with the manner of opening of the accounts in the name of Greyling. If the loss was occasioned by the deposit into the account of two fraudulent cheques and the acceptance on the part of the plaintiff's staff of the cheques, credit value, in the absence of allegations of some action on the part of the defendant, it is easy to see why the defendant has excepted to the declaration, as there is no legal basis for a cause of action against him averred on the papers, ^D especially when one considers that no misrepresentation is averred as regards the

cheques themselves. Nor is there an averment that the defendant was a part of their presentation to the defendant's staff for purposes of payment or negotiation.

In para 22, the plaintiff alleges that the defendant had acted in concert at all ^ε times with Greyling in relation to the cheques with an intent to defraud the plaintiff. Even though it is alleged that the two, the defendant and Greyling, had acted in concert intending to defraud the plaintiff of the proceeds of the two cheques, the specific elements of fraud as relating to the cheques, not the opening of the accounts in the name of Greyling, have not been set out as is required by law. The allegations of fraudulent representations contained in ^ε para 7 do not include Greyling as they touch specifically on the defendant. There are no allegations anywhere else that Greyling had made misrepresentations to the plaintiff's staff of a fraudulent nature. It then begs the question, how the loss could have been caused as a result of fraud when the particulars as the fraudulent behaviour have not been pleaded? If the basis ^g is contained in para 7 as amended, then para 22 is superfluous and in the context in which it appears is, in fact, in direct contradiction to para 7 as amended.

In relation to the averment in the declaration that the defendant had made representations negligently, the defendant has raised an exception that such representation must be false and must be made in breach of a duty of care owed ^h

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^a to the plaintiff by the defendant. By the time the matter was set down for hearing before me, the plaintiff had filed an amendment that would have the effect of removing the grounds on which the defendant based its exception. The defendant, however, contends that in order to succeed on a claim based on negligence causing economic loss, it is incumbent upon a litigant to prove the breach of a duty of care. The misrepresentation being relied on as the cause ^b of action must have been made contrary to a duty of care.

In para 5, the plaintiff alleged that the defendant, based on the contract of banker and client, owed the former a duty of care not to put the plaintiff at risk of suffering any financial loss as a result of any transactions conducted between the plaintiff and the defendant. The defendant further contends that ^c a duty of care would only arise if the relationship between the parties contained an undertaking only to furnish correct information or a guarantee of the correctness of the information provided. The declaration does not refer to any transaction between the parties except for the introduction of Greyling to the plaintiff. A duty of care would of necessity arise where there is a legal relationship between the parties which would give rise to an obligation on the ^d part of the defendant to exercise such duty in relation to the plaintiff. No such relationship has been alleged. All that the plaintiff avers is that there were transactions between the parties. What those transactions constituted or entailed is not pleaded. One then is left with the conclusion that the "transactions" being referred to are the introduction of Greyling to the plaintiff. There is no averment that there was in this introduction an undertaking ^e on the part of the defendant to only furnish correct information relating to Greyling. Nor, even if this undertaking had been given, would that have caused the plaintiff's staff to believe that any cheques presented by Greyling, no matter what their source was, ought to be treated as cash without an opportunity to have the same cleared by the paying bank.

^f Although I have not been referred to any authority for this proposition, it is, in my view, not without substance. The test for establishing wrongfulness, a general criterion for reasonableness, based upon considerations of public policy, is now accepted to be based on the legal convictions of the community. The law takes account of the fact that it is not the norm that one contracting party needs tell the other all he knows about anything that may be material. ^g The submission, in my view, accords with the principle that where conduct takes the form of an omission such conduct is *prima facie* lawful. See *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA). A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the ^h information moreover, is such that the right to have it communicated to him

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would be mutually recognized by honest men in the circumstances. The ^a submission is made by the defendant that the plaintiff has not, on the pleadings, averred a duty of care in relation to the

opening of the account by Greyling. There are no transactions in the pleadings giving rise to a duty of care on the part of the defendant; all there was, was an introduction of Greyling.

I turn now to the complaint by the defendant that the declaration is vague and embarrassing. The excipient has picked out in particular paras 7, 8, 10, 14, 17 and 22 as being the miscreants.

Paragraph 7 was amended since the filing of the exception and now contains particulars of the fraudulent misrepresentations. In relation to the averment of negligence, the defendant contends that it cannot differentiate between the two alternatives pleaded by the plaintiff in paras 7 and 8, since negligence consists of the breach of a duty of care. It is correct that in para 5 the plaintiff sets out a duty of care between the plaintiff and the defendant. In para 7, however, negligence is pleaded as an alternative to fraud. The particulars of negligence therein are not set out. Paragraph 8 then sets out an alternative claim based on the breach of a duty of care. If there is a claim for pecuniary loss due to the plaintiff as a result of the negligence of the defendant, the declaration does not clarify what it is based on. Which elements or factors constitute the particulars of negligence is not pleaded. The pleadings not only do not set out the allegations of negligence, they appear to have set out mutually destructive claims based on negligence. It is not clear if the two alternative claims are different and, if so, how if both are due to the alleged negligence of the defendant.

In para 14, the plaintiff alleges that, based on the representations of the defendant as to the trustworthiness of Greyling and of his dealings with Greyling, its manager authorized a debit of US\$70 000 against the account of Greyling and caused a transfer of the amount to a bank in South Africa. Nowhere else on the declaration is there an averment that the defendant had made misrepresentations as to his dealings with Greyling. In para 17, the plaintiff alleges that, based on the representations made by the plaintiff as to the trustworthiness of Greyling, members of staff of the plaintiff debited the account of Greyling with the sum of US\$75 000 which sum was transferred to a bank in South Africa. Paragraph 22, on the other hand, makes the averment that at all times the defendant and Greyling were acting in concert to defraud the plaintiff. There are no allegations of fraud in any of the paragraphs against Greyling. It then raises a question as to how then does Greyling act in concert with the defendant to defraud the plaintiff?

Much has been made in the plaintiff's arguments about the defendant having received a reward from Greyling from the amounts debited against the foreign

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A currency account of Greyling. The argument is made on behalf of the plaintiff that the defendant must explain the reward that he was given by Greyling. It is correct that, in the claim against him, the defendant in defending himself is obliged to give a credible explanation for the deposit into his account of the US\$4 000. Before he is required to do so, however, it is my view that the plaintiff has to file a claim which discloses a cause of action in its claim against the defendant. This has not been done on the declaration placed before the court. In the premises, it is my considered view that the declaration is vague and embarrassing.

The plaintiff had, in an earlier exception against its declaration, been given an opportunity to amend its declaration when the exception was upheld by this court on 31 January 2005 in default of appearance by the plaintiff. I perceive no real difference in the declarations, except that in the amended declaration there is an averment that the defendant owed the plaintiff a duty of care. There is also the amendment to allege that the representation was false.

It seems to me that the opportunity granted to the plaintiff to amend its declaration was not well utilized. The paragraphs which allegedly contain the cause of action make up the body of the declaration. If they are struck out nothing remains of the declaration. It would therefore, be more appropriate for the plaintiff to start afresh if it is so minded. *In casu*, it is appropriate for the plaintiff's claim to be dismissed.

In the result, I make the order that: ¹

1. The exception is upheld.
2. The plaintiff's claim is dismissed with costs.

Byron Venturas, excipient's legal practitioners

² *Costa & Madzonga*, plaintiff's legal practitioners

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METRO INTERNATIONAL (PVT) LTD v THE OLD MUTUAL PROPERTY INVESTMENT CORPORATION (PVT) LTD & ANOR 2007 (1) ZLR 408 (S)

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Citation	2007 (1) ZLR 408 (S)
Case No	Judgment No. S-83-06
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA and Malaba JA
Heard	21 November 2006
Judgment	26 June 2007
Counsel	<i>E W W Morris</i> , for the appellant <i>G Gapu</i> , for the first respondent <i>L T Biti</i> , for the second respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Contract — *interpretation* — “golden rule” of interpretation — application of rule — literal meaning of words to be ascertained first — thereafter regard must be paid to the context, background circumstances and, where ambiguity exists, to the application of extrinsic evidence

Words and phrases — “supermarket” — concept of — includes not only the trading floor space but also features ancillary thereto.

Headnote

The appellant was the lessee of trading premises which had an area of just over 2000 square metres. The lease stipulated that no more than 1000 square metres of the premises, which was also used as a clothing store, could be used as a “supermarket” (a term which was not defined in the contract), without the prior permission of the lessor. When the clothing store went out of business, the appellant wanted to use the whole of the premises as a supermarket. The trading floor *per se* consisted of 960 square metres. This area, combined with the coffee shop, take-aways, refrigerators and bulkheads, all of which were open to public access, comprised a total of 1215 square metres. The remainder of the leased premises, which was not accessible to the public, constituted 1135 square metres assigned to storage and service facilities ancillary to the supermarket. The appellant respondent argued that the word “supermarket” pertained only to the trading area.

Held, that the parties did not define the word “supermarket” when they used ^G it, so they must be presumed to have used the word in its ordinary and grammatical sense. The correct approach to the application of the “golden rule” of interpretation, after having ascertained the literal meaning of the word or phrase in question, is broadly speaking to have regard to:

- (a) the context in what the word or phrase is used; and ^H

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- (b) the background circumstances which explain the genesis and purpose of the contact; and
 (c) the application of extrinsic evidence regarding the surrounding circumstances where the language of the document is apparently ambiguous

^B (*dicta per* Joubert JA in *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767-768 followed).

Held, further, that in applying the “golden rule” of interpretation to identify the ordinary and grammatical meaning in which the word “supermarket” was used in the two lease agreements, the standard definition of the term given in an English dictionary or elsewhere can be used. The concept of ^C a supermarket as a large self-service store occupying a large floor space and retailing a wide variety of food and household goods is the essence of the definitions given. The space where goods are displayed and paid for, *viz* the trading area, is unquestionably an essential part of a supermarket. Moreover, the storage facilities of a supermarket, as well as the areas where services are provided, form as much an integral part ^D of the supermarket as its trading area. It is difficult to separate the other amenities and facilities that are usually attached to a supermarket from its trading area *per se*. In other words, a supermarket in its totality must be viewed as comprising not only its trading area but also its ancillary warehousing, refrigeration and ablution facilities. What the appellant did was to convert the whole floor space of the leased premises into a large ^E supermarket without prior written consent of the landlord.

Held, further, that in considering the meaning to be given to the word “supermarket” in the two written agreements of lease, the parties thereto must be presumed to have intended that the word be used in its ordinary and grammatical sense. Had they intended to give the word a limited or special meaning they would have defined it.

^F Decision of Patel J in *Old Mutual Properties Invstms v Metro Intl (Pvt) Ltd & Anor* 2006 (1) ZLR 442 (H) upheld.

Case cited

Coopers and Lybrand v Bryant 1995 (3) SA 761 (A)

Case information

^G *E W W Morris*, for the appellant

G Gapu, for the first respondent

L T Biti, for the second respondent

Judgment

MALABA JA: This is an appeal from a declaratory judgment of the High Court ^H dated 11 May 2006 as to the meaning of the word “supermarket” used in two

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measured 2 039 m² in extent. It comprised a single storey shop, main Plaza, plus ^A a walled service yard of approximately 130 m².

Under clause 11.1 of the lease agreement, the parties agreed that: “

“11.1 The tenant shall be entitled to use the premises for a clothing store, plus a supermarket which may not exceed 1 000m² and for no other purpose whatsoever without the landlord’s prior written consent.” ^B

By an addendum No. 1 dated 19 November 1997, the parties agreed that the area occupied by Metro be extended to 2 264.53 m².

From the date of commencement of the lease to June 2004, Metro operated the business of selling imported clothes under the name "W-Store". It also ran a supermarket over an area which did not exceed 1 000 m². When the clothing business fell on hard times because of the ban on importation of finished clothing material, Metro ceased operating the clothing business and closed W-Store.

On 16 June 2004, Metro advised Old Mutual of its intention to use the area of the premises previously occupied by W-Store to trade under a Spar franchise. It argued that the lease agreement entitled it to do so provided the "supermarket, ^D within the store as a whole does not exceed 1 000m²". Metro envisaged the conversion of the whole area of the leased premises into a large store with a trading area which it defined as a supermarket covering 1 000m².

This is clear from the letter dated 22 October 2004, written by Metro's ^E managing director to Old Mutual. In the letter, Metro asserted its right to "run a large store with all its ancillary facilities (offices, freezer rooms, kitchens canteens, toilets, goods receiving and pricing areas, storerooms, compressor rooms, etc.), plus a supermarket not exceeding – 1 000m²". According to Metro the floor space of the premises under ancillary facilities such as the bakery, butchery, cold rooms and storeroom was not a "supermarket". The contention ^F was that the word "supermarket", as used in the lease agreement, referred to the trading floor area with shelves and refrigerators containing goods to which the public had access.

Old Mutual was of the view that the large store which Metro intended to operate over the entire area of the leased premises would be a "supermarket" ^G in excess of 1 000 m² in size. The Chief Property Manager wrote to the managing director of Metro on 27 October 2004, pointing out that the word "supermarket" as used in the lease agreement between the parties, referred to the trading area and ancillary facilities of a large store. He said:

" Whilst we take note of your intention to separate the supermarket trading area from its ancillary facilities and defend that position, we wish to advise ^H

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a that such a position is potentially not defensible. You should appreciate that the current proposal materially changes the previous use hence the whole question of compliance."

TM was also of the view that the word "supermarket" was used in both lease agreements to include the trading floor area and all ancillary facilities. In ^B para 20.8 of the opposing affidavit, TM's Director said:

"... I submit that commonsense dictates that a supermarket cannot consist solely of the area under shelving. Supermarkets by their very definition are self-service stores and the goods sold therein cannot be made available without the infrastructure of coldrooms, a bakery, butchery, a delicatessen, preparation areas, offices and other facilities. The basic sales floor area must be supported by ancillary facilities."

^C On 4 February 2005, Old Mutual made an application to the High Court seeking a declaration as to the meaning of the word "supermarket" in the context of the two lease agreements it entered into with Metro and TM respectively in light of its obligation to TM under clause 40. The court *a quo* (PATEL J) held that the word "supermarket" as used in the ^D context of the two lease agreements included the trading floor area and all ancillary facilities in the store such as the bakery, butchery and storeroom. The learned judge said:

" According to Anderson & Labley *Success in Commerce* at p 25, a supermarket is a large self-service store buying in bulk. This definition accords with the dictionary definition of the term. In the *New Collins* ^E *Concise Dictionary* (1982), the word 'supermarket' is defined as 'a large self-service store retailing food and household supplies' while 'store' is defined as 'an establishment for the retail of goods and services'."

What emerges from these definitions is that a supermarket is a large commercial establishment where goods are stored in bulk and where goods and possibly ^F services are retailed to members of the public. Obviously, the space where goods are displayed and paid for, *viz.*, the trading area, is unquestionably an essential part of a supermarket. Moreover, the definitions cited above indicate that the storage facilities of a supermarket, as well as the areas where services are provided, form as much an integral part of the supermarket as its trading area. Taking this conception further, it seems to me difficult to separate the ^G other amenities and facilities that are usually attached to a supermarket from its trading area *per se*. In other words, a supermarket in its totality must be viewed as comprising not only its trading area but also its ancillary warehousing, refrigeration and ablution facilities. In my view, the latter constitute intrinsic facets of the notion of a supermarket.

^H In the result, I am of the considered opinion that the word "supermarket",

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regarded in both its grammatical and colloquial sense, means the entire ^A enterprise comprising the business of a large self-service store inclusive of its trading area as well as its ancillary storage, refrigeration, cooking and ablution facilities. In the present context, it follows that the Spar Supermarket presently operated by the first respondent includes not only its trading area which is open to the public but also the ancillary facilities and amenities to ^B which the public are ordinarily denied access *viz.*, the entire area devoted to the business of the "supermarket".

Metro appealed against the judgment. The grounds of appeal are that:

- "1. The court *a quo* erred in finding that the ordinary meaning of the word 'supermarket' is applicable in the context of the lease entered into between the appellant and the first respondent. ^C
2. The court *a quo* erred in interpreting the word 'supermarket' in isolation, without having regard to the fact that the lease refers to 'a clothing store, plus a supermarket which may not exceed 1 000m²' and therefore, the reference to 'supermarket' is to the trading floor area only, since the ancillary facilities such as reception and pricing area, storerooms, toilets and other facilities would also be necessary for ^D or ancillary to the business and the clothing store.
3. The court *a quo* erred in interpreting the word 'supermarket' without having regard to the intention of the parties.
4. The court *a quo* erred in finding that the lease agreement between the second respondent and third respondent affected the interpretation ^E of the lease agreement between the appellant and the first respondent.
5. The court *a quo* erred in finding that the *contra proferentem* rule was not applicable and that the first respondent was not the dominant party, even though it was the owner of the property being leased."

The allegations constituting the fourth and fifth grounds of appeal can be disposed of right away. Clause 11.1 of the lease agreement between Old ^F Mutual and Metro, particularly the limitation on the area size of the supermarket to 1 000 m², was inserted in light of the obligation Old Mutual undertook in favour of TM under clause 40 of their lease agreement. The interpretation of the terms of clause 11.1 had to take into account the meaning of clause 40 of their lease agreement.

Counsel are agreed that in establishing what the parties to the two lease ^G agreements meant when they used the word "supermarket" there was no need for the court to call in aid the *contra proferentem* rule of interpretation. The question for determination is whether the court *a quo* was correct in holding that the word "supermarket" was used by the parties to the two lease agreements in its ordinary and grammatical sense as referring to a large ^H

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^A a commercial establishment, occupying a floor space with facilities for the sale of a wide variety of foods and household goods to members of the public.

In *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A), JOUBERT JA at 767E-768E said:

" According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this ^B would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument ... The mode of construction should never be to interpret the particular word or phrase in isolation (*in vacuo*) by itself ... The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or ^C phrase in question is broadly speaking, to have regard –

- (1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract ...
- (2) to the background circumstances which explain the genesis and purpose of the contract, *i.e.* to matters probably present to the minds ^D of the parties when they contracted.
- (3) To apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence, of their own intentions."

^E The parties did not define the word "supermarket" when they used it. They must be presumed to have used the word in its ordinary and grammatical sense. In applying the "golden rule" of

interpretation to identify the ordinary and grammatical meaning in which the word "supermarket" was used in the two lease agreements, the learned judge referred to the definition of the term given in a standard English dictionary.

One may add the definition of "supermarket" in the *Wikipedia Free Encyclopedia*, where it is stated that:

"A supermarket is a departmentalized self-service store, offering a wide variety of food and household merchandise. It is larger in size and has a **g** wider selection than a traditional grocery store. The supermarket typically comprises meat produce, dairy and baked goods departments along with shelf space reserved for canned and packaged goods as well as for various non-food items such as household cleaners, pharmacy products and pet supplies. Most supermarkets also sell a variety of other household products that are consumed regularly **h** such as alcohol (where permitted) household cleaning products, medicine,

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clothes and some sell a much wider range of non-food products. **a** The traditional supermarket occupies a large floor space on a single level and is situated near a residential area in order to be convenient to consumers. Its basic appeal is the availability of a broad selection of goods under a single roof at relatively low prices."

The concept of a supermarket as a large self-service store occupying a large **b** floor space and retailing a wide variety of food and household goods is the essence of the definitions given. The learned judge found that the area size of a supermarket was demarcated by the floor space it occupied. It incorporated the floor space under shelves and refrigerators with the merchandise displayed for the public to take to the tills for payment. This is what is referred to as the trading floor space. That leaves that part of the floor space occupied by **c** ancillary facilities such as butchery, bakery, storeroom, kitchen and goods receiving area. The definition of supermarket in the *Wikipedia Free Encyclopedia* clearly includes ancillary facilities and those on the trading floor space.

Mr *Morris* argued on behalf of Metro that the word "supermarket" refers to the trading floor space only. He said that is the place where money is made **d** and to which the public has access. It appears to me that the meaning given to the word "supermarket" by the appellant is contrary to the ordinary and grammatical meaning of the word. If the parties intended to give the word the limited or special meaning advocated for by Metro, they would have defined it.

In each lease agreement, the word "supermarket" was used in the context of **e** the rights to use floor spaces of the leased premises. TM was given the right to use the whole floor space of the leased premises as a supermarket. Metro, on the other hand, was given the right to use the floor space of the leased premises as a clothing store plus a supermarket which may not exceed 1 000 m². Each party was under an obligation not to use the floor space for any other purpose whatsoever without Old Mutual's prior written consent. **f**

There was a clear restriction on the maximum area size of a supermarket Metro could legally operate over the floor space of the leased premises. As it had no right at all to use the floor space under the clothing store for anything other than the business of a clothing store, it had to have all the facilities, the use of which was connected to the business of a supermarket, within the 1 000 m² **g** of the floor space of the leased premises. Metro could not locate a butchery or bakery providing back up service to the trading area of the supermarket on the floor space reserved for the clothing store.

In the context in which the word "supermarket" was used in clause 11.1 of the lease agreement between Old Mutual and Metro, it is clear that it was meant to refer to all the facilities which occupied the floor space measuring 1 000 m² **h**

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a and constituting the business of a supermarket. That would include the floor space under the shelves and refrigerators with goods displayed for the public to take to the tills for payment and the floor space under ancillary facilities such as the butchery, bakery, offices and storerooms.

When the clothing store was operational, Metro accepted that the word "supermarket" bore the ordinary and grammatical meaning given to it by the **b** court *a quo*. At p 114 of the record, there is a diagram depicting the layout of the clothing store and supermarket. The diagram shows that the

trading floor space of the supermarket was 251 m². The rest of the floor space was under ancillary facilities such as the storeroom, produce/meat preparation, compressor, goods receiving and food handling facilities. The trading floor ^c space and the ancillary facilities floor space did not exceed 1 000 m². The diagram formed part of the contract of lease and expressed the common intention of the parties as to what a supermarket entailed in the context of the lease.

It is also clear from the diagram that the clothing store had its own trading floor space which was 846m² in extent. It was only after the demise of the clothing ^d store business that Metro became desirous to establish a large store with all its ancillary facilities (offices, freezer rooms, kitchens, canteen, toilets, goods receiving and pricing areas, storerooms and compressor). It was then that a suggestion was made that the floor space of 1 000 m² was a trading floor to which the word "supermarket" in clause 11.1 of the lease agreement referred. There is a diagram at p 113 of the record which shows that Metro had now ^e converted the whole floor space of the leased premises into a large self-service area of 865 m². The rest of the floor space was to be under ancillary facilities such as storerooms, bakery, delicatessen, office, butchery, kitchen, canteen and goods receiving. It retailed a wide variety of foods and household goods. In short, Metro had converted the whole floor space of the leased premises ^f into a large supermarket without the prior written consent of the landlord. The attempt to give the word "supermarket" as used in clause 11.1 of the lease agreement, an exceptional meaning referring to the trading floor space only was correctly rejected by the court *a quo*.

The appeal is accordingly dismissed with costs.

^g SANDURA JA & CHEDA JA concurred.

Atherstone & Cook, appellant's legal practitioners

Scanlen & Holderness, first respondent's legal practitioners

^h *Honey & Blackenberg*, second respondent's legal practitioners

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