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DULY HOLDINGS v CHANAIWA 2007 (2) ZLR 1 (S)**2007 (2) ZLR p1**

Citation	2007 (2) ZLR 1 (S)
Case No	Judgment No. S-17-07
Court	Supreme Court, Harare
Judge	Ziyambi JA, Gwaunza JA and Garwe JA
Heard	29 January 2007
Judgment	9 July 2007
Counsel	<i>H Zhou</i> , for the appellant <i>S Maruza</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

c Administrative law — *rules of natural justice* — *rule requires no more than domestic tribunal acts according to the common sense precepts of fairness*

Employment — *code of conduct* — *proceedings under* — *code not covering specific situation flexible approach to be followed*— *management adapting procedures to ensure fair hearing* — *rules of natural justice* **d** — *rule requires no more than the domestic tribunal acts according to the common sense precepts of fairness*

Headnote

The appellant company, though its managing director, brought disciplinary proceedings against the respondent, who was himself a branch manager. The appellant's code of conduct did not provide specifically for the ^e situation where a branch manager was charged. The managing director chaired the initial disciplinary hearing, which found the respondent guilty. The code provided for an appeal to the branch manager and the operations manager in the relevant section. The managing director ensured that a committee that excluded himself determined the appeal. The respondent's appeal to that committee failed. The Labour Court ^f upheld the respondent's argument that the disciplinary proceedings had not been conducted in compliance with the code of conduct. It also found out that the rules of natural justice had not been observed in the manner in which the disciplinary proceedings against the respondent were held.

Held, that the appellant did the best thing in the circumstances in order to ^G guarantee the respondent natural justice in the absence of a provision in the code providing for the equivalent of a "head of department" for the respondent who was, himself, the head of his branch. In the absence of a provision in the code specifically covering the conduct of disciplinary proceedings against a branch manager, the appellant had ensured that ^H the respondent's case was properly heard before the disciplinary

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Gwaunza JA

committee constituted and chaired by the managing director for that ^A purpose.

Held, further, that the respondent was given ample opportunity to be heard in accordance with the *audi alteram partem* rule. The gap in the code left the field open for the relevant senior staff to apply disciplinary procedures that, in their view, would accord justice to the offending employee. The ^B rules of natural justice require no more than that the domestic tribunal acts according to the common sense precepts of fairness. In the circumstances of this case, it could not be said that the rules of natural justice were not observed. The respondent was therefore, not prejudiced in any way by the disciplinary procedures which were followed.

Cases cited ^C

Air Zimbabwe Corporation v Mlambo 1997 (1) ZLR 220 (S)

Chataira v ZESA 2001 (1) ZLR 30 (H)

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

Sefularo v President of Bophutatswana & Anor 1994 (3) SA 80 (B)

ZFC Ltd v Geza 1998 (1) ZLR 137 (S) ^D

Case information

H Zhou, for the appellant

S Maruza, for the respondent

Judgment

GWAUNZA JA: This is an appeal against an order of the Labour Court ^E requiring the appellant to reinstate the respondent to his employment with it, or *in lieu* thereof pay him damages.

The facts of the matter are not in dispute. The respondent was employed by the appellant as a branch manager. Due to what was referred to by his managing director, Mr Papalexis, ("Papalexis") as the respondent's failure to comply with instructions from his superiors, unauthorized absence from his ^F office and work performance that left a lot to be desired, a letter to the following effect was written to the respondent by Papalexis:

- "1. You are no longer permitted to leave your Branch without my authority or that of (the) financial director, during working hours.
2. You will cease to play golf during working hours without prior ^G approval.
3. 3 – 5 (not relevant to these proceedings).

Should you have any queries regarding these instructions, please refer them to me. Failure to comply with these instructions will result in disciplinary action which may include dismissal." ^H

2007 (2) ZLR p3

Gwaunza JA

^A On 14 March 2002, the respondent requested authority to play golf in the afternoon. Such authority was denied. He then asked for permission to go to the bank for about 20 minutes, which was granted. It is not in dispute that after the respondent left (ostensibly to go to the bank) he did not come back to work for the rest of that day. Nor did he come to work the following day, which was a Friday. No word was received from the respondent as to where he might have ^B been during the period of his absence.

These developments prompted Papalexis to write, on 15 March 2001, to the respondent, commenting on his unauthorized absence from work and drawing attention to the earlier correspondence, in which he had been instructed not to absent himself from the office without authority. Papalexis, through the c same letter, also suspended the respondent with immediate effect, pending a disciplinary hearing to answer charge No. 12:10 of the code of conduct ("the Code"), that is "failure to obey or comply with lawful instructions given by a person in authority".

A disciplinary hearing was duly held on 25 March 2002, and was chaired by Papalexis. The respondent was found guilty of the charge preferred against d him, a circumstance that led to the disciplinary committee unanimously agreeing that he should be dismissed from employment. The respondent thereafter noted an appeal with the managing director, who happened to be Papalexis, against the decision to dismiss him. In his appeal, he took issue with the fact that the disciplinary hearing had been chaired by the managing e director, i.e Papalexis, contrary to the appellant's code of conduct ("the Code"), when in terms of the Code he would be required to file his appeal to the same managing director. The respondent charged, therefore, that the disciplinary committee had not been properly constituted, as required by Part III S 14.14.4 of the Code, which reads as follows:

"No employee shall be discharged from the service of the company without f the proper disciplinary procedure having been taken."

The respondent's appeal was heard on Tuesday 9 April 2002, and at Papalexis' instruction, was chaired by the finance director, Mr Mutyambizi, who also acted as the management representative. The respondent lost the appeal, and subsequently appealed to the Labour Court. The Labour Court upheld the g respondent's argument that the disciplinary proceedings had not been conducted in compliance with the Code. In addition to this, it was the Labour Court's finding that the rules of natural justice had not been observed in the manner in which the disciplinary proceedings against the respondent were held. For this, the court a quo relied on *Chataira v Zesa* 2001 (1) ZLR 30 (H) h where it was held that the rules of natural justice required no more than that

2007 (2) ZLR p4

Gwaunza JA

the domestic tribunal acts according to the common sense precepts of a fairness.

Observing that failure to follow the provisions of the Code was fatal to the disciplinary proceedings, the court a quo held that the respondent's dismissal was, therefore, wrongful. It ordered that he be reinstated with no loss of salary or benefits, failing which the appellant was to pay him damages in lieu of b reinstatement.

The appellant submits: (i) that the court a quo erred in determining that there was a violation of the rules of justice in relation to the respondent; and (ii) that contrary to the respondent's assertions, he had suffered no prejudice from the procedure adopted. The appellant also submits as an alternative ground of appeal, that if there were procedural irregularities involved, the court a quo c should have remitted the matter for a re-hearing or dealt with the merits of the case itself, instead of ordering the respondent's reinstatement.

I will consider the argument pertaining to the rules of natural justice first. The appellant's contention that the disciplinary proceedings against the respondent accorded with the principles of natural justice, is premised on four grounds. d

These are:

- (a) that the appellant did the "best thing in the circumstances" in order to guarantee the respondent natural justice, in the absence of a provision in the Code providing for the equivalent of a "head of department" for the respondent who, himself, was the head of his branch; e
- (b) that in the absence of a provision in the Code specifically covering the conduct of disciplinary proceedings against a branch manager, the appellant had ensured that the respondent's case was properly heard before the disciplinary committee constituted and chaired by Papalexis for that purpose;
- (c) that since the provision in the Code for an appeal to the branch manager f and the operations director in the relevant section did not apply to the respondent, the appellant had done the best it could under the circumstances to ensure that the appeal was determined by a committee that excluded Papalexis, who had chaired the earlier disciplinary committee proceedings; and g

- (d) that in any case, the respondent was given ample opportunity to be heard in accordance with the *audi alteram partem* rule. See *Sefularo v President of Bophuthatswana & Anor* 1994 (3) SA 80 (B) at 82E

The appellant submits in the light of this that there were no procedural irregularities in the proceedings against the respondent. Further that, in any ^H

2007 (2) ZLR p5

Gwaunza JA

A event, this court has emphasized the importance of flexibility of disciplinary tribunals, and the principle that they are there to conduct an enquiry. See *ZFC v Geza* 1998 (1) ZLR 137 (S).

I find the appellant's contentions to be persuasive. It has not been disputed that the respondent was a branch manager and therefore the most senior official at his branch. The appellant's Code outlines a procedure for disciplining ^B an employee who in his work is accountable to a departmental head who, in turn, reports to the branch manager. The role of these two in such disciplinary procedure is clearly laid out. The Code attempts, in its Part III, to address the situation involving the discipline of a senior employee, by stating as follows:

"14. In the case of senior staff, the alleged offence will be reported to the ^C relevant operations director/manager at head office."

The Code, however, does not go on to set out the disciplinary procedure to be followed after the operations director/manager at head office is seized with the matter. While one might attempt to seek guidance or draw parallels from the procedures laid out for less senior staff, there is no denying the fact that this gap in the Code leaves the field open for relevant senior staff to apply ^D disciplinary procedures that, in their view, accord justice to the offending employee. The appellant argues this is what happened *in casu*. Papalexis, being the respondent's superior, set in motion a process that saw the respondent being charged with an offence provided for in the Code, being given an opportunity to answer to those charges, appearing before a disciplinary committee and thereafter filing an appeal against that committee's determination ^E and subsequently appearing before an appeal committee. Having chaired the disciplinary committee, Papalexis constituted an appeal committee that excluded him but had the requisite representatives from management and workers.

The respondent avers that he was prejudiced by the procedure followed in these disciplinary proceedings. He submits it was unlikely that, at the appeal ^F stage, any other employee would have risked his employment by going against the judgment of the managing director, that is Papalexis.

I am not persuaded by this argument. Apart from Papalexis not having solely determined the respondent's fate at the disciplinary committee stage, since he sat with others on the committee, the appeals committee, in its turn, comprised members who represented, in equal numbers, management and ^G workers. To suggest without substantiation that members of both these committees so stood in awe of Papelexis that they would not have dared to go against his (Papalexis's) judgment on the respondent's case is, in my view, to unfairly put their personal integrity and professionalism into question.

The appellant's argument that it did the best thing under the circumstances ^H to ensure that the respondent had a fair hearing cannot, in my view, be faulted.

2007 (2) ZLR p6

Gwaunza JA

To the extent that the respondent was given an opportunity to answer to the ^A charges and present his side of the story, he should not be heard to say that there was no observance of the *audi alteram partem* rule. The court *a quo* correctly noted in its judgment that the rules of justice required no more than that the domestic tribunal acts according to the common sense precepts of fairness. Given the circumstances outlined above, I respectfully disagree with ^B the court *a quo*'s conclusion that it could, *in casu*, not be said that the rules of natural justice were observed. I am satisfied that the respondent was, therefore, not prejudiced in any way by the disciplinary procedures followed.

The appellant argues, correctly, that the adoption of disciplinary procedures not specifically outlined in the Code finds support in *ZFC v Geza* 1998 (1) ZLR 137 (S), where this court emphasized the importance of flexibility in the ^C conduct of disciplinary tribunals, and the principle that they were

there to conduct an enquiry. It cannot, in my view, be said in this case that the disciplinary tribunal did not conduct an enquiry.

The appellant argues in the alternative that, even if there were procedural irregularities, the court *a quo* erred in ordering reinstatement. The appellant ^d correctly cites *Dalny Mine v Banda* 1999 (1) ZLR 220 in which this court emphasized the undesirability of deciding labour matters on the basis of procedural irregularities, instead of putting right such irregularities. The latter would be achieved either by remitting the matter for a hearing *de novo*, and in a procedurally correct manner, or by the Tribunal hearing evidence. See also *Air Zimbabwe Corp v Mlambo* 1997 (1) ZLR 220 (S). This court has also ^e stressed the point that once the tribunal decides that the proceedings were fatally irregular, and that it cannot come to a conclusion on the merits, it has no choice but to remit.

In casu there is no evidence that the court *a quo* addressed its mind to the option of remitting the matter to the appellant, in keeping with the decisions of this court referred to. That clearly was a misdirection at law. ^f

Although I have considered remitting the matter to the court *a quo* for the appropriate determination as indicated, I am also cognizant of the need to bring finality to the case. Accordingly, since all the evidence that would enable this court to determine the matter on the merits has been placed before us, I shall proceed to do so. ^g

It is evident from the record that the respondent disregarded specific instructions given to him not to absent himself from work without authority. While his belated explanation that he fell sick on both the days he absented himself from work, sounds somewhat farfetched, he did not ensure that even this explanation was transmitted to his office. The respondent explained that ^h

2007 (2) ZLR p7

Gwaunza JA

^a on both occasions he had fallen violently sick while driving his car, had stopped the car and then fallen asleep, only waking up some 3 to 4 hours later. He suspected it was food poisoning. By his own admission, he not only did not inform his wife of the first bout of sickness, but also left home the following day with no indication that he would not be going straight to work as usual. He asserted that he had only informed his wife of the second bout of sickness ^b when he got home at the end of the second day. That was after he found that the letter of dismissal had been left at his home.

Under these circumstances, the disciplinary committees that heard the matter initially and on appeal clearly were correct in their finding that the respondent had indeed disobeyed lawful and specific instructions given to him by his ^c superior. Their finding that the respondent's explanation lacked credence cannot be faulted, neither can their determination to dismiss him. The appeal must therefore succeed.

It is in the result, ordered as follows:

1. The appeal be and is hereby allowed with costs. ^d
2. The judgment of the Labour Court is hereby set aside and substituted with the following –
"The appeal be and is hereby dismissed with costs."

ZIYAMBI JA & GARWE JA concurred.

^e *Gill, Godlonton & Gerrans*, appellant's legal practitioners

Chingore & Garabga, respondent's legal practitioners

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Source:

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PROVINCIAL SUPERIOR, JESUIT PROVINCE OF ZIMBABWE v KAMOTO & ORS 2007 (2) ZLR 8 (S)

2007 (2) ZLR p8

Citation	2007 (2) ZLR 8 (S)
Case No	Judgment No. S-84-06
Court	Supreme Court, Harare
Judge	Cheda JA, Ziyambi JA & Garwe JA
Heard	18 September 2006
Judgment	10 July 2007
Counsel	<i>L Mazonde</i> , for the appellant <i>N Chikono</i> , for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Arbitration — award — setting aside of — grounds for — award contrary to public policy — meaning — award promoting an illegality — such award contrary to public policy

Headnote

A farm outside Harare was acquired by the appellant religious order in 1902. ^D In time the appellant allowed some of the respondents to reside at the farm whilst a number of respondents settled themselves on the farm without authority. In 1975, the farm was incorporated into the Greater Harare Area by the Harare City Council. As all activities in the area now had to comply with the Council by-laws, the City's Director of Works advised the Area Board in 1998 that the settlement on the farm was not in accordance with ^E the law and required regularizing. It was then that the appellant established a board to liaise with the Council. Eventually approval was granted in October 2002 for the subdivision of the farm into residential stands, with land also being reserved for schools, crèches, churches, commercial use and other such purposes. It had been the appellant's intention to ^F accommodate the respondents in its development plans but because of developments that followed the appellant was prevented from doing so by the Council. The Council would only approve a low density housing scheme, which meant that the appellant was required to build roads and storm water drains in the area and to provide a water reticulation system. To do this, the respondents would have to be moved and some of their ^G houses demolished.

The appellant brought an action for the eviction of the respondents; the matter was referred for arbitration. The arbitrator concluded that any agreement that may have been reached between the appellant and the respondents in terms of which the latter were to occupy stands on the ^H

2007 (2) ZLR p9

Garwe JA

A farm was null and void in the light of the provisions of s 39(1) of the Regional Town and Country Planning Act [*Chapter 29:12*]. This provides that such any such agreement must be in accordance with a permit issued by the Council. The arbitrator also found that there was no basis in law upon which the appellant could be said to be liable to pay compensation since the buildings constructed by the respondents had to be demolished ^B and the appellant had not been enriched in any way. The respondents filed an application in the High Court challenging the award on the basis that it

was contrary to the public policy of Zimbabwe. In particular, they argued that the effect of the award was that the respondents should resettle themselves, that the award did not deal with the issue of *c* alternative resettlement and that the award promoted the setting up of squatter camps. This, they argued, would be against the public policy of Zimbabwe. The High Court held that the arbitrator made a gross mistake in finding that the appellant had no obligation to compensate the respondents.

Held, that in ascertaining the meaning of the elusive concept of “public *d* policy” in the context of the Model Law, regard must be had to the structure of articles 34(5) and 36(3), which deal with two aspects: the first relates to the circumstances connected with the making of the award, whilst the second relates to the substantive effect of the award itself. *In casu*, the latter was pertinent. An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are *e* wrong in fact or in law. In such a situation a court would not be justified in setting aside the award. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far-reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded *f* person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. The same consequences apply where the arbitrator has not applied his mind to the question or has totally misunderstood the issue and the resultant injustice reaches the point mentioned above.

Held, further, that the effect of s 39(1) of the Act is to render null and void *g* any agreement conferring upon any of the respondents the right to occupy the farm for a period of more than ten years. None of the residents had stayed at the farm for more than thirty years, so none had acquired any rights through prescription. The continued stay of the respondents was unlawful. The appellant had been forced to seek the eviction of the *h* respondents. To have allowed them to remain on the farm would have

2007 (2) ZLR p10

Garwe JA

been, in the circumstances, tantamount to promoting an illegality. The *a* public policy of Zimbabwe cannot demand of a party in the appellant’s position that he perpetuates the kind of settlement found at the farm. Although the appellant felt obliged to do so from a moral rather than legal standpoint, it did attempt to provide compensation and relocation allowance to enable those families it had authorized to occupy the farm *b* to move. The attempt was a failure. The farm having been incorporated into the Council area, the responsibility of resettling the respondents would have rested firmly at the door of Government through the relevant Ministry.

Cases referred to *c*

Zimbabwe Electricity Supply Authority v Maposa 1999 (2) ZLR 452 (S)

Legislation considered

Arbitration Act [*Chapter 7:15*], Schedule, arts 34(5) and 36(3)

Regional Town and Country Planning Act [*Chapter 29:12*], s 39(1) *d*

Case information

L Mazonde, for the appellant

N Chikono, for the respondents

Judgment

GARWE JA: At the hearing of this matter before this court, the parties agreed that the matter be postponed *sine die* to afford them the opportunity to discuss *e* the possibility of a settlement. In the event that no such settlement materialized, the parties were given leave to approach the court so that the matter could be determined in the normal course. After some discussions the parties were unable to reach an agreement and this court was then asked to determine the appeal.

The background to this matter is aptly summarized in the arbitral award forming *f* the subject of this appeal. The appellant is the owner of Manresa Farm, a piece of land measuring 417.931 hectares in

extent situated within the boundaries of the City of Harare. The respondents claim that they are all residing on Manresa Farm. It is unknown exactly how many families are living on the farm. Some of the families moved onto the farm with the appellant's authority whilst others did so without such authority. The appellant was given permission by ^G the Harare City Council ("the Council") to subdivide the farm into residential stands, with land also being reserved for schools, crèches, churches, commercial use and other such purposes. It had been the appellant's intention to accommodate the respondents in its development plans but because of developments that followed the appellant was prevented from doing so by the ^H

2007 (2) ZLR p11

Garwe JA

^A Council. In 1998, the Council advised the appellant that the settlement on Manresa was unlawful and that the position had to be regularized. The appellant started proceedings to get approval from the Council for the orderly and lawful settlement of persons at Manresa. The appellant had previously told the residents that they would be included in the scheme. The proposal by the appellant for the development of a high density residential scheme was, ^B however, turned down by the Council on the basis that such a scheme would need to be connected to the Council sewerage system, which was not possible. A medium density scheme was also not acceptable to the Council for the same reason. Therefore, the appellant adopted a low density scheme which the Council then approved. The respondents were given the option of ^C purchasing these stands but, for financial reasons, only one was able to do so. The appellant then made some offers of relocation assistance to those households it had authorized to reside at Manresa. Some of the residents accepted the assistance and moved. Others accepted but did not move. In terms of the permit issued by the Council, the appellant was required to build roads and storm water drains in the area and to provide a water reticulation ^D system. To do this, the respondents would have to be moved and some of their houses demolished.

The appellant filed an application in the High Court seeking an order for the eviction of the respondents. The respondents opposed the application. Owing to a dispute of facts on the papers, the court suggested and the parties agreed that, for a speedy resolution, the matter be referred to arbitration. The ^E matter came before the arbitrator who concluded that any agreement that may have been reached between the appellant and the respondents in terms of which the latter were to occupy stands on Manresa was null and void in the light of the provisions of s 39(1) of the Regional Town and Country Planning Act [*Chapter 29:12*]. That section provides that such an agreement must be ^F in accordance with a permit. The arbitrator also found that there was no basis in law upon which the appellant could be said to be liable to pay compensation since the buildings constructed by the respondents were to be demolished and the appellant had not been enriched in any way.

The respondents filed an application in the High Court challenging the award on the basis that it was contrary to the ^H public policy of Zimbabwe. In particular, they challenged the award on the basis that the effect of the award was that the respondents should resettle themselves, that the award did not deal with the issue of alternative resettlement and that the award promotes the setting up of squatter camps. This, the respondents argued, would be against the public policy of Zimbabwe.

2007 (2) ZLR p12

Garwe JA

The High Court, after hearing argument, set aside the award. The court ^A concluded that the arbitrator made a gross mistake in finding that the appellant had no obligation to compensate the respondents "when the parties themselves seem to have accepted that principle and only needed guidance in its implementation in terms of the levels of compensation and identity of those so entitled". The court further concluded that the arbitrator had failed to apply ^B his mind to this question or had totally misunderstood the issue.

It is against this finding that the appellant has now approached this court. More specifically, the appellant submits that the arbitral award is not against public policy and that the respondents are not, in any event, entitled to compensation and relocation expenses. To determine this issue, it will be necessary to look at the law. ^C

The Arbitration Act [*Chapter 7:15*] in the First Schedule has incorporated the United Nations Commission on International Trade Law (UNCITRAL) Model Law, with modifications. Article 34 of the Model Law has prescribed the procedure to be followed in applying for the setting aside of an

arbitral award. For purposes of the present appeal, the relevant provisions are to be found in paras 2(b)(ii) and 5. Paragraph 2(b)(ii) provides as follows:

- "2. An arbitral award may be set aside by the High Court only if –
 - (a) ...
 - (b) the High Court finds, that:
 - (i) ...
 - (ii) the award is in conflict with the public policy of Zimbabwe." ^ε

The term "public policy" is a somewhat vague and amorphous concept. It does not lend itself to a clear definition. As stated by Gubbay CJ in *ZESA v Maposa* 1999 (2) ZLR 452 (S) at 464D:

"Public policy is an expression of vague import. Its requirements invariably pose difficult and contentious questions." ^φ

The position is now settled that, in ascertaining the meaning of this elusive concept in the context of the Model Law, regard must be had to the structure of articles 34(5) and 36(3). These articles deal with two aspects. The first relates to the circumstances connected with the making of the award, whilst the second relates to the substantive effect of the award itself. For purposes of ^ς the present appeal, it is the latter that is pertinent. In *ZESA v Maposa supra* Gubbay CJ stated:

"What has to be focused upon is whether the award, be it foreign or domestic, is contrary to the public policy of Zimbabwe. If it is, then it cannot be sustained. ^η

2007 (2) ZLR p13

Garwe JA

α In my opinion, the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognize the basic objective of finality in all arbitrations; and to hold such defence applicable only if some fundamental principle of the law or morality is violated."

At p 466B, the learned Chief Justice further observed:

β "The difficulty, then, is not with the formulation of an appropriate and acceptable test. It is with the application of that test in an endeavour to determine whether the arbitral award should be set aside or enforcement of it denied, on the ground of a conflict with the public policy of Zimbabwe."

ZESA v Maposa supra is authority for the proposition that an award will not ^ς be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation, a court would not be justified in setting aside the award. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far-reaching and outrageous in its ^δ defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. The same consequences apply where the arbitrator has not applied his mind to the question or has totally misunderstood the issue and the resultant injustice reaches the point mentioned above.

ε The question that arises in this appeal is whether the arbitral award is contrary to the public policy of Zimbabwe. In particular, the arbitrator found that the respondents had no right to continue residing at Manresa and, further, that the respondents do not have any claim against the appellant in respect of the houses they have built or for relocation assistance.

φ Manresa farm was acquired by the appellant in 1902. In time, the appellant allowed some of the respondents to reside at the farm whilst a number of respondents settled themselves on the farm without authority. In 1975, Manresa farm was incorporated into the Greater Harare Area by the Harare City Council. This meant that all activities in the area had to comply with the Council by-laws. It was for this reason that the Director of Works of the City Council ^ς advised the Chishawasha Area Board in 1998 that the settlement at Manresa was not in accordance with the law and required regularizing. It was then that the appellant established the Manresa Development Board to liaise with the Council. Eventually, approval was granted in October 2002 for the subdivision ^η of Manresa into stands.

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Garwe JA

It is clear from the evidence led before the arbitrator that Manresa is an ^A unplanned residential settlement. Some houses are constructed of pole and dagga. There are no toilets and no running water. There are no schools or clinics or shops. The existing houses were not built under the supervision of any authority. The need for the proper development of Manresa appears to have been common cause. Indeed, during the arbitration proceedings, the ^B legal practitioner for the respondents submitted that the respondents were not opposed to the development of Manresa into a residential suburb. Their only concern was where they would go.

Section 39(1) of the Regional Town and Country Planning Act [*Chapter 29:12*] provides that no person shall subdivide any property or enter into an agreement conferring on any person a right to occupy any portion of a ^C property for a period of ten years or more or for his lifetime except in accordance with a permit issued by the Council.

Although some of the residents may have settled at Manresa before the area was incorporated into the Greater Harare Area in 1975, it is clear that the effect of ^S 39 is to render null and void any agreement conferring upon any of the ^D respondents the right to occupy Manresa for a period of more than ten years. The arbitrator also concluded that none of the residents had stayed at the farm for more than thirty years and that therefore none had acquired any rights through prescription. The arbitrator also found that the appellant has not been enriched and that a claim for unjust enrichment cannot succeed. The arbitrator concluded:

“Because the claimant has allowed them to erect houses and stay at Manresa does not mean that the claimant is now required to assist in their relocation either by way of financial assistance or by providing alternative accommodation or places to build houses. The claimant has been forced by Council to remove the residents from Manresa. However, even if it had voluntarily decided to remove them, the legal position would be the same.” ^F

From a legal standpoint, the reasoning of the arbitrator cannot be impugned in any way. It had been the appellant’s intention to include the respondents in any development plans that were to be approved by the Council. Indeed, the representatives of the respondents were members of the Manresa Development Board that was tasked with the responsibility of liaising with the ^G Council on the development of Manresa. It is clear that the appellant had allowed some of the respondents to stay at Manresa as a benevolent gesture. Such stay was indefinite. There were no basic standards to be met in the construction of houses at Manresa. There was no talk at that time of possible compensation in the event that it became necessary for the respondents to ^H

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Garwe JA

^A move. To suggest in these circumstances that the arbitrator was wrong in that he adopted a strict approach to issues of evidence and procedure is, to say the least, unfair to the arbitrator. The arbitrator was aware that the main issue was whether the respondents had the right to remain at Manresa. Having found they did not, he considered the issues of compensation and alternative settlement. He considered that the appellant was under no legal obligation to ^B provide these. Whilst the net effect of the award is to render the respondents homeless, I am not persuaded that the arbitrator was wrong in coming to this conclusion.

The present position is that the continued stay of the respondents at Manresa is unlawful. The appellant has been forced to seek the eviction of the ^C respondents. To have allowed the respondents to remain on the farm would have been, in the circumstances, tantamount to promoting an illegality. The public policy of this country cannot demand of a party in the appellant’s position that he perpetuates the kind of settlement that is to be found at Manresa.

The circumstances reveal that the appellant did attempt to provide ^D compensation and relocation allowance to enable those families it had authorized to occupy Manresa to move. It is apparent that the appellant felt obliged to do so from a moral rather than legal standpoint. The attempt was a failure. Some accepted and moved. Others accepted but stayed, citing possible intimidation by other respondents. There remains a dispute as to the ^E identity of the residents that the appellant had authorized to set up home on Manresa.

The finding by the court *a quo* that the arbitrator made a gross mistake in finding that the appellant had no obligation to compensate the residents “when the parties themselves seem to have accepted that principle and only needed guidance in its implementation in terms of the level of compensation ^F and identity of those so entitled” is not supported by the facts. There is evidence that the appellant, alive to the difficulties the respondents would face in the event of eviction, tried to assist

but failed in this endeavour. There certainly was no agreement that compensation be paid. In all the circumstances therefore the finding by the arbitrator cannot be said to be so outrageous as to intolerably hurt the conception of justice in Zimbabwe. The finding cannot ^g be said to violate any fundamental principle of the law or morality or justice.

It is clear in this case that, Manresa having been incorporated into the Council Area, the responsibility of resettling the respondents would have rested firmly on the door of Government through the relevant Ministry. There is evidence ^h Government became involved at some stage but at a somewhat superficial

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Garwe JA

level. The arbitrator was alive to this and the problems that faced the appellant ^a namely, that the appellant had wanted to accommodate the respondents in the development plans but was prevented from doing so by the Council which went further to advise that the respondents could not continue staying at Manresa owing to Council by-laws; that both the Council and Government were aware of the need for the respondents to be resettled; that both have the ^b authority to acquire land for resettlement purposes but have done nothing to resettle the respondents. The result of the award is that the respondents will be evicted from Manresa. The stands that have been demarcated at Manresa have been purchased by third parties. Whilst the eviction of the respondents is a sad development, this cannot, in the circumstances, be said to be against the public policy of Zimbabwe. ^c

In all the circumstances, the appeal must succeed.

It is accordingly ordered that –

1. The appeal is allowed with costs.
2. The order of the High Court is set aside and in its place the following is substituted: ^d
 - “(a) The application to set aside the arbitral award dated 8 November 2004 be and is hereby dismissed.
 - (b) The arbitral award of 8 November 2004 be and is hereby registered as a judgment of the High Court of Zimbabwe.
 - (c) The respondents are to bear the costs of suit.” ^e

CHEDA JA & ZIYAMBI JA concurred.

Mutumbwa, Mugabe & Partners, appellant’s legal practitioners

Mhiribidi, Ngarava & Moyo, respondents’ legal practitioners ^f

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GREENDALE HARDWARE & ELECTRICAL (PVT) LTD v BANGABA 2007 (2) ZLR 17 (S)

2007 (2) ZLR p17

Citation	2007 (2) ZLR 17 (S)
Case No	Judgment No. S-15-07
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Malaba JA
Heard	5 February 2007

Judgment	10 July 2007
Counsel	<i>L T Biti</i> , for the appellant <i>D Pundu</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

c Contract — restraint of trade — protection of employer from mere competition by former employee — unreasonable restraint

Contract — restraint of trade — reasonableness thereof — a question of law — clause in contract that consent of employer required before prohibited **d** conduct is undertaken — such clause not making an unreasonable restraint reasonable — test for validity of restraint of trade — protection of proprietary interests of employer — protection must be no more than is reasonably necessary to protect such interests

Contract — restraint of trade — trade connections of employer — protection **e** thereof — such protection achieved by a restraint against competition — when such a restraint can be considered reasonable and enforceable — such restraint must be the only way of protecting the employer's trade connections

Employment — contract of employment — restraint of trade — test for validity of restraints of trade — protection from mere competition by **f** former employee — such restraint unreasonable

Employment — contract of employment — restraint of trade — trade connections of employer — protection of such interests by a restraint against competition by former employee — when such restraint enforceable

Headnote

- g** The unreasonableness of a restraint of trade is a question of law. Its determination involves the application by a court of a legal standard to the facts of a particular case. The relevant circumstances are those existing at the time the restraint of trade is sought to be enforced in so **h** far as they impinge on public interest. What constitutes public interests

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changes from time to time. As such the circumstances of a restraint of **a** trade would not depend on the fact of the approval or disapproval of the conduct of the employee by the employer. A restraint of trade, which is otherwise unreasonable, would not become reasonable merely because of a provision that the consent of the employer shall be sought before the prohibited conduct is undertaken. It is not a question of the restraint. It is a question of the legality of the restraint. **b**

The correct test for the validity of a restraint of trade in a contract of employment is whether there are proprietary rights for the protection of which the restraint was imposed by the employer and undertaken by the employee. If there are proprietary interests to be protected, the next question is what are they being protected against and is the restraint **c** more than is reasonably necessary for the protection of the proprietary interests. The *onus* is on the employee who seeks to resile from the restraint of trade in the contract to show that it is against public policy and unenforceable.

A restraint of trade which does no more than protect the employer against mere competition from a former employee by preventing him from **d** carrying on business similar to that undertaken by him on entering the service of an undertaking in fear that in doing so the employee would exercise the knowledge and skill acquired during employment with him, is an unreasonable restraint. So is a restraint of trade which is too wide as to time or place or scope, depending on the nature of the business carried on, and the duties of the employee. **e**

The respondent was a former employee of the appellant, which was part of a group of companies. The appellant carried on the business of retail and wholesale general hardware, specialising in mining and industrial cutting tools. In 1998, the respondent was employed by the appellant as a

clerk and counter salesman, subsequently being promoted to an external sales representative. His contract of employment contained a restraint of trade, which prohibited the respondent, for a period of two years after termination of his employment with the appellant, from entering the employ of any undertaking involved directly or indirectly in any business undertaken by any company within the group of companies. The restraint of trade also contained other clauses, one of which was a special restraint for the protection of appellant's proprietary rights in the trade connections, against exploitation by respondent upon termination of employment. Each of the other clauses was deemed to be a separate restraint for the purposes of the contract of employment. In 2004, the respondent left the appellant's employ and joined another rival company.

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As a salesman. In that capacity, he obtained an order from a former customer of appellant for facing and external tools. In 2005, the appellant wrote to the respondent claiming that by joining the rival company before the expiry of two years from the date of his cessation of employment with the appellant, the respondent was in breach of the restraint of trade. The respondent rejected this and the appellant sought a High Court order upholding the restraint of trade against respondent. The appellant relied on the general restraint clause. The High Court dismissed the appellant's claim. On appeal to the Supreme Court:

Held, that it must be shown that the proprietary rights in the trade connections could only be adequately protected against prejudicial interference by a former employee if the restraint against competition is imposed and enforced. In other words, there must be no other restraint protecting the same proprietary rights.

Held, further, that the appellant did not rely on the special restraint clause but rather on the general restraint clause. This clause did not even prohibit the use of knowledge of and influence over the appellant's customers. This suggested that the clause was not intended to protect the appellants' trade connections against exploitation by the respondent upon termination of employment. The clause was a restraint against mere competition in the use of personal knowledge in the trade acquired during his employment with the appellant. As such, the clause was too widely framed. It was therefore unreasonable and unenforceable.

Cases cited

American Building Maintenance Co v Shandley (1966) 58 DLR (2d) 525

Attwood v Lamont [1920] 3 KB 571

Basson v Chilwan & Ors 1993 (3) SA 742 (A)

Book v Davidson 1988 (1) ZLR 365 (S)

Herbert Morris Ltd v Saxelby [1916] 1 AC 688

Maguire v Northland Drug Co [1935] 3 DLR 521

Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A)

Paragon Business Forms (Pty) Ltd v du Preez 1994 (1) SA 434 (SE)

Super Safes (Pty) Ltd & Ors v Voulgarides & Ors 1975 (2) SA 783 (W)

Stenhouse Australia Ltd v Phillips [1974] AC 391

Case information

L T Biti, for the appellant

D Pundu, for the respondent

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Malaba JA

Judgment

MALABA JA: This is an appeal from a judgment of the High Court dated 7 ^A April 2006, dismissing with costs an application for an order enforcing a restraint of trade contained in the respondent's contract of employment with the appellant on the ground that the restriction was unreasonable and unenforceable.

The appellant is a member of the Crundal Group of companies carrying on the ^B business of retail and wholesale of general hardware, specialized in mining and industrial cutting tools and protective clothing from No. 2 Hood Road, Southerton, Harare, under the name "Mining and Industrial Suppliers".

The respondent is a former employee of the appellant. He was engaged as a clerk/counter salesman on 28 August 1998 and was later promoted to the position of external sales representative. On 31 October 2004, the respondent ^C left employment with the appellant and entered the services of an undertaking known as RG Tools Zimbabwe ("RG Tools") carrying on business from No. 196 Glen Eagles Road, Willowvale, Southerton, Harare.

When the appellant and the respondent entered into the contract of employment they acknowledged that, by virtue of his duties, the respondent would become ^D possessed of knowledge of proprietary rights of the appellant in the business carried on. Such proprietary interests listed in clause D of the agreement included trade secrets and details of trade connections. They also agreed that for the purpose of protecting the proprietary rights listed in clause D, against the abuse of their knowledge by the respondent during the period of employment and after he left employment with the appellant, it was necessary ^E for the respondent to undertake a restraint of trade.

The parties agreed that:

- "1. Unless he obtains the express written authority of the managing director of the specific company within the Crundal Group by which he is employed, the employee warrants and undertakes unto and in ^F favour of the group that during the period of his employment with the group and for a period of two years after his employment with the group terminates for any reason whatsoever, he shall be restrained from being interested either directly or indirectly and whether as a director, partner, owner, promoter, principal, agent, representative, shareholder, financier or employee in any undertaking involved ^H directly or indirectly in any of the business undertaken by the Group and the employee agrees that he will not:
 - 1.1 Use any such knowledge or exercise any such influence as is referred to in clause 'D' of the preamble hereto in any way directly or indirectly prejudicial to or in competition with the group; ^H

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Malaba JA ^A

- 1.2. Perform any service of a type, class or kind similar to or in competition with the services of the type, class or kind performed by the group;
- 1.3. Be employed by any business, firm, undertaking or company (all of which are hereinafter called 'any undertaking') or be the agent of, or the advisor to any undertaking which performs any activity ^B to or in competition with those of the group;
- 1.4. In any manner whatsoever, assist in the activities of any undertaking which carries on business similar to or in competition with the activities of the group;
- 1.5. Be financially interested directly or indirectly in any undertaking which carries on activities similar or in competition with those of the group;
- 1.6. Take part in any undertaking carrying on business of a type, class or kind similar to or in competition with the type, class or kind of business carried on by the group.
2. Each restraint aforesaid shall be deemed to be a separate restraint for ^D the purpose of this agreement."

^D As an external sales representative, the duties of the respondent involved the promotion and sale of the appellant's products to old and new customers. He would visit customers at their places of business to discuss with and explain to them the qualities of the products sold by the appellant. As a result, the respondent acquired knowledge of the names and addresses of the customers. ^E He got to know of their special requirements which the appellant had to meet. The business of the appellant was very extensive. The list of names of customers with whom the respondent came into contact shows that they were located in almost all the urban centres of the country including Harare.

Annexure "J" is a business card belonging to the respondent. It shows that he got employment with RG Tools as a salesman. RG Tools carried on the ^F business of "suppliers of mining and industrial

tools and equipment, electrical, building materials, abrasives and general hardware". It was involved in the business of selling specialized mining and industrial tools. It also dealt in general hardware like the appellant.

On 18 November 2004, the respondent placed an order with "SANDVIK G TOOLS" on behalf of RG Tools for 33 facing tools and 15 external tools. "SANDVIK TOOLS" was one of the appellant's customers with whom the respondent had personal contact during the period of his employment with the appellant.

On 16 August 2005, the appellant, through its legal practitioners, wrote to the H respondent informing him of the fact that his taking up of employment with

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Malaba JA

RG Tools before the expiry of the period of two years from the date of A termination of employment with it was in breach of the contract in restraint of trade. It demanded an immediate cessation of the respondent's association with RG Tools. By letter dated 26 August 2005 written on his behalf by legal practitioners, the respondent rejected the appellant's demands on the ground that the restraint of trade was unreasonable and unenforceable. B

On 27 September 2005, the appellant made an application to the High Court for an order in the following terms:

- "1. That the respondent be and is hereby restrained from being interested either directly or indirectly and whether as a director, partner, owner, promoter, principal, agent, representative, shareholder, financier or employee in any business similar to and/or in competition with the C business undertaken by the applicant.
2. That this restraint shall operate throughout Zimbabwe for a period of two (2) years reckoned from the date of judgment.
3. That the respondent and his legal practitioners Pundu and Company pay the costs of the application on the legal practitioner and client scale, the one paying the other to be absolved." D

The respondent admitted that he was employed by RG Tools as a salesman. He denied the allegation that RG tools carried on business similar to and in competition with that undertaken by the appellant. The court *a quo* found that RG Tools was not involved in the business of retail and wholesale of specialized mining and industrial cutting tools undertaken by the appellant. E It found that RG Tools carried on the business of selling general hardware.

Whilst holding that the respondent was in breach of the restraint of trade undertaken by him, in that he got employment with RG Tools as a salesman and sold general hardware, the court *a quo* determined that the restraint of trade was unreasonable and unenforceable. The learned judge said at p 15 of the cyclostyled judgment: F

"It became apparent that the applicant was concerned, not so much with the general hardware operations of the respondent but feared that he was also involved in the field of special cutting tools used in mines. It also feared that he was introducing unwelcome competition in its overall broad business operations.

Implicit in Mr *Biti's* submissions was a reluctant acceptance that the G applicant could not contract competition out in a restraint of trade agreement because the line in which the respondent was involved in was prevalent throughout Zimbabwe. In my view, the respondent has established that he is intimately involved with RG Tools in general hardware business and that RG Tools does not pose any threats to the H

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Malaba JA

A applicant's business activities especially in the special cutting tools line of business. It would be unreasonable, in my view ,to deny the respondent a calling in the profession in which, he has been involved since leaving school in 1990 ... in a bid just to protect a general fear of competition in the general hardware business operations."

The application was dismissed with costs. The appellant appealed against the B judgment on the grounds that:

- "1. Having held that the respondent was in breach of the restraint agreement the court *a quo* erred in holding that the restraint was unreasonably wide and unenforceable.
2. More importantly the court *a quo* erred in failing to hold that the respondent had failed to dislodge the *onus* upon his shoulders of C showing that the restraint was unreasonable, too wide and

unenforceable.

3. Further, and in any event, the court *a quo* erred in ignoring the fundamental fact that the restraint in question could only be enforced after the respondent had approached the appellant for his approval ^d or not. To the extent that this was not done the court *a quo* erred in not holding that the respondent was estopped from making a challenge on the restraint of trade.”

Ground of appeal (3) can be disposed of right away. A finding of the fact that the respondent breached the restraint of trade did not bar the court *a quo* from enquiring into and determining the question whether the restraint was ^e unreasonable. The unreasonableness of a restraint of trade is a question of law. Its determination involves the application by a court of a legal standard to the facts of a particular case. The relevant circumstances are those existing at the time the restraint of trade is sought to be enforced in so far as they impinge upon public interest. What constitutes public interest changes from time to time. As such, the unreasonableness of a restraint of trade would not ^f depend upon the fact of approval or disapproval of the conduct of the respondent by the managing director of the appellant. A restraint of trade which is otherwise unreasonable would not become reasonable merely because of a provision that the consent of the covenantee shall be sought before the prohibited conduct is undertaken. It is not a question of the restraint. It is a question of the legality of the restraint.

^g The only question for determination is therefore whether or not the court *a quo* was correct in holding that the restraint of trade sought to be enforced by the appellant against the respondent was unreasonable. Before I answer the question it is necessary to comment on the correctness of the findings of ^h fact made by the court *a quo*.

Malaba JA

The learned judge found that RG Tools was not carrying on the business of a retail and wholesale of specialized mining and industrial cutting tools. The business card belonging to the respondent shows that RG Tools traded in mining and industrial tools. The order (Annexure "K") placed by the respondent with "SANDVIK TOOLS" on behalf of RG Tools was for industrial tools. In the opposing affidavit, the respondent admitted that these industrial tools ^B were used in machining. Although he alleged that general hardware was what he sold, he did not deny that RG Tools carried on the business of retail and wholesale of mining and industrial tools like the appellant. What he denied was that he acquired the knowledge and skill of salesmanship from employment with the appellant.

In light of the evidence contained in the founding affidavit and the opposing ^C affidavit, the finding by the court *a quo* that RG Tools did not carry on the business of retail of mining and industrial tools was wrong.

I now turn to answer the question for determination in the appeal. The correct test for the validity of a restraint of trade in a contract of employment is whether there are proprietary rights for the protection of which the restraint was ^D imposed by the employer and undertaken by the employee. If there are proprietary interests to be protected the next question is what are they being protected against and is the restraint more than is reasonably necessary for the protection of the proprietary interests.

In *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 710, Lord Parker said:

"... the reason, and the only reason, for upholding such a restraint on the ^E part of an employee is that the employer has some proprietary right, whether in the nature of trade connection, or in the nature of trade secrets for the protection of which such a restraint is – having regard to the duties of the employee – reasonably necessary."

A restraint of trade is an obligation voluntarily undertaken by the employee ^F to refrain from the exercise of freedom of trade in favour of the employer in the exercise of freedom of contract. It is, therefore, *prima facie* valid and the *onus* is on the employee who seeks to resile from its burden to show that it is nonetheless against public interest and unenforceable. See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *Book v Davidson* 1988 (1) ZLR 365 (S) at 385D.
G

A restraint of trade which does no more than protect the employer against mere competition from a former employee by preventing him or her from carrying on business similar to that undertaken by him or entering the services of an undertaking in fear that in doing so the employee would exercise the knowledge and skill acquired during employment with him is an unreasonable restraint. ^H

2007 (2) ZLR p25

Malaba JA

^A So is a restraint of trade which is too wide as to time or place or scope depending, of course, on the nature of the business carried on and the duties of the employee.

In *Saxelby's case supra*, Lord Parker said that a purchaser of the goodwill of a business may take a covenant against competition from his vendor to protect what he is contracting to buy. It was quite different in the case of an ^B employer taking such a restraint from his employee. His Lordship at 709 said:

"The goodwill of his business is under the conditions in which we live necessarily subject to the competition of all persons (including the servant or apprentice) who choose to engage in similar trade. The employer in such a case is not endeavouring to protect what he has, but to gain a special advantage which he could not otherwise secure. I cannot ^C find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the court. Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge ^D of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilize information confidentially obtained."

In *Super Safes (Pty) Ltd & Ors v Voulgarides & Ors* 1975 (2) SA 783 (W) at ^E 785E, Nicholas J said:

"A bare covenant not to compete cannot be upheld. A restraint against competition must, if it is to be valid, serve some interest of the person in whose favour it was inserted ... the purchaser of a business, for

example, who requires protection against the erosion of its goodwill by the competition of the seller; or the employer who requires that his trade ^F secrets and his trade connections be protected against exploitation by the man whom he is taking into his employment."

The accepted proposition that an employer is not entitled to protection from mere competition by a former employee means that the employee is entitled to use to the full any personal skill or experience even if it has been acquired in the service of his employer. It is this freedom to use to the full a man's ^G improving ability and talent which lies at the root of the policy of the law regarding this type of restraint. The additional knowledge and skill acquired during employment belong to the employee and their exercise cannot be lawfully restrained by an employer as they are not his property.

The first question is: Was there a proprietary right for the protection of which ^H the appellant needed a restraint of trade to be undertaken by the respondent?

2007 (2) ZLR p26

Malaba JA

It is clear from the founding affidavit and the list of names of customers with ^A whom the respondent had established personal contact in the performance of his duties as sales representative, that the appellant had trade connections against the abuse by the respondent of the knowledge of which it required protection.

In *Paragon Business Forms (Pty) Ltd v du Preez* 1994 (1) SA 434, Leach J ^B at 444C said:

"Where an employee has access to customers and is in a position to build up a particular relationship with customers so that when he leaves his employer's service he could easily influence them to follow him to his new business, there does not seem to me to be any reason why, in principle, a restraint should not be enforced to protect the employer's trade ^C connections."

The order the respondent placed with "SANDVIK Tools" on behalf of RG Tools induced a reasonable apprehension in the appellant that he could use the knowledge of and influence over its customers to take them with him to RG Tools.

The next question is this: Was the restraint of trade, sought to be enforced ^D by the appellant against the respondent, an appropriate remedy for the protection of its trade connections? The restriction is undoubtedly a no-competition restraint. As stated by Lord Parker in the *Saxelby's* case *supra*, a no-competition restraint can be used for the protection of trade connections where, if competition were allowed, the employee would take advantage of the ^E employer's customer connections. It must, however, be shown that the proprietary rights in the trade connections could only be adequately protected against prejudicial interference by the employee, if the no-competition restraint is imposed and enforced. In other words, there must be no other restraint protecting the same proprietary rights. No-competition restraints were upheld as appropriate methods of protecting trade connections in *Paragon Business ^F Forms (Pty) Ltd v Du Preez* *supra* and *Basson v Chilwan & Ors* 1993 (3) SA 742 (A).

In my view, the no-competition restraint in this case does not protect the appellant's proprietary rights. It is not in collocation with the other restraints. It stands alongside the other restraints from which it is severable. The ^G intention of the parties in clause 2 of the agreement was that each restraint should be deemed to be a separate restraint of trade. Clause 1.1 is the special restraint for the protection of the appellant's proprietary rights in the trade connections against the exploitation by the respondent upon termination of his employment. The anti-solicitation restraint covered the trade connection ^H

2007 (2) ZLR p27

Malaba JA

^A and, being severable from the no-competition restraint, would have been enforceable. The presence of an enforceable anti-solicitation restraint diminished the need for a wider restraint for the protection of the same trade connections.

The restraint of trade sought to be enforced in this case is under clause 1 and not clause 1.1. Clause 1 does not even prohibit the use of knowledge of and ^B influence over the appellant's customers, suggesting that it was not intended to protect trade connections against exploitation by the respondent upon termination of his employment with the appellant. It is too wide, as it prevented

the respondent from being engaged by any undertaking carrying on business similar to that undertaken by the appellant in any part of the country.

c To preclude a former employee from carrying on his natural trade in any part of the country on his own, or in association with others, is a very strong prohibition which requires exceptional justification. It appears to me that the restraint sought to be enforced by the appellant in this case is in effect a restraint against mere competition from the respondent in the use after termination of employment, of personal knowledge and skill in the trade in d which he is involved, acquired during the period of employment with the appellant.

In *American Building Maintenance Co v Shandley* (1966) 58 DLR (2d) 525, the appellant sought to enforce a no-competition restraint to protect proprietary rights in trade connections when there was a separate and severable e no-solicitation restraint covering the same proprietary interests. Bull JA held that the restraint was invalid and unenforceable because it was directed primarily to the prevention of competition and the use of the personal skills and knowledge acquired by the respondent in the appellant's business.

The learned Judge of Appeal had this to say at 534:

f "If the 'no-competition' clause were merely an extension of the 'no-disclosure' and 'no-solicitation' covenants there might well be merit in the submission [that the restraint was no more than was reasonably necessary to protect the appellant's proprietary rights in trade marks, confidential information and customer connections, the subject-matter of the two earlier specific restrictive covenants] but to this conclusion I cannot g come. Each of the three covenants, in my opinion, is severable, clear and unambiguous, and can be separately and adequately enforced without reference to or affecting the others. It is obvious that to prevent the respondent from engaging at all in a similar business in the appellant's area likely would be an effective way to discourage or prevent any disclosures and, particularly, any solicitations being made. But they are h not *in pari materia*, because one can still disclose information and solicit

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Malaba JA

regardless of whether or not a like business is being carried on. Therefore, a where such a restriction against engaging in business is added to specific covenants clearly forbidding the actions of disclosure and solicitation, that restriction of necessity must constitute nothing more or less than a covenant to restrain the respondent from business competition. The appellant relies on *Putsman v Taylor* [1927] 1 KB 637 and *Herbert Morris, Ltd v Saxelby* [1916] 1 AC 688, to support its position that such 'no-competition' b clauses have been upheld on the ground that if restraint against the competition were not allowed the former employee could take advantage of his employer's 'trade connections or utilize information confidentially obtained'. But it is to be observed that in both those cases, and I venture to say in others where such clauses have been upheld on such grounds, the only covenant being considered by the courts was the c one preventing the engagement in the competitive business and if there were present any special covenants specifically forbidding those very things which it was alleged that the no-competition clause was aimed to prevent, no mention was made of them. I conclude that the presence of the 'no-competition' clause in the case at bar cannot be based or justified on the hypothesis that its purpose is merely to give reasonable protection d to the proprietary rights of the appellant already fully covered by the other two clauses, but on the contrary that the clause is directed primarily to the prevention of competition and the use of the personal skills and knowledge acquired by the respondent in the appellant's business. It is, therefore, invalid and unenforceable."

See *Maguire v Northland Drug Co* [1935] 3 DLR 521 at 526; *Herbert Morris e Ltd v Saxelby supra* at 710; *Attwood v Lamont* [1920] 3 KB 571; *Stenhouse Australia Ltd v Phillips* [1974] AC 391 at 403.

This, in my judgment, was not a case in which, from the nature of the respondent's duties, the only method by which the appellant could obtain protection for its trade connections was by prohibiting competition on the part of the respondent after he left its employment. The restraint was, in the f circumstances of this case, a restraint against competition only. It is, therefore, unreasonable and unenforceable.

The appeal is accordingly dismissed with costs.

SANDURA JA & CHEDA JA concurred. g

Honey & Blanckenberg, appellant's legal practitioners

Pundu & Co., respondent's legal practitioners h

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/KATSANDE v THE MASTER & ANOR 2007 (2) ZLR 29 (H)

KATSANDE v THE MASTER & ANOR 2007 (2) ZLR 29 (H)**2007 (2) ZLR p29**

Citation	2007 (2) ZLR 29 (H)
Case No	Judgment No. HH-50-07
Court	High Court, Harare
Judge	Hungwe J
Heard	6 September 2005
Judgment	11 July 2007
Counsel	<i>G C Chikumbirike</i> , for the applicant <i>S J Chihambakwe</i> , for the second respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Administration of estates — *executor — appointment of — who may be appointed — spouse of deceased person preferred — potential bias on part of executor — when may be a ground for setting aside appointment*

Headnote

Section 26 of the Administration of Deceased Estates Act [*Chapter 6:07*] states that the surviving spouse is to be preferred where there is ^D competition for the appointment of an executor. The Act, in spite of the obvious interest potentially prejudicial to the interests of the other beneficiaries, recognizes the unique position of spouses in respect of their joint estates and purposely prefers the spouse ahead of others. Potential bias by the executor is not a ground for the setting aside of an appointment unless it is demonstrably clear that due to such bias the ^E executor is completely incompetent or unable to discharge her duties as an executor. The section even allows for the appointment of a creditor as executor. Had potential bias been ranked as such, then the Act would not have included this class of persons in the category of people from which executors may be appointed.

Legislation considered ^F

Administration of Estates Act [*Chapter 6:01*], s 26

High Court Rules 1971 (RGN 1047 of 1971), r 257

Case information

G C Chikumbirike, for the applicant

S J Chihambakwe, for the second respondent

Judgment

HUNGWE J: The applicant seeks an order, by way of review, firstly, setting aside the appointment of the second respondent, his step-mother, and widow of the late Petros Peter Katsande, as executrix dative in the estate of the late Petros Peter Katsande. Secondly, he seeks an order appointing a professional ^h person to the office of executor in the estate of the late Petros Peter Katsande.

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Hungwe J

What has led to the present application may be summarized as follows. The ^a applicant is one of the children of the late Katsande. The second respondent is his step-mother, having married her late husband on 29 December 1973. On 26 March 1980, her husband bought lot 1 of lot 142 Athlone Township of Green Grove. The deceased, the second respondent and the applicant resided at these premises. The late Katsande died *ab intestato* on 5 November 1983. After his death, the parties continued to stay at the premises also known as ^b 19 Hopley Avenue, Greendale.

On 1 June 1984, the first respondent appointed the applicant as executor dative in the estate of the late Peter Petros Katsande. In October 1984, the first respondent at the applicant's instance, approved a distribution account whereby the property was awarded to the applicant. It was transferred into the ^c name of the applicant on 30 June 1988. In about October 2002, the applicant, who had always been in occupation of the property together with the second respondent, wrongfully, unlawfully and maliciously forced the second respondent under threat of serious bodily harm or death, out of her matrimonial home. She left under protest.

Aggrieved by this conduct, she sought and obtained an order setting aside ^d the applicant's appointment as executor to the estate of the late Peter Katsande in case HC 11123/02. That order also directed the first respondent to ensure that the estate is properly wound up, among other things. In compliance with the order, the first respondent called the edict meeting which was attended by all interested parties including the present litigants. In the ^e meeting, it was proposed to adopt one of two courses of action open to the attendees. They could appoint a professional executor or they could settle for an appointment by the first respondent of one from amongst them. If they were to choose an independent executor, each beneficiary would be called upon to make a financial contribution towards the costs of the executor. None of all those present including the present litigants, indicated willingness to make ^f such a contribution. Faced with this situation and in the exercise of his discretion, the first respondent appointed the second respondent as the executrix dative to her late husband's estate. He also directed in a letter to the parties that everybody be allowed access to the property. It is essentially the appointment of the second respondent and the permission granted to her to ^g access the property that has irked the applicant, who considers the property to be his home to the exclusion of everyone else. He has approached this court for relief.

His grounds of review, as can be gleaned from his founding affidavit, as he does not set out the same as required by the rules of court, are that the ^h

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Hungwe J

^a appointment of the second respondent was irregular as she will be biased against him and other beneficiaries. He points to her institution of case HC 11123/02 as evidence of bias. Further, he states that there was no basis for the first respondent's order granting access to the property. He also states that the order does not permit the first respondent to appoint an executor but to merely ascertain who the heirs to the estate were. As such the determination ^b is liable to be set aside.

On the first ground of review put forward by the applicant, it is said that the fact that the second respondent instituted process against the applicant demonstrates her bias against the him. Mr *Chikumbirike*, who appeared for the applicant, persuasively urged this court to find that the second respondent ^c has shown potential bias against the applicant by instituting the application in HC 11123/02. If the ground is based on the simple fact of suing applicant, then it is ill-conceived. I say ill-conceived because ^s 26 of the Administration of Estates Act [*Chapter 6:01*] permits such an appointment and in fact specifically states that the surviving spouse is to be preferred where there is competition for the appointment of an executor. In my view, the Act, in spite ^d of the obvious

interest potentially prejudicial to the interests of the other beneficiaries, recognizes the unique position of spouses in respect of their joint estates and purposely prefers the spouse ahead of others. Potential bias by the executor, in my view, is clearly not a ground for the setting aside of an appointment unless it is demonstrably clear, that due to such bias, the executor is completely incompetent or unable to discharge her duties as an executor. ^ε Section 26 allows for the appointment of even a creditor as executor. Had potential bias been ranked as such, then the Act would not have included this class of persons in the category of people from which executors may be appointed.

In any event, it is the applicant who acted brazenly dishonestly in excluding ^φ the second respondent from his distribution account, when he acted as executor, thereby necessitating the application by the widow. Bringing to the court's attention what may strictly amount to a fraud cannot form a basis of a finding of prejudicial bias against the second respondent. There is nothing in her founding affidavit filed in HC 11123/02 which can be construed as remotely suggesting bias against the applicant. His actions against her in fact ^θ do support such an allegation were she to make it against him. In my view, the fact that one has an interest in an estate does not, without more, disqualify that person from being appointed as an executor. This is clear from the tenor of the Act. On the face of it, she is eminently qualified to act in that position until evidence of such prejudicial bias is placed before the court. I can perceive ^η of no basis why this court should set aside the determination by the Master

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Hungwe J

in this regard, especially in view of the applicant's failure to provide the ^α requisite financial backing to the other course open to the beneficiaries.

As for the directive granting access to the property, unless the second respondent has forced herself on the property against the wishes of the applicant, I do not see how an expression of the first respondent's opinion based upon the meeting he had with the parties, could be a ground for setting ^β aside his appointment of the second respondent as an executrix. The second respondent has rights to the property in question. These have not been determined. As her matrimonial home, she clearly is entitled to access it. The first respondent may have had this in mind when he expressed the view he did in his letter to all the parties, but that is insufficient ground upon which to set aside the appointment of the second respondent as executrix to the estate. The ^γ court order clearly requires the first respondent to ensure that the estate be wound up properly. For this to be done, the first step is to set up an edict meeting. Those that attend assist the first respondent in determining who the heirs are. Coincidental to the purposes of such a meeting is the appointment of an executor or executrix. The fact that the court order does not specifically authorize this necessary step does not vitiate the determination of the first ^δ respondent in appointing the second respondent as executrix. In any event, the appointment is part of the greater mandate given the first respondent by the order to ensure that the estate is wound-up properly.

There is another basis for dismissing this application.

In terms of ^ρ 257 of the rules of court, the applicant is required, in an application ^ε for review, to state shortly and clearly the grounds on which he seeks to have the proceedings set aside. This the applicant has not done.

In the result, therefore, I am satisfied that there is no basis for setting aside the appointment by the first respondent of the second respondent as executrix in the estate of the late Peter Petros Katsande. ^φ

The application for setting aside the appointment of the second respondent as executrix ^δ dative in the estate of the late Petros Peter Katsande be and is hereby dismissed. The applicant is to pay the second respondent's costs.

Chikumbirike and Associates, applicant's legal practitioners

Chihambakwe Mutizwa and Partners, second respondent's legal ^θ practitioners ^η

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/S v
TAMBO 2007 (2) ZLR 33 (H)

S v TAMBO 2007 (2) ZLR 33 (H)**2007 (2) ZLR p33**

Citation	2007 (2) ZLR 33 (H)
Case No	Judgment No. HH-56-07
Court	High Court, Harare
Judge	Uchena J
Heard	12 July 2007
Judgment	12 July 2007
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure — *trial – conduct of – unrepresented accused – judicial officer’s role and duties*

Ⓒ **Evidence** — *assessment of – criminal case – correct approach to take – evidence should not be massaged to fit pre-conception*

Evidence — *circumstantial – reliance on – inference must be only reasonable one that can be drawn from the facts*

Evidence — *reliability – demeanour – extent to which demeanour should be relied on – should only be relied on where determination cannot be made on basis of available evidence*

Headnote

The Zimbabwean system of criminal justice is essentially adversarial in nature. The essential characteristic of the adversary system is that the ^Epresiding officer appears as an impartial arbiter between the parties. Although a judge must ensure that justice is done, it is equally important that the judge must ensure that justice is seen to be done. When the accused is unrepresented, the judicial officer is in the invidious position of being an arbiter and, at the same time, an adviser of the accused because he must explain the rules of procedure and evidence to the ^Faccused. Over the years, there has been a steady progression in the fashioning of rules by the courts in order to mitigate the harshness of putting an unrepresented accused on trial, particularly for serious offences. These rules require positive conduct by judicial officers to assist unrepresented accused in a variety of ways. They are all judge-made rules, and have their origin in the fundamental principle of fairness ^G which is the bedrock of law that requires trials to be fair and justice to be equal.

An accused’s poor demeanour does not justify a finding against him when the evidence, including that of the State, clearly supports his defence. Demeanour is a product of impressions created by the conduct of a ^Hwitness in the mind of a judicial officer. Poor demeanour could be due to

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the witness's discomfort because he is not telling the truth. It can in some ^A cases be due to the witness succumbing to the intimidating atmosphere of a courtroom or even to the normal character of the witness. Some people are strong while others are weak. This will have a bearing on how they present themselves before the court. Judicial officers must take these factors into consideration before condemning a witness's evidence ^B on the basis of demeanour. It is therefore important for judicial officers to carefully examine the demeanour of a witness before drawing adverse inferences from it. Demeanour should only be relied on in cases where a determination cannot be made on the basis of the available evidence.

Circumstantial evidence can only be used to draw an inference if the inference sought to be drawn is the only reasonable one which can be drawn from ^C those facts. It must be supported by rational reasoning and an analysis of the proved facts.

The correct judicial assessment of evidence must be based on establishing proved facts, the proof of which must be a result of careful analysis of all the evidence led. The final result must be the product of an impartial and dispassionate assessment of all the evidence placed before the ^D court. It would be wrong to massage the evidence to fit a pre-conception. The court should examine the evidence first and see what it proves, rather than arrive at a pre-conception first and then see whether it can, no matter how, be supported.

Cases referred to ^E

Parkin v Guardian Security Svcs (Pvt) Ltd S-130-99

S v Anochili S-24-01

S v Chimanga S-125-98

R v Difford 1937 AD 370

S v Garande 2002 (1) ZLR 297 (H) ^F

R v Hepworth 1928 AD 265

S v Matida S-180-98

S v Miri HH-239-98

S v Mpofu S-154-91

S v Rall 1982 (1) SA 828 (A) ^G

Judgment

UCHENA J: The accused person was jointly charged with another on one count of theft of newspapers. They pleaded not guilty but the accused was convicted after a trial. His co-accused was acquitted at the end of the trial. The accused was sentenced to six months' imprisonment, of which three months were suspended on conditions of good behaviour and the remaining three ^H

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^A months on condition he performed 105 hours of community service, which was to commence on 4 August 2006 and be completed within three weeks of that date.

The facts leading to the charge are as follows. The accused person worked in a newspaper printing factory. The company's general manager, a Mr Innocent Kurwa, worked from the same premises. On 3 March 2006, Kurwa ^B passed through the factory on his way out for lunch. He saw the accused carrying something he did not identify, but later believed to be newspapers, to a place he believed was a convenient place from which they would be eventually moved out of the factory. He believes they were eventually placed in a broken down machine within the factory, because he heard a metallic ^C sound when the accused was out of his sight. He later found heaps of newspapers within the factory including some which were hidden in a machine which was not working. A total of two hundred and fifty seven copies were eventually found. They were valued at \$30 840 000, and were all recovered within the factory.

The accused person and all his workmates who were in the factory were ^D arrested on the basis of Kurwa's report to the police. According to him, the accused's co-accused, who was acquitted, had

told him not to blame the accused as they were all involved. The police declined to charge the other five, but preferred theft charges against the accused and his co-accused.

In his defence outline, the accused said he simply picked printed wastes which ^ε were scattered in the factory and placed them at a place where water had been spilled to absorb it. He said other newspaper wastes were found in a broken down machine. They were all arrested as Kurwa believed everyone in the factory was involved, but others were released except him and his co-accused.

In his defence outline, the accused's co-accused said the accused took some newspapers and placed them where tea is made to absorb water which had ^ε leaked from a kettle. He later heard the general manager calling the accused. He went to where the general manager was, and was asked about the newspapers. He told the general manager that they were printed wastes. The manager then accused him of protecting thieves.

Innocent Kurwa gave evidence for the State. He told the court of how he saw ^g the accused carrying something within the factory and become suspicious. He followed him but lost sight of him during which period he heard a metallic sound which he believes was caused by the accused when he placed what he was carrying in a broken down machine. He later found copies of make-ready newspapers in a broken down machine. He also found other heaps of wastes ^h and make-ready newspapers in the factory. He eventually discovered 257

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wastes and make-ready copies of *The Independent* newspaper. Kurwa told the ^a court that wastes and make-ready newspapers are not for disposal by employees as they send them back to their customers, together with properly printed newspapers.

Morgan Chatikobo, the investigating officer, told the court of how he was called to the complainant's company and he arrested the accused and six ^b others. He further told the court of how Kurwa showed him a heap of newspapers at a place "which he said was used as a changing room by workers". The newspapers in question were not yet completed to make a full paper and it then became very difficult for him "to ascertain the quantity." He told the court that the accused and his workmates denied putting all the newspapers there as they said some had been put there by those on the night ^c shift. He said some of these papers appeared to have been for some time at the place where he saw them. He told the court that Kurwa told him that he believed the accused's co-accused, who is a member of the workers' committee, influences other workers. He was responding to the prosecutor's question on the accused's co-accused being implicated because of his membership in the company's workers' committee. He told the court that he checked the point ^d Kurwa suspected was used for taking out the newspapers and found it was very difficult for them to carry the newspapers out through that point. His last comment under examination in chief was:

"From my own observation, maybe the circumstances surrounding this case as I proceeded to the scene it gives me the impression not to ^e emphatically say the accused persons stole the newspapers."

Under cross-examination by the accused, he was asked about the state of the papers he saw and he said:

"There were several heaps from the entrance up to the point where you were seen carrying the papers."

When asked whether the accused did not show him where there was water he ^f wanted to absorb using the newspapers he said: "Yes you did."

The following exchange took place when he was being cross examined by the accused's co-accused:

^A

"Q. Is it not true that Kurwa said he wanted you to detain the two of us and leave the other five? ^g

A. It's true.

Q. Is it not true initially you said the value was \$8 million but when we came to court he said \$30 million?

A. Yes and I didn't argue with the complainant. ^h

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Uchena J ^A

Q. Is it not true that when we left the papers were still scattered?

A. It is true."

The trial proceeded into the defence case and nothing of benefit to the State's case was established. The accused person was, surprisingly, convicted and sentenced as already indicated.

▫ The following should have put the trial magistrate on alert:

[*The learned judge then dealt with the evidence in detail, and continued:*]

The record of proceedings was forwarded for scrutiny. The regional magistrate raised issues on the propriety of the accused's conviction. The trial magistrate surprisingly defended the conviction. It is clear to me that she should have c conceded and taken correction instead of wasting everyone's time defending a conviction which is not supported by the State's evidence. It is obvious from the investigating officer's evidence that the case was viewed with suspicion by the officer who brought it to court. That officer contradicted Kurwa's evidence. The State did not prove its case beyond reasonable doubt. It is surprising that the trial magistrate was not alerted by the police officer's doubt ▯ and the corroboration his evidence gave to the accused person's defence.

In her response, the trial magistrate said she drew inferences from the evidence led and the demeanour of the accused person. I am aware of what Ebrahim JA said in *Parkin v Guardian Security Services (Pvt) Ltd* S-130-99 about an appellate court's interference with a trial court's findings on credibility. At ▫ p 10 of the cyclostyled judgment, he said:

"It is true that an appellate court is reluctant to interfere with the findings of credibility of a trial court unless the reasons given for accepting certain evidence may be unsatisfactory: Hoffmann & Zeffertt *South African Law of Evidence* 4 ed at p 484. The probabilities are important in assessing credibility. See *Arter v Burt* 1922 AD 303, *Germani v Herf & Anor* 1925 (4) SA 887 at 903B. Compare *Zimbabwe Electricity Supply Authority v F Dera* 1998 (1) ZLR 500 (S) and *CAPS Holdings Ltd v Chikuavira* S-73-99."

In *S v Mpofu* S-154-91 at p 3 of the cyclostyled judgment, Ebrahim JA also commented on the appellate court's interference with the trial court's findings on credibility based on demeanour as follows:

"An appeal court will not lightly interfere with the findings on credibility ▫ based on demeanour made by a trial court: see *R v Dhlamayo & Anor* 1948 (2) SA 677 (A); *Watt (or Thomas) v Thomas* [1947] All ER 582 (HL); *Joyce v Yeomans* [1981] 2 All ER 21 (CA) and *S v Makawa & Anor* 1991 (1) ZLR 142 (S)."

In this case, the magistrate's reasons are not supported by either the law or ▫ the evidence. Her reasons for accepting the State's evidence as a basis for the

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Uchena J

conviction are unsatisfactory. She relied on inferences and the accused's A demeanour in circumstances where she was not entitled to do so, as the State's own evidence clearly pointed to a contrary inference; and the use of demeanour was inappropriate, because common cause evidence had proved the issues she sought to prove by relying on the accused's demeanour. In my view, an accused's poor demeanour does not justify a finding against him when the evidence, including that of the State, clearly supports his defence. Demeanour ▫ is a product of impressions created by the conduct of a witness in the mind of a judicial officer. It could be due to the witness's discomfort because he is not telling the truth. It can, in some cases, be due to the witness succumbing to the intimidating atmosphere of a courtroom or even be due to the normal character of the witness. Some people are strong, while others are weak. This c will have a bearing on how they present themselves before the court. Judicial officers must take these factors into consideration before condemning a witness's evidence on the basis of demeanour. It is therefore important for judicial officers to carefully examine the demeanour of a witness before drawing adverse inferences from it. In my view, demeanour should only be relied on in cases where a determination cannot be made on the basis of the ▯ available evidence. In this case, the accused's evidence that he used the newspapers to absorb water is corroborated by that of the investigating officer, who found newspapers placed where water had been spilled. This could not be outweighed by Kurwa's inconclusive evidence that he saw the accused coming without the newspapers and assumed he had placed them in a broken down machine because he heard the sound of a metal object, and ▫ subsequently found some newspapers in a broken down printing machine. If that evidence is compared to Chatikobo's to the effect that newspapers were strewn all over the factory and that some seemed to have been in the positions he saw them for some time, the accused's poor demeanour referred to by the magistrate does not justify her conclusion that the accused stole the newspapers. F

The magistrate's inference that the accused stole the newspapers is not consistent with all the proved facts. In *S v Anochili* S-24-01, Sandura JA at p 7 of the cyclostyled judgment, commenting on circumstantial evidence said:

"Whilst it is true that the State relied in the main upon circumstantial evidence, I am satisfied that the inference which the State urged the court to draw was consistent with all the proved facts. In addition, the proved facts excluded the possibility that the appellant was innocent."

In *S v Chimanga* S-125-98, Muchechetere JA at p 8 of the cyclostyled judgment, when dealing with circumstantial evidence, commented as follows:

"I am however in agreement with Mr *Wamambo's* submission that the only

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Uchena J

A inference a court could draw from the facts is that the appellant stole the money in question. In the first instance, the appellant's attempt to blame Dube in the matter is without any substance. Although Dube admitted to having at times handled the keys to the safe and the post office, there was no opportunity for him to have had the keys to the new office duplicated. He could not have got to the safe without getting into the appellant's new B office. The evidence that the appellant had moved into a new office a few days before the theft and that no-one had had access to the new office and its keys before the theft was committed was not disputed. Further, the evidence that Dube was in Bulawayo during the week-end that the theft occurred was not seriously challenged. It is also of significance that because he flouted PTC regulations on keys he for most of the time kept both keys to himself and therefore lessened the chance of any other C person to duplicate them."

In the present case, it cannot be said that the inference drawn by the magistrate is consistent with all the proved facts. The proved facts do not exclude the possibility of the accused's innocence. The evidence outlined above does not only point to the guilt of the accused person. In my view, it is more consistent D with the accused's innocence than his guilt. The investigating officer's evidence in particular supports the accused's evidence and expresses doubt on the complainant's claim that the accused stole the newspapers.

Circumstantial evidence can only be used to draw an inference if the inference sought to be drawn is the only reasonable inference which can be drawn from those facts. The inference, as demonstrated in *Chimanga supra*, must be E supported by a rational reasoning and an analysis of the proved facts. In the present case, it cannot be said that the proved facts are only consistent with the accused person's guilt. The proved facts, in fact, favour the accused and raise a doubt in his favour.

An accused person is entitled to an acquittal if there is a doubt after the F consideration of all the available evidence, and if his defence is probably true. In *S v Matida* S-180-98, Ebrahim JA at p 3 of the cyclostyled judgment said:

"There is nothing on the record of evidence to justify a finding that his explanation cannot reasonably be true and he must therefore be given the benefit of the doubt, even though the army driver's version seems more probable."

G In the present case, the accused's story was more probable than Kurwa's and he must certainly have been given the benefit of the doubt. The onus was on the State to prove him guilty beyond reasonable doubt. In *R v Difford* 1937 (AD) 370 at 383, Curlewis CJ said:

H "It is equally clear that no onus rests on the accused to convince the court

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of the truth of any explanation he gives. If he gives an explanation, even A if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is unprovable, but beyond reasonable doubt that it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

In this case, there is no question of the accused's story being possibly true as it is supported by what the investigating officer saw at the scene of the B crime. He should have been acquitted even without being put on his defence, as the State's own evidence supported his defence outline. The magistrate did not realize that she has a duty to protect the interests of an unrepresented accused. It was not fair to put the accused persons on their defence in the face of the investigating officer's evidence narrated above. In *S v Garande* 2002 (1) ZLR 297 (H) at 303D, Ndou J said: C

"... but the trial magistrate appeared not to be aware that the unrepresented accused needed her assistance. Such conduct on the part of judicial officers came under attack in the case of *S v Manyani* HB-36-90 wherein at pp 4-5 of the cyclostyled judgment, Muchechetere J (as he then was) said:

'Another matter which is of concern is that the trial magistrate appeared not to have been sensitive to the fact that the accused before him was unrepresented. See *S v Matimhodya* 1973 (1) RLR 76; *S v Wall* GS-190-81 and *S v Nyoni* HB-248-86. It is clear that in the end the accused who appeared to be a simple person was facing the prosecutor and an unsympathetic court. ^ε

The Zimbabwean system of criminal justice is essentially adversarial in nature. The essential characteristic of the adversary system is that the presiding officer appears as an impartial arbiter between the parties. Although, according to the well-known dictum of Curlewis JA in *R v Hepworth* 1928 (AD) 265 at 277, a judge must ensure that 'justice is done', it has been held to be 'equally important' that the judge must ensure that ^ε 'justice is seen to be done': see *S v Rall* 1982 (1) SA 828 (A) at 831H-832A. When the accused is unrepresented, the judicial officer is then in the invidious position of being an arbiter and, at the same time, an adviser of the accused, because he must explain the rules of procedure and evidence to the accused. Over the years, there has been a steady progression in the fashioning of rules by the courts in order to mitigate the harshness of ^ε putting an unrepresented accused on trial, particularly on serious offences. These rules require positive conduct by judicial officers to assist unrepresented accused in a variety of ways. They are all judge-made rules, and have their origin in the fundamental principle of fairness which is the bedrock of law that requires trials to be fair and justice to be equal." ^η

2007 (2) ZLR p41

Uchena J

A The magistrate in this case did not explain the procedure entitling the accused to a discharge at the end of the State case in circumstances which called for such an explanation in view of the investigating officer's evidence. She also did not act as an impartial arbiter. She in fact stretched the State's evidence to justify a conviction, as demonstrated by her relying on an improper use of circumstantial evidence to draw unjustifiable inferences, and by her relying ^ε on demeanour when the issues could be determined by the evidence led by the parties.

In *S v Mbiri* HH-239-98, Gillespie J at pp 3-4 of the cyclostyled judgment commented on the court's duty to examine evidence as follows:

"In my estimation, this is a classic example of the court massaging the evidence in order to have it fit a preconception. That is not the way to do ^ε things. It should scarcely need saying that one must examine the evidence first, and see what it proves rather than arriving at a preconception first, and see whether it can, no matter how, be supported."

The correct judicial assessment of evidence must be based on establishing proved facts whose proof must be a result of a careful analysis of all the ^ε evidence led. The final result must be a product of an impartial and dispassionate assessment of all the evidence placed before the court. The judicial officer's duty is to determine the issues before him one way or the other guided by the evidence which he must critically examine.

I am satisfied that the regional magistrate was correct in questioning the propriety of the accused's conviction. The accused's conviction and sentence ^ε must be set aside. The accused was sentenced on 3 August 2006. He, according to the sentence imposed by the magistrate, must have completed serving that sentence within three weeks of the date of sentence. The regional magistrate's letter to the trial magistrate is dated 8 February 2007. This was some six and half months after the accused had finished serving the sentence imposed on him. The trial magistrate's response is dated 19 February 2007. The ^ε regional magistrate's letter forwarding the record of proceedings for review is dated 14 May 2007. It is accompanied by the clerk of court's letter which reads as follows:

"The above matters refers:

A lot of cases coming in were completed last year. There was a delay in ^ε processing them because of either stationary shortages or machine breakdown.

Any inconveniences, is sincerely regretted (*sic*)."

This is an example of how administrative inefficiencies can prejudice accused persons. The letter of explanation and apology, though welcome as ^η acknowledgment of the delays, does not help the accused person who has

2007 (2) ZLR p42

Uchena J

served a sentence for a conviction which is going to be set aside. The ^A explanation of the delay is not valid as cases can be sent on review or scrutiny in improvised review or scrutiny covers. They also need not be typed, as hand-written review covers are acceptable. Review and scrutiny periods must be strictly adhered to, to avoid injustices such as the accused in this case has suffered. In *S v Lindo* HH-149-03 at pp 5-6 of the cyclostyled judgment, I said: ^B

“Magistrates at trial and scrutiny levels should ensure that the urgency with which records are to be prepared for scrutiny and review as provided by ss 58(1) and 57 (1) of the Magistrates Court Act is complied with. The record of proceedings should within a week be sent for review or scrutiny. As soon as a record is received for scrutiny or review it should be timeously attended to by the scrutinizing regional magistrate or reviewing ^C judge. If this is not done, the need for urgently sending records for review or scrutiny may be frustrated and mistakes which should be corrected by the review and scrutiny procedure will take long to correct, as happened in this case. Persons wrongly convicted or sentenced will continue to serve their sentences. The injustice which should be corrected by the scrutiny and review procedures will continue for longer than was anticipated by ss 57 (1) and 58 (1) of the Magistrates Court Act.” ^D

I must add that in some cases, as happened in this case, the injustice may become too late to correct because the accused will have finished serving his sentence. Even though the accused has served the sentence imposed on the basis of a wrongful conviction, the conviction and sentence must be set aside.

The accused’s conviction and sentence are set aside. ^E

Bhunu J agrees. ^F

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/BUSINESS EQUIPMENT CORPORATION v MTETWA 2007 (2) ZLR 43 (S)

BUSINESS EQUIPMENT CORPORATION v MTETWA 2007 (2) ZLR 43 (S)

2007 (2) ZLR p43

Citation	2007 (2) ZLR 43 (S)
Case No	Judgment No. S-14-07
Court	Supreme Court, Harare
Judge	Sandura JA, Gwaunza JA & Garwe JA
Heard	15 January 2007
Judgment	16 July 2007
Counsel	<i>H Zhou</i> , for the appellant The respondent in person
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

c Employment — dismissal — grounds for — absence from work without reasonable excuse — appeal against order for reinstatement pending — effect of noting such appeal — order for reinstatement stayed notwithstanding the appeal was devoid of merit — reasonable excuse for employee to be absent

Headnote

▫ The respondent was dismissed from the appellant's employ for misconduct. He appealed against his dismissal to the negotiating committee, which ordered the appellant to reinstate him without loss of pay or benefits. No alternative order for damages in lieu of reinstatement was made. An appeal by the appellant to the Labour Court failed. When the respondent ^ε subsequently presented himself for duty, he was told that the appellant was going to file an appeal to the Supreme Court. He thereafter stayed away from work but proceeded himself to file an appeal to the Supreme Court against the order of reinstatement, without the alternative of damages, seeking an order for payment of damages as an alternative to reinstatement. Pending the hearing of the appeal, the respondent did not ^ε report for work.

Some seven months later, the appellant, although aware of the respondent's appeal, directed him to report for work, and when he did not do so, instituted disciplinary proceedings against him. These culminated in the respondent being dismissed for the second time. His domestic appeals ^ε failed but the Labour Court held that he had a reasonable excuse for not presenting himself for work while his appeal to the Supreme Court was pending. The appellant at some stage (the evidence did not establish precisely when) abandoned its first appeal. The respondent's appeal, on the other hand, was found to be devoid of merit. It was dismissed on the ^ε grounds that there was no evidence of the breakdown of the relationship

2007 (2) ZLR p44

Gwaunza JA

between the parties and thus no evidence upon which the Labour Court ^A could consider making the earlier orders of the negotiating committee and the Labour Court, for the appellant to reinstate the respondent without the option of damages.

Held, that the respondent's appeal had been properly before the Supreme Court. There was nothing to justify the departure from the law concerning ^B the effect of an appeal on the judgment appealed against. During the seven months period before he was told to come back to work, the respondent was not informed of the appellant's change of heart regarding its proposed appeal to the Supreme Court. His own appeal aside, the respondent could not, therefore, have reasonably been expected to know that he would be welcomed back to work and so had reasonable cause ^C to stay away from work.

Case cited

Phiri & Ors v Industrial Steel and Pipe (Pvt) Ltd 1996 (1) ZLR 45 (S)

Case information

H Zhou, for the appellant ▫

The respondent in person

Judgment

GWAUNZA JA: This is an appeal against a judgment of the Labour Court, in terms of which the appellant's application for rescission of an earlier default judgment against it was dismissed.

The background to the dispute is as follows. The respondent was dismissed ^ε from the appellant's employ for misconduct ('the first dismissal'). He appealed against his dismissal to the Negotiating Committee, which ordered the appellant to reinstate him without loss of pay or benefits. No alternative order for damages in lieu of reinstatement was made.

The appellant, aggrieved at the order to reinstate the respondent, appealed ^ε against such order to the Labour Court, which however, dismissed the appeal and upheld the Negotiating Committee's decision for the appellant to reinstate the respondent without loss of salary or benefits.

When the respondent subsequently presented himself for duty, he was handed a letter in which it was stated that the appellant was going to file an ^ε appeal to the Supreme Court. He thereafter

stayed away from work but proceeded to file an appeal to the Supreme Court against the order of reinstatement without the alternative of damages. It is not clear from the evidence when the appellant abandoned its appeal to the Supreme Court. Nor is it clear when the respondent, who initially had exhibited a willingness to ^h

2007 (2) ZLR p45

Gwaunza JA

A return to work in compliance with the Labour Court's order, had decided to opt for damages instead. What is clear is that it took the appellant a period of some seven months to demand from the respondent that he report for duty or face dismissal. Significantly, the appellant knew by then that the respondent had – correctly or otherwise – filed his appeal to the Supreme Court.

In that appeal, the respondent sought an order for payment of damages as an ^b alternative to reinstatement. As indicated, pending the hearing of appeal by this court, the respondent did not report for work. It was then of the view that the noting of the appeal against the order of reinstatement had the effect of suspending its enforcement. The appellant, being of a different view, directed the respondent to report for work, and when he did not do so, instituted ^c disciplinary proceedings against him. These culminated in the respondent being dismissed from his employment with effect from 14 May 2002 ('the second dismissal'). The respondent thereafter appealed against such dismissal – but unsuccessfully – to the Local Joint Committee and, later, the Negotiating Committee. He then appealed to the Labour Court. On the date of hearing of the matter, the appellant *in casu* was in default, and the Labour Court, which ^d was satisfied that notice of the hearing had properly been served on the appellant's legal practitioners, proceeded to consider the matter on the merits. The court found that the respondent *in casu* had a reasonable excuse for failing to report for work during the pendency of his appeal to the Supreme Court, and accordingly upheld the appeal. The appellant later sought rescission of that judgment and, having failed in its quest, has now appealed to this court.

^e In the meantime, the respondent's appeal to the Supreme Court, in which he sought an order for damages in lieu of re-instatement, was dismissed (S-25-04). The basis of such dismissal is set out in the Supreme Court judgment as follows:

"The question of the breakdown of the relationship between the parties ^f was never raised by the appellant in the lower *fora*. Indeed, as stated in the notice of appeal, it was in the closing submissions by counsel at the end of the hearing before the (Labour) Tribunal that this point was first taken. No evidence of the breakdown of the relationship having been led, there was no evidence upon which the Tribunal could find that the relationship between the parties had broken down and consider making ^g an order in terms of the *proviso*. Accordingly, the appeal is devoid of merit and it is dismissed with costs."

From the foregoing, it is evident that two separate court proceedings were at one time being pursued by the parties. There is, however, no doubt that the finding of the Supreme Court in the matter concerning the respondent's first ^h dismissal has a bearing on the dispute concerning his second dismissal.

2007 (2) ZLR p46

Gwaunza JA

As already pointed out, the respondent successfully challenged his first ^a dismissal before the Negotiating Committee, which ordered his reinstatement. When the appellant sought to have the Negotiating Committee's determination reversed on appeal to the Labour Court, the respondent, who had neither filed a cross appeal against the Negotiating Committee's determination, nor placed before the Labour Court evidence indicating a breakdown in the relationship ^b between the parties, left it until the stage of closing submissions to mention, for the first time, that he preferred damages to reinstatement. The Labour Court correctly disregarded this belated claim, if such it was, and upheld the Negotiating Committee's decision to reinstate the respondent. Quite clearly, the respondent's appeal to the Supreme Court was doomed to failure.

It is against this background that the respondent's second dismissal must be ^c considered.

The appellant contends that, contrary to the finding by the court *a quo* it was not in wilful default when it failed to attend the hearing of this matter in the court *a quo*. The appellant disputes the court *a quo*'s finding that proper service of the notice of hearing had been effected through the appellant's legal ^d practitioners. It is also argued that the court *a quo* erred in finding, as it did, that

there was proof on record that the appellant had been properly served with the notice of hearing. Further, that the court gave no indication of the type of service referred to.

I find there is merit in these contentions. The court *a quo* referring to the issue of the notice of set down, noted as follows on p 2 of the judgment: ^Ε

“The record shows that the notice of set down was date stamped 23 July 2004. Service was effected ‘B/H’ i.e. ‘by hand’ on the applicant’s legal practitioners.”

However, as correctly stated in the appellant’s heads of argument, while the notice of set down may have been date stamped 23 July 2004, the appellant’s ^Ε legal practitioners, almost two weeks later on 6 August 2004, indicated in a letter to the respondent’s legal practitioners, that such notice had not been received by them. The letter read in part as follows:

“We have your letter of 2 August 2004 and wish to point out that we have not as yet been served with any notice of further set down of this matter. We will naturally deal with the matter in the event that it is indeed set down ^Γ for finalization.”

It is pertinent to note that the observation by the court *a quo* concerning the date stamp of 23 July 2004, and service by hand, does not indicate whose date stamp it was nor whether someone at the appellant’s legal practitioners’ office had signed the notice of set down to indicate acknowledgement of receipt. The ^Η

2007 (2) ZLR p47

Gwaunza JA

A appellant’s legal practitioner, Mr *Mahlangu*, in his affidavit denied ever receiving the notice of set down. I find, too, that the letter from the appellant’s legal practitioners to the effect that they would “deal with the matter” once they received notice of set down, did not accord with an intention to wilfully default in attending the hearing.

Given these circumstances, I find that the finding by the court *a quo* that the ^Β appellant was in wilful default is not supported by the evidence before the court. There is no evidence, in other words, to suggest that the appellant deliberately, and with full knowledge of the date of set down, took the decision not to attend the hearing in question.

The appellant contends further that the court *a quo* should have rescinded ^ϸ the judgment in question, given that it, (the appellant) had proved the *bona fides* of its defence on the merits, which carried prospects of success.

I do not find merit in this argument.

In its default judgment upholding the respondent’s appeal (against his second dismissal), the Labour Court ruled as follows:

^Δ “The employee had a reasonable excuse for his failure to report for work. He was waiting the outcome of an appeal. As such the decision of the Negotiating Committee is set aside. The appeal is accordingly upheld. The parties are to await the outcome of the appeal which was noted with the Supreme Court.”

The Supreme Court duly dismissed the respondent’s appeal, an outcome ^Ε whose effect was to confirm the earlier orders of the Negotiating Committee and the Labour Court, for the appellant to reinstate the respondent without the option of damages.

The court *a quo* in its judgment cited authorities to support the proposition that under common law the noting of an appeal has the effect of suspending ^Ε the decision appealed against (see among others, *Phiri & Ors v Industrial Steel and Pipe (Pvt) Ltd* 1996 (1) ZLR 45) where the legislature was silent on the effect of an appeal. Nowhere in its papers does the appellant deny that the respondent had properly noted an appeal with this court. Far from denying it, the appellant filed opposing heads of argument to that appeal. The appeal was registered as such by this court, and all relevant processes to have it heard ^Γ were followed. It was duly heard albeit at the end of the hearing, dismissed.

In other words, it was an appeal considered to be properly before the court. The appellant, while stating that the respondent sought to appeal against an order that was, in fact, in his favour, has advanced no argument to justify a ^Η departure from the law concerning the effect of an appeal on the judgment

2007 (2) ZLR p48

Gwaunza JA

appealed against. It has not been suggested, for instance, that the leave of the ^A court to execute the judgment pending an appeal against it, had been granted.

There was another pertinent consideration. The appellant does not deny that it addressed a letter to the respondent to the effect that it wished to file an appeal against the Labour Court's determination that he should be reinstated without loss of salary or benefits. Nor was the respondent's averment that he ^B was given that letter on the day he sought to attend for duty, disputed. The record also shows that it took the appellant almost seven months to inform the respondent that he should attend for duty, and that during that period he was not informed of the appellant's change of heart regarding its proposed appeal to the Supreme Court. His own appeal aside, the respondent could not, therefore, have reasonably been expected to know that he would be welcomed ^C back to work.

Against this background, the finding by the court *a quo* that the respondent had reasonable cause to stay away from work pending the determination of his appeal to the Supreme Court cannot be faulted. His dismissal on that basis was therefore unjustified.

I find, in the final analysis, that while the court *a quo* may have erred in its ^D finding that the appellant was in wilful default, it was correct in its finding regarding the *bona fides* or lack thereof, of the appellant's defence on the merits. The appeal must, therefore, fail.

For the avoidance of doubt, the respondent is entitled to reinstatement to his former employment with the appellant, without loss of salary or benefits, that ^E being the effect of the judgment of this court in case S-25-04.

In the result, the appeal is dismissed with costs.

SANDURA JA & GARWE JA concurred. ^F

Gill, Godlonton & Gerrans, appellant's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/ZIMBABWE REVENUE AUTHORITY v MPINDIWA 2007 (2) ZLR 49 (S)

ZIMBABWE REVENUE AUTHORITY v MPINDIWA 2007 (2) ZLR 49 (S)

2007 (2) ZLR p49

Citation	2007 (2) ZLR 49 (S)
Case No	Judgment No. S-85-06
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA & Gwaunza JA
Heard	30 October 2006
Judgment	17 July 2007
Counsel	<i>P Machaya</i> , for the applicant <i>J Ndlovu</i> , for the respondent
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

c Employment — appeal — to Labour Court — need for matter to have been determined by the tribunal a quo — tribunal failing to make decision — no appeal possible — correct course for employee to take

Headnote

The respondent was employed by the appellant. She was charged with two acts of misconduct in terms of the appellant's code of conduct. She was ^b found guilty by the disciplinary and grievance committee and appealed to the appeals committee. At the end of the appeal hearing, the committee adjourned. It agreed to have minutes of the proceedings typed and later come up with a final overall verdict. About a week later, the chairman of the appeals committee wrote to the appellant, saying that the committee ^e did not reach a consensus, but recommending that the verdict passed by the disciplinary and grievance committee be upheld. After another few days, he wrote to the respondent, saying that after the committee deliberated over the matter, he, as the chairman, found no reason to interfere with the decision of the disciplinary and grievance committee. He told her she could appeal to the Labour Court, which she duly did. The ^f Labour Court found that the appeals committee had not determined the respondent's appeal. It then proceeded to determine the appeal, which ought to have been determined by the appeals committee. It set aside the decision of the disciplinary and grievance committee, and ordered the appellant to reinstate the respondent or pay her damages in lieu of reinstatement. On appeal to the Supreme Court:

^g *Held*, that the appeals committee did not determine the appeal. The chairman had no authority to decide the appeal on behalf of the appeals committee, so his decision was null and void, and of no force and effect. There was, therefore, no decision or determination against which the respondent ^h could have appealed to the Labour Court. Her appeal was premature and

2007 (2) ZLR p50

Sandura JA

was not, therefore, properly before the Labour Court. On that basis alone ^a it should have been struck off the roll.

Held, further, that it was not competent and proper for the Labour Court to determine the respondent's appeal, which should have been determined by the appeals committee. It could only do so if there was a determination to appeal against.

Held, further, that the correct course for the respondent should have been ^b to seek an order compelling the appeals committee to determine her appeal.

Case cited

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

Case information

P Machaya, for the applicant

J Ndlovu, for the respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the Labour Court in terms of which the appellant ("Zimra") was ordered to reinstate the respondent ^b ("Lindiwe") as its librarian, or pay her damages in lieu of reinstatement. The factual background is as follows. At the relevant time, Lindiwe was employed by Zimra as a librarian. On 29 July 2005, she was charged with two acts of misconduct in terms of Zimra's Code of Conduct ("the Code"). The details of the alleged acts of misconduct are not necessary for the determination of this appeal. Subsequently, on 2 August 2005 Lindiwe appeared before Zimra's ^e disciplinary and grievance committee for a hearing on the misconduct charges. After the hearing, she was found guilty of both charges, and her employment contract was terminated with effect from 4 August 2005.

Dissatisfied with that result, Lindiwe appealed to the appeals committee on 6 August 2005, challenging both convictions. Thereafter, the appeal was set ^f down for hearing on 18 August 2005. However, on that date it was postponed to 19 August 2005 because certain relevant documents had not been placed before the appeals committee. On 19 August 2005, the hearing of the appeal was again postponed, because one of the members of the appeals committee was not present. However, the appeal was finally heard on 26 and 29 August 2005. What happened at the end of the hearing is indicated by the record of ^g the hearing as follows:

"The committee adjourned at 19.30 hours and agreed to have minutes of the proceedings typed and later come up with a final overall verdict."

After the appeal had been heard, the chairman of the appeals committee ("the ^h

2007 (2) ZLR p51

Sandura JA

a chairman") wrote a letter to Zimra's Human Resources Manager on 7 September 2005. The relevant part of the letter reads as follows:

"The committee did not reach a consensus on the various issues under consideration in this case ...

From the deliberations of the appeals committee, I recommend that the verdict passed by the disciplinary and grievance committee be upheld ..."

b Six days later, on 13 September 2005, the chairman wrote another letter to Lindiwe. The letter, in relevant part, reads as follows:

"I refer to the decision that is addressed to the Human Resources Manager that was also sent to you dated 7 September 2005, informing you about the outcome of your appeal.

c For the avoidance of doubt, this is to advise that after the committee deliberated over the matter, I, as the chairman, have found no reason to interfere with the decision of the disciplinary and grievance committee.

This means that you remain dismissed. In terms of the code of conduct you have a right to appeal against this decision to the Labour Court."

Thereafter, Lindiwe appealed to the Labour Court. That court found that the ^d appeals committee had not determined Lindiwe's appeal. It then proceeded to determine the appeal, which ought to have been determined by the appeals committee. It set aside the decision of the disciplinary and grievance committee, and ordered Zimra to re-instate Lindiwe as its librarian or pay her damages in lieu of reinstatement.

e Aggrieved by that decision, Zimra appealed to this court.

In my view, there are two issues for determination in this appeal. The first is whether the appeals committee determined Lindiwe's appeal, and the second is whether it was proper for the Labour Court to determine Lindiwe's appeal which ought to have been determined by the appeals committee.

f With regard to the first issue, there is no doubt in my mind that the appeals committee did not determine Lindiwe's appeal. I say so for three reasons. The first reason is that there is no evidence in the record before this court that after the appeals committee adjourned on 29 August 2005, it ever reconvened and reached a verdict on Lindiwe's appeal.

The second reason is that, in his letter to the Human Resources Manager, ^g dated 7 September 2005, the chairman stated that the appeals committee had not reached a consensus on the issues it had considered, and that he was, therefore, recommending that the verdict of the disciplinary and grievance committee be upheld. The third reason is that in his letter to Lindiwe, dated ^h 13 September 2005, the chairman said the following, *inter alia*:

2007 (2) ZLR p52

Sandura JA

"For the avoidance of doubt, this is to advise that after the committee ^a deliberated over the matter, I, as the chairman, have found no reason to interfere with the decision of the disciplinary and grievance committee ..."

It is quite clear from this extract that the decision communicated to Lindiwe was that of the chairman, and not that of the appeals committee. As the chairman had no authority to decide the appeal on behalf of the appeals ^b committee, his decision was null and void, and of no force and

effect. There was, therefore, no decision or determination against which Lindiwe could have appealed to the Labour Court. That is significant, because the existence of a decision, determination, judgment or order is a prerequisite to the noting of an appeal. Consequently, Lindiwe's appeal was premature and was not, therefore, properly before the Labour Court. On that basis alone, it should have been struck off the roll.

Although the conclusion I have reached in respect of the first issue in this appeal effectively disposes of the appeal, I will consider the second issue, which is whether it was competent and proper for the Labour Court to determine Lindiwe's appeal, which should have been determined by the appeals committee. There is no doubt in my mind that it was not. In determining the appeal which should have been determined by the appeals committee, the Senior President of the Labour Court relied upon what McNally JA said in *Dalny Mine v Banda* 1999 (1) ZLR 220 (S). At 221B-F, the learned Judge of Appeal said:

"As a general rule it seems to me undesirable that labour relations matters should be decided on the basis of procedural irregularities. By this, I do not mean that such irregularities should be ignored. I mean that the procedural irregularities should be put right. This can be done in one of two ways:

- (a) by remitting the matter for hearing *de novo* and in a procedurally correct manner; and
- (b) by the Tribunal hearing the evidence *de novo*.

In regard to the first of these alternatives, this court has previously said that:

'The Tribunal is not given a discretion whether to remit or not. Once it decides that the proceedings were fatally irregular, and that it cannot come to a conclusion on the merits, it has no choice but to remit.'

See *Air Zimbabwe Corp v Mlambo* 1997 (1) ZLR 220 (S) at 223F, and s 101(8) of the Act.

In regard to the second alternative, I draw attention to the words in the above extract: 'and that it cannot come to a conclusion on the merits'.

2007 (2) ZLR p53

Sandura JA

A There used to be many cases in which the record of evidence was so scanty that it was virtually impossible to come to a conclusion on the record. I commented on this in *Sirdar's Manufacturers (Pvt) Ltd v Chinya* 1995 (1) ZLR 368 (S) at 370F *et seq*. I noted there that the Tribunal has the power to hear evidence in terms of s 106(6) of the Act as amended (now s 90(6) of [Chapter 28:01]). See also s 18(1) of SI 30 of 1993. It may also be pointed out that in terms of s 97(4)(a) and (b) of the Act, the Tribunal has a choice (to be exercised, of course, judicially) either to 'proceed with the appeal by way of a hearing' or to 'decide the appeal on the record'."

However, the facts of that case were very different from the facts of the present case. The facts were summarised by McNally JA at 220F-221B as follows:

"The facts are, briefly, that Banda was suspended from his job as a cardex clerk at the mine on 16 December 1992. At a hearing the previous day he had been found guilty of 'failure to follow established procedures'. He appealed, in terms of the relevant Code of Conduct (SI 165 of 1992), to the Mine Manager. The Mine Manager dismissed him on 30 December 1992, having offered an alternative of demotion which was refused.

Banda then appealed, in terms of Part D, s 3(e) of the Code, to the labour relations authorities, and his appeal was heard and dismissed by a senior labour relations officer on 1 February 1993. He then appealed to the Labour Relations Tribunal (the Tribunal). His hearing in that forum extended from 30 November 1995 to 5 November 1996, 20 February 1997 and 7 May 1997.

The decision of the Tribunal was based on three procedural points taken by the Tribunal *mero motu* and *in limine*. Because it found fatal procedural defects in the procedure, the Tribunal 'considered it proper to uphold the appellant's (Banda's) appeal without going into the merits'. Accordingly, it ordered his reinstatement with an alternative of damages."

In my view, it is clear from the above facts that there is at least one fundamental difference between *Banda's* case *supra* and the present case. The difference is that whereas in *Banda's* case *supra* Banda's appeals to the mine manager and the senior labour relations officer were dismissed, and therefore determined, Lindiwe's appeal to the appeals committee was never determined by that committee. Banda's appeal to the Tribunal was, therefore, properly before the Tribunal, whereas Lindiwe's appeal to the Labour Court was not properly before that court, and should not have been heard. What McNally JA said in *Banda's* case *supra* does not, therefore, apply to the present case. It seems to me that, instead of appealing against a non-existent determination of the appeals committee, Lindiwe should have sought a court order compelling the appeals committee to

determine her appeal. This she can still do, because the ^H appeals committee has not yet determined her appeal.

2007 (2) ZLR p54

Sandura JA

The appeal before this court must, therefore, succeed. However, as far as the ^A costs in the court *a quo* and in this court are concerned, in view of the fact that Lindiwe was represented by the Legal Aid Directorate, there will be no order as to costs.

In the circumstances, the following order is made:

1. The appeal is allowed with no order as to costs. ^B
2. The order of the court *a quo* is set aside, and the following is substituted –
“The matter is struck off the roll, with no order as to costs.”

CHIDYAUSIKU CJ & GWAUNZA JA concurred. ^C

Kantor & Immerman, appellant’s legal practitioners

Legal Aid Directorate, respondent’s legal practitioners ^D

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Source:

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S v SITHOLE 2007 (2) ZLR 55 (S)

2007 (2) ZLR p55

Citation	2007 (2) ZLR 55 (S)
Case No	Judgment No. S-16-07
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Garwe JA
Heard	21 May 2007
Judgment	17 July 2007
Counsel	<i>T Nyakunike</i> , for the appellant No appearance for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

^C **Criminal procedure (sentence)** — murder — extenuating circumstances — facts associated with the crime which diminish morally albeit not legally the degree of an accused’s guilt — payment of compensation by accused to the

relatives of the deceased — mitigating factor but not an extenuating factor — may be considered for the purposes of sentence after extenuating circumstances have been found

Headnote

- ▷ An extenuating circumstance in cases of murder, has been defined as " ... a fact associated with the crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner's guilt ..."

The payment of compensation by an accused to the relatives of the person ϵ he had killed is indicative of remorse but it is not a circumstance that is associated with the crime or one that would throw light on an accused's state of mind at the time of the commission of the offence. It is a mitigating factor rather than an extenuating factor, which may be considered only when the court, having found extenuating circumstances, has to consider Γ what sentence to impose.

Cases cited

S v Jaure 2001 (2) ZLR 393 (H)

S v Meyer 1981 (3) SA 11 (A)

Case information

Ⓒ *T Nyakunike*, for the appellant

No appearance for the respondent

Judgment

GARWE JA: On 28 February 2001, the appellant appeared before the High $\mathcal{H}$ Court at Mutare charged with the crime of murder. He pleaded not guilty but

2007 (2) ZLR p56

Garwe JA

was convicted of murder with actual intent and sentenced to death. He now $\mathcal{A}$ appeals against that sentence to this court.

The facts of this case are largely common cause or at least not seriously in dispute. The appellant and the deceased were engaged in an extra marital relationship. The relationship had commenced sometime in 1998. On 10 January 1999 at about 20:00 hrs, the appellant and the deceased met along a $\mathcal{B}$ certain path. They walked together for a distance. Thereafter the appellant took a machete from his cycle and struck the deceased with it five times on the head. The deceased collapsed and died on the spot. According to the post-mortem report, the cause of death was severe hemorrhage.

The sentence imposed by the court *a quo* is attacked on the basis that the trial court misdirected itself in finding that no extenuating circumstances existed. $\mathcal{C}$

In considering the question of extenuation, the court *a quo* had regard *inter alia* to the statement made by the appellant to the police. In that statement the appellant told the police that he had been intimate with the deceased for a period of almost a year and had spent a lot of money on her. In early 1999, the deceased started to avoid him and the appellant formed the impression that $\mathcal{D}$ she was no longer interested in him. On the day preceding the fateful day, the appellant assaulted the deceased hoping that this would have a positive effect on the relationship. That did not happen. On the day in question, he looked for her and eventually found her. He then took her along the main road on the pretext that he was going to give her back her property when in fact he wanted to kill her. Thereafter he struck her with a machete about five times and she ϵ fell. In the statement, he stresses that the reason he became angry was that although he had spent a lot of money on her the deceased had lost interest in him.

The first ground of appeal against the finding that no extenuating circumstances existed is that no consideration was given to the fact that the appellant and Γ the deceased were engaged in a relationship which had gone sour because the deceased was now seeing other men. No attempt was made by the appellant's legal practitioners to substantiate this statement in the heads of argument. Nor was any case law authority cited in support of this submission. On the facts it is apparent that the appellant fatally attacked the deceased because he felt spurned after having lavishly spent money on her. There was $\mathcal{G}$ no heated exchange of words between the two shortly before the attack.

This appears to be a case where the appellant acted out of jealousy and decided to eliminate the deceased because she did not want him anymore. In these circumstances, there can be no question of any extenuating circumstances. ^h

2007 (2) ZLR p57

Garwe JA

^A This court is aware of the decision of the South African appellate court in *S v Meyer* 1981 (3) SA 11 (A). In that case, the court held that the fact that the murderer and the victim were involved in a love relationship, involving mental tension resulting from jealousy and provocation, could amount to a factor which may serve as an extenuating circumstance. The present case is distinguishable in that there was no provocation in the ordinary sense and the ^B appellant acted in the way he did because he felt spurned by the deceased.

The second ground of appeal against the finding that no extenuating circumstances existed is that the court *a quo* failed to take into account the fact that the appellant must have been drunk at the time because his irrational conduct in attacking a defenceless woman with a dangerous weapon can only ^C be explained on the basis of drunkenness. The trial court considered the possibility that the appellant may have been labouring under intoxication at the time but concluded that intoxication did not play any part during the incident. The court *a quo* remarked as follows:

"... The evidence seems to make it clear that on the fateful day, the accused did not act under the influence of alcohol. Those who saw him at the market ^D place were all convinced that he did not partake of any alcohol that day. The accused himself admitted in evidence that he did not drink alcohol on 10 January. Those who saw him on the day in question all agreed that there was no argument between the accused and the deceased on the day in question. There can be no question of any form of provocation being causal to the violent attack that took place on the deceased on that day. ^E There is nothing upon which the court can find that the accused can justify the claim that he, that the accused acted under circumstances which usher an excuse (*sic*). On the contrary, the overwhelming indications are that there was a predetermined effort on the part of the accused to ensure not only that the deceased is injured but that her life should be taken.

There may be reasons which have not been disclosed to the court as to ^F why such a bald determination was made that the deceased should die. Whatever those reasons might be have not been made open to the court. But be that as it may, the court's task is made easier by the fact that the evidence led both by the State and by the accused himself turn (*sic*) to show that the love affair that took place between the two went horribly wrong about that time. In fact, so long (*sic*) that there was such a serious ^G determination on the part of the accused to eliminate the deceased and that apparently is what happened. The court has no choice except to hold that the accused acted with an actual intent to bring about the result which eventuated and we, accordingly find the accused guilty of murder with ^H actual intent."

2007 (2) ZLR p58

Garwe JA

This finding by the trial court cannot be impugned in any way. The totality ^A of the evidence suggests that the murder was not committed on the spur of the moment or that the murder was committed as a result of drunkenness. Rather the evidence suggests that the appellant lured the deceased to a lonely spot where he then took a machete and struck the latter at least five times on the head. The reason given by the appellant for his conduct is that the ^B deceased was no longer interested in him but in other men and yet he had spent what he considered a considerable sum of money on her. In these circumstances there is no basis upon which the trial court can be criticized for coming to the conclusion that the appellant's conduct was not attributable to alcohol.

The last ground upon which the sentence of the court *a quo* is attacked is that the court should have taken into account the fact that the appellant paid ^C compensation to the deceased's family as a sign of his remorsefulness. The claim by the appellant during the trial that he had paid compensation was never fully investigated and it remains unknown whether in fact he did so. As the State did not dispute the claim it can be assumed in the appellant's favour that he did so. However the payment of compensation in these circumstances would not, on its own, amount to extenuation. An extenuating circumstance ^D has been defined as:

"... a fact associated with the crime which serves, in the minds of reasonable men, to diminish, morally albeit not legally, the degree of the prisoners' guilt ..."

See Gardiner and Lansdown *South African Criminal Law and Procedure*, ^E Vol 1, General Principles and Procedure 6 ed by C W Lansdown, W G Hoall and A V Lansdown (p 675). See also *Criminal Law*

2 ed by C R Snyman p 424.

The position is also settled that:

"... a circumstance will not be of extenuating character in relation to a murder unless it is associated therewith at some stage of the chain leading from motive to execution, both inclusive, but a circumstance may, it is submitted, be extenuating in this connection which has reference to the mentality or the personality of the accused ..."

See Gardiner and Lansdown *South African Criminal Law and Procedure*, Vol 1 *supra* at p 395.

The payment of compensation to the deceased's relatives by the appellant in this case was done in accordance with tradition in order to show remorse for the death of the deceased. Such remorse is a factor that a court would normally take into account in assessing an appropriate sentence. It is not a circumstance that is associated with the crime or one that would throw light on the appellant's state of mind at the time of the commission of the offence. As stated H

2007 (2) ZLR p59

Garwe JA

A by Snyman in *Criminal Law* 2 ed this is a factor which:

"... like other factors affecting punishment, may be considered only when the court, having found extenuating circumstances, has to decide what sentence to ... to impose" (at p 425).

In other words, the payment of compensation in these circumstances is a mitigating factor rather than an extenuating circumstance. The case of *S v B Jaure* 2001 (2) ZLR 393 cited in the appellant's heads of argument deals *inter alia* with conduct suggesting repentance and endeavours to assist the victim before death ensues. That is not the position in this case.

In all the circumstances therefore, there is no basis upon which the trial court could be said to have misdirected itself in arriving at the conclusion that no C circumstances of extenuation existed in this case. Indeed, both defence and State counsel appear to have been agreed at the conclusion of the trial that there were no extenuating circumstances. Although, as the trial court found, the full reasons have not been disclosed as to why there was such a bold determination on the part of the appellant that the deceased should die, the evidence led before the court *a quo* suggested clearly that the appellant D became bitter when the deceased started to ignore him after he had spent what he considered a substantial sum of money on her. The attack did not take place on the spur of the moment. The appellant lured the deceased to a lonely spot at night where he then used a machete to inflict fatal blows to the head. It is common cause she died on the spot.

E The appeal against sentence must therefore fail.

In the result, the appeal is dismissed.

SANDURA JA & CHEDA JA concurred.

F *Pro deo*

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/TOTAL MARKETING ZIMBABWE (PVT) LTD v POLLYLAMP INVESTMENTS (PVT) LTD 2007 (2) ZLR 60 (S)

TOTAL MARKETING ZIMBABWE (PVT) LTD v POLLYLAMP INVESTMENTS (PVT) LTD 2007 (2) ZLR 60 (S)

2007 (2) ZLR p60

Citation 2007 (2) ZLR 60 (S)

Case No Judgment No. S-34-07

Court	Supreme Court, Harare
Judge	Cheda JA
Heard	26 July 2007
Judgment	26 July 2007
Counsel	<i>H Zhou</i> , for the applicant <i>O Masendeke</i> , for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Appeal — *against interlocutory ruling — need for leave of judge to note c appeal against such ruling — merits of matter not dealt with — not proper for Supreme Court to deal with case on merits*

Headnote

The applicant approached the High Court with an urgent chamber application seeking a provisional order. When the urgent chamber application was placed before the judge, he declined to deal with it and ruled that it was **D** not urgent. The applicant then approached the Supreme Court, asking it to grant the order sought in the High Court.

Held, that the judge *a quo*, having determined that the matter was not urgent, did not deal with the merits. This meant that the matter was still pending before the High Court. The decision by the High Court judge was **E** interlocutory and the applicant needed leave from the judge to note the appeal. Without such leave the matter was not properly before the Supreme Court. The Supreme Court cannot be used to take over and hear applications from the High Court just because a litigant thinks that his application is urgent. This can only be done where the High Court has given reasons for declining to deal with a matter, in which case it must **F** be shown that the court erred in arriving at such a decision. The merits in the application before the High Court were not considered, so it would be wrong for a judge of the Supreme Court to take it upon himself to consider them as if it were a court of first instance.

Cases cited ^H

ANZ GrindlayBank (Zim) (Pvt) Ltd v Hungwe 1994 (2) ZLR 1 (S)

Crouch v Dube 1997 (1) ZLR 427 (S)

Case information

H Zhou, for the applicant

O Masendeke, for the respondent

2007 (2) ZLR p61

Cheda JA

Judgment

^A **CHEDA JA** (In chambers in terms of r 31 of the Supreme Court Rules):

The applicant approached the High Court with an urgent chamber application seeking a Provisional Order with the following terms:

"TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. that the cancellation of the agency relating between the applicant and the respondent be and is hereby confirmed.
2. the respondent shall pay the applicant's costs on a scale of legal practitioner and client.

INTERIM RELIEF GRANTED^c

1. Pending granting of the final order, the respondent shall, upon service on it of this provisional order, forthwith deliver to the applicant –
 - (a) the applicant's Mercedes Benz C240 registration AAG 5786 together with the keys and the registration book; ^d
 - (b) the applicant's Volvo S40 registration AAG 5881 together with the keys and the registration book.”

The application was filed at the High Court on 13 July 2007.

On 19 July 2007, the applicant filed with the Supreme Court an urgent chamber application in which he stated as follows:

“However, when the urgent chamber application was placed before the Honourable Mr Justice Bhunu, he declined to deal with it and ruled that it was not urgent.”

He then prays that this court grants this application.

The order that he seeks is exactly the same one that he sought at the High Court.

The application is opposed. The respondent says the decision by the High ^e Court judge was interlocutory and the applicant needed leave from the judge to note this appeal. Without such leave the matter is not properly before the judge of the Supreme Court. The judge at the court *a quo*, having determined that the matter was not urgent, did not deal with the merits. This means the matter is still pending before the High Court.

^g I agree with the observations made by the respondent.

The applicant is actually asking the Supreme Court to take over a matter that is pending at the High Court and determine it on the merits as a court of first ^h instance.

2007 (2) ZLR p62

Cheda JA

This is so because the applicant filed this application with an affidavit on the ^a merits of the matter before the High Court and did not provide any judgment from the High Court or seek the High Court judge's reasons for the decision that he made.

The applicant is clearly trying to cut across the clear procedural rules of court, a situation that is not permissible. ^b

This court cannot be used to take over and hear applications from the High Court just because a litigant thinks that his application is urgent.

This can only be done where the High Court has given reasons for declining to deal with a matter, in which case it must be shown that it erred in arriving at such a decision. ^c

In *Crouch v Dube* 1997 (1) ZLR 427 (S), it was held that:

“Where a lower court exercises a discretionary power, an appeal court has to decide firstly what was the nature of the discretionary power.

There are two categories of such powers. The first relates to matters having the character of being so essentially for the determination by the lower court that it would ordinarily be inappropriate for an appeal court ^d to substitute its own discretion.

The second relates to matters having the character of being equally appropriately determinable by either court.

Where the discretionary power is of the first kind, the appeal court has no jurisdiction to substitute its own discretion unless the lower court's ^e exercise of its power was not judicial.”

In *ANZ Grindlay Bank (Zim) (Pvt) Ltd v Hungwe* 1994 (2) ZLR 1 (S) Korsah JA stated:

“I venture to say it would be highly irregular, if not unfair and dangerous, for an appellate court to assume the jurisdiction of a court of first instance, and pronounce on issues which are properly recognizable in a

court of first instance, but have not been canvassed before that court. To do so would be to deprive the losing party of the right to appeal should our determination be wrong.”

I agree entirely with the above observations.

The merits in the application before the High Court were not considered and as such it would be wrong for me to take it upon myself to consider them as if this is a court of first instance.

It follows that this application cannot be granted and I order as follows:

The application is dismissed with costs. H

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Cheda JA

A Gill, Godlonton & Gerrans, applicant’s legal practitioners

Hogwe, Dzimirai & Partners, respondent’s legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/KARITAWU v KARITAWU & ORS 2007 (2) ZLR 64 (H)

KARITAWU v KARITAWU & ORS 2007 (2) ZLR 64 (H)

2007 (2) ZLR p64

Citation	2007 (2) ZLR 64 (H)
Case No	Judgment No. HH-58-07
Court	High Court, Harare
Judge	Makarau JP
Heard	17 July 2007
Judgment	8 August 2007
Counsel	<i>W Bharebende</i> , for the applicant First respondent in default <i>L Mauwa</i> , for the second respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Administration of estates — executor — removal of — application for — C application under common law — who may make application — grounds on which application may be made

Headnote

The first respondent, one of the deceased's sons, by producing a fraudulent death certificate, induced the Master to appoint him as executor and sole ^D beneficiary of his father's estate, which included a piece of land. He gave a false name to the Master. Using the same false name, he sold the piece of land to the second respondent. The applicant, the deceased's widow, filed an application for an order declaring the appointment of the first respondent as executor ^E and the subsequent sale of the immovable property to the second respondent null and void and that the property ^E be registered in the name of the estate of the deceased. The second respondent claimed to be an innocent purchaser of rights in the property and denied that she ever dealt with the first respondent. She also raised the point of whether the applicant had *locus standi* to bring an application for the removal of an executor and to compel reversal of the cession of rights in favour of the second respondent. ^F

Held, that the applicant was clearly a beneficiary in the deceased's estate, as the surviving spouse. The issue was whether a beneficiary has any capacity at law to bring proceedings for the removal of an executor on any ground, because s 117 of the Administration of Estates Act [*Chapter 6:01*] gives the Master the power to approach a judge in chambers for ^G the removal of an executor. There was no doubt that the Master could act under the section as the appointment of the first respondent was induced by fraud.

Held, further, that an executor of an estate may be removed from office at common law. The grounds for doing so, inexhaustive as they are, are ^H

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Makarau JP

^A based on a broad principle: the court possesses inherent power to remove a trustee or administrator (even one appointed under a will) on the ground that his continuance in office will prejudicially affect the future welfare of the estate entrusted to him. While no person other than the Master may proceed under s 117, granting such a power to the Master was not intended to take away the right of all those having an interest ^B in the estate from approaching the court at common law to have the executor removed if they can establish to the satisfaction of the court that the continuance in office of the executor does not augur well for the future welfare of the estate and beneficiaries. The applicant, as a beneficiary in the estate, had the capacity to approach the court at common law to move the court for the removal of the first respondent as an executor. Her ^C application was brought at common law as she was alleging fraud.

Held, further that because the first respondent's appointment was induced by fraud, it was null and void *ab initio*. It was as if it was never made. It was a nothing and upon which nothing of consequence can hang. This included the purported sale to the second respondent.

Cases cited ^D

Bonsma v Meaker NO & Ors 1973 (2) RLR 16 (G)

Fey NO and Whiteford NO v Serfontein and Another 1993 (2) SA 605 (A)

Sackville West v Nourse & Anor 1925 AD 516

Siziba v Siziba HB-25-04

^E *Van Niekerk NO v Master of the High Court* 1996 (2) ZLR 105 (S)

Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech 1987 (2) ZLR 338 (S)

Legislation considered

Administration of Estates Act [*Chapter 6:01*], ss 116, 117(1)(b) & (d)

Case information

^F *W Bherebende*, for the applicant

First respondent in default

L Mauwa, for the second respondent

Judgment

MAKARAU JP: Mairosi Katirawu died in Harare on 25 July 2005. He left an ^a estate that included interest in a piece of land whose street address is No. 23 Gora Street, New Mabvuku, Harare. He was survived by the applicant, as surviving spouse, two minor children and two adult children, one of whom is the first respondent.

On 20 June 2006, the first respondent obtained a death certificate for the late ^b Mairosi Katirawu from the Harare Central Registry. On the death certificate,

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Makarau JP

the deceased was described as a single retired man of 70 whose country of ^a birth was Zambia. On 15 August 2005, another death certificate had been issued in respect of the deceased, in which he was correctly described as a married man aged 70.

It is on account of the issuance of these two certificates that the events that I will narrate hereafter were possible and, in my view, a tightening of the ^b registration of deaths and the issuance of copies thereof by the relevant authorities will greatly assist in curbing fraudulent activities regarding deceased estates.

Armed with the second death certificate and one that incorrectly described the deceased as single, the first respondent had the estate of the deceased registered with the magistrates court. The first respondent misrepresented to ^c the Assistant Master, firstly, that he was Never Patinampamba, a son of the deceased and, secondly, that he was the only beneficiary to the estate. In due course, he was granted letters of administration, appointing him executor dative. He was also given the Master's consent to sell the immovable property in the estate, which he did, selling the property to the second respondent. In ^d concluding the agreement of sale with the second respondent, the first respondent still masqueraded as one Never Patinampamba.

Rights in the property were in due course ceded to the second respondent.

On 19 February 2007, the first respondent was arraigned before the magistrates court charged with one count of fraud and one count of forgery, arising from ^e his dealings with the estate of the late Mairosi Katirawu. He pleaded guilty to both counts and was sentenced to 10 years' imprisonment, with four years suspended on condition of good behaviour.

Realizing that the property is still registered in the name of the second respondent, the applicant filed this application praying for an order declaring the appointment of the first respondent as executor dative and the subsequent ^f sale of the immovable property to the second respondent null and void and that the property be registered in the name of the estate of the late Mairosi Katirawu.

The application was opposed by the second respondent. In her opposing affidavit, the second respondent admitted that she had purchased rights in ^g the property after she was shown letters of administration issued in favour of Never Patinampamba. She thus claims to be an innocent purchaser of rights in the property and further denies that she ever dealt with the first respondent.

While there is a dispute as to whether it was Never Patinampamba or the first respondent that sold the property to the second respondent, I am satisfied that ^h

2007 (2) ZLR p67

Makarau JP

^a on the evidence before me I can be robust and resolve this conflict of facts in favour of the applicant without doing an injustice to the respondents. See *Zimbabwe Bonded Fibreglass v Peech* 1987 (2) ZLR 338 (S).

Attached to the applicant's papers was a copy of the record of proceedings in the magistrates court, where the first respondent pleaded guilty to forging the death certificate of the late Mairosi Katirawu and to defrauding the second ^b respondent by misrepresenting that he had the requisite capacity and authority to dispose of the property. In such proceedings, the first respondent admitted that he misrepresented to the second respondent that he was Never Patinampamba. I am thus satisfied that it was the first respondent that the second respondent dealt with. I am fortified in coming to this finding by the fact that the burden of proof in a criminal matter is higher than that in a civil ^c trial. There is, therefore, abundant evidence before me that it was the first respondent that defrauded the second respondent.

In her heads of argument, the second respondent raised a legal point that has exercised my mind to some degree. It is whether the applicant has the *locus standi* to bring an application for the removal of an executor and to compel ^D reversal of the cession of rights in favour of the second respondent.

The applicant has not in her papers alleged that she is the executor of the estate of the late Mairosi Katirawu.

The applicant is clearly a beneficiary in the estate of the late Mairosi Katirawu as the surviving spouse. The issue that then falls for determination is whether ^E a beneficiary has no capacity at law to bring proceedings for the removal of an executor on any ground because the law gives the Master of this court the power to approach a judge in chambers for the removal of an executor.

Section 117(1) of the Administration of Estates Act [*Chapter 6:01*] provides:

"The Master may apply to a judge in chambers for the removal of an ^F executor, tutor or curator from his office on the ground –

- (a) that he was not qualified for appointment to such office or that his appointment was for any reason illegal, or
- (b) ..."

It would appear to me that the wording of the above section is wide enough to empower the Master to have an executor removed from office on the ground ^G that the appointment was procured by fraud, as occurred in this matter. The issue, however, remains whether a person in the position of the applicant can approach the court to have an executor removed from office.

It is trite that an executor of an estate may be removed from office at common law. The grounds for removing an executor from office at common law are ^H inexhaustive, as they are based on a broad principle.

In

2007 (2) ZLR p68

Makarau JP

Bonsma v Meaker NO & Ors 1973 (2) RLR 16 (G) at 21, Goldin J adopted ^A the summary of the law on the subject matter on what Solomon ACJ had to say in *Sackville West v Nourse & Anor* 1925 AD 516 at 527 in the following words:

"There is very little authority in our law with respect to the grounds which justify a Court in removing trustees from office, and what is still more ^B strange is that there appears to have been an equal dearth of authority on this subject in the law of England. The matter was however carefully considered in *Letterstedt v Broers* (1884) 9 AC 371, which came before the Privy Council on appeal from the Cape Supreme Court, and which has laid down the broad principles by which, on this subject, courts administering the Roman-Dutch law should be guided. In his judgment, Lord Blackburn says: 'There is very little to be found to guide us in ^C saying what are the cases requiring such a remedy, so little that their Lordships are compelled to have recourse to general principles; He then quotes a passage from *Story's Equitable Jurisprudence* (para 1298) as follows: 'But in cases of positive misconduct courts of equity have no difficulty in interposing to remove trustees who have abused their trust: it is not indeed every mistake or neglect of duty or inaccuracy or conduct ^D of trustees, which will induce courts of equity to adopt such a course. But the acts or omissions must be such as endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity'."

In my view, the net effect of the citation from the *Sackville West* case is to be found in the last sentence of the cited passage which reads: ^E

"In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated that their main guide must be the welfare of the beneficiaries."

It has been held that, under Roman-Dutch Law, the court possess inherent ^F power to remove a trustee or administrator (even one appointed under a will), on the ground that his continuance in office will prejudicially affect the future welfare of the estate entrusted to him. See *Fey NO and Whiteford NO v Serfontein and Another* 1993 (2) SA 605 (A) at 610B. In that case, the appeal court accepted as sound the reasoning by the trial court that:

"It would seem to me that the position of a trustee in insolvency is ^G analogous to that of a trustee, administrator or executor in a deceased's estate. He occupies a position of trust. Under the insolvency laws, it is his function to liquidate the insolvent estate and account to creditors and the insolvent for his

administration. In this respect, his fiduciary position differs little from that of an executor or administrator of the estate property. ^H

2007 (2) ZLR p69

Makarau JP

^A In my view, the court has at common law the same power to remove a trustee in an insolvent estate as it has in respect of a trustee, or guardian or administrator in a deceased's estate."

In *Siziba v Siziba* HB-25-04, this court had occasion to discuss whether under s 117(1) of the Administration of Estates Act [*Chapter 6:01*], any party other than the Master may bring an application for the removal of an executor. The ^B court held, and correctly so, in my view, that the section does not empower any one else other than the Master to seek the removal of an executor in terms of that section.

In *Van Niekerk NO v Master of the High Court* 1996 (2) ZLR 105 (S), McNally JA was quite clear that the Master's application was made, not ^C under the common law, but specifically in terms of s 117(1), subsections (b) and (d), of the Act, namely:

"(b) that he has failed to perform satisfactorily any duty or requirement imposed upon him by or in terms of any law;

and ^D

" (d) that in his opinion such person is no longer suitable to hold such office."

While s 117 (1) empowers the Master to approach the court for the removal of an executor for the listed grounds, in my view, such a power granted to the Master was not intended to take away the right of all those having an interest in the estate from approaching the court at common law to have the executor ^E removed if they can establish to the satisfaction of the court that the continuance in office of the executor does not augur well for the future welfare of the estate and beneficiaries. The power granted to the Master by s117 is, in my view, complementary to the inherent power of the court at common law. In any event, if it was the intention of the legislature to revoke the common law power of the court in this regard, it would have done so in express ^F language, for the jurisdiction of the court is not ousted other than in clear language.

Applying the above law to the facts before me, it is my finding that the applicant as a beneficiary in the estate has the capacity to approach this court at common law to move the court for the removal of the first respondent as an ^G executor. Her application was brought at common, law as she is alleging fraud. She is not alleging any of the grounds listed in s 117 for the removal of the first respondent as executor of the estate.

Further, having established that the appointment of the first respondent as executor to the estate of the late Mairosi Katirawu was procured by fraud, the ^H removal of the first respondent follows the finding, for nothing legal can flow

2007 (2) ZLR p70

Makarau JP

from a fraud. His appointment was null and void *ab initio* on account of the ^A fraud. It is as if it was never made. It is a nothing and upon which nothing of consequence can hang.

In conclusion, the "rights" that the second respondent believes to have purchased and acquired from the first respondent are tainted by the same illegality and amount to naught by token of the same reasoning. It is as if there ^B was never a sale between her and the first respondent and consequently, no rights can flow from a non-sale in her favour. The sale and the consequent cession of rights in her favour amount to nothing at law, for nothing legal can flow from a fraud.

In the result, the application succeeds and I make the following order:

1. The appointment of the first respondent as executor dative in the estate ^C of the late Mairosi Katirawu is hereby set aside.
2. The cession of rights in No. 23 Gora Street Mabvuku, Harare in favour of the second respondent is hereby set aside.
3. The fourth respondent is hereby ordered to within seven days of service of this order upon him, restore the name of Mairosi Katirawu in his register ^D as the holder of rights in No. 23 Gora Street, Mabvuku, Harare.
4. The second respondent shall bear the costs of this application.

Mavhunga & Sigauke, applicant's legal practitioners

Mutezo, Mushangwe & Co, second respondent's legal practitioners E

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/J D M AGRO-CONSULT & MARKETING (PVT) LTD v EDITOR, THE HERALD & ANOR 2007 (2) ZLR 71 (H)

J D M AGRO-CONSULT & MARKETING (PVT) LTD v EDITOR, THE HERALD & ANOR 2007 (2) ZLR 71 (H)

2007 (2) ZLR p71

Citation	2007 (2) ZLR 71 (H)
Case No	Judgment No. HH-61-07
Court	High Court, Harare
Judge	Gowora J
Heard	25 June 2007; 27 June 2007
Judgment	8 August 2007
Counsel	<i>G Mtisi</i> , for the plaintiff <i>H Zhou</i> , for the defendant
Case Type	Civil trial
Annotations	Link to case annotations

Flynote

c **Practice and procedure** — parties — citation of — need to cite natural or legal persons — failure to do so — summons a nullity and incapable of amendment

Headnote

The plaintiff brought an action for defamation, citing as defendants "The Editor, *The Herald*" and "*The Herald* Newspaper". Appearance to defend was entered and a plea was filed. At the pre-trial conference, the plaintiff, by consent, amended the summons to cite, as second defendant, Zimbabwe Newspapers (1980) Ltd. No attempt was made to describe the first defendant as anything other than "The Editor, *The Herald*". At the E trial, the defence took a point *in limine*, that the summons was invalid on the grounds that there were no defendants before the court. The Editor of *The Herald*, cited as the first defendant, did not exist: the editor of a newspaper is a position within the structures of a newspaper and is neither a natural nor a legal person. There is also no entity called "The Herald Newspaper" and the attempt to amend the summons at the F pre-trial conference did not cure the invalidity. The plaintiff argued that: (1) the defendants were not entitled at the trial stage to raise a point *in limine*; the pleadings had closed and the defendants were not entitled thereafter to raise such a point and that to do so was acting in bad faith and (2) the citation of the defendants was due to a misnomer which could G easily be cured by an appropriate application to amend the summons and declaration.

Held, that a party can amend its pleadings at any time, provided that there is no prejudice to the other party which is not capable of being cured by an award of costs. Such an application can be made even after pleadings ^H have closed. The point raised by the defence did not fall under exceptions

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Gowora J

or special plea as it did not attack a defect in the pleadings. It dealt with ^A an irregularity in the summons itself, which cannot be amended. The point *in limine* was a legal issue, in which the defendants averred that the summons was bad at law in that no defendant had been brought before the court and as a result the proceedings were a nullity.

Held, further, that the amendment of the summons at the pre-trial conference ^B was without effect, as the party named as the second defendant did not exist at the time that the summons was issued and served.

Held, further, that even though the plaintiff tried to cure the defective summons in respect of the second defendant, no attempt to do so was made in respect of the first defendant. The position of editor of a newspaper is an occupation wherein the occupant can change from time ^C to time. It is not a natural or legal person and there was no person identified by that name.

Held, further, that fact that the two defendants entered appearance to defend and proceeded to file a plea was irrelevant. The process of filing pleadings under those names would not have imbued the summons with any form of legality. The matter would therefore be struck off the roll. ^D

Cases cited

Gariya Safaris (Pvt) Ltd v van Wyk 1996 (2) ZLR 246 (H)

Reuben v Meyers 1957 R & N 616 (SR)

Stewart Scott Kennedy v Mazongororo Syringes (Pvt) Ltd 1996 (2) ZLR 565 (S) ^E

Case information

G Mtisi, for the plaintiff

H Zhou, for the defendant

Judgment

GOWORA J: The plaintiff issued summons against the defendants described ^F herein for defamation damages in the sum of \$ 500 000 000. In the declaration, which is attached to the summons, the defendants are described in the following terms:

- "2 (a) The first defendant is the editor of *The Herald* newspaper.
 (b) The second defendant is the owner, publisher of *The Herald* newspaper, the distributor of *The Herald* newspaper and the ^G printer of *The Herald* newspaper all of Herald House, Corner Second Street/George Silundika Avenue, Harare."

The allegations in the declaration are to the effect that on 12 July 2005, in Zimbabwe and to the world at large, an article was published in the Herald of that date. The article was entitled "Bogus Firm Swindles farmers of ^H

2007 (2) ZLR p73

Gowora J

^A \$4.4 billion". A copy of the article is annexed to the summons. The plaintiff further alleges that the Herald is widely distributed both within and outside this country. The plaintiff further alleges that the article is highly defamatory of the plaintiff, and as a result it suffered damages due to the injury done to its reputation as a business concern. It therefore claimed the sum of \$500 000 000 against both the defendants, jointly and severally.

^B The summons and declaration were served on the parties named as the defendants therein. Appearance to defend was entered on behalf of both, and a joint plea was filed on behalf of the said defendants. Thereafter the parties applied for a pre-trial conference to be held at which issues for

trial between the litigants would be defined. It is at this juncture that it seems to have occurred to the plaintiff and or its legal practitioners that the description of the defendants was incorrect. An application to amend the summons and declaration was therefore filed. At a pre-trial conference held on 11 September 2006, the plaintiff moved for the said amendment, which was granted by consent. The amendment was to the following effect:

- "2 (b) The second defendant is the Zimbabwe Newspapers 1980 (Pvt) Ltd, which is the owner, publisher of *The Herald* newspaper, distributor of *The Herald* newspaper and printer of *The Herald* newspaper all of *The Herald* House Corner Second Street/ George Silundika Avenue, Harare."

There was no attempt to try and describe the first defendant in any other manner, other than what appeared on the face of the summons and in the declaration. With the pleadings in that state the matter was then referred to trial.

On 25 June 2007, when the matter was due for trial before me, a notice of point *in limine* was filed on behalf of the defendants. In order to give the plaintiff a chance to respond thereto, the matter was then stood down to 27 June 2007 for oral argument on the point *in limine*. In the meantime, both counsel had filed written submissions by the time the matter was called, and I am indebted to counsel for the submissions thus filed. The point taken by the defendants is that the summons filed of record is invalid in that there are no defendants before the court. The editor of *The Herald*, cited as the first defendant, does not exist. The editor of a newspaper is a position within the structures of a newspaper and is neither a natural nor a legal person. There is no entity called *The Herald* newspaper, and the attempt to amend the summons at the pre-trial conference did not cure the invalidity. The defendants therefore prayed that the matter should be struck off the roll with the plaintiff being made to pay the costs.

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Gowora J

In response to the point *in limine*, the plaintiff raised two issues. The first contention was that the defendants were not entitled at the trial stage to raise a point *in limine*. The contention by the plaintiff was that pleadings had closed, the defendants were not entitled thereafter to raise such a point, and that to do so was acting in bad faith. The second contention by the plaintiff was that the citation of the defendants was due to a misnomer, which can easily be cured by an appropriate application to amend the summons and declaration. It was contended that the emphasis by the court should be to ensure that matters and disputes between parties be finalized, rather than delayed due to technicalities that do not deal with the real issues between the parties.

It is correct, as submitted by Mr *Mtisi* that the point *in limine* taken by the defendants is in fact a special plea, in that its determination may ultimately resolve the issue as to whether or not the citation of the defendants is fatal to the claim at this stage of the proceedings. The contention by the plaintiff is that, in terms of Order 18 r 119 of the High Court Rules, the time for filing a plea or other answer to the plaintiff's is within the period stated therein, and after pleadings have closed and *litis contestatio* joined, the defendant cannot just file a special plea. Apart from the rule quoted above, the plaintiff has not referred me to any authority that would preclude this court from considering the application made by the defendants in connection with the point *in limine*. The nearest authority I was able to find is that of *Reuben v Meyers* 1957 R&N 616 (SR). The defendant in that case had, on the day of trial, made an application to amend his plea, by raising a special plea of prescription. The plaintiff opposed the application on the grounds that once the parties had joined *litis contestation*, such a plea was no longer available, and that the defendant would be taken as having abandoned all such rights as a plea of prescription would have given him. The court granted the application to amend the plea and found that parties are permitted, by the rules, to amend their pleadings at any stage of the proceedings, but before judgment, in such a manner and on such terms as may be just.

A party can, in this court, amend its pleadings at any time, provided that there is no prejudice to the other party, which prejudice is not capable of being cured by an award of costs. As much as I have searched, I have not come across any authority that says that such an application cannot be made even after pleadings have closed. The application raised does not in my mind, fall under exceptions or special plea, as it does not attack a defect in the pleadings. It deals with an irregularity in the summons itself, which cannot be amended. I am unable to agree, therefore, with the contention by the plaintiff that, having pleaded to the summons, the defendants are barred from raising the issue of the incorrect citation of the parties that have been brought before the court.

Gowora J

A I turn now to consider the application on its merits. I am not in this instance, considering a special plea raising prescription, as in the authority I have just referred to. What is now before me is a point *in limine* dealing with the question of the citation of the parties. It is a legal issue, in that the defendants aver that the summons is bad at law, in that no defendant has been brought before the court. They allege that the proceedings are a nullity as a result, and no B application launched by the plaintiff to amend the summons or substitute the defendants can cure the defect, as the summons is a nullity.

It is pertinent to state, from the outset, that the application to amend the summons by altering the name of the second defendant, which was granted at the pre-trial conference, was without effect. The party named as the second C defendant did not exist at the time that the summons was issued and served. The correct appellation for the publisher and owner of the newspaper is Zimbabwe Newspapers (1980) Ltd. That is a registered company, duly incorporated under the laws of this country. Its coming into being is due to the process by which it was incorporated as such. It is then, after its incorporation, that it becomes a juristic person, capable of suing and being D sued in its own right. Without that process it is non-existent. The entity sued by the plaintiff as the second defendant is *The Herald* newspaper. It is not a registered company and does not exist in any other form. Consequently, the plaintiff issued summons against a non-existent being. The amendment to the second defendant's name, therefore, was of no force and effect, as the summons itself was a nullity. In *Gariya Safaris (Pvt) Ltd v van Wyk* 1996 (2) ZLR 246 (H), this court stated: E

"A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names in the summons as being those of the defendant, the summons is null and void *ab initio*."

F There might have been an attempt to correct the defect relating to the citation of the second defendant. There was no such attempt when it relates to the first defendant. The editor of a newspaper is the person responsible for the editorial content of such newspaper. It is a position that is occupied for the appropriate period by such individual as is employed in that capacity. It is therefore an occupation wherein the occupant can change from time to time. It is not a G natural or legal person, and there is no person identified by that name. The citation of the first defendant in that form is therefore irregular. It matters not, in my view, that the two defendants entered appearance to defend and proceeded to file a plea. The process of filing pleadings under those names would not have imbued the summons with any form of legality. There was no H summons for them to plead to, given that there were no persons answering

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Gowora J

to the names on the summons. They cannot be identified as such. This is not A a mis-description which can be amended by alteration of the names on the summons, nor is it a substitution. One cannot amend or substitute something which does not exist.

In the premises, it is my finding that the proceedings before me are a nullity. In terms of the disposition of the matter, I am urged by Mr Zhou to strike the B matter off the roll, on the premise that, as the summons is a nullity, there is in fact no matter before me. I have not been referred to any authority to support this contention. In *Stewart Scott Kennedy v Mazongororo Syringes (Pvt) Ltd* 1996 (2) ZLR 565 (S), the Supreme Court dismissed an appeal against a decision in the High Court, where an application for substitution was refused, with the claim by the plaintiff being dismissed as a consequence of the refusal for C substitution. The plaintiff, as cited, had not existed as a legal or natural person at the time proceedings were instituted. I can see no harm in following the same course.

With regard to the issue of costs, both parties had claimed costs against each other. The plaintiff was clearly dilatory in not confirming the exact identities D of the defendants it intended to proceed against. The defendants, on the other hand, lulled the plaintiff into a false sense of security. They, more than the plaintiff, knew their proper names. It did not have to take them to the eve of trial to inform the plaintiff that the wrong parties had been cited. They were not, in my view, vigilant in defending this claim. Even though they were successful in challenging the citation, it is my view, that they should be E disallowed part of their costs. It would be proper, therefore, for the plaintiff to be ordered to meet half their costs for this suit.

In the premise, I make the following order. The plaintiff's claim is dismissed. The defendants are hereby awarded half their costs.

Sawyer & Mkushi, plaintiff's legal practitioners ^F

Gula-Ndebele & Partners, defendants' legal practitioners ^G

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/MALIMANJI v CENTRAL AFRICA BUILDING SOCIETY 2007 (2) ZLR 77 (S)

MALIMANJI v CENTRAL AFRICA BUILDING SOCIETY 2007 (2) ZLR 77 (S)

2007 (2) ZLR p77

Citation	2007 (2) ZLR 77 (S)
Case No	Judgment No. S-47-07
Court	Supreme Court, Harare
Judge	Ziyambi JA, Gwaunza JA & Garwe JA
Heard	3 September 2007
Judgment	3 September 2007
Counsel	<i>L Mazonde</i> , for the appellant <i>H Zhou</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — *code of conduct* — *proceedings under* — *code not covering c specific situation* — *person admittedly guilty of dishonesty charged with unsatisfactory performance of work* — *dishonesty an example of such performance* — *charge proper*

Headnote

The appellant, a bank teller, recorded a shortfall in his money and reported the matter. A few days later, he told his superiors that he had recovered ^D the money from a client whom he had overpaid. In fact he had not overpaid anyone and had paid the money in from his own resources. He was charged under the bank's code of conduct with "unsatisfactory work performance", found guilty and dismissed. The Labour Court, to which he had unsuccessfully appealed, held that, by acting dishonestly, ^E he had performed his duties in an unsatisfactory manner. The appellant argued that, under the code of conduct, dishonesty and unsatisfactory work performance were listed separately and, by definition, did not cover the type of conduct that led to misconduct charges being preferred against him.

Held, that lying about the overpayment and the source of the refund was, by ^F any definition, a serious offence. In a financial institution, such as the respondent, integrity and honesty are

fundamental attributes forming an integral part of the employee's performance of his work. The respondent's code made it clear that such conduct as unsatisfactory performance of work and dishonesty were dismissible offences. Details of conduct that would constitute such offences must be viewed in the light of being ^G examples. They could not possibly have been meant to be exhaustive. The conduct with which the appellant was charged constituted dishonesty and unsatisfactory performance of his work, if the ordinary meaning of those words was to be applied. One cannot strictly interpret ^H the provisions of a code or restrict it to what the lay draftsmen stated.

2007 (2) ZLR p78

Gwaunza JA

It would not be in the interest of justice to find that an admitted act of ^A dishonesty was not covered in the code because the drafters shoddily drafted the offences.

Case information

L Mazonde, for the appellant

H Zhou, for the respondent ^B

Judgment

GWAUNZA JA: At the hearing of this appeal, counsel for the appellant conceded that he had no meaningful submissions to make on behalf of the appellant. Counsel for the respondent then moved for the dismissal of the appeal with costs. This court thereupon dismissed the appeal with costs and indicated that the reasons would follow. These are they.

The facts of the matter are as follows. The appellant was employed as a bank teller by the respondent. On 31 March 2003, he recorded a shortfall of \$50 000 ^D and made a report to his superiors. A few days later, the appellant reimbursed the sum of \$50 000. He, however, lied to his superiors that he had recovered the money from a client whom he had overpaid. In reality, he had paid the money from his own resources. ^D

The appellant was subsequently charged with the misconduct of "unsatisfactory work performance", was found guilty and dismissed from his employment. His successive appeals to the local joint committee, the negotiating committee and the Labour Court were unsuccessful. He has now appealed to this court.

The court *a quo* found that the appellant, having acted dishonestly, had ^E performed his duties in an unsatisfactory manner and was therefore properly dismissed. The court *a quo* noted as follows at p 4 of its cyclostyled judgment (Judgment No. LC/H/104/2005):

"He (the appellant) acted dishonestly. He performed his duties in an unsatisfactory manner in that he sought to mislead the employer as to how ^F he had incurred the shortfall and further as to how he had recovered the shortfall. Performing your duties in a dishonest manner is clearly unsatisfactory work performance."

The appellant takes issue with the decision of the court *a quo* on a number of grounds.

Firstly, the appellant seeks to argue that the court *a quo* erred in holding that, ^G by lying about the source of the refund, he had committed an act of dishonesty as contemplated by s 5 to Part IV Offences of the respondent's code of conduct (the "Code"). He contends that under the Code dishonesty and unsatisfactory work performance are listed separately and, by definition, did not cover the type of conduct that led to misconduct charges being preferred against him. ^H

2007 (2) ZLR p79

Gwaunza JA

^A I do not find any merit in these contentions. The appellant does not deny that he lied, firstly, by saying that the shortfall was occasioned by an overpayment made to a client, and, secondly, by stating that the same client had provided the refund. These are, by any definition, serious offences. As correctly contended for the respondent, in a financial institution, such as the respondent, integrity and honesty are fundamental attributes forming an integral part of ^B the employee's performance of his work.

The respondent's Code makes it clear that such conduct as unsatisfactory performance of work and dishonesty are dismissible offences. Details of conduct that would constitute such offences must be viewed in the light of being examples. They could not possibly have been meant to be exhaustive. ^c Viewing them as exhaustive would result in the ridiculous situation where someone who commits an offence that in the ordinary sense would constitute the conduct in question, e.g. dishonesty, would walk free simply because the specific offence was not listed as an offence. That could not have been the intention of the drafters of the Code, who, in general, are not schooled in the law.

^d The conduct with which the appellant was charged, constituted dishonesty and unsatisfactory performance of his work, if the ordinary meaning of those words is to be applied. The court *a quo* was alive to this interpretation and noted as follows at p 3 of its cyclostyled judgment:

"The Labour Court is a court of equity concerned, not with the formalities ^e and technicalities of the legal profession, but with achieving just and equitable resolution of disputes between the parties."

Earlier on, the learned President of the Labour Court had observed, again correctly, as follows at p 3 of its cyclostyled judgment:

"The Supreme Court has stated in *Coh Coh Enterprises v Mativenga and Anor* S-30-01 that one cannot strictly interpret the provisions of the Code ^f or restrict it to what the lay persons stated. It would not be in the interest of justice to find that an admitted act of dishonesty is not covered in the Code because the drafters shoddily drafted the offences."

These passages being apposite to the circumstances of this case, I am satisfied the appellant was properly charged, "convicted" and dismissed from his employment.

^g Secondly, the appellant takes issue with the court *a quo*'s finding that the penalty of dismissal was properly imposed. He contends that the court *a quo* erred in not considering the imposition of other alternative forms of punishment ^h besides dismissal.

2007 (2) ZLR p80

Gwaunza JA

The issue of what punishment to impose after an employee is found guilty of ^a an act of misconduct is clearly one of discretion. The respondent's Code emphasises this in para 3.4 of its Part I, which reads as follows:

"3.4 The penalties to be imposed for each offence are specified in Part IV and Part V. Part V applies to the Private Security Sector only. However, an employer may apply a lesser penalty *at his discretion*" (my emphasis). ^b

It is trite that an appeal court does not interfere with the exercise of discretion by a lower tribunal unless it is shown that the discretion was improperly exercised. As contended for the respondent, the penalty imposed must show a serious misdirection to justify interference by the appeal court. The misconduct with which the appellant was charged attracts the penalty of ^c dismissal. There is nothing in the manner in which the proceedings were conducted, and the evidence against him considered, to suggest any misdirection on the part of the employer.

The court *a quo* was therefore correct in upholding the decision to dismiss the appellant from his employment.

In the light of the foregoing, we were satisfied the appeal had no merit, hence ^d we dismissed it with costs.

ZIYAMBI JA & GARWE JA concurred.

Mbidzo, Muchadehama & Makoni, appellant's legal practitioners ^e

Gill, Godlonton & Gerrans, respondent's legal practitioners ^f

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Source:

DELTA OPERATIONS (PVT) LTD v ORIGEN CORPORATION (PVT) LTD 2007 (2) ZLR 81 (S)
2007 (2) ZLR p81

Citation	2007 (2) ZLR 81 (S)
Case No	Judgment No. S-86-06
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Malaba JA
Heard	20 November 2006
Judgment	7 September 2007
Counsel	<i>R Y Phillips</i> , for the appellant <i>A P de Bourbon SC</i> , for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

c **Arbitration** — award — setting aside of — grounds for — award contrary to public policy — arbitrator granting remedies not available to parties in terms of contract — arbitrator ignoring or disregarding provision of applicable legislation — creating an issue between parties which did not arise from their submissions — arbitrator failing to give reasons for *D* award

Headnote

In the court *a quo*, the respondent sought the setting aside of an arbitrator's award while the appellant sought to have it enforced. In terms of the contract between the parties, the respondent was to deliver a specified *E* tonnage of barley suitable for brewing, while the appellant was to deliver an equal tonnage suitable for stock feed. The contract provided that if there was a shortfall in the respondent's delivery, the respondent would pay a specified sum for every tonne short. The dispute was referred to arbitration, there being two questions for the arbitrator: (a) whether the appellant was entitled to an order for specific performance; and (b) *F* whether interest was payable and, if so, from when and at what rate.

In his award, the arbitrator ordered the respondent to deliver the shortfall, failing which it should pay the appellant what it would actually cost the appellant to buy the shortfall from elsewhere. The court *a quo* set aside the award as being contrary to public policy. On appeal:

G *Held*, that the award was contrary to public policy for four reasons:

- (1) the arbitrator granted remedies which were not available to the appellant in terms of the contract, these being specific performance and the alternative relief granted in the second part of the award. By granting the alternative relief, the arbitrator disregarded the remedy *H* agreed upon by the parties, as well as the appellant's alternative

2007 (2) ZLR p82

Sandura JA

claim, and granted a remedy which had not been contemplated or *A* agreed upon by the parties. By doing so, he violated one of the most important tenets of public policy, i.e. the sanctity of contracts.

- (2) by granting the alternative relief the arbitrator deliberately ignored or disregarded s 4(1) of the Contractual Penalties Act [Chapter 8:04]. The provision in the contract that the respondent would pay a ^B specific sum for every tonne shortfall was a penalty clause and there was no basis for declining to enforce the penalty stipulation or for reducing it.
- (3) the arbitrator created an issue between the parties which did not arise from their submissions and awarded a measure of damages which went so far outside the contract as to create a new contract for the ^C parties.
- (4) in terms of Art 31(2) of the Model Law, the arbitrator is obliged to state the reasons upon which the award is based. *In casu*, no reasons were given by the arbitrator for granting the alternative relief. This is in conflict with the public policy of Zimbabwe and invalidated the ^D alternative award.

Cases cited

Printing and Numerical Registering Co v Sampson (1875) LR 19 Eq 462

Zimbabwe Electricity Supply Authority v Maposa 1999 (2) ZLR 452 (S) ^E

Legislation considered

Arbitration Act [Chapter 7:15], Schedule, art 31(2)

Contractual Penalties Act [Chapter 8:04], s 4(1)

Judgment of Kamocha J in *Origen Corp (Pvt) Ltd v Delta Operations (Pvt) ^F Ltd & Anor* 2005 (2) ZLR 349 (H) upheld.

Case information

R Y Phillips, for the appellant

A P de Bourbon SC, for the respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court which ^G set aside an arbitral award made in favour of the appellant.

The background facts are as follows. In 2002, the appellant ("Natbrew") and the respondent ("Origen") signed a contract which, in relevant part, reads as follows: ^H

2007 (2) ZLR p83

Sandura JA

^A "Reciprocal Deliveries of Barley

- 1.1 During the months of June and July 2002, Natbrew shall supply to Origen at the Northern Products grain silos in Chinhoyi a quantity of not less than 2 400 metric tonnes and not more than 2 450 tonnes of barley.
- 1.2 The Natbrew Delivery shall comprise of barley unsuitable for brewing ^B purposes but suitable for use as stock feed.
- 1.3 During the month of October 2002, Origen shall deliver to Natbrew at Northern Products or GMB Banket a tonnage of barley grown in the 2002 winter season and of an exactly equivalent tonnage to the Natbrew Delivery. ^C
- 4.4 In the event that, and to the extent that, Origen may fail to deliver the tonnage of barley required to be delivered by it in terms of clause 1.3 then, recognizing that Natbrew shall suffer loss as a consequence of such breach, Origen shall pay to Natbrew the sum of \$75 000 per tonne in respect of each tonne which Origen has failed to deliver in terms of clause 1.3."

^D In terms of clause 6, any dispute between the parties arising out of the agreement was to be referred to arbitration. Following the conclusion of the agreement, Natbrew delivered to Origen 2 019.28 tonnes of barley suitable for stock feed, but Origen delivered to Natbrew 1 127.848 tonnes of barley grown in the 2002 winter season, leaving a shortfall of 891.432 tonnes. That shortfall gave rise to a dispute which the parties agreed to refer to arbitration, and an ^E arbitrator was appointed.

In its statement of claim, Natbrew averred as follows:

- "6. In the circumstances (the) claimant seeks an award that (the) respondent forthwith deliver to it 892 tonnes of barley of a specification in compliance with the Agreement.
 F Alternatively to paragraph 6 above, and if it be found that (the) respondent was entitled to elect not to deliver barley but instead to pay (the) claimant \$75 000 per tonne of undelivered barley, which is denied, then –
7. (The) claimant seeks an award that (the) respondent pay to it the sum of \$66 900 000, together with interest thereon calculated from 1 G November 2002 at a rate to be determined at the hearing as being calculated to put (the) claimant in the same position it would have been had payment been made not later than 31 October 2002."

The sum of \$66 900 000 stated in para 7 of the statement of claim was arrived at as a result of an error in the calculation, and should be \$66 857 400, i.e. the H shortfall of 891.432 metric tonnes multiplied by \$75 000. Subsequently, on

2007 (2) ZLR p84

Sandura JA

21 January 2004, the parties held a preliminary meeting with the arbitrator at A which it was agreed that the issues to be determined by the arbitrator were:

- "(a) Whether the claimant (i.e. Natbrew) is entitled to an order for specific performance, viz., that Origen deliver 2 019.28 metric tonnes of barley to the claimant; and if not.
 (b) Whether the claimant is entitled to interest on the amount awarded B and, if so, from what date and at what rate."

Thereafter, on 23 April 2004, the arbitrator conducted a hearing and four days later, on 27 April 2004, made the following award in favour of Natbrew:

"It is ordered that:

- A. On or before 30 May 2004, Origen Corp (Pvt) Ltd shall deliver to Delta Operations (Pvt) Ltd 891.432 tonnes of barley of the quality specified c in the contract signed by the parties on 21 August 2002.
 B. Failing compliance with Order A, Origen Corp (Pvt) Ltd shall pay to Delta Operations (Pvt) Ltd, promptly on demand, the full amount expended by Delta Operations (Pvt) Ltd in purchasing the tonnage of barley not delivered by Origen Corporation (Pvt) Ltd in accordance with Order A." D

Dissatisfied with that result, Origen filed a court application in the High Court on 7 June 2004, in terms of art 34(2) of the *Model Law on International Commercial Arbitration* adopted by the United Nations Commission on International Trade Law on 21 June 1985, which is set out, with modifications, in the First Schedule to the Arbitration Act [Chapter 7:15] ("the *Model Law*"), E seeking an order setting aside the award made by the arbitrator on 27 April 2004. Four days later, on 11 June 2004, Natbrew filed a court application in the High Court, in terms of Art 35(1) of the *Model Law*, seeking an order enforcing the arbitral award made in its favour.

The two court applications were subsequently heard together on 1 February 2005, and on 23 November 2005, the learned judge in the court a quo granted F the following order:

"IT IS ORDERED THAT:

1. The arbitrator's arbitral award of 27 April 2004 be and is hereby set aside in its entirety.
2. Delta's application for the enforcement of the arbitral award be and G is hereby dismissed.
3. The parties are left to proceed as they deem fit.
4. Delta shall bear the costs of these proceedings."

Aggrieved by that decision, Natbrew appealed to this court. H

2007 (2) ZLR p85

Sandura JA

A The learned judge in the court a quo set aside the arbitral award in terms of Art 34(2)(b)(ii) of the *Model Law* which, in relevant part, reads as follows:

"An arbitral award may be set aside by the High Court only if –

- (a) ...;
 (b) the High Court finds that – B
 (i) ...; or
 (ii) the award is in conflict with the public policy of Zimbabwe."

The main issue in this appeal is whether the learned judge correctly found that the award was in conflict with the public policy of Zimbabwe. The test to be applied in determining whether an award is in conflict with the public policy of Zimbabwe was set out by this court in *ZESA v Maposa* 1999 (2) ZLR 452 (S). At 466E-G, Gubbay CJ, with whom Ebrahim JA and I concurred, said:

“Under article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it.

The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above.”

Applying that test to the facts of the present case, I am satisfied that the learned judge in the court *a quo* correctly found that the award was in conflict with the public policy of Zimbabwe. I say so for four main reasons. The first reason is that the arbitrator granted remedies which were not available to Natbrew in terms of the contract. The first such remedy is that of specific performance. This remedy was not available to Natbrew because clause 1.4 of the contract provided that, if Origen failed to deliver the barley which it was required to deliver to Natbrew in terms of clause 1.3, Origen would pay to Natbrew the sum of \$75 000 in respect of each tonne of barley not delivered. Quite clearly, clause 1.4 means that the parties agreed that if Origen failed to deliver the barley to Natbrew, *for whatever reason*, Origen would pay to Natbrew the sum of \$75 000 for each tonne of barley not delivered. In effect, it means that Natbrew agreed that in return for the barley which it delivered to Origen in June and July 2002, it would take either the same quantity of the barley grown in the 2002 winter season, or the sum of \$75 000 in respect of each

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tonne of barley not delivered by Origen. The remedy of specific performance was not, therefore, contemplated or agreed upon by the parties, and was not available to Natbrew in terms of the contract.

The second remedy granted to Natbrew, but which was not available to Natbrew in terms of the contract, was the alternative relief granted in the second part of the award. This provided that if Origen failed to comply with the order of specific performance, Origen was to pay to Natbrew the full amount paid by Natbrew in purchasing the quantity of barley which Origen had not delivered. This remedy was not available to Natbrew in terms of the contract, because the contract did not provide that if Origen failed to deliver the barley which it was required to deliver to Natbrew in terms of clause 1.3 of the contract, Natbrew would itself purchase the barley elsewhere and recover the cost thereof from Origen. As already stated, clause 1.4 of the contract provided that if Origen failed to deliver the barley to Natbrew, Natbrew’s remedy was payment by Origen of the sum of \$75 000 for each tonne of barley not delivered, and not payment of whatever sum Natbrew would have spent in purchasing the quantity of barley not delivered by Origen. Indeed, Natbrew recognised this and sought payment of the sum of \$66 900 000 if the order of specific performance was not granted, although there was an error in the calculation of the sum payable. Nevertheless, Natbrew’s alternative claim was disregarded by the arbitrator.

Accordingly, by granting the alternative relief, the arbitrator disregarded the remedy agreed upon by the parties, as well as Natbrew’s alternative claim, and granted a remedy which had not been contemplated or agreed upon by the parties. The measure of damages awarded to Natbrew, in lieu of specific performance by Origen, therefore, fell totally outside the ambit of the contract. In the circumstances, by granting the remedy of specific performance and, alternatively, a measure of damages falling totally outside the ambit of the contract, the arbitrator completely disregarded the contractual terms agreed upon by the parties, thereby in effect creating a new contract for them. By doing so, he violated one of the most important tenets of public policy, i.e. the sanctity of contracts. As Jessel MR said in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465:

“If there is one thing which more than any other public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore

you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.” ^h

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^a The second reason why the award is in conflict with the public policy of Zimbabwe is that, by granting the alternative relief, the arbitrator deliberately ignored or disregarded a provision of the Contractual Penalties Act [*Chapter 8:04*] (“the Act”).

The provision that if Origen failed to deliver the barley which it was required to deliver to Natbrev in terms of clause 1.3 of the contract, Origen would pay ^b to Natbrev the sum of \$75 000 for each tonne of barley it failed to deliver, was not an ordinary term of the contract, but a penalty stipulation in terms of s 2 of the Act. In terms of s 4(1) of the Act, such a stipulation is enforceable in any competent court, unless the court finds, in terms of s 4(2) of the Act, a basis for declining to enforce the penalty stipulation or for reducing it. No such basis ^c exists in the present case, and none was found by the arbitrator. There is no other provision in the Act in terms of which a court or an arbitrator may ignore or disregard a penalty stipulation in a contract, and grant some other relief which had not been within the contemplation of the parties at the time they concluded their contract. By granting the alternative remedy, the arbitrator deliberately ignored or disregarded a provision of the Act. The public policy ^d of Zimbabwe does not permit him to do that.

The third reason why the award is in conflict with the public policy of Zimbabwe is that the arbitrator created an issue between the parties which did not arise from their submissions.

As already stated, on 21 January 2004, the parties held a preliminary meeting ^e with the arbitrator at which it was agreed that the issues to be determined by the arbitrator were whether Natbrev was entitled to an order of specific performance, and if not, whether it was entitled to interest on the amount awarded, and if so, from what date and at what rate.

There was no dispute between the parties as to the amount to be paid by Origen in the event that Origen failed to deliver the barley to Natbrev. What was in ^f issue was whether interest was payable on that amount, and if so from what date and at what rate. The reason is not difficult to see.

Quite clearly, the parties knew that in the event that Origen failed to deliver the barley to Natbrev, the amount to be paid by Origen to Natbrev was to be determined in terms of clause 1.4 of the contract, i.e. \$75 000 for each tonne ^g of barley not delivered. But, as clause 1.4 did not deal with the question of interest on the sum payable, that was an issue to be determined by the arbitrator. It is clear from what the arbitrator said in para 5 of the award that he, too, was of the same view. The paragraph reads as follows:

“The first issue to be determined is whether Natbrev is entitled to an order ^h that Origen deliver 891 432 metric tones of barley to Natbrev. The parties

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are agreed that if I conclude that Natbrev is not entitled to this order for ^a specific performance, then Natbrev is entitled to be awarded the sum of \$66 857 250. In that event, the further issue to be determined is whether the claimant (i.e. Natbrev) is entitled to interest on the amount awarded and if so, from what date and at what rate.”

However, notwithstanding that clear statement of the alternative remedy available to Natbrev, and for no apparent reason, the arbitrator went on a frolic ^b of his own, created an issue which did not arise from the submissions made by the parties, and awarded a measure of damages which went so far outside the contract as to create a new contract for the parties. The public policy of Zimbabwe does not permit an arbitrator to do that.

Finally, in terms of art 31(2) of the *Model Law*, the arbitrator is obliged to state ^c the reasons upon which the award is based. *In casu*, no reasons were given by the arbitrator for granting the alternative relief. In my view, this is in conflict with the public policy of Zimbabwe and invalidates the alternative award.

In the circumstances, by granting the remedy of specific performance, which was not available to Natbrev in terms of the contract, or alternatively, a ^c measure of damages falling totally outside the

ambit of the contract, and by creating an issue which did not arise from the submissions made by the parties, the arbitrator's reasoning or conclusion in making the award went:

"... beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award ..."

It would, therefore, be contrary to public policy to uphold the award. The appeal is, therefore, devoid of merit and is dismissed with costs.

CHEDA JA & MALABA JA concurred. ^F

Gill, Godlonton & Gerrans, appellant's legal practitioners

Costa & Madzonga, respondent's legal practitioners ^G

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/CHIHWAYI ENTERPRISES (PVT) LTD v ATISH INVESTMENTS (PVT) LTD 2007 (2) ZLR 89 (S)

CHIHWAYI ENTERPRISES (PVT) LTD v ATISH INVESTMENTS (PVT) LTD 2007 (2) ZLR 89 (S) 2007 (2) ZLR p89

Citation	2007 (2) ZLR 89 (S)
Case No	Judgment No. S-23-07
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Malaba JA
Heard	6 February 2007
Judgment	7 September 2007
Counsel	<i>F M Katsande</i> , for the appellant <i>O Mushuma</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

^C **Evidence** — affidavits — what is not denied in affidavits must be taken to be admitted

Legal practitioner — conduct and ethics — preparation by legal practitioner of affidavits which are false and misleading — legal practitioner should not appear in subsequent legal proceedings — duty in such cases

^D **Practice and procedure** — affidavits — what is not denied in affidavits must be taken to be admitted

Practice and procedure — judgment — default judgment — rescission — court empowered to grant rescission for "sufficient cause" — what must be shown to establish "sufficient cause"

^E **Practice and procedure** — judgment — default judgment — rescission — judgment obtained improperly or fraudulently — not a judgment granted under the rules of court — no need to seek condonation for delay in applying for rescission

Headnote

¶ The simple rule of law is that what is not denied in affidavits must be taken to be admitted (*dicta per McNally JA in Fawcett Security Operations (Pvt) Ltd v Director of Customs and Excise & Ors* 1993 (2) ZLR 121, (S) at 127F, followed).

Where a legal practitioner has prepared and signed a certificate of service, on behalf of his client, which contained false and misleading information, ¶ it is undesirable that he should appear for his client in subsequent legal proceedings. He should rather have filed an affidavit explaining the role he played in the matter.

Rule 63 of the High Court Rules 1971 (RGN 1047 of 1971) which relates to court applications for rescission of judgment only applies to the rescission of ¶ a judgment given "under these rules or under any other law". The rule

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would not apply to the rescission of a default judgment obtained ¶ fraudulently or improperly, because such a default judgment could not be described as a default judgment granted "under these rules or under any other law."

A claim for rescission of judgment must be considered in terms of the common law which empowers the court to rescind a judgment obtained in default ¶ of appearance, provided sufficient cause therefor has been shown. The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. But it is clear that in principle and in the long standing practice of our courts two essential elements of "sufficient cause" for rescission of judgments are that: ¶

1. the party seeking relief must present a reasonable and acceptable explanation for his default; and
2. on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success (*dicta per Miller JA in Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) ¶ at 764-765C followed). ¶

Cases cited

Fawcett Security Operations (Pvt) Ltd v Director of Customs & Excise & Ors 1993 (2) ZLR 121 (S)

Chetty v Law Society, Transvaal 1985 (2) SA 756 (A)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 63

Case information

F M Katsande, for the appellant ¶

O Mushuma, for the respondent

Judgment

SANDURA JA: This is an appeal against a judgment of the High Court which set aside a default judgment granted in favour of the appellant ("the Hardware") on 3 September 2003. ¶

The background facts in this case may be tabulated conveniently as follows:

1. On 20 June 1995, the respondent ("Atish") acquired a piece of land ("the stand") from the City of Harare.
2. In July 2005, Atish decided to sell the stand. Accordingly, it instructed a registered estate agent and valuer to inspect the stand and prepare a ¶

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¶ a valuation report. Thereafter, the estate agent inspected the stand and reported to Atish that the stand was in the possession of the Hardware.

3. Following that discovery, Atish instructed its lawyers to investigate the circumstances in which the Hardware acquired the stand.
4. On 4 August 2005, the lawyers conducted a search at the Deeds Registry, and on the following day visited the High Court where they perused the record of case No. HC 6950/2003. They discovered that on 7 May 2002, a Mr James Muindisi ("Muindisi") fraudulently sold the stand to the Hardware, and that a purported agreement of sale had been signed by Muindisi purporting to represent Atish, and by a Mr Patrick Chihwayi ("Patrick") representing the Hardware. ^c
5. The lawyers also discovered that the agreement of sale was drafted by Mr F M Katsande ("Katsande") of Messrs F M Katsande & Partners, the Hardware's lawyers, and that Katsande signed the agreement of sale as a witness.
6. The search at the Deeds Registry established that the transfer of the stand ^d from Atish to the Hardware had been facilitated by a default judgment obtained by the Hardware against Atish on 3 September 2003 in case No. HC 6950/2003, in which the High Court ordered that:
 - "(a) within 10 (ten) days of service of this order on the respondent it shall deliver the documents necessary to enable Messrs Coghlan, Welsh & Guest, legal practitioners, to pass transfer of stand No. 17027, ^e Graniteside, Harare, to the applicant, failing which the Deputy Sheriff is hereby directed to procure and sign such documents as may be necessary to enable the conveyancers (to) pass transfer to the applicant.
 - (b) The respondent shall pay the costs of this application." ^f
7. On 21 September 2005, Atish commenced a civil action in the High Court (case No. HC 4738/2005) against the Hardware, Muindisi, Patrick and the Registrar of Deeds, seeking, *inter alia*, an order nullifying the sale and transfer of the stand to the Hardware.
8. On 23 September 2005, Atish filed a court application in the High Court ^g (case No. HC 4809/2005) against Patrick, the Hardware and the Registrar of Deeds, seeking an interdict restraining the Hardware from disposing of the stand pending the finalisation of case No. HC 4738/2005. The interdict was subsequently granted on 12 January 2006.
9. On 7 March 2006, a pre-trial conference was held in case No. HC 4738/2005. ^h At that conference, the Hardware sought leave to amend its plea in order

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to allege that Atish could not secure the nullification of the sale and ^a transfer of the stand to the Hardware unless the default judgment granted against Atish on 3 September 2003 had been rescinded. That amendment was granted with the consent of both parties.

10. Consequently, on 6 April 2006, Atish filed a court application in the High Court (case No. HC 1998/2006), seeking an order condoning the delay in ^b filing the application for the rescission of the default judgment, and setting aside the default judgment. That relief was granted by the High Court on 13 July 2006.

Aggrieved by that result, the Hardware appealed to this court.

There are three main issues to determine in this appeal.

The first issue is whether the default judgment granted in favour of the ^c Hardware in case No. HC 6950/2003 on 3 September 2003 was properly granted. I do not think it was.

I say so because the service of the court application on Atish in case No. HC 6950/2003 did not comply with the provisions of r 39(2)(d) of the High Court rules, 1971 ("the Rules"), which reads as follows: ^d

"Subject to this Order, process other than process referred to in subrule (1) may be served upon a person in any of the following ways –

- (a) – (c) ...;
- (d) in the case of process to served on a body corporate –
 - (i) by delivery to a responsible person at the body corporate's place ^e of business or registered office; or
 - (ii) if it is not possible to serve the process in terms of subparagraph (i), by delivery to a director or to the secretary or public officer of the body corporate."

The certificate of service filed in case No. HC 6950/2003 as proof of the service ^F of the court application upon Atish reads as follows:

"I, Francis Munetsi Katsande, the Legal Practitioner of record for the applicant, do hereby certify that on 5 August 2003, at 1628 hours, at the offices of Atish (*sic*) Investments (Pvt) Ltd, stand No. 17021, Sande Crescent, Graniteside, Harare, for the respondent, I served the following document: ^G

Court Application

By handing it to the Director, Mr Muindisi."

In my view, it is clear from the record that Muindisi was not a director, secretary or public officer of Atish. On the contrary, he was a fraudster. In addition, if the court application was handed to Muindisi, as the certificate of service ^H

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^A alleges, it was not handed to "a responsible person at the body corporate's place of business or registered office".

Mukesh Patel ("Patel"), a director of Atish, who deposed to the founding affidavit in this case, vehemently denied that Muindisi was a director of Atish and that Atish had offices at stand No. 17021, Sande Crescent, Graniteside, ^B Harare.

In para 23 of the founding affidavit Patel averred as follows:

"After the respondent (*i.e.* the Hardware) filed the court application, it proceeded to obtain a default judgment by fraudulent means, more particularly in that –

23.1 The court application was never served upon the applicant (*i.e.* ^C Atish). A purported Certificate of Service signed by Mr F M Katsande on 26 August 2003, contained false and misleading information more particularly that –

- (a) the applicant never had any offices at stand No. 17021, Sande Crescent, Graniteside, Harare, but Mr Katsande stated and certified that the applicant had offices at the stand. ^D
- (b) Mr James Muindisi is not a director of the applicant and did not claim to be such in all his correspondence with the respondent, but Mr F M Katsande stated and certified in the Certificate of Service that he had handed a copy of the court application 'to the Director, Mr Muindisi' ...

23.2 If the court application had been properly served upon the applicant ^E the default judgment could not have been granted."

It is pertinent to note that the averments made by Patel in para 23 of the founding affidavit were not denied by the Hardware in its opposing affidavit. What that means is that the averments were admitted by the Hardware.

As McNally JA said in *Fawcett Security Operations (Pvt) Ltd v Director ^F of Customs and Excise & Ors* 1993 (2) ZLR 121 (S) at 127F:

"The simple rule of law is that what is not denied in affidavits must be taken to be admitted."

In the circumstances, the court application in case No. HC 6950/2003 was not served upon Atish and, consequently, the default judgment granted on ^G 3 September 2003 should not have been granted.

Before dealing with the second issue in this appeal, I wish to state that in view of the fact that Patel alleged that the certificate of service prepared and signed by Katsande contained false and misleading information, it was undesirable ^H for Katsande to appear for the Hardware in the High Court and in this court.

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Sandura JA

Instead, Katsande should have filed an affidavit explaining the role he played ^A in the matter.

Having said that, I now proceed to consider the second issue in the appeal, which is whether the provisions of ^r 63 of the rules apply to the rescission of the default judgment granted on 3 September 2003 in case No. HC 6950/2003. I do not think they do. ^B

The rule reads as follows:

"63(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.

(2) If the court is satisfied on an application in terms of subrule (1) that c there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just."

In my view, the provisions of this rule only apply to the rescission of a default d judgment given "under these rules or under any other law". They would not apply to the rescission of a default judgment obtained fraudulently or improperly, such as the one granted in favour of the Hardware in case

No. HC 6950/2003, because such a default judgment could not be described as a default judgment granted "under these rules or under any other law".

Consequently, there was no requirement on the part of Atish to seek e condonation of the delay in filing the court application for the rescission of the default judgment granted against it in case No. HC 6950/2003.

I now come to the third and final issue to be considered in this appeal, which is whether Atish established a basis for the rescission of the default judgment in terms of the common law. I have no doubt in my mind that it did. f

The principles applicable in determining this issue were set out by Miller JA in *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764I-765C as follows:

"The appellant's claim for rescission of the judgment ... must be considered in terms of the common law, which empowers the court to rescind a judgment obtained on default of appearance, provided sufficient cause therefor has been shown. See *de Wet & Ors v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042, g and *Childerly Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163. The term 'sufficient cause' (or 'good cause') defies precise or comprehensive definition, for many and various factors require to be considered. See *Cairn's Executors v Gaarn* 1912 AD 181 at 186 per Innes JA. But it is clear that in principle and in the long-standing practice h

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Sandura JA

A of our courts two essential elements of 'sufficient cause' for rescission of a judgment by default are:

- (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
- (ii) that on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success. See *de Wet's case supra* at b 1042; *P E Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A); *Smith NO v Brummer NO & Anor*; *Smith NO v Brummer* 1954 (3) SA 352 (O) at 357-8."

Applying the test set out above, I am satisfied that both essential elements of "sufficient cause" for the rescission of the default judgment granted in case No. HC 6950/2003 were established by Atish.

c With regard to the first essential element, Atish presented a reasonable and acceptable explanation for its failure to oppose the court application. The explanation was that the court application had not been served upon it by Katsande, and that Muindisi, upon whom the court application was allegedly served, was not a director, secretary or public officer of Atish.

d On the merits, the defence raised by Atish was that the stand had been fraudulently sold to the Hardware by Muindisi. In my view, the defence appears *bona fide* and carries some prospect of success.

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

e CHEDA JA & MALABA JA concurred.

f M Katsande & Partners, appellant's legal practitioners

f Mushuma Law Chambers, respondent's legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/MATAKE & ORS v MINISTER OF LOCAL GOVERNMENT & HOUSING & ANOR 2007 (2) ZLR 96 (H)

MATAKE & ORS v MINISTER OF LOCAL GOVERNMENT & HOUSING & ANOR 2007 (2) ZLR 96 (H)**2007 (2) ZLR p96**

Citation	2007 (2) ZLR 96 (H)
Case No	Judgment No. HB-93-07
Court	High Court, Bulawayo
Judge	Ndou J
Heard	16 May 2006
Judgment	13 September 2007
Counsel	<i>B Dube</i> , for the applicants <i>K I Phulu</i> , for the respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Administrative law — review — grounds for — legitimate expectation — c what party seeking to rely on legitimate expectation must establish

Headnote

The applicants were public servants employed at a teachers' training college. Their main task was to provide catering and cleaning services at the college. The Ministry sub-contracted private companies to provide these services, thus rendering the applicants redundant. The applicants were retrenched. They requested the first respondent to be allowed to purchase the government houses in which they had been living for many years. Nearly two years later the first respondent replied, saying that a policy was being formulated and that the sitting tenants would be advised. Eighteen months later, the Secretary to the first respondent told the applicants that their request to purchase the houses had been turned down. They were given three months' notice to vacate. The applicants did not move out or seek a review of the decision, but instead, at the expiry of the three month period they obtained a provisional order which stayed their eviction. At the hearing at which they applied for confirmation of the provisional order, they sought an order compelling the respondent to sell the houses to them. They claimed that the first letter gave rise to a legitimate expectation that the houses would be sold to them.

Held, that a legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. The requirements for legitimacy of the expectation include the following:

- (1) The representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification.

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Ndou J ^A

- (2) The expectation must be reasonable.
- (3) The representation must have been induced by the decision-maker.
- (4) The representation must be one which it was competent and lawful for the decision-maker to make, without which reliance cannot be legitimate.

^B Based on these criteria, the applicants' case was defective from the outset. They may subjectively have had expectations, but these failed to meet the criteria in (1) and (2). There was no representation to the applicants that the houses would be sold to them – let alone a clear, unambiguous and unqualified representation. Nor were the applicants' expectations to that effect reasonable. All that the letter stated was that their request ^C would be considered, which could mean either a favourable or an unfavourable outcome of the consideration.

Cases referred to

Administrator, Tvl v Traub 1989 (4) SA 731 (A)

Council of Civil Svc Unions v Min of the Civil Svc [1984] 3 All ER 935 (HL)

^D *Health Professions Council v McGown* 1994 (2) ZLR 329 (S)

Mawenga v PTC 1997 (2) ZLR 483 (S)

Metsola v Chrmn, PSC & Anor 1989 (3) ZLR 147 (S)

Min of Information v PTC Managerial Employers' Workers Cttee 1999 (1) ZLR 128 (S)

^E *National DPP v Phillips* 2002 (4) SA 60 (W)

S A Veterinary Council v Szymanski 2003 (4) SA 42 (SCA)

Taylor v Min of Education & Anor 1996 (2) ZLR 772 (S)

Case information

B Dube, for the applicants

K I Phulu, for the respondents

Judgment

^F **NDOU J:** The applicants are former government employees based at Gweru Teachers College. Gweru Teachers College has now been succeeded by the Midlands State University. During the applicants' tenure as civil servants, they were in occupation of houses in Senga Township which were specifically reserved for employees of Gweru Teacher's College. In fact most of them have ^G been occupying such properties for over twenty-four years. These are the affected properties:

[*The learned judge listed the applicants and the properties and continued:*]

Sometime in 2000, the second respondent sub-contracted private companies ^H to provide catering and cleaning services, thus rendering the applicants

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Ndou J

redundant as their core business was rendering these services. The applicants ^A were retrenched. Upon retrenchment, the applicants, through their workers' committee, approached the Principal of Gweru Teachers College, requesting him to assist them in purchasing the above-mentioned properties. On 29 October 2000, the Acting Principal, Gweru Teachers College, wrote to the Secretary for the second respondent in, *inter alia*, the following terms: ^B

"Re: Application by sitting tenants to be given preference in the purchase of college houses in Senga"

It is now common knowledge that Ministry has sub-contracted/privatised grounds and catering and will do the same in the case of cleaning in January 2001. Most government employees affected by this exercise were residing in government houses placed under the care of the Ministry by ^C the Ministry of National Housing and Construction. Some of these employees have occupied the houses for up to 30 years. They have known no other home and have been paying rates for these properties from as far back as July 1983.

These sitting tenants are requesting that they be allowed to purchase these houses. Some of them are expected to vacate these houses at the end of November 2000 and have nowhere to go.

Your urgent attention to this matter will be greatly appreciated" (emphasis added).

What can be gleaned from the papers is that the matter was eventually referred to the first respondent who responded by a minute dated 25 April 2002 addressed to the second respondent in the following terms: ^E

"Re: Sale of Senga houses to sitting tenants: Former Gweru Teachers College

Reference is made to minute dated 4 March 2002 concerning the above stated houses.

Please be advised that the *Ministry is in the process of formulating a policy on the disposal of rented accommodation to sitting tenants. As such, you will be advised accordingly when the matter is finalised"* (emphasis added).

The next correspondence the applicants received were "Notices to vacate Government Houses" from the office of the Provincial Administrator, Midlands Province. These were followed by letters of threats of arrest issued by a magistrate in Gweru. Suffice to say the magistrate did not have authority to issue such letters and I will ignore them for the purpose of the judgment. The applicants complained about the eviction notices to the Secretary of the first respondent through a letter authored by a legal practitioner dated 28 July 2003. This letter prompted the first respondent to respond to the applicants' ^H

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Ndou J

A request. The Secretary of the first respondent responded to the second respondent in a minute in the following terms:

"Derreservation of houses: Senga Teachers College

I refer to your minute C/9/4 addressed to the Pro-Vice Chancellor of Midlands State University.

Please be advised that we have dereserved the houses as requested but *we are not offering them for sale to the sitting tenants. There is an acute shortage of Government housing in Gweru and the houses have thus been placed in the pool.* They will be allocated by the Ministry of Local Government, Public Works and National Housing official in Gweru.

All sitting tenants who are civil servants should approach our offices for fresh leases. *Those who are not longer civil servants will be required to vacate the accommodation within three months"* (emphasis added).

Subsequently, the Secretary of the second respondent informed the applicants by letter dated 15 September 2003 in, *inter alia*, the following terms:

"... I refer to your minute dated ... pertaining to the above subject. Please be advised that the Secretary of Local Government ... and National Housing *has turned down your request to purchase the houses as per Secretary for Higher and Tertiary Education's recommendations.* Attached hereto ..." (emphasis added).

The applicants did not move out or seek a review of the decision; instead, at the expiry of the three months, they filed and obtained a provisional order which stayed their eviction in the interim. They now seek the confirmation of ^E this order in the following terms:

"Terms of Final Order made

That you show cause to this honourable court why a final order should not be made in the following terms:

1. That the first and second respondents be and are hereby ordered to ^F sell the following properties GP 1224/20 ... and GP 1224/24 to the respective applicants.
2. That the respondents pay the costs of this application.
3. That the order shall remain binding notwithstanding the notice of appeal."

^G The first respondent's case is briefly the following. Government policy does not stipulate that every house will eventually be sold to sitting tenants. Government houses fall in two different categories. These are the Housing and Guarantee Fund and the Rental Accommodation or pool houses. Only the Housing and Guarantee Fund can be sold to sitting tenants, since these are ^H classified as "rent to buy", which gives the sitting tenant the option to

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purchase the house. Rental accommodation or pool houses are specifically ^A meant to cater for serving civil servants, and the houses occupied by the applicants fall into this latter category. The

applicants, in their answering affidavit, do not dispute this position. Instead, they rely on what they term "a solid promise and undertaking that the Senga houses will be sold to sitting tenants." The following words cited above are said to constitute this solid promise and undertaking: ⁸

"Please be advised that the Ministry is in the process of formulating a policy on the disposal of rented accommodation to sitting tenants. As such, you will be advised accordingly when the matter is finalised."

Is this a promise or undertaking? Does this conduct of the first respondent give rise to a legitimate expectation to the applicants that these houses will ⁹ be sold to them? These are the issues for determination.

In considering what conduct would give rise to a legitimate expectation, Corbett CJ in *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) at 756I, cited the following passage from the speech of Lord Fraser of Tullybelton in *Council of Civil Service Unions v Minister of the Civil Service* [1984] 3 All ER 935 (HL) at 944a-b: ¹⁰

"Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

This doctrine was approved by the Supreme Court in our jurisdiction in *Metsola v Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S); ¹¹ *Health Professions Council v McGown* 1994 (2) ZLR 329 (S); *Taylor v Minister of Education & Anor* 1996 (2) ZLR 772 (S); *Mawenga v PTC* 1997 (2) ZLR 483 (S) and *Minister of Information v PTC Managerial Employees Workers' Committee* 1999 (1) ZLR 128 (S) at 136A-C.

The above requirements were considered in greater detail in *National Director of Public Prosecutions v Phillips* 2002 (4) SA 60 (W), which was cited, with approval, by the Supreme Court of Appeal in *South African Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA).

Heher J in *National Director of Public Prosecutions v Phillips, supra*, said:

"The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation, include ¹² the following:

- (i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': De Smith, Woolf and Jowell [*Judicial Review of Administrative Action* 5 ed] at 425 para 8-055. The requirement is a sensible one. It accords with the ¹³

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a principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril. ¹⁴

- (ii) The expectation must be reasonable: *Administrator, Transvaal v Traub supra* [cited with approval by the Constitutional Court in *President of the Republic of South Africa & Ors v South African Rugby Football Union & Ors* 2000(1) SA I (CC)]; De Smith, Woolf and Jowell *supra* 417 para 8-037.
- (iii) The representation must have been induced by the decision-maker: ¹⁵ De Smith, Woolf and Jowell (*op cit* at 422 para 8-050); *Attorney General of Hong Kong v Ng Yuen Shui* [1983] 2 All ER 346 (PC) at 350h-j.
- (iv) The representation must be one which it was competent and lawful for the decision-maker to make, without which reliance cannot be legitimate: *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C) at 59E-G." ¹⁶

Adopting and applying this exposition, it is plain that the applicants' case was defective from the outset. They may subjectively have had expectations. But these expectations fail to meet criteria (i) and (ii), making it unnecessary to consider any further requisite. There was no representation to the applicants that the houses will be sold to them – let alone a clear, unambiguous and ¹⁷ unqualified representation. Nor were the applicants' expectation to that effect reasonable. It is worth emphasising that the reasonableness of the expectation operates as pre-condition to its legitimacy – see Lord Diplock's speech in *Council of Civil Service Unions & Ors v Minister for the Civil Service, supra* at 949h-j and *South African Veterinary Council v Szymanski, supra*. The first ¹⁸ question is factual – whether in all the circumstances the expectation sought to be relied on is reasonable. That entails applying an objective test to the circumstances from which the applicant claims the expectation arose. Only if that test is fulfilled does the further question – whether in public law the expectation is legitimate – arise. As alluded to above, the representation underlying the expectation

in casu is not a clear and unambiguous statement ^g which is devoid of relevant qualification that the first respondent will sell the houses to the applicants. If anything, it expressly states that their request will be considered. That entails either a favourable or an unfavourable outcome of the consideration. No legitimate expectation could therefore have been created that the first respondent will sell the houses to the applicants. Further, ^h the expectation by the applicants is not reasonable. They assumed a positive

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outcome of their request. They acted at their peril. Their letter and those written ^a by the Principal of Gweru Teachers College were requests. A person who requests cannot claim that he expects a positive answer to his request. The letter relied upon is no more than an acknowledgement of the requests and an undertaking that these requests will be considered by the first respondent. Indeed, these requests or pleas for charity were considered and the outcome ^b was unfavourable and this was communicated to them in writing.

Accordingly, the provisional order granted by this court on 30 April 2004 be and is hereby discharged with costs.

Mhuruyengwe & Associates, c/o Calderwood, Bryce Hendrie & Partners, applicants' legal practitioners ^c

Coghlan & Welsh, respondents' legal practitioners ^d

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ZIMBABWE GRAPHICAL WORKERS UNION v FEDERATION OF MASTER PRINTERS OF ZIMBABWE & ANOR 2007 (2) ZLR 103 (S)

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Citation	2007 (2) ZLR 103 (S)
Case No	Judgment No. S-25-07
Court	Supreme Court, Harare
Judge	Sandura JA, Gwaunza JA & Garwe JA
Heard	15 January 2007
Judgment	14 September 2007
Counsel	<i>P Machaya</i> , for the appellant <i>S Sadomba</i> , for the first respondent No appearance for the second respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment — *collective job action — lawfulness of — dispute of interest and dispute of right — distinction between*

Employment — *collective job action — right to resort to collective job action D — matter not settled within 14 days of notice of collective action being given — no requirement for fresh notice to be given if certificate of no settlement issued after expiry of 14 day period — collective job action lawful if resorted to within a reasonable time*

Employment — *collective job action — show cause order by Minister — not E open to Minister to issue second show cause order in respect of same matter — correct course for parties to follow in event of no settlement being reached*

Headnote

In labour matters, broadly speaking, disputes of right concern the infringement, F application or interpretation of existing rights embodied in a contract of employment, collective agreement or statute, while disputes of interest (or economic disputes) concern the creation of fresh rights, such as higher wages, modification of existing collective agreements *et cetera*. Collective bargaining, mediation and, as a last resort, peaceful industrial action are generally regarded as the most appropriate avenues for the G settlement of conflicts of interest, while adjudication is normally regarded as an appropriate method for resolving disputes of right.

The appellant union represented employees in the printing, packaging and newspaper industry. It had been engaged in a protracted dispute with the first respondent, a federation representing the employers in that industry. H Eventually a deadlock was reached between them and the appellant

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served notice upon first respondent of its intention to resort to collective A job action. Five days later the latter applied to the second respondent, the Minister of Public Service, Labour and Social Welfare, for a show cause order. This order was duly issued by the Minister in terms of s 106(1) of the Labour Act [Chapter 28:01] and the parties to the dispute were directed to appear before the Labour Court to show cause why the B dispute should not be disposed of in terms of s 107 of the Act. The parties duly appeared before the court and a disposal order was issued. The matter was referred to a labour officer for conciliation. In the meantime, the projected collective job action was prohibited. The parties appeared before the labour officer for conciliation. It was unsuccessful and he issued a certificate of no settlement. A week later, the appellant resorted C to collective job action and on the same day, the first respondent to applied the Minister for another show cause order, notwithstanding the fact that there was nothing in the Act to authorize such a step. The labour officer compiled a report, which recommended that the Minister should not issue this second show cause order as he believed that collective job action was now lawful. Nonetheless, the Minister did issue a second D show cause order, directing that the appellant should appear before the Labour Court to show cause why the collective job action commenced should not be disposed of in terms of s 107 of the Act. The parties duly appeared before the Labour Court, which, after several other appearances before it by the parties, held that the collective job action was unlawful. It reasoned that the notice given by the appellant to the first respondent E had expired and the appellant had lost the right to such action. Fresh notice should have been given to the first respondent before embarking upon the collective job action. On appeal to the Supreme Court:

Held, that the Minister did not have the power to issue the second show cause order. There was nothing in the Act which permitted him, after F issuing the first show cause order, to issue another such order in the same matter and in respect of the same dispute, directing the parties, for the second time, to appear before the Labour Court to show cause why another disposal order should not be made in terms of s 107 of the Act.

Held, further, that instead of applying to the Minister for the second show cause order, the first respondent should have followed the procedure set G out in subss (5) and (7) of s 93 of the Act after the certificate of no settlement had been issued by the labour officer.

Held, further, that the appellant did not acquire the right to resort to collective job action on the expiry of the 14 day period because, in terms of s 104(2)(b) of Act, no attempt had been made to conciliate the dispute H

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A and no certificate of no settlement had been issued in terms of s 93. The appellant only acquired such a right after a certificate of no settlement had been issued to the parties.

Held, further, that the right to collective job action, once acquired, must be exercised within a reasonable time. In determining what period of time is reasonable or unreasonable in any given case, all the circumstances B relative to the delay must be taken into account, including the explanation given for the delay (*dicta per* Hefer J in *Free State Consolidated Gold Mines Operations Ltd v National Union of Mineworkers & Ors* 1988 (2) SA 425 (O) at 429 followed).

Held, further, that although the appellant only embarked on the collective job C action four days after it acquired the right to do so, the delay was not unreasonable, bearing in mind that it had to organize the collective job action and the need to inform its members throughout the country of its decision to do so.

Cases cited

D *Free State Consolidated Gold Mines (Operations) Ltd v National Union of Mineworkers & Ors* 1988 (2) SA 425 (O)

Moyo & Ors v Central African Batteries (Pvt) Ltd 2002 (1) ZLR 615 (S)

Legislation considered

E Labour Act [Chapter 28:01], ss 2, 89(2), 93(5) & (7), 104(1),(2) & (3), 106(1) & (2) and 107

Case information

P Machaya, for the appellant

S Sadomba, for the first respondent

F No appearance for the second respondent

Judgment

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

In a judgment handed down on 3 January 2006, the Labour Court declared that the collective job action embarked upon by the appellant on 25 July 2005 and G terminated on 3 August 2005 was unlawful.

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

1. The appellant ("the Union") consists of the employees in the printing, packaging and newspaper industry, and the first respondent ("the H Federation") is an amalgamation of the employers in that industry.

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2. During the first half of 2005, the Union commenced negotiating with the A Federation a cost of living adjustment of the salaries and allowances payable to its members during the last quarter of 2005. The Union proposed a salary increase of 220 per cent and the introduction of a housing allowance of \$1 500 000 and a transport allowance of \$300 000 per month, but the Federation rejected the proposals and, instead, offered an increase of 40 per cent of the current salaries and allowances. B
3. After three rounds of negotiations, the parties reached a deadlock, and thereafter the Union began preparing for a lawful collective job action, which was approved by an overwhelming majority of its members voting by secret ballot.
4. On 15 June 2005, the Union gave the Federation notice of its members' C intention to resort to collective job action. The notice, in relevant part, reads as follows:

"MEMORANDUM

To: Federation of Master Printers of Zimbabwe

From: Zimbabwe Graphical Workers Union D

Date: 15 June 2005

Ref: Notice of Intention to go on an Industrial Collective Job Action

The above refers:

In terms of Part XIII section 104(2)(a) of the Labour Act, we are hereby E giving you fourteen (14) days to redress our grievances. The grievances are outlined below –

(1) We want wage/salary increase of 220%.

(2) We want housing and transport allowances of \$1.5 million and \$300 000 respectively ...”

5. On 20 June 2005, the Federation applied to the second respondent (“the F Minister”) for a show cause order.
6. On 4 July 2005, the Minister, acting in terms of s 106(1) of the Labour Act [*Chapter 28:01*] (“the Act”), issued a show cause order directing the Union to appear before the Labour Court on 7 July 2005 at 11 a m to show cause why the threatened collective job action should not be disposed G of in terms of s 107 of the Act.
7. On 7 July 2005, the parties appeared before the Labour Court, and a disposal order was issued by that court with the consent of the parties. It reads as follows:

“Whereupon, after reading documents filed of record and hearing H

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A both parties’ representatives, it is by consent hereby ordered that a disposal order be issued on the following terms:

1. That the salaries dispute between the parties be and is hereby referred to a labour officer for conciliation.
2. That pending the outcome of the conciliation mentioned in paragraph 1 above, the respondents are prohibited from embarking on the A threatened collective job action.”
8. On 18 July 2005, the parties appeared before a labour officer for conciliation. That exercise lasted until 20 July 2005 and, as the dispute was not settled, the labour officer issued a certificate of no settlement to the parties on 21 July 2005. c
9. On 25 July 2005, the Union resorted to collective job action. On the same day, the Federation applied to the Minister for another show cause order.
10. On 28 July 2005, the parties appeared before a labour officer and made their submissions on the Federation’s application for the second show cause order. However, the circumstances in which the application, which had been submitted to the Minister, was placed before the labour officer were D not clear. Presumably, the Minister wanted the labour officer to look into the matter and compile a report thereon for his consideration. Nevertheless, after considering the submissions made by the parties, the labour officer compiled a report in which he recommended that the Minister should not issue the show cause order sought because, in his view, the collective job E action was lawful. That recommendation was subsequently supported by the provincial labour officer for the Harare region.
11. Nevertheless, on 1 August 2005, the Minister issued the second show cause order, directing the Union to appear before the Labour Court on 3 August 2005 at 10 a.m. to show cause why the collective job action commenced on 25 July 2005 should not be disposed of in terms of s 107 F of the Act. In addition, the Minister directed that, pending the determination of the matter by the Labour Court, the collective job action should be terminated immediately or, in any case, within twenty-four hours of receipt of the show cause order.
12. On 3 August 2005, the parties appeared before the Labour Court. It G appears from the record that the parties did not complete their submissions on that day, but had to appear again on two or three other occasions before the Labour Court reserved its judgment.
13. On 3 January 2006, the Labour Court handed down its judgment. It declared that the collective job action embarked upon by the Union on 25 H July 2005 and terminated on 3 August 2005 was unlawful.

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Aggrieved by that decision, the Union appealed to this court. A

The Labour Court found that when the notice given by the Union on 15 June 2005 expired on 29 June 2005, and the Union did not immediately thereafter embark upon the collective job action it had threatened, it lost the right to resort to such action on the basis of the notice given on 15 June 2005, and that a fresh notice should, therefore, have been given before the Union embarked upon the collective job action on 25 July 2005. As no such notice had been given, ^b the Labour Court concluded that the collective job action was unlawful.

The correctness of that finding has been challenged in this appeal.

Subsections (1) and (2) of s 104 of the Act read as follows:

- "(1) Subject to this Act, all employees, workers committees and trade unions shall have the right to resort to collective job action to resolve ^c disputes of interest.
- (2) Subject to subsection (4) [which is not relevant in the present case], no employees, workers committee, trade union, employer, employers organisation or federation shall resort to collective job action unless –
 - (a) fourteen days written notice of intent to resort to such action, specifying the grounds for the intended action, has been given: ^d
 - (i) to the party against whom the action is to be taken; and
 - (ii) to the appropriate employment council; and
 - (iii) to the appropriate trade union or employers organisation or federation in the case of members of a trade union or employers organisation or federation partaking in a ^e collective job action where the trade union or employers organisation or federation is not itself resorting to such action; and
 - (b) an attempt has been made to conciliate the dispute and a certificate of no settlement has been issued in terms of section *ninety-three*." ^f

There are three issues for determination in this appeal. The first is whether the dispute between the parties was a dispute of interest or a dispute of right. The second is whether the Minister had the power in terms of the Act to issue the second show cause order. And the third is whether the Union lost the right to resort to collective job action, on the basis of the notice given on 15 June 2005, when it did not embark upon such action immediately after the expiration ^g of the notice on 29 June 2005. I shall deal with these issues in turn.

WAS IT A DISPUTE OF INTEREST OR A DISPUTE OF RIGHT?

This issue is important because if the dispute between the parties was a dispute of right, the Union had no right to resort to collective job action to resolve the dispute. I say so for two reasons. ^h

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^a The first reason is that the right given by s 104(1) of the Act to employees, workers committees and trade unions to resort to collective job action is in respect of the resolution of disputes of interest and does not cover disputes of right. Section 104(1) states that:

"... all employees, workers committees and trade unions shall have the right to resort to collective job action to resolve *disputes of interest*" (my emphasis).

And the second reason is that in terms of s 104(3)(a)(ii) of the Act employees, workers committees, etc, cannot resort to collective job action if the issue in dispute is a dispute of right. Section 104(3)(a)(ii) reads as follows:

- "(3) Subject to subsection (4) (which is not relevant to the present case), ^c no collective job action may be recommended or engaged in by –
 - (a) any employees, workers committee, trade union, employer, employers organisation or federation –
 - (i) ...; or
 - (ii) if the issue in dispute is a dispute of right;"

^d The terms "dispute of interest" and "dispute of right" are defined in s 2 of the Act as follows:

"'dispute of interest' means any dispute other than a dispute of right.

'dispute of right' means any dispute involving legal rights and obligations, including any dispute occasioned by an actual or alleged unfair labour practice, a breach or alleged breach of this Act or of any regulations

made ^ε under this Act, or a breach or alleged breach of any of the terms of a collective bargaining agreement or contract of employment.”

Thus, a dispute of right would be a dispute concerning, for example, the infringement or interpretation of an existing legal right embodied in a statute or contract of employment. On the other hand, a dispute of interest would be ^ε a dispute concerning, for example, the creation of new legal rights for the workers, such as higher salaries and allowances.

The learned authors, Alan Rycroft and Barney Jordaan, in their book *A Guide to South African Labour Law* 2 ed, have this to say on disputes of interest and disputes of right at p 169:

“Broadly speaking, disputes of right concern the infringement, application ^ε or interpretation of existing rights embodied in a contract of employment, collective agreement or statute, while disputes of interest (or ‘economic disputes’) concern the creation of fresh rights, such as higher wages, modification of existing collective agreements, etc. Collective bargaining, mediation and, as a last resort, peaceful industrial action, are generally ^η regarded as the most appropriate avenues for the settlement of conflicts

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of interest, while adjudication is normally regarded as an appropriate ^α method for resolving disputes of right.”

I entirely agree with those observations, which accord with the definitions of “dispute of right” and “dispute of interest” set out in s 2 of the Act.

In the circumstances, there can be no doubt that the issue which was in dispute between the parties in this case was a dispute of interest, involving the ^β creation of fresh legal rights in the form of higher salaries and allowances.

DID THE MINISTER HAVE THE POWER IN TERMS OF THE ACT TO ISSUE THE SECOND SHOW CAUSE ORDER?

I do not think he had. However, before I give my reasons for that conclusion, I wish to set out the relevant provisions in ss 106 and 107 of the Act. ^c

Section 106, in relevant part, reads as follows:

“106 Show Cause orders

- (1) Whenever a workers committee, trade union, employers organisation or federation of registered trade unions or employers organisations ... threatens, recommends, encourages, incites, ^δ organises or engages in any collective action ... the Minister, acting on his own initiative or upon the application of any person affected or likely to be affected by the unlawful collective action, may issue an order calling upon the responsible person to show cause why a disposal order should not be made in relation thereto:

Provided that the Minister may call both parties to appear before ^ε him or her for submissions before he or she issues a show cause order if he or she deems it necessary that they appear.

- (2) A show cause order –
 - (a) shall specify –
 - (i) the date, time and place at which the responsible ^ε person must appear before the Labour Court to show cause why a disposal order should not be made; and
 - (ii) the order or action desired or proposed;
 - (b) may direct that pending the issuance of a disposal order, the unlawful collective action concerned be terminated, ^ε postponed or suspended.”

And s 107, in relevant part, reads as follows:

“107 Disposal orders

- (1) On the return day of a show cause order the Labour Court shall ^η ...

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^α ...inquire into the matter and shall afford the parties concerned an opportunity of making representations in the matter.

- (2) After conducting an inquiry in terms of subsection (1), the Labour Court may issue a disposal order directing that –

- (a) the unlawful collective action be terminated, postponed ^b or suspended; or
- (b) the issue giving rise to the unlawful collective action concerned be referred to another authority to be dealt with in terms of Part XII and that, pending the determination of the issue in terms of that Part, the unlawful collective action concerned be terminated, postponed or suspended."

^cIn my view, the Minister did not have the power to issue the second show cause order. I say so because there is no provision in the Act in terms of which the Minister, after issuing a show cause order directing the parties to appear before the Labour Court, to show cause why a disposal order should not be made in terms of s 107, could issue another show cause order in the same matter, and in respect of the same dispute, directing the parties for the second ^d time to appear before the Labour Court to show cause why another disposal order should not be made in terms of s 107.

In addition, subss (5) and (7) of s 93 of the Act set out the procedure to be followed by the parties after a certificate of no settlement has been issued by a labour officer. Instead of applying to the Minister for the second show cause ^e order, the Federation should have followed that procedure to resolve the dispute.

Subsection (5) of s 93 of the Act, in relevant part, reads as follows:

"After a labour officer has issued a certificate of no settlement, the labour officer, upon consulting any labour officer who is senior to him and to ^f whom he is responsible in the area in which he attempted to settle the dispute or unfair labour practice –

- (a) ...;
- (b) may, with the agreement of the parties, refer the dispute or unfair labour practice to compulsory arbitration; or
- (c) ..."

^g However, as the Union did not want the dispute referred to compulsory arbitration, the labour officer could not act in terms of s 93(5)(b). He could only have done so with the agreement of both parties, but the parties disagreed on that course of action.

^h Nevertheless, that was not the end of the matter, because the Federation

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should have acted in terms of subs (7) of s 93 which, in relevant part, reads ^a as follows:

"(7) If, in relation to any dispute or unfair labour practice –

- (a) after a labour officer has issued a certificate of no settlement in relation to the dispute or unfair labour practice, it is not possible for any reason to refer the dispute or unfair labour practice to ^A compulsory arbitration as provided in subsection (5); or
- (b) ...;

any party to the dispute or unfair labour practice may, in the time and manner prescribed, apply to the Labour Court –

- (i) for the dispute or unfair labour practice to be disposed of in accordance with paragraph (b) of subsection (2) of section eighty-nine, in the ^c case of a dispute of interest; or
- (ii) ..."

And s 89(2)(b), mentioned above, reads as follows:

"89 Functions, powers and jurisdiction of Labour Court

- (1) ... ^d
- (2) In the exercise of its functions, the Labour Court may –
 - (a) ...
 - (b) in the case of an application made in terms of subparagraph (i) of subsection (7) of section ninety-three, remit it to the same or a different labour officer with instructions directing ^e that officer to attempt to resolve it in accordance with such guidelines as it may specify;"

In the circumstances, it is clear beyond doubt that after issuing the first show cause order the Minister had no further role to play in the matter. The second show cause order was, therefore, null and void. The same applies to the second disposal order issued, because the matter was not properly before the Labour ^e Court.

Although that effectively disposes of this appeal, I shall deal with the third issue because I consider it important, as it formed the basis on which the matter was determined by the court *a quo*.

DID THE UNION LOSE THE RIGHT TO RESORT TO G COLLECTIVE JOB ACTION WHEN IT DID NOT RESORT TO SUCH ACTION IMMEDIATELY AFTER THE NOTICE GIVEN ON 15 JUNE 2005 EXPIRED ON 29 JUNE 2005?

I do not think it did. I say so because when the fourteen days expired on 29 June 2005, the Union could not immediately thereafter lawfully resort to H

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Sandura JA

A collective job action. In fact, the Union did not have the right to resort to collective job action at that stage because, in terms of s 104(2)(b), the Union could not resort to such action unless an attempt had been made to conciliate the dispute and a certificate of no settlement had been issued in terms of s 93 of the Act.

It was common cause that the Labour Court referred the dispute to a labour B officer for conciliation on 7 July 2005. The conciliation exercise subsequently commenced on 18 July 2005 and ended on 20 July 2005. The exercise was not successful, and a certificate of no settlement was issued to the parties on 21 July 2005.

In my view, it was only on 21 July 2005, after a certificate of no settlement had C been issued to the parties, that the Union acquired the right to resort to collective job action. Four days later, on 25 July 2005, the Union embarked on the collective job action.

It seems to me that the delay of four days in commencing the collective job action was not unreasonable, bearing in mind the fact that the Union had to organise the collective job action and inform its members throughout the country about the decision to resort to such action after the certificate of no settlement had been issued.

In submitting that the Union should have given a fresh notice in respect of the collective job action embarked upon on 25 July 2005, counsel for the Federation relied upon what this court said in *Moyo & Ors v Central African E Batteries (Pvt) Ltd* 2002 (1) ZLR 615 (S). At 620C-D, Gwaunza AJA (as she then was) said:

“There is no evidence on record to show the nature of the grievance that led to the strike of December 1997. However, even if the grievance had been the same – for instance, because the respondent had not complied with whatever determination was made in October 1997 – as long as the F original notice period had expired, there would still have been need to issue a fresh notice of the intended strike in accordance with s 104(2) of the Act.”

In that case, the respondent’s employees wrote to the member-in-charge at Norton Police Station on 26 August 1997, stating their intention to resort to G collective job action fourteen days later. The letter was copied to the Ministry of Labour and to the relevant trade union. The employees did not notify their employer about the proposed action, but the employer later became aware of it from some other source.

When the fourteen days expired, the employees did not immediately embark H on the proposed collective job action, but did so subsequently on 3 December 1997, relying upon the notice given in August

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1997. This court held that a fresh A notice in respect of the collective job action of 3 December 1997 should have been given.

However, *Moyo’s case supra* is distinguishable from the present case. The main distinction is that *Moyo’s case supra* was decided in terms of s 104(2) of the Act before it was amended by s 37 of the Labour Relations Amendment B Act No. 17 of 2002, which came into force on 7 March 2003.

The amendment introduced an additional requirement which had to be met by the employees intending to embark upon collective job action, i.e. they could not embark upon such action unless

an attempt had been made to conciliate the dispute and a certificate of no settlement had been issued in terms of s 93 of the Act. c

Thus, whereas before the amendment, and assuming that all the other requirements set out in s 104(2) were met, employees intending to embark on collective job action acquired the right to embark upon such action immediately after the expiration of the fourteen days notice, after the amendment that right was acquired by the employees only after an attempt had been made to d conciliate the dispute and a certificate of no settlement had been issued in terms of s 93.

Once acquired, the right could only be lost if it was not exercised within a reasonable time, and no reasonable explanation for the delay in exercising the right was given.

Thus, in *Free State Consolidated Gold Mines (Operations) Ltd v National E Union of Mineworkers & Ors* 1988 (2) SA 425 (O), Bester J said the following at 429C-E, whilst considering an issue similar to the one in this case:

"While the remarks of Hoexter JA lend support to the contention that a right to strike acquired in terms of s 65 must be exercised within a reasonable time, the premise that a right must be asserted within a f reasonable time after its acquisition does not warrant the conclusion that the failure to do so results *ipso iure* in its loss. This latter point emerges clearly from the judgment of Hefer JA in *Mahabeer v Sharma NO & Anor* 1985 (3) SA 729 (A) at 736E-I."

And at 430A-B, the learned judge continued:

"In determining what is a reasonable time or an unreasonable delay in any g given case, all the circumstances relative to the delay must be taken into account, including the explanation given for the delay. See *Setsokeane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander* 1986 (2) SA 57 (A) at 86I-87A.)" h

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Sandura JA

a I entirely agree with the learned judge. It is incumbent upon the employees who have delayed in embarking on collective job action to give a reasonable explanation for that delay.

In *Moyo's* case *supra*, it does not appear from the judgment that the employees gave a reasonable explanation for the delay in embarking on the collective job action.

b However, in the present case the Union gave a reasonable explanation for not embarking on such action immediately after the end of the fourteen days notice on 29 June 2005, i.e. that an attempt to conciliate the dispute had not yet been made, and a certificate of no settlement had not yet been issued, matters over which the Union had no control. In fact, as already stated, the Union could not have lawfully resorted to collective job action before 21 July 2005, when c the certificate of no settlement was issued in terms of s 93.

Finally, when the parties appeared before the Labour Court on 7 July 2005, in response to the first show cause order, which was issued on 4 July 2005, it must have been common cause that the Union had not lost the right to resort to collective job action on the basis of the notice given on 15 June 2005. I say d so because of the wording of the disposal order, which was issued by the Labour Court with the consent of the parties. It reads as follows:

- "1. That the salaries dispute between the parties be and is hereby referred to a labour officer for conciliation.
2. That pending the outcome of the conciliation mentioned in paragraph 1 above, the respondents are prohibited from embarking on the e threatened collective job action" (emphasis added).

The Union was, therefore, prohibited from embarking on the threatened collective job action "pending the outcome of the conciliation", which must mean that if the conciliation exercise was not successful the Union was at liberty to resort to collective job action.

f The conciliation exercise commenced on 18 July 2005 and ended on 20 July 2005. The exercise was not successful, and a certificate of no settlement was issued on 21 July 2005.

In the circumstances, the collective job action embarked upon by the Union on 25 July 2005 and terminated on 3 August 2005 was lawful.

Consequently, the following order is made –

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

"It is declared that the collective job action embarked upon by the respondent and its members on 25 July 2005 and terminated on 3 August 2005 was lawful."

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Sandura JA

GWAUNZA JA & GARWE JA concurred. A

Mbidzo, Muchadehama & Makoni, appellant's legal practitioners

Gill, Godlonton & Gerrans, first respondent's legal practitioners B

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ZIMBABWE BANKING & ALLIED WORKERS UNION & ANOR v BEVERLEY BUILDING SOCIETY & ORS 2007 (2) ZLR 117 (H)

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Citation	2007 (2) ZLR 117 (H)
Case No	Judgment No. HH-63-07
Court	High Court, Harare
Judge	Patel J
Heard	25 March 2006
Judgment	17 September 2007
Counsel	<i>L T Biti</i> , for the applicant <i>A M Gijima</i> , for the first respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Banking — bank — distinction from building society — whether building society can be regarded as a bank

Constitutional law — Constitution of Zimbabwe 1980 — Declaration of Rights — s 21 (freedom of association) — right to join trade union — D effect of such right — limitations on right — does not oblige employer to pay union fees to unregistered trade union

Employment — trade union — trade union registered for particular sector — whether employees entitled to join another trade union — whether employer obliged to deduct union dues for union not registered for that E sector

Headnote

E The first applicant trade union was originally registered in February 1991 to cover banking institutions. In April 1992, its scope of coverage was varied to cover financial institutions. Until

December 2004, all the employees of the respondent building society were members of another ^F trade union, but then many of those employees resigned from the other union and opted to join the first applicant. Nevertheless, the respondent continued to deduct union dues from all of its employees in favour of the other union. The respondent considered that it was bound to do so in terms of ss 52, 53 and 54 of the Labour Act [*Chapter 28:01*], as read with the Collective Bargaining Agreement: Commercial Sectors (SI 45 of 1993) ^G which applies to all commercial entities, including building societies. The first applicant contended that the respondent was a financial institution within the scope of the Collective Bargaining Agreement: Banking Undertaking (SI 273 of 2000). The applicants sought a *declaratur* that SI 45 of 1993, did not apply to the first applicant's members, coupled with ^H an order compelling the respondent to deduct and forward to the first

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applicant the union dues of such of its employees as were members of ^A the first applicant. The first respondent argued that the applicant was not a party to SI 45 of 1993 and was not duly registered to claim union dues from the respondent's employees. Moreover, it argued that it was regulated by the Building Societies Act [*Chapter 24:02*] and was not a financial institution within the first applicant's scope of coverage. It ^B argued that ss 52, 53 and 54 of the Labour Act were designed to curb the mischief of multiplicity of union representation in order to achieve uniformity and equity in the collective bargaining process.

Held, that in terms of s 2(1) of the commercial sectors agreement, the agreement applies to all employers and employees in the "commercial sectors of Zimbabwe", which in terms of s 3, as read with the First ^C Schedule, includes "building societies". It also includes "financial institutions excluding commercial banks, merchant banks (accepting houses) and discount houses". The banking undertaking agreement, on the other hand, was stated to apply *inter alia* to registered commercial banks, registered accepting houses (merchant banks), registered discount houses and financial institutions. Although General Notice 101 of 2005, ^D promulgated in terms s 3(3) of the Banking Act [*Chapter 24:20*], applied a significant number of the provisions of the Banking Act to every building society regulated by the Building Societies Act [*Chapter 24:02*], it did not operate to obliterate the difference between banks and building societies to such a degree that both entities must now be ^E regarded without distinction as financial institutions. Although banks and building societies are both subsumed under the general rubric of "financial institution", the distinction between them remains legally and practically intact. The Banking Act and the Building Societies Act constitute quite separate regimes, which apply to distinct financial entities, but with overlapping regulatory effect whenever this is deemed ^F expedient by the regulating authority. The distinction between the banking sector and the building society sector is explicitly and rigidly maintained by the two separate regimes embodied in the two agreements. A building society, *stricto sensu*, is governed exclusively by the Commercial Sectors Agreement and falls outside the ambit of the Banking Undertaking Agreement. ^G

Held, further, that analysis of ss 4(2), 30(3), 50(1), 52(2), 53 and 54 of the Act shows that a trade union's right to collect union dues from its members is confined to those of its members who are employed or engaged in the undertaking or industry for which it is registered. A trade union is not entitled, as of right, to collect union dues from its members employed in ^H

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^A an industry or undertaking for which it is not registered. The employer's obligation to collect union dues, by means of a check-off scheme or in any other agreed manner or pursuant to a written authorisation, and to transfer such dues to the trade union concerned must be restricted to a trade union registered in the industry or undertaking in which its members are employed. Such trade union, in effect, constitutes "the trade ^B union concerned" for the purposes of levying union dues. To interpret these provisions otherwise would mean that an employer would be obliged to collect and transfer union dues to a trade union with no capacity to represent the interests of the employees from whom those dues are levied. That would negate the very purpose of collecting union ^C dues from employees, viz. effective trade union representation of those employees in the industry or undertaking in which they are employed. There is nothing in law to stop an employee from joining and paying subscriptions to a trade union which does not

represent his industry or undertaking but that does not oblige his employer to collect and transfer union dues to that trade union in accordance with ss 52 and 54 of the ^d Labour Act.

Held, further, that the ILO Freedom of Association and Protection of the Right to Organise Convention, No. 87 of 1948, prescribes the rights of workers and employers to establish and join organisations of their own choosing for furthering and defending their respective interests. Section 21 of the Constitution of Zimbabwe guarantees the right of every person ^e to form or belong to any association for the protection of his interests. However, this freedom of association does not *per se* include the right to pursue the objects, purposes and activities of a given association. If there is any such right, it certainly is not one that is constitutionally recognised and any claim to it must be established *aliunde*, viz. by statute or the common law. Sections 52 and 54 of the Labour Act cannot be said ^f to impede or circumscribe the freedom of association of those members or of the trade union as guaranteed by s 21 of the Constitution and by art 2 of the Convention. The limitations envisaged by the statutory provisions do not bear on the right to form or belong to any trade union. Conversely, a trade union's claim to collect union dues in a manner not ^g sanctioned by statute cannot properly be conceived to form part of the freedom of association. The fact that a particular trade union is not entitled to levy union dues in a given industry through a check-off scheme may, in practice, militate against the desirability of joining or belonging to it, but the legal right to form or belong to the union remains ^h intact and unimpaired.

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Cases cited ^A

Colleymore & Anor v Attorney-General [1970] AC 538

Professional Institute of the Public Service of Canada v Commissioner of the Northwest Territories & Ors (1990) 2 SCR

Legislation considered

Banking Act [*Chapter 24:20*] ^B

Constitution of Zimbabwe 1980, s 21

ILO Freedom of Association and Protection of the Right to Organise Convention, No. 87 of 1948, arts 2 & 10

Labour Act [*Chapter 28:01*], ss 4(2), 30(3), 50(1), 52(2), 53 and 54 ^C

Case information

L T Biti, for the applicant

A M Gijima, for the first respondent

Judgment

PATEL J: The first applicant in this matter is the Zimbabwe Banking and Allied Workers Union (ZIBAWU). The union was originally registered in February 1991 to cover banking institutions. In April 1992, its scope of coverage was ^D varied to cover financial institutions. The first respondent is Beverley Building Society (BBS). Until December 2004, all the employees of BBS were members of the Commercial Workers Union of Zimbabwe (CWUZ). At that juncture, many of those employees resigned from CWUZ and opted to join ZIBAWU. Nevertheless, BBS has continued to deduct union dues from all of its employees in favour of CWUZ. The reason for this, according to BBS, is that ^E it is bound to do so in terms of ss 52, 53 and 54 of the Labour Act [*Chapter 28:01*] (hereinafter referred to as "the Labour Act") as read with the Collective Bargaining Agreement: Commercial Sectors (SI 45 of 1993) which applies to all commercial entities, including building societies such as BBS. As against this, ZIBAWU, which is a party to the Collective Bargaining Agreement: ^F Banking Undertaking (SI 273 of 2000), contends that BBS is a financial institution within the scope of that agreement. It further contends that BBS's current practice violates s 21 of the Constitution of Zimbabwe, as read with the relevant provisions of the Labour Act and the governing conventions of the International Labour Organisation (ILO).

The applicants herein seek a *declaratur* that SI 45 of 1993 does not apply to c ZIBAWU's members, coupled with an order compelling BBS to deduct and forward to ZIBAWU the union dues of such of its employees as are members of the latter. BBS resists this relief, on the basis that ZIBAWU, unlike CWUZ, is not a party to SI 45 of 1993 and is not duly registered to claim union dues from BBS employees. Moreover, BBS is regulated by the Building Societies H

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A Act [Chapter 24:02] and is not a financial institution within ZIBAWU's scope of coverage. According to BBS, ss 52, 53 and 54 of the Labour Act are designed to curb the mischief of multiplicity of union representation in order to achieve uniformity and equity in the collective bargaining process.

The issues for determination in this matter, as I perceive them, are as follows: B

- (a) Is a building society covered exclusively by SI 45 of 1993 or does it also fall within the ambit of SI 273 of 2000 as a financial institution?
- (b) Do ss 52, 53 and 54 of the Act oblige an employer to collect and remit union dues only in favour of a trade union which is registered to represent workers in the industry in which its employees are employed? c
- (c) Do ss 52, 53 and 54 of the Act violate the freedom of association enshrined in s 21 of the Constitution, as read with the relevant Conventions of the ILO?

BUILDING SOCIETY QUA FINANCIAL INSTITUTION

SI 45 of 1993 (the Commercial Sectors Agreement) was concluded on 14 April 1992 between the National Commercial Employers' Association of the one part D and CWUZ of the other part. By virtue of s 2(1), the Agreement applies to all employers and employees in the "commercial sectors of Zimbabwe". The latter term, as defined in s 3 as read with the First Schedule, includes "building societies". It also includes "financial institutions excluding commercial banks, merchant banks (accepting houses) and discount houses".

E SI 273 of 2000 (the Banking Undertaking Agreement) was concluded on 29 March 1999 between the Banking Employers' Association and ZIBAWU, both being parties to the Employment Council for the Banking Undertaking. In terms of s 1, the provisions of the Agreement are binding upon "all employers and employees in the undertaking who are members of the employers' organisation or the trade union [ZIBAWU] respectively" and "all F such other employers and employees in the undertaking to which this agreement relates, within the area of Zimbabwe". Section 3 defines "banking undertaking" or "undertaking" to mean "the business of a registered commercial bank, registered accepting house (merchant bank) or registered discount house [and] financial institutions, trusteeship, executorship and insurance G broking where such business is carried out by a registered bank itself or by a subsidiary of such bank". It is pertinent to note that ZIBAWU's certificate of registration, as varied in 1992, employs the same terminology.

Section 8(1)(b) of the Commercial Sectors Agreement allows deductions from the remuneration due to an employee by a written stop-order for contributions H to, *inter alia*, "subscriptions to a trade union". Similarly, s 12(1)(b) of the

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Banking Undertaking Agreement allows deductions effected through the A written authority of an employee for "the monies due to a trade union in the form of a check-off system". It is clear, from the wording of the Banking Undertaking Agreement, that it applies to all employees in the banking undertaking who are members of ZIBAWU – including employees of building societies – but only if it is accepted that those societies fall within the purview B of that undertaking. The critical question, therefore, is whether or not a building society forms part of the banking undertaking.

Mr *Biti* contends that this question must be answered in the affirmative. In support of this contention, he relies to a large extent on GN 101 of 2005, which was promulgated on 11 March 2005 by the Minister of Finance in terms of s 3(3) of the Banking Act [Chapter 24:20]. The effect of that Notice is to apply C a significant number of the provisions of the Banking Act to every building society regulated by the Building Societies Act [Chapter 24:02]. Mr *Biti*'s contention, in essence, is

that the Notice operates to obliterate the difference between banks and building societies to such a degree that both entities must now be regarded, without distinction, as financial institutions.

While I accept that the scope of the provisions applied to building societies ^d is fairly extensive, I am unable to agree with Mr *Biti's* argument. The starting premise of s 3 of the Banking Act is to exclude building societies and other institutions from the remit of that Act. The broad purpose of the assimilation between banks and building societies, as I see it, is to ensure that the latter conform with the rules and standards prescribed for the former, to the extent ^e that building societies participate in the business ordinarily carried out by banks. However, it does not follow that banks and building societies are, to all intents and purposes, entities *ad idem* without any meaningful distinction. Although banks and building societies are both subsumed under the general rubric of "financial institution", the distinction between them remains legally and practically intact. In my view, the Banking Act and the Building Societies ^f Act constitute quite separate regimes which apply to distinct financial entities, but with overlapping regulatory effect whenever this is deemed expedient by the regulating authority.

Turning to the specific sphere of labour relations, it is clear that the Commercial Sectors Agreement undoubtedly applies to all building societies. Its scope of ^g coverage also extends to other financial institutions, but with the express exclusion of commercial banks, merchant banks and discount houses. Conversely, the Banking Undertaking Agreement applies to the business of a commercial bank, merchant bank and discount house, as well as the business of a financial institution, but only to the extent that such latter business is ^h

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^a carried out by a registered bank itself or by its subsidiary. In my view, the distinction between the banking sector, on the one hand, and the building society sector, on the other is explicitly and rigidly maintained by the two separate regimes embodied in SI 45 of 1993 and SI 273 of 2000, respectively, insofar as concerns the regulation of labour relations in these two sectors. I therefore conclude that a building society, *stricto sensu*, is governed exclusively ^b by the Commercial Sectors Agreement and falls outside the ambit of the Banking Undertaking Agreement. It follows that BBS itself is not subject to, or bound by, the provisions of the latter Agreement.

UNION DUES FOR REGISTERED UNION

Before dealing with the specific sections governing union dues, it seems ^c relevant to have regard to the provisions of s 45(1) of the Labour Act, which sets out the considerations relating to the registration of trade unions and employers organisations. The Registrar is enjoined, in this respect, to take into account, *inter alia*, "the desirability of affording the majority of the employees and employers within an undertaking or industry effective representation in negotiations affecting their rights and interests," and "the desirability of ^d reducing, to the least possible number, the number of entities with which employees and employers have to negotiate". While these provisions clearly support the first respondent's argument against the multiplicity of union representation in a single industry, they do not necessarily preclude the collection of union dues by more than one union within that industry.

^e Sections 4(2) and 50(1) of the Labour Act entitle all employees to membership of the trade unions registered to represent their undertaking or industry:

Section 4(2) reads:

"Every employee shall have the right to be a member of a trade union which is registered, as the case may be, for the undertaking or industry in which ^f he is employed if he complies with the conditions of membership."

Section 50(1) reads:

"Every employee shall be entitled to membership of any registered trade union which represents his undertaking or industry if he is prepared to comply with its rules and conditions of membership."

Section 52(1) of the Labour Act recognises the right of registered unions to ^g levy union or association dues as follows:

"For the purpose of fulfilling its obligation to represent the interests of its members employed or engaged in the undertaking or industry for which it is registered, a registered trade union or employers organisation may, subject to this Act, levy, collect, sue for and recover union and association ^h dues."

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Section 53 of the Labour Act restricts the collection of union dues by ^A unregistered trade unions by stipulating that:

- "(1) No employer shall, without the consent of the Minister, pay on behalf of any employee any union dues other than to a registered trade union.
- (2) Any employer who contravenes subsection (1) shall be guilty of an ^B offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment".

The collection of union dues is regulated by s 54 of the Labour Act which, in its relevant portions, provides that:

- "(1) Union dues shall be collected by an employer from his employees and ^C transferred to the trade union concerned —
 - (a) by means of a check-off scheme or in any other manner agreed between the trade union and the employees and the employer or employers organisation concerned; or
 - (b) failing such agreement as referred to in paragraph (a), by authorisation in writing of an employee who is a member of the ^D trade union concerned.
- (2) ... (5)
- (5a) No employer shall collect or pay any union dues in terms of this section to or on behalf of a trade union or federation —
 - (a) while its registration is suspended; or ^E
 - (b) after its registration has been rescinded.
- (6) Any employer who fails or refuses to collect union dues and transfer them to the trade union concerned in accordance with this section shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment." ^F

Also relevant in the context of union dues is s 30(3) of the Labour Act which stipulates that:

- "No unregistered trade union may, whether in its corporate name or otherwise —
 - (a) recommend collective job action; or ^G
 - (b) have the right of access to employees conferred by subsection (2) of section seven; or
 - (c) levy, collect or recover union dues by means of a check-off scheme."

Taking all of the foregoing provisions together, the statutory regime that emerges is as follows. By virtue of s 4(2) of the Labour Act, every employee ^H

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^A has "the right to be a member of a trade union which is registered, as the case may be, for the undertaking or industry in which he is employed". Similarly, in terms of s 50(1) of the Labour Act, every employee is "entitled to membership of any registered trade union which represents his undertaking or industry". Conversely, in accordance with s 52(1) of the Labour Act, a registered trade union is entitled to levy and collect union dues in order "to represent the ^B interests of its members". However, its right to do so is confined to those of its members who are "employed or engaged in the undertaking or industry for which it is registered". It follows that a trade union is not entitled, as of right, to collect union dues from its members employed in an industry or undertaking for which it is not registered. Section 53 of the Labour Act prohibits an employer, under pain of criminal sanction, from paying any union dues on ^C behalf of any employee "other than to a registered trade union". This prohibition is bolstered by s 54(5a) of the Labour Act and is mirrored by the restriction imposed upon unregistered unions by s 30(3)(c) of the Labour Act against the collection of union dues through a check-off scheme. In my view, s 53 of the Labour Act is concerned solely with unregistered unions and does ^D not *per se* proscribe the payment of union dues to a trade union registered in another industry or undertaking.

Section 54 of the Labour Act requires an employer to collect union dues, by means of a check-off scheme or in any other agreed manner or pursuant to a written authorisation, and to transfer such dues to "the trade union concerned". The employer's obligation to collect and transfer union dues must be effected ^E "in accordance with this section". The critical question to be answered is this:

what is the meaning that should be ascribed to the phrase “the trade union concerned”? In favour of ZIBAWU, it might well be argued that the terminology employed in s 54 of the Labour Act differs materially from that used in s 52 of the Labour Act. Thus, “the trade union concerned” in s 54 of the Labour Act must mean the trade union of which the employees concerned are members, rather than the trade union registered in the industry or undertaking in which they are employed. As against this, it seems preferable to read s 52 together with s 54 in an holistic fashion so as to confine the application of the latter to the trade union referred to in the former. In other words, the employer’s obligation under s 54 of the Labour Act must be restricted to a trade union registered in the industry or undertaking in which its members are employed. Such trade union, in effect, constitutes “the trade union concerned” for the purposes of levying union dues. To interpret these provisions otherwise would mean that an employer would be obliged to collect and transfer union dues to a trade union with no capacity to represent the interests of the employees from whom those dues are levied. That would surely negate the

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very purpose of collecting union dues from employees, viz., effective trade union representation of those employees in the industry or undertaking in which they are employed. Of course, there is nothing in law to stop an employee from joining and paying subscriptions to a trade union which does not represent his industry or undertaking. However, that does not oblige his employer to collect and transfer union dues to that trade union in accordance with ss 52 and 54 of the Act.

It follows from the above analysis that BBS is not required to collect and remit any union dues to ZIBAWU inasmuch as the latter is not registered to represent those of its members who are employed in the Commercial Sector. Accordingly, the relief sought by ZIBAWU as against BBS cannot be granted in terms of the relevant provisions of the Labour Act.

VIOLATION OF s 21 OF THE CONSTITUTION AND THE ILO

CONVENTIONS

Section 21 of the Constitution of Zimbabwe enshrines the freedom of assembly and association in the following terms:

“(1) Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests.

(2) The freedom referred to in subsection (1) shall include the right not to be compelled to belong to an association.”

The long title of the Labour Act articulates the objects of the Act to include:

“to give effect to the international obligations of the Republic of Zimbabwe as a member state of the International Labour Organisation and as a member of or party to any other international organisation or agreement governing conditions of employment which Zimbabwe would have ratified.”

The ILO Convention which is of direct relevance to the present matter is the Freedom of Association and Protection of the Right to Organise Convention, No. 87 of 1948. Article 2 of the Convention expresses the freedom of association in the following terms:

“Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”

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The term “organisation” is defined in Art 10 of the Convention to mean:

“any organisation of workers or of employers for furthering and defending the interests of workers or of employers.”

In substance, the Convention prescribes the right of workers and employers to establish and join organisations of their own choosing for furthering and defending their respective interests. By the

same token, the Constitution guarantees the right of every person to form or belong to any association for the protection of his interests. In essence, the freedom of association as enunciated in both instruments comprises three distinct rights, that is to say:

- (a) the right to establish or form an association;
- (b) the right to join or belong to an association; and
- (c) the right not to join or belong to an association (expressly stated in the Constitution and necessarily implied in the Convention).

Does the freedom of association extend beyond the three rights described above? In other words, does that freedom include, as well, the right of an association to pursue the objects or purposes for which it has been formed? And, more specifically in the present context, does it embrace the right of a registered trade union to compel an employer to collect and transfer union dues from its employees who are members of the trade union but who are employed in an industry for which that union is not registered?

With direct reference to these questions, the decision of the Privy Council in *Collymore & Anor v Attorney-General* [1970] AC 538 at 547-548 provides unequivocal authority for the following propositions. Firstly, the freedom to associate cannot be equated with the freedom to pursue, without restriction, the objects of the association. Secondly, the abridgement of the right of free collective bargaining and of the freedom to strike is not an abridgement of the freedom of association. Therefore, the freedom of a trade union to organise and bargain collectively is something over and above the freedom of association. Also instructive is the majority decision of the Canadian Supreme Court in *Professional Institute of the Public Service of Canada v Commissioner of the Northwest Territories & Ors* (1990) 2 SCR to the effect that the constitutional guarantee of the freedom of association does not include a guarantee of the right to bargain collectively. Thus, the legislative restriction of collective bargaining is not a violation of the freedom of association. Moreover, the objects, purposes and activities of an association, even if they are fundamental to its existence, are irrelevant to the constitutional protection of the freedom of association.

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To similar effect, the Indian Supreme Court has consistently adopted the position that the constitutional right to form a trade union does not carry with it any right of every individual union to represent its members in an industrial dispute. Nor does the right to form a union include any guaranteed right to collective bargaining or to strike. See in these respects the authorities cited in Basu *Shorter Constitution of India* (10 ed) at pp 121-122. The learned author himself, at p 120, takes the view that the right to form an association does not carry with it a further guarantee that the objects or purposes of an association so formed shall not be interfered with by law.

Having regard to the above authorities, I am of the firm opinion that the freedom of association enshrined in s 21 of the Constitution and in Article 2 of the Convention does not *in se* include the right to pursue the objects, purposes and activities of a given association. If there is any such right, it certainly is not one that is constitutionally recognised and any claim to it must be established *aliunde*, viz. by dint of statute or the common law.

Does the strict application of this approach operate to render nugatory the right of a person to form or belong to an association "for the protection of his interests"? In my view, it does not necessarily and invariably have that effect. In any event, the objects, purposes and activities of an association, to the extent that they purport to protect its members' interests, are only relevant insofar as their restriction or control operates to violate the freedom of association itself. On this basis, it is necessary to test every alleged restriction of an association's objects in order to determine whether or not it hinders the right to form or belong to the association. In this respect, it must be emphasised that the right to associate is one which vests in the persons who wish to associate, and not in the association which they have formed or joined. That being so, the rights and functions of the association itself can rarely, if ever, be relevant to a proper analysis of the freedom of association. The position of unregistered unions under the Labour Act, viz., their relatively unprivileged status in terms of what they are legally permitted to do, is obviously relevant to the larger question posed above. However, both of the trade unions *in casu* are duly registered under the Act, albeit in respect of different industries. Therefore, I do not think it necessary or appropriate

for the purposes of this case to delve into the collection rights of unregistered unions as regulated by ss 30 and 53 of the Labour Act. ^g

Turning specifically to ss 52 and 54 of the Labour Act, their combined effect is to require an employer to collect union dues from his employees by way of a check-off scheme and to transfer those dues to the trade union to which they belong and which is registered to represent their interests in the industry in ^h

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^a which they are employed. The employer is statutorily bound and cannot be compelled to do so in favour of a trade union which is not so registered. As I read these provisions, the obligations and restrictions imposed by them do not prevent any employee from joining any trade union of his choice, including one that is not registered for the industry in which he is employed. Nor do they preclude the employee from paying his union dues to that union by any means, ^b other than a check-off scheme instituted and implemented by his employer. Conversely, the union is at total liberty to collect its dues from that employee in any other appropriate manner. Most importantly, there is nothing to hinder the union itself from applying to extend its scope of coverage to include any industry in which its members are employed so as to enable it effectively to ^c represent their interests in that industry.

In the final analysis, ss 52 and 54 of the Labour Act cannot be said to impede or circumscribe the freedom of association of those members or of the trade union as guaranteed by s 21 of the Constitution and by Art 2 of the Convention. The limitations envisaged by the statutory provisions do not bear on the right to form or belong to any trade union. Conversely, a trade ^d union's claim to collect union dues in a manner not sanctioned by statute cannot properly be conceived to form part of the freedom of association. The fact that a particular trade union is not entitled to levy union dues in a given industry through a check-off scheme may operate, in practice, to militate against the desirability of joining or belonging to it. However that may be, the legal right to form or belong to the union remains intact and unimpaired. It is ^e often the case that a right conferred and protected by the law is not exercised because of the practical futility of so doing. But that does not necessarily vitiate the legal nature of that right or amount to an infringement of the right.

CONCLUSIONS

To conclude, I am of the opinion that ss 52 and 54 of the Labour Act do not ^f contravene the freedom of association guaranteed by s 21 of the Constitution and Art 2 of the Convention. Moreover, as already stated, the provisions of the Labour Act cannot be construed to accommodate the principal relief claimed by the applicants *vis-à-vis* the collection of union dues through a check-off scheme from those of ZIBAWU's members who are employed by ^g BBS. However, insofar as concerns the *declaratur* sought by the applicants as to the right of ZIBAWU's members to join any trade union of their choice, this is clearly in conformity with the law and I see no reason not to grant a declaratory order to that effect.

As for costs, the applicants have not been successful in their main claim. ^h However, I consider the issues raised in this application to be matters of

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significant public importance and I am therefore inclined not to award costs ^a against any of the parties herein.

ORDER

In the result:

1. It is declared that the Commercial Sectors Agreement contained in SI 45 of 1993 does not operate to prevent or interfere with the right of the first ^b applicant's members to belong to the first applicant or to any other trade union of their choice.
2. It is ordered that each party shall bear its own costs.

Honey & Blankenberg, applicants' legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/GIFFORD v MUZIRE & ORS 2007 (2) ZLR 131 (H)

GIFFORD v MUZIRE & ORS 2007 (2) ZLR 131 (H)**2007 (2) ZLR p131**

Citation	2007 (2) ZLR 131 (H)
Case No	Judgment No. HH-69-07
Court	High Court, Harare
Judge	Kudya J
Heard	18 September 2007
Judgment	18 September 2007
Counsel	<i>D P Drury</i> , for the applicant <i>O Hodzi</i> , for the first, second and third respondents <i>E Mwatse</i> , for the fourth respondent
Case Type	Chamber application
Annotations	Link to case annotations

Flynote**Practice and procedure** — *application — urgent — application for spoliation c order — generally should be dealt with on urgent basis***Property and real rights** — *spoliation order — requirements for — peaceful and undisturbed possession — possession tainted with illegality — not peaceful and undisturbed possession***Headnote**

- ▯ All that an applicant for a spoliation order has to show is that his matter cannot wait the observance of normal procedures and time frames set by the rules of court for ordinary applications without rendering nugatory the relief that he seeks. The preservation of law and order and the prevention of self help in the resolution of disputes place an application for spoliation in this unique position. To wait for the ordinary time limits and procedures to apply would undermine these salutary aims and encourage the usurpation of the due process by the strong and well connected at the expense of the weak and disadvantaged. In determining whether a matter involving spoliation is urgent, the court will in the exercise of its discretion obviously be guided by the specific averments of fact that are made in the particular case before it.
- ▮ One of the requirements for a spoliation order is that the applicant must show that he was in peaceful and undisturbed possession of the property. Where a farmer who had been dispossessed of his farm under the land reform programme remained in physical control of the farm even

though his continued stay had become illegal, his possession could not be ^g peaceful and undisturbed because it was tainted with illegality.

Cases cited

Dilwin Investments (Pvt) Ltd v Jopa Engineering Co (Pvt) Ltd HH-116-98

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

^H *Karori (Pvt) Ltd & Anor v Mujaji* 2007 (1) ZLR 105 (H)

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Legislation considered ^A

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

Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*], s 3(2)(a)

Case information

D P Drury, for the applicant

O Hodzi, for the first, second and third respondents

E Mwatse, for the fourth respondent ^B

Judgment

KUDYA J: This is an urgent chamber application for a spoliation order that was filed by the applicant on 12 September 2007. It was allocated to me on 13 September 2007 and I set it down for hearing on 18 September 2007. All the respondents filed opposing papers. The applicant did not have an opportunity ^C to file his answering affidavit as the opposing affidavits were filed on 17 September by the fourth respondent and during the hearing by the first to the third respondents (the new farmers).

THE FACTS

While the applicant initially averred in his founding affidavit that he was the ^D owner of Wolfscrag, situate in the district of Chipinge, Mr *Drury* for the applicant conceded in his oral submissions that the farm was acquired by and is now owned by the fourth respondent (hereinafter referred to interchangeably as the Minister or the acquiring authority), since September 2005.

The Minister gave notice of eviction to the applicant on 12 March 2007. The letter was referenced "Authority of Temporary Extension of Stay on Farm to ^E Wind up Business". It drew his attention to the coming into effect of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] on 20 December 2006 and highlighted the provisions of s 3(2)(a) which ordered every former owner or occupier of gazetted land to cease to occupy, hold or use that land forty-five days after the fixed date, unless lawfully authorized to do so. ^F

He was further advised that he should have vacated the farm on 4 February 2007, but following an assessment of his operations by the district technical committee and in line with guidelines drawn by the ministry he was allowed to wind up business and harvest his crops or dispose of his livestock consisting of 108 cattle, 47 sheep and two horses *only* and *strictly* (emphasis mine) by 30 June 2007. The temporary extension was given on five conditions. ^G These were:

- (a) Firstly, that he would not plant new crops in the fields or introduce additional livestock on the farm from the date of service of the notice of eviction; ^H

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Kudya J ^A

- (b) Secondly, no vandalism or removal of infrastructural developments identified by the valuation officers would occur;
- (c) Thirdly, he would allow incoming legally authorized beneficiaries to use open fields and grazing paddocks to start agricultural activities and co-exist with them; ^B

- (d) Fourthly, he would undertake a handover-takeover of the inventoried assets with ministry officials before he vacated the farm at the expiry of the temporary extension; and
- (e) Lastly, he would notify the district/provincial land officer of any conflict that might arise during the currency of the temporary extension authority.

The applicant signed an acknowledgement of receipt on 3 April 2007. It reads c as follows:

"I, V A GIFFORD of WOLFSCRAG farm, acknowledge receipt of authority to stay on the farm for a temporary period to wind up business and harvest crops. I have read and understood the contents of this letter and will fully comply with the same and undertake to vacate the farm on the given date, d failure of which the Acquiring Authority will invoke provisions of section 3 of the Gazetted Land (Consequential Provisions) Act [Chapter 20:28] in respect of my eviction."

On 16 April 2007, he wrote to the Minister seeking that he comply with the guidelines set out by his ministry in a minute of 8 January 2006, which amongst other things extended the cut off date for livestock to 30 September 2007. He e highlighted that he would complete the harvest of his coffee crop in December 2007 and that his timber still had ten years to maturity. He stated his failure to plant maize was due to harassment by lands officials and sought an A2 farmer offer letter.

In the penultimate paragraph of his letter, he abandoned his pretensions at appealing and gave the Minister an ultimatum to reply within seven days f failing which he would deem himself duly permitted to continue with his farming business.

It is not possible for me to determine whether the Minister responded to this letter as it was produced from the bar at the hearing. It was not attached to the applicant's founding affidavit. The Minister did not have the opportunity to g comment on it in his opposing affidavit.

On 22 August 2007, the new farmers, armed with the first respondent's offer letter issued by the Minister on 26 June 2007, moved onto the farm. At first, the applicant averred that they broke a lock to a gate on the farm and that the Minister's official also broke a lock to gain access to the area where farming h equipment and materials were kept. In his oral submissions Mr *Drury*

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Kudya J

abandoned these averments on broken locks and the consequent relief for a their return.

The ministry official then compiled an inventory of the equipment and implements. The applicant averred that this process amounted to acquisition while the Minister averred that it was done for the accountability of the property. The onus is on the applicant in spoliation proceedings to show on b a balance of probabilities that the equipment was seized. In the face of denials by all the respondents, I am not satisfied that he has done so on his papers. I find that the equipment and implements were neither acquired nor seized by any of the respondents.

THE SUBMISSIONS

Mr *Drury* submitted that the applicant had been despoiled both of his c possessory rights of the farm and equipment and materials. He based his legal arguments on the judgment that I delivered in *Karori (Pvt) Ltd & Anor v Mujaji* 2007 (1) ZLR 105 (H). He also contended that, as the respondents had resorted to self help, the matter was urgent.

Mr *Hodzi*, for the new farmers, submitted that the matter was not urgent because the new farmers had not evicted the applicant but were living in harmony with him. He also submitted that, as they had utilized idle land, they had not despoiled the applicant. He contended that they were, after all, between a rock and a hard place, in that they were obliged by the offer letter to take occupation within thirty days or lose the farm, while their moving in was viewed as spoliation. e

Ms *Mwatse*, for the Minister, abandoned her initial preliminary point on the dirty hands principle in the light of my opinion in the *Karori* case *supra*, at p 3 that:

"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 and reward him for his alleged usurpation of the due f process."

She did not oppose the relief sought, subject to the determination of the court on the submissions made by the applicant and the new farmers on spoliation. She submitted that no acquisition process

of the equipment and materials had commenced which complied with the provisions of ss 4, 5 and 6 of the *Acquisition of Farm Equipment and Material Act [Chapter 18:23]*.

RESOLUTION OF THE SUBMISSIONS

Urgency

All that an applicant has to show is that his matter cannot wait the observance ^h of normal procedures and time frames set by the rules of court for ordinary

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Kudya J

^A applications without rendering nugatory the relief that he seeks. See *Document Support Centre (Pvt) Ltd v Mapuvire* 2006 (2) ZLR 240 (H) and *Dilwin Investments (Pvt) Ltd v Jopa Engineering Co (Pvt) Ltd* HH-116-98.

It seems to me that the preservation of law and order and the prevention of self-help in the resolution of disputes place an application for spoliation in this unique position. To wait for the ordinary time limits and procedures to apply ^B would undermine these salutary aims and encourage the usurpation of the due process by the strong and well connected at the expense of the weak and disadvantaged. In determining whether a matter involving spoliation is urgent, the court will in the exercise of its discretion obviously be guided by the specific averments of fact that are made in the particular case before it.

^C I am satisfied that in the present matter the averments made establish the urgent need to determine whether the applicant has been despoiled. To await normal procedures and time limits, would make the relief sought ineffective. It would reward the alleged act of self help. I therefore hold that the matter is urgent.

D The Merits

The two essential elements of spoliation which must be made and proved are that:

- (a) the applicant was in peaceful and undisturbed possession of the property; and ^E
- (b) the respondent deprived him of the possession forcibly or wrongfully against his consent. See ^p 5 of the *Karori* case *supra*.

The facts in the present matter are distinguishable from those in the *Karori* case. Firstly, the acquiring authority was not a party and, secondly, there was a dispute as to whether the farm had been acquired. Letters from various government functionaries involved in the acquisition process did not shed ^F light on this fact. There was no proof that the farm had been acquired. Lastly, there was no acknowledgement of receipt of the notice to vacate. In the present matter, the acquiring authority is a party to the proceedings, it was common cause that the farm was acquired and the applicant signed an acknowledgment of receipt of the authority to stay on the farm. An application of the same law ^G to these different facts may result in a different conclusion. The *Karori* case does not have universal application to all cases of spoliation. The particular facts of each case determine its own outcome.

As regards the farming equipment and implements, I found that the applicant had not discharged the onus on him to show on a balance of probabilities that ^H his physical control and entitlement to these movables had been disturbed.

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Kudya J

But even if it was disturbed, he did not prove that they were taken away from ^A him or that he was denied his rights of access and use. The relief sought of declaring the purported acquisition of farm equipment and material invalid, in para 4 of the draft order, cannot succeed.

As regards occupation of farming land, Mr *Drury* appeared to accept that the new farmers were utilizing idle land. He however contended that even the use ^B of that land amounted to self-help. He emphasized that the applicant did not consent to their presence on the farm, nor was he involved in identifying the idle land. He further contended that the so called "idle land" was pasture for the

applicant's livestock and highlighted the difficulties in identifying idle land. He also dwelt on the failure by the Minister to show that the provisions of the Agricultural Land Settlement Act [Chapter 20:21] had been complied c with. He further submitted that an offer letter, lease agreement or permit did not repose in the new farmer a real or substantial interest to sue for eviction. I find that these last two submissions are not relevant to the question of spoliation.

The only relevant aspect of his submissions was the one that dwelt on the twin d issues of whether the applicant was in peaceful and undisturbed possession and whether he was forcibly or wrongfully deprived of such possession.

In my view, it was common cause that the applicant had physical control of the farm in question before the new farmers occupied it on 22 August 2007. I however hold that, by operation of law, by 4 February 2007, his possession was no longer peaceful and undisturbed. The Gazetted Land (Consequential e Provisions) Act [Chapter 20:28] was the source of the disturbance. Transient relief came for him in the form of the notice of eviction of 12 March 2007, which was served on him on 3 April 2007. The acquiring authority authorized him, as it is wont to do by virtue of s 3(2)(a) of the Gazetted Land (Consequential Provisions) Act [Chapter 20:28], to stay until 30 June 2007. From 30 June to f 22 August 2007, he remained in physical control of the farm even though his continued stay was illegal. In my view, possession that is tainted with illegality cannot be peaceful and undisturbed. The notice of eviction and his response to it of 16 April 2007 underscored the point that he was no longer in a peaceful and tranquil state of mind. I therefore find that he neither had the right of nor the right to possess the farm. The absence of the mental right undermined the g physical act. In my view, by operation of law, he did not have peaceful and undisturbed possession of the farm after 30 June 2007. But even if I am wrong on the application of the mental aspect of possession, and such possession denotes physical control only, it seems to me that the applicant's case would still fail on the basis of the second essential element of spoliation. h

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Kudya J

A It seems to me that the acknowledgement of receipt that he signed on 3 April 2007 was not just an acceptance of service of the notice of eviction, but an express consent to the entry onto the farm of new farmers. It was a consent knowingly and deliberately given in the full knowledge of the five conditions set out in the notice of eviction. Any submission that he believed he was doing no more than merely acknowledging receipt of the notice is disingenuous and b false. Once he had given this consent on 3 April 2007, it was no longer necessary for him to give further consent, as he contended, on 22 August. The earlier consent could not be revoked once given. It was not revoked by the letter of appeal, which ended as an ultimatum, of 16 April 2007.

I am not persuaded that failure to respond to that letter amounted to an c acceptance to be bound by its contents. Hoffmann and Zeffertt, relied on by Mr *Drury* for the proposition that the failure to respond to a letter indicated acquiescence to its contents and demands, in *The South African Law of Evidence* 3 ed, at 157-158 point out that such a conclusion must be the only reasonable inference that can be drawn, which in any event must exclude a failure to reply due to carelessness or disinterest. In *casu*, the letter of 12 March d 2007 clearly closed the door on further appeals or ultimatums by use of the words "only and strictly". Assuming that the Minister did not respond, he may very well have shown back of interest in the contents of that letter which, in essence, sought to renegotiate the conditions of his continued stay on the farm, which had been closed by this letter.

e His alleged failure to respond would not fall foul of the provisions of s 3 of the Administrative Justice Act [Chapter 10:28]. In any event, the remedies availed by s 4 and 6 of that Act were never utilized by the applicant. There is no provision in that Act for the applicant to extend his period of stay on acquired land on the basis that his proposal to that effect has not been responded to.

f It was, after all, outside his powers to choose and approve the new farmers who would settle on the farm. Such a process was entirely in the hands of the acquiring authority.

I therefore find that the prior consent given by the applicant dispensed with the need for a court sanctioned eviction before the new farmers could move g onto the farm. I hold that the applicant was not despoiled of the farm.

COSTS

h I see no reason why costs must not follow the event.

Kudya J

CONCLUSION ^A

Accordingly, the application is dismissed with costs.

Coghlan, Welsh and Guest, applicant's legal practitioners

Chirimuuta & Associates, first, second and third respondents' legal practitioners ^B

Civil Division of the Attorney General's Office, fourth respondent's legal practitioners ^C

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Source:

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MODZONE ENTERPRISES (PVT) LTD & ANOR v TRANSTECH FREIGHT ZIMBABWE (PVT) LTD 2007 (2) ZLR 139 (H)

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Citation	2007 (2) ZLR 139 (H)
Case No	Judgment No. HH-65-07
Court	High Court, Harare
Judge	Patel J
Heard	26 June 2007; 27 June 2007
Judgment	24 September 2007
Counsel	<i>C N Nhemwa</i> , for the plaintiffs <i>R M Fitches</i> , for the respondent
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Carrier — common carrier — who is — not necessary that party's main business be carriage of goods — liability of common carrier — not possible for carrier to contract out of liability for wilful misconduct or gross negligence — liability of carrier for acts of agents to whom actual ^D carriage entrusted

Headnote

The first plaintiff engaged the defendant to carry a load of fabric from Harare to Namibia. It was a term of the agreement that the goods were to be transported as one load in a container and to reach their destination ^E safely and in good and merchantable condition. The first plaintiff loaded

all the fabric into a container. In Johannesburg, the defendant removed the fabric from the container and split the load into two different consignments. The second consignment was mixed with highly flammable goods and was loaded into a vehicle equipped with defective tyres. A tyre burst and caught fire, with the result that the vehicle caught fire. The ^F first plaintiff's consignment was destroyed. As a result, the plaintiff suffered damages, being the invoice value of the fabric that was burnt in transit.

The defendant's defence was that the agreement between the parties was qualified by an express term that the fabric was being transported by the defendant at the first plaintiff's risk. The defendant also challenged its ^G citation as a public carrier. It relied on a clause in its association's standard condition which said that it was not a common or public carrier and that carriage of goods by it was merely incidental to its clearing and forwarding operations. The defendant contracted two different hauliers ^H for the two stages of the journey. It accepted that it was responsible for

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Patel J

the entire haulage from Harare to Namibia and that as the principal it ^A would ordinarily be liable for any negligence or breach of contract committed by the subcontracted hauliers. It said it was necessary, for practical reasons, to split the original consignment into two in Johannesburg. Furthermore, while it is accepted that the second consignment was destroyed in transit, the fire which caused the loss was ^B not caused in any way by the defendant's conduct or omission. ^H

Held, that for a party to be a public carrier, it is not necessary for that party to have as its main business the carriage of goods. When a party carries on the trade or profession of carriage of goods as part of its business, that is enough to make that party a public carrier. The defendant was thus a public carrier and its liability had to be determined by the common law ^C rules governing the rights and obligations of a public carrier, as read with the contractual terms agreed by the parties.

Held, further, that a public carrier is absolutely liable to restore property received by him unless he can prove that the loss or damage was caused by *damnum fatale* or *vis major*. The carrier's liability starts from the moment he takes delivery of the goods and continues until he has ^D discharged his contractual obligation, viz. to deliver the goods to the consignee at the agreed destination. Where the goods are lost or destroyed, the measure of damages payable by the carrier will normally be the market value of the goods at their destination. A carrier who accepts the goods from the consignor and agrees to deliver them at a particular destination is responsible for the goods throughout the whole ^E journey. If the goods are lost or damaged, it is immaterial to the consignor whether the fault lies with the original carrier or with another carrier to whom he has handed them over.

Held, further, that while it is standard practice for carriers to introduce special terms limiting their liability into their contracts, either specifically or by ^F way of standard conditions, such terms will be narrowly construed so as to give only that degree of exemption from liability that is expressly stated. Thus, a contract to carry "at owner's risk" does not absolve the carrier from all liability, but only from liability for slight negligence, leaving him liable for definite or gross negligence. It is not possible for the parties to agree to contract out of liability for gross negligence. The ^G reference in the contract to "wilful act" must be similarly construed to include liability for any wilful default or gross negligence on the part of the defendant.

Held, further, that the identity of the actual hauliers in this case was not disclosed to the plaintiffs when the contract was concluded or during the ^H

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Patel J

^A a course of carriage of the goods in question. That being so, the defendant remained contractually responsible for any act or omission of those hauliers, who were deemed to be the defendant's servants for the purposes of any liability towards the first plaintiff. Even if the hauliers had been disclosed to the plaintiffs, this would not enable the defendant to escape liability for the wilful conduct or gross negligence of its agents. ^B The defendant was thus liable not only for its own wilful acts or gross negligence but also for the wilful misconduct or gross negligence of the hauliers contracted by it to ferry the first plaintiff's cargo.

Held, further, that the burden of establishing a valid defence under a contract of carriage rests upon the carrier himself. There is no onus on the c consignor to prove how the goods were damaged, lost or destroyed. It would place an intolerable burden on him to require of him proof of what he cannot possibly know. All he can do is to establish that he handed over the goods in an undamaged condition and that they were damaged when he received them back.

Held, further, that the division of the consignment into two smaller ones did b not constitute a fundamental breach of contract or in itself cause the destruction of the goods in question. There was simply no causal nexus between the reloading of the goods and their eventual destruction by fire.

Held, further, that the loss *in casu* was occasioned by an unexpected and unavoidable accident, ie. *damnum fatale*, and not by reason of wilful e misconduct or gross negligence. While there were indicators of possible negligence on the part of the second haulier and/or its servants, these were all matters of conjecture and, whether taken in isolation or together, did not evince any wilful misconduct or gross negligence on the part of the defendant or its agents such as to render the defendant liable for the f loss incurred by the first plaintiff.

Cases referred to

AMI Zimbabwe (Pvt) Ltd v Casalee Hldgs (Successors) (Pvt) Ltd 1997 (2) ZLR 77 (S)

Clan Tpt Co (Pvt) Ltd v Mhishi 1991 (2) ZLR 333 (S)

g *Cotton Mktg Bd of Zimbabwe v NRZ* 1988 (1) ZLR 304 (S)

Independence Mining (Pvt) Ltd v Fawcett Security Ops (Pvt) Ltd 1994 (2) ZLR 222 (H)

Mashonaland Rlys Co v Gordon 1921 SR 80

h *Tubbs (Pvt) Ltd v Mwamuka* 1996 (2) ZLR 27 (S)

2007 (2) ZLR p142

Patel J

Case information

C N Nhemwa, for the plaintiffs a

R M Fitches, for the respondent

Judgment

PATEL J: The plaintiffs in this case claim the sums of USD26 528.72 and ZAR43 534.80 as damages for breach of a contract of carriage entered into with the defendant in June 2001. The plaintiffs' claim is founded on the common b law of carriage and, alternatively, on the negligent performance of the contract. The defendant disputes liability on both grounds.

At the commencement of trial, counsel for the plaintiffs conceded that the second plaintiff was only acting as agent for the first plaintiff and therefore had no *locus standi* to sue as such. Accordingly, the matter proceeded on the basis that the second plaintiff was not a proper claimant in this action. c

The Evidence

Evidence for the plaintiffs was given by Edward Mutambanadzo, the managing director of the second plaintiff, and by Courage Mandivenga who was employed by the first plaintiff at the relevant time as its imports and exports officer. The plaintiffs' case is that the defendant is a public carrier and was d engaged by the second plaintiff in June 2001 to transport the first plaintiff's consignment of fabric to its customers in Namibia. It was a term of the agreement that the goods were to be transported as one load in a container and to reach their destination in the early part of July 2001 safely and in good and merchantable condition. The first plaintiff loaded all the fabric into a e container. In Johannesburg, the defendant unlawfully removed the fabric from the container and split the load into two different consignments. The second consignment was mixed with highly flammable goods, i.e. paint and shade netting, and was loaded into a defective vehicle equipped with tyres that were unfit for the intended journey. In the event, the second consignment was destroyed by fire in

Botswana and was never delivered to the destined ^εcustomer. As a result, the plaintiff suffered damages, being the invoice value of the fabric that was burnt in transit.

Glen Davis, who is the regional manager of UTI in Central Africa, testified for the defendant. The defendant admits most of the uncontentious facts outlined above. Its defence is that the agreement between the parties was qualified by ^ϑan express term that the fabric was being transported by the defendant at the first plaintiff's risk. The defendant also challenges its citation as a public carrier. In Johannesburg, it became necessary for practical reasons to split the original consignment into two. Furthermore, while it is accepted that the second consignment was destroyed in transit, the fire which caused the loss was not caused in any way by the defendant's conduct or omission. ^η

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Patel J

A **Privity of Contract between first Plaintiff and Defendant**

In its plea the defendant disputed the *locus standi* of the second plaintiff, as a mere agent, to sue the defendant in this matter. This point was accepted by the plaintiffs at the commencement of trial and, as already indicated above, the matter proceeded with the first plaintiff as the only claimant in this action.

^θAt the close of trial, counsel for the defendant submitted for the first time that even the first plaintiff had no cause of action against the defendant, inasmuch as there was no *vinculum juris* between them constituting the requisite privity of contract entitling the first plaintiff to sue the defendant.

Having regard to the pleadings and the evidence before the court, it is clear that the defendant's objection in this regard cannot be sustained. The ^ϑtestimony of Mutambanadzo shows that the first plaintiff contracted the second plaintiff to engage the defendant to ferry its fabric to Namibia. This was specifically mandated because the second plaintiff did not operate the Namibian route, while the defendant was known to the plaintiffs as the only transporter who plied that route. In effect, the first plaintiff instructed and authorised the second plaintiff to hire the defendant not merely as the second ^δplaintiff's sub-agent or servant but specifically as the first plaintiff's agent to execute the mandate to ferry the first plaintiff's cargo. Therefore, the contract *in casu* was not a sub-contract *stricto sensu* but was intended in reality to be a contract between the first plaintiff and the defendant.

This position is indeed precisely what is reflected in the defendant's plea. In ^εpara 4, the defendant admits: "As the second plaintiff was a mere agent, the contract was between the defendant and first plaintiff. The second plaintiff was not party thereto". This is an unequivocal acceptance of the requisite *vinculum juris* between the first plaintiff and the defendant. The remainder of the defendant's plea affirms that linkage and contains nothing whatsoever to contradict it. This admission was never duly withdrawn and the defendant ^ϑmust be held to be bound by it – quite apart from the evidentiary finding made above.

Whether the Defendant was a Public Carrier

In para 3 of its plea, the defendant "admits that it is in the business of carrying cargo [but] denies that it is a public carrier as alleged". In denying its status ^ϑas a public carrier, the defendant primarily relies on clause 2 of The Shipping and Forwarding Agents Association of Zimbabwe Standard Trading Conditions (the Standard Conditions) which states:

"The Company is not a common or public carrier. Its carriage of goods is merely incidental to its clearing and forwarding operations and it may ^ηrefuse to accept for carriage any goods or class of goods."

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Patel J

According to Mutambanadzo's evidence, the defendant has a number of small ^αtrucks and hires larger trucks through transport brokerage. For this reason and because it plied the Namibian route, the defendant was contracted by the second plaintiff to provide transport for the first plaintiff's shipment to Namibia. The second plaintiff then hired a 40 ft container and delivered it to the defendant. The goods were packed into the container at the first plaintiff's ^θpremises and then loaded on to a truck provided by the defendant. At that stage, the defendant did not indicate

whether it had subcontracted the transportation to another carrier nor did it disclose the identity of any such carrier – either for the trip from Harare to Johannesburg or for the trip from Johannesburg to Namibia.

Dennis testified that the defendant contracted two different hauliers for the c two journeys. However, apart from denying that the defendant was a public carrier, Dennis did not materially dispute the evidence of Mutambanadzo regarding the contract between the parties. He also accepted that the defendant was responsible for the entire haulage from Harare to Namibia and that as the principal it would ordinarily be liable for any negligence or breach of contract committed by the subcontracted hauliers. d

In *Clan Transport Co (Pvt) Ltd v Mhishi* 1991 (2) ZLR 333 (S) at 334, Korsah JA held that:

“The question whether a person is a common carrier or not is one of fact. A man may be a common carrier without so styling himself. Anyone who undertakes to carry the goods of all persons indifferently, for hire, is a e common carrier. It is of no consequence that that carrier restricts his liability for the goods transported; that does not make him any the less a common carrier: *Cotton Marketing Board of Zimbabwe v National Railways of Zimbabwe* 1988 (1) ZLR 304 (S).”

In similar vein, it was observed by Chidyausiku J (as he then was) in *Independence Mining (Pvt) Ltd v Fawcett Security Ops (Pvt) Ltd* 1994 (2) ZLR 222 (H) at 229-230: e

“For a party to be a public carrier, it is not necessary for that party to have as its main business the carriage of goods. When a party carries on the trade or profession of carriage of goods as part of its business, that is sufficient to make that party a public carrier. There is nothing in the authorities to suggest that a party has to have as its sole business the g carriage of goods before it can be regarded as a public carrier.”

On these authorities, and having regard to the evidence before me, I am satisfied that the defendant is a public carrier and that it certainly acted as such in the performance of the contract *in casu*. Accordingly, its liability in the present context is to be determined by the common law rules governing the h

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A rights and obligations of a public carrier – as read with the contractual terms agreed by the parties.

Liability of Public Carrier

According to the Roman praetor’s edict, a public carrier is absolutely liable to restore property received by him unless he can prove that the loss or damage b was caused by *damnum fatale* or *vis major*. In Zimbabwe, there is no legislation laying down standard conditions for the carriage of goods by road and it is accepted that the edict applies to all carriers by land for reward. See *Cotton Marketing Board of Zimbabwe v National Railways of Zimbabwe* 1988 (1) ZLR 304 (S) at 315; and see generally *Christie Business Law in Zimbabwe* (1985) at pp 181-192.

c A public carrier is not liable if he can establish the defence of *damnum fatale* (unexpected and unavoidable accident) or *vis major* (superior force) or the negligence of the consignor or inherent fault or vice in the goods themselves. The carrier’s liability commences from the moment he takes delivery of the goods and continues until he has discharged his contractual obligation, viz. d to deliver the goods to the consignee at the agreed destination. Where the goods are lost or destroyed, the measure of damages payable by the carrier will normally be the market value of the goods at their destination.

According to *Christie op cit* at p 186, the carrier who accepts the goods from the consignor and agrees to deliver them at a particular destination is responsible for the goods throughout the whole journey. If the goods are lost e or damaged, it is immaterial to the consignor that the fault lies with the original carrier or with another carrier to whom he has handed them over. Even if it is established that the fault lies with the subsequent carrier, the consignor is entitled to sue the original carrier on the ground that he contracted to deliver, personally or through the agency of the subsequent carrier, at the stipulated f destination. As there is no privity of contract between the consignor and the subsequent carrier, the original contractor is obliged to compensate the consignor and is then entitled to recover from the subsequent carrier.

It is now standard practice for carriers to introduce special terms limiting their liability into their contracts, either specifically or by way of standard conditions. Special terms limiting the carrier's liability will be narrowly construed so as to ^g give only that degree of exemption from liability that is expressly stated. Thus, a contract to carry "at owner's risk" does not absolve the carrier from all liability but only from liability for slight negligence, leaving him liable for definite or gross negligence. See *Mashonaland Railways Company v Gordon* 1921 SR 80; *Cotton Marketing Board of Zimbabwe v National Railways of Zimbabwe supra*.

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Terms of Agreement between the Parties ^A

In terms of the defendant's quotation of 27 June 2001 and its invoice dated 29 June 2001 the defendant was to ferry the first plaintiff's textiles in a 40 ft container from Harare to Namibia via Johannesburg. The cost of insurance was not included in the contract charges. More significantly, all goods were to be "carried, handled, loaded and off loaded at owner's risk" and the contract ^b was subject to the defendant's Standard Conditions. For present purposes, the salient exclusionary provisions of the Standard Conditions are as follows:

Clause 16: "The Company shall not be liable for loss of or damage to goods unless such loss or damage occurs whilst the goods are in the actual custody of the Company and under its actual control and unless such loss or damage is due to the wilful act of the Company or its own ^c servants."

Clause 17: "The Company shall be entitled, in the absence of express instructions to the contrary, to employ independent third parties to perform all or any of the functions required of the Company. Where such parties are disclosed to its customer, the Company shall have no responsibility or liability to its customer for any act or omission of such ^d third party ... If the third party is not disclosed to its customer, then such third party shall, for the purpose of the Company's responsibility to its customer, be deemed to be a servant of the Company."

In the instant case, the combined effect of the relevant exclusionary provisions is this. Firstly, as per the authorities referred to above, the "owner's risk" clause operates to exonerate the defendant only in respect of negligence and ^e not for its gross negligence. Moreover, as was held in *AMI Zimbabwe (Pvt) Ltd v Casalee Holdings (Successors) (Pvt) Ltd* 1997 (2) ZLR 77 (S) at 85, it is not possible for the parties to an agreement to contract out of liability for gross negligence. In this context, the reference to "wilful act" must be similarly construed to include liability for any wilful default or gross negligence on the part of the defendant. ^f

Secondly, it is common cause that the identity of the actual hauliers in this case was not disclosed to the plaintiffs when the contract was concluded or during the course of carriage of the goods in question. That being so, the defendant remains contractually responsible for any act or omission of those hauliers, who are "deemed" to be the defendant's servants for the purposes of any ^g liability towards the first plaintiff. In any event, even if the hauliers had been disclosed to the plaintiffs, this would not enable the defendant to escape liability for the wilful conduct or gross negligence of its agents. See *Tubbs (Pvt) Ltd v Mwamuka* 1996 (2) ZLR 27 (S) at 32, where Gubbay CJ held:

"A party cannot exempt himself from liability for the wilful misconduct or ^h

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a criminal or dishonest activity, of himself, his servants or agents; or perhaps, even from the loss of or damage to the *merx* resulting from gross negligence on his or their part."

To conclude on this aspect, the exclusionary clauses *in casu* do not exonerate the defendant from all liability in respect of the contract of carriage between the parties. The defendant remains liable not only for its own wilful acts or ^b gross negligence but also for the wilful misconduct or gross negligence of the hauliers contracted by it to ferry the first plaintiff's cargo.

Validity of Exclusion Clauses

Having regard to the view that I have taken of the exclusionary clauses in this case and their narrow construction limiting the scope of their application to ^c the facts herein, I deem it

unnecessary for present purposes to determine their validity or enforceability under the Consumer Contracts Act [*Chapter 8:03*].

Burden of Proof

Ordinarily, the burden of establishing a valid defence under a contract of carriage rests upon the carrier himself. Seemingly to the contrary, it was stated in the *Tubbs* case, *supra*, at 32:

"Where the existence of an 'owner's risk' clause excluding liability for negligence is not in dispute, the burden of establishing any other possible ground of liability, such as gross negligence or *dolus*, rests upon the claimant. See *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N) at 643B; *Stocks & Stocks (Pty) Ltd v T J Daly & Son (Pty) Ltd* 1979 (3) SA 754 (A) at 760E-F." ^Ε

It seems reasonably clear, however, that this *dictum* was made in the context of contracts generally and does not extend to the special situation of public carriers. As was stated by Korsah JA in *Mhishi's* case, *supra*, at 336-337:

"A salutary effect of the strict liability for damages to, or loss of, the goods ^Γ which the Edict imposes on common carriers is that it places the onus on the carrier to prove that: 'the loss was due to *vis major* or to *damnum fatale*, to inherent vice in the goods or to the negligence of the owner of the goods.' See *Pohoomull Brothers v Rhodesia Railways* 1921 SR 88.

There is no onus on the consignor of goods who brings an action for damages against the carrier to prove how the goods were damaged, lost ^Γ or destroyed. After all, he would not be present during the course of the journey and it would be placing an intolerable burden on him to require of him proof of what he cannot possibly know. All he can do is to establish that he handed over the goods in an undamaged condition and that they were damaged when he received them back.

Η ... As the definition of 'owner's risk' specifically exempts the appellant

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from certain types of negligence, effect must be given to that exemption ^Α or exclusionary clause, but only after ascertaining its meaning, like any other clause in a contract, having regard to the nature and purpose of the contract, and the context within which the words were used.

To begin with, to the extent that the exclusionary clause attempts to shift the onus of proving negligence onto the consignee, it is bad in law. The rules of evidence are based on considerations of fairness and experience. ^Β It is the court that determines the party upon whom the burden of proof lies. The parties cannot by their contract deprive the court of this responsibility. They may contract out of liability for negligence, but not out of the rules of evidence by which negligence may be established.

The burden of proof, in the sense of the risk of non-persuasion, may be taken from the pleader desiring action and placed upon the opponent. ^Γ Common sense and experience have dictated that the burden of proving a fact is on the party who is presumed to be possessed of the peculiar means of knowledge enabling him to prove its falsity, if it is false. In the instant case, the damage to the materials occurred when they were in the possession of the appellant. The respondent was not present when such damage was occasioned. The appellant, and the appellant alone, is the ^Δ party who presumably has peculiar means of knowledge enabling it to prove whether the damage occurred as a direct consequence of the wilful misconduct or gross negligence of its servant, agents or sub-contractors."

Breach of Contract and/or Gross Negligence

Turning to the facts *in casu*, the first plaintiff's cargo was conveyed intact in ^Ε the 40 ft container from Harare to Johannesburg where it was split into two separate consignments at the instance of the second haulier, Transworld Roadfreight (Pty) Ltd. The seal placed on the original container was presumably removed in Johannesburg. The second consignment was mixed with other goods and placed in a fibre glass container. It was then damaged en route to Namibia. According to the report furnished by the second haulier: ^Γ

"While driving along the driver heard a tyre burst so he pulled over. He saw that the tyres on the passenger side of the middle axle were burning. The inner tyre had come off the rim and moved on to the axle housing under the trailer. He tried to drive slowly but the axle started coming out of the housing which prohibited him from driving any further. He and another driver which (*sic*) had stopped to assist tried in vain to extinguish the fire. ^Δ The main problem was the tyre burning on the axle did not allow them to get close enough to one under the trailer.

The tyre eventually set the glass fibre box alight. By this time the police from Kalkfontein had arrived on the scene and also attempted to extinguish the fire to no avail. They then off hooked the front runner and

took that H

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A a safe distance from the burning trailer to ensure that that and the truck tractor did not burn as well. There was paint as well as shade netting in the load and once these took it was impossible to stop the fire. ... The entire 12m box of freight burnt out as per attached photographs."

As regards breach of contract, it is submitted for the plaintiffs that the removal of the seal from the original container and the transshipment of the goods into B two smaller containers constituted a fundamental breach of contract resulting in the loss sustained by the first plaintiff. I am unable to agree. The purpose of placing a seal on the original container was to ensure that the consignment in question was identifiable throughout its journey and upon arrival at its eventual destination. The mere removal of the seal was not, in my view, a fundamental breach of contract, nor did it result in the destruction of the C second consignment. By the same token, it cannot be said that the placement of this consignment into a smaller container constituted a fundamental breach of contract or in itself caused the destruction of the goods in question. There is simply no causal nexus between the removal of the seal or the reloading of the goods on the one hand and their eventual destruction by fire on the other.

Turning to the question of negligence, has the defendant discharged the onus D upon it to show that the first plaintiff's goods were destroyed in circumstances which did not amount to wilful misconduct or gross negligence either on its part or on the part of its agents? It is common cause that the goods were destroyed by a fire which resulted from a burst tyre on the conveying vehicle. Having regard to the totality of the evidence before the court, it seems to me that the loss *in casu* was occasioned by an unexpected and unavoidable E accident, viz. *damnum fatale*, and not by reason of wilful misconduct or gross negligence. It is arguable that the burst tyre might have been defective or that the goods with which the plaintiff's goods were mixed might have been flammable or that the driver of the truck might not have done enough to extinguish the fire. These are indicators of possible *negligence* on the part of the second haulier and/or its servants. However, they are all matters of conjecture and, whether taken in isolation or together, they do not evince any wilful misconduct or *gross negligence* on the part of the defendant or its agents such as to render the defendant liable for the loss incurred by the first plaintiff.

Accordingly, the plaintiffs' claim cannot succeed and must fail, both on the G main ground of breach of contract and on the alternative ground of negligence.

Costs

It is submitted for the defendant that the plaintiffs' cause of action was misconceived from the outset and that they should therefore be subjected to H an order for costs on the higher scale. I see absolutely no warrant for such an

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order in this case. The plaintiffs' claim was not entirely devoid of merit, A particularly on the relevant questions of law which were not unarguable or without some measure of complexity. In the result, the plaintiffs' claim is dismissed with costs on the ordinary scale.

Nhemwa & Associates, plaintiffs' legal practitioners B

Gill, Godlonton & Gerrans, defendant's legal practitioners C

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Source:

MDC v MINISTER OF JUSTICE & ORS 2007 (2) ZLR 151 (S)**2007 (2) ZLR p151**

Citation	2007 (2) ZLR 151 (S)
Case No	Judgment No. S-48-07
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA, Malaba, JA, Gwaunza JA & Garwe, JA
Heard	26 September 2007
Judgment	26 September 2007
Counsel	<i>H Zhou</i> , for the applicant <i>N Mutsonziwa</i> , for the first respondent and the intervener (the Attorney-General) <i>G Chirumbirike</i> , for the second respondent
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

c **Constitutional law** – *Constitution of Zimbabwe 1980 — Declaration of Rights — s 24 — application under — limited to alleged breaches of rights set out in Declaration of Rights — averment that provisions of legislation were in conflict with other provisions of the Constitution — cannot alone form basis for application under s 24 — need to show that applicant's rights have been violated — correct procedure to obtain relief*

Headnote

The applicant brought an application, seeking relief under s 24 of the Constitution. It averred that certain sections of the Zimbabwe Electoral Commission Act [*Chapter 2:12*] were in conflict with s 61 of the Constitution, which establishes the Commission. With respect to the *ε* sections of the Act dealing with voter education, the applicant averred that these also breached s 61 of the Constitution, alternatively, that they breached s 20 of the Constitution, which protects freedom of expression.

Held, that s 61 of the Constitution does not fall within the Declaration of Rights and consequently the applicant could not allege that its *φ* fundamental rights, as guaranteed by the Declaration of Rights, had been violated. As the application in respect of an alleged breach of s 61 of the Constitution, which is not part of the Declaration of Rights, it could not form the basis of an application in terms of s 24(1) of the Constitution. Section 24(1) was never intended to apply to a violation of the Constitution other than a violation of the Declaration of Rights. This did not mean that *g* other violations of the Constitution have no redress. They do have: they can be redressed via the High Court and by the Supreme Court on appeal.

Held, further, that the Supreme Court is essentially an appeal court without original jurisdiction, but s 24(1) of the Constitution confers original jurisdiction on the court in respect of specific cases that fall within the *h* four corners of s 24(1) of the Constitution. If the applicant had stated its

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cause of action as a violation of s 18 of the Constitution, in that its right *a* to protection of the law guaranteed by s 18 had been, or was likely to be, violated by the application to it of a law that

was invalid by reason of its being *ultra vires* the Constitution, that might have brought the application within the ambit of s 24.

Held, further, that for a litigant to establish *locus standi* in terms of s 24(1), ^b he must aver that a violation of the Declaration of Rights has occurred or is likely to occur in respect of himself. The only exception provided for in s 24 is in respect of a person in custody on whose behalf an application can be made by another person. In respect of the averment that ss 15(1)(d) and 15(2) of the Act violated s 20 of the Constitution, there was no averment that the applicant's right to freedom of expression had ^c been violated. The averment that other people's rights protected under s 20 had been violated was insufficient to found an application in terms of s 24(1).

Cases cited

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

Catholic Commission for Justice and Peace in Zimbabwe v A-G & Ors 1993 (1) ZLR 242 (S)

Law Society of Zimbabwe v Min of Justice & Anor 2006 (2) ZLR 19 (S)

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

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

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

Legislation considered

Constitution of Zimbabwe 1980 ss 18, 24(1) ^f

Case information

H Zhou, for the applicant

N Mutsonziwa, for the first respondent and the intervener (the Attorney-General)

G Chirumbirike, for the second respondent

Judgment

CHIDYAUSIKU CJ: This is an application made in terms of s 24(1) of the ^g Constitution of Zimbabwe ("the Constitution").

The first and second respondents raise two points *in limine*. At the commencement of the hearing of this matter, the court advised counsel that it intended to determine the points *in limine* before determining the merits of ^h

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^a the application. Thereafter, both counsel made submissions on the points *in limine*. At the conclusion of submissions, the court upheld the first point *in limine* and dismissed the application. It was indicated then that the reasons for judgment would follow. The following are the reasons for judgment.

The first respondent sets out the first point *in limine* in para 4.6 of his opposing ^b affidavit, which reads as follows:

"4.6 I do not believe that the applicant has a grievance which falls to be redressed in terms of section 24(1) of the Constitution of Zimbabwe. To the extent that I can understand the complaints of the applicant I do not think that such fall within the ambit of section 24(1) of the Constitution. This is a classic case of the applicant abusing this procedure. The section ^c 24(1) procedure is open only in instances where there is a contravention of any of the provisions of the Declaration of Rights (Chapter 3 of the Constitution). Nowhere in the founding affidavit is there any allegation of a violation of the Declaration of Rights by any of the respondents. The purported allegation of a contravention of section 20 of the Constitution has no basis and is put forward in bad faith."

^d The second respondent also raised the same point, namely, that the application does not fall within the ambit of s 24(1) of the Constitution, and the further point that the citing of the second respondent was a misjoinder.

Thus, the two points *in limine* that emerge on the papers were (1) whether this application falls within the ambit of s 24(1) of the Constitution; and (2) whether or not the second respondent was properly cited.

It is now settled law that in a court application the founding affidavit in support of the application sets out the applicant's cause of action. The applicant's case stands or falls on the founding affidavit. Consequently it can never be over-emphasised that care must be taken by legal practitioners representing applicants when drafting the founding affidavit. The founding affidavit must succinctly set out the cause of action. The cause of action should be clearly stated so that the respondent is left in no doubt as to what case he has to meet and the relief sought. The relief is usually contained in the draft order which forms part of the application. It is equally important that the opposing affidavit be sufficiently clear so that it informs the applicant and the court of the defence the respondent is raising. In those circumstances where the cause of action is based on a statutory provision, be it the Constitution or an Act of Parliament, it is a must that the legal practitioner reads carefully and understands the requirements of the particular statutory provision.

This application perhaps represents what has become very common among legal practitioners, namely taking a statement from the client and rehashing that statement, as in the founding affidavit, without giving careful thought to

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what it is in that statement that constitutes the cause of action or what a procedure is required to be complied with by the relevant statutory provision.

A perusal of the application reveals that the applicant was ill-advised on which forum or court to bring its application. Alternatively, the cause of action was poorly drafted and no attempt was made to bring it within the ambit of s 24 of the Constitution, in terms of which the application is purported to have been made. ^B

The applicant, in para 6 of the founding affidavit, avers that the application was made in terms of s 24(1) of the Constitution. Section 24(1) of the Constitution provides as follows:

"24 Enforcement of protective provisions

(1) If any person alleges that *the Declaration of Rights has been, is being or is likely to be contravened in relation to him* (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress." (the emphasis is mine)

The applicant then proceeds to set out the cause of action in paras 7-10 of the ^D founding affidavit. Paras 7-10 of the founding affidavit read as follows:

- "7. The applicant has participated in Presidential, Parliamentary and local authorities elections in this country since it was formed about eight years ago. During the Presidential election in 2002 I represented the applicant as its candidate. The applicant therefore has a vested ^E interest in this application as it is going to field me as its Presidential candidate in the event that the applicant decides to participate in the Presidential elections to be held in 2008. The applicant will also participate in the Parliamentary and Senatorial elections in the event that these are held in 2008 as has been reported in the Government-controlled media. It is therefore important that all legal instruments ^F which regulate the elections comply with the provisions and spirit of the Constitution of Zimbabwe for there to be free and fair elections.
8. In 2004 the Legislature enacted the Zimbabwe Electoral Commission Act [*Chapter 2:12*] (Act Number 22 of 2004). That Act came into operation on 7 January 2005. Among other things, the Act establishes the Zimbabwe Electoral Commission and defines the functions of that ^G Commission.
9. It is my contention that certain sections of the Zimbabwe Electoral Commission Act (hereinafter referred to as the Act) are inconsistent with the provisions of the Constitution of Zimbabwe, and are therefore null and void. The following are the sections in issue: ^H

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Chidyausiku CJ ^A

- 9.1 Section 3(1)(a) of the Act contravenes section 61(1)(a) of the Constitution, in that the Act limits the appointment of the Chairman of the Commission to 'a person qualified to be appointed as a Judge of the High Court or the Supreme Court'. The Constitution in the section

cited above provides that the Chairman of the Commission 'shall be a Judge of the High Court or the B Supreme Court or a person qualified to be appointed as a Judge of the High Court or (the) Supreme Court'. Given that the Chairman is appointed by the President who, under the current set up, is the President and Secretary of the ruling ZANU (PF) party, the section as (it) appears in the Act leaves room for the President to appoint a party activist from his political party c merely because that person might be qualified to be appointed as a Judge having regard to his educational qualifications and experience after being admitted as a legal practitioner.

- 9.2 Section 3(1)(b) of the Act contravenes section 61(1)(b) of the Constitution in that the Constitution provides that in addition to the Chairman, there shall be *six* other members of the Commission, ^d at least *three* of whom shall be women, appointed from a list of *nine* nominees submitted by the Committee on Standing Rules and Orders. The Act gives a total of *four* other members of the Commission (in addition to the Chairman), at least *two* of whom shall be women. The Act also reduces the number of nominees to be submitted by the Committee on Standing Rules and Orders to *seven*. ^e
- 9.3 Section 61(8) of the Constitution stipulates exhaustively what shall or may be provided for in an Act of Parliament. Among the functions of the Zimbabwe Electoral Commission provided in section 61(4) of the Constitution is 'to conduct voter education'. That is provided for in section 61(4)(f) of the Constitution. The ^f same function is repeated in section 4(f) of the Act. However, the Act in section 15 deals with voter education by persons other than the Commission or political parties. Section 15 of the Act, in my submission, is invalid as its provisions are not included in section 61(8) of the Constitution, and do not fall within any of the matters which shall or may be provided for in the Act. Accordingly, section 15 must be declared to be null and void for contravening ^g the provisions of section 61(8) of the Constitution of Zimbabwe.
- 9.4. Alternatively, section(s) 15(1)(d) and 15(2) of the Act are null and void for contravening section 20 of the Constitution, which protects freedom of expression. One of the Commission's functions is to conduct voter education. Any organisation ^h involved in voter education is in essence performing the same

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function as the Commission. The requirement that the other ^a persons or organisation involved in voter education must furnish the Commission with a programme for approval by the same Commission both ^b offends against principles of natural justice and hinders enjoyment of freedom of expression. The Commission must have its own programmes. The Constitution does not allow it to approve voter education programmes of other persons or ^b organisations.

- 9.5 Section 15(3) of the Act contravenes section 61(8) of the Constitution, as the Constitution does not provide for criminal or penal provisions to be included in the Act. Accordingly, section 15(3) of the Act is null and void.
- 9.6 Section 16 of the Act makes the Commission the sole and ^c exclusive recipient of all foreign contributions or donations for the purpose of voter education. That provision is not provided for in section 61(8) of the Constitution and is accordingly null and void."

Thereafter the application sets out the relief sought in the draft order, which reads as follows: ^d

"IT IS ORDERED THAT

1. A rule *nisi* will issue calling upon the respondents to show cause before this court at 09.30 hours on the ... day of ... 2007, why:
 - (a) Section 3(1)(a) of the Zimbabwe Electoral Commission Act [*Chapter 2:12*] should not be declared to be inconsistent with section 61(1)(a) ^e of the Constitution of Zimbabwe.
 - (b) Section 3(1)(b) of the Zimbabwe Electoral Commission Act [*Chapter 2:12*] should not be declared to be inconsistent with section 61(1)(b) of the Constitution of Zimbabwe.
 - (c) Section 15 of the Zimbabwe Electoral Commission Act [*Chapter 2:12*] should not be declared to be *ultra vires* section 61(8) of the ^f Constitution of Zimbabwe.
 - (d) Section(s) 15(1)(d) and 15(2) of the Zimbabwe Electoral Commission Act [*Chapter 2:12*] should not be declared to be inconsistent with section 20 of the Constitution of Zimbabwe.
 - (e) Section 16 of the Zimbabwe Electoral Commission Act [*Chapter g 2:12*] should not be declared to be *ultra vires* section 61(8) of the Constitution of Zimbabwe.
2. The costs of the application are to stand over for determination on the return day." ^h

Chidyausiku CJ

A The first respondent contends in both the opposing affidavit and in his heads of argument that the Declaration of Rights provisions of the Constitution are found in Chapter III, namely ss 11-23, and that s 24 provides a remedy for the breach of these rights. He argued that s 61 of the Constitution, a violation of which forms the basis of the application, does not fall within the Declaration of Rights and consequently the applicant could not allege that its fundamental B rights, as guaranteed by the Declaration of Rights, have been violated. He argued further that, as the application was for a breach of s 61 of the Constitution which is not part of the Declaration of Rights, it could not form the basis of an application in terms of s 24(1) of the Constitution. On this basis the respondents contend the application was improperly before this court.

In my view, the respondents' submissions are simply unanswerable. The clear C intention of the Legislature in enacting s 24(1) of the Constitution was to provide a speedy procedure for the violation of the Declaration of Rights. Section 24(1) was never intended to apply to a violation of the Constitution other than the Declaration of Rights. Lest I be misunderstood, I am not suggesting that other violations of the Constitution have no redress. They D do have. They can be redressed via the High Court and by this court through the process of appeal. It is a question of procedure. It is not every violation of the Constitution that can found an application in terms of s 24(1).

This court is essentially an appeal court without original jurisdiction. Section 24(1) of the Constitution confers original jurisdiction on this court in respect of specific cases that fall within the four corners of s 24(1) of the Constitution. E In my view, if the applicant had stated its cause of action as a violation of s 18 of the Constitution in that its right to protection of the law guaranteed by s 18 had been, or is likely to be, violated by the application to it of a law that was invalid by reason of its being *ultra vires* the Constitution, then that might have brought this application within the four corners of s 24 of the Constitution. Section 18 of the Constitution is part of the Declaration of Rights and its E violation entitles an applicant to resort to a s 24(1) application. An applicant who simply avers, as this applicant has done, that sections of the electoral law are *ultra vires* the Constitution and prays for a *declaratur* to that effect, should launch such an application in the High Court which enjoys original jurisdiction.

G This point is not new. This court has time and again determined that for a litigant to establish *locus standi* in terms of s 24(1) of the Constitution, it is necessary for the litigant to aver that a violation of the Declaration of Rights has occurred or is likely to occur in respect of himself/herself/itself. The only exception provided for in s 24 is in respect of a person in custody on whose H behalf an application can be made by another person.

2007 (2) ZLR p158

Chidyausiku CJ

This proposition finds support in the following cases: A

In *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Ors* 1993 (1) ZLR 242 (S) Gubbay CJ, dealing specifically with the issue of *locus standi* at 250F-251A makes the following observation:

"THE RELEVANT CONSTITUTIONAL PROVISIONS

Section 24(1) of the Constitution, which is the provision pursuant to B which the application was brought, vests in the Supreme Court the power to deal with constitutional issues as a court of first instance. It enjoins the Supreme Court to examine challenged legislation, or a particular practice or action authorised by a State organ, in order to determine *whether or not it infringes one of the entrenched fundamental rights and freedoms of the individual*. The Supreme court is empowered to measure the effect C of the enactment or action against the particular guarantee it is claimed it offends. *Clearly it has jurisdiction in every type of situation which involves an alleged breach or threatened breach of one of the provisions of the Declaration of Rights* and, particularly, where there is no other judicial procedure available by which the breach can be prevented. Compare *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S)." (the D emphasis is mine)

It is quite clear from the remarks of the learned Chief Justice that an application can be made in terms of s 24(1) of the Constitution only where it is alleged that there has been or is likely to be a breach of the Declaration of Rights and *not* any other provision of the Constitution.

This case was followed in *In re Wood & Anor* 1994 (2) ZLR 155 (S) at 159F-160A ^Ε where Gubbay CJ stated the following:

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

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

2007 (2) ZLR p159

Chidyausiku CJ

^Α Again, the point is made clear that a litigant who brings an application in terms of s 24(1) of the Constitution must allege that a violation of the Declaration of Rights, as set out in ss 11-23 of the Constitution, has occurred or is likely to occur. No such averment has been made in this application.

Again, in *Retrofit v PTC & Anor* 1995 (2) ZLR 199 (S) at 207G-208A the court re-emphasized the same point where Gubbay CJ, who delivered the judgment ^Β of the court, had this to say:

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

In the case of *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S), this court held that a political party had no *locus standi in judicio* to challenge the provisions of the Electoral Act which it alleged contravened the right to freedom of expression of voters, such right being protected by s 20 of the ^Ε Constitution. In dismissing the application Gubbay CJ said at 258 B-E:

"Thus, s 24(1) affords the applicant *locus standi in judicio* to seek redress for a contravention of the Declaration of Rights only in relation to itself (the exception being where a person is detained). It has no right to do so either on behalf of the general public or anyone else. The applicant must be able to show a likelihood of *itself* being affected by the law impugned ^Γ before it can invoke a constitutional right to invalidate that law. See *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation & Anor* 1995 (2) ZLR 199 (S) at 207H-208A; 1995 (9) BCLR 1262 (ZS) at 1269 E-G; 1996 (1) SA 847 (ZS) at 854 D-F.

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

2007 (2) ZLR p160

Chidyausiku CJ

The *United Parties* case re-emphasised the point that it is critical for an ^Α application in terms of s 24(1) of the Constitution to allege that the Declaration of Rights has been violated in respect of the applicant. There is no such averment in the present application.

Following this line of cases, I made the following observation in the case of *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe & Ors* 2003 (2) ZLR 236 (S) at 243B-G: ^Β

"This court is essentially an appeal court. It enjoys no original jurisdiction except in constitutional matters in terms of s 24 of the Constitution. Thus the jurisdiction and the *locus standi* of litigants seeking to

approach this court in terms of s 24 have to be found within the four corners of s 24 of the Constitution. This restriction does not affect a litigant that wishes to c institute a constitutional application in the High Court. The provisions of s 24 do not, in any way, circumscribe the *locus standi* of an applicant in the High Court. In the High Court the common law test, namely having an interest in the matter under adjudication, is sufficient to establish *locus standi* (*Van Winsen, Cilliers and Loots* stated in *Herbstein & Van Winsen The Civil Practice of the Supreme Court of South Africa* 4 ed at 364; *▯ Zimbabwe Teachers' Association & Ors v Minister of Education* 1990 (2) ZLR 48 at 51B *et seq*). In a constitutional application in the High Court all that a litigant is required to show to establish *locus standi* is a substantial interest in a matter.

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

A constitutional application commenced in the High Court can always find its way to the Supreme Court on appeal. In short, the basis of a litigant's *locus standi* in the High Court is much wider than it is in this court sitting as a constitutional court. In my view, it would be doing violence to the language of s 24 of the Constitution to ascribe to it the meaning that *g* it is sufficient to allege an interest in the matter in order to establish *locus standi*."

Again the same point is made that for an application to fall within the ambit of s 24(1) of the Constitution there has to be an allegation of a violation of the Declaration of Rights in relation to the applicant. *▯*

2007 (2) ZLR p161

Chidyausiku CJ

A In the matter of *Law Society of Zimbabwe v Min of Justice & Anor* 2006 (2) ZLR 19 (S), I made the same point in the following remarks at p 30G-31B:

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

Locus standi to bring a constitutional application to the Supreme Court in the first instance must be found within the four corners of s 24 of the Constitution. It is not sufficient to simply establish that the applicant has an interest in the matter. The applicant has to go further and establish that the Declaration of Rights has been or is likely to be contravened in respect *c* to itself.

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

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

Thus, the submission of the respondents that an application in terms of s 24(1) of the Constitution is limited to violations of the Declaration of Rights, protected in terms of ss 11-23 of the Constitution, is supported by a long line *ε* of cases of this court.

In the present case the allegation is that there has been a violation of s 61 of the Constitution, which does not form part of the Declaration of Rights. Redress for the violation of s 61 of the Constitution cannot be obtained using the s 24(1) of the Constitution procedure.

▯ There is a suggestion in para 9.4 of the founding affidavit that ss 15(1)(d) and 15(2) of the Electoral Act violate s 20 of the Constitution. However, there is no averment that the applicant's right to freedom of expression has been violated. That paragraph simply avers that other people's rights protected under s 20 have been violated. This averment is insufficient to found an application in terms of s 24(1). See the *United Parties* case *supra*. There is no *g* averment in the founding affidavit that the applicant's right to receive information has been violated. In the heads of argument the suggestion is made that the right to receive information is interfered with. There is no factual basis in the founding affidavit to found such a submission.

Finally, it is quite clear from the line of cases cited above that the applicant is *▯* in the wrong forum. It should have brought its application in the High Court

Chidyausiku CJ

if it wished to have the provisions of the Electoral Act set aside on the basis ^A that they are *ultra vires* s 61 of the Constitution. Alternatively, the drafting of its cause of action should have been done in the manner suggested above in order to bring it within the ambit of s 24 of the Constitution.

Having found in favour of the respondents in respect of the first point *in limine*, there was no need to determine the second point *in limine* and it ^B accordingly fell away.

In the result, we dismissed the application with no order as to costs for the reasons set out above.

CHEDA JA, MALABA JA, GWAUNZA JA & GARWE JA concurred. ^C

Gutu & Chikowero, applicant's legal practitioners

Civil Division of the Attorney-General's Office, first respondent's and intervener's legal practitioners

Chikumbirike & Associates, second respondent's legal practitioners ^D

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Source:

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NHUNDU v CHIOTA & ANOR 2007 (2) ZLR 163 (S)

2007 (2) ZLR p163

Citation	2007 (2) ZLR 163 (S)
Case No	Judgment No. S-28-07
Court	Supreme Court, Harare
Judge	Cheda JA, Ziyambi JA & Malaba JA
Heard	5 March 2007
Judgment	1 October 2007
Counsel	<i>T E Mudambanuki</i> , for the appellant <i>N Madya</i> , for the respondent No appearance for the second respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

^C **Contract** — evidence — *parol evidence rule* — written contract — when *parol evidence* may be led — contract conditional upon the happening of an event which has not yet occurred — extrinsic evidence thereof not precluded — *parol evidence* led with the object of incorporating condition precedent into agreement so as to enforce condition not ^D admissible

Evidence — *parol evidence* — when permissible to lead such evidence — *integration rule* — recorded terms of an integrated contract — rule prevents a party from altering the terms thereof in order to rely on the contract as altered

Headnote

When a contract has been reduced to writing, the document is, in general, regarded as the exclusive memorial of the transaction and, in a suit between the parties, no evidence to prove its terms may be given, save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied ^F by parol evidence. The parol evidence or integration rule does not, however, preclude extrinsic evidence that the contract is conditional upon the happening of an event which has not yet occurred. However, if the object of leading such extrinsic evidence is not to prove the alleged oral condition precedent but to incorporate it into the agreement and then to enforce the condition by relying on the failure of the other party to ^G comply therewith then the extrinsic evidence would be inadmissible.

In the law of evidence, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered (*dicta per* Corbett ^H JA in *Johnston v Leal* 1980 (3) SA 927 (A) at 943 followed).

2007 (2) ZLR p164

Ziyambi JA

Cases cited ^A

Johnston v Leal 1980 (3) SA 927 (A)

Philmatt (Pty) Ltd v Masselbank Development CC 1996 (2) SA 15 (A)

Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd 1941 AD 43

Case information

T E Mudambanuki, for the appellant ^B

N Madya, for the respondent

No appearance for the second respondent

Judgment

ZIYAMBI JA: At the end of the hearing, we dismissed this appeal with costs. The following are our reasons for so doing.

The first respondent, to whom I shall refer as “the respondent”, and the ^C appellant concluded an agreement of sale in respect of property known as 139 Rietfontein, Rietfontein Township, Harare (“the property”). Clause 2 of the agreement provided that the purchase price for the property was Z\$28 billion and Clause 11 provided that:

“The parties acknowledge that this document constitutes the entire ^D agreement between them and that no other terms, conditions, stipulations, warranties or representations whatsoever have been made by them or their agents other than those set out in this agreement and the parties agree that no variation of this agreement shall be binding on them unless first reduced to writing and signed by both parties.”

The agreement was signed by the parties on 25 January 2006 at the offices of ^E the Central African Building Society (“CABS”). Immediately, upon signature by the parties, CABS gave instructions to its attorneys to attend to the registration of a bond which was to facilitate the registration of transfer and payment of the purchase price to the appellant.

On 30 January 2006, the appellant wrote a letter to CABS advising that she had ^F cancelled the agreement of sale. The letter reads in relevant part:

“I write to inform you that I have cancelled sale of my house (known as stand No 139 Rietfontein Township) to Mr Phineas Chivazve Chiota. I have informed him in writing. Cancelled is agreement of sale dated 25 January 2006. Thus done at your Platinum Office. Attached is a copy of my letter to him.” ^G

A similar letter was written to the respondent. It read:

“I hereby write to inform you that I have cancelled our agreement of sale of my house dated 25 January 2006. I have sent a copy of this letter to CABS. Also attached is a copy of a letter which I wrote to CABS.” ^H

Ziyambi JA

A The respondent was of the view that there was no basis for the cancellation since he had committed no breach of the agreement nor had any breach been cited in the letter. He therefore refused to accept the cancellation and sought redress in the High Court by way of an interim interdict restraining the appellant from disposing of the property to a third party. He obtained a provisional order granting the interim interdict sought and requiring the B appellant to show cause why a final order compelling the transfer should not be issued in his favour.

The appellant opposed the confirmation of the provisional order. In her opposing affidavit, she claimed that the respondent had breached a condition precedent to the agreement, namely, that the respondent, who was then C Deputy Minister of Industry and International Trade, orally agreed to make available to her two licences: one for the buying and selling of sugar; and the other for buying and selling of petroleum. For this reason, so she averred, the purchase price was pegged at the low price of 28 billion dollars as she would be able to trade with those licences and obtain, from so doing, such profits as would offset the low price at which the house was being sold. The D agreement of sale, she stated, was reluctantly signed at CABS because the respondent had not, at the time of signature thereof, honoured the verbal agreement by issuing the two licences to her. She did not give a date by which the alleged oral agreement was to be performed.

At the hearing for confirmation of the provisional order, the issues for E determination by the trial court were whether the appellant had established that there was an oral agreement amounting to a condition precedent governing the written agreement signed by the parties and, if so, whether the respondent was in breach of that agreement; and whether the cancellation by the appellant was valid. The learned judge decided the issues in favour of the respondent and granted the final order against which the appellant now appeals to this F court.

The appellant submitted in this court that the written contract is not a true representation of what the parties agreed and, therefore, evidence ought to be admitted to establish the "real and genuine agreement", which is, that the sale was subject to the oral condition precedent.

G It was contended on behalf of the respondent that the entire agreement between the parties is contained in the written contract and that the parol evidence rule prohibits the leading of extrinsic evidence to prove the existence of the alleged oral condition precedent.

The parol evidence rule was stated by Watermeyer JA in *Union Government H v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 (AD) 43 at p 47, where he said:

2007 (2) ZLR p166

Ziyambi JA

"Now this court has accepted the rule that when a contract has been A reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence."

See also *The Law of Contract in South Africa* 3 ed by R H Christie at p 212. B

However, the learned Judge of Appeal went on to say further at the same page:

"Whatever may be the correct view as to the precise nature of the rules, it is clear that they do not prevent a party from setting up the case that the contract is not a presently enforceable contract inasmuch as it is conditional upon the happening of some event which has not occurred." C

Thus the parol evidence rule does not preclude extrinsic evidence that the contract is conditional upon the happening of an event which has not occurred. However, if the object of leading such extrinsic evidence is not only to prove the alleged oral condition precedent but to incorporate it into the agreement of sale and then to enforce the said condition by relying on the respondent's failure to comply therewith then the extrinsic evidence would D be inadmissible. See *Philmatt (Pty) Ltd v Masselbank Development CC* 1996 (2) SA 15 (A) at p 23. See also *Johnston v Leal* 1980 (3) SA 927 (A) at 943 where Corbett JA (as he then was) remarked:

"Dealing first with the integration rule, it is clear to me that the aim and effect of this rule is to prevent E a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract. The object of the party seeking to adduce such extrinsic evidence is usually to

enforce the contract as redefined or, at any rate, to rely upon the contractual force of the additional or varied terms, as established by the extrinsic evidence ...” F

And later on the same page:

“To sum up, therefore, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered.”

The appellant herein seeks, firstly, to prove that, contrary to the provisions of clause 11 *supra*, there was a condition precedent governing the contract G and, secondly, to enforce that condition so proved. In so doing, the appellant was seeking to redefine the terms of the contract. The parole evidence rule precludes her from leading extrinsic evidence with that objective. See *Philmatt (Pty) Ltd v Masselbank Development supra*. H

2007 (2) ZLR p167

Ziyambi JA

A In any event, even assuming for an instant that the court had been persuaded to allow parole evidence of the oral condition precedent, the evidence on record does not support the existence of such an oral agreement as the learned judge correctly found.

It was common cause at the hearing that the appellant’s friend and confidante, Biata Nyamupinga (“Biata”), was actively involved in the negotiations B preceding the conclusion and signature of the agreement.

Biata averred in her supporting affidavit that no such condition precedent was ever discussed during the negotiations or at any time before the signature of the agreement by the parties. She relates the events following the offer of 28 billion dollars by the first respondent for the property as follows:

C “The applicant [the respondent] and [the appellant] shook hands and hugged each other after signing the agreement. All the dealings between the applicant [the respondent] and [the appellant] involved me as I was in essence the link between the two. At no stage during the negotiations for the sale of this property was there any discussion of the licenses that [the appellant] has referred to. This is the first time that I have heard of D these licences. Such an issue never formed the basis of the agreement. The [appellant] was selling because of mounting debts. She owed me and several other people in town huge sums of money. The purchase price would have enabled her to pay off all debts and then acquire a smaller property.”

Further, the respondent averred, and this was not contradicted, that neither E of the two licences allegedly offered by him to the appellant fell within the mandate of his Ministry. In any event, since the alleged condition precedent had not been fulfilled, there is no reason given in the papers as to why the appellant signed the agreement of sale and why, when she later cancelled the agreement, no reason was given for such cancellation.

F In view of the above, we were satisfied that the judgment of the court *a quo* was unassailable and that the appeal was accordingly devoid of merit.

CHEDA JA & MALABA JA concurred.

G *Mudambanuki & Associates*, appellant’s legal practitioners

H *Wintertons*, first respondent’s legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/LOTHIAN v VALENTINE 2007 (2) ZLR 168 (H)

LOTHIAN v VALENTINE 2007 (2) ZLR 168 (H)

2007 (2) ZLR p168

Citation	2007 (2) ZLR 168 (H)
Case No	Judgment No. HH-91-07
Court	High Court, Harare
Judge	Gowora J
Heard	6 March 2006; 7 March 2006; 8 March 2006; 9 March 2006; 10 March 2006; 31 May 2006; 10 May 2006; 11 May 2006; 12 May 2006; 13 July 2006; 25 January 2007; 29 January 2007; 8 February 2007
Judgment	3 October 2007
Counsel	<i>R Harvey</i> , for the plaintiff <i>Mrs J B Wood</i> , for the defendant
Case Type	Civil trial
Annotations	Link to case annotations

Flynote

Family law — *child* — *guardianship* — *child born out of wedlock* — *right c of mother to guardianship* — *when may be deprived of custody* — *position and rights of natural father* — *child's wishes* — *irrelevance of* — *need for reform of law*

Headnote

When the plaintiff, who at the time of the trial was 24 years of age, was 16 her ^D mother handed over into the care of the defendant, who was then 40 years of age. She fell pregnant by the defendant and gave birth to a son soon after she turned 18. Due to differences which developed between them the parties separated when their son was just over two years old. The plaintiff left him in the defendant's custody. He remained living with his ^E father for about four years. Then, in October 2005, the plaintiff lodged an urgent application for the interim custody of their son. A provisional order was issued in terms of which the plaintiff was given immediate custody of their son. The defendant opposed the confirmation of the provisional order. The parties filed numerous affidavits from third ^F parties. As there were many disputes of fact, the parties gave *viva voce* evidence. The result was a long drawn out, acrimonious trial to determine who was entitled to the custody of their son. The police and Department of Social Welfare were dragged into the dispute and reports were produced from a clinical psychologist and a medical doctor.

Held, that the cardinal common law principle is that the mother of a child born ^G out of wedlock is its legal guardian from birth until some special order is made by a court. The father to such child cannot claim custody as of right, even if he pays maintenance for the minor child, but he may, in the same manner as any other third party, claim custody of such child. The court, in the exercise of its discretion, may award him access or custody of such ^H minor child if he has made application and if the court is satisfied that it

2007 (2) ZLR p169

Gowora J

^A is in the best interests of the minor child to do so. It would be incumbent upon the father of such child to show the court that the mother should be deprived of custody, but the court will not intervene until and unless there is some very strong ground compelling it to do so. The child's preference does not affect the issue either. It is only the rights of the mother that are considered, unless the father can show that the mother ^B has not been exercising such rights properly. Even if it is in his best interests for him to live with his father, before the court can

determine that, it has to be satisfied that the mother is not exercising “her rights” over the child before it can interfere with those rights.

Held, further, that the inherent rights that a mother has in respect of children c born out of wedlock were developed as principles a long time ago. The incidence of couples setting up home and having issue out of these informal unions was frowned upon. The children were ostracized by society in view of the manner of their birth. Times have moved on since then and society no longer frowns on such unions. It therefore defies logic that society has moved on but the justice system in this country d appears to be still stuck in a time warp. Society has recognized that children have rights which must be given effect to. That is why, when the court considers applications for custody or access, the welfare of the minor child is the overriding concern. The law should therefore recognize that, in as much as the court considers that it is giving weight to the best interests of the minor child, in effect it is recognizing what rights the child e has, that is, the right to be placed in an environment that is best for the child. That child should also be accorded the right to have access to, or to refuse access to, a parent. It is now the court that is depriving these children of their right to relate to both parents on the legal footing of illegitimacy, itself recognized as an archaic and derogatory appellation.

Cases cited f

A v C [1985] FLR 445 (CA)

B v P 1991 (4) SA 113 (T)

B v S 1995 (3) SA 571 (T)

Calitz v Calitz 1939 AD 56

g *Cruth v Manuel* 1999 (1) ZLR 7 (S)

Douglas v Meyers 1991 (1) ZLR 1 (H)

F v B 1988 (3) SA 948 (D)

Hardy v Skaramangas 2000 (1) ZLR 196 (H)

Masama v Nyoni S-154-96

h *Mudzimirwa v Kamanga* S-52-89

2007 (2) ZLR p170

Gowora J

T v M 1997 (1) SA 54 (A) a

W v W 1981 ZLR 243 (A)

Case information

R Harvey, for the plaintiff

Mrs J B Wood, for the defendant

Judgment

GOWORA J: On 3 October 2005, the plaintiff lodged with the Registrar of this b court an urgent application for interim custody of her son Brandon. On 4 October 2005, a certificate of service was filed by the legal practitioners of the plaintiff confirming that service had been effected at the respondent’s residence. I enrolled the matter for 6 October 2005. At the appointed time, there was no appearance by the defendant and I therefore issued a provisional order c in terms of which the applicant was given immediate custody of the child. When the order was served on him, the defendant then filed an affidavit opposing the granting of the order. The matter was placed before me again, this time for confirmation or discharge of the Provisional Order. The attitude of the defendant was that service had not been effected at his residence and thus he had not defaulted on the initial date of hearing. I was requested to set d aside the order I had given. I declined, firstly, because the child had at that stage, been in the mother’s custody for a period in excess of a month. Secondly, no proper application for the rescission of that judgment was mounted and I could not set aside the order on the basis of the papers placed before me.

Equally, I was not able to determine the matter on the papers as both of the ^E parties filed numerous affidavits from acquaintances, friends and family which raised issues that had disputes of facts. Those disputes could not be resolved on the papers and I therefore directed that the parties give *viva voce* evidence on the dispute between the parties. The result was a long drawn out bitterly fought and acrimonious trial. There were accusations and counter accusations. ^F The police and the Department of Social Welfare were also dragged into the dispute as accusations of abuse, assault and kidnapping were made by the parties at various stages of the trial.

With the evidence concluded, I requested counsel to prepare and file, for the assistance of the court, reasoned submissions backed up by authorities. Both ^G parties were given deadlines and, despite this, Mr *Harvey* did not file his. Several reminders and letters of complaint were addressed to him by the defendant's legal practitioners to no avail. I have now been furnished with the submissions for the defendant. I therefore am preparing this judgment without any submissions from the plaintiff. I turn now to the dispute before me. ^H

Gowora J

A BACKGROUND TO THE DISPUTE

The plaintiff is aged 24. She left school at 17 and has no qualifications to speak of. Her background appears to have been unstable. She was born in South Africa where she, her brother and her parents lived. The family migrated to Zimbabwe in the early 1990s. The plaintiff and her brother were enrolled at Lomagundi College, but they had to leave school when the farm at which the father was working was acquired. The plaintiff was unable to continue at school but her brother was offered accommodation by a relative and remained at school. As a consequence, the education of the plaintiff was interrupted and she has no educational certificate. She did some bookkeeping course, but it was not established in evidence as to the level that she attained in such course. What is obvious, however, is that she has no skills to enable her to obtain permanent employment. Her employment record, or lack thereof, speaks for itself. Her parents are divorced. The defendant is either a friend or a former business partner of her father, the nature of the relationship depending on which of them is describing it. In any event, the defendant was an associate of her parents. At some point, when she was either 15 or just turned 16, the plaintiff commenced a relationship with the defendant. When she was 16 her mother handed her over into the defendant's care, and as a consequence, she moved in with him.

At the age of 17, the plaintiff fell pregnant. They commenced to live as man and wife. The child, who is the cause of the dispute, was then born after the plaintiff turned 18. What emerges from her evidence and that of the defendant is that she was, at the time, completely dependent on him. In fact, it is not in dispute that the defendant preferred her to stay at home. Whilst the plaintiff contends that she was a good mother but had to stop breastfeeding on the advice of the doctor because her milk was not good for the child, the defendant is of the view that she was not and that she refused to breastfeed her son. She denies the contention by the defendant that she never used to stay in to look after the baby. They continued living with each other but due to differences the plaintiff left after Brandon turned two. The plaintiff returned to the nest but only for a brief period. Brandon was left with the defendant, in whose custody he remained until he was placed in the custody of the plaintiff on 6 October 2005. The plaintiff is seeking confirmation of the interim order of custody. She stated that she had been young when she had her child, but that she is more mature now and can be responsible. The defendant opposes such confirmation. He has not himself counter-applied for an order of custody.

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EVIDENCE PLACED BEFORE THE COURT ^A

The two parties adduced *viva voce* evidence. In addition, the court had the benefit of evidence from a clinical psychologist and a social welfare officer. Subsequent to the order that I granted giving custody of the minor child to the plaintiff, at the instance of the defendant various allegations were made against the plaintiff.

[The learned judge analysed the evidence given by the plaintiff and the ^B defendant, as well as reports from the police, a social welfare officer, a clinical psychologist and a medical doctor, concerning allegations made by the defendant that the plaintiff had abused their son, both physically and mentally. She also had the child brought to her chambers, after which he was referred to a doctor to ascertain the nature of the injuries she saw. She found ^C that the allegations of abuse were substantiated. The judge continued:

THE LEGAL POSITION

The cardinal common law principle, according to our law, is that the mother of a child born out of wedlock is its legal guardian from birth until some special order is made by court. The father of such child cannot claim custody as of ^D right but may, in the same manner, that any other third party can, claim custody of such child. This court, in the exercise of its discretion, may award him access or custody of such minor child if he has made application and if the court is satisfied that it is in the best interests of the minor child to do so. What constitutes the best interests of the minor child has been the subject of a ^E number of judgments in this jurisdiction. The test to be used to determine what would in the best interests of the minor child was laid down by Goldin AJA (as he then was) in *W v W* 1981 ZLR 243 (A) at 247H where he stated:

"A court will only deprive a natural parent of custody and award it to a third party upon special ground. Such special grounds include detrimental and undesirable effects upon the physical, moral and psychological or ^F educational welfare of a child. The test is still not whether a third party can provide materially or possess more desirable attributes, but whether the parent or parents should be deprived of custody for any reason involving harm or danger to the child's welfare as mentioned above."

With regard to the rights and interests of children born out of wedlock and their parents, the leading case in our jurisdiction is that of *Douglas v Meyers* ^G 1991 (1) ZLR 1 (H), which was a judgment by Muchecheitere J (as he then was). The learned judge had to consider an application by the father of a child born out of wedlock to have access to his son. The learned judge, after reviewing a number of authorities on the subject, concluded that there was no inherent right of access or custody for a father of a minor child who had ^H

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A been born out of wedlock, but that such father had a right, as had other third parties, to claim, and would be granted, those rights if the court considers that to do so would be in the best interests of the minor. In view of its impact on the law relating to the rights of parents in that type of relationship, it is only appropriate that I quote the paragraph in which the learned judge made his pronouncement. It appears at pp 6-7 of the judgment and was phrased as ^B follows:

"From the above, my conclusion is that there is no inherent right of access or custody for a father of a minor illegitimate child, but the father, in the same way as other third parties, has a right to claim and will be granted these if he can satisfy the court that it is in the best interests of the child. The onus is on the applicant, in this case the father, to satisfy the court ^C on the matter and usually the court will not intervene unless there is some very strong ground compelling it to do so. The standard usually applied by the court is that used before interfering with the rights of a father of a legitimate child, although in a case like the present one the fact that the applicant is paying maintenance for the child will also, in my view, be taken into account. See *Calitz v Calitz* 1939 AD 56 at 64 where Tindall JA ^D said:

"Where, however (as in the present one) it is not exercising such a power, the court in Scotland cannot deprive the father of custody except upon special grounds. In *Nicholson v Nicholson* (6 SC LR 692) – a case where the court ordered an infant to be returned to the father – the common law was thus stated: 'The legal right to the custody of a lawful child is in the ^E father. But that right is not absolute, it is not beyond the control of the law. It is within the power of the court to mitigate the severity of the general rule by

interfering in exceptional cases. The exceptions must be few and must rest on clear grounds and the grounds must be found in consideration of danger to the life, health or morals of the child. When the interests of the child in regard to life, health or morals have required ^F it, the court has refused to permit the father to retain custody. This has been done in Scotland in the exercise of the nobile officium of this court'. I presume that power corresponds with the powers of the Supreme Court in South Africa as upper guardian of minors' (my emphasis).

In view of the above, the applicant in this case can therefore, only succeed if he satisfies this court that it is in the best interests of the child that the ^G court interferes with the custodial rights of the respondent and grant reasonable access to him."

It would be incumbent upon the respondent, therefore, in the capacity of the father to such minor child, to show to the court that the mother should be deprived of custody, but the court will not intervene until and unless there is ^H some very strong ground compelling it to do so.

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In this jurisdiction, the case has been followed in the following decisions: ^A *Masama v Nyoni* S-154-97 and; *Mudzimirwa v Kamanga* S-52-89. The question came up for determination again before our courts in the matter of *Cruth v Manuel* 1999 (1) ZLR 7 (S), which was an appeal to the Supreme Court, by the father of a child born out of wedlock, against a refusal by the High Court to grant him access to that child. Mucheche J rendered a judgment in which Ebrahim JA concurred, with Sandura JA dissenting. The learned ^B Judge of Appeal stated at p 14A-D as follows:

"... in my view, in cases of this nature it is of paramount importance to keep in mind the point of law which I consider has been approved and accepted in all the cases cited above, that is, *Douglas v Meyers supra*; *B v P supra*; *T v M supra* and *B v S supra*. It is to the effect that : ^C

'... there is no inherent right to access or custody for a father of a minor illegitimate child but the father, in the same way as other third parties, has a right to claim and be granted these if he can satisfy the court that it is in the best interests of the child.' ... *Douglas v Meyers supra* at p 914E

I have always understood the above to mean that the father of a child born out of wedlock has no rights at all in the child and that conversely all these ^D rights are vested in the mother. The law does not therefore recognize the father of a child born out of wedlock as a parent to it but gives full recognition to the mother. In the circumstances, the rights of the mother to the child are the same as the rights of legitimate parents to their children. It is in this context that the case of *Calitz v Calitz supra* was cited in *Douglas v Meyers supra*. It was to emphasize that the rights of the mother ^E to the child are the same as those of a legitimate father or mother to their child. It appears, therefore, that this point was not appreciated by Howie JA in *B v S supra*."

In his dissenting judgment, Sandura JA considered that the papers revealed serious disputes of fact which necessitated the hearing of *viva voce* evidence. He therefore set aside the order granted by the court *a quo* and remitted the ^F matter for oral evidence. However, the learned judge felt himself compelled to disagree with the dicta in *Douglas v Meyers supra*. In so doing, he followed the long line of South African cases decided after *Douglas v Meyers supra*.

The decision in *Douglas v Meyer supra* was followed in *F v B* 1988 (3) SA 948 (D). In that matter Kriek J considered that it would not be in the best interests ^G of the minor child for the father to be granted access. Subsequent to that, the courts in South Africa have refused to follow the decision. In *B v P* 1991 (4) SA 113 (T), the parties had, in 1979, had a child out of wedlock whilst living together. The mother was a divorcee whilst the father was married. In 1984, they stopped co-habiting and the appellant, who had by then divorced, ^H remarried. The respondent regularly permitted the appellant to have access

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^A to the child at his home until 1989, when the child turned nine. She then refused to allow the child to speak to the appellant. An application to the High Court having been unsuccessful, he then filed an appeal. Making reference to *Calitz v Calitz* 1939 AD 56, Kirk-Cohen J observed that the court in that case had to consider an application to deprive the father of a legitimate child of custody to such child where no divorce or order of separation had been granted, and ^B that the court in that case had rightly held that it had no jurisdiction, in the circumstances prevailing, to deprive the father of his child, except in exceptional cases, where there was a danger to life, health or morals. At pp 115I-116A, the learned judge made the following further observations:

"There is no justification in introducing or applying that test, relating as c it does to particular circumstances, to the issue of access to an illegitimate child. It would be untenable to suggest that the court, as upper guardian, will assist a legitimate child, whose parents are in the process of becoming divorced or are divorced, on the basis of what is in the best interests of that child, but an illegitimate child only if there is danger to life, health or morals."

o This decision was followed and approved in *B v S* 1995 (3) SA 571 (A) and *T v M* 1997 (1) SA 54 (A). In *B v S supra*, Howie JA questioned the appropriateness of the reference to whether or not a parent had rights when it came to the issue of custody or access being considered by a court. On this issue, he quoted the *dicta* from *A v C* [1985] FLR 445 (CA) by Ormond LJ, to the following effect:

ε "[The judge *a quo*] took the point at an early stage in the judgment, when he came to deal with the law, that it was a mistake to talk, in relation to access in terms of rights, and he was undoubtedly, in my judgment, correct in what he said. The word 'rights' is a highly confusing word, which leads to a great deal of trouble if it is used loosely, particularly when it is used in a court of law. So far as access to a child is concerned, there are no rights f in the sense in which lawyers understand the word. It is a matter to be decided always entirely on the footing of the best interests of the child, either by agreement between the parties or by the court if there is no agreement ... The first and paramount consideration [is] the welfare of the child, bearing in mind, of course, the wishes and feelings and so on of the respective parents and other people concerned with the child, but always g bearing in mind that the decision must rest in terms of the best interests of the child, having taken all these other factors into account."

Judging by the *dicta* in those cases, the South African courts considered that the court in *Douglas v Meyer's supra*, when considering the application for access to a child by the father of a child born out of wedlock, had erroneously h derived the perceived need for very strong compelling grounds from *Calitz*

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v *Calitz supra*. Thus, the courts in South Africa viewed the welfare and best a interests of the minor child as the overriding factor for consideration, irrespective of the manner of birth of the child. The fact that the child might have been born out of wedlock would not be of import, as long as the court was satisfied that the access or custody being sought by the father would be in the best interests of the child. The common trend in those judgments was b that, in so far as it related to custody, the position of a father to an illegitimate child was no different to that of a father whose child was born in wedlock. The overriding consideration, in so far as Sandura JA in *Cruth v Manuel supra* was concerned, was whether or not it was in the best interests of the minor for access or custody to be awarded to the father. In *T v M supra*, Scott JA summed up the legal position in that jurisdiction as follows: c

"While at common law the father of a child born out of wedlock, unlike the father of a legitimate child, has no right of access, the difference between the respective positions of the two is not one of real substance in practice since in our modern law, whether or not access to a minor is granted to its non-custodian father is dependent, not upon the legitimacy or illegitimacy of the child, but in each case wholly upon the child's welfare, d which is the central and consistent consideration. Accordingly, and to the extent that one may choose to speak in terms of inherent right or entitlement, it is the right or entitlement of the child to have access or to be spared access, that determines whether contact with the non-custodian parent will be granted. Furthermore, when the question of access is judicially determined for the first time, there is no onus in the sense of an e evidentiary burden or so-called risk of non-persuasion on either party. This is because the litigation really involves a judicial investigation in which the court can call evidence *mero motu* and is not adversarial."

Mr Wood in her written submissions, submitted that in South Africa there is now an Act of Parliament, the Natural Fathers of Children Born out of Wedlock Act 1997, which enables a court to grant such a father rights of guardianship, f custody or access if it would be in the best interests of the child to do so. I have not been given a copy of the Act and cannot confirm that it provides accordingly. However, whatever the legal position may be in South Africa, in our law, in terms of the common law, the inherent right of custody and guardianship of such minor child vests in the mother. It is settled in our law that a father to a child born out of wedlock has no automatic right to claim g access or custody to the minor child. This is so even if he pays maintenance for the minor child. In *Hardy v Skaramangas* 2000 (1) ZLR 196 (H) this court, sitting as an appeal court against a decision from the magistrates court, reaffirmed the legal position as stated in *Cruth v Manuel supra*. Omerjee J at p 198E-F put the position as follows: h

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A "The law with regard to the question of minor children born out of wedlock was dealt with in *Masama v Nyoni* S-154-96 in particular at p 2 of the cyclostyled judgment where Ebrahim JA stated as follows:

'It is true that under our law the natural father has no automatic right to the custody of his illegitimate child. See s Guardianship of Minors Act [Chapter 5:08]. The interests of the child will always be the paramount consideration in any case relating to the custody of a child, regardless of whether customary law or any other law is applied. In the case of *Mudzimirwa v Kamanga* S-52-89, Manyarara JA outlined the approach to be followed thus:

"It follows that it is the common law principles which must now be applied to custody disputes. The starting point therefore, is cardinal common law principle that the mother of an illegitimate child is its legal guardian from its birth until some special order of court is made. See *Spiro's Law of Parent and Child* 4 ed p 454.'"

DISPOSITION

I come now to the crux of the dispute: what do I do with the child? In so far as the order for guardianship is concerned, the law is clear that the plaintiff is the natural guardian of the child. She needs no confirmation of that situation. The defendant has not, in my view, disputed that. All that concerns me, therefore, is the issue of custody, and whether or not I should return the child to the father. It is important, therefore, that the starting point in the determination of this inquiry be clarified. In *Cruth v Manuel supra*, Muchechechere JA at E stated thus:

"The rights of legitimate parents and therefore those of the mother of a child born out of wedlock cannot be interfered with ordinarily. Third parties, and the father of a child born out of wedlock is placed in the same category, can only interfere with those rights when they are not being exercised properly. In my view, it should first be appreciated here that it is the rights F of the parents and the mother which the third parties would seek to interfere with. And one cannot interfere with another's rights if the other person is exercising them properly. The trigger that warrants any interference must, therefore, be an allegation that the rights are not being exercised properly, and that it is therefore, in the interests of the child that those rights be interfered with. The welfare of the child in cases of this G nature only becomes an issue when there is an allegation that the exercise by the mother of her rights causes some concern."

The undisputed fact is that the defendant has had custody of the child from when the child was about two years and some months. There is no disputing that the child and the father have a bond, unlike the child's relationship with H the mother. It is also obvious that, if the parties had not quarrelled over the

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child's birthday party, the plaintiff might never have brought these proceedings A in order to obtain custody of the child. She did bring the matter to court and it now becomes necessary to decide what to do with the child as a result of the action instituted by his mother.

It seems to me that the defendant, in seeking to defend these proceedings and ask the court to refuse to confirm the provisional order, had a misapprehension B of our law. The plaintiff is accorded inherent rights which are vested in her by virtue of being the mother and natural guardian of Brandon, who was born out of wedlock. She came to court to assert those rights, and to that end have the child removed from the father's custody into hers. Her position is that he has no rights under our law to have custody of Brandon, this notwithstanding the illegal agreement they had entered into. The first 'agreement' was to the C following effect:

"I [plaintiff] have agreed that [defendant] will have full custody and be Brandon's legal guardian.

In return (defendant) will give me two hundred thousand dollars and a motor vehicle in good working order and will make sure it doesn't break D down within six months and will repair it at his own cost.

This document is not to be shown to family members."

This "agreement" was concluded on 23 July 2002 and was signed by both the plaintiff and the defendant. On 12 October 2002, yet another agreement was concluded, this later one being typed. Again, it concerned the same issue, custody of Brandon being surrendered to the defendant by the plaintiff, with E the added provision that the defendant would make an application to adopt Brandon. As events have indicated, he never did.

There is no disputing the fact that, under our law, these agreements were invalid and of no force and effect. I note that, properly, in my view, the defendant's legal practitioners did not seek to have the court accord him rights ^F as agreed between them in terms of those contracts, as those contracts were contrary to *bonos mores* and against public policy. You cannot exchange a child for money or a vehicle. I will assume, in favour of both of them, that neither of them knew that what they did was reprehensible.

From the manner in which they dealt with the question of Brandon, it was never an issue between the plaintiff and the defendant that, as the father to the minor ^G child, the defendant could exercise, in respect of Brandon, not just access but custody as well. The question of whether or not he could act as guardian did not enter their minds. Thus, in the eyes of all, including Brandon, the defendant was a father who cared for the child and did all that a child expected his father, to do. In interviews with the social welfare officer and the clinical psychologist, ^H

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A Brandon expressed the wish to live with his father as opposed to his mother. From my assessment of the evidence, this is in all probability due to the fact that he has a bond with his father, which is missing in his relationship with his mother. In addition, it is apparent that whilst his mother believes in punishment, his father does not. Whatever the reason for such a preference on his part, the reality is that unless the criteria set in *Douglas v Meyers supra* and *Cruth v B Manuel supra* are satisfied, this court will not be in a position to grant Brandon's expressed wishes. In terms of our law currently, the child has no right to indicate any preference as to who he wants to live with. It is only the rights of the mother that must be considered, unless the father can show that the mother has not been exercising such rights properly. Even if it is in Brandon's best interests for him to live with his father, before the court can c determine that, it has to be satisfied that the mother is not exercising "her rights" over the child before it can interfere with those rights.

In Zimbabwe, a couple can choose to marry according to civil rites or in terms of custom, if they are of African descent. When one chooses to marry according to custom, the parties to such marriage can choose to have their D union solemnized or not. According to custom, the children born of an unregistered union are legitimate, and in fact, in accordance with the provisions of s 68(1) of the Administration of Estates Act, such children are issues of a union and they are beneficiaries not only to the estate of their mother but also of that of their father.

There is thus a conflict, in that in terms of common law the parties would be E living as man and wife. Such children would therefore, be born out of wedlock. Increasingly, couples are setting up home and living together in unions that have not been formalized. From such unions are born children who have been brought up in a family unit with a father and a mother. The children have, therefore, become accustomed to having both parents, and to relate to them F equally. When they separate, and the mother enforces her inherent rights in accordance with the common law, all of a sudden the children are bastardized. It seems, therefore, that there is confusion in the law which recognizes the legitimacy of children born of unions contracted in accordance with customary law, when the father to the same children passes away. When he is alive, the mother can safely claim that they had never been married, even where an G unregistered customary union might have existed, and therefore the children are illegitimate. Thus the mother is the natural guardian and custodian of those children.

The inherent rights that a mother has in respect of children born out of wedlock H were developed as principles a long time ago. The incidence of couples setting

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up home and having issue out of these informal unions was frowned upon. A The children were ostracized by society in view of the manner of their birth. Times have moved on since then and society no longer frowns on such unions. It therefore, defies logic, that society has moved on but the justice system in this country appears to be still stuck in a time warp. Society has variously recognized that children have rights which must be given effect to. B That is why, when this court considers applications for custody or access, the welfare of the minor child is the overriding concern. The law should therefore recognize that, in as much as the court considers that it is giving weight to the best interests of the minor child, in effect it is recognizing what rights the child has, that is, the right to be placed in an environment that is best for the child. Such child should also be accorded the right to have access to, or to refuse C access to, a parent. It is now the court that is depriving these children of their right to relate to both parents on the legal footing of illegitimacy, itself recognized as an archaic and derogatory appellation. This, our law has not found necessary to do presently and yet, as stated by Scott JA in *T v M supra*, the difference between the two positions as relates to a legitimate child and one born out wedlock, is not a matter of real substance. The consideration D in both positions is that of the welfare of the child.

Having started by stating the rights of the plaintiff, it becomes necessary then to decide whether those rights should be interfered with. Indeed, the defendant is of the view that she should be deprived of custody and that it should be given to him. It cannot be said that there are no allegations before me of the E improper exercise of her rights by the plaintiff. There are plenty, both on the documents filed and on the evidence presented to the court. Muchecheitere JA did not, in *Cruth v Manuel supra* determine what he meant by the improper exercise by the plaintiff of her

rights as the mother of a child born out of wedlock. That discussion was dwelt on in *Douglas v Meyers supra*. One must accept that the onus set in *Douglas v Meyers* is indeed high. ^F The judgment seems to require that the applicant must convince the court that, before a court intervenes and accords right of custody to another party, there must be threat to the life, morality or health of the minor child. When one peruses the later judgment of *Cruth v Manuel, supra*, one does not get the impression of such a high standard of onus placed on the applicant. In my view, I believe that the main consideration is that of the interests of the minor ^G child.

In the present case, a lot of effort has been expended to convince the court that it is not in the best interests of the minor child to remain with the mother. The nature of the evidence relating to alleged abuse does not make me conclude that she was indeed abusing her child. The beating on the buttocks ^H

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A might have resulted in the child having bruises, but one cannot conclusively say that she was physically abusing the child. With regard to the assault on Brandon, she was taken to court but it appears that the prosecution did not proceed. I am unaware of the reasons for the decision made. What is clear, however, is that in November 2006, when Brandon was interviewed by the social welfare officer, what he complained of against his mother was that she ^B had burnt him with an iron when he was young and that she had thrown him against the wall, from which event he is said to bear a scar. These were events told to him by his father. He did not complain about any other physical assault perpetrated by his mother which he himself could recall. Even though he told the psychologist about the constant beatings from his mother, when interviewed by the social welfare officer, he did not repeat this. He said she ^C had burnt him with an iron and thrown him against the wall when he was a baby. I was not enlightened as to when the ring worms started and cannot therefore conclude that they were as a result of neglect on her part. The drawings that the child made to the psychologist did suggest that the child was being exposed to pornography. From the time that the child was placed in the ^D plaintiff's custody, he was in contact with his father. He therefore had contact with both parents and, given the unwarranted allegations of abuse that I have already referred to, I am unable to conclude that, if he was exposed to sex, it was at the hands of his mother.

A suggestion in one of the reports submitted by the social welfare officer was that the child be placed in a children's home. When he was taken to the ^E children's home so that he could be interviewed properly, i.e., without the influence of his parents, he said that he would rather stay at the home than go back to his mother. There is clearly no bond between Brandon and his mother. The plaintiff admitted as such. What sticks out like a sore thumb is that the defendant did not want the child to remain in the custody of the ^F plaintiff. He reported an alleged physical abuse and the child was dragged from the police to the doctor and finally to court. Next, he launched the ill-fated application for him to have custody whilst Brandon underwent the operation on his hernia. Even as he launched the application, Brandon still needed to undergo the operation and, when the court did not find in his favour, it still took the defendant another four months before the doctors could perform the ^G procedure. The irony of the attitude displayed by the defendant is that, notwithstanding the need by his beloved son for treatment, he felt he could only get this done on his conditions and, more specifically, by a doctor of his own choice. That failed and another allegation of physical abuse was made.

I turn now to the mother. She is the product of a dysfunctional family, who was ^H given over by her own mother at the age of 16 to a man of 40. Whilst on the

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subject of the plaintiff's mother, a letter written by her was admitted in ^A evidence. The tenor of the letter is to the effect that this court should not give custody of the minor child to the plaintiff because she is not a fit and proper person. The letter was not adduced as part of an affidavit nor was it introduced into evidence properly. I will not have regard to it. The plaintiff admitted, in a diary produced by the defendant, that she had smoked "pot", which I ^B presume to be marijuana. There was a suggestion from the psychologist and the social welfare officer that she might be partaking of harmful drugs, but no substantive evidence was adduced on that aspect of her behaviour. What was stated conclusively is that she smokes cigarettes in the home, and the social welfare officer was alive to the harmful effects of such habits on her young child. I am unable to deny her custody of her child due to the fact that she ^C indulges in a habit that sections of society frown upon. It is not a compelling reason to do so.

Understandably, the child was very confused by all this attention that he was receiving. In his mother's home people, in the guise of the psychologist, the social worker, the police and any other person that should have an input on ^D how he was being looked after, could come and go as they liked. He was taken to offices for interviews and followed to a house where his mother was house-sitting, all in an effort to ascertain just what kind of a person or mother his birth mother was. Is it any wonder then, that he would express a preference to stay with his father? When he lived with his father there was no fuss made over him. He was not asked endless questions by strangers he did not care to talk ^E to, and life was much more pleasant.

The defendant went to the extent of requesting a copy of the report being prepared by the social welfare officer before its submission to court and demanding that it be altered. Two reports were submitted to court by social welfare officer recommending that the child be returned to the mother. When the third report was being prepared, the defendant had the audacity to furnish ^F to the social welfare officer a copy of the report submitted to court by the psychologist. From all this, I can only surmise that he would do anything in his power to ensure that the court ruled in his favour as opposed to the plaintiff. He clearly intended to influence the outcome of these proceedings, and it gives me pause as to how far his influence extended. When it came to the issue ^G of the child's health and schooling, he was found wanting, in that he would only pay for the operation if it was done by his doctor and on his terms. Even so, after the operation was performed by the doctor chosen by him after capitulation by the plaintiff, he still wanted to be reimbursed for half the costs. This was despite the fact that it was accepted by all concerned that the mother had difficulties in securing well-paying employment, and there was some ^H

Gowora J

A doubt on his part that she was in fact in gainful employment. In so far as the school was concerned, he felt himself not obliged to pay the fees in full if the child was sent to a school not of his liking. Both the psychologist and the social welfare officer in their evidence said that he over-compensated in his relationship with the child, and that it would do no good to the child. There was a suggestion that the defendant should undergo some sort of counselling B so that he corrects his behaviour in relation to the manner he relates to Brandon.

I am not convinced that the plaintiff has not been exercising her rights properly as regards the minor child. However, she clearly has issues to do with her behavioural patterns and also it relates to her son. She needs to learn to C communicate with him, instead of resorting to punishment each time he is naughty. She overdoes it and she admitted that she needs to change in that respect. She has admitted that she needs to go for counseling, and had in fact started counselling sessions. I do not ignore the suggestion that she might be indulging in drugs, and I believe that it is only proper that she submits herself to help from a psychiatrist or psychologist to obtain assistance to rid D herself of that habit.

During the course of the trial, at the behest of the parties, I had given an order by consent, in terms of which the plaintiff would have custody, with the defendant having rights of access. This was done so that the child would not be denied the company of his father. I believe that this was one of the sources E of the problems in Brandon not settling down with his mother, taking into account the father's attitude to the *status quo*. He does not want the child to have a relationship with the mother, if one has regard to the infrequency with which the plaintiff was given access to the child. It is clear and accepted by all parties, that the mother and the child had never bonded. In the main matter, there has been no application for access, and it means therefore that the F consent order I had granted falls away. In so far as the father is concerned, he has not applied for custody of his son. It seems to have escaped the attention of his legal practitioners that, in the event that he wanted to be awarded custody of his son, the route to take was for him to make application. He has not done so, and I cannot give him what he has not sought. The fact that prior to my order awarding the mother custody he had *de facto* custody G of the child, does not assist him in view of the illegality of their arrangement. In addition, the application placed before me by the applicant was in the form of her asserting her inherent rights to have custody of the minor child. It was not enough for him to just oppose. He should have taken the further step, if he was so inclined, to have himself awarded custody.

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Gowora J

It is to be regretted that Brandon will be denied the company of his father, as A both appear to be attached to the other, but it may well be that the parties, in the interests of the child, may come to some accommodation to see how that can be achieved. For present purposes that is not before me.

In the premises, I find that the plaintiff is entitled to retain custody of Brandon and I make the following order. B

IT IS ORDERED as follows:

1. that the plaintiff, being the mother and natural guardian of Brandon, is entitled to retain custody of her minor child and exercise all the rights of custody and guardianship.
2. the defendant is hereby ordered to pay the costs of this action. C

Granger & Harvey, plaintiff's legal practitioners

Byron Venturas, defendant's legal practitioners D

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THOMAS MEIKLES STORES v MWAITA & ANOR 2007 (2) ZLR 185 (S)**2007 (2) ZLR p185**

Citation	2007 (2) ZLR 185 (S)
Case No	Judgment No. S-21-07
Court	Supreme Court, Harare
Judge	Malaba JA, Gwaunza JA and Garwe JA
Heard	12 February 2007
Judgment	8 October 2007
Counsel	<i>L Mazonde</i> , for the appellant <i>O Takaindisa</i> , for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Ⓒ **Contract** — *contracts of employment — repudiation — what amounts to repudiation — conduct of employer — practical effect thereof forcing employees to cancel contracts of employment*

Employment — *contracts of employment — conduct of employer — practical effect thereof forcing employees to cancel contracts of employment — such dismissals either constructive or unfair*

Ⓓ **Employment** — *disciplinary hearing — no room for disciplinary proceedings after termination of employment*

Headnote

The appellant had employed the two respondents as buyers. In terms of identical letters dated 30 September 2004, each was informed by the ε appellant that due to the economic downturn, it had been forced to restructure various management positions and responsibilities. The letter gave the respondents the choice of accepting the post of section manager in one of the appellants departmental stores, in effect a demotion, or to opt for exit packages, details of which were set out in the letter. They were told to report for work the following day so as to take up their new ρ assignments or to indicate their wish to accept the exit package. In the event that they did not report for work, it would be taken by the appellant that they had opted for the exit package. Neither respondent reported for work as requested. Instead, they wrote identical letters to the appellant dated 4 October 2004 declining the reassignment to the junior posts and ϑ also the exit package, which they dismissed as paltry. This resulted in letters from the appellant to the respondents dated 6 October 2004. Contrary to what had been stated in the appellant's letters of 30 September 2004, the appellant now stated that the respondents were still employed by it and were expected to report for work the following day η so as to take up their reassigned posts. Oral discussion between the

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parties then followed as to a possible exit package but no agreement was Α reached. In a further letter to each respondent dated 15 October 2004, contrary to that set out in its letters of 30 September, the appellant stated that it had not been its intention to offer exit packages as an alternative to their reassignment and that they should report for work on 19 October 2004.

The respondents replied thereto in a strongly worded letter dated 21 October ^B 2004, to which the appellant took offence. This led to two disciplinary charges against the respondents, the first of which alleged an absence from work without leave or reasonable excuse and the second alleged that the letter of 21 October 2004, was threatening, defamatory and amounted to insubordination. The disciplinary committee found the ^C respondents guilty on both charges and dismissed them from employment in respect of the second thereof.

At the behest of a labour relations officer, consequent upon the respondents appeal, conciliation between the parties was attempted. Upon the failure thereof, the matter was referred to compulsory arbitration in terms of the Labour Relations Act. The arbitrator ordered that the respondents be ^D reinstated without loss of salary or benefits or, in lieu thereof appellant was to pay them damages. The Labour Court upheld the award, against which appellant appealed to the Supreme Court. In argument, the respondents submitted that they had been unfairly dismissed not only consequent upon the disciplinary proceedings but earlier, as a result of the appellant's letter of 30 September 2004, which letter amounted to a ^E repudiation of the contracts of employment. Alternatively, they argued that they had been the victims of a constructive dismissal because the respondents had been forced to cancel their contracts of employment.

Held, that the appellant had repudiated the contracts of employment of the two respondents.

Repudiation is nothing more than an intentional ^F communication by a debtor that he is not going to perform. The appellant's letter of 30 September 2004 amounted to just that. The respondents thereafter, as they were entitled to, effectively cancelled their contracts of employment.

Held, further, that in any event, the appellant had, in effect, forced the respondents to cancel their contracts of employment. It would have been ^G humiliating for them to have gone back to work in inferior positions. Accordingly, they were dismissed and such dismissals were either constructive or, in terms of s 12B (3) of the Labour Relations Act [*Chapter 28:01*], unfair.

Held, further, that as the appellant had already dismissed the respondents ^H

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^A before it had received the letter of 21 October 2004, which it deemed offensive and was the subject of the disciplinary hearing, it was inappropriate for the appellant to have resorted to such proceedings. The respondents were no longer employees of appellant.

Held, further, dismissing the appeal, that as the Labour Court had properly dismissed the appeal, the effect thereof was to reinstate the arbitrator's ^B determination.

Case cited

Gilchrist and Co v Stone (1889) 5 HCG 353

Legislation considered

Labour Relations Act [*Chapter 28:01*], s 12(B) 3

Case information

L Mazonde, for the appellant

O Takaindisa, for the respondents

Judgment

^D **GWAUNZA JA:** The Labour Court upheld an arbitration award in terms of which the appellant *in casu* was ordered to reinstate the respondents without loss of salary or benefits, or, in lieu thereof, pay them damages. The appellant was aggrieved at the decision of the court *a quo* and has now appealed to this Court.

The facts of the matter are not in dispute. The two respondents, who were ^E employed by the appellant as buyers, were advised through an identical letter dated 30 September 2004 that:

- (i) the appellant had been forced, due to the economic downturn, to restructure various management positions and responsibilities;

- (ii) as a result the respondents' buying responsibilities had been ^F re-allocated to other buyers, thereby reducing the number of buyers employed by the Central Buying Office;
- (iii) the respondents were being given the opportunity each to move to a position of section manager in one of the appellant's departmental stores, with effect from the following day, i.e. 1 October 2004; and ^G
- (iv) the respondents' salaries would remain the same even though the new positions did not require the allocation of a motor vehicle, meaning the respondents would not be entitled to one.

The letter went on to state that should the respondents not wish to take up the offer, the appellant was prepared to award them an exit package whose ^H details were specified in the letter. The appellant in the same letter also asked

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the respondents to report for work the following day, 1 October 2004, to take ^A up their new assignments, or indicate if they wished to opt for the exit packages. The letter ended by stating that if the two did not report for duty on 1 October 2004, it would be taken that they had opted for the exit package.

The respondents did not report for work on 1 October 2004, but addressed identical letters to the appellant on 4 October 2004. In the letters, the ^B respondents rejected both the offer of re-assignment and the exit package, alleging that both violated the relevant provisions of the Labour Relations Act. In the respondents' view, the post of Section Manager was an undeserved demotion, while the exit package was 'paltry' and not in line with current market trends. The respondents made it known to the appellant that they preferred a 'negotiable and reasonable' retrenchment/exit package that was in line with ^C the Labour Relations Act.

In the appellant's response to the respondents' letters, dated 6 October 2004, the Group Merchandise Manager, Mr SD Mesham ("Mesham") informed the respondents that they had not been dismissed, nor retrenched, so were still employed by the appellant. They were therefore, expected to report for work ^D on 7 October 2007 to take up their re-assignments. Mesham then invited the respondents to contact the Group Labour Relations Manager for any further amplification of the legal aspects of their situation.

The respondents duly met with the Group Labour Relations Manager, Mr Chigwedere ("Chigwedere") on 9 October 2004. They thereafter communicated to Chigwedere what they considered to be an acceptable exit package for them. ^E The appellant rejected the respondents' proposed exit package and addressed letters to them, reiterating its position that the two were still employees of the appellant. The respondents were also informed that the original positions offered to them as Section Managers were still open to them. The two were, again, invited to come to work, and were given a new date for it, that is 19 October 2004. ^F

In relation to the exit package, the appellant wrote as follows in the same letter:

"The exit package was an available alternative in the event of you thinking otherwise. It was not the intention of Thomas Meikles to offer you an exit package as a first option, hence we are not prepared to shift from our original position in our letter of 30 October 2004." ^G

The respondents took a very dim view of the contents of this letter and in their response dated 21 October, 2004 used strong language to register their disgruntlement. The appellant took exception to the language employed in the respondents' letters and also their refusal to report for work as directed. It therefore instituted disciplinary proceedings against them for: ^H

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Gwaunza JA ^A

- (a) absence from work for more than five or more working days without leave for no reasonable cause;
- (b) an act, conduct or omission inconsistent with the fulfillment of the express or implied conditions of their contract in that they addressed letters to it dated 21 October 2004, whose contents the appellant described as "insubordinate, threatening and defamatory".

^B The two were found guilty as charged and were suspended from duty with effect from 26 October 2004 without pay and benefits, pending a disciplinary hearing to be held on 25 November 2004. The hearing was duly held with the outcome that the respondents were given a final warning in respect of the first offence, and had the penalty of dismissal imposed in respect of the second.

^C After the respondents filed a notice of appeal to the Labour Relations Office, an attempt was made to have the dispute resolved through conciliation. When this failed, the parties agreed to submit the dispute to compulsory arbitration in terms of the Labour Relations Act. It is the award that the arbitrator made in this respect that the appellant appealed against to the Labour Court.

^D *In casu*, the appellant's grounds of appeal are that the court *a quo* erred and misdirected itself in finding:

- (i) that the appellant's conduct of offering the respondents alternative positions following the abolition of respondents positions was unlawful;
- (ii) that having rejected the exit package offered to them, the respondents were entitled to reject the alternative position offered; ^E
- (iii) that the respondents' conduct of authoring a letter derogatory of the appellant was induced by the appellant's conduct; and
- (iv) that the respondents had been constructively dismissed.

The appellant also charges that the court *a quo* erred in ordering the ^F reinstatement of the respondents to positions that no longer existed in the appellant's organization.

I will consider, first, the appellants ground of appeal relating to the court *a quo*'s findings that the respondents had constructively been dismissed. It is pertinent in this respect to note that, on the evidence before the court, the respondents are of the view that they were dismissed twice by the appellant. ^G The appellant, on the other hand, maintains that the respondents were only dismissed once, that is, after disciplinary proceedings had been taken against them.

For convenience only, I shall refer to these episodes as the respondents' first ^H and second dismissals.

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Gwaunza JA

"FIRST DISMISSAL" ^A

It is not in dispute that by its letter of 30 September 2004, the appellant, in categorical terms, gave the respondents two choices, to accept either demotion by a certain date or a pre-determined exit package. The tone of the letter suggests there was to be no negotiation over the two choices given to the respondents. That this was the intended import of the appellant's letter is left ^B in no doubt when regard is had to its closing paragraph, which read as follows:

"If you do not report for duty on 1 October 2004, I will take it that you have opted for the exit package."

It is accordingly contended for the respondents that, since they did not report for work on 1 October 2004, the only correct position flowing from the letter is that the respondents were deemed to have been dismissed, "subject only ^C to the fact that they were further deemed to have accepted the exit package".

The respondents' counsel, Mr *Takaindisa*, urged the court, in the light of this assertion, to find that, after the respondents' non-compliance with the appellant's ultimatum, the employment relationship was terminated.

The court *a quo* was persuaded by this argument and found that the appellant ^D had, by its conduct, repudiated the respondents' contracts. This finding, and the reasoning behind it, as contained in the judgment of the court *a quo*, in my view cannot be faulted.

There is no doubt that, by any rules of interpretation, the appellant's letter to the respondents of 30 September 2004, gave them only two choices; to accept ^E demotion and start work on the 1 October, 2004, or accept the unilaterally pre-determined exit package. As indicated, the respondents did not report for work on 1 October 2004. Going by its letter of 30 September 2004, one would have expected the appellant to henceforth "take it" that the two opted for the exit package. One would have expected the appellant to take this stand even though the respondents had indicated they might reject the proposed pre-determined ^F exit package in preference for a negotiated one. This

was, however, not to be. Instead, the appellant's response was to turn a deaf ear to the respondents' categorical rejection of the proposed demotion. The respondents had, in no uncertain terms, stated in writing that they strongly objected to, and were rejecting, the proposed re-assignment of duties.

Responding as if the respondents had not rejected the two options it offered ^a them, the appellant twice asked them to report for work on given dates, to take up the very posts they had rejected. This was because, the appellant stated, the respondents had "neither been dismissed nor retrenched", but were still its employees. This apparent about turn on the part of the appellant is, in my view, difficult to understand, given its position as so clearly enunciated in its ^b

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Gwaunza JA

A letter of 30 September 2004. Even more incomprehensible was the appellant's insistence that, by asking the respondents to report for work and take up the posts they had rejected, it was in no way deviating from its originally stated position, but was simply "re-stating" the essential features of the letter of 30 September 2004. The letter of 30 September 2004 quite clearly made no mention of the fact that the respondents would remain employees of the appellant, and ^b therefore obliged to take up the reassignments imposed on them, even if they rejected the two options offered to them. Rather than re-state the position outlined in its letter of 30 September 2004, the appellant, it appears, was in fact, pronouncing a shift in its original position.

In short, the appellant was attempting to force the respondents to accept ^c demotion under the guise of "reassignment". This is evidenced by its response to the respondents' counter-proposal for an exit package, contained in the appellant's letter of 15 October 2004, which I have already alluded to above. In other words, it was the appellant's position that the respondents, once they rejected the proposed demotion, had no other alternative but to accept the pre-determined exit package. When they refused to take up the ^d alternative option, the appellant's intention, as is now evident, and contrary to the specific wording of its letter of 30 September 2004, was to nevertheless force them to accept the demotion. In so doing, the appellant, as correctly noted by the court *a quo*, was not only repudiating the respondents' original contracts of employment, it was also making it intolerable for the respondents ^e to continue working for it.

That the appellant repudiated the respondents' contracts of employment, in my opinion, cannot be disputed. The learned author, D J Joubert in his book *General Principles of the Law of Contract* 1 ed at p 211 defines repudiation in these terms:

"But, analysed to reveal its essentials, a repudiation is nothing more than ^f an intentional communication by the debtor of the statement that he is not going to perform."

Performance by the appellant, *in casu*, would amount to it allowing the respondents to keep their jobs as buyers for the appellant. The statement communicated to the respondents through the appellant's letter of 30 September 2004, was that the appellant had abolished their posts and therefore made it ^g impossible for the respondents to perform their side of the contract. In its subsequent letters to the respondents, the appellant reiterated that it stood by its letter of 30 September 2004, and demanded that the respondents report for work, not as buyers, but as Section Managers. Had the appellant invited ^h the respondents to go back to work as buyers, one might have considered that

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Gwaunza JA

it intended to withdraw the repudiation. However, rather than reverse its ^a repudiation of the respondents' contracts of employment, the appellant's letters, in effect, re-emphasised it in different terms.

The respondents were therefore correct in alleging, and the court *a quo* in finding, that the appellant had repudiated their contracts of employment. The respondents had served the appellant for respective periods of 17 and ^b 27 years. These periods are not insignificant. It has not been alleged that there were any adverse reports concerning their work performance. That being the case, the respondents had not done anything to warrant what amounted to summary dismissal. Their request for a negotiated exit package was under these circumstances, in my view, not unreasonable.

What falls to be determined, then, is the nature and legal effect of the respondents' response to the repudiation of their employment contracts. Joubert, *op cit* at pp 212 to 213 variously stated as follows in this respect:

"As is the case where the debtor commits some other form of breach of contract, the repudiation does not as such bring an end to the contract." [See, among other authorities, *Gilchrist & Co v Stone* (1889) 5 HCG 353]. It only gives rise to legal remedies."

Later on, the learned author wrote:

"The paramount right flowing from the repudiation is the right to accept the repudiation and to cancel the contract [*Gilchrist's case supra*] ... Upon cancellation, the respective duties of the parties to perform come to an end. Each may recover his own performance. The debtor who had repudiated the contract will in addition be liable to compensate the damages of the creditor ..."

On the authority of these statements of the law, it is evident that the respondents' contracts of employment were not brought to an end by the mere fact of their repudiation by the appellant. The contracts, in my view, came to an end when, by their conduct, the respondents effectively cancelled them. This they did, in the first place, by not insisting that the appellant reinstate them to their previous positions as buyers, secondly, by not accepting demotion and reporting for duty, and thirdly, by demanding that they be paid a negotiated exit package (in effect, "compensation of damages") as calculated by them.

Alternatively, because the appellant made it impossible for the respondents to go back to work as buyers (having abolished their posts) and went on to insist they take up inferior positions, the two were forced by the appellant to cancel their contracts of employment. It is argued for the respondents that this amounted to their constructive dismissal. The court *a quo* described such

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Gwaunza JA

A dismissal as unfair dismissal of the two respondents. The court relied for this on s 12B(3) of the Labour Relations Act which stated:

- "(3) An employee is deemed to have been unfairly dismissed –
- (a) if the employee terminated the contract of employment with or without notice because the employer deliberately made continued employment intolerable for the employee."

It was submitted for the respondents, in my view correctly, that it would have been humiliating for them to go back to work for the appellant in inferior posts to the ones they occupied. Thus, whether it was constructive or unfair dismissal, by the appellant, there is no denying that the respondents were dismissed from their employment.

The events outlined above, it is pertinent to note, happened before the respondents wrote the letter (dated 21 October 2004) that the appellant found so offensive that it was moved to institute disciplinary proceedings against them.

"SECOND DISMISSAL"

This brings me to the issue of the respondents' "second dismissal". It is argued for them that after the respondents' non-compliance with the appellant's ultimatum, the employment relationship was thereby terminated. Further that, given this circumstance, it was "inappropriate" to resort to disciplinary procedures that are intended to regulate relationships between employees and employers.

This argument clearly has merit. Since, as I have found, the employment relationship between the parties was terminated in the manner indicated, it was clearly no longer open to the appellant to seek to discipline the respondents for conduct that took place after such termination. As is now evident, events prior and up to the alleged acts of misconduct had effectively placed them beyond the reach of such proceedings.

This court's finding in relation to the "second dismissal" of the respondents makes it unnecessary to consider the appellant's ground of appeal concerning the court *a quo*'s finding on what the appellant refers to as the "derogatory letter" of 21 October 2004, authored by the respondents.

The finding concerning the termination of the respondents' contracts of employment, disposes of the appellant's first, second and fourth grounds of appeal.

The last ground of appeal charges that the court *a quo* erred in ordering reinstatement of the respondents to positions that no longer existed in the ^H appellant's organization. I find no merit in this ground of appeal. The dispute

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Gwaunza JA

went to the court *a quo* on appeal. At the conclusion of the appeal hearing, ^A the court was obliged to uphold the appeal, dismiss it or make any other order it considered appropriate. The court found no merit in the appeal and properly dismissed it. The effect of such dismissal was to re-reinstate the arbitrator's determination. No misdirection can therefore be attributed to the court *a quo* for the dismissal.

Likewise, the appeal now before us, given the foregoing, will not succeed. The ^B result is that the arbitrator's determination has final effect in this dispute. That determination clearly stated that if the re-instatement of the respondents was no longer an option, the appellant would be obliged to pay the respondents their damages *in lieu* of reinstatement. The arbitrator's determination is thus capable of enforcement, one way or the other. ^C

In the result, the appeal is dismissed with costs.

MALABA JA & GARWE JA concurred.

Atherstone & Cook, appellant's legal practitioners ^D

Musunga & Associates, respondents' legal practitioners

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DZVOVA v MINISTER OF EDUCATION & ORS 2007 (2) ZLR 195 (S)

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Citation	2007 (2) ZLR 195 (S)
Case No	Judgment No. S-26-07
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Cheda JA, Ziyambi JA and Malaba JA
Heard	25 January 2007
Judgment	10 October 2007
Counsel	<i>Z Chadambuka</i> , for the appellant <i>Miss R Sweto</i> , for the respondents
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

c Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 19 — protection of freedom of religion — what constitutes a religion — Rastafarianism — whether a religion — child ordered to cut his hair so as to attend school — child required to have long hair in a accordance with his religious beliefs — act done which infringed constitutional right — act done in terms of rules of a school — such rules do not constituting a "law" — school having no right to make rules which derogated from child's constitutional right to freedom of religion*

Education — *Education Act [Chapter 25:04] — s 69 — power of Minister of Education to make regulations — power cannot be exercised by headmasters — s 4 — fundamental right to an education*

E Education — *Education (Disciplinary Powers) Regulations 1998 (SI 362 of 1998) — s 2 — conduct and behaviour of pupils — section not extending to asking pupils to conform to a standard of discipline which infringes on pupil's manifestation of his religion*

Education — *school rules — legal status of — whether they constitute a "law" for purposes of Constitution*

Headnote

The applicant was the father of a 6 year old child who attended a primary school operated by the Ministry of Education. He and his family belong to a faith group known as the Rastafarian faith. Its adherents all took a vow not to cut their hair. For this reason, the child wore his hair in a fashion commonly described as dreadlocks. This conflicted with a rule of the primary school at which the child attended. The applicant's attention was drawn to this by a letter from the headmaster which pointed out that all pupils were required, in terms of the rule, to keep their hair very short and combed. Subsequent discussions between the headmaster and the applicant, and also involving the Ministry Regional Education

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Cheda JA

Officer, failed to resolve matters. The applicant was told that unless his child's hair was cut to an acceptable length, he could not continue as a pupil at the school. The applicant thereupon brought an application before the Supreme Court, in terms of s 24(1) of the Constitution of Zimbabwe, alleging that, in seeking to exclude his child from the school, his right to freedom of religion, guaranteed by s 19(1) of the Constitution had been violated.

While it was clear that the Rastafarian faith fell within the dictionary definition of a religion, it was also necessary to decide whether the facts of the case fell within the exclusion set out in s 19(5) of the Constitution. This provided that s 19(1) should have no application in respect of anything "... done under the authority of any law..." made for certain stated purposes. The question to be determined was whether the rules formulated by the headmaster could be considered a "law".

The respondents referred to s 2 of the Education (Disciplinary Powers) Regulations, 1998 which required pupils to conform to the standard of discipline enforced at "...the school and to ..." render prompt obedience to the school staff. Reference was also made to s 4 of the Education Act [Chapter 25:04] which provided that children had a fundamental right to an education free from discrimination.

Held, that every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual which are stipulated in the Constitution, subject to certain limitations. Religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights. Every shade of religious belief, if genuinely held, is entitled to due protection.

Held, that s 2 of the Regulations did not assist the respondents. The section referred to the conduct and behaviour of pupils and obedience to the staff generally. It could not be argued that having long hair at the school was indiscipline or disobedience to the school staff; it was only a manifestation of a religious belief, unrelated to the child's conduct at school. Asking pupils to conform to a standard of discipline did not include an aspect which infringed on a pupil's manifestation of his religion.

Held, further, that in terms of s 69 of the Education Act [Chapter 25:04], only the Minister of Education, and not a headmaster, was empowered to make regulations and, having regard to s 4 of the Act, any attempt to bar the child from school contravened his fundamental right to receive an education.

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Cheda JA

^A *Held*, further, that in any event, the headmaster could not make rules, which constituted a derogation from the constitutional rights of pupils, as set out in s 19(1) of the Constitution of Zimbabwe, 1980. The rules of the school could not be considered a law for the purposes of s 19(5) thereof.

Cases cited ^B

In re *Chikweche* 1995 (1) ZLR 235 (S)

Christian Education South Africa v Min of Education 2000 (4) SA 757 (CC)

Crown Suppliers v Dawkins [1993] 1 CR 517 (CA)

In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S)

^C *People v Lewis* 510 NYS (2d) 73 (1986)

R, on application of S B & Ors v Head Teacher & Governors, Denbigh High School [2004] EWHC 1389

Reed v Faulkner 842 F2d 960 (7th Cir 1988)

Legislation considered ^D

Constitution of Zimbabwe 1980, ss 19(1) and 19(5)

Education Act [*Chapter 25:04*], ss 4 and 69

Education (Disciplinary Powers) Regulations, 1998 (SI 362 of 1998), s 2

Interpretation Act [*Chapter 1:01*], ss 3, 26 and 27

Case information

^E *Z Chadambuka*, for the appellant

Miss *R Sweto*, for the respondents

Judgment

CHEDA JA: The applicant is the father of a 6 year old child, Farai Benjamin Dzova, (hereinafter referred to as "the child").

The first respondent is the Government Minister responsible for Education, ^F Sports and Culture, under whose Ministry the second respondent falls (hereinafter referred to as "the Minister").

The second respondent is the Primary School in which the child was enrolled (hereinafter referred to as "the school").

The third respondent is the Headmaster of the school (hereinafter referred to ^G as "the Headmaster").

At the beginning of March 2005, the child was enrolled in grade (0) at the school in line with the new education policy of the Ministry of Education which required that children's pre-schools be attached to primary schools so ^H that the children would automatically attend the primary schools from pre-

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schools. The child graduated from the pre-school system and was then ^A enrolled in the primary school system. The fees were paid and all necessary books and stationery were purchased.

The child's father said while in pre-school the child's hair was never cut and was kept in what is commonly known as dreadlocks until the child graduated from pre-school. ^B

The child's father was called to the school a few weeks into January 2006 to discuss the issue of the child's hair with the teacher-in-charge and asked to write a letter to explain. By then the child was being detained and was no longer going to the classroom with other children. The father sent a letter from his church.

On 27 January 2006, one Brighton Zengeni brought a letter from the school ^C addressed as follows:

"Ruvheneko Government Primary School
P.O. Box GN8
Glen Norah
Harare D

25 January 2006

Dear Parent

REF: FARAI BENJANI DZVOVA'S HAIR E

You are cordially advised that one of our regulations as a school, is that hair has to be kept very short and well combed by all pupils attending Ruvheneko Government Primary School, regardless of sex, age, race or religion: You are therefore being asked to abide by this regulation, failure to which, you will be asked to withdraw or transfer your child Farai Benjamin Dzvova to any other school. This is to be done with immediate F effect.

Yours Faithfully

F. Nyahuye

SCHOOL HEAD."

The applicant went and discussed the matter with the deputy headmaster and the teacher-in-charge who maintained that they could not accept the child's continued learning in the school so long as his hair was not cut to a length acceptable by the school. H

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A A further discussion with the headmaster of the school and the Regional Education Officer did not resolve the matter.

The applicant then made an application to the High Court and obtained the following provisional order:

"TERMS OF ORDER MADE

B That you show cause to this Honourable Court why a final order should not be made in the following terms:

TERMS OF THE INTERIM RELIEF

BY CONSENT OF THE PARTIES:

1. Pending the resolution of this matter by the Supreme Court it is C ordered that:
 - (i) The respondents be and are hereby compelled to allow the minor Farai Benjamin Dzvova to enter upon the second respondent school for purposes of education until the Supreme Court determines the matter.
 - (ii) The respondents are hereby interdicted from in any way D negatively interfering with the minor Farai Benjamin Dzvova's education, more particularly in that the respondents be and are hereby barred from:
 - (a) separating Farai Benjamin Dzvova from his classmates;
 - (b) otherwise detaining Farai Benjamin Dzvova in solitary or in the sole company of adults; E
 - (c) in any other way discriminating against Farai Benjamin Dzvova on the basis of his hairstyle or his religious beliefs pending the determination of the matter by the Supreme Court.
2. The case is referred to the Supreme Court for the determination of: F
 - (i) whether the exclusion of the minor child Farai Benjami Dzvova was done under the authority of a law as envisaged in section 19(5) of the Constitution and in the event the court finds it was done under the authority of a law;
 - (ii) whether such a law is reasonably justifiable in a democratic society."

G In accordance with para 2 of the above order the application has now been brought to this court in terms s 24 of the Constitution alleging that the child's rights guaranteed by s 19(1) of the constitution has been violated.

In his founding affidavit, the applicant says he is a Rastafarian as well as his wife and they were customarily married in 1991. His wife Tambudzayi Chimedza H is the mother of the child. They have been practising Rastafarianism for almost

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a decade. They initially attended Chaminuka Rastafarian House in St Mary's, ^a Chitungwiza which is the Headquarters of the National Rastafarian Council. He said about four years ago in 2002 they opened a branch of the church in Glen Norah for which he is "Ilect of Priesthood".

Church services are held every Sabbath day and in good weather they begin the preceding Friday evening. He said it is an integral part of the Rastafarian ^b faith that they take certain vows as part of their religion. The vows include that they do not eat refined food, but only eat food in its natural state. Further to this, they do not drink alcohol. *Also central to this is the vow that they do not cut their hair* (my emphasis). He said the vow not to take alcohol or eat refined food and to shave their hair is the Nazarene vow which is biblically present in Numbers 6 verses 1-6. ^c

He said their children are born Nazarites. *Thus, Farai Benjamin Dzvova, in line with the family religion, cannot cut his hair* (my emphasis).

He said they let their hair grow long and the twisting which eventually occurs is a natural result of African hair which is left to grow long. This is one of the visible distinguishing factors between genuine Rastafarian adherents and ^d those who appear to have as their hairstyle for fashion purposes and actually twist it, which is forbidden by their religion.

He said in accordance with their religion, before, and during his days at pre-school, their son's hair was never cut and it was in the inevitable locks.

He then narrated the events from March 2005 which led to the order that was ^e later obtained at the High Court.

Section 19(1) of the Constitution provides as follows:

"(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of conscience, that is to say freedom to change his religion or belief, and freedom, whether alone or in community with others, and whether in public or private, to ^f manifest and propagate his religion or belief through worship, teaching, practice and observance."

In order to determine whether this application falls within the ambit of the above section, it is necessary to consider the following question:

IS RASTAFARIANISM A RELIGION? ^g

The appellant submitted that Rastafarianism is a religion. He stated in his founding affidavit the following:

"About four years ago in 2002 we opened a branch of the church in Glen Norah of which I am 'Ilect of priesthood', that is, the priest. This is at Jah Ruins in Glen Norah ^b, behind, In fill primary school. Church services are ^h

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^a held every Sabbath day, that is, every Saturday. In good weather, they begin the preceding Friday evening."

The above shows that the Rastafarian Organization conducts services for worshipping purposes on week-ends. He further stated that the Rastafarian religion is based on the Bible which is a basis for many other religions.

The *New English Dictionary on Historical Principles* VIII, gives the following ^b definition of religion:

- "1. A state of life bound monastic vows ...
2. A particular monastic or religious order or rule ...
3. Action or conduct indicating a belief in, reverence for, and desire to please a divine ruling power, the exercise or practice of rites or ^c observances implying this;
4. A particular system of faith and worship;
5. Recognition on the part of man of some higher or unseen power as having control of his destiny, and as being entitled to obedience, reverence and worship. The general mental and moral, attitude ^d resulting from this belief, with reference to its effect upon the individual or the community; personal or general acceptance of the feeling as a standard of spiritual and practical life.

6. Devotion to some principle, strict fidelity or faithfulness, conscientiousness; pious affection or attachment."

What the applicant said about Rastafarianism falls within these descriptions, ^ε thus leaving no doubt that it is a religion.

The applicant also referred to cases in other jurisdictions in which it was decided that Rastafarianism is a religion.

These are: *Reed v Faulkner* 842 f 2d 960 (7th Cir 1988); *People v Lewis* 510 NYS 2d 73 (Court of Appeals of New York, 1986); *Crown Suppliers (Property & Svcs Agency) v Dawkins* [1993] 1 CR 517 (CA).

These cases were also referred to in a recent case that was before the Supreme Court, that is *In re Chikweche* 1995 (1) (ZLR) 235 (S) in which it was held that Rastafarianism is a religion.

The applicant's complaint is that the rules made by the respondent:

- G "... are unlawful and in contravention of my son's rights under section 19 of the Constitution which provision gives the right to protection of freedom of conscience and religion."

The rules referred to, are under the following heading:

"RUVHENEKO GOVERNMENT PRIMARY SCHOOL JANUARY 2005

H SCHOOL RULES FOR ALL PUPILS

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1. All pupils to be in school uniform all the time at the school. A
2. All pupils to have short brush hair regardless of sex, age, religion or race.
3. ...
4. ..."

The rules bear the signature of the School Head. The applicant referred the ^B court to a number of cases from other jurisdictions which dealt with an issue similar to the one complained of in this case.

The protection of the rights of the individual against discrimination on religious grounds are in s 19 of the Constitution of Zimbabwe.

There have been several decisions on the nature and content of the rights. ^c They include the following:

1. In *re Munhumeso & Ors* 1994 (1) ZLR 49 (S), where it was confirmed that every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual which are stipulated in the Constitution subject to certain limitations.
2. In *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), it was held that: ^D
 "... religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights." ^E
3. In *R, on application of S B & Ors v Head Teacher & Governors, Denbigh High School* [2004] EWHC 1389 (CA) Scott Baker LJ stated that:
 "Every shade of religious belief, if genuinely held, is entitled to due consideration under Article 9. What went wrong in this case was that the school failed to appreciate that by its action it was infringing the claimant's Article 9 right to manifest her religion." ^F

This case shows that it is important to respect one's genuine religious beliefs.

The applicant referred to several useful international authorities based on similar provisions of the Human Rights Charter.

The distinction between the authorities, and referred to in this case, is that they inquired into the validity of regulations. This case deals with rules made by ^G a school headmaster. The question is, on what authority did he make them. I now proceed to deal with this question.

As indicated earlier, the rules were issued and signed by the headmaster of the school. ^H

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A Section 19(5) of the Constitution of Zimbabwe provides as follows:

"Nothing contained in or done under the authority of a law shall be held to be in contravention of subsection (1) or (3) to the extent that the law in question makes provision:

- (a) ... B
- (b) ...
- (c)"

The question is – was the rule on the basis of which the applicant was barred from attending at the school made under the authority of a law? If it was, it would have been necessary to consider any derogations or justification provided in the Act. In this case, it seems this was not done under a law since c no law authorized such action.

Section 4 of the Education Act [*Chapter 25:04*] provides as follows:

"4. Children's fundamental right to education in Zimbabwe.

(1) Notwithstanding anything to the contrary contained in any other enactment, but subject to this Act, every child in Zimbabwe shall have the d right to school education.

(2) Subject to subsection (5), no child in Zimbabwe shall –

- (a) be refused admission to any school; or
- (b) be discriminated against by the imposition of onerous terms and conditions in regard to his admission to any school;

e on the grounds of his race, tribe, place of origin, national or ethnic origin, political opinions, colour, creed or gender."

It follows that the attempt by the school to bar the child from the school contravenes not only the Constitution, but the above provision of the Education Act as well.

F Section 69 of the Education Act provides as follows:

"(1) The Minister may make regulations providing for all matters which by this Act are required or permitted to be prescribed or which, in his opinion, are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

G (2) Regulations made in terms of subsection (1) may provide for –

- (a) ...
- (b) ...
- (c) discipline in schools and the exercise of disciplinary powers over pupils attending schools, including the administration of corporal H punishment and the suspension and expulsion of such pupils

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in respect of their attendance and conduct in schools, and in public A places when not accompanied by their parents or by adult persons into whose custody they have been entrusted by their parents."

There is nothing in the Act which confers similar powers on the headmaster of a school to make similar rules or regulations.

The respondents submitted that the Minister made regulations (the Education B (Disciplinary Powers) Regulations, 1998 (SI 362 of 1998)). These regulations provide as follows:

"2. Every pupil who enrolls in a Government or non-Government school shall conform to the standard of discipline enforced at that school, and shall render prompt obedience to the school staff." c

The respondents concede that the school rules are not laws, but argue that they were made under the authority of a law.

The provisions of SI 362 of 1998 deal with discipline in the school and obedience to the school staff. It has not been suggested, nor can it be argued, that having long hair at the school is indiscipline or disobedience to the school D staff.

It is only a manifestation of a religious belief and is not related to the child's conduct at school.

I therefore do not agree that these regulations are relevant to the matter complained of by the applicant.

In s 3 of the Interpretation Act [*Chapter 1:01*], "law" means any enactment ^E and the common law of Zimbabwe. "Regulation", "rule", "by-law", "order", or "notice" means respectively a regulation, rule, by-law, order or notice in force under the enactment under which it was made. There is nothing to link the school rules with any enactment. ^F The rules were not made under any enactment.

Section 26 of the Interpretation Act states as follows:

"Holders of Offices

Where any enactment confers a power, jurisdiction or right, or imposes a duty, on the holder of an office as such, then the power, jurisdiction or right may be exercised and the duty shall be performed, from time to time, ^G by the holder for the time being of the office or the person lawfully acting in the capacity of such holder."

The question that follows then is: was the headmaster authorized by the enactment to make rules? ^H

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^A Section 69 of the Education Act confers powers to make regulations on the Minister regarding discipline in schools and other related matters. It does not confer on the headmaster any powers to make regulations. It does not authorize the Minister to delegate to the headmaster the power to make regulations regarding the conditions of the admission of a child to a school.

The regulations clearly specify the powers the headmaster can exercise over ^B a pupil in cases of serious acts of misconduct only.

The Minister made the Education (Disciplinary Powers) Regulations 1998 (SI 362 of 1998) ("the Regulations").

Section 2 of the Regulations provide as follows:

^C **"Standard of discipline**

2. Every pupil who enrolls in a Government or non Government school shall conform to the standard of discipline enforced at that school, and shall render prompt obedience to the school staff."

I understand this to refer to the conduct or behaviour of pupils and obedience to the school staff generally. I do not consider that asking pupils to conform ^D to a standard of discipline would include an aspect that infringes on a pupil's manifestation of his religion. There is no suggestion by the respondents that keeping dreadlocks is an act of indiscipline or misconduct.

If the headmaster believed that he had authority to make such rules then he was wrong.

^E The Minister did not make regulations concerning the type of hair to be kept by the pupils. Neither did he delegate the making of regulations on that subject matter to the headmaster.

Further to that, s 26 of the Interpretation Act provides as follows:

"Where any enactment confers a power, jurisdiction or right, or imposes a duty, on the holder of an office as such, then the power, jurisdiction or ^F right may be exercised and the duty shall be performed, from time to time, by the holder for the time being of the office or the person lawfully acting in the capacity of such holder."

Section 27 provides as follows:

"An appointment made under an enactment may be made either by name ^G or by reference to the holder of an office or post."

It is clear that the enactment appointed only the Minister, and not the headmaster, to make regulations.

It is also clear that the headmaster of the school was never appointed to the ^H office held by the Minister, and he did not act in that post at all.

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The Minister allowed the school to maintain certain standards at the school, ^A but never authorized the school to make any regulations.

It follows that the submission by the respondent that the rules were made under the authority of a law cannot be correct.

The head teacher cannot make rules which constitute a derogation from the constitutional rights of the pupils. He exceeded his powers which are stipulated ^b in SI 362 of 1998 and used powers which he did not have.

In so doing he was wrong as such powers were never, and could never have been, lawfully delegated to him.

Having concluded that the rules by the school were not made under a law, it is not necessary to consider the issue of justification raised by the respondents. ^c

In conclusion, the following order is made –

- (a) The respondents be and are hereby compelled to allow the minor Farai Benjamin Dzvova to enter upon the second respondent school for purposes of education.
- (b) The respondents are hereby interdicted from in any way negatively ^d interfering with the minor Farai Benjamin Dzvova's education, more particularly in that the respondents be and are hereby barred from:
 - (i) separating Farai Benjamin Dzvova from his classmates;
 - (ii) otherwise detaining Farai Benjamin Dzvova in solitary or in the sole company of adults;
 - (iii) in any other way discriminating against Farai Benjamin Dzvova on the ^e basis of his hairstyle or his religious beliefs.
- (c) It is hereby declared that expulsion of a Rastafarian from school on the basis of his expression of his religious belief through his hairstyle is a contravention of ss 19 and 23 of the Constitution of Zimbabwe. ^f
- (d) The respondents shall pay the costs of this application.

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

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners

Civil Division of the Attorney-General's Office, respondent's legal practitioners ^h

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GARWE v ZIMIND PUBLISHERS (PVT) LTD & ORS 2007 (2) ZLR 207 (H)

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Citation	2007 (2) ZLR 207 (H)
Case No	Judgment No. HH-70-07
Court	High Court, Harare
Judge	Gwaunza JA
Heard	31 July 2006; 2 August 2006
Judgment	10 October 2007
Counsel	<i>S Chihambakwe</i> , for the plaintiff <i>S F Joubert</i> , with him <i>E W W Morris</i> , for the defendants

Case Type	Civil trial
Annotations	Link to case annotations

Flynote

c Damages — defamation — assessment — aggravating factors — bad reputation of plaintiff — relevance of — what must be shown — extent of publication — effect of — status of plaintiff — senior judge being defamed in his professional capacity — lack of apology or retraction — inflation — effect of — future inflation may not be considered

Delict — defamation — what is defamatory — ordinary meaning of words **d** used — reasonable reader's understanding of words used — context in which words are used — defences — qualified privilege — variance between true facts and what was reported — inference of improper motive — defence failing

Headnote

The plaintiff was Judge President of the High Court when he presided at the **e** trial for treason of Morgan Tsvangirai, the leader of the main opposition party in Zimbabwe. The trial was lengthy, spread over eighteen weeks, and at its conclusion the plaintiff indicated that judgment would be delivered on a stated date some five months later. When that date came, the judgment was postponed to a future date. The first defendant's **f** newspaper published an article in which it stated that the assessors in the trial had "blocked" the plaintiff from delivering his judgment before they could review transcripts of the trial proceedings. The plaintiff wrote to the editors, explaining the procedures involved in criminal trials and asking for a retraction. The defendants denied that the statement was defamatory or that they had suggested that the plaintiff had already **g** prepared his judgment.

The plaintiff issued summons for defamation. The amount claimed was revised upwards on the date the matter came for trial, on the grounds of the rate of inflation affecting the country. He claimed that the words were defamatory because an ordinary reader would understand them to mean **h** that he had improperly reached a decision without consulting his

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assessors and would have delivered a single man's verdict unless the **a** assessors had stopped him. Evidence was led of articles, published outside the country, which directly alleged that the plaintiff had decided on a verdict without consulting the assessors, although the plaintiff denied any knowledge of such articles. These articles also claimed that the assessors had stopped the judge from delivering his judgment.

The defence denied that the article was defamatory or that substantial **b** damages were justified. The defence also raised the defences of qualified privilege, justification, fair comment and lack of *animus injuriandi*.

Held, that the ordinary meaning of words is determined by looking at the context in which they were uttered. The judge must decide both whether the words in their ordinary significance are *capable* of bearing a **c** defamatory meaning and whether a reasonable reader *would* regard the words in a defamatory light. The reasonable reader is a person who gives a reasonable meaning to the words used, within the context of the document as a whole. *In casu*, the context included the environment that led to the investigations into the matter being carried out by the newspaper. **d**

Held, further, that in the context in which the words were published, the ordinary reader would have understood the word "blocked" by its ordinary dictionary meanings of "stopped" or "prevented. To expect the reader, even after reading the entire article, to understand the word "blocked" to mean "delayed" would be to expect too much from him. Such a reader would not have engaged in an exercise to subtly, elaborately or **e** intellectually analyse the word in order to come up with a meaning different from the one ordinarily assigned to it. Similarly, the ordinary reader who reads about anything to do with the courts or with a judge would understand the word "judgment" to mean the verdict or the judge's decision on the matter. The ordinary reader would have **f** understood that the assessors had *stopped* the plaintiff from passing his (single man's) prepared

judgment in the criminal case and that the plaintiff wished to do this improperly, if not corruptly, without consulting the assessors.

Held, further, that with regard to the defence of qualified privilege, the defendants relied on the situation relating to the discharge of a duty to ^g a person who has a corresponding right to receive the information. While the criminal trial and its outcome were matters of public importance, the variance between what the defendants established to be the true facts concerning the postponement of the judgment, and what they went on to report, was difficult to explain except in terms of their being driven by ^h

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^a an improper motive. They thus, forfeited their right to the protection of the defence of qualified privilege.

Held, further, that with regard to the defence of justification, what the defendants wrote was untrue. The language used in the statement complained of went beyond mere exaggeration: the defendants, having established the truth about the circumstances surrounding the ^b postponement of the judgment, went on to publish statements that directly contradicted such truth.

Held, further, that for the defence of fair comment to succeed, the allegation in question must be a comment (opinion), it must be fair, the factual allegations on which the comment is made must be true and the comment ^c must be on a matter of public interest. The words complained of could not be said to be a correct interpretation of the facts. Even allowing for the exaggeration that normally characterises the reporting of facts or events in newspaper articles, the words exceeded the limits of exaggeration, and so could hardly be said to be fair comment. The defendants' use of words such as "blocked" and "demanded", when ^d they knew very well that this was not what had happened, smacked of dishonesty and malice.

Held, further, that *animus injuriandi* is a subjective intention on the part of an individual as opposed to the mass media to defame or injure the reputation of the plaintiff. This intention covers *dolus directus*, *dolus indirectus* and *dolus eventualis*. The evidence showed that the ^e defendants, in writing and publishing the words complained of, were motivated by *dolus directus* as well as the other forms of *dolus*. The two defendants reduced what were essentially rumours doing the rounds concerning the postponement of the judgment, to writing, and published them in a local newspaper. They must have foreseen the eventual harm to the plaintiff of the statement complained of.

^f *Held*, further, with regard to "punitive" damages, factors aggravating the defendants' conduct may serve to increase the amount awarded to the plaintiff as compensation, either to vindicate his reputation or to act as a *solatium*. While evidence of the general bad reputation of a plaintiff may be pleaded in mitigation of damages, evidence that other people had ^g made similar defamatory statements about the plaintiff is not admissible to show that the plaintiff already had a tarnished reputation. Although not a large number of copies of the newspaper were sold, the extent of the publication of the newspaper included internet access and therefore the distribution of the article complained of was fairly wide. The ^h defamation was a serious one: given the plaintiff's position as the most

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senior High Court judge at the time, to suggest that he would have ^a attempted to so depart from established procedure as to wish to improperly exclude the assessors in the process of formulating and handing down judgment in a case that they had heard together was highly damaging to his professional integrity. To the extent that the defendants' subsequent statement might be termed a retraction of sorts, it clearly was neither ^b prompt (they refused to retract when asked to do so by the plaintiff before the matter was taken to court) nor was it as prominently displayed as was the article complained of. The timing and brevity of the statement suggested reluctance on the part of the defendants to make it, and also that it was grudgingly not spontaneously made.

Held, further, that the court could take judicial notice of the hyperinflationary ^c environment obtaining in Zimbabwe at the time of the publication and at the time of the trial. However, it

could not base its assessment on speculation as to the rate at which inflation might continue to rise, nor could it do so on the basis of whether it would rise at all. There was no basis for taking future inflation into account.

Cases cited

Associated Newspapers Ltd v Dingle [1962] 2 All ER 737 (HL); [1964] AC 371 (HL)
Buthlezi v Poorter & Ors 1975 (4) SA 608 (WLD)
Cassell & Co Ltd v Broome [1972] All ER 801(HL), [1972] 1 AC 1027
Chinamasa v Jongwe Printing & Publishing Co (Pvt) Ltd 1994 (1) ZLR 133 (H) ^E
Demmers v Wyllie & Ors 1980 (1) SA 835 (AD)
Dorfman v Africaanse Pers Publikasies (Edms) Bpk en Andere 1966 (1) PH J9 (A)
Dymes v Natal Newspapers Ltd 1937 NPD 85 ^H
Gelb v Hawkins 1960 (3) SA 687 (A)
Johnson v Rand Daily Mails 1928 AD 190
McGuire v Western Morning News Co Ltd [1903] 2 KB 100
Mtsetwa v Tenda Transport & Ors HH-89-00
O'Brien v Marquis of Salisbury (1889) 6 TLR 133
S A Associated Newspapers Ltd v Samuels 1980 (1) SA 24 (A) ^G
S A Associated Newspapers Ltd v Yutar 1969 (2) SA 442 (A)
Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Anor 1994 (1) ZLR 445 (H)
Ward-Jackson v Cape Times Ltd 1910 WLD 257
Zvobgo v Kingstons Ltd 1986 (2) ZLR 310 (H) ^H

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Case information

S Chihambakwe, for the plaintiff ^A
S F Joubert, with him E W W Morris, for the defendants

Judgment

GWAUNZA JA: I was assigned from the Supreme Court to the High Court specifically to hear this matter.

The trial was conducted over a period of two days, at the end of which it was ^B agreed between the parties that they would prepare their written submissions and submit them by certain specified dates. The deadlines were not all met, a circumstance that contributed to the delay in the preparation and handing down of this judgment.

At the time the cause of action *in casu* arose, the plaintiff was the Judge ^C President of the High Court of Zimbabwe. He was elevated to the Supreme Court a year or so after the publication of the article in question. The first, second and third defendants are, respectively, the publishers, editor and correspondent of a weekly news publication titled "*The Zimbabwe Independent*", hereinafter referred to as "*The Independent*."

The essential facts of the matter are not in dispute and are as follows.

^D On 26 February 2004, a criminal trial presided over by the plaintiff, sitting with two assessors, came to an end. The trial had lasted some eighteen weeks and attracted considerable interest nationally and internationally. On trial, for high treason, was Morgan Tsvangirai, the President of an opposition political party called the Movement for Democratic Change (the "MDC"). At the end of that ^E trial the plaintiff, as the presiding judge, had indicated that he expected judgment in the

matter to be handed down on 29 July 2004. When this date came, he was, however, for reasons that are now in dispute, not able to hand down the judgment and postponed the event to a future date. Because of the interest the trial had generated, the postponement of the judgment gave rise to a lot of speculation, particularly concerning the possible reasons behind ^F it.

Reporting on the postponement, *The Independent* of 30 July 2004 carried an article containing the following passage.

"TSVANGIRAI TREASON JUDGMENT BLOCKED:

Assessors in the Movement for Democratic Change leader Morgan G Tsvangirai's treason case have blocked Judge President Paddington Garwe from passing his judgment before they could review transcripts of the trial, the *Zimbabwe Independent* has gathered."

The plaintiff regarded these words as being both misleading and highly defamatory of him, and took two courses of action. Firstly, and on the same ^H date as the article appeared in *The Independent*, he asked the Registrar of the

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High Court to prepare and transmit to the second respondent a detailed ^A response explaining the procedures followed in criminal trials in the High Court, including the role of assessors. The Registrar in his response took issue with, among other concerns, the suggestion in the article complained of, that the plaintiff had already prepared a judgment in the Tsvangirai trial. He referred to the article in question as "misleading and mischievous". Secondly, and on ^B 3 August 2004, the plaintiff wrote a letter of protest to the defendants and asked for a retraction of the statement in question. In their response dated 5 August 2004, the defendants disputed the plaintiff's claim that the words were defamatory, and indicated that no retraction would be forthcoming. The second defendant, however, caused the Registrar's letter to be published in *The Independent's* edition of the following week, on the same page as the ^C column headed "Editor's Memo". At the end of the editor's memo of that day, titled "Windshield Smash", the second respondent appended two paragraphs in which he "placed on record" that, contrary to the Registrar's contention, the defendants had not suggested in their article that the plaintiff had already prepared a judgment. Nor, the second respondent added, was it their intention to do so. ^D

The plaintiff subsequently issued summons against the three defendants, jointly and severally, the one paying the other to be absolved, for damages for defamation arising out of the article in question. He initially claimed \$250 000 (old currency) as damages but revised this amount upwards, firstly to \$1 000 000 (old currency) and on the day the trial commenced, to \$75 000 000 ^E (old currency).

The reason for these revisions in the *quantum* of damages claimed was given in the main, as the then prevailing high rate of inflation. While submitting that to his knowledge, there was no law that recognised inflation as a ground for raising a monetary claim upwards, the defendants' counsel, Mr *Joubert*, said the defendants would however not object to the amendment, although they ^F would make submissions on this issue later.

The plaintiff claims that the words complained of were false, malicious and defamatory of him. Further, it is claimed by the plaintiff that such words meant, and were understood by the general readership locally and internationally, to mean that: ^G

- (a) he had reached a verdict in the Tsvangirai trial/case without discussing the evidence with the assessors;
- (b) had the assessors not stopped him, he would have delivered a single man's judgment, thereby acting wrongfully, unlawfully and illegally; and
- (c) that he was thus a corrupt and unjust person. ^H

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^A The plaintiff goes on to say that as a result of the aforesaid defamatory words, he had suffered damage to his good name, fame and reputation and had sustained damages in the amounts indicated. In this connection, I will take judicial notice of the fact that in August 2006, the Government of Zimbabwe effected changes to its currency by removing three zeros therefrom, but without reducing the value of such currency in any way. As a result of this ^B currency change, the

plaintiff's initial claim of \$250 000 000 would currently translate to \$250 000, while the second and third amendments to his claim would, in today's terms, translate to \$1 000 000 and \$75 000 000, respectively. I shall, for obvious reasons, determine the matter of the damages claimed, on the basis of the new currency.

1. EVIDENCE

The plaintiff gave evidence on his own behalf and called two witnesses, Mr Muguyo ("Muguyo") who at the relevant time was a judge's clerk attached to the plaintiff, and Mr Dangarembizi ("Dangarembizi") who sat as an assessor with the plaintiff during the trial referred to in the article. The defendants' instructing legal practitioner, Mr *Chagonda* ("Chagonda") gave evidence for the first defendant. The second defendant gave evidence on his own behalf and that of the first defendant, while the third defendant gave evidence on his own behalf.

In his evidence, the plaintiff chronicled his professional advancement within the magistracy (where he was once Chief Magistrate) and judiciary, among other legal spheres. He was also the chairman of the National Council of Community Service, and had been involved in criminal jurisprudence as a Board member of Penal Reform International since 1999. He was also a founder member of the International Correctional Services and a Board member of several international judicial bodies.

The plaintiff then explained the process that ensues after the end of a criminal trial in the High Court. He said that it was normal, after closing submissions by the parties' legal counsel, for a judge to reserve his or her judgment indefinitely or indicate when judgment might be handed down. He explained that the judge would normally meet with the two assessors who sat with him and discuss mostly the evidence relating to factual matters, while leaving issues of law to be determined by the judge. After this, the judge would prepare a judgment and indicate when it would be handed down. Before this date, however, something might happen to cause the judge to postpone the handing down of the judgment. During the trial, both the judge and the assessors record the evidence in longhand even though transcription of the record of proceedings normally took place after close of argument, if one of

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the litigants wished to appeal. In the case at hand, the trial had been a long one. At its end, he had about twenty three note books containing handwritten notes. Judgment was reserved and everybody involved in the trial was exhausted. He had not looked at the matter – that is, considered his notes and the record – until after the second term of the High Court started on 2 May 2004.

He said he must have met with the assessors then, and suggested they all went back to their notes to refresh their memories. Hoping that, by the end of that term they would be ready with the judgment, he had given a provisional date of 29 July 2004, for the handing down of the judgment.

The plaintiff explained that, at the request of counsel from both sides, special arrangements had been made by the Registrar for the transcription of the record to be done simultaneously with the trial. Around June 2004, the assessors were still studying their notes and he was able to meet with them several times around mid-July, to discuss the evidence. After a while, there was some confusion as to what had happened at the various meetings held with the assessors, so the plaintiff suggested that the assessors too, be given transcripts of the proceedings. Since only three copies had by that time been made – one each for the prosecutor, defence counsel and the plaintiff – there was need to postpone handing down of the judgment to give time to the assessors to review the transcripts. The judgment had, in fact, not yet been prepared, such process having only started from the end of August to September 2004.

The plaintiff submitted that the issue of availing the transcripts to the assessors was his own initiative, and that the transcripts were bulky and lengthy. He emphatically denied that the assessors had "blocked" him from passing judgment in the matter, saying such an assertion was blatantly untrue. He denied, too, that the assessors had at any time demanded the transcripts or forced him to postpone handing down of the judgment, saying the judgment had at that time not even been prepared. He challenged the defence put up by the defendants that the words complained of were fair comment, saying they had no factual basis and were false. The plaintiff said he was hurt after seeing the article in question, and added that the decision to institute these proceedings

had not been easy. He had, despite making the request, received no apology from the defendants, who had also refused to withdraw the statement. ^g

Asked by his legal counsel, Mr *Chihambakwe*, to justify the \$75 000 000 (old currency) that he was claiming as damages, the plaintiff noted that he was not "a small man" in legal circles, and was well known internationally, and in particular by Governments in Malawi, Kenya and other African jurisdictions through his involvement in the community service programme. He added that ^h

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At his position on the boards of various international institutions had necessitated extensive travel around the world, and his work was well known and commended. He had also been a judicial officer for many years, and currently occupied a very senior position in the judiciary. Against this background, it was his view that for anybody to suggest he had acted in the manner alleged in the article, was highly defamatory of him. The newspaper in question had ^b a wide circulation within and without Zimbabwe, and he knew that the article had been read far and wide, to the detriment of his reputation.

The plaintiff was subjected to a lengthy cross-examination. He conceded that many things had been said and written about him, some of them unkind and untrue. When his attention was drawn to what defence counsel, Mr *Joubert*, referred to as a "highly defamatory" article about him, that is, the plaintiff, ^c published in the United Kingdom's *Daily Telegraph* newspaper, the plaintiff responded that he was not aware of this article, nor could he have accessed it on the internet, since he had no access to such facility. He was also not aware of the other articles appearing in international newspapers, that defence counsel referred to as having said things about the plaintiff that were "much worse" than the statement complained of. The plaintiff conceded that *The* ^d *Daily Telegraph* had a more extensive circulation than *The Zimbabwe Independent* since the United Kingdom had wider readership than Zimbabwe. He admitted that the Tsvangirai case had attracted a lot of interest and speculation, especially after rumours had started circulating in Harare about the possible verdict of the court in the case. He said that both legal counsel ^e had received adequate notice of the postponement of the handing down of judgment. He conceded that he had consulted with the Registrar of the High Court over the response to the article in question, that the latter submitted to the media, although he could not remember whether he had actually examined the draft before it was submitted for publication.

The plaintiff denied knowledge of the unsuccessful attempt that the second ^f respondent was said to have made, to contact him over and before publication of the article in question. He conceded that everybody might not have been aware that the judgment date of 29 July 2004 was provisional, and also that journalists, in trying to find out why, might have been told that judgment had been postponed to allow time for the assessors to study the transcript. However, he questioned where, if that was the case, the issue of "blocking" ^g the judgment had come from, even assuming that journalists may have wanted to capture readers' interest in the judgment through exaggeration. The plaintiff submitted that while he had initially not been aware of the rumour doing the rounds, to the effect that he was ready with a judgment to convict Tsvangirai before the publication of the article in question, he had become ^h aware of it later.

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It was also put to the plaintiff that his impression was wrong, that other ^a newspapers within and without Zimbabwe had drawn from *Zimbabwe Independent* article and subsequently printed other articles on the same subject matter. His attention was drawn to exhibit 4 which was an excerpt from an article in a South African newspaper, the *Cape Argus*. It was published on 28 July 2004, a day before *Zimbabwe Independent* article. The plaintiff ^b asserted he was not aware of that article or its contents. He dismissed as untrue the statement in that article, that judgment in the case had been "postponed indefinitely this week because the presiding judge had reached a verdict without consulting his two assessors". It also said that the reporter had been "authoritatively" told that the plaintiff had "convicted Tsvangirai over the alleged plot to kill Mugabe but that the assessors refused to rubber stamp this ^c decision".

As to whether or not the article complained of had alleged that he had not consulted the assessors, the plaintiff said it was implied in the article, if one read all of it. He denied that the word "blocked",

which he himself understood to mean “stopped” could be read or interpreted to mean “delayed”, since it was followed by the word “before” and not “because”. In response to the ^D question whether he had seen the “retraction” published by the defendant in their next edition of *The Zimbabwe Independent*, the plaintiff said he had not seen it, since, as it later emerged, the “retraction” had been “hidden away” at the bottom of another article dealing with matters unrelated to the trial of Tsvangirai. The plaintiff was asked why he had not looked for a copy of *The* ^E *Daily Telegraph* newspaper, which the defendants’ legal practitioners referred to in their letter to his (the plaintiff’s) legal practitioner dated 5 August 2004 (Exh. 7). It was stated in that letter that *The Daily Telegraph* article had actually alleged that the plaintiff had reached a verdict, which he wished to deliver without consulting the assessors. The plaintiff responded that he had not looked for the article because he had no access to the internet. He added that, ^F while he was aware of other articles highly defamatory of him, he had not gone out of his way to look for them either. Asked why he did not sue all those other publication as well, the plaintiff responded that he would not have afforded the foreign currency to sue those international publications. He had not thought of asking the Registrar to write to the publications, as he had done with *The Zimbabwe Independent*, even though he doubted that the letter ^G would have elicited any response.

The plaintiff was asked to comment on a variety of other articles appearing in some international publications, which made allegations against him that the defendants said were far worse in their defamatory content, than the statement ^H

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^A complained of (Exh. 8, 9, 14). While he may have heard about those articles, the plaintiff maintained that the current case was the worst since it suggested that he had abdicated his responsibilities as a judge and corruptly sought to hand down a judgment without the knowledge of the assessors.

In re-examination, the plaintiff said that, apart from the article in *The Daily Telegraph*, he had, until the previous day, not been aware of the other ^B international articles that were highly defamatory of him. He denied causing the arrest of *The Zimbabwe Independent* journalists following publication of the article, even though he was the complainant.

Generally, the plaintiff gave his evidence well and with confidence, although he hesitated and was somewhat evasive over the question relating to the arrest ^C of the second and third respondents after publication of the article complained of.

The plaintiff called his then clerk, Mr Muguyo, as his first witness. The latter confirmed that he had, at the instruction of the plaintiff, contacted both the State and defence counsel and asked them for their copies of the transcript so they could be availed to the assessors. Although he could not remember ^D the exact number of times he had communicated with the defendants’ legal practitioner, Mr *Chagonda*, he was certain he must have conveyed to him news of the postponement of the judgment several weeks beforehand. Under cross-examination he denied ever receiving any telephone calls from the second defendant, even though he knew him by sight. He said he could not ^E recall whether he was on duty on 28 and 29 July 2004.

Although he exhibited some confusion over the dates on which certain actions were taken by him, no negative comment can be made about Muguyo’s credibility as a witness.

The plaintiff’s next witness was Mr Joseph Dangarembizi, one of the assessors ^F who had sat with the plaintiff during the Tsvangirai trial. It should be noted that Mr Dangarembizi was said by the defendants’ counsel, to have initially agreed to be the defendants’ witness but had, apparently, decided to switch over to the plaintiff’s side. Be that as it may, Dangarembizi explained in his evidence-in-chief that he had been an assessor since 1994. After the Tsvangirai trial he, the other assessor and the plaintiff had gone into the latter’s chambers ^G to discuss the matter and had been told they would be given transcripts. He added that the judge had not yet made a decision on the matter, which decision was made long after the assessors had received the transcripts. He added that after he heard about the publication of the article in question, he had looked for the newspaper and read it for himself. Dangarembizi denied that he and the ^H other assessor had blocked the judgment, or demanded to see the transcripts.

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Under cross-examination, Dangarembizi said he and the other assessor had ^A met with the plaintiff to discuss the case the very next day after the conclusion of the trial. He however could not remember when the trial ended, whether or not both counsel filed heads of argument at the end of the trial, or whether the plaintiff had mentioned the need to wait for the transcripts of the record. He said he did not know that transcripts were being prepared as the trial ^B proceeded. He admitted knowing the third defendant, as a reporter, but did not recall him phoning or visiting him at his house to discuss the case. He did not recall being informed that 29 July 2004 was the date on which judgment was to be passed. He had sought this information from the Registrar and had then confirmed it with the Judge's clerk. As for the postponement of the handing down of the judgment, it was the witness's evidence that he had been informed ^C of this fact by the plaintiff's clerk. He denied that he had told the third defendant that he and the other assessor were waiting for the transcripts, and emphasised that the postponement of the judgment had nothing to do with the transcripts.

Mr Dangarembizi's demeanour as a witness was not impressive. He gave the impression of tailoring his evidence in order to distance himself from the article ^D that attributed to him a role in holding up the passing of the judgment. His evidence on the issue of the transcripts was inconsistent with the weight of other evidence on the matter. His memory of events was also selective as he resorted to memory loss on questions that he did not wish to answer. Finally, Dangarembizi's denial of having had any visit from, or communication with, ^E the third respondent over the delayed judgment, lacked credibility. His evidence, in my view, must be treated with caution.

Dangarembizi's evidence marked the end of the plaintiff's case.

The defence case started with evidence from Mr Chagonda who was Tsvangirai's legal practitioner in the main trial. He confirmed that transcripts ^F of the record were being prepared as the trial progressed. While the transcript came in batches, it was possible at the end, after receiving the full record, to make several copies for the advocates, the accused and himself, as well as a spare copy. He had received a call from the plaintiff's clerk, around 4 July 2004, to the effect that judgment would be delivered on 29 July 2004. He immediately shared the information with the local and foreign counsel who had represented ^G Tsvangirai in the trial. The latter started making arrangements to travel to Zimbabwe and avail himself on the date indicated. Around 20 July 2004, he received another call from the plaintiff's clerk, informing him that judgment had been postponed because the assessors had requested copies of the transcript. He then offered to assist by giving the assessors a copy of the transcript. The ^H

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^A second defendant telephoned him a few days later seeking confirmation of the postponement of the judgment, as well as the reasons for such postponement. He gave the second defendant the reasons as given to him by the clerk.

Under cross-examination, the witness said he himself had used the words "postponed *sine die*", not "block", because he had not understood the plaintiff's clerk to say the assessors had blocked the judgment. While he knew ^B the second defendant, the witness said he did not know the third defendant.

Chagonda gave his evidence confidently and was not shaken under cross-examination.

The third defendant, Augustine Mukaro, was the second witness for the defence. He was a reporter for *The Independent* and was responsible for ^C writing the article in question. He prefaced his evidence with the statement that the postponement of the judgment was high profile news and that it was, at that time, attracting a lot of interest, excitement and speculation. Many articles had also been written on the subject in the international press, and transmitted through the electronic media. The issue was discussed at a diary meeting at *The Independent's* offices and it emerged that, despite speculation and ^D numerous rumours doing the rounds nationally and internationally, no concrete reason had emerged as to why the judgment had been postponed. As *The Independent* treated all the rumours as speculation, he was given the mandate to investigate the matter. Having decided to talk to various people, he on 27 July 2004, telephoned one of the two assessors who had sat with the ^E plaintiff in the Tsvangirai trial, Mr Dangarembizi, because he had known him for a long time. By agreement, the two then met at Mr Dangarembizi's home in Mandara, which address he had visited before. Mr Dangarembizi told him that the assessors had requested from the plaintiff copies of the transcript because their notes were not clear. Mr Dangarembizi had also, in answer to

the question whether there was a judgment ready, informed him that there was ^F no judgment as yet, since the judge would not hand it down without consulting with the assessors. After this interview, Mukaro had proceeded to interview other people in the legal profession, who included Lovemore Madhuku, a law lecturer who is also the chairman of the National Constitutional Assembly, an NGO whose main mandate is to advocate for a new constitution for Zimbabwe. Madhuku explained to him the role of assessors in a trial. ^G Mutero also contacted someone from the Zimbabwe Lawyers for Human Rights, the defence lawyer, Mr Chagonda, and a retired judge. He had then written the article on 29 July 2004 and discussed it with the editor several times. He had also "cross checked" the information he had gathered because he was ^H concerned about writing the truth. Mukaro admitted using the word "block"

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which had given rise to this dispute, and submitted he had actually intended ^A to say the judgment had been delayed or deferred. He added that it was not his intention to infer that the judgment had been written.

Under cross-examination, Mukaro said he took care to use words carefully in his articles, and that he had never received any criticism over the way he wrote his articles. He said his superiors had not effected much change to the article ^B although the heading had been put in by the sub editors who had however showed it to him first. Asked whether he agreed with the use of the word "blocked", Mukaro hesitated somewhat before answering in the affirmative. He was also asked what he had meant by the words "passing his judgment". His response was that the words must be read in context, but he did not mean to say the plaintiff had a written judgment that he was ready to pass. He went ^C on to say that the word "blocked" was one of the alternative meanings attributed to words like "delay", "impede" and so on in the *Thesaurus*.

Mukaro gave his evidence clearly, although, as indicated, he was somewhat shaken during cross-examination over the use of the word "blocked", and its meaning, given the information he said he had gathered concerning the judgment in question. ^D

The next witness for the defence was Vincent T Kahiya ("Kahiya"), who gave a run-down of his educational, journalistic and public relations qualifications and explained that he was the custodian of editorial policy at *The Independent*. His job included ensuring that articles published in the newspaper conformed to both policy and laws governing their operations. He also wrote commentary ^E and other articles for the newspaper and represented it in any litigation by or against the newspaper. Prior to publication, it was also his job to read the newspaper back to front. This was because the media environment was a "minefield" and the need to check and cross check articles was paramount, in order to check for accuracy and prevent litigation against the paper for ^F defamation. He also ensured that anyone mentioned in the newspaper was given a chance to respond.

Kahiya confirmed that the Tsvangirayi trial had generated a lot of interest nationally and internationally, and added that close to the given date of judgment a number of meetings were held within civil society circles in order to speculate on the possible outcome of the trial and its impact on opposition ^G politics. While this had "spawned" many rumours, even more had been generated by news of the postponement of the judgment. He repeated what Mukaro said about wild stories being flighted in the international media, and in this respect summarised the "tone" prevailing at that time as being that:

- (1) there was a verdict ^H

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- (2) there was a judgment
- (3) the assessors had rebelled; and
- (4) the Government was in panic and did not know what to do.

Kahiya made reference to the diary meeting mentioned by Mukaro and said the latter's specific mandate was to find out: ^B

- (1) whether there was a judgment already prepared.
- (2) what the role of the assessors was in the trial process; and

(3) why the original date of judgment had been moved back.

Even though Mukaro had been given the mandate to investigate the story, he himself had called a number of people, and met with a retired judge, to c discuss the matter. The retired judge had told him that the plaintiff was unlikely to have attempted to hand down the judgment without consulting the assessors. The retired judge had gone on to explain the role of the assessors which was essentially, to help the judge on factual matters, although they would be "in the know" as to the verdict by the time it is given. The retired judge had advised him to contact the two assessors over the issue of the transcripts. d By Wednesday Mukaro had talked to Mr Dangarembizi and they then met to compare notes. He had then telephoned Mr Chagonda to ask about the postponement and was told the same story about the assessors and the transcripts. Since it was his wish to contact the plaintiff before publication of the article, Kahiya had attempted to do so but was told that the plaintiff was e not in the office. He had sat down with the reporter (Mukaro) and then finally had the story ready. However, it was no longer a page one story. He also explained the procedure followed in the publication of an article, saying the article goes to the news editor, who reads and asks any questions before sending it to the editor. Since he himself was acquainted with the matter, he had not sent it to the news editor.

f Even on the day of publication of the article, stories on the matter continued to appear on the internet. The witness denied that when he saw the article, he understood it to mean that a judgment had already been written, or that the assessors had stopped the plaintiff from handing it down. He explained that he had, after being advised of it over the phone, gone to the Registrar's office g to collect the letter from him which sought to put the record straight. He had also telephoned the Registrar to seek clarification on a number of issues mentioned in the letter. The letter was then published in its original form on the page in the newspaper that is reserved for contributions from people who would have been aggrieved by any of their articles. He denied that he intended h the article in question to be misleading or mischievous, since they had made

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the effort to verify its accuracy before publication. He also denied that the a story implied that a judgment had been written. He emphasised that he believed the article in question correctly reported on the matter, and that there was no intention on the part of the newspaper to defame the plaintiff.

Kahiya explained that the editor's page was reserved for the editor, and it was on this page that he wrote articles expressing his own views and opinions. As b indicated earlier, the page also had space for readers' letters. Kahiya said he stood by the short statement printed at the bottom of the editor's memorandum of the following week, in which it was recorded that the newspaper had not suggested in the article concerned, that the plaintiff had already prepared a judgment. Under cross-examination, Kahiya was asked why, in the article complained of, reference had been made to a judgment, when their investigations c had revealed that no judgment had in fact been written. His response was that "judgment" was meant to refer to the process of preparing and handing down a judgment, not the actual judgment. He went on to say that the assessors' concern was the need to consult the transcripts and cross check them against their notes. His understanding, having heard from a number of sources, was that the assessors had raised their objections with the Registrar, or perhaps d the plaintiff. Kahiya said he was not acquainted with Mr Nyatanga, the Registrar, and did not see the need to contact him over the matter, since it was the judge, and not Mr Nyatanga, who prepared the judgment. Kahiya was taken to task over consulting other people beside the plaintiff and the Registrar, and also over leaving it until 11.00 a.m. on the day before publication, e to look for the plaintiff. His response was that it was their choice to interview those other people and that they could not have sought to contact the plaintiff earlier since they were still gathering information. He added that when investigating an issue, it was their practice to consult people who have some link to the systems and processes involved, to explain these without necessarily referring to the specific case being investigated. They had considered it f important to talk to a retired judge because he had in the past sat with assessors and was certain to have an intimate knowledge and understanding of the process involved. Kahiya failed to give a direct answer when he was asked about his understanding of the word "blocked" and repeated that reference to "judgment" meant the process of coming up with a judgment, which process had been "deferred". Kahiya was asked why the "retraction" contained at the g bottom of his editor's memorandum of the following week's publication had not been given prominence. He explained that a retraction is normally placed on the

same page that the article complained of would have been published. However, in this case, the article had been given due prominence since many ^h

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A readers read the editor's memorandum. He treated the "retraction" as an apology.

Kahiya confirmed that on the date of publication, around 14 000 copies of the newspaper had been sold, and it could be that at least that number of people read the article. Another 150 copies had gone to South Africa. As for their website, Kahiya said they did not keep a daily record of the "hits" since they ^b did not record such data. It was therefore not possible to say how many people had read *The Zimbabwe Independent* on line. Asked whether they would write the same type of misleading article, Kahiya said it was not likely to ever happen again.

In re-examination, Kahiya said the article had indicated in its second paragraph ^c that the plaintiff would not have handed down the judgment without consulting the assessors, because that is what they believed.

Kahiya's account of the events leading to and surrounding the publication of the article in question was given with confidence. There were, however, parts of his evidence that, in my view, lacked credibility. One example is what he said was the intended meaning of the word "judgment" in the article ^d complained of. Kahiya was also somewhat evasive under cross-examination, when confronted with questions concerning his understanding of the word "blocked".

Kahiya was the last witness to give evidence in these proceedings.

2. THE ISSUES

^e The issues to be determined in this matter were agreed at the pre-trial conference and I will consider these in the light of the evidence placed before the court, as outlined above, but not necessarily in the order given.

The issues are as follows:

- (a) whether or not *The Zimbabwe Independent* is "widely" circulated as ^f alleged or at all;
- (b) whether or not the words complained of are false, malicious or defamatory of the plaintiff as alleged or at all;
- (c) whether or not the said words meant and were understood to mean, by the general readership locally and internationally that – ^g
 - (i) the plaintiff had reached a decision on Tsvangirai's treason trial case without discussing the evidence with the assessors;
 - (ii) the assessors stopped the plaintiff from delivering a single man's judgment;
 - (iii) had the plaintiff not been so stopped he would have acted wrongfully, ^h unlawfully and illegally; and

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- (iv) the plaintiff was a corrupt and unjust person as alleged or at all; ^a
- (d) whether the words complained of, published together with other words, would have disabused any reasonable reader accept to the meaning attributed to those words as alleged or at all;
- (e) whether the said words were published on a privileged occasion as alleged or at all;
- (f) whether the words complained of were substantially true, in the public interest or fair comment as alleged or at all; ^b
- (g) whether the plaintiff suffered damages to his good name, fame and reputation; and;
- (h) whether the plaintiff is entitled to damages in the sum claimed or any ^c amount.

3. MEANING OF THE WORDS COMPLAINED OF

Jonathan Burchell in *The Law of Defamation in South Africa* 1 ed at 85 writes as follows about the significance of the meaning of the words complained of, in defamation cases: ^d

"As has been seen, the meaning to be attached to words is probably the most important single factor in a defamation case, since it is of cardinal significance at so many stages' (Report of the Committee on Defamation (Faulks Committee) (Cmnd 5909 (1975) para 92."

It is an established rule of the law that the ordinary meaning of words is ^ε determined by looking at the context in which they were uttered. ¹ According to Burchell *op cit*, at 88, it is the judge who must decide both whether the words in their ordinary significance are *capable* of bearing a defamatory meaning and whether a reasonable reader *would* regard the words in a defamatory light. The reasonable reader is aptly described by the learned judge in the case of *Demmers v Wyllie & Ors* 1980 (1) SA 835 (A) at 840, in these terms: ^ƒ

"[The reasonable person or reasonable man] is a person who gives a reasonable meaning to the words used within the context of the document as a whole and excludes a person who is prepared to give a meaning to those words which cannot reasonably be attributed thereto."

Having established the correct approach in considering the ordinary meaning of the words complained of, it follows that such context must be defined. ^g

In the case at hand, the immediate context would be the newspaper article in which the words complained of appeared. In its turn, the article would have

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^a to be considered within the context represented by the newspaper as a whole, that is, *The Zimbabwe Independent*.

The article read as follows:

"TSVANGIRAI TREASON JUDGMENT BLOCKED

Assessors in Movement for Democratic Change leader Morgan ^b Tsvangirai's treason case have blocked Judge President Paddington Garwe from passing his judgment before they could review transcripts of the trial, the Zimbabwe Independent has gathered.

Garwe was last week obliged to indefinitely postpone the judgment when the two assessors, Major Misheck Nyandoro and Joseph Dangarembizi, demanded recorded transcripts of the proceedings. The judgment should ^c have been handed down yesterday but had to be postponed after the assessors raised objections.

Tsvangirai is accused of plotting to assassinate President Robert Mugabe ahead of the presidential poll in 2002. The outcome of Tsvangirai's treason trial is crucial in efforts to find an internal settlement in Zimbabwe. Diplomatic sources this week said Nigeria and South Africa were watching ^d the proceedings with keen interest.

Legal experts said, procedurally, assessors should have been given tapes and transcripts to enable them to make informed assessments and a meaningful contribution towards the Judge's verdict.

The experts said in the Tsvangirai case, the Judge would not have made a ruling without the views of the assessors.

^e 'A verdict is an issue of majority vote', law lecturer and NCA head Lovemore Madhuku said. 'In the case of Tsvangirai, at least two out of the three should concur on whether he is guilty or not'.

Sources in the justice system this week said the only records the assessors had were notes which they scribbled during the lengthy trial.

The sources said by late yesterday the assessors had not been availed ^f with the necessary documentation and audio tapes.

'The assessors have not yet received the recorded transcripts they asked for', a source said. 'What this entails is that there will be a lengthy delay in handing down judgment.'

It is still not clear how a date for the judgment was set before the assessors ^g were ready.

Tsvangirai's trial started in February last year and ended in February this year. Charges against Tsvangirai arose from secretly recorded meetings between him and Ari Ben-Menashe, president of a Canadian-based public relations firm, Dickens & Madson, in which the idea of "eliminating ^h Mugabe" was brought up.

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Defence lawyers have argued that the videotape on which the alleged plot ^a to assassinate Mugabe was based was defective and could not be relied on."

On the evidence before the court, particularly that from the defendants and their witnesses, there was an even wider context within which I am satisfied the words complained of must be understood.

This was the environment that ^B led to the investigations into the matter being carried out by *The Independent*. The environment was described as being charged with speculation and rumour concerning the reasons for the postponement of the Tsvangirai judgment. The speculation and rumours were attributed to some print and electronic news items originating outside Zimbabwe, but nevertheless accessible to some Zimbabwean readers. These news items, the court was ^C informed, contained such sensational content as "Lay assessors block judge's guilty verdict on Tsvangirai" "Assessors vehemently disagreed with the judge's guilty verdict and refused to rubberstamp his decision", "assessors were enraged" and "assessors revolt".

This, then, is the context within which I must now consider the meaning of the words complained of. In doing this, I shall derive some useful guidance ^D from the following words by Holmes JA in *Dorfmann v Afrikaanse Pers Publikasies (Edms) Bpk en Andere* 1966 (1) PH J 9 (A) at 45:

"A court deciding whether a newspaper report is defamatory must ask itself what impression the ordinary reader would be likely to gain from it. In such an enquiry, the court must eschew any intellectual analysis of the ^E contents of the report and of its implications and must also be careful not to attribute to the ordinary reader a tendency towards such an analysis or an ability to recall more than an outline or overall impression of what he or she has just read ..."

Although it is important to consider the ordinary meaning of all the words complained of, it is evident from the evidence placed before the court that the ^F two words within the offending statement that were the subject of dispute *vis-à-vis* their ordinary meaning, were "blocked" and "judgment". The plaintiff submitted that the ordinary meaning of the word "blocked" was "stopped". Further, therefore, that the word, used in the context that it was, was understood by the ordinary reader to mean that the assessors had stopped him from passing his (prepared) judgment on the Tsvangirai case without the ^G assessors' input.

The defendants deny that the word "blocked" was used in the sense alleged by the plaintiff. In the defendants' heads of argument, recourse is had to the *Oxford English Dictionary* definition of the word "blocked", which is given as: ^H

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A "To obstruct or close with obstacles, to obstruct the way or course; to postpone or prevent."

It is accordingly argued for the defendants that if looked at as a whole, the article in question did not suggest that the assessors had prevented or obstructed the judgment altogether, in the sense that no judgment would ever be given, but merely that the passing of any judgment was to be "delayed" ^B or postponed to a day later than that originally set.

I am not persuaded by the defendants' argument.

The ordinary reader, in my view, would have understood the word "blocked" to mean "stop" or as defined in the *Oxford English Dictionary*, "put obstacles in the way of, prevent". To expect the reader, even after reading the entire ^C article, to understand the word "blocked" to mean "delayed" would, in my view, be to expect too much from him. Furthermore, the word "delayed" is not mentioned anywhere in the article. Instead, what the ordinary reader would understand is that the judgment had been stopped, because the assessors had made certain demands. This, as suggested in the second paragraph of the article, had "obliged" the plaintiff to postpone the judgment.

^D In the passage cited below, Burchell, *op cit* at 85 describes a reasonable reader and the manner in which he is likely to assimilate what he reads in a newspaper article:

"... the reasonable reader does have shortcomings – he often skims through a publication, he may have a capacity for implication and be prone ^E to draw derogatory inferences. He may also be guilty of a certain amount of 'loose thinking and will jump to conclusions more readily than a man trained in the caution of the law'. (*Johnson v Rand Daily Mails supra*. Similarly, the reasonable reader does not engage in *elaborate and overly subtle analysis*.

It is important to bear in mind the ordinary or natural meaning of words ^F includes what the ordinary or reasonable person will infer from them" (my emphasis).

I am satisfied that a reasonable reader, such as the one described above, having read the article in question, would not have given to the word "blocked" used twice in the top part of the article a meaning which would not reasonably be attributed to it. Such reader, I am satisfied, would not have ^G engaged in an exercise to subtly, elaborately or intellectually analyse the word in order to come

up with a meaning different from the one ordinarily assigned to it. It is important in this respect to remember that the ordinary meaning of a word is not always its dictionary meaning.

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In relation to the word "judgment" the defendants submit that, in the context ^A in which it was used, "judgment" was meant to convey the meaning that the process of passing judgment had been delayed. I am again not persuaded by this argument. The ordinary reader who reads about anything to do with the courts or a judge, would, in my view, understand the word to mean the verdict or the judge's decision on the matter. An ordinary reader is not likely to appreciate the fact that there is a process attached to the passing of a ^B judgment, much less the nature of such process. To then expect such reader to understand the words "pass his judgment" to mean a process whose existence and nature the reader is not aware of would, in my view, be to do precisely what the learned judge quoted above said should not be done, that is, attribute to the ordinary reader "a tendency towards such (intellectual) ^C analysis". This is particularly so, given what has already been referred to, that is, the lack of an ordinary reader's capacity to read more into the words that he or she reads, than what has been printed. In any case, the word "his" placed immediately before "judgment" in the statement complained of would tend to negate the suggestion that the word 'judgment' was meant, or understood, to refer to the "process of passing judgment". ^D

As already indicated, the meaning of the words complained of must be understood within the context of the article as a whole. The defendants contend that if the words complained of were to be read within such context, it would be evident that the defendant was not suggesting that the plaintiff had reached a decision or prepared a judgment without consulting or conferring with the assessors. To bolster this argument, reference is made to paragraphs ^E 6 and 8 of the articles in which "sources" are quoted as saying in effect, that the plaintiff would not have made a ruling without the assessors' views, and that, since the assessors were yet to see the transcripts in question there would be a lengthy delay in handing down judgment.

The plaintiff denies this was the effect of the legal experts' comments and ^F argues that the experts quoted were simply commenting on the law and the suggestion put to them that the plaintiff had to be stopped by the assessors from passing his judgment. He argues therefore, that what the legal experts said would have had no effect on the reader's understanding of the meaning of the words complained of.

I find the plaintiff's argument to be persuasive. ^G

On the authority cited above, the court, in deciding what impression an ordinary reader would gain from the words complained of, must be careful not to attribute to the reader:

"an ability to recall more than an outline or overall impression of what he ^H or she has just read ..."

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^A Applied to the circumstances of this case, I am of the view that an ordinary reader would not have had his understanding of the words complained of, as already determined, altered by what the legal experts were quoted as having said. The legal experts were commenting on issues to do with the law. Before a reader's understanding of the offending words could shift to what the defendants aver was their real meaning, such reader would, in my view, have ^B to resort to some "intellectual analysis" of the article in question. As already indicated, an ordinary reader normally does not possess a tendency towards such type of analysis, especially when it concerns an area of specialisation that he or she may not be schooled in.

Going back to the words complained of in the light of what I have determined ^C the ordinary reader would have understood the words "blocked" and "judgment" to mean, I am satisfied such reader would have understood that the assessors had *stopped* the plaintiff from passing his (single man's) prepared judgment in the Tsvangirai case. Further to that, the reader would have understood that the plaintiff wished to do this improperly if not corruptly, without consulting the assessors. The ordinary reader would also have ^D understood that as a result of the assessors' demand for recorded transcripts of the trial proceedings, and their "raising of objections," the plaintiff was obliged to postpone the judgment indefinitely. As for what the legal experts are quoted as having said, my view is that an ordinary reader would have gained the impression that the plaintiff had attempted to do that which the experts said would have been improper or corrupt.

¶ I have no doubt in my mind that the foregoing is what a reasonable reader, having read the offending words within the context already outlined, would have understood to be the meaning of those words complained of.

My finding, therefore, is that the words complained of, understood by the ordinary reader to mean what I have determined, were capable of bearing the ¶ defamatory meaning alleged by the plaintiff. I also find that a reasonable reader would regard the words in such a light.

Having so determined, it now behoves me to consider the defences that the defendants have put forward.

4. DEFENCES

¶ Burchell *op cit* at 85 makes the point that the meaning attached to the words complained of is:

"... relevant to defences such as fair comment, where a distinction must be drawn between fact and comment, truth for the public benefit (justification in the narrow sense) and privileged occasion. It is also important in regard ¶ to the assessment of damages."

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The defences put up by the defendants must therefore be considered in the ¶ context of what I have determined was the ordinary meaning of the words complained of.

4.1 PRIVILEGED OCCASION

The defence of qualified privilege, which is what, in effect the defendants are claiming, rebuts the inference of unlawfulness that arises on the publication ¶ of defamatory matter referring to the plaintiff. ¶ The defendant must adduce evidence of a privileged occasion. The plaintiff can, however, show that the defendant has forfeited his right to the protection offered by the defence by proving that he, the defendant, was actuated by an improper motive. According to Burchell, the right to publish defamatory matter on a privileged occasion ¶ is "abused" or exceeded by improper motive.

Of the three major categories of occasions that enjoy qualified privilege, the defendants rely on the one relating to the discharge of a duty to a person who has a corresponding right to receive the information. Specifically, the defendants as publishers of a national newspaper, regard it as their duty to publish information that is in the interest of the public to read. The plaintiff ¶ quite rightly does not dispute the defendant's duty to publish such material for the consumption of the public. He however disputes that the defendants genuinely believed in the truth of the words, or that they had published them without any defamatory intention. In other words, the plaintiff is alleging an improper motive on the part of the defendants. To determine whether or not the defendants did have an improper motive in publishing the article in ¶ question, it is necessary again, to consider the circumstances leading up to the publication of the words in question.

That the Tsvangirai trial and its outcome were a matter of public interest is not in doubt. The defendants sought to establish the truth behind the postponement of an eagerly awaited judgment, amid highly speculative, and on their ¶ evidence, highly defamatory allegations concerning the reason for the postponement of the judgment. All the stories turned out, upon the defendants' investigations, not to be true. Specifically, no guilty verdict and consequently, no judgment, had been passed. No objections had been raised by the two assessors, nor had they stopped the plaintiff from passing any judgment, for the simple reason that no such judgment existed. Not only did the defendants ¶ establish this truth from other sources not mentioned in the article, they actually quoted a number of legal experts who indicated, in fact, that what the plaintiff was alleged to have done, i.e. reach a verdict without the input of the

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¶ assessors, would have both been unprocedural and against specific provisions of the High Court Act. Yet in the first part of the article which is in the form of a summary of what they had "gathered" from their investigation, the defendants published words that were, distinctly, at variance with the content of what they had gathered. An active role in 'blocking' the passing of what was referred to as "his" (i.e. the plaintiff's) judgment before they could read ¶ the transcripts, is

attributed to the assessors. The plaintiff is said, in the words immediately following the offending statement, to have then been “obliged” to postpone the judgment.

The variance between what the defendants established to be the true facts concerning the postponement of the judgment, and what they went on to report, is in my view, difficult to explain except in terms of their being driven by an improper motive.

I am satisfied, in the result, that the plaintiff has proved that the defendants have forfeited their right to the protection of the defence of qualified privilege.

4.2 TRUTH FOR THE PUBLIC BENEFIT (JUSTIFICATION)

▫ The defendants have, in the alternative, pleaded truth for the public benefit. It is contended that they genuinely believed in the truth of the said words, published them without any defamatory intention, and received them from an impeccable source on whose words they were entitled to rely.

According to Burchell at 211, the statement alleged to be true need not be true in every minute detail, although as a general rule, only the material allegations or “sting” of the charge, must be true. Applying this to the circumstances of this case, it is evident that the material allegations stemming from what I have determined was the ordinary meaning of the words complained of, were that the two assessors in the Tsvangirai trial “blocked” or stopped the plaintiff from passing his (single man’s) judgment without consulting the assessors. Further, that the plaintiff was then obliged to postpone indefinitely the handing down of such judgment.

The totality of the evidence before the court establishes that there was in fact no dispute as to what the true state of affairs was concerning the judgment in question. The plaintiff avers that he had not prepared any judgment at the time the article in question was written. The defendants, through Kahiya and Mutero, concede that their investigation had also established the same fact. The plaintiff argues that if there was no judgment prepared, there could therefore not have been anything for the assessors to stop or block. The defendants again concur with this assertion.

▫ Applying Burchell’s explanation of the defence of truth for the public benefit

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to the circumstances of this case, it seems to me that the material allegation ^a in the article complained of was untrue. Given the wider context referred to, where in certain circles rumours and speculation were rampant concerning the postponement in question, the plaintiff, I find, is correct in his assertion that the defendants, having established that the assessors had neither blocked the plaintiff from passing a judgment that did not exist, nor made objections or ^b demands, nevertheless went on to write “that which was in the rumour mill”. The respondents, in other words, had an opportunity to correct such rumours, but chose not to do so. Instead, they wrote what they knew to be untrue.

The argument is also made for the defendants that, in so far as the use of the word “blocked” in the article was to a degree sensational, or an exaggeration, such exaggeration should not be held against the defendants. The defendants ^c cite the following passage in Burchells *op cit*.

“The fact that there is some exaggeration in the language used will not deprive the defendant of his defence of truth for the public benefit *unless the exaggeration is such as is calculated to convey a wrong impression to the detriment of the plaintiff’s reputation*” (my emphasis).

I find that the language used in the statement complained of went beyond mere ^d exaggeration. This is because the defendants, having established the truth (and in the process disproved the many stories doing the rounds), concerning the circumstances surrounding the postponement of the judgment in question, went on to publish in a prominent part of the article, statements that directly contradicted such truth. The inference of an improper motive, to wit, that of ^e conveying a wrong impression to the detriment of the plaintiff’s reputation, is in my view, difficult to escape. This inference is bolstered by the fact that the defendants used exactly the same word “blocked” that was used in one article they had specifically pointed out as having been defamatory of the plaintiff. The defendants sought to distance themselves from it. The article, which appeared in a British newspaper, *Daily Telegraph*, was entitled: ^f

“... Lay assessors *block* judge’s guilty verdict on Tsvangirai.”

Thus, while on the one hand distancing themselves from *Telegraph* article, the defendants have on the other inexplicably borrowed a strong word from the same article, and used it in their article. I therefore find there is merit in the plaintiff's assertion that the defendants deliberately, and to his detriment, set out to perpetuate an impression they knew was a misrepresentation of the true state of affairs.

The defence of truth for the public benefit is, therefore, not one that is available to the defendants.
H

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A 4.3 FAIR COMMENT

The defendants also rely on the defence of fair comment and submit that, in so far as the words complained of were comment, they were fair. According to Burchell *op cit* the requirements for this defence are that the allegation in question must be a comment (opinion), that it must be fair, that the factual allegations on which the comment is made must be true and that the comment B must be on a matter of public interest. I am satisfied the last two requirements have been met *in casu*. This leaves the first two.

In order to establish whether the words complained of constituted fair comment, it is necessary to consider firstly, whether the words were in fact comment (opinion) and if so, whether such comment was fair given the facts C upon which it was founded. The following statement by Field J in *O'Brien v Marquis of Salisbury* is instructive in this respect:

"comment may sometimes consist in the statement of a fact, and may be held to be comment if the fact so stated appears to be a deduction or conclusion come to by the speaker from other facts stated or referred to by him, or in the common knowledge of the person speaking and those D to whom the words are addressed, and from which his conclusion may be reasonably inferred."

In casu, the writer and editor of the article in question not only stated that they had consulted a number of legal experts on the role of assessors in criminal trials, the writer also quoted what were presented as the exact words used by E such experts. In addition to this, Kahiya and Mukaro told the court that the process involved in criminal trials in the High Court, where assessors sit with a judge, and the role of the latter in such process, had been fully explained to them by the legal experts that they had consulted.

The words complained of are presented in such a manner that they constitute the writer's own summation or conclusion of what the legal experts had F informed him, or, in other words, what the defendants' own investigations had established. To that extent, and on the basis of the *dictum* cited, the words complained of constituted comment.

What has to be determined next is whether such comment was fair given the facts on which they were based.

G It is not in dispute that the need arose and was acknowledged, for the assessors to first read the transcript of the trial before they could contribute meaningfully to the process that would have culminated in the preparation and passing of the judgment in question. This necessitated the postponement of

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the handing down of the judgment from the date originally scheduled for it. A The plaintiff maintains it was at his instigation that the transcripts were prepared. I find nothing in the evidence led before the court to seriously challenge this assertion. Indeed, Dangarembizi, the assessor, aside from his shortcomings as a witness, denied ever requesting the transcripts. The words complained of, which, as I have found, constituted the writer's own comment B based on these facts, gave the impression that the plaintiff was all set to deliver his judgment had he not been "blocked" by the assessors, who had "demanded" copies of the transcript. This can, in my view, hardly be said to be a correct interpretation of the facts. Even allowing for the exaggeration that normally characterises the reporting of facts or events in newspaper articles, the words in my opinion, exceeded the limits of exaggeration, and can hardly C be said to be fair comment.

I am also not satisfied the offending words could have been reasonably inferred from the facts as stated above. Such words would be difficult to defend against an allegation of malice. See in this respect the definition of “fair” in relation to comments, that is contained in *McGuire v Western Morning News Co Ltd* as: [Ⓓ]

“any genuine (honest) expression of opinion is fair if it is relevant, and if it is not such as to disclose in itself actual malice.”

The defendant’s use of words such as “blocked” and “demanded” when they knew very well that this was not what had happened, to my mind smacks of dishonesty and malice. Indeed, no explanation was tendered as to why, if all [Ⓔ] they meant to say was that the judgment had been postponed, such word had not been used instead of the misleading word “blocked”. It is telling, that in the “retraction” tagged on to the editor’s memo, care was taken to use the word “delayed”.

I find in the face of all this that the defendants have failed to prove the defence of fair comment. [Ⓕ]

4.4 LACK OF *ANIMUS INJURIANDI*

The other defence put up by the defendants is lack of *animus injuriandi*. It is contended for the second and third defendants that they had, in their evidence, proved their lack of *animus injuriandi* since they had published the [Ⓖ] article:

- (a) in the public interest
- (b) believing the same to be true

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- (c) with no intention of defaming the plaintiff
- (d) without being negligent and,
- (e) relying upon a source that it was reasonable for them to rely on.

I have already made my determination in respect of points (a) and (b), above. As for point (e), while it was reasonable for the defendants to rely on [Ⓑ] Dangarembizi as a source of information, I find that their presentation of the information gathered, in the offending article, suggests an intention to defame the plaintiff. Despite his shortcomings as a witness, I doubt that Dangarembizi ascribed to himself and his co-assessor an aggressive role in “demanding” the transcripts in question and “blocking”, the plaintiff from passing “his” judgment.

[Ⓒ] The plaintiff disputes that the defendants lacked *animus injuriandi* and charges that there was no connection between the words complained of and what the defendants had established as a matter of fact. In these circumstances, it is the plaintiff’s argument, they intentionally wrote an article defamatory of him.

[Ⓓ] I do not find the plaintiff’s contention to be without merit.

According to Burchell *animus injuriandi* is defined as subjective intention (on the part of an individual as opposed to the mass media) to defame or injure the reputation of the plaintiff. He goes on to say that this intention covers *dolus directus*, *dolus indirectus* and *dolus eventualis*. These are terms that [Ⓔ] are self explanatory.

There is much in the evidence before the court to suggest the defendants, in writing and publishing the words complained of, were motivated by *dolus directus* as well as the other forms of *dolus*.

As already indicated, the defendants, having established the true state of affairs concerning the postponement of the Tsvangirai judgment, nevertheless [Ⓕ] went on to write what was not true, that is, that the judgment had been “blocked” by the assessors. I am not persuaded by their submission that they in fact meant to convey the meaning that the judgment had been delayed. This impression is bolstered by the hesitation exhibited by both Mukaro and Kahiya in answering questions put to them under cross-examination, over [Ⓖ] their understanding of the word “blocked”. Mukaro went so far as to submit he had actually meant to say “delayed”, rather than “blocked”. In any case, given the way that the word “blocked” is used in the first paragraph of the article, substituting it with the word “delayed” would have resulted in an [Ⓗ] inelegantly, if not ungrammatically constructed sentence. One normally does

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not “delay” someone “from” doing something. In my view, *dolus directus* is, ^a in the light of this, established.

Even if the two defendants, that is Kahiya and Mukaro, had not had the aim and object of defaming the plaintiff, they must, nevertheless, have foreseen the possibility of defaming him as substantially certain, when they published the words complained of. As discussed above, the two defendants reduced ^b what were essentially rumours doing the rounds concerning the postponement of the judgment, to writing, and published them in a local newspaper. They can not, in my view, be said not to have foreseen the eventual harm to the plaintiff, of the statement complained of. In these circumstances, the defendants’ submission that they were not negligent is difficult to sustain.

When all is told, I find that the two defendants, Kahiya and Mukaro, have failed ^c to prove the defence of lack of *animus injuriandi*.

Taking into account all the evidence led for the plaintiff and that led for the defendants, I find in the final analysis, that the defendants have failed to establish any of the defences that might have exonerated them *vis-à-vis* the plaintiff’s claim for defamation. ^d

What has to be determined next is the question of damages.

5. NATURE AND ASSESSMENT OF DAMAGES

The parties in their closing submissions have addressed the question of the nature of damages that the court should award to the plaintiff. The plaintiff argues that courts have accepted damages for defamation that were intended ^e to vindicate the plaintiff’s character and act as a *solatium*. Also, that in other cases, “punitive” and exemplary damages have also been granted. He, however, urges the court to award damages that take into account the aggravating factors of the defamation, as outlined by him in his evidence, which I have dealt with above. By this, I understand the plaintiff to wish for damages that would both “punish” the defendants, and vindicate his character. ^f The defendants, on the other hand, submit that the concept of punitive or exemplary damages is not part of our law. The parties therefore have opposing views on this issue. Neither has referred me to any authorities to support their respective positions. P J Visser and J M Potgieter *Law of Damages* 2^{ed} (2003) at 464 state that there is no agreement on the question of whether the amount ^g of satisfaction should also serve the purpose of punishing the defendant for his conduct, which purpose has to be reflected in a larger amount of satisfaction. The authors go on to say that, despite the controversy surrounding this matter, case law accepts that the object of punishment must be taken into account by the court in determining the quantum of satisfaction for defamation ^h

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^a Thus “punitive” or exemplary” damages have been awarded where, for example, the defendant acted with a malicious motive, was aware of the untruth of his remarks and where the defamation was of an exceptionally serious nature. ⁶

Burchell *op cit* at 293 however, suggests an approach that I find has some ^a appeal:

“But even the critics of ‘punitive’ damages would, I think, accept that factors aggravating the defendant’s conduct may serve to increase the amount awarded to the plaintiff as compensation, either to vindicate his reputation or to act as a *solatium*.”

This approach can, in my view, be properly adopted *in casu*, where as I have ^c found, and as indicated below, certain factors aggravated the defendant’s conduct.

Assessing the appropriate damages in a defamation case is always a difficult task. As lord Hailsham correctly observed in *Cassel & Co Ltd v Broome* [1972] 1 All ER 801 (HL) at 825e; [1972] CA 1027 at 1027G, the whole process of assessing damages where they are “at large” is essentially a matter of ^d impression and not addition. *In casu*, before computing the damages that I consider to be appropriate in the circumstances of this case, it is pertinent to consider the parties’ submissions regarding the factors that may aggravate or mitigate such damages.

The plaintiff urges this court to consider his legal standing within the judiciary and the legal profession as a whole; the fact that he is an international ^e consultant on criminal justice; that 13 681 copies of *The Independent Newspaper* were sold within Zimbabwe while 150 were sold in South

Africa; and that there had been “hits” on the newspaper’s website. He also makes mention of the fact that there had been no apology or retraction from the defendants. The plaintiff also takes issue with what he regarded as the serious nature of the imputation, saying it had grave implications for him, given his standing within the judiciary ^F and the system that he represented.

As is evident from the foregoing, the defendants dispute most of the plaintiff’s assertions.

5.1 PLAINTIFF’S REPUTATION

The defendants do not dispute that the plaintiff is a senior judge in the ^G country’s judicial system, nor that he has occupied and continues to occupy

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influential positions nationally and internationally. They also do not dispute ^A that the plaintiff has an international reputation. The defendants argue, however, that contrary to the plaintiff’s assertions, he was a controversial figure and one who enjoyed some “notoriety”. In support of this latter assertion, the defendants urged the court to have regard to a number of media articles, almost all from the international electronic media, that had been ^B tendered as exhibits and which had made more serious allegations against the plaintiff, for instance, that he had already reached a guilty verdict and was ready to hand it down but for the forceful intervention of the assessors. The articles on that subject were all published around the same time as the article complained of, with most having been published a few days prior to the article in question. In one or two of the articles, mention is made of publications going ^C back several years, in which serious allegations against the plaintiff had been made concerning other matters.

Burchell, *op cit* correctly notes that in our law, evidence that, other people had made similar defamatory statements about the plaintiff is not admissible to show that the plaintiff already had a tarnished reputation. The reasons for that were succinctly set out in the English case of *Associated Newspapers Ltd v Dingle* [1962] 2 All ER 737 (HL) at 754G; [1964] AC 371 (HL) where Lord Denning wrote:

“Our English law does not love tale-bearers. If the report or rumour was true, let him justify it. If it was not true, he ought not to have repeated it or aided its circulation. He must answer for it just as if he started it himself. ^E Newspapers in particular must not speak ill about people for the spice it gives readers. It does a newspaper no good to say other newspapers did the same. *They must answer for the effect of their own circulation without reference to the damage done by others. They may not even refer to other newspapers in mitigation of damages ...*” (my emphasis).

While it is part of our law that evidence of the general bad reputation of a ^F plaintiff may be pleaded in mitigation of damages, in cases of this nature, ^Z I am not satisfied the exhibits relied upon by the defendants in their endeavour to show that the plaintiff had a bad reputation constitute “evidence” for this purpose. They are at best allegations, which the plaintiff says were not proven, made against him in some sections of the foreign media. The plaintiff asserts, seemingly with some justification, that the articles exhibited hostility towards ^G him because of who and what he was.

I will disregard the other “evidence” of the plaintiff’s bad reputation that the defendants sought to put before the court, for the reason that such evidence

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^A was mentioned for the first time in the defendants’ closing submissions. This meant that the allegations in question were never put to the plaintiff so as to give him a chance to answer to them.

It cannot be disputed that the plaintiff as judge and Judge President of the High Court presided over many criminal trials where he must have sat with assessors. He therefore fully appreciated the role that the assessors play in ^B such trials. The defendants have sought to convince the court that the plaintiff’s impressive professional record as well as his integrity as a judge are so greatly undermined by the bad reputation they claim he has, that any damages they may be liable for should be mitigated.

I am not persuaded by the defendants’ arguments and find that they have ^C failed in their effort to mitigate any damages on the basis of the plaintiff’s alleged bad reputation.

5.2 EXTENT OF PUBLICATION

While the circulation figures cited in the papers before the court are not disputed, the defendants argue that such circulation was “minimal” in relation to the population of Zimbabwe, and other publications.

The extent of the circulation of the article complained of has a direct bearing on the quantum of damages, since the wider the publication, the heavier the damages will be, and vice versa. It needs no emphasis that the greater the number of people who access the publication, the greater the loss of a plaintiff’s reputation. *The Zimbabwe Independent* is a weekly publication and the extent of its circulation can hardly be compared to that of, say, a daily newspaper. Since I do not consider it particularly useful to consider the extent of the publication (in this case 13 681 copies) in relation to Zimbabwe’s total population in the absence of statistics concerning levels of literacy, estimated readership by age, geographical location, economic and professional status of the readership and others, a determination on the extent or otherwise of circulation cited can only be based on a value judgment. I will accept that

13 681 copies, while not a great number *vis-à-vis* the Zimbabwean population, nevertheless is not a negligible figure when considered against the background that the newspaper was distributed nationwide. It seems to me unlikely that the defendants would deliberately aim to produce a “minimal” number of copies of what is clearly their flagship newspaper. The probabilities are that the publishers of the newspaper would wish to publish and sell a sufficient number to keep the weekly publication viable. The possibility can also not be discounted, that readers will share interesting or sensational news with those who may not have bought the newspaper. Other newspapers also tend to pick up a story published in one publication, and repeat it in their own publications.

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While the defendants averred no particular effort had been made to establish the number of “hits” regarding the website, in this world of sophisticated communications technology, it would not be an exaggeration to surmise that a sizeable number of people, both within and without Zimbabwe, did access the article on the internet. At least one article in a foreign newspaper picked up the story and repeated it, including the defendant’s other exhibits. The possibility can therefore not be discounted, that readers outside Zimbabwe who knew the plaintiff, or of him, may have accessed the article in question.

As an aggravating factor, I find that the extent of the publication of *The Zimbabwe Independent* in question and therefore the article complained of, was fairly wide.

5.3 NATURE AND GRAVITY OF DEFAMATION

The seriousness of the defamation alleged has a direct bearing on the quantum of damages – thus the graver the defamation, the higher the award of damages, and *vice versa*. According to Burchell *op cit* the gravity of the imputation often depends on the standing of the plaintiff. As an example, Burchell cites a case where the allegation that the Deputy Attorney-General had deliberately misled the court was regarded as a particularly serious defamation, calling for a high award of damages. An analogy can, in my view, be drawn between that case and the one at hand. The plaintiff had been a judge and Judge President of the High Court for over 10 years at the time the article in question was published. His impressive record as a judicial officer before that has already been referred to. It cannot be disputed that during his tenure as firstly a judge and then later Judge President of the High Court, he must have presided over countless criminal trials in which he had, perforce, to sit with assessors. It cannot be doubted under these circumstances that he must have fully appreciated what the role of assessors was in criminal trials and must also be taken to have been fully acquainted with the law and rules regarding such role.

To suggest, against this background, and given his position as the most senior High Court judge then, that he would have attempted to so depart from established procedure as to wish to improperly exclude the assessors in the process of formulating and handing down judgment in a case that they had heard together, in my view, was highly damaging to his professional integrity. For that reason, I consider the defamation in question, to be particularly grave.

5.4 RETRACTION AND APOLOGY

The defendants refused to retract the statement in question, or tender an apology. They disputed the plaintiff's assertion that the article was defamatory

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A of him. In a letter written in response to the plaintiff's request for a retraction, dated 5 August 2004 (Exh. 7), the defendant's legal practitioners stated that the article was not defamatory and that therefore, no apology was to be rendered. However, in their next edition of the newspaper, the defendants published in its "Readers Forum" column, a statement that had been issued by the Registrar of the High Court, commenting upon and replying to the article B complained of. The second defendant, in response to the Registrar's statement, published at the end of his editor's memo and on the same page as that on which the Registrar's statement appeared, the following statement:

"Last week we informed readers that the judgment in Morgan Tsvangirai's treason trial, initially due on July 29, had been *postponed* to give the C assessors a chance to go through the trial transcript. The court's registrar took issue with our story and sent us a statement to publish which you may have already seen in the Herald. It appears in full (opposite top) on this page. I must place it on record that contrary to the registrar's contention, we did not suggest that the Judge President had already prepared a judgment. Nor was it our intention to do so" (my emphasis).

It is noteworthy that the defendants avoided use of the word "blocked" and D instead used "postponed", a word they had not used in the original article.

The plaintiff took issue with the fact that the editor's statement was not placed where readers would have seen and read it. I find the plaintiff's position on this matter to be well founded. Although, contrary to what the plaintiff stated, the editor's statement was not in "small print" there is, in my view, no doubt E that such a statement would have had more impact had it been printed immediately below the Registrar's response to the words complained of. The comments were, after all, made in response to the Registrar's statement. I do not find the defendants argument to be persuasive, that because the editor's memo is more widely read than other articles in the newspaper, the statement in question, being tagged on to the end of the editor's memo, would likewise F have been widely read. As contended for the plaintiff, the headline to the editor's memo, which read "Windshield Smash" had no relationship at all to the article complained of. The title to an article normally is a persuasive factor in a reader's choice to read the article beneath it.

Thus, the reader who read the Registrar's statement may not have been G interested in the editor's memo, and *vice versa*. It is the former who would have had an interest in the editor's statement on the same issue, and would have read it had it been printed immediately below the Registrar's statement. The likelihood of a reader drawn to the editor's memo by its title, not being able to make any proper sense of the unrelated statement tagged to the end of the H article, cannot in my view, be discounted.

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When this is taken together with the fact that such statement was only issued A in response to the Registrar's statement and not in an endeavour to correct the erroneous impression created in the article complained of, the conclusion is inescapable that the defendants had no serious intention of correcting the erroneous impression created by the article complained of. In short, they remained remorseless.

Legal authorities on the matter state that a retraction and apology must not B be reluctant ⁹ or grudging. ¹⁰ It must rather be prompt and receive the same prominence as the offending publication. To the extent that the defendants' statement might be termed a retraction of sorts, it clearly was neither prompt (they refused to retract when asked to do so by the plaintiff before the matter was taken to court) nor was it as prominently displayed as was the article C complained of. The timing and brevity of the statement in my view suggests reluctance on the part of the defendants to make it, and also that it was grudgingly, not spontaneously, made. The defendants maintained this recalcitrant attitude up to and during the trial, as indicated by the evidence that they gave. P J Visser and J M Potgieter *op cit* make the point that the refusal by the defendant to respond to requests by the plaintiff to apologise, or any D other conduct from which it can be

deduced that the defendant did not regret their actions, are aggravating factors in the assessment of damages.

While an appropriate retraction and apology are important factors in reducing the amount of damages *in casu*, I find therefore that the absence of such retraction and apology has the opposite effect. Despite this conclusion, I will, however, consider in their favour the fact that the defendants, even though ^ε they did so in response to a complaint from the Registrar, did print a statement in which they attempted to correct, at least in part, the impression created by the article complained of.

5.5 QUANTUM OF DAMAGES

As indicated, the quantum of the damages to be awarded to the plaintiff will, ^ϕ among other factors, be considered against the background of what I have found to be aggravating and mitigating circumstances in this case.

The defendants take issue with the plaintiff's revised claim of \$75 million in damages, which they refer to as exceedingly high. They make reference to a "gold digging" claim and its effect on an award, that they observe was ^ϑ recognized in our jurisdiction by Reynolds J in *Zvobgo v Kingstons Ltd* 1986 (2) ZLR 310 (H). Citing the case of *Mukarati v Zimbabwe Newspapers*

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^Α 1117/96, the defendants argue that while damages for defamation are primarily intended to vindicate the plaintiff's character and to act as *solatium*, they are not meant to make the injured party a rich man. They submit in this respect that the plaintiff, should he succeed in his claim, should be entitled to no more than \$7 million. Asserting that the plaintiff's claim "makes one gasp by its sheer excess and by the amount it varies with other judgments for this type of delict", ^Β the defendants submit, therefore, that if the plaintiff is successful in anyway in this case, he should be deprived of his costs. Conversely, that if he is unsuccessful, he should be made to pay costs on the higher scale.

I have no hesitation in dismissing this argument. A plaintiff should have the right to claim an amount that he feels would vindicate him. Reynold J, in my ^ϒ view correctly, observed in this respect, in *Zvobgo v Kingstons Ltd supra* at 330C-E as follows:

"Furthermore, it is my view, that the mere fact that a party's claim exceeds the sum that is eventually awarded to him will not normally entail a punitive order of costs against a successful plaintiff. If this were the general rule, the claims brought in such cases would invariably be too low.

^Δ ... furthermore I do not think that a claim that is ultimately held to be inflated necessarily reveals 'an unseemly degree of cupidity'. The difficulties experienced by courts in assessing damages in cases of this sort has already been mentioned. Why should the plaintiff, or even his legal representative, be in any better position than the court in arriving at the 'correct amount'?"

^Ε That the plaintiff was a public figure cannot be denied. Public figures generally attract criticism. However, as correctly pointed out by the learned judge in *Zvobgo v Kingstons Ltd supra* at 323C:

"It is an obvious fact that no public figure can expect to escape criticism, disapproval, complaint and even hostility at times in respect of some of ^ϕ his decisions and actions. Provided that these protests are kept within the bounds of moderation, and do not impute improper, immoral or otherwise dishonourable conduct to the plaintiff, the author's constitutional rights of free expression will be protected."

I have already found that the words complained of exceeded the "the bounds of moderation", since they imputed dishonourable conduct to the plaintiff.

^ϑ 5.5.1 INFLATION

Apart from the aggravating and mitigating factors of this case, I have in assessing the quantum of damages to be awarded to the plaintiff, and which I consider would meet the justice of this case, also taken into account the issue ^Η of inflation. Inflation was used by the plaintiff as justification for revising upwards to

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\$75 million his original claim of \$250 000. While the defendants ^A dispute the correctness of the plaintiff's action in this respect, this court can and does take judicial notice of the hyperinflationary environment then and currently obtaining in Zimbabwe. Inflation statistics are now and again published in the national media and are therefore public knowledge. There is at the moment little indication as to whether these inflation statistics will come ^B down, or whether they will maintain their upward trend. The plaintiff submits inflation was at 1 200 percent *per annum* around August 2006. Around the time this judgment was written, inflation had been cited at 4 500 percent as of May 2007, 7 634 percent as of July 2007 and 6 592.8 percent as of August 2007. ¹¹

The plaintiff has cited a number of Zimbabwean and South African authorities ¹² that have accepted that inflation in as far as it erodes the value of money, is ^C a factor to be considered in assessing damages. He submits that in pegging his claim at \$75 million, he had taken into account the "real possibility" that it will be a while before this matter is concluded. He expected that even if this court found for him, the defendants would, in all probability, appeal, which would mean a further one or two years before finalisation of the matter. In addition to current inflationary trends, the plaintiff has, in coming up with the ^D figure of \$75 million, therefore factored in future rises in inflation statistics. The authorities that he cited, which took into account inflation in the assessment of damages, clearly were concerned with the erosion of the value of money due to inflation over a number of years preceding the time the assessments concerned were made. None of these authorities speculated, as the plaintiff ^E is in fact doing, as to the impact of possible future inflation on the amount claimed between the date of judgment and the finalization of any appeal the defendants may file. I know of no authority, and the plaintiff has not pointed me to any, that justifies such speculation. Indeed, while the court may take judicial notice of inflation figures that are currently common knowledge, it cannot base its assessment on speculation as to the rate at which inflation may ^F continue to rise, nor can it do so on the basis of whether it will rise at all. There is therefore no basis for taking future inflation into account.

The plaintiff has also cited awards given in past cases, but has observed, correctly, that such figures were now "meaningless" owing to inflation. I do not propose to undertake a mathematical computation of these amounts in ^G order to get an idea of what their value would be in terms of today's currency.

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Gwaunza JA

^A Indeed such a task is quite beyond me! I will instead be guided by and attempt, in my assessment of the damages due to the plaintiff to reflect "the state of economic development and general economic condition of the country." ¹³

5.6 COSTS

The plaintiff had, in his response to the defendant's response to his closing ^B submissions, sought to claim against the defendants costs on the higher scale and *de bonis propriis*. This prayer was prompted by what the plaintiff listed as instances of "unethical conduct" displayed by the defence counsel in this case. Defence counsel did not take kindly to these charges and the request for punitive costs, and some heated exchange was communicated between the parties. The vehement response by the defendants' counsel, however, was ^C unnecessary, as it came *after* counsel for the plaintiff, Mr *Chihambakwe*, had, in a letter dated 12 February 2007, withdrawn the claim for punitive costs and settled instead on the usual party and party scale. As already mentioned, the defendants, in praying for a dismissal of the plaintiff's claim, prayed for costs of two counsel at an attorney and client scale. They also assert that, even if he succeeds in his claim, the plaintiff should not be awarded any costs.

^D Despite bitter exchanges between the parties in which accusations of unethical conduct were levelled against the defendants' counsel and irrelevant and unproved allegations of unprofessional conduct were levelled against the plaintiff, among other assertions, I see nothing in what happened, to justify a departure from the ordinary rule that costs should follow the cause.

^E 6. ORDER

As is evident from the foregoing, the plaintiff succeeds in his claim, and I make the following order:

The defendants shall pay to the plaintiff, jointly and severally, the one paying, F the other to be absolved –

- (i) damages for defamation, in the sum of \$70 000 000 (seventy million dollars), together with interest at the prescribed rate from the date of judgment to the date of payment in full; and
- (ii) costs of suit.

G *Chihambakwe, Mutizwa & Partners*, plaintiff's legal practitioners

Atherstone & Cook, respondent's legal practitioners

1 *Johnson v Rand Daily Mails* 1928 (AD) 190 at 204-5, cited on p 84 of Burchell's *The Law of Defamation in South Africa* 1 ed *supra*.

2 Burchell at p 244

3 (1889) 6 TLR 133, cited in Burchell's *op cit* 223

4 [1903] 2 KB 100 at 110 & 112, quoted in Burchell *op cit* 226.

5 *Gelb v Hawkis* 1960 (3) SA 687 (A) at 693; *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 27-28.

6 *SA Associated Newspapers Ltd v Yutar* 1969 (2) SA 442 (A) at 458

7 Hoffmant & Zeffert *South African Law of Evidence* p 73

8 *SA Associated Newspapers Ltd v Yutar* 1969 (2) SA 442 (A)

9 *Ward-Jackson v Cape Times Ltd* 1910 WLD 257 at 263

10 *Dymes v Natal Newspapers Ltd* 1937 NPD 85 at 97

11 *The Sunday Mail* Newspaper of 23 September 2007 at p B2

12 *Mtetwa v Tenda Transport & Ors* HH-89-00; *Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Anor* 1994 (1) ZLR 445 (H) and *Buthlezi v Poorter & Ors* 1975 (4) SA 608 (W)

13 *Per* BARLETT J in the *Chinamasa v Jongwe Printing and Publishing Co (Pvt) Ltd* 1994 (1) ZLR 133 (H) at 170

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Source:

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MAWERE & ANOR v CENTRAL INTELLIGENCE ORGANISATION 2007 (2) ZLR 246 (S)

2007 (2) ZLR p246

Citation	2007 (2) ZLR 246 (S)
Case No	Judgment No. S-30-07
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Cheda JA, Ziyambi JA & Malaba JA
Heard	25 January 2007
Judgment	15 October 2007
Counsel	<i>O Takaendesa</i> , for the applicants <i>C Muchenga</i> , for the respondent
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of c Rights — s 18(9) — right to fair hearing within a reasonable time — disciplinary hearing — members of Central Intelligence Organisation — not members of public service — not governed by public service regulations — disciplinary board set up by CIO — not an adjudicating authority established by law — no protection given by Constitution*

Public service — *public servant — who is — employee of Central Intelligence Organisation — not a member of the public service*

Headnote

The applicants were members of the Central Intelligence Organisation, an ^ε organisation established in the President's Office for the protection of national security. In October 1998, they were suspended from duty on disciplinary grounds, the allegation being that they had defrauded the State. In 2006 a disciplinary board was eventually convened. When the CIO set up the Board it purportedly acted in terms of the Public Service Regulations 2000, published in SI 1 of 2000. The Regulations were made ^ε by the Public Service Commission in terms of s 31 of the Public Service Act [*Chapter 16:04*], with the concurrence of the Minister of Public Service, Labour and Social Welfare. The applicants asked the Board to stop the hearing in order for them to file an application with the Supreme Court in terms of s 24(1) of the Constitution, in which they sought a declaratory order that the delay by the respondent in dealing with their ^ε suspension from duty for more than eight years was a violation of their right to a fair hearing within a reasonable time guaranteed by s 18(9) of the Constitution.

Held, that the first question was whether the Board was a court or other adjudicating authority established by "law", as defined in s 113 of the ^ε

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^ε A Constitution. In terms of s 14(e) of the Public Service Act, members of the CIO are not members of the Public Service. This being so, the applicants were not governed by the Act and the Regulations, and the disciplinary procedure set out in the Regulations did not apply to them. The Board set up by the CIO, purportedly in terms of the Regulations, was thus not covered by the expression "other adjudicating authority ^ε established by law" in s 18(9) of the Constitution, as it was not set up in terms of any law governing the members of the CIO.

Held, further, that the fact that, in terms of the contract of service, the conditions of service, including disciplinary procedures, were in general aligned to those of the Public Service, did not mean that s 14(e) of the Act ^ε had been amended and that the employment contract had made the applicants part of the Public Service. That could only have been done by means of an Act of Parliament. Nor did it mean that the disciplinary authority set up by the CIO was a disciplinary authority established by law, because the Board was not set up in terms of any "law". Consequently, the right claimed by the applicants in terms of s 18(9) of the Constitution ^ε did not exist, and the application could not succeed.

Legislation considered

Constitution of Zimbabwe 1980, ss 18(9) & 113(1)

Public Service Act [*Chapter 16:04*], s 14

Case information

^ε *O Takaendesa*, for the applicants

C Muchenga, for the respondent

Judgment

SANDURA JA: This application was filed in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution").

^ε The applicants seek a declaratory order stating that the delay by the respondent ("the CIO") in dealing with their suspension from duty for more than eight years was a violation of their right to a fair hearing within a reasonable time guaranteed by s 18(9) of the Constitution.

The background facts in the matter are as follows. At the relevant time the applicants were employed by the CIO, an organisation established in the G President's Office for the protection of national security. In October 1998, they were suspended from duty.

The letter of suspension, received by the first applicant ("Mawere") on 10 November 1998, in relevant part, reads as follows:

H "... Chief Transport Officer, Ricky N Mawere, you are hereby notified that

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with effect from 06 October 1998, you are suspended from all duties that A you would normally be required to perform as a member of the Organisation. ...

During the period of your suspension you will receive your normal salary.

A Board will be convened in due course to look into allegations that you committed an act of misconduct as defined in the Second Schedule of the Public Service (Disciplinary) Regulations 1992. The act of misconduct is B reflected in the Audit Report on Phase One Construction Projects."

The second applicant ("Nyabando") received a similar letter.

What happened after the applicants had been suspended from duty is set out by Mawere in a letter addressed to the Director of Administration ("the Director") and dated 15 February 1999 (the year should be 2000). The letter, C in relevant part, reads as follows:

"Your good office is requested to kindly consider review of my suspension from duty without pay. Suspension was effected in October 1998 to [the] present date. I was on full salary up to [the] end of January 1999.

I appeared before a Disciplinary Board in January 1999. I was again D suspended, this time without pay until this date ...

In January 1999, when I appeared before the Board, I was told that I would receive a Questionnaire in two weeks time and answer to the allegations of Fraud. I never received anything from CIO Headquarters till this date. It's now a period [of] over a year whilst waiting for the Questionnaire to answer ... E

In March 1999, I was detained by CID Frauds to face fraud charges reported to the Police by [the] Central Intelligence Organisation. I was granted bail of \$10 000, the following day. I have been on remand for almost a year. On 28 January 2000, my lawyer successfully applied for refusal for further remand [sic]. He was granted the order on 31 January 2000. F

I submit that I have been on suspension for over a year, a period I consider unreasonable and unrealistic ..."

On 21 February 2000, the Director replied as follows:

"Please be advised that your continued suspension is in terms of Public Service Regulations 2000 (SI 1 of 2000). G

This minute also serves as notice that in terms of the Regulations, your suspension remains in force until such time that the criminal investigation into your alleged fraud case are concluded, and or you are convicted or acquitted of the criminal charge. H

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A The Director-General has also reiterated that no salary shall be paid to you because the allegation levelled against you involves financial prejudice to the Government."

Thereafter, on 13 November 2000, Mawere wrote to the responsible Minister requesting him to review the suspension and order his reinstatement.

B On 22 February 2001, the Minister replied as follows:

- "1. Reference is made to your letter dated 13 November 2000, seeking a review of your suspension from work.
2. Please be advised that the review of your suspension will be carried out after the hearing of your case and others in the High Court. We understand the case will be heard in May 2001."

C Subsequently, on 29 December 2005, Mawere received a written notification of the setting up of a Board of Inquiry ("the Board") which, in relevant part, reads as follows:

"You are hereby notified that in terms of Public Service (Disciplinary) Regulations of 2000, a Board of Inquiry has been convened to inquire into D your contravention of Paragraph 8 of the First Schedule

(Section 2) which states:

'Theft of, or failure to take reasonable care of or account for, or making improper or unauthorised use of, public moneys or the moneys of any statutory body.'

The Board will assemble in the 9th Floor boardroom, Chaminuka Building, E on 13 January 2006 at 1030 hours ...

The Inquiry will be based upon the allegations that you were involved, together with Lovemore Itai Mukandi, in a financial scam [scam] from the CIO Construction Projects which resulted in the Organisation suffering financial prejudice to the tune of \$16 972 784.32."

On 13 January 2006, Mawere and his lawyer went to the venue where the Board F was to sit and arrived there at 10 am. At 11.35 am they were informed that the hearing had been cancelled and that they would be notified about a new date in due course. They were later advised that the hearing would be on 6 July 2006.

At the hearing before the Board, Mawere's lawyer raised several points *in limine*, the most important of which was that Mawere's right to a fair hearing G within a reasonable time had been violated. The Board found all the points to be without merit and dismissed them.

That decision prompted Mawere's lawyer to ask the Board to stop the hearing in order for him to file this application in terms of s 24(1) of the Constitution. The request was granted and the application was subsequently filed on 9 H August 2006.

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At the hearing of the application, the original draft order was amended in such A a way that what the applicants now seek is the declaratory order indicated at the beginning of this judgment.

Section 18(9) of the Constitution, which the applicants allege was violated in relation to them, reads as follows:

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

The question which immediately arises for consideration is whether the Board was covered by the expression "court or other adjudicating authority established by law". C

In my view, the Board was certainly not a court. The only issue is whether it was covered by the expression "other adjudicating authority established by law".

The word "law" is defined in s 113(1) of the Constitution as follows:

"law' means – D

- (a) any provision of this Constitution or of an Act of Parliament;
- (b) any provision of a statutory instrument; and
- (c) any unwritten law in force in Zimbabwe, including African customary law;"

When the CIO set up the Board it purportedly acted in terms of the Public E Service Regulations, 2000, published in SI 1 of 2000 ("the Regulations"). The Regulations were made by the Public Service Commission ("the PSC.") in terms of s 31 of the Public Service Act [Chapter 16:04] ("the Act"), with the concurrence of the Minister of Public Service, Labour and Social Welfare.

In my view, the Regulations do not apply to the applicants because the Act F does not apply to the members of the CIO. In this regard, s 14(e) of the Act provides as follows:

"14 Constitution of Public Service

Subject to section 113 of the Constitution, the Public Service shall consist of all persons in the service of the State, other than –

- (a) – (d) ...; or G
- (e) members of any organisation established in the President's Office for the protection of national security."

And s 113(1) of the Constitution, in relevant part, reads as follows:

"Public Service' means the service of the State but does not include H –

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- (a) – (c) ...;
- (d) service which this Constitution or an Act of Parliament provides shall not form part of the Public Service.”

It is, therefore, clear beyond any doubt that the applicants, being members of the CIO, were not part of the Public Service and were not governed by the Act and the Regulations. Accordingly, the disciplinary procedure set out in the ^b Regulations did not apply to them.

Consequently, the Board set up by the CIO, purportedly in terms of the Regulations, was not covered by the expression “other adjudicating authority established by law” in s 18(9) of the Constitution, as it was not set up in terms of any law governing the members of the CIO.

c I now wish to consider the effect of para 2 of the contract of employment between the CIO and the applicants. It reads as follows:

“2. Your conditions of service are in general aligned to the provisions of the following legislation:

- (a) – (f) ...; ^d
- (g) Public Service (Officers) (Discharge and Misconduct) Regulations, 1979, published in SI 561 of 1979 (now replaced by the Public Service Regulations, 2000, published in SI 1 of 2000).”

In my view, the effect of the above provision was that the CIO and the applicants agreed that the disciplinary procedure applicable to the applicants would, to a large extent, be the same as or similar to the disciplinary procedure ^e set out in the Regulations for the members of the Public Service.

However, that did not mean that s 14(e) of the Act had been amended and that the employment contract had made the applicants part of the Public Service. That could only have been done by means of an Act of Parliament.

In addition, the above provision did not mean that the disciplinary authority ^f (i.e. the Board), set up by the CIO for the purpose of determining the allegation of misconduct against the applicants, was a disciplinary authority established by law, because the Board was not set up in terms of any law.

As the Board was not “an independent and impartial court or other adjudicating authority established by law”, the right claimed by the applicants in terms of ^g s 18(9) of the Constitution did not exist, and the application cannot succeed.

That being the case, all the other issues debated in this application fall away.

Finally, as far as costs are concerned, my view is that there should be no order as to costs because the matter has been determined on the basis of a point not ^h raised by the parties.

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In the result, the application is dismissed with no order as to costs. ^a

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

Kwenda & Associates, applicants’ legal practitioners

Civil Division of the Attorney-General’s Office, respondent’s legal practitioner

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Source:

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NHERERA v KUDYA NO & ANOR 2007 (2) ZLR 253 (S)

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Citation

2007 (2) ZLR 253 (S)

Case No	Judgment No. S-45-07
Court	Supreme Court, Harare
Judge	Chidyausiku CJ (in Chambers)
Heard	18 October 2007
Judgment	18 October 2007
Counsel	<i>J Mandizha</i> , for the applicant No appearance for the first respondent <i>G Butau-Mocho</i> , for the second respondent
Case Type	Chamber application
Annotations	Link to case annotations

Flynote

c Court — Supreme Court — jurisdiction — review — court's powers of review — no power to entertain review launched by a party — limits to court's powers to undertake review of proceedings of lower court

Headnote

The applicant had been convicted in the regional magistrate court. An application to the High Court for bail pending appeal was rejected. The ^o applicant then launched an application in the Supreme Court, purportedly in terms of s 25 of the Supreme Court Act [*Chapter 7:13*], for a review of the proceedings in the regional court.

Held, that although the Supreme Court and its judges have the same review powers as do the High Court and the judges thereof, it is quite clear that s 25 of the Supreme Court Act does not confer on an applicant the right ^e to apply to the Supreme Court or a judge of the Supreme Court for the review of proceedings of a regional magistrate's court in the first instance.

Held, further, that the Supreme Court or a judge of the Supreme Court can review such proceedings *mero motu* in terms of s 25(2) of the Act. Section ^f 25(2) deals with irregularities in respect of which no appeal or application is before the Supreme Court. The review is undertaken at the instance of the Supreme Court and not of any litigant. Reviews of such irregularities would, but for the provisions of s 25(2), fall outside the jurisdiction of the Supreme Court acting in terms of its appellate jurisdiction or sitting in terms of s 24 of the Constitution. Section 25(3) expressly prohibits any ^g attempt to approach the Supreme Court as a court of first instance in an application for review.

Case cited

Chairman, Zimbabwe Electoral Commission & Anor v Bennett & Anor ^h 2005 (2) ZLR 296 (S)

2007 (2) ZLR p254

Chidyausiku CJ

Legislation considered ^a

Supreme Court Act [*Chapter 7:13*], s 25(2) & (3)

Supreme Court Rules 1964 (RGN 380 of 1964)

Case information

J Mandizha, for the applicant

No appearance for the first respondent

G Butau-Mocho, for the second respondent [ⓑ]

Judgment

CHIDYAUSIKU CJ: After hearing submissions by both counsel in this matter, I dismissed the application and indicated that reasons for judgment would follow. The following are my reasons for judgment –

The notice of application for review reads in part as follows: [Ⓒ]

“NOTICE OF AN APPLICATION FOR REVIEW TO A JUDGE OF THE SUPREME COURT IN TERMS OF THE SUPREME COURT ACT, AS READ WITH PARTS II AND III OF THE SUPREME COURT RULES

TAKE NOTICE THAT the applicant hereby applies for the review of the proceedings of the Regional Court, sitting at Harare, via CRB R404/2006, [Ⓓ] on the grounds, *inter alia*, that ...”.

Thereafter, the notice proceeds to set out in some detail the grounds for review upon which the application is based. In support of the notice, the applicant deposed to a lengthy affidavit in which he sets out, again in some detail, his criticisms of the judgment of the regional magistrate.

The applicant was charged with contravening s 3(1)(a)(i) of the Prevention of [Ⓔ]Corruption Act [*Chapter 9:16*] in the regional magistrates court. The applicant pleaded not guilty but was found guilty after a long trial. Upon his conviction, the applicant applied to a judge of the High Court for bail pending appeal. The application for bail was dismissed on the grounds that the appeal had no prospects of success. Following the refusal to admit him to bail, the applicant [Ⓕ]launched this application for review.

The second respondent opposed the application and filed a document headed “RESPONDENT’S RESPONSE TO APPLICATION FOR REVIEW”, which reads as follows:

- “1. It is respectfully submitted that the application is not properly before this Honourable court. [Ⓖ]
2. The Supreme Court Rules cited by the applicant do not provide for the making of an application for review of a magistrate’s decision by this Honourable Court whilst bypassing the High Court.
3. The High Court has the same review powers as this Honourable Court. The fact that the High Court heard the applicant’s application [Ⓗ]

Chidyausiku CJ

A for bail pending appeal does not necessarily mean that it cannot exercise its review powers on the same matter. The provisions which apply in applications for bail pending appeal are quite different from those for review proceedings.

4. It is further submitted that section 25 of the Supreme Court Act [*Chapter 7:13*] does not give any right to any accused person to B institute any review in the first instance before the Supreme Court.
5. In the premises the respondents (*sic*) pray that the application be struck off the roll."

I pause here to make the following observation –

Where a party, the respondent, wishes to oppose an application, he/she/it C should file a notice of opposition, supported by an opposing affidavit. To simply file a document headed "The respondent's response" reveals an appalling lack of appreciation of court procedure and the rules of this court. I would urge counsel for the second respondent to familiarise himself with the rules and procedure of this court.

Be that as it may, it is quite clear that the second respondent is raising a point D *in limine*, namely that it is not competent for the applicant to make an application for review of the proceedings of the regional magistrate's court directly to a judge of the Supreme Court.

It appears *ex facie* that the application was made in terms of s 25 of the Supreme Court Act [*Chapter. 7:13*] (hereinafter referred to as "the Act"), as read with E Parts II and III of the Supreme Court Rules. A perusal of Parts II and III of the Supreme Court Rules reveals that they do not provide for an application for review by this court. The notice does not cite the specific rule in terms of which it is made. I do not believe there is such a rule. The application also purports to be made in terms of s 25 of the Act.

F Section 25 of the Act provides as follows:

"25 Review powers

(1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings and decisions of inferior courts of justice, G tribunals and administrative authorities.

(2) The power, jurisdiction and authority conferred by subsection (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such H proceedings are, or such decision is, not the subject of an appeal or

2007 (2) ZLR p256

Chidyausiku CJ

application to the Supreme Court. A

(3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court or a judge of the Supreme Court, and provision may be made in rules of court, and a judge of the Supreme Court may give directions, specifying that any class of review or any particular review shall be instituted before or shall be referred or remitted to the High Court B for determination."

A proper reading of the above section reveals that the section provides for the following –

- (a) it confers review jurisdiction on the Supreme Court and every judge of the Supreme Court; C
- (b) the review jurisdiction conferred on the Supreme Court and every judge of the Supreme Court is of the same level as the High Court or a judge of the High Court and is over inferior courts, tribunals and administrative authorities;
- (c) the review jurisdiction is exercisable by the Supreme Court and/or every D judge of the Supreme Court *mero motu* when an irregularity comes to its/his/her attention;
- (d) in terms of s 25 of the Act, no person has a right to institute review proceedings in the first instance in the Supreme Court; and
- (e) the section provides for the making of rules for review by the High Court E and also for the Supreme Court or any judge of the Supreme Court to remit a matter for review to the High Court.

It is quite clear that s 25 of the Act does not confer on an applicant the right to apply to the Supreme Court or a judge of the Supreme Court for the review of proceedings of a regional

magistrates court in the first instance. Section 25(3) of the Act is very explicit in this regard. However, the Supreme Court or F a judge of the Supreme Court can review such proceedings *mero motu* in terms of s 25(2) of the Act. Indeed, this court had occasion to deal with this point in the case of *Chairman, Zimbabwe Electoral Commission & Anor v Bennett & Anor* 2005 (2) ZLR 296 (S), where Ziyambi JA had this to say at 299D-300A:

"It appears to me that the effect of subsections (2) and (3) of s 25 of the Supreme Court Act is that although the Supreme Court may correct an G irregularity in proceedings or in the making of a decision which comes to its attention, not necessarily by way of appeal or application, no person has the right to institute any review in the first instance before this court. Thus it is not open to a party aggrieved by proceedings in a lower court H

2007 (2) ZLR p257

Chidyausiku CJ

A to apply directly to the Supreme Court on review for redress. This much is clear from the wording of s 25(3) of the Supreme Court Act.

The Supreme Court is an appellate court. It has no original jurisdiction except when it sits as a Constitutional Court by virtue of s 24 of the Constitution of Zimbabwe ('the Constitution'). The powers conferred on the Supreme Court by s 25(1) of the Supreme Court Act are, therefore, to B be exercised as part of its appellate jurisdiction. This view is, in my judgment, emphasised by the fact that the legislature has made the provisions of subsection (1) 'subject to' the rest of the section, that is, subsections (2) and (3).

Section 25(2) confers additional jurisdiction which may be exercised when it comes to the notice of the Supreme Court or a judge of that court that C an irregularity has occurred in proceedings not before it on appeal or application. Thus s 25(2) deals with irregularities in respect of which no appeal or application is before the Supreme Court and the review is undertaken at the instance of the Supreme Court and not of any litigant. Reviews of such irregularities would, but for the provisions of s 25(2), fall outside the jurisdiction of the Supreme Court acting in terms of its D appellate jurisdiction or sitting in terms of s 24 of the Constitution. This view is emphasised by s 25(3) which states that subss 25(1) and (2) must not be construed as giving a right of review at first instance."

The learned Judge of Appeal further concluded at 300F-G:

"However, lest it should be thought that litigants have, because of the provisions of s 25(2), the right to approach the Supreme Court directly in E order to obtain redress for perceived irregularities, s 25(3) was enacted to correct any misconception that a litigant may approach this court directly for review. Thus the Act expressly prohibits any attempt to approach the Supreme Court as a court of first instance in an application for review.

It is clear from the above that the intention of the legislature was to ensure that the Supreme Court remains the final court of appeal. The application F before us is one for review at first instance – the very thing which is prohibited by s 25(3). In the premises, I agree with the submission advanced on behalf of the first respondent, namely, that this application was contrary to statute."

I agree with the learned judge's conclusion or interpretation of s 25 of the Act. Accordingly, this application could not succeed. Before concluding, I wish G to make the following observations, I find it rather unusual that this court or a judge of this court is conferred with jurisdiction to adjudicate on an irregularity that has come to its/his/her attention, but is barred from adjudicating on the same irregularity if attention to that irregularity is brought to the court H or the judge by one of the affected parties through an application for review.

2007 (2) ZLR p258

Chidyausiku CJ

It would also appear to me that in terms of s 25 of the Act, the Supreme Court A has no review jurisdiction in respect of any irregularity in High Court proceedings except in the process of hearing an appeal. In my view, this is unsatisfactory and needs redress.

Mandizha & Co, applicant's legal practitioners B

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

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/S v SHUMBA 2007 (2) ZLR 259 (H)

S v SHUMBA 2007 (2) ZLR 259 (H)**2007 (2) ZLR p259**

Citation	2007 (2) ZLR 259 (H)
Case No	Judgment No. HH-79-07
Court	High Court, Harare
Judge	Bhunu J
Heard	19 October 2007
Judgment	19 October 2007
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – *common law crimes – assault – accused in a position of authority – serious view taken of abuse of authority – appropriate sentence*

Headnote

The accused, a member of the local neighbourhood watch, was, together with seven colleagues, investigating crimes. They suspected one of a group of seventeen people had been in possession of some dagga which had been dropped on the floor. They severely assaulted the members of the group in order to try to extract information from them. The accused pleaded guilty to 17 counts of assault and was sentenced to a minor fine.

Held, that the sentence was too lenient. As a member of the neighbourhood watch committee, the accused was in a responsible position of trust, which position he abused. The use of force was totally uncalled for as none of the suspects had resisted arrest or done anything to warrant the use of force. The courts take a serious view of offences involving the abuse of authority, callousness and brutality. The community is rightly outraged when the very people whose function is to protect them turn against them in this way. This case cried out for a community service related penalty or at the very least a hefty fine coupled with a wholly suspended term of imprisonment.

Cases referred to

S v Chadamoyo & Anor HH-75-83

S v Nyirenda 1988 (1) ZLR 160 (H)

Judgment

G BHUNU J: The accused is a member of the neighbourhood watch committee. On 18 March 2007, he was at Gundura business centre Gokwe together with seven colleagues, investigating crime.

During the course of investigations, the accused and his accomplices accosted the seventeen complainants at a ^h local shop.

2007 (2) ZLR p260

Bhunu J

As the investigations progressed, they suspected that one of the seventeen ^a complainants had clandestinely dropped some dagga on the floor. They were, however, unable to identify the culprit and none of the seventeen complainants owned up. This resulted in the accused and his accomplices severely assaulting all the seventeen complainants in a bid to identify the culprit. The medical affidavits show that the complainants sustained bruises on the ^b buttocks and all over their bodies and that severe force was used to inflict the injuries.

The accused is a married young first offender of 28 years of age. He pleaded guilty and was contrite. On those facts, he was convicted of seventeen counts of assault as defined in the Criminal Law Code. All the seventeen counts were treated as one for the purpose of sentence. He was then sentenced to a fine ^c of \$40 000 or, in default of payment, ten months' imprisonment.

It is needless to say that the sentence is too lenient so as to induce a sense of shock, albeit that the alternative period of imprisonment is grossly disproportionate to the amount of fine. See *S v Nyirenda* 1988 (1) ZLR 160 (H).

As a member of the neighbourhood watch committee, the accused was in a ^d responsible position of trust and yet he abused that position of trust and responsibility, giving the police and government which had authorized them to carryout investigations a bad name in the process.

The offence being investigated was apparently a trivial one which did not at all warrant the callous, high-handed manner in which the accused and his accomplices conducted their investigations. The use of force was totally ^e uncalled for as none of the suspects had resisted arrest or done anything to warrant the use of force.

The courts take a serious view of offences involving the abuse of authority, callousness and brutality. For authority for that proposition of law one need not to go beyond Prof G Feltoe's *Guide to Sentencing in Zimbabwe* at p 128 ^f where the learned professor had occasion to remark that:

"1. Authority – abuse of position of authority

It will be an aggravating feature if policemen and others in positions of authority assault persons whom they are supposed to protect. See for instance, *Chigomba* S-6-83 (municipal policeman) *Korera & Anor* S-105-83 (off duty policeman); *Phiri* S-83-86 (military policeman); ^g *Chasango* HH-705-87 (soldier); *Nyoni* HH-703-87 (policeman).

2. Brutality and callousness

If during the commission of a crime such as robbery the offender uses unnecessary violence or brutality or cruelty this will be an aggravating factor. So, too, if during an assault the offender deliberately tortures ^h

2007 (2) ZLR p261

Bhunu J

^a his victim to cause him considerable pain. See for instance, *James* HH-137-83 and *Horwe* 311-86. See also *Walken* 1971 (3) SA 488 (A) and *Daguiar* 1975 (2) PH H110 (A)."

In *S v Chadamoyo & Anor* HH-175-83, a police officer had been convicted of assault with intent to cause grievous bodily and sentenced to twelve months' imprisonment of which five months were suspended on appropriate conditions ^b of good behaviour. Aggrieved by the severity of sentence, he appealed to the High Court. In dismissing the appeal, McNally J (as he then) observed that:

"This kind of unprovoked brutality by police in the course of and in total disregard of their duty to protect people cannot be too strongly condemned. It is fortunate that examples of such conduct are rare. *When it occurs, c punishment must be effective and a fine, save perhaps in very exceptional circumstances, will be wholly inadequate retribution.*

Even had the conviction been for common assault only, we take the view that a prison sentence would have been justified. The community is rightly outraged when the very people whose function is to protect them turn against them in this way" (my emphasis).

^d In this case it is clear that the brutal assaults perpetrated on seventeen helpless defenseless souls were wicked and uncalled for. They were motivated by sheer love of the abuse of power and wickedness. For that reason alone, the paltry fine of \$40 000 is so inadequate as to induce a sense

of shock in the mind of the proverbial reasonable man. In my view, this was an appropriate case crying out for a community service related penalty or, at the very least, a hefty € fine coupled with a wholly suspended term of imprisonment.

That being the case I am unable to certify these proceedings as being in accordance with real and substantial justice. I accordingly withhold my certificate.

¶ Bhunu J & Chatukuta J agree.

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/TEL-ONE (PVT) LTD v COMMUNICATION & ALLIED SERVICES WORKERS' UNION OF ZIMBABWE 2007 (2) ZLR 262 (H)

TEL-ONE (PVT) LTD v COMMUNICATION & ALLIED SERVICES WORKERS' UNION OF ZIMBABWE 2007 (2) ZLR 262 (H)

2007 (2) ZLR p262

Citation	2007 (2) ZLR 262 (H)
Case No	Judgment No. HH-74-07
Court	High Court, Harare
Judge	Hungwe J
Heard	3 July 2007
Judgment	24 October 2007
Counsel	<i>S Hwacha</i> , for the applicant <i>L T Biti</i> , for the respondent
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Arbitration — *award* — *setting aside of* — *grounds for* — *award contrary to public policy* — *meaning of* — *wage settlement* — *award which would drive employer out of business* — *contrary to public policy*

Headnote

Wages negotiations between the applicant company and the respondent trade union were referred to arbitration. The arbitrator's award, in which pay rises were ordered, was ambiguous. On one interpretation, the increase was such that the applicant would have been driven into insolvency, as the increase was more than the applicant's income. On another, it was an affordable increase. The applicant sought to have the award set aside on the grounds that it was contrary to public policy. €

Held, that the concept of public policy is an elusive one, depending on transient and sometimes subjective views on what is or what is not in the public benefit or what constitutes Zimbabwean public good. In assessing an arbitral award, the court must consider the substantive effect of the

award and determine whether or not it is contrary to public policy in its effect. There is no doubt that the spirit of collective bargaining between employer and employee is to arrive by consensus or, if that fails, by arbitration, what a fair wage is. The idea is to preserve the employer-employee relationship. The employee makes his labour available for a fair fee. The employer engages the employee on acceptable terms and conditions. The employer employs his resources to ensure that the goose that lays the eggs for their mutual benefit continues to do so. Society expects these mutually beneficial outcomes. Awards which would drive employers out of business, thereby destroying the economic fabric of the nation, could not be said to be in the best interests of the general good of Zimbabwe. ^H

2007 (2) ZLR p263

Hungwe J

Cases cited ^A

Pamire & Ors v Dumbutshena NO 2001 (1) ZLR 123 (H)

Walenn Holdings (Pvt) Ltd v Lloyd & Anor 1996 (2) ZLR 383 (H)

Zimbabwe Electricity Supply Authority v Maposa 1999 (2) ZLR 452 (S)

Case information

^S *Hwacha*, for the applicant

^B *L T Biti*, for the respondent

Judgment

HUNGWE J: In this application, the applicant seeks an order setting aside an arbitral award made on 29 March 2004 in terms of s 34(2)(b)(ii) of the UNCITRAL Model Law, as incorporated into our domestic law by the ^C Arbitration Act [Chapter 7:15].

The dispute in this matter arose out of a series of salaries and wages negotiations. Since 2003, it had become the applicant's policy to review the salaries and wages of members of the respondent on a quarterly basis. This was in response to the inflationary trends and in accordance with the Median Market Quarterly ("MMQ") or cost of living adjustment. The last of such ^D negotiations had been concluded in October 2003. Between 28 January 2004 and 12 February 2004, the parties had met on no less than eight occasions, without agreement as to what the applicable MMQ for that quarter was. According to the applicant, the deadlock resulted from disagreement on whether the MMQ was a forecast of what the next quarter's salary would be, or whether the figure those figures provided in the MMQ were the actual salary ^E increments. The applicant's management contended for the former and respondent for the latter.

A deadlock was declared and the matter referred to the appropriate national employment council ("NEC"). With the agreement of both parties the NEC appointed an arbitrator to determine the matter. He is the second respondent ^F in these proceedings.

The NEC furnished the arbitrator with the following:

- (a) minutes of the collective bargaining process which ended in a stalemate but did not identify the issues for determination;
- (b) the respondent's submissions on the issues as it understood them; ^G
- (c) the applicant's submissions on the issues.

For his part, the arbitrator did not invite the parties to set out a joint set of issues for determination, but proceeded to deal with the matter as he perceived it. He considered the minutes as well as the submissions made to him by the parties. ^H He then made his award. On receipt of the award, the applicant wrote to the

2007 (2) ZLR p264

Hungwe J

NEC seeking clarification on certain aspects of the award. This provoked a ^A response from the arbitrator. Two days later he volunteered yet another unsolicited response on the same subject.

The applicant contends that the award is liable to be set on the basis that, in its effect, the arbitral award violates the public policy of Zimbabwe. At para 11 of its founding affidavit, the applicant put its case in the following terms: ^B

"I am convinced and respectfully contend that the general sense of justice of the Zimbabwean community is that employees should at all times be paid the best possible salaries. The very same community appreciates that in any employment arrangement, salaries and wages are limited by a company's ability to pay. As such, where a company's cash flow can afford to sustain poverty datum line or higher salaries then such should ^C be paid. If clearly, the balance sheet cannot support such payments then common and sensible notions of justice require that reasonable salaries be paid. The community's sense of justice expects that affordability by the employer is always a crucial consideration in the consideration of salaries payable. Failure to fully recognise this consideration is grossly irregular and turns upside down the society's considerations of justice. ^D

I am also of the view, with respect, that the general sense of justice demands clarity, certainty and confidence that the arbitral authority does not overlook important averments or circumstances and that his/her determination must reason through the contentions of the parties. To overlook important features of a case damages public confidence and is thus against public policy." ^E

The applicant illustrates the point it is at pains to make in the following paragraph thus:

"12. The arbitrator's award is capable of more than one interpretation. One possible interpretation of the arbitrator's award is that the salary of the lowest paid employee (grade 16) be moved to MMQ monthly salary of between \$354 445 and \$531 667 with the mid-point being \$443 056 and this ^F constitutes the base upon which a percentage increment is to be applied to the MMQ figure in order that the net salary of a grade 16 employee excluding allowances becomes at least \$861 241 after subtracting statutory deductions of PAYE, pension and NSSA contributions."

If this interpretation is adopted, as it is contended for by the respondent, it would require a 266 percent increase of salary and wages throughout all ^G grades. The effect of this on the salaries and wages bill for the applicant would be devastating. It will simply cripple all the applicant's operations and drive it into insolvency. It is, for this reason, that the applicant contends that the award, in that form, threatens its very existence. ^H

2007 (2) ZLR p265

Hungwe J

^A The applicant demonstrates the effect of the other possible interpretation. This interpretation will result in an increase of 83 per cent, the effect of which will be bearable. The respondent contends for the interpretation whose effect would be to award a 266 per cent increase across the board. The applicant's income is determined by the tariffs it charges, which in turn are controlled by the Government. At the time, the applicant had had its application for a tariff ^B increase rejected by the Government. As such, clearly, it could not meet the award as set out above.

On the other hand, the respondent haughtily disputes that the award is ambiguous, or that in its effect it will cripple the operations of the applicant. The respondent categorically states that the balance sheets relied on by the ^C applicant are not a true reflection of the financial position of the applicant. It has attached to its opposing papers what it terms is the true financial position of the applicant. Further, the respondent denied that the arbitral award failed to take into account public policy considerations of keeping the applicant in business in making the award. On behalf of the respondent, it was contended that the arbitrator properly took into account the reality of the situation in ^D Zimbabwe based on the poverty datum line, the consumer price index and the applicant's ability to pay.

In my view, the issue for determination is whether, on the papers before me, the applicant has made a case for the setting aside of the award in terms of s 34(2)(b)(ii) of the Model Law. The question as to the requirements to be met ^E before a court could lawfully set aside an arbitral award has exercised the minds of these courts before.

In *Walenn Holdings (Pvt) Ltd v Lloyd & Anor* 1996 (2) ZLR 383 (H), Chinhengo J considered the question and affirmed that the courts will always be most reluctant to interfere with the award of an arbitrator. In that case, the learned judge was considering an application for a stay of proceedings ^F among other issues. The question as to when an award could be held to be in conflict with the public policy of Zimbabwe was dealt with by Gubbay CJ in *Zesa v Maposa* 1999 (2) ZLR 452 (S).

From the cases, it is trite that what the court must consider is whether the award is contrary to the public policy of Zimbabwe. The concept of public policy is ^G an elusive one, depending on transient

and sometimes subjective views on what is or what is not in the public benefit or what constitutes Zimbabwean public good. In assessing the award, it is inevitable that one has to consider the substantive effect of the award and determine whether or not it is contrary to public policy in its effect. One can conceive of the many examples given by ^h Gubbay CJ in *Maposa's case supra*, and many more. In *Pamire & Ors v*

2007 (2) ZLR p266

Hungwe J

Dumbutshena NO 2001 (1) ZLR 123 (H), this court held that it was against ^a public policy to grant full damages to a party, in spite of its own failure to meet all its obligations under the contract, as it would violate the elementary notions of justice.

There is no doubt in my mind that the spirit of collective bargaining between employer and employee is to arrive by consensus or, if that fails, by arbitration, ^b at what a fair wage is. The idea is to preserve the employer-employee relationship. The employee makes his labour available for a fair fee. The employer engages the employee on acceptable terms and conditions. The employer employs his resources to ensure that the goose that lays the golden eggs for their mutual benefit continues to do so. Society expects these mutually beneficial outcomes. The economy thrives and so does the community ^c generally, and its members in particular. An award that plunges the apple-cart over the cliff could not, in my view, not be said to be in the best interest of the general good of Zimbabwe.

The applicant has demonstrated that the award in effect will result in it being obliged to pay or commit 130 percent of its income, as at January 2004, to ^d salaries and wages. In all work situations, salaries and wages are limited by the employer's ability to pay. The courts, and indeed all tribunals delegated with decisions of a financial nature, would be failing in their duty if they were to willy-nilly give awards whose effect would be to drive corporations into insolvency, thereby destroying the economic fabric of the nation. Such awards would defeat the very purpose they are meant to serve. As such, they ^e are liable to be set aside as being in conflict with the public policy of Zimbabwe.

I am satisfied therefore that the application ought to succeed. I issue the following order:

1. The application is granted with costs.
2. The award of the arbitrator dated 29 March 2004 be and is hereby set aside ^f in terms of article 34(2)(b)(ii) of the Model Law.

Dube, Manikai & Hwacha, applicant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners ^g

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/NESTOROS v INNSCOR AFRICA LTD 2007 (2) ZLR 267 (H)

NESTOROS v INNSCOR AFRICA LTD 2007 (2) ZLR 267 (H)

2007 (2) ZLR p267

Citation	2007 (2) ZLR 267 (H)
Case No	Judgment No HH-73-07
Court	High Court, Harare
Judge	Patel J

Heard	31 January 2007
Judgment	29 October 2007
Counsel	<i>P Machaya</i> , for the plaintiff <i>S V Hwacha</i> , for the defendant
Case Type	Civil trial
Annotations	Link to case annotations

Flynote

^c **Contract** — *validity — offer — need for offer to be certain and definite — uncertainty as to what was promised or when it was to be fulfilled — no binding agreement*

Headnote

The plaintiff, a director of a company, sought an allocation of shares similar ^d to what other directors, who had been in the company much longer, had received. The deputy chairman of the defendant company explained that the plaintiff's allocation was lower because of his shorter time in office but promised to "sort out" the plaintiff's shareholding.

Held, that what distinguishes a true offer from any other proposal or statement is the express or implied intention to be bound by the offeree's ^e acceptance. It is fundamental to the nature of any offer that it should be certain and definite in terms. It must be firm, that is, made with the intention that when accepted it will bind the offeror. An offer to enter into a binding contract must be distinguished from preliminary discussions, invitations to treat, offers to negotiate, statements of intention and mere ^f puff. The terms of a contractually binding offer must be firm, certain and definite. Vagueness or uncertainty in the terms of an offer is fatal to the existence of the supposed contract. *In casu*, the purported offer was not couched in certain and definite terms sufficient to constitute an offer for the purposes of a binding contract. It was uncertain as to when the promise would be fulfilled and as to what was actually promised. The ^d deputy chairman's promise thus did not constitute a binding agreement giving rise to any clear contractual undertaking by the defendant.

Cases cited

Dube v Banana 1998 (2) ZLR 92 (H)

^h *Levenstein v Levenstein* 1955 SR 91; 1955 (3) SA 615 (SR)

2007 (2) ZLR p268

Patel J

Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor 1998 (2) ZLR 547 (H) ^a

United Air Charters (Pvt) Ltd v Jarman 1994 (2) ZLR 341 (S)

Legislation considered

Prescription Act [*Chapter 8:11*], s 16(1) ^b

Case information

P Machaya, for the plaintiff

S V Hwacha, for the defendant

Judgment

PATEL J: The plaintiff herein is a former director of the defendant which is listed as a public company. The plaintiff's claim, as amended, is for the transfer c to him of 3 625 000 ordinary paid up shares in the defendant company (Innskor). In the alternative, he claims payment of the market value of such shares as at the date of judgment.

The principal issue for determination in this matter is whether or not there was a binding and enforceable agreement between the parties for the allotment to d the plaintiff of 4 500 000 shares in Innskor. At the close of the plaintiff's case, Innskor applied for absolution from the instance on the grounds that no such agreement had been established on the plaintiff's evidence and that, in any event, the plaintiff's claim was not only void but also prescribed by law.

ABSOLUTION FROM THE INSTANCE E

The approach to be adopted in an application for absolution from the instance was succinctly expounded by Gubbay CJ in *United Air Charters (Pvt) Ltd v Jarman* 1994 (2) ZLR 341 (S) at 343, as follows:

"The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an F application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him. See *Supreme Svc Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at 5D-E; *Lourenco v Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S) at 158B-E."

Moreover, in considering an application for absolution, the court should lean G in favour of continuing the case rather than dismissing it. See *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor* 1998 (2) ZLR 547 (H) *per* Smith J at 552-553. H

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Patel J

A EVIDENCE FOR THE PLAINTIFF

The plaintiff testified that he first joined Mbanje Bird (Pvt) Ltd (Mbanje Bird) in 1997 as a consultant and later became its Projects Director. At that time, Mbanje Bird was owned by Microlite Safaris (Pvt) Ltd (Microlite Safaris) which changed its name to Innskor Africa Ltd in December 1997. Innskor, which held all the shares in Mbanje Bird, then became a public company and B was listed on the stock exchange in January 1998.

Soon thereafter, the directors of Mbanje Bird, like the directors of other subsidiaries of Innskor, were issued ordinary shares in Innskor. These shares were pooled in terms of a Pooling Agreement dated 5 July 1998 [Exhibit 1] which restricted the tradability of the shares for a period of five years.

c The plaintiff's four co-directors were allotted 4 500 000 shares each, free of charge, while the plaintiff himself was only given 125 000 shares in Innskor. He discussed this with Zenon Koudounaris, the Deputy Chairman of Innskor, at a meeting held in August 1998. The latter explained that the plaintiff had been given fewer shares because he had only been employed by Mbanje Bird for a few months, but that the remaining shares would be allotted to him in the d ensuing five year period. Also present at that meeting was Charles Mbanje, representing Mbanje Bird.

In August 1998, the plaintiff was granted a share option [Exhibit 2] to subscribe to 250 000 shares under Innskor's Share Option Scheme [Exhibit 10]. This was intended to be a bonus or incentive option and not part of the pooling e arrangement. In November 1998, the plaintiff was allotted a further 500 000 shares in Innskor which were donated free of charge by his four co-directors to enable him to purchase his home [Exhibit 3].

In March 2002, Innskor entered into a joint venture with Exxon-Mobil which for several reasons could not accommodate the plaintiff. He then agreed to resign, subject to him receiving his remaining shares. He proposed that he be f allotted 3 625 000 shares, being 4 500 000 shares less the 875 000 shares that he had already received. Innskor declined to allot any further shares to the plaintiff.

In a letter from Charles Mbanje to the plaintiff dated 28 June 2002 [Exhibit 4], it was explained that the allocation of Innskor shares to the four co-directors g was effected in accordance with their respective shareholdings in Mbanje Bird. This alleged shareholding was incorrect as appears from

the Return of Allotments for Mbanje Bird dated 10 December 1997 [Exhibit 5] which shows that all of Mbanje Bird's shares at that time were held by Microlite Safaris.

According to the plaintiff, although his name does not appear in Mbanje Bird's H company returns, his position as a director of Mbanje Bird is reflected on the

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Patel J

company's letterhead, as evidenced by Exhibit 4 as well as a lease agreement A dated 17 July 2000 [Exhibit 6]. The company's registration records were haphazard and inaccurate and did not provide a correct listing of its directors at any given time. This is reflected in its Particulars of Directors dated 10 December 1997 [Exhibit 7], Annual Return dated 11 April 1997 [Exhibit 8] and Annual Return dated 21 March 2000 [Exhibit 9]. B

Under cross-examination, the plaintiff accepted that he was never a shareholder in Mbanje Bird or Microlite Safaris. Moreover, he was unable to produce any Companies Registry record or Board resolution appointing him as a director of Mbanje Bird. In January 1998, there was no clear undertaking, either from Mbanje Bird or from Innscor, that he would be allotted 4 500 000 shares. That undertaking was only made verbally by Koudounaris at the meeting in August C 1998. However, at that stage, there was no clarity as to the source of the additional shares.

The plaintiff conceded that the above position is not what is reflected in his further particulars or in his summary of evidence (which was prepared by himself). The further particulars state that the verbal agreement was entered D into in January 1998, while the summary of evidence contains no specific reference to the meeting held in August 1998. The plaintiff also conceded that the verbal undertaking by Koudounaris in August 1998 was never reduced to writing. Nor was he able to produce any mandate from the Board of Innscor authorising Koudounaris to make that undertaking.

WHETHER CLAIM PRESCRIBED E

It seems convenient to deal with the question of prescription at the outset as it is an issue that naturally arises *in limine*. For the defendant, Mr *Hwacha* argues that the plaintiff's claim has prescribed, inasmuch as his demand for the additional shares was made in August 1998, and more than three years elapsed before he instituted the present action in April/May 2003. Mr F *Machaya*, for the plaintiff, counters by pointing to the period during which the promised allocation of shares was to be performed, *viz.* five years from the inception of the Pooling Agreement in July 1998, and submits that prescription would only begin to run from the end of that period.

In terms of s 16(1) of the Prescription Act [Chapter 8:11], prescription in G respect of a contractual obligation commences to run as soon as a debt is due, *viz.*, from the time when the claimant's cause of action is crystallised. See *Dube v Banana* 1998 (2) ZLR 92 (H) at 95. The crisp question to be answered in this regard is this: when did the plaintiff's cause of action arise? It certainly was not the date when the promise relied upon was made. It might arguably be the H

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Patel J

A last date for the fulfilment of the promise, *i.e.* 4 July 2003. In my view, the earliest possible date when the plaintiff's cause of action arose was when it was made clear to him that the promised allocation of shares would not materialise, *viz.*, between March and June 2002. On either approach, the plaintiff's claim was instituted timeously and the defendant's exception based on prescription must therefore fail and be dismissed.

B BINDING AND ENFORCEABLE AGREEMENT

The first question to consider in this case is the date of conclusion of the contract relied upon by the plaintiff. At para 4 of his further particulars, in response to the question "When was the alleged agreement entered into?", the plaintiff declared unequivocally "January 1998". In his evidence in court, C however, the plaintiff altered his position and stated that the undertaking in question was made by Koudounaris not in January but in August 1998. In my assessment of the plaintiff's testimony, this inconsistency was not satisfactorily explained by him, either in his evidence-in-chief or under cross-examination.

▫ Turning to the averred agreement itself, it is necessary to consider the specific terms of the undertaking attributed to the defendant through the agency of Koudounaris. According to Christie *The Law of Contract in South Africa* 3 ed at 30:

"What distinguishes a true offer from any other proposal or statement is the express or implied intention to be bound by the offeree's acceptance. E... It is fundamental to the nature of any offer that it should be certain and definite in terms. It must be firm, that is, made with the intention that when accepted it will bind the offeror."

An offer to enter into a binding contract must be distinguished from preliminary discussions, invitations to treat, offers to negotiate, statements of intention and mere puff. The terms of a contractually binding offer must be firm, certain F and definite. It follows that vagueness or uncertainty in the terms of an offer is fatal to the existence of the supposed contract. See *Levenstein v Levenstein* 1955 SR 91; 1955 (3) SA 615 (SR) per Quènet J at 619.

The offer or promise made by Koudounaris and relied upon by the plaintiff *in casu*, as stated at para 1.1.12 of the plaintiff's summary of evidence, is as G follows:

"I gave Graeme Bird so many shares because I gave him my word and I give you my word, I will sort out your shareholding Nestora."

In his evidence to the court, the plaintiff recollected this verbal promise in H somewhat different terminology, but the essence of what was promised is

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Patel J

substantially the same. Having regard to the words said to have been used A by Koudounaris, it is evident that the purported offer was not couched in certain and definite terms sufficient to constitute an offer for the purposes of a binding contract. In other words, there was no certainty in the terms of the alleged offer.

The first element of uncertainty relates to *when* the defendant's promise or B undertaking was to be fulfilled. The plaintiff avers that the additional shares were to be allocated to him over the duration of the Pooling Agreement, i.e. within five years from 5 July 1998. In this respect, there is no clarity whatsoever as to whether the promised shares were to be allotted in instalments at regular intervals or in a single allotment, or as the date or dates when the allotment or allotments were to be made. C

Secondly, and more significantly, the plaintiff's claim lacks certainty as to *what* was actually promised, in terms of the nature of the supposed share allotment. In his unamended declaration, the plaintiff averred that the agreement between the parties was that he would be allocated the same "option right" that had been allocated to his co-directors. At para 4 of the plaintiff's further D particulars, this "option right" is explained as "the right to purchase ordinary Innscor Africa Ltd shares at an agreed discounted price of Z\$4.90 per share". At the commencement of trial, the plaintiff applied to amend his declaration to delete the references to "option right" and for them to be replaced by references to "shares" *simpliciter*. However, the rest of his pleadings remained unaltered. Thereafter, during the course of the trial, the plaintiff testified that E he, like each of his co-directors, was in fact entitled to the additional shares "free of charge" as opposed to shares at a discounted price. In the event, what emerges from the plaintiff's case in this regard is an unhappy ambivalence between his oral testimony and his unamended pleadings.

Finally, the vagueness that characterises the plaintiff's claim is pointedly F mirrored in the actual words attributed to Koudounaris. The essence of the latter's promise to the plaintiff, *viz.*, "I will sort out your shareholding" is intrinsically as meaningless as it is open-ended. At best, it constitutes a statement of intention – a promise to look into the plaintiff's grievance with a view to accommodating his claim to be treated as an equal co-director of Mbanje Bird. The promise made by Koudounaris, as I read it, does not in itself G constitute a binding agreement giving rise to any clear contractual undertaking by the defendant.

DISPOSITION

In light of my conclusions as to the absence of any binding and enforceable H contract between the parties, I deem it unnecessary to canvass the additional

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Patel J

A submissions made by counsel as to the authority of Koudounaris to bind the defendant and the legality of the plaintiff's claim in the context of s 75 of the Companies Act [*Chapter 24:03*].

In the result, the defendant's application for absolution from the instance is granted and the plaintiff's claim is dismissed with costs.

B *Majome & Company*, plaintiff's legal practitioners

C *Dube, Manikai & Hwacha*, defendant's legal practitioners

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Source:

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AVACALOS v RILEY 2007 (2) ZLR 274 (H)

2007 (2) ZLR p274

Citation	2007 (2) ZLR 274 (H)
Case No	Judgment No. HH-75-07
Court	High Court, Harare
Judge	Makarau JP
Heard	17 September 2007
Judgment	31 October 2007
Counsel	Mrs J B Wood, for the plaintiff R M Fitches, for the defendant
Case Type	Stated case
Annotations	Link to case annotations

Flynote

Practice and procedure — judgment — judgment by consent — claim expressed in foreign currency, alternatively in local currency at market rate — not permissible to grant judgment at "market" rate — official rate only allowed — date on which official rate to be determined

Headnote

The plaintiff issued summons against the defendant, claiming the sum of ₨ US\$ 64 000 or its equivalent in Zimbabwean currency at the "market rate" prevailing on the date of payment. After initially opposing the claim, the defendant consented to judgment in the alternative prayer as set out in the plaintiff's declaration. In the consent to judgment filed of record, the defendant specifically consented to judgment in the sum of Zimbabwe \$16 000 000, representing the sum of US\$64 000 at the official exchange rate as at the date of the consent. The plaintiff refused to accept the defendant's consent to judgment and requested that the matter be referred to trial on

the sole issue of whether the “market” rate of exchange referred to in the summons is the same as the official rate upon which the defendant made payment or is some other higher rate, known in common parlance as the parallel or black market rate. The facts not being in ^ε dispute, the matter was argued as a stated case. Three main arguments were put forward by the plaintiff: (a) that judgment should be granted to the plaintiff in the sum of US\$64 000 and not in the sum of the local currency equivalent in which the defendant consented to judgment; (b) alternatively, that the sum of US\$64 000 be converted to local currency ^g at the parallel market rate; (c) alternatively, that if the local currency equivalent of the amount due to the plaintiff was to be converted at the official rate, the rate applicable should not be that which obtained on the date the consent to judgment was filed, but that which would be obtaining when the plaintiff sought to enforce the judgment. ^h

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Makarau JP

- ^a *Held*, that a judgment may be given in foreign currency where the obligation to pay is in that currency. Since the defendant had consented to judgment, it was not possible to deal with the matter on the merits and thereby determine whether the plaintiff was entitled to judgment in foreign currency. The plaintiff worded his declaration in such a way that he gave the defendant a choice as to the currency of the judgment.
- ^b *Held*, further, that while there is a shortage of foreign currency in the country, it is illegal to pay at any other rate other than the official rate. While the parallel market is a reality and may be the only viable market at times, the court cannot lend itself to an illegality and validate its operations by giving a judgment that makes reference to it.
- Held*, further, that the principle that the amount of foreign currency in a ^c judgment is to be converted into local currency at the date when leave is given to enforce the judgment only applies where the judgment is expressed in foreign currency. Where the judgment is expressed in local currency, then the amount of the judgment is set and determined on the date that the consent to judgment is filed. It cannot be re-converted on the date that judgment is finally given as to do so would be highly ^d prejudicial to the defendant, who would have unequivocally elected to have a judgment entered against him in a certain specified amount.
- Held*, further, that the differences between the exchange rates or markets obtaining in the country would continue to work hardships on people in the position of the plaintiff. It was hoped that the situation would normalise in the near future so that litigants would not lose faith in a legal ^e system that was compelled by law to recognize only the official rate, a rate which was not only unrealistic but was never part of the parties’ consideration when they enter into transactions involving foreign currency.

Cases cited

- ^f *AMI Zimbabwe (Pvt) Ltd v Casalee Hldgs (Successors) (Pvt) Ltd* 1997 (2) ZLR 77 (S)
- Echodelta Ltd v Kerr & Downey Safaris (Pvt) Ltd* 2002 (1) ZLR 632 (H)
- Intercontinental Trading (Pvt) Ltd v Nestlé Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (H)
- Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC)
- ^g *Zimbabwe Development Bank v Zambezi Safari Lodges (Pvt) Ltd & Ors* 2006 (2) ZLR 118 (H)

Case information

Mrs J B Wood, for the plaintiff

^h R M Fitches, for the defendant

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Makarau JP

Judgment

MAKARAU JP: The issue that falls for determination in this matter is relatively ^a easy to formulate. The matter, however, took a long and rather tortuous road from the issuance of summons to

presentation of argument before me by counsel as a stated case.

The plaintiff issued summons against the defendant on 7 April 2006, claiming the sum of US\$64 000 or its equivalent in Zimbabwean dollars at the market ^b rate prevailing on the date of payment. The prayer also sought interest *a tempore morae* and costs of suit.

On 12 May 2006, the plaintiff filed a declaration in which he set out his cause of action against the defendant as an agreement of sale of shares in a company registered in Zimbabwe, which agreement the defendant is alleged to have breached. ^c

The action was defended and, after a request for further particulars which were duly furnished, the defendant filed a plea in which a number of legal points were raised in addition to a denial of the alleged indebtedness. In addition, the defendant filed a counterclaim in which he prayed for the removal from attachment of his shares, which attachment had been made by the Sheriff to ^d found jurisdiction in the matter. The plea was filed in December 2006.

A replication was filed in the matter in May 2007 and an application for a pre-trial conference made. A conference was scheduled for 8 June 2007. Two days before the conference was held, the defendant consented to judgment in the alternative prayer as set out in the plaintiff's declaration. In the consent to judgment filed of record, the defendant specifically consented to judgment in ^e the sum of \$16 000 000, representing the sum of US\$64 000 000 at the official exchange rate as at the date of the consent. The defendant also consented to judgment for interest and costs as prayed for in the summons.

At the pre-trial conference of the matter, the plaintiff refused to accept the defendant's consent to judgment and requested that the matter be referred to ^f trial on the sole issue of whether the "market" rate of exchange referred to in the summons is the same as the official rate upon which the defendant made payment or is some other higher rate, known in common parlance as the parallel or black market rate.

At the hearing of the matter, in view of the fact that the facts of the matter are ^f not in dispute, I directed that counsel file heads of argument on the matter and allowed the matter to be argued on the opposed motion roll.

Mrs *Wood*, for the plaintiff, raised three main arguments on behalf of the plaintiff. Firstly, she argued that I should grant judgment to the plaintiff in the sum of US\$64 000 and not in the sum of the local currency equivalent in which ^h

2007 (2) ZLR p277

Makarau JP

^a the defendant has consented to judgment. Secondly, she argued that in the event that I am not inclined to give judgment in the sum of US\$64 000, then I should order that the sum of US\$64 000 be converted to local currency at the parallel market rate. Finally, she argued that if I am to hold that the local currency equivalent of the amount due to the plaintiff is to be converted at the official rate, then I should order that the official rate applicable is not the one ^b that obtained on the date the consent to judgment was filed, but the one that will be obtaining when the plaintiff seeks to enforce the judgment.

I will deal with each of these arguments in turn.

JUDGMENT EXPRESSED IN FOREIGN CURRENCY

It has been held by the Supreme Court that a judgment may be given in foreign ^c currency where the obligation to pay is in that currency. See *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC).

The position established in *Makwindi* was followed in *AMI Zimbabwe (Pvt) Ltd v Casalee Hldgs (Successors) (Pvt) Ltd* 1997 (2) ZLR 77 (S) and, more recently, in *Zimbabwe Development Bank v Zambezi Safari Lodges (Pvt) Ltd* ^d 2006 (2) ZLR 118 (H) and was averted to as *dicta* in *Intercontinental Trading (Pvt) Ltd v Nestlé Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (H).

In my view, while it is competent for this court to order that judgment be expressed in foreign currency in appropriate cases, it is not competent for me to do so in the matter before me.

ε As stated elsewhere above, the defendant filed a consent to judgment. The consent was properly filed in terms of the High Court Rules 1971. Had the plaintiff been inclined to do so, he would have been perfectly within his rights to apply through the chamber book to the registrar for judgment to be entered in his favour. This he did not do, as he was of the view, erroneously held as I will show below, that he was entitled to convert the original debt at the elusive ε parallel market rate.

That the plaintiff is entitled to judgment in the alternative and at the official rate of exchange is beyond doubt. This he is entitled to, not because the matter has been determined on its merits and after a full trial of the issues between the parties, but because the defendant has elected to throw in the towel and ε conceded the claim. It thus appears to me that the judgment I have to enter in this matter is not a judgment on the merits and where I determine the issues between the parties. The resolution of the dispute has been taken out of my hands by the consent filed by the defendant. There is no issue remaining alive η for me to determine.

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Makarau JP

In my view, the situation would have been different had the plaintiff worded α his declaration in such a way that he did not give the defendant a choice as to the currency of the judgment. By including the alternative prayer for the local currency equivalent of the foreign currency, the plaintiff created room for the defendant to choose to consent to judgment in the local currency equivalent.

Thus, two legal principles militate against my making an order sounding in foreign currency in this matter. Firstly, I cannot determine the matter on the merits to establish whether or not the plaintiff is entitled to judgment in the sum of the foreign currency claimed. By consenting to judgment in the matter, the defendant had taken away the need on my part to deal with the matter on the merits. Secondly, the defendant has already calculated the amount of the c local currency that he is consenting to judgment in. This he has correctly done and no challenge has been mounted against his calculations. He has thus consented to judgment, not only in terms of the summons but in a manner where all I have to do, is to convert the consent into an order of this court.

THE COURT'S RECOGNITION OF THE PARALLEL MARKET D RATE

The facts of the matter before me are similar to the facts that faced Smith J in *Echodelta Ltd v Kerr & Downey Safaris (Pvt) Ltd* 2002 (1) ZLR 632 (H). In that case, while noting that the official rate of exchange for foreign currencies was far removed from the exchange used in the informal market, the ε court endorsed the argument by counsel for the defendant that while there is a shortage of foreign currency in the country, it is illegal to pay at any other rate other than the official rate. While the parallel market is a reality and may be the only viable market at times, the court cannot lend itself to an illegality and validate its operations by giving a judgment that makes reference to it.

THE DATE OF CONVERSION OF THE JUDGMENT DEBT F

Finally, Mrs Wood argued that if I were to uphold the submissions by Mr Fitches that the only rate applicable to convert the mount due to the plaintiff is the official rate, then I must order that the rate applicable be the current official rate and not the rate that obtained at the time the defendant consented to judgment and attempted to pay off the debt. g

It appears to me that Mrs Wood is seeking reliance from the dicta in *Makwindi Oil Procurement (Pvt) Ltd supra* where it was laid down that the amount of foreign currency in a judgment is to be converted into local currency at the date when leave is given to enforce the judgment. This is the established position but, in my view, it only applies where the judgment is expressed in η

2007 (2) ZLR p279

Makarau JP

A foreign currency. Where the judgment is to be expressed in local currency, then the amount of the judgment is set and determined on the date that the consent to judgment is filed. It cannot be re-converted on the date that judgment is finally given as to do so will, in my view, be highly prejudicial to the defendant who would have unequivocally elected to have a judgment entered against him in a certain specified amount.

¶ I am aware of the loss that the plaintiff is going to incur in this matter and that this is why Mrs Wood is pressing for the higher rate of exchange. It is, however, my view that the plaintiff is to some extent to blame for the monumental loss that he will now incur by having the judgment entered in his favour at the much lower rate. He firstly pleaded in the alternative as stated above, opening the c doors wide for the defendant to accept the less onerous burden of consenting to judgment in the local currency equivalent. He then wrongfully refused to accept the tender of the local currency at a time when its value was relatively higher than now, thereby compounding his loss.

DISPOSITION

¶ The judgment in this matter is harsh upon the plaintiff. It is, however, not for the courts to make policy and determine what rates should apply between traders and contracting parties. The differences between the exchange rates or markets obtaining in the country will continue to work hardships on people in the position of the plaintiff and it is hoped that the situation will normalize in the near future so that litigants will not lose faith in the legal system that ¶ is compelled by law to recognize only the official rate which is not only unrealistic but is never part of the parties' consideration when they enter into transactions involving foreign currency. It is, however, my view that, the law cannot be changed to address the shortage of foreign currency in the country, for it is not the function of the court to address such issues.

¶ In the result, I make the following order:

1. Judgment is entered for the plaintiff in the sum of \$16 million together with interest thereon at 30 percent *per annum* from the date of summons to date of payment in full.
2. The defendant shall pay the plaintiff's costs up to the date of the filing ¶ of the consent to judgment.

Byron Venturas & Partners, plaintiff's legal practitioners

¶ *Scanlen & Holderness*, defendant's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/SUPLINE INVESTMENTS (PVT) LTD v FORESTRY CO OF ZIMBABWE 2007 (2) ZLR 280 (H)

SUPLINE INVESTMENTS (PVT) LTD v FORESTRY CO OF ZIMBABWE 2007 (2) ZLR 280 (H) 2007 (2) ZLR p280

Citation	2007 (2) ZLR 280 (H)
Case No	Judgment No. HH -76-07
Court	High Court, Harare
Judge	Makarau JP
Heard	23 October 2007
Judgment	31 October 2007
Counsel	<i>E W W Morris</i> , for the applicant <i>J Zviuya</i> , for the respondent
Case Type	Opposed application

Flynote

Landlord and tenant — *cancellation of lease* — *failure to agree on fair c rental* — *obligation of tenant to pay rental* — *consequences of failure to pay rental*

Practice and procedure — *dispute of facts* — *dispute must be material* — *court to be robust in determining whether dispute is material* D

Practice and procedure — *plea* — *lis alibi pendens* — *where plea raised court has discretion whether or not to stay proceedings* — *right to stay proceedings to be exercised sparingly*

Practice and procedure — *waiver of rights by a party* — *must be unequivocal act done with full knowledge of facts and rights alleged to be waived.* E

Headnote

The applicant was a property-owning company. It leased certain premises to the respondent in terms of a written lease agreement. A dispute arose between the parties as to the payment of rent. The applicant then cancelled the lease on 24 January 2007. On 11 April, the applicant wrote to the respondent, alleging that the rent for December 2006 and March F 2007 had not been cleared and nothing had been paid for April. In its letter of 24 January 2007, the applicant stated that rentals were in arrears for the months of September, October and December 2006 and January 2007, because the amounts that had been paid for the four months in 2006 were under-payments and no payment had been made as rent for January 2007. In a letter dated 25 January 2007, the respondent conceded that no rental had been paid for January and explained why. In a letter dated 5 February 2007, the applicant's legal practitioners acknowledged receipt of the outstanding rentals. In the same letter it referred to the alleged shortfalls and accrued interest and stated that the cancellation of the lease still H stood.

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Makarau JP

A On 24 April 2007 the applicant filed an application seeking an order evicting the respondent from the leased premises. In opposing the application, the respondent objected to the procedure adopted by the applicant, arguing that there were serious disputes of fact, and raised the plea in bar of *lis alibi pendens*.

Held, that for a dispute of fact to deter a court from resolving a dispute before B it, the dispute must be material. In deciding whether or not it is material, the court must adopt a robust approach.

Held, further, that a tenant has an undisputed obligation to pay rentals for property that it leases. Where the amount of the rental is disputed, the tenant must pay what it contends represents a fair rental. Failure to do so entitles the landlord to eject the tenant.

C Held, further, that a plea of *lis alibi pendens* is not a complete bar to the bringing of proceedings in a court. It is merely a plea to the court for the court to stay the proceedings before it in order to allow the other proceedings to be completed. The power to stay proceedings on such a ground should be exercised sparingly.

D Held, further, that by continuing to accept rentals from the respondent after the applicant had cancelled the lease, the applicant did not waive its right to rely on the breach by the respondent. For waiver to operate, there must be an unequivocal act done with full knowledge of all the relevant facts, as well as of the rights which it is argued have been waived.

Cases cited E

Quest Motor Corporation (Pvt) Ltd v Nyamakura 2000 (2) ZLR 84 (1)

Stracon Development (Pvt) Ltd v Gruer 1990 (1) ZLR 354 (H)

Van Niekerk v Van Niekerk & Ors 1999 (1) ZLR 421 (S)

Zikiti v United Bottlers 1998 (1) ZLR 389 (H)

Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech 1987 (2) ZLR 338 (S)**Case information**

¶ *E W W Morris*, for the applicant

J Zviuya, for the respondent

Judgment

MAKARAU JP: The applicant is a property-owning company that leased ^g certain premises to the respondent in terms of a written lease agreement that has been varied from time to time with the written consent of the parties. A dispute arose between the parties as to the payment of rentals for the leased premises resulting in the applicant canceling the lease agreement between the ^h parties on 24 January 2007. At the time of the cancellation of the lease

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Makarau JP

agreement, the applicant alleged that the respondent was in arrears with its ^a rentals to the tune of \$5 810 000.

On 11 April 2007, the applicant addressed another letter to the respondent, alleging that the rental for December 2006 and March 2007 had not been cleared and that nothing had been paid for the month of April 2007, resulting in the cancellation once again of the lease agreement. ^b

In its letter dated 24 January 2007 and in which the cancellation of the lease was first communicated to the respondent, the applicant stated that the rentals that were in arrears were for the months of September, October, November and December 2006 and for January 2007. Payments had been made for September to December 2006 but in amounts that the applicant alleges were underpayments. No payment had been made as rentals for January 2007. In ^c responding to the allegations and cancellation of the lease agreement, the respondent conceded in a letter dated 25 January 2007 that no rentals had been paid for January 2007 and explained the circumstances leading to the non-payment of the rentals. I shall revert to the contents of this letter in detail.

It is not clear on the papers when the rentals for January 2007 were finally paid, ^d but in a letter dated 5 February 2007, the applicant's legal practitioners acknowledged receipt of payment of the outstanding rentals. In the same letter, it brought to the attention of the respondent an alleged shortfall in the rentals and the accrued interest and maintained that the cancellation of the lease would hold and the instructions of the applicant would be sought on whether or not to reinstate the lease. ^e

On 24 April 2007, the applicant filed this application seeking an order evicting the respondent from the leased premises together with costs of suit on the higher scale.

The application was opposed.

In opposing the application, the respondent relied on four main issues. It ^f firstly raised a point *in limine* attacking the authority of the deponent to the applicant's founding affidavit. It then alleged that the agreement of lease was illegal as it fixed the rentals of the property in foreign currency. As a third defence, the respondent denied that the rental for January 2007 was outstanding at the time of the filing of the application. Finally, the respondent contended ^g that the same matter is pending before the Rent Board and was thus raising the plea in bar of *lis alibi pendens*.

At the hearing of the matter, the respondent withdrew the first two legs of its defence leaving the *lis alibi pendens* defence and one objecting to the procedure adopted by the applicant. ^h

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^a I shall deal with each in turn starting with the procedural one.

The respondent argued that there are serious disputes of facts that arise from the application and the applicant must have proceeded by way of action rather than by filing this application.

In support of this argument, Mr *Zviuya* referred to the dispute relating to the ^b amount of rent payable within each quarter and whether or not CB Richard Ellis acted as the agent of the lessor or

of the lessee in submitting a Rental valuation Report in respect of the leased premises for each quarter.

In my view, it is the settled practice of this court for which authority is hardly necessary that for a dispute of fact to deter a court from resolving a dispute before it, the dispute must be material.

c The need on the part of the court to be robust is now common place, the exhortation having been made by Gubbay JA (as he then was) in *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (S) at 339C-D. The exhortation was taken up and endorsed by Sandura JA in *Van Niekerk v Van Niekerk & Ors* 1999 (1) ZLR 421 (S).

d It remains the practice of this court to endeavour to resolve applications without calling evidence where to do so will not result in a miscarriage of justice. I am to be guided by this practice in determining the application before me.

In casu, I am convinced that the dispute of facts are not material to the resolution of the dispute between the parties and that in resolving the matter e without referring it to oral evidence, I will not be causing any prejudice to either of the parties.

It is not in dispute that as from September 2006 to date of issuance of summons, the parties did not agree as to what constitute fair rentals for the property. CB Richard Ellis was appointed in terms of the agreement to set rentals for the three f months of each term. This it did by stipulating rental payable for each month of the term. Allegations were then exchanged as to whose agent CB Richard Ellis was and whether it had an obligation to set the rent for each individual month or for the entire period of three months. This dispute was referred to the Rent Board, giving rise to the respondent's plea of *lis alibi pendens*, which I deal with below.

g It is my considered view that the factual dispute relating to the amount of the rental payable each month does not materially affect whether or not the rental for January 2007 was paid, even in the amount admitted by the respondent as the correct amount. A tenant has an undisputed obligation to pay rentals for h property that he leases from the landlord. That is the *sine qua non* for his

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continued occupation of the leased property. He has no right to occupy the a landlord's property save in return for payment of rent. Where the tenant disputes the amount of the rentals chargeable for any premises, in my view, that challenge does not absolve the tenant from paying any rentals at all. The minimum that the tenant in such a situation must pay is the amount that it contends represents fair rentals for the premises. This, the tenant must pay to avoid being ejected on the basis of non-payment of rentals even if its b challenge to what constitutes fair rentals is subsequently validated. At most, the tenant can pay the disputed amount and claim or be credited with the difference once its contentions as to what constitutes fair rentals are validated.

Further, it is my view, that the dispute relating to whose agent CB Richard Ellis was, is a non-issue, as the parties agreed in the various addenda to the lease c agreement that the rental for each quarter would be determined by CB Richard Ellis. The parties therefore, in my view, appointed CB Richard Ellis as their joint but independent arbiter.

In my view, the simple issue that falls for determination in this application is whether the admitted failure by the respondent to pay rent for January 2007 was such a breach as to entitle the applicant to cancel the lease. d

I think it was.

The contract between the parties specifically provided that rent would be paid "on presentation of invoice and statements reconciling the period". It is common cause that the invoice for January 2007 was furnished to the respondent on 14 January 2007. The respondent itself concedes that rent was e not paid until the letter of the applicant's legal practitioners of 24 January 2007 cancelling the lease agreement was received. In the circumstances, the respondent was clearly in breach of the lease agreement. The breach committed by the respondent was contemplated by the parties and specifically provided for in clause 25 of the lease agreement. It was the common intention of the parties that should the lessee fail to pay rent within seven days of its due date, f then the lessor would be entitled to cancel the lease as it did. It is common cause that the rent was due on 14 January 2007 when the invoice was presented to the respondent. It remained unpaid up to 24

January 2007, more than seven days after due date when the letter canceling the agreement was delivered.

Mr *Zviuya* attempted (and valiantly so in my view) to prevent the applicant from relying on the clear and admitted breach of the lease agreement by the *G* respondent by raising the issues of *lis alibi pendens* and waiver on the part of the applicant.

It is trite that the plea of *lis alibi pendens* is not a complete bar to the bringing of proceedings in this court. It is merely a plea to the court for the court to stay *H* the proceedings before it to allow the other proceedings to be completed.

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A "As is made clear in *Mhungu v Mtindi* 1986 (2) ZLR 171 (S), where a plea of *lis alibi pendens* is raised, the court has a discretion as to whether or not it should stay the proceedings. See too *Williams v Shub* 1976 (4) SA 567 (C)" per Smith J in *Quest Motor Corporation (Pvt) Ltd v Nyamakura* 2000 (2) ZLR 84 (H).

For those seeking the jurisprudential basis for holding that a plea of *lis alibi pendens* is in the discretion of the court, reference may be made to the remarks of Gillespie J in *Zikiti v United Bottlers* 1998 (1) ZLR 389 (H).

For my purposes, I seek guidance from the learned judge's remarks that the power of the court to stay proceedings on the grounds that the matter is pending before another tribunal should be exercised sparingly since the *C* courts of law should be open to all, and it should only be in exceptional circumstances that these doors will be closed upon a litigant.

The attempt by counsel for me to withhold my jurisdiction at this stage fails to succeed for, in my view, to do so will unnecessarily prolong the resolution of the dispute between the parties and lead to a duplication of proceedings *D* as a rent board cannot order the eviction of a tenant from the leased premises.

I now turn to the issue of the alleged waiver by the applicant to rely on the clear breach by the respondent in failing to pay on time the rent due for January 2007.

It is my view that by continuing to accept rentals from the respondent after the letter of 24 January 2007 cancelling the lease, the applicant did not waive its right to rely on the breach by the respondent as it was made quite clear in *E* correspondence that ensued between the parties that rentals were being received without prejudice and were actually damages for holding over. In such circumstances, the acceptance of the payments cannot be construed as condoning the breach by any stretch of the imagination. In my view, the facts of this matter are to be distinguished from the facts in *Stracon Development (Pvt) Ltd v Guer* 1990 (1) ZLR 354 (H), relied upon by Mr *Zviuya*, where the *F* landlord purported to cancel the lease after receiving the rental for that month and continued to receive further rentals timeously paid. It then sought to rely on the alleged past breach.

For waiver to operate, there must be an unequivocal act done with full knowledge of all the relevant facts, as well as of the rights which it is argued *G* have been waived. *In casu*, the applicant was quite aware that it was entitled to cancel the lease agreement on account of the breach of January 2007. It proceeded to cancel the lease and to inform the respondent that all future payments would be accepted without prejudice to its rights to proceed to cancel the lease agreement. It then described the payments that it demanded *H* from the respondent as being holding over damages. At no stage, in my view,

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did it blow hot and cold. It was quite clear it had cancelled the lease agreement *A* and was now entitled to damages for the continued use of its premises by the respondent.

On the basis of the foregoing, I find it hard to establish a legal basis upon which the continued occupation of the leased premises by the respondent can be justified. *B*

Finally, it was submitted that in the event that I grant the application, my order should operate notwithstanding the noting of an appeal in the matter. I believe that our law and procedures provide

ample protection to the applicant in the event that an appeal is noted and such is perceived to be without merit.

In the result, I make the following order:

1. The respondent shall give vacant possession of No. 49 Coventry Road c to the applicant within 10 days of service of this order, failing which the Deputy Sheriff is hereby authorized to evict the respondent and all those occupying through it and hand over vacant possession of the premises to the applicant.
2. The respondent shall pay the applicant's costs of this application. d

Wintertons, applicant's legal practitioners

Bere Brothers, respondent's legal practitioners e

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/MANICA ZIMBABWE LTD & ORS v MINISTER OF STATE FOR NATIONAL SECURITY, LAND REFORM AND RESETTLEMENT & ANOR 2007 (2) ZLR 287 (S)

MANICA ZIMBABWE LTD & ORS v MINISTER OF STATE FOR NATIONAL SECURITY, LAND REFORM AND RESETTLEMENT & ANOR 2007 (2) ZLR 287 (S)

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Citation	2007 (2) ZLR 287 (S)
Case No	Judgment No S-31-07
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA, Ziyambi JA Gwaunza JA & Garwe JA
Heard	1 February 2007
Judgment	5 November 2007
Counsel	<i>A P de Bourbon SC</i> , for the applicants <i>E M Mwatse</i> , with her <i>Ms N Mutsonzwa</i> and <i>Mrs V Mabhiza</i> , for the respondents
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 16 — protection against acquisition of property — Acquisition of Farm Equipment or Material Act [Chapter 18:23] — whether complies with requirements of s 16*

d **Statutes** — *Acquisition of Farm Equipment or Material Act [Chapter 18:23] — ss 6, 8, 9 and 10 — constitutionality of*

Headnote

The applicants contended that ss 7, 9 and 10 of the Acquisition of Farm Equipment or Material Act [Chapter 18:23] were invalid by reason of their non-compliance with s 16(1)(a)(ii), (c), (e) and (f) of the Constitution. They argued that

- (a) the Act did not provide that the acquisition of the farming equipment had to be in terms of legislation which provided that such acquisition was for one of the purposes set out in s 16(1)(a)(ii) of the Constitution, in particular that it had to be for a purpose beneficial to the public generally or to any section of the public;
- (b) the Act did not require the acquiring authority to pay fair compensation before or within a reasonable time after acquiring the property, as it made no provision for compensation to be paid before the acquisition, providing instead that a quarter of the compensation should be paid at the time of acquisition or within thirty days and the balance within five years in the case of farm equipment and one year in the case of farm material;
- (c) the Act made no provision, as required by s 16(1) of the Constitution, to allow the owner of the property to apply to a court for prompt return of the property if the court does not confirm the acquisition, and made no provision for an appeal to the Supreme Court; and

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- (d) the Act made no provision to allow a claimant for compensation to apply to the High Court or some other court for the determination of any question relating to compensation, and to appeal against such a decision to the Supreme Court.

Held, that it is sufficiently clear from the language of ss 6 and 10 of the Acquisition of Farm Equipment or Material Act [Chapter 18:23] that the compulsory acquisition of farm equipment and materials is for the purpose of furthering a programme of land reform. As this programme is not a private activity, but one that is beneficial to the public generally and certainly to sections of the public, ss 6 and 10 of the Act are not in conflict with s 16 (1)(f) of the Constitution of Zimbabwe which provides for compulsory acquisition of property "¼ for a purpose beneficial to the public generally or to any section of the public:"

Held, further, that s 9 of the Act is not in conflict with s 16(1)(c) of the Constitution, as the latter cannot be construed as providing for one lump sum payment. To interpret the clear wording of that provision as prohibiting payment in installments would be doing violence to the plain language thereof, which simply provides that the payment be fair and that it should be made within a reasonable time. Whether the payment will be made in one lump sum payment or in installments is something for which the Constitution choose not to provide.

Held, further, that both s 16(1)(e) of the Constitution and s 8(5) and (6) of the Act deal with a situation where confirmation of the acquisition has been refused. In that event, the Constitution confers on the claimant the right to apply to the High Court or any other court for the prompt return of the property. Although s 8(5) of the Act, unlike s 16(1)(e) of the Constitution, does not confer on the claimant the right to apply to the High Court or any other court, it however directs the Administrative Court to order the return of the property to the claimant upon its refusal to confirm the compulsory acquisition. Thus, whenever the Administrative Court refuses to confirm a compulsory acquisition, it is required as a matter of law to order the return of the acquired property to the claimant; it has no discretion in the matter. Thus, the claimant is granted the order for the return of the property without having to apply for such an order. Section 8(5) of the Act thereby relieves the claimant of the burden of having to apply to the High Court or any other court for the return of the property. Section 8(5) of the Act is, therefore, complementary to s 16(1) of the Constitution. There was thus no inconsistency between s 16(1)(e) of the Constitution and s 8(5) and (6) of the Act that rendered the Act invalid.

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Held, further, that s 8 of the Act provides that whenever compensation is contested the acquiring authority is required to apply within 30 days to the Administrative Court for confirmation of the acquisition. Thus in the event of a contestation relating to compensation, the Administrative Court will determine it. The only variation between the Act and s 16(1)(f) of the Constitution is that whereas the former makes the acquiring authority *dominus litis*, the latter provides for the

claimant to be *dominus litis* of the proceedings. The difference between the Constitution and the Act relates to procedure and not substance and this difference does not amount to an inconsistency that would render the act invalid.

Legislation considered ^c

Constitution of Zimbabwe 1980, ss 16(1)(a), 16(1)(c), 16(1)(e), 16(1)(f), 24(1), 24(2) and 24(3)

Acquisition of Farm Equipment or Material Act [*Chapter 18:23*], ss 6(1), 8(5), 8(6), 9(1), 10(1) and 10(2)

Case information

▷ *A P de Bourbon SC*, for the applicants

E M Mwatse, with her Ms N Mutsonzwa and Mrs V Mabhiza, for the respondents

Judgment

CHIDYAUSIKU CJ: This is an application in terms of s 24(1) of the Constitution ^E of Zimbabwe, which provides:

“If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that ^F person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress.”

The respondents have taken a point *in limine*. The point *in limine* taken is that this matter was heard and determined in the Administrative Court, after an application for referral to the Supreme Court in terms of s 24(2) of the Constitution was made to and refused by the Administrative Court. The ^G respondents contend that it is not open to a litigant in a matter where a referral has been refused to make a direct application to this Court in terms of s 24(1) of the Constitution.

It is quite clear that s 24(3) of the Constitution, which provides:

“Where in any proceedings such as are mentioned in subsection (2) any

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such question as is therein mentioned is not referred to the Supreme Court ^A then, without prejudice to the right to raise that question on any appeal from the determination of the court in those proceedings, no application for the determination of that question shall lie to the Supreme Court under subsection (1),”

prohibits the making of such an application.

Consequently, the applicants can only approach this court by way of an ^B appeal for a review of the proceedings of the Administrative Court.

The applicants have raised two defences to the point *in limine*. Firstly, the applicants contend that the Administrative Court should not have refused to grant the application for referral to the Supreme Court because the application was neither frivolous nor vexatious. The refusal to refer the matter to the ^C Supreme Court by the Administrative Court, it was argued, constitutes a violation of the applicants’ constitutional right to due process. Secondly, the applicants contend that the second, third and fourth applicants were not party ^D to the proceedings before the Administrative Court. Consequently, s 24(3) of the Constitution does not apply to these three respondents.

It is common cause that the second, third and fourth applicants were not party to the proceedings before the Administrative Court. It admits of no debate that as the second, third and fourth applicants were not party to the proceedings before the Administrative Court, s 24(3) of the Constitution does not apply to them.

The first applicant’s cause of action is identical to that of the second, third and ^E fourth applicants. Thus, even if I were to uphold the point *in limine* in respect of the first applicant, that would not resolve the dispute in this matter. The second, third and fourth applicants are entitled to a determination of the same issue raised by the first applicant. This renders the issue of referral raised *in limine* academic. I do not intend to dwell on the issue of referral as it has been ^F rendered academic. I leave that issue entirely open.

I will now proceed to deal with the substantive issues in this case.

The applicants contend that the Acquisition of Farm Equipment or Material Act [*Chapter 18:23*] (hereinafter referred to as "the Act"), which came into force in September 2004, is invalid by reason of its non-compliance with the Constitution of Zimbabwe ("the Constitution") and in particular with s 16 ^g thereof. I note in passing that s 16 of the Constitution forms part of the Declaration of Rights. Consequently, its violation in respect of a party entitles such party to approach this Court directly in terms of s 24(1) of the Constitution.

The applicants seek the relief set out in the draft order, which reads as follows: ^h

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^a "IT IS DECLARED/ORDERED THAT:

1. The Acquisition of Farm Equipment (or) Material Act [*Chapter 18:23*] fails to comply with the requirements set out in s 16(1) of the Constitution of Zimbabwe and is accordingly void.

Alternatively –

^b Sections 7, 9 and 10 of the Acquisition of Farm Equipment (or) Material Act [*Chapter 18:23*] are in conflict with s 16(1)(a)(ii), (c), (e) and (f) of the Constitution of Zimbabwe and are accordingly void.

The costs of this application be borne by the first respondent."

The particulars of the cause of action in this application are set out in para 9 of the founding affidavit, which reads: ^c

"9. The Constitutional issues that were raised before the Administrative Court were:

- (a) That the Acquisition of Farm Equipment (or) Material Act did not provide that the acquisition of the farming equipment had to be in terms of legislation which provided that such acquisition was for one of the purposes set out in s 16(1)(a)(ii) of the Constitution ^d of Zimbabwe;
- (b) The legislation in question did not require the acquiring authority to pay fair compensation before or within a reasonable time after acquiring the property. In fact, the legislation makes no provision for such compensation to be paid before the acquisition. Furthermore, section 9 of the Act makes provision for the ^e payment of one quarter of the compensation at the time of acquisition or within thirty days. The balance of the compensation is to be paid within five years in the case of farm equipment and one year in the case of farm material;
- (c) The legislation makes no provision as required by s 16(1) of the Constitution to allow the owner of the property that has been acquired to apply to a court for prompt return of the property if ^f the court does not confirm the acquisition, and makes no provision for an appeal to the Supreme Court;
- (d) The legislation makes no provision to allow a claimant for compensation to apply to the High Court or some other court for the determination of any question relating to compensation, and to appeal against such a decision to the Supreme Court."

^g It is clear from the founding affidavit and the submissions made on behalf of the applicants that they impugn the Act on four grounds, namely –

- (1) that the Act does not provide for the acquisition of farm equipment for purposes provided for in the Constitution in terms of s 16(1)(a)(ii) of the ^h Constitution;

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- (2) that the Act does not provide for the payment of fair compensation within ^a a reasonable time, as is required by s 16(1)(c) of the Constitution;
- (3) that the Act does not enable the person whose property has been acquired to apply to the High Court or any other court for the immediate return of the acquired property or for fair compensation, as is required by s 16(1)(e) of the Constitution; and ^b
- (4) that the Act does not enable an applicant to apply for compensation or to appeal to the Supreme Court, as is provided for by s 16(1)(f) of the Constitution.

In short, the contention is that the Act does not comply with s 16 of the Constitution.

Section 16(1) of the Constitution sets out the essential elements that should ^c be contained in any law that provides for the compulsory acquisition of property of any description or interest or right

therein. As I have already said, s 16 is part of the Declaration of Rights accorded special protection in terms of the Constitution.

As s 16 of the Constitution sets out the essential provisions that should be in any law that provides for the compulsory acquisition of property of any description, it follows that failure to provide for any of such requirements will render such law or enactment for compulsory acquisition invalid to the extent of the non-compliance or inconsistency. See s 3 of the Constitution.

I now turn to the specific grounds of challenge – E

(1) COMPLIANCE WITH S 16(1)(a)(ii) OF THE CONSTITUTION

The applicants contend that the Act does not comply with s 16(1)(a)(ii) of the Constitution.

Section 16(1)(a)(ii) of the Constitution reads:

“16 Protection from deprivation of property F

- (1) *Subject to section sixteen A, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that –*
 - (a) requires –
 - (i) ...; or G
 - (ii) in the case of any property, including land, or any interest or right therein, that the acquisition is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilisation of that or any other property *for a purpose beneficial H*

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A to the public generally or to any section of the public” (my emphasis).

The critical issue here is whether the Act provides that the acquisition in terms thereof is for a purpose beneficial to the public generally or any section of the public.

The applicants argue that the Act permits the Executive to acquire property B for private as opposed to public purpose in order to sell it for commercial advantage. The applicants argue that this is not permissible in terms of s 16(1)(a)(ii) of the Constitution.

The respondents, on the other hand, contend that the Act clearly spells out that the acquisition is in furtherance of the land reform programme, a programme C that is beneficial to the public generally or a section of the public. This, it is contended, brings the Act within the ambit of s 16(1)(a)(ii) of the Constitution. The respondents’ contention is based on the provisions of s 6, as read with s 10, of the Act.

Sections 6 and 10 of the Act in relevant part provide as follows:

“ D 6 Acquisition of farm equipment or material by acquiring authority

- (1) Subject to this Act, the acquiring authority may, either by agreement or compulsorily, acquire any farm equipment or material not currently being used for agricultural purposes on any agricultural land, where the acquisition is reasonably necessary for the utilisation of that farm equipment or material E on any agricultural land.
- (2) - (3) ...

10 Use of acquired farm equipment or material

- (1) Subject to subsection (2), any farm equipment or material acquired in terms of this Act shall vest in the State for the benefit of the F Land Reform Programme.
- (2) The State may, subject to such conditions as are prescribed under section *twelve* sell or otherwise dispose of for valuable consideration any farm equipment or material acquired in terms of this Act to any private individual, institution or corporation requiring to use the equipment or material for agricultural purposes G on any agricultural land:
 Provided that if the person from whom the farm equipment or material was acquired by the State contests the acquisition, the State shall not sell or otherwise dispose of it in terms of this subsection until the matter is finally determined in accordance H with section *eight*.”

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While the language of the above two sections leaves a lot to be desired in terms ^A of spelling out succinctly the purpose of the acquisition in terms of the Act, it is however sufficiently clear that the compulsory acquisition in terms ^B of the Act is for the purpose of furthering the land reform programme. The land reform programme is not a private activity but is a programme that is beneficial to the public generally and certainly to sections of the public.

It is on this basis, that I am satisfied that the compulsory acquisition in terms of the Act is for a purpose beneficial to the public generally or to a section of the public.

Accordingly, I am satisfied that the first ground of challenge to the Act fails.

(2) DOES THE ACT PROVIDE FOR OR FAIL TO PROVIDE FOR THE PAYMENT OF FAIR COMPENSATION WITHIN A ^C REASONABLE TIME AS IS REQUIRED BY S 16(1)(c) OF THE CONSTITUTION?

The second ground of challenge is that the Act does not comply with s 16(1)(c) of the Constitution, in that it fails to provide for payment of fair compensation within a reasonable time.

Section 16(1)(c) of the Constitution provides as follows: ^D

"16 Protection from deprivation of property

(1) Subject to section *sixteen A*, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that –

(a) - (b) ...; and ^E

(c) subject to the provisions of subsection (2), requires the acquiring authority to pay fair compensation for the acquisition before or within a reasonable time after acquiring the property, interest or right; ..."

It is very clear that the Constitution requires that the Act should provide for the payment of fair compensation within a reasonable time. The Act in this case ^F seeks to achieve this through s 9, which provides thus:

"9 Payment for farm equipment or material

(1) The acquiring authority shall pay to the owner or holder of any farm equipment or material acquired in terms of this Act the compensation offered, agreed or fixed therefor, as the case may be, within a reasonable ^G time and, in any event, where the farm equipment or material is compulsorily acquired –

(a) at least one quarter of the compensation payable shall be paid at the time the equipment or material concerned is acquired, or within thirty days thereafter; and ^H

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(b) the balance of the compensation payable shall be paid within –

(i) five years after the acquisition thereof in the case of farm equipment;

(ii) one year after the acquisition thereof in the case of farm material.

(2) The compensation to be paid to the owner or holder of any farm ^B equipment or material in terms of subsection (1) shall accrue interest at the prescribed rate from date of acquisition thereof."

It is sufficiently clear from s 9 of the Act that payment of compensation can be made by way of instalments.

The applicants' contention in this ground of challenge is that s 16(1)(c) of the Constitution prohibits the payment of compensation in instalments, as is ^C provided for in s 9 of the Act.

The plain language of s 16(1)(c) of the Constitution is that compensation should be fair and that it should be paid within a reasonable time. I see nothing in the language of the section or the context of the provision that suggests that such payment cannot be made in instalments. In my view, the fact that ^D the Constitution is silent on this issue, that is, it does not specifically prohibit or specifically authorise payment in instalments, cannot be construed as prohibiting payment by instalments. The fact that previous constitutional enactments specifically authorised payment by instalments does not mean failure to make specific mention is prohibition.

I am not persuaded by the applicants' argument that s 16(1)(c) is to be ^E construed as providing for one lump sum payment. As I have stated, s 16(1)(c) of the Constitution is intended to provide for two things –

(1) payment of fair compensation; and

(2) that such payment be made within a reasonable time.

To interpret the clear wording of s 16(1)(c) as outlawing payment in instalments ^F would be doing violence to the plain language of a section that simply provides that the payment be fair and that it should be made within a reasonable time. The payment, in my view, has to be made within a reasonable time. Whether the payment will be made in one lump sum or in instalments is something the Constitution chose not to prescribe.

^G The outside time limits set out in the Act are indications of what the Legislature considers as the outer limits of reasonable time for payment. They do not circumscribe the discretion of the court, which will decide the reasonableness of the time for payment on the basis of the facts of each case.

^H Accordingly, the second challenge fails.

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(3) DOES THE ACT PROVIDE FOR THE PERSON WHOSE ^A PROPERTY HAS BEEN ACQUIRED TO APPLY TO THE HIGH COURT OR ANY OTHER COURT FOR PROMPT RETURN OF PROPERTY IF THE COURT DOES NOT CONFIRM THE ACQUISITION AND THE RIGHT TO APPEAL TO THE SUPREME COURT?

Section 16(1)(e) of the Constitution provides as follows: ^B

"16 Protection from deprivation of property

(1) Subject to section sixteen A, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that –

(a) – (d) ...; ^C

(e) enables any person whose property has been acquired to apply to the High Court or some other court for the prompt return of the property if the court does not confirm the acquisition, and to appeal to the Supreme Court ..." (my emphasis).

Section 16(1)(e) of the Constitution requires the Act to provide for two things: ^D (1) to allow the claimant to apply for the prompt return of the acquired property if there is no confirmation; and (2) to confer on the claimant the right to appeal to the Supreme Court.

The applicants contend that the Act does not provide for the above. The respondents contend that s 8 (5) and (6) of the Act meet the above requirements of the Constitution. ^E

Section 8(5) and (6) of the Act reads as follows:

"8 Application for order confirming acquisition of farm equipment or material

(1) - (4);

(5) Where the Administrative Court refuses to grant an order confirming ^F the acquisition of farm equipment or material, *it shall* order the acquiring authority to return the farm equipment or material to the owner or holder thereof.

(6) Where the owner or holder of the farm equipment or material concerned or the acquiring authority is dissatisfied with any decision of the Administrative Court, whether in relation to the acquisition of the farm ^G equipment or material or the compensation fixed therefor, either party may appeal to the Supreme Court against that decision" (my emphasis).

Both s 16(1)(e) of the Constitution and s 8(5) and (6) of the Act deal with a situation where confirmation of the acquisition has been refused. In the event of that occurrence, the Constitution confers on the claimant the right to apply ^H

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Chidyausiku CJ

^A to the High Court or any other court for the prompt return of the property. Although s 8(5) of the Act does not confer on the claimant (which s 16(1)(e) of the Constitution does) the right to apply to the High Court or any other court, it however directs the Administrative Court to order the return of the property to the claimant upon its refusal to confirm the compulsory acquisition. Thus, whenever the Administrative Court refuses to confirm a compulsory ^B acquisition, it is required as a matter of law to order the return of the acquired property to the claimant. The Administrative Court has no discretion in the matter. Thus, the claimant is granted the order for the return of the property

without having to apply for such an order. Section 8(5) of the Act relieves the claimant of the burden of having to apply to the High Court or any other court for the return of the property. It is simply returned to him by operation of law.

c I see complementarity and not conflict between s 16(1)(e) of the Constitution and s 8(5) of the Act. In my view, s 8(5) of the Act meets the requirements of s 16(1)(e) of the Constitution.

Section 8(6) of the Act confers on the claimant the right to appeal to the Supreme Court, as is required in terms of s 16(1)(e) of the Constitution.

d I see no inconsistency between s 16(1)(e) of the Constitution and s 8 (5) and (6) of the Act that renders the Act invalid. If anything, the claimant is relieved of the need to apply to the High Court or any other court for the prompt return of property, because such return will be ordered as a matter of law, upon an order of refusal to confirm a compulsory acquisition. Accordingly this ground e of challenge fails.

(4) DOES THE ACT ENABLE A CLAIMANT FOR COMPENSATION TO APPLY TO THE HIGH COURT OR ANY OTHER COURT AS IS REQUIRED BY S 16(1)(f) OF THE CONSTITUTION?

Section 16(1)(f) of the Constitution provides as follows:

f "(1) Subject to section *sixteen A*, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that – ...

(f) enables any claimant for compensation to apply to the High Court or some other court for the determination of any question relating to compensation and to appeal to the Supreme Court:

g Provided that the law need not make such provision where –

- (i) the property concerned is land or any interest or right therein; and
- (ii) the land is substantially unused or is used wholly or mainly for agricultural purposes or for environmental conservation or the h utilisation of wild life or other natural resources; and

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Chidyausiku CJ

- (iii) the land or interest or right therein, as the case may be, is acquired a for a purpose referred to in paragraph (a)(i)."

In terms of the above provision, the Act should enable an applicant or claimant to apply to the High Court or to any other court for the determination of any question relating to compensation and to appeal to the Supreme Court against such determination. The applicants' contention is that the Act makes no b provision for the claimant to make such an application.

It is common cause that the Act has no specific provision allowing a claimant to apply to the High Court or to any other court as the *dominis litis* in the determination of any question relating to compensation.

The respondents contend that, despite the absence of a specific provision enabling a claimant to apply to the Administrative Court, the claimant has c access to that court. I assume that the respondents' argument is predicated on the provisions of s 8 of the Act, which I have already quoted above.

The issue, however, is whether s 8 of the Act constitutes compliance with s 16(1)f) of the Constitution. Whenever property is compulsorily acquired, either the parties agree on all the issues relating to the acquisition, that is, the d acquisition itself and the level and terms of payment of compensation for the property, or the compulsory acquisition and/or the compensation is contested. In the event of the compensation being contested, s 16(1)(f) of the Constitution requires that there be a provision in the Act that entitles a claimant to apply to the High Court or to any other court to determine the issue of compensation and the right of appeal to the Supreme Court thereafter. e

Thus s 16(1)(f) of the Constitution guarantees a claimant the right to have the contestation for compensation to be adjudicated upon by either the High Court or by any other court. The section also guarantees the claimant the right to appeal, as of right, against that adjudication to the Supreme Court. The wording of s 16(1))f) of the Constitution makes the claimant the *dominis litis*. f

However, s 8 of the Act provides, among other things, that whenever compensation is contested the acquiring authority is required as a matter of law to apply within thirty days to the Administrative

Court for the confirmation of the acquisition. Thus, in the event of a contestation relating to compensation, the contestation as a matter of law will be determined by the Administrative Court in terms of s 8 of the Act. The only variation between the Act and s 16(1)(f) of the Constitution is that whereas the Act makes the acquiring authority the *dominis litis*, s 16(1)(f) of the Constitution provides for the claimant to be the *dominis litis* in the proceedings.

The difference between the Constitution and the Act relates to procedure and not substance. What is important is that the contestation or compensation is

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is determined by the High Court or by any other court and this is provided for in s 8 of the Act.

Section 8(6) of the Act confers on either party the right of appeal to the Supreme Court, if either party is not satisfied with the adjudication of the Administrative Court. In my view, the fact that the Constitution makes the claimant the *dominis litis* while the Act makes the acquiring authority the *dominis litis* does not amount to an inconsistency that would render the Act invalid.

The critical issue is that the dispute is subject to determination by the High Court or by any other court, and that is provided for in the Act. Accordingly, this ground of appeal must fail.

In the result, the application fails and is hereby dismissed. There will be no order as to costs.

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

Coghlan, Welsh & Guest, applicants' legal practitioners

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

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NUMENT SECURITY (PVT) LTD v MUTOTI & ORS 2007 (2) ZLR 300 (S)

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Citation	2007 (2) ZLR 300 (S)
Case No	Judgment No. S-32-07
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Malaba JA
Heard	10 July 2006
Judgment	5 November 2007
Counsel	<i>P Machaya</i> , for the appellants <i>N Zwizayi</i> , for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Interdict — application for — material disputes of facts between parties c — petitioner unable to establish a clear right for the grant of an interdict — final interdict cannot be granted

Practice and procedure — application — interdict — grant of — requirements — need for clear right to be established — material disputes of fact — clear right not established — interdict should not be granted d

Headnote

Where material disputes of facts exist between the parties and a petitioner has not been able to establish a clear right to an interdict, no final interdict can be granted.

Cases cited ^E

Cresto Machines (Edms) Bpk v Die Afdeling Speur-Offisier, SA Polisie, Noord Transvaal 1972 (1) SA 376 (A)

Setlogelo v Setlogelo 1914 AD 221

Philips Electrical v Gwanzura HH-374-88

United Technical Equipment Co v Johannesburg City Council 1987 (4) SA 343 (T) ^F

Welkom Bottling Co (Pty) Ltd en Andere v Belfast Mineral Waters (OFS) (Pty) Ltd 1967 (3) SA 45 (O)

Case information

P Machaya, for the appellants

N Zwizayi, for the respondents ^G

Judgment

CHEDA JA: The history of this matter, which is common cause, is that a company known as Python Investments (Pvt) Ltd ("Python"), which was in the security business, using the name Knight Security, ran into financial problems. ^H

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Cheda JA

^A The proprietor of the company wanted to close down and leave the country, but was unable to pay the company's work force their benefits and gratuities.

The company decided to offer all the employees the company as a going concern. The employees accepted the offer in full and final settlement as set off against their claims and the agreement was put in writing.

^B Part of the agreement provided as follows:

"AND WHEREAS the company and the employees have agreed that in full and final settlement of a dispute concerning possible terminal benefits, annuities, retrenchment gratuities, pay in lieu of leave and the like and in full and final settlement of any claim each employee might have against the company, that the company in lieu of such claim does donate, hand c over and grant to the employees who shall form a syndicate, the trade name, goodwill, current customers contracts, and assets as per the attached schedule as upon the following terms and conditions."

The agreement was signed on 27 May 2002.

Pursuant to the above agreement, two companies were formed. They were Flit-On Enterprises (Pvt) Ltd ("Flit-On") and Nument Security (Pvt) Ltd ("Nument")

^D According to Musiwa's affidavit, when Flit-On was formed he was appointed as one of the Directors.

He says Flit-On is the company that took over the goodwill, trade name, contracts and assets of Python. Its directorship and shareholding was made up of the former employees of Python. It traded under the name Knight ^E Security Services. He says Nument Security (Pvt) Ltd was incorporated with Mutoti, Mupfende, Gweremhezhe Goche and Moyo as its directors.

Nument also went on to trade under the style of Knight Security Services, the trade name used by Flit-On.

According to him, this company has no authority to do so and infringes on the rights of Flit-On. It is for that reason that Flit-On wants Nument to be interdicted, restrained and barred from using the premises, assets, manpower and any bank account in the name Knight Security Services.

On the other hand, the opposing affidavit of Simon Mutoti, the Chairman of the Board of Directors of the appellant, says the former employees of Python set up a committee to negotiate the take over of Python.

He says the committee then proceeded to form and register Flit-On Enterprises (Pvt) Ltd on their own and without the mandate of the other employees.

A serious dispute emerged following which the workers formed their own company called Intensive Security (Pvt) Ltd.

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Cheda JA

The disputes resulted in the workers engaging in legal suits at the magistrates court where an order by consent was issued.

Part of the consent order provided that all the cases the parties filed at the magistrates court be withdrawn, and that an *ad hoc* committee be formed with a specific mandate spelt out in writing, to replace the management and task force committees.

It should be noted here that the effect of the consent order leaves out completely the existence of the companies concerned.

It seems this is the reason why the employees found themselves torn between two companies, that is, Flit-On Enterprises (Pvt) Ltd and Nument Security (Pvt) Ltd, both claiming to have taken over the assets, contracts and premises of Python Investments (Pvt) Ltd and decided to go to the High Court to have the dispute settled.

The High Court found that the dispute was "riddled with irreconcilable material disputes of facts".

There were two rival companies and each claimed to be the authentic and legitimate successor to Python.

The High Court concluded, on the basis of the papers, as follows:

"On the papers, it is clear that Flit-On Enterprises (Pvt) Ltd trading as Knight Security was the product of the joint will of the former employees of Python Investments in terms of the above agreement.

Nument Security (Pvt) Ltd is a product of disgruntled employees who seek to break away from the original company by forming a rival company to take over the functions and assets of the original company."

On the basis of this conclusion, the High Court granted a final order interdicting, restraining and barring Nument Security (Pvt) Ltd from trading under the style of Knight Security Services and ordered it to pay the costs.

This order by the High Court does not seem to have taken into account the interest of those employees who were on the side of Nument Security Services.

Once the court *a quo* made the finding that there were irrevocable disputes of facts, it should have been guided by the numerous authorities on interdicts, starting from *Setlogelo v Setlogelo* 1914 AD 221 which laid down the principles applicable to interdicts.

This case was followed by several judgments which laid down the requirements for the granting of an interdict as:

- (a) a right, which though *prima facie* established, may be open to some doubt;
- (b) a well grounded apprehension of irreparable injury;

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Cheda JA

A(c) the absence of any ordinary remedy.

See (1) *United Technical Equipment Co v Johannesburg City Council* 1987 (4) SA 343 (T); (2) *Welkom Bottling Co. (Pty) Ltd en'n Ander v Belfast Minerals Waters (OFS) (Pty) Ltd* 1967 (3) SA 45 (O), where a rule *nisi* was discharged because the applicant had not established a clear right; and (3) *Cresto Machines (Edms) Bpk v Afdeling Speur-Offisier, S A Polisie, Noord B Transvaal* 1972 (1) SA 376 (A), where it was again held that:

"As the appellant had not proved in all the circumstances that it had a clear right not to be disturbed in its ownership or possession of the machines, that the appeal should be dismissed with costs."

See also *Phillips Electrical (Pvt) Ltd v Gwanzura* HH-374-88 (HC 1757/88), c where it was held that:

"Since there was a material dispute of fact, petitioner had not made out 'a clear right' to an ... interdict."

When parties first appeared in this court, the matter was postponed as it was reported that they wanted to negotiate a settlement. Mr *Zvidzai*, for the d respondents, conceded that the interdict was wrong as it gave a right to one party without hearing evidence. That concession was properly made.

Each side was claiming that their company is the legitimate successor to Python.

There is an allegation that the workers who formed Flit-On made themselves the directors without the mandate of the other workers.

¶ If this is one of the irreconcilable material disputes of fact, then the court should have heard evidence to determine what the correct position was before granting a final interdict.

It was therefore, unsafe to resolve the matter on the papers without establishing a clear right on the part of the respondents.

¶ For that reason, I make the following order –

1. The order of the court *a quo* in case No. HC 955/05 is set aside.
2. The matter is referred to trial before a different judge.
3. Costs be reserved for determination at the trial.

g CHIDYAUSSIKU CJ & MALABA JA concurred.

Mtombeni & Associates, appellant's legal practitioners

h *Chinyama & Associates*, respondents' legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/SACHIKONYE v CAPITAL ALLIANCE (PVT) LTD & ORS 2007 (2) ZLR 304 (H)

SACHIKONYE v CAPITAL ALLIANCE (PVT) LTD & ORS 2007 (2) ZLR 304 (H)

2007 (2) ZLR p304

Citation	2007 (2) ZLR 304 (H)
Case No	Judgment No. HH-5-08
Court	High Court, Harare
Judge	Gowora J
Heard	24 January 2007
Judgment	7 November 2007
Counsel	<i>A B Chinake</i> , for the applicant <i>H Zhou</i> , for the respondents

Case Type	Civil application
Annotations	No case annotations to date

Flynote

Companies — disposal of assets — when approval of shareholders required **C** — disposal of greater part of assets of company — need for approval when over half of assets disposed of

Headnote

The prior approval of shareholders is required before the directors of a **D** company may dispose of the undertaking of the company or of the whole or the greater part of the assets of the company. In this context, “undertaking” means a business or enterprise; and “the greater part of the assets” means anything over a half of the assets.

Cases cited ^E

Bromley & Ors v Tryon & Ors [1950] 2 All ER 955 (CA); [1952] AC 265

Mutare RDC v Chikwena 2000 ZLR (1) 534 (S)

Ngatibatanezi (Pvt) Ltd v Venganayi & Anor 2007 (1) ZLR 330 (S)

Legislation considered ^F

Companies Act [Chapter 24:03], s 183(1)(b)

Case information

A B Chinake, for the applicant

H Zhou, for the respondents ^G

Judgment

GOWORA J: The applicant is a former Chief Executive of First Mutual Limited. First Mutual Society was an insurance company offering products associated with life insurance and the provision of pension benefits and investments. Some time ago it undertook a demutualization process as a result of which **H** shares were offered to members of the general public on 17 November 2003.

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Gowora J

^A As a result of the demutualization a limited liability company came into being as First Mutual Limited (FML). It was decided within FML itself that in order to motivate staff to perform better a certain percentage of the shares should be availed to the employees. A special arrangement was then made for employees who were part of the management structure to buy an agreed portion of those shares and in order to facilitate this a limited liability company ^B was to be incorporated whose sole asset was to be the shares acquired for the management. Such company was Neotrangus Investments (Pvt) Ltd which was acquired as a shelf company. Subsequently its name was altered to Capital Alliance which is the first respondent herein.

It is not in dispute that at its inception the applicant held 3 900 of the issued ^C share capital in the first respondent, Capital, which translated to 26 per cent of the entire shareholding. Consequently, he was the controlling shareholder within Capital. As such the applicant was entitled to the beneficial interest of 218 400 000 shares in FML. Capital and FML subsequently ran into difficulties which caused their suspension from the list of companies on the Zimbabwe Stock Exchange, during which period their shares were not trading. This ^D resulted in Capital not being able to service its debts and as a result of compromise with its creditors a specific number of shares held by Capital in FML were transferred to those creditors to offset the sums due. The net effect of those transfers was that the

shareholding of Capital in FML was reduced to 145 320 000 shares and the applicant's entitlement was then reduced to 37 783 200 shares in FML. On 2 June 2004, for reasons that are not germane ^E to this matter, the applicant resigned from his employment with FML. In his founding affidavit he avers that he is no longer a director of Capital. In an answering affidavit signed by him on 13 March 2006, he suggests that he never resigned as a director of Capital, and in fact the respondents were challenged to prove that he had resigned as a director. The challenge has not been met. ^F Whether or not he would have retained his shareholding after his departure from FML is one of the issues that is to be determined in this application.

Subsequent to the applicant's departure from FML, Capital disposed of a number of shares in FML. The applicant was not involved in the decision to sell the shares. It was his view that the respondents were precluded from doing this by the Companies Act [*Chapter 24:03*] and consequently he has now ^G brought these proceedings for a declarator that the respondents had violated the provisions of the Act when they sold the shares, and for consequential relief following upon the declarator.

Mr *Zhou* on behalf of the respondents has raised three defences to the ^H application. The first is that there are disputes of fact on the papers which

Gowora J

cannot be resolved on the papers. The second is that the applicant does not ^A have the *locus standi* to bring these proceedings and lastly that the application itself is devoid of merit.

As to the first issue, it was contended that there are material disputes of fact as would preclude this court from determining the matter on the basis of the papers filed by the parties. One of the alleged disputes of fact being alluded ^B to is whether or not the applicant was ever a shareholder in Capital. Given the background to the demutualization process undertaken by FML and which has been detailed in the opposing affidavits and the respondents' heads of argument, I am at a loss as to how this submission could have been made. In para 15 of the respondents' heads of argument it is stated "Capital Alliance acquired 840 000 000 ordinary shares in FML's issued share capital at the time, ^C as part of the management buy-in scheme conceived by the Executive Management of FML, and approved by the Board of Directors of FML". The buy-in scheme, according to the respondents, was driven by the applicant. In para 16 is the cryptic statement to the following effect: the concept and terms of the Management Buy-In scheme were conceived by senior management of FML who included, at the time, the applicant. ^D

Turning to the documents themselves, on the 26 October 2005, a meeting was held by the board of directors of Capital, amongst whom were the second to fifth respondents. In discussing what was to be done about shares belonging to executives who had left FML it was noted that the applicant prior to his departure had 3 900 shares in Capital Alliance and in fact all the other shareholders detailed at that meeting were individuals and not corporate ^E entities. It was further resolved at that meeting that the shares of former executives who were no longer with FML should be redistributed among current members in proportion to their existing shareholding. The redistribution then left the applicant with zero shares. The shares held by the second and fifth respondents climbed to 3 307 from 1 875, making the two of them the ^F majority shareholders with 22.05 per cent shareholding each. The minutes for that meeting were signed by the second respondent as chairman, yet in his opposing affidavit he had the temerity to suggest that the applicant was never a shareholder in Capital. Clearly he was not telling the court the truth.

The respondents contend further that the applicant has never been a shareholder in Capital Alliance and that he had participated in Capital Alliance ^G through a company called Mellowdew Investments (Pvt) Ltd. As proof for this contention the respondents attached a document which appears to be some sort of register. Other than that, it is not specifically identified to establish its origin. My view of the attitude taken by the respondents is that they are abusing court process. ^H

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Gowora J

A Apart from a host of other numerous documents affixed to the papers by the parties, on which matter I shall discourse later in the judgment, the respondents have attached two draft shareholders agreements. The first draft is dated 19 December 2003 and the first party thereto is Capital, with the second being an entity called Sachikonye Investments (Pvt) Ltd. The rest of the parties are companies bearing the names of the other executives then employed by FML B who had participated in the scheme. The last page of this draft agreement, however, bears the names of the individual executives who participated in the buy-in scheme. Featuring prominently at the top of the list is the applicant with a shareholding of 3 900 which is defined as 26 per cent.

The next draft agreement is dated 17 September 2004, and again the first party C is Capital, with the second party thereto being Mellowdew Investments (Pvt) Ltd. The names of the other parties are not germane to the resolution of the dispute but are supposedly registered limited liability companies. The last page of this draft again bears the names of the executives and again the applicant is recorded as having 3 900 shares which are again defined as 26 per cent. It is pertinent to note that when this particular draft was prepared the D applicant was no longer with FML, since he had left on 1 June 2004. The documents emanating from Capital however confirmed him as having, almost three months after his resignation, 3 900 shares in Capital. To cap it all, the record bears a letter written by Douglas Hoto, dated 1 October 2004, and addressed to the curator of Royal Bank. The letter starts by listing the original shareholders of Capital and again at the top of the heap is one N E Sachikonye E with his 3 900 shares.

A certificate of incorporation confirms that Mellowdew was incorporated on 14 October 2003. On the other hand, Neotrangus was incorporated on 2 September 2002, and changed its name to Capital Alliance on 23 October 2003. The first meeting of the company, Neotrangus, was held on 5 September 2002, F and the applicant was elected the chairperson. Thus, Mellowdew could not have subscribed to shares in a company which came into being almost a year before it, Mellowdew, was incorporated. In any event, there are numerous documents on the file confirming that the applicant had 3 900 shares in either Neotrangus or Capital.

It appears, however, that the shares that the applicant had in the first G respondent are no longer available. The papers do not state what happened to the shares but the respondents contend that they are no longer available to the applicant. I can only assume, going by the minutes of the meeting of the board of Capital held on 26 October 2005, that they were distributed as H stated therein.

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Gowora J

The respondents further state that in terms of the draft agreements, it was A agreed that when an executive leaves employment the shares have to be offered to the rest of the shareholders given that the scheme is for the benefit of senior employees of First Mutual. As such, so the argument goes, the applicant has lost his right to those shares and consequently the right to institute these proceedings. I am not persuaded by that argument. The B respondents have not produced any document to show that the applicant has either given up his shares or transferred them, and consequently he is still entitled to the same.

As far as the draft agreements are concerned, the papers are mute testimony to the fact that right up until the applicant left employment there were terms and conditions in the draft agreements on which there had been no agreement. C At a meeting of the board of Capital held on the 18 November 2004, which was chaired by the second respondent, he, the second respondent, reported to the meeting that the shareholders' agreement had not been signed because there was disagreement between the directors of FML and Capital over some of the clauses. These minutes were signed by the second respondent as chairman of that meeting. Subsequently, at a meeting held by the board of directors for D Capital, the second respondent, having received a letter from the applicant, changed tack and informed the meeting that the directors of Capital had taken the view that the terms of the shareholders agreement were binding even though such agreement had not been signed.

In addressing this issue, Mr Zhou contended that the court should have E recourse to clause 10:3 of the agreement. The question I ask myself is which agreement we are referring to. In the first agreement, the shareholders are companies bearing the names of the executives. I have not been informed whether in fact such companies exist or whether at the time the agreements were drafted

they did exist. In the place of the applicant, the company is named as Sachikonye Investments (Pvt) Ltd and it is not a party in this application. ^F In the second draft agreement the shareholder supposedly representing the applicant is Mellowdew which although incorporated, never subscribed to shares in Capital. It also is not a party to these proceedings. The only party who is before me who is named in the agreements in question is Capital. What normally brings a written contract into existence is its signature by the parties ^G thereto. The agreements produced before me were not signed by any of the parties indicated thereon.

The applicant, on the papers before me, is not a party to any of the agreements produced by the respondents. In so far as the companies named are parties to such agreements, there is no evidence which has been adduced on the ^H

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Gowora J

A papers to show a link with the applicant such as could lead this court to conclude that such companies should be in the capacity of nominees of the applicant, given that a company is a separate legal entity to its members. In fact, no proof was even adduced to show that the applicant was a member of either company. In order, therefore, to hold him to the agreements, the respondents had to show that he was privy to the contract despite not being ^B a party thereto. The respondents by contending on the one hand that the applicant never owned shares in Capital and that the shares were owned by Mellowdew have shot themselves in the foot in that they cannot then be seen to argue that the terms that would have bound Mellowdew can bind the applicant. The applicant could only be bound by the agreement if he was a shareholder and according to them he was not. Thus the applicant cannot be ^C bound by unsigned agreements to which he is not even a party or signatory. If the respondents seek to bind any party to the agreements, it would have to be Mellowdew and the other companies cited therein as parties.

The other telling factor is that when the second draft agreement was prepared the applicant had resigned from his post with FML. If the terms and conditions ^D had been concluded by the time he left, why did the directors of Capital seek another draft? The papers are very clear on this point and it is mischievous for the respondents to contend that the draft agreements are binding on the applicant.

One of the contentious issues was what was to happen to the shares of an ^E employee who departed from FML. I accept the contention by the respondents that there were concerns that if a departed employee carried on participating in the scheme this would defeat the whole purpose of the scheme, which was meant to benefit current employees and thus drive the performance of FML to greater heights. When one has regard to the attitude that the respondents have adopted, that the applicant never was a shareholder in Capital, it seems ^F illogical for them to then argue that the applicant lost his shares when he left FML. It cannot be possible for one to lose what he never had. Either the applicant was a shareholder or he was not. Even assuming the shares had been held by a company instead of him, how would his leaving FML affect the shares held by the company?

Notwithstanding this, the applicant was a shareholder whose shareholding ^G had not been given up by him at the time he departed. The shares were in fact appropriated by the other shareholders. From the various documents submitted by both sides it appears that the understanding was that when a participating executive left FML, the board would select a participant to take his or her place. ^H The interest of the departed executive would be valued and notional liabilities

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Gowora J

set-off. The respondents did not follow this course. They have neither ^A formally offered to buy the shares nor have they indicated to the applicant by what method the surrender by him of his shares should be dealt with. He was not paid off for his shareholding and the respondents refuse to state with any certainty what happened to those shares. When he left FML no decision had yet been made as to how the shares of departing executives would be dealt ^B with as reflected in the letter written to him by the Board Chairman of FML on 2 July 2004, the pertinent portion of which reads as follows:

"As regards your participation in Capital Alliance, no decision can be made at the present time. It would be improper to make any decision about Capital Alliance until the outstanding matters regarding that

company are resolved and concerns of stakeholders, including the Board, the c Regulators, management and staff have been addressed."

This letter belies the contention by the respondents that agreement had been reached that when a participating employee left FML their shareholding had to cease, principally due to the manner in which the shares had been financed, as the lenders required security for the due payment of the monies advanced for the purchase. The respondents do not tell us when a decision was actually d made and by whom such decision was made regarding the applicant's continued participation in Capital. In the absence of proof of what that decision is and whether it put paid to his participation in Capital and in what manner and on what terms, he, the applicant, therefore still retains the right to those shares as there was no transfer from himself to some other party, and e in fact they could not be appropriated without value without notification to him. There is no doubt that the applicant had the stated number of shares in the first respondent and his *locus standi* to bring these proceedings is not in any doubt.

The respondents admit that a disposal of 45 million First Mutual shares was effected. It is not disputed that the disposal was not authorized by the f company in general meeting but occurred as a result of a decision made by the directors of the company. At the time of such sale the first respondent held 145 320 000 First Mutual shares. The beneficial value to the applicant was some 37 000 odd shares. The disposal has left him holding legally a lesser number. He was not consulted about the disposal and the respondents do not deny this. The applicant seeks, accordingly, a declarator from this court to the effect g that the disposal of those shares was unlawful and in violation of s 183(1)(b) of the Companies Act [Chapter 24:03]. The specific provisions of the section in question are in the following terms: h

2007 (2) ZLR p311

Gowora J

A "(1) Notwithstanding anything in the articles, the directors of a company shall not be empowered, without the approval of the company in general meeting-

(a) ...

(b) to dispose of the undertaking of the company or of the whole or the greater part of the assets of the company.

B (2) No resolution of the company shall be effective as approving of the differential issue or allotment of shares to a director or a disposal in terms of paragraph (b) of subsection (1) unless it authorizes, in terms, the specific transaction proposed by the directors."

In this application I am concerned with subs (1), para (b). The applicant's c contention is that the directors did not obtain the approval of the company in general meeting before they disposed of the 45 million shares in contention. The respondents admit that they had not obtained approval but that the sale was subsequently ratified. The section proscribes the disposal of the undertaking of the company or of the whole or the greater part of the assets of the company. The company concerned did not have an undertaking which d has been defined as "business or enterprise". See *Mutare Rural District Council v Chikwena* 2000 ZLR (1) 534 (S) at 537C-D wherein Gubbay CJ explained the word in the following terms:

"The word 'undertaking' is of variable meaning. Basically, the idea it conveys is that of a business or enterprise. In the Australian case of *Top of the Cross (Pty) Ltd v Federal Commissioner of Taxation* (1980) 50 FLR e 19, Woodward J said at 36:

'Frequently, the word 'undertaking' is used in circumstances where it could be interchanged with either the word business or enterprise and with varying shades of meaning. Sometimes it is used alone, sometimes by way of distinction from the assets of the owner and sometimes as a synonym for business. Sometimes it is used to embrace the property f which is used in connexion with the undertaking as well as the debts and liabilities which have arisen in relation thereto.'"

The sale of an undertaking or the whole of the assets or a greater part thereof in contravention of s 183(1)(b) in the absence of a resolution by the company authorizing such disposal has been held to be null and void. See *Ngatibataneyi g (Pvt) Ltd v Venganayi & Anor* 2007 (1) ZLR 330 (S). In this instance, Capital was a vehicle for the ownership of shares in FML by the executive of the latter. The shares therefore constituted the assets of Capital, and could not be described as a business or undertaking. There is consequently a difference h between an undertaking and the assets of the company in this instance.

2007 (2) ZLR p312

Gowora J

The applicant, therefore, needed to show that the disposal of the 45 million A shares fell within the ambit of the section and was thus null and void. Prior to the disposal Capital had beneficial ownership to 145 320 000 shares in FML. The directors then disposed of 45 500 000 of those shares leaving a balance of just under 100 million shares. A comparison of those figures will show that what was disposed of was about 30 per cent of the entire shareholder. It does B not constitute the whole of the assets of the company. The question next to be asked is whether the portion sold then constituted the greater part of the assets of the company. Neither legal practitioner provided any authority to the court on the definition of the phrase. I came across an English case in which the phrase has been defined. In *Bromley & Ors v Tryon & Ors* [1950 2] All ER 955 (CA); [1952] AC 265 Lord Simonds LC described the "greater part" as C meaning anything over one half. If the respondents, for instance, had disposed of 51 per cent of the FML shares held by Capital, then they would have disposed of the greater part of the asset of Capital. In this instance, they only sold about 30 per cent of such assets and they did not dispose of the greater part. Their action, therefore, did not fall foul of the section. The actions of the respondents would only be null and void if they had disposed of the D whole or the greater part of the assets of Capital. That is not the case in this situation and I find, unfortunately, that the application for a declarator is not well founded. The sale of 45 million odd shares did not infringe the provisions of the section and the court cannot issue the declarator that the applicant seeks.

In light of my finding that the sale was not null and void as prescribed in the E section, it then becomes unnecessary for me to determine whether or not the applicant's request for the calling of a meeting is necessary as such meeting was tied up to the alleged illegal disposal of the shares. In any event by the time the matter was set down for hearing Messrs Biti and Hoto had left Capital. In the premises I find for the respondents in this case. F

Earlier on in the judgment I made reference to the bulky documents filed by the parties. The application itself including the papers filed on behalf of the respondents covers some 346 pages. This excludes the heads of argument filed by the respective legal practitioners which themselves are extensive. Of the 346 pages constituting the application, I have two draft agreements which G have not been signed, the provisions of which are almost identical. I have documents relating to Mellowdew which do not connect the company with the applicant. The entire Memorandum and Articles of Association of Mellowdew has been attached as well as those of Neotrangus. The value of these documents to the resolution of the dispute is completely lost on me. I H

2007 (2) ZLR p313

Gowora J

A also have various pages relating to the allotment of shares in various companies, the probative value of which is lost on me. Both sides in this matter have contributed to the unnecessary filing of voluminous documents which are not pertinent to the issues at hand. It becomes difficult for me to assign blame. The parties should not be made to suffer financially by paying for the cost of photocopying or the origination of documents that are completely B unnecessary, and as a result I will not order costs against any of the parties.

The application is dismissed with no order as to costs.

Kantor & Immerman, legal practitioners for the applicant

C *Dube, Manikai & Hwacha*, legal practitioners for the respondents.

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ZIMASCO (PVT) LTD v CHIZEMA 2007 (2) ZLR 314 (S)

Citation	2007 (2) ZLR 314 (S)
Case No	Judgment No. S-38-07
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Gwaunza JA
Heard	11 June 2007
Judgment	12 November 2007
Counsel	<i>R Moyo</i> , for the appellant <i>N Goneso</i> , for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Employment — *appeal — to Labour Court — court's functions on appeal c — do not include substituting one charge for another where evidence did not support charge preferred by employer — not the responsibility of Labour Court to formulate charges or case for litigants*

Employment — *disciplinary proceedings — charge — employer dismissing employee on basis of particular charge — evidence not adequate to support such charge — no alternative charge brought — employee entitled to acquittal*

Headnote

The appellant brought disciplinary charges against the respondent, alleging theft and fraud after he had, with permission, borrowed a machine from which a motor was later found to have been stolen. The appellant's disciplinary committee found him guilty and dismissed him. An appeal to the Labour Court succeeded, the court finding no evidence of theft or fraud, and the respondent's reinstatement was ordered. The appellant appealed to the Supreme Court, arguing that the Labour Court erred in not finding that the facts showed that the respondent had committed a dismissible offence, that is, "an act inconsistent with the fulfilment of the express or implied conditions of his contract". It argued that the Labour Court had thereby decided the matter "on a legal technicality".

Held, that at no stage during the disciplinary proceedings, or during the appeal hearing in the Labour Court, was it indicated that the respondent was being charged, in the alternative, with committing an act or conduct inconsistent with the fulfilment of his contract of employment. It clearly was not the responsibility of the Labour Court to amend the "charge sheet" by substituting the charge preferred against the respondent with another one. The court's function is not to formulate charges or cases for litigants; it is to determine, on the basis of evidence placed before it, whether or not a case has been proved against the respondent. He who

Gowora J

A alleges anything against another person must prove such allegation. The appellant failed to prove, on the facts presented, that the respondent committed fraud or theft.

Held, further, that the Labour Court had not decided the case on a technicality by failing to substitute one charge for another. What the court was called upon to do was to determine whether, on the basis of the facts, the offence with which the respondent was charged had been established on a balance of probabilities. For the court to go beyond this mandate to rewrite the "charge sheet" for the appellant, and then try the respondent on a charge not preferred against

him on the papers (a charge, moreover, to which the respondent would not have had an opportunity to respond) c would have resulted in a miscarriage of justice. It would also have been unprocedural and improper for the court so to act.

Cases cited

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

Case information

▷ *R Moyo*, for the appellant

N Goneso, for the respondent

Judgment

GWAUNZA JA: The appellant was ordered by the Labour Court to reinstate the respondent to his employment without loss of salary or benefits, or, in *lieu* thereof, pay him damages. The appellant was aggrieved at this decision and ε has now appealed to this court.

The facts of the matter are not in dispute. The respondent asked to borrow the appellant's brick-moulding machine for private use. The machine was at the time not functional and needed repairs. A foreman of the appellant, one Mr Dzombe, assigned another company employee to repair the machine, a task ϕ that was undertaken on a Saturday in the presence and at the instigation, of the respondent. To facilitate these repairs, the respondent had the machine removed from the timber yard to the brick-moulding yard. It is the appellant's submission that the former premises were more secure than the latter. After the machine was repaired, it remained within the brick-moulding yard while the respondent waited for authority from the mine manager to use it. It was then ς later discovered that the electric motor to the machine had been stolen.

The appellant preferred charges of theft/fraud against the respondent and, after finding him guilty of the offence, subsequently dismissed him from his employment. The respondent successfully appealed to the Labour Court, as η indicated.

2007 (2) ZLR p316

Gowora J

The court *a quo* reasoned and concluded as follows in its judgment: α

"For the respondent to prove the appellant was indeed guilty of theft, there was need to prove, on a balance of probabilities, the appellant's intention to permanently deprive the respondent of the machine or some misrepresentation in the case of fraud. The facts showed that the appellant wanted to have the machine repaired and then use it ... However, β no intention to steal on his part was shown. In view of the above, a case of theft or fraud has not, on a balance of probabilities, been made against the appellant."

In my view, this reasoning and conclusion, given the facts of the matter as outlined, cannot be faulted. Indeed, the appellant concedes, in its heads of argument, that the facts of the matter did not establish the commission of theft γ or fraud by the respondent. Having so conceded, one would have expected the appellant to have accepted defeat and let the matter rest.

It did not do so, however, but chose to take the matter on appeal to this court, effectively on points that were not raised with, or considered by, the court *a quo*. But for the fact that a point of law can be raised at any stage of the legal proceedings in any dispute, this court might, on that ground, have dismissed δ the appeal.

Be that as it may, the appellant charges that the court *a quo* erred in ordering the reinstatement of the respondent, and therefore deciding the matter on legal technicalities, when it was "apparent" from the facts of the matter that he had committed a dismissible offence. According to the appellant, this was "an act ε inconsistent with the fulfillment of the express or implied conditions of his contract".

Two points of law arise from the appellant's contentions. The first is whether the Labour Court, faced with an appeal in the case where an employee was dismissed on the basis of a wrong charge, can *mero motu* substitute the wrong charge with another. The second is whether the failure by the court *a quo* to ϕ alter the wrong charge preferred against the respondent by the appellant, amounted to deciding the matter on a legal technicality.

Dealing with the first point, it is evident from the record that the respondent was charged with theft or fraud. He was subjected to disciplinary hearings on this basis, and was subsequently dismissed after being found guilty as ^g charged. At no stage during these disciplinary proceedings, or during the appeal hearing in the Labour Court, was it indicated that the respondent was being charged, in the alternative, with committing “an act or conduct inconsistent with the fulfillment of his contract of employment”. ^h

2007 (2) ZLR p317

Gowora J

^a The Labour Court considered the appeal on the basis of the evidence placed before it. It found that such evidence did not establish, even on a balance of probabilities, the commission of that offence. The court therefore properly discharged its mandate. It should be noted that it clearly was not the responsibility of the Labour Court to amend the “charge sheet” in this matter by substituting the charge preferred against the respondent with another one. ^b The court is not there to formulate charges or cases for litigants. In cases of this nature the court’s brief is to determine, on the basis of evidence placed before it, whether or not a case has been proved against the respondent. It needs no emphasis that he who alleges anything against another person, must prove such allegation. The appellant *in casu* failed to prove, on the facts ^c presented, that the respondent committed fraud or theft.

The second issue arising from the appellant’s submissions is whether, by not substituting the original charge with another, the Labour Court had decided the matter on the basis of legal technicalities, and not on the merits. The appellant in this respect sought to argue, on the authority of *Dalny Mine v Banda* 1999 (1) ZLR 220 (H), that procedural matters in labour disputes should ^d not determine the ultimate direction of the matter but rather that a consideration of the merits thereof should be the basis for disposing of the matter.

I do not find any merit in this contention, nor am I persuaded that the *Dalny* case is applicable to the circumstances of this case. The Labour Court did consider the merits of the matter, as they were argued by both parties. The facts ^e of the matter were not in dispute. What the Labour Court was called upon to do, quite properly, was to determine whether, on the basis of such facts, the offence with which the respondent was charged had been established on a balance of probabilities. The appellant’s contention, in fact, is that the Labour Court should have gone beyond this mandate to rewrite the “charge sheet” for the appellant, and then try the respondent on a charge not preferred against ^f him on the papers. A charge, moreover, to which the respondent would not have had an opportunity to respond.

That such an action would have resulted in a miscarriage of justice, as contended for by the respondent, can, in my view, not be disputed. It would also have been unprocedural and improper for the Labour Court to so act.

The appellant in its heads of argument raised a number of other arguments in ^g its endeavor to have the respondent penalized, at any cost, for the conduct that it had mislabeled “fraud or theft”.

It is for instance contended that while the respondent may not have committed ^h fraud or theft in the ordinary sense, the definition of “theft” in the appellant’s

2007 (2) ZLR p318

Gowora J

code of conduct, which extended to “unauthorized application of the appellant’s ^a assets”, came “quite close to the facts of this matter”.

I do not find this argument to be persuasive. Apart from the appellant now wishing to improperly argue its case differently, the contention is clearly not sustainable on the facts of the matter. The respondent did not intend to use the brick-moulding machine without authority. To the contrary, he asked for, ^b and was still awaiting, such authority when the theft in question occurred. His actions in taking the machine from one place to the other for repairs can hardly be described as attempting to “apply to a wrong use for any unauthorized purpose” the brick-moulding machine in question.

The respondent submits that the appellant, at the initial hearing before the disciplinary committee and later before the General Manager, “totally refused” ^c to accept the proposal from the respondent’s representatives to prefer alternative charges if it felt the respondent had moved the machine without authority. Instead, the appellant is said to have insisted that the allegations of

fraud and theft were appropriate to the facts of the matter. It seems to me the appellant would have done well to heed that suggestion from the respondent. As a result of not doing so, the appellant now finds itself in a position where it must clutch at any straw in an attempt to have the respondent penalized for the conduct in question.

I find, when all is said, that the appeal has no merit.

It is accordingly ordered as follows:

“The appeal be and is hereby dismissed with costs.”

SANDURA JA & CHEDA JA concurred.

Gill, Godlonton & Gerrans, appellant’s legal practitioners

Goneso & Associates, respondent’s legal practitioners

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MAHEYA v INDEPENDENT AFRICAN CHURCH 2007 (2) ZLR 319 (S)

2007 (2) ZLR p319

Citation	2007 (2) ZLR 319 (S)
Case No	Judgment No. S-58-07
Court	Supreme Court, Harare
Judge	Malaba JA (in chambers)
Heard	14 November 2007
Judgment	14 November 2007
Counsel	<i>H Zhou</i> , for the applicant <i>R H Wood</i> , for the respondent
Case Type	Chamber application
Annotations	Link to case annotations

Flynote

Appeal — *lapsed appeal* — *reinstatement of* — *application for condonation* — *matters to be considered* — *failure by legal practitioners to comply with rules of court* — *failure amounting to wilful disdain for rules* — *need for finality in litigation*

Headnote

The applicant had noted an appeal against a judgment of the High Court evicting her from the house she occupied. There had been no compliance with r 34 of the Supreme Court Rules regarding preparation of and payment for the record and the appeal was accordingly deemed to have lapsed. Although the error had been pointed out, her successive legal practitioners did little

to pursue the appeal for over seven years. An application was made for re-instatement of the appeal.

¶ *Held*, that in considering applications for condonation of non-compliance with the Rules, the court has a discretion, which it has to exercise judicially. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance; the explanation therefor; the prospects of success on appeal; the importance of the case; the respondent's interests in the finality of the judgment; the convenience to the court and the avoidance of unnecessary delays in the administration of justice. *In casu*, although the applicant blamed her erstwhile legal practitioners for non-compliance with the Rules, there had been no explanation from the legal practitioners concerned for failure to comply with r 34(1) at the time the notice of appeal was filed. They failed ¶ to appreciate at any time during the period of seven years that the appeal had lapsed and to institute appropriate proceedings to regularize it. The absence of an explanation of the non-compliance with the Rules showed a wilful disdain for the rules of court, the consequences of which the applicant could not escape. An equally important principle applicable in ¶ this case was that there should be finality in litigation. No suggestion had

2007 (2) ZLR p320

Malaba JA

been made as to why the applicant would have any right to occupy the A house.

Cases cited

Beitbridge RDC v Russell Construction Co 1998 (2) ZLR 190 (S)

Bishi v Secretary for Education 1989 (2) ZLR 240 (H)

Firestone South Africa (Pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A) B

Independent African Church v Bessie Maheya HH- 206-99

Ndebele v Ncube 1992 (1) ZLR 288 (S)

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

Legislation considered c

Supreme Court Rules 1964 (RGN 380 of 1964) r 34(1)

Case information

H Zhou, for the applicant

R H Wood, for the respondent

Judgment

Before **Malaba JA**: In chambers, in terms of r 34(5) of the Supreme Court D Rules.

This is an application in terms of r 34(5) of the Rules of the Supreme Court of Zimbabwe ("the Rules") for an order of reinstatement of the appeal in case S-303-99 which lapsed following failure by the applicant to comply with the provisions of r 34(1). The subrule provides that: ¶

"The appellant, unless he has been granted leave to appeal *in forma pauperis*, shall at the time of noting the appeal in terms of rule 29 or within such period therefrom, not exceeding five days, as the Registrar of the High Court may allow, deposit with the said Registrar the estimated cost of the preparation of the record in the case concerned:

Provided that the Registrar of the High Court may, in lieu of such deposit, F accept a written undertaking by the appellant or his legal representative for the payment of such cost immediately after it has been determined."

The applicant is the widow of the late Bishop Isaac Maheya who was the head of the respondent church before its congregation split into two factions in 1993. At the time of his death on 24 June 1996, Bishop Maheya was a leader of one faction of the congregation whilst one Mpisaunga led the other. He G lived with the applicant in a house at stand No. 4070 Old Highfield, Harare leased by the respondent from the City of Harare. The applicant remained in occupation of the house as her place

of residence after the death of her husband. She had the support of the followers of her late husband who were now led by Bishop Chitanda. ^H

2007 (2) ZLR p321

Malaba JA

^A In June 1998, the faction led by Mpisaunga instituted proceedings in the High Court in the name of the respondent claiming an order for the eviction of the appellant from the house. The cause of action as pleaded was the alleged unlawful occupation of the house for residential purposes by the applicant after her husband, who had occupied it in the exercise of a right of the office of a Bishop of the church and through whom she had derived the right to live ^B in the house, had died. Considering that the determination of the question of ejectment of the applicant from the residential property, depended upon the resolution of the question which of the two factions of the congregation constituted the Independent African Church, the learned judge referred the matter to trial. After hearing evidence at the trial, the court *a quo* held, in the judgment dated 13 October 1999, that the faction of the congregation led by ^C Mpisaunga enjoyed the support of the majority of members: *Independent African Church v Maheya* HH-206-99.

The learned judge said:

"The conclusion I have come to is that this dispute can best be resolved on the basis that the will of the majority prevail. I have little doubt that if ^D an election were held at the time of the schism and even now, the Mpisaunga congregation would command an overwhelming majority. Bishop Chitanda did not dispute this."

An order was then made to the effect that:

- "1(a) the defendant Bessie Maheya, shall give the plaintiff vacant ^E possession of the residential building on Stand No. 4070 Old Highfield ('the church house') within 90 days of the date of this order.
- (b) ... if the defendant or any persons occupying the property through her remain in occupation of the church house, after that date the Deputy Sheriff be and is hereby authorized to remove her or them and their possessions from the said property."

^F The effect of the judgment of the court *a quo* was that the applicant in her individual capacity or as a widow of the late Bishop Maheya had no right to continue using the "church house" as her residence, particularly in the face of demands which represented the will of the majority of the members of the congregation that she should vacate the premises.

The applicant was represented at the trial by a legal practitioner

^G Mr *T Masendeke* of Honey & Blanckenberg. On 11 November 1999, a notice of appeal against the judgment of the court *a quo* was filed out of time. It took the respondent's legal practitioners to point out to the appellant's legal practitioners the defect in the noting of the appeal before an application for ^H condonation of the non-compliance with the Rules and extension of the time

2007 (2) ZLR p322

Malaba JA

within which to file the notice of appeal was made. The application which was ^A not opposed was granted on 15 December 1999.

The notice of appeal was filed on 7 January 2000. No estimated cost of the preparation of the record of proceedings was deposited with the Registrar of the High Court at the time the appeal was noted, nor was a written undertaking to pay the cost given to the Registrar by the applicant or her legal practitioners ^B in lieu of the deposit as required by *r* 34(1).

Under *r* 34, a notice of appeal which is filed without the mandatory requirements of subrule (1) being specifically satisfied must be deemed to have lapsed. The notice of appeal lapsed on the day it was filed. By letter dated 17 January 2000, the respondent's legal practitioner brought to the attention of the applicant's legal practitioners the fact that the mandatory requirements of *r* 34(1) may not ^C have been complied with and the consequences that would follow.

The letter reads in part:

"We presume that you have in terms of *r* 34 of the Supreme Court Rules lodged security with the Registrar of the High Court for the preparation of the record. If you have done so and the appeal is still pending, on behalf ^D of the respondent we call upon you to lodge security with the Registrar of the Supreme Court by not later than 7 February in the sum of \$50 000. This request is made in terms of *r* 46(2) of the Supreme Court Rules as your client's notice of appeal has delayed execution of the judgment appealed against."

Instead of making an application for condonation of the non-compliance with r 34(1) and an order of reinstatement of the lapsed appeal, the applicant's legal practitioners renounced agency on 21 March 2000. On 1 September 2000, Mandizha, Chitsunge & Co assumed agency on behalf the applicant. The new legal practitioners must have become aware of the fact that there had been no compliance with r 34(1) in the noting of the appeal because on 29 December 2000 they wrote the following letter to the Registrar of the High Court: ^F

"RE: BESSIE MAHEYA v INDEPENDENT AFRICAN CHURCH CASE

SC 303/99

We refer to the above matter in which we assumed agency on behalf of Mrs Bessie Maheya, the appellant. We kindly request that you prepare the record of proceedings and hereby undertake to pay your costs for ^G preparing same."

The appeal had lapsed and there was no appeal pending before the Supreme Court at the time the written undertaking to pay the cost of the preparation of the record of proceedings was given. The cost was not even estimated. Its amount was unknown to the applicant's legal practitioners. There has in fact ^H

2007 (2) ZLR p323

Malaba JA

A been no appeal pending before the Supreme Court in this case for the past seven years. On 25 September 2006, Mandizha & Co renounced agency and a third firm of legal practitioners, Musunga & Associates assumed the agency on behalf of the applicant.

The question for determination is whether the applicant has shown a cause for the re-instatement of the appeal. In considering applications for condonation ^B of non-compliance with its Rules, the court has a discretion which it has to exercise judicially in the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance; the explanation therefor; the prospects of ^C success on appeal; the importance of the case; the respondent's interests in the finality of the judgment; the convenience to the court and the avoidance of unnecessary delays in the administration of justice: *Bishi v Secretary for Education* 1989 (2) ZLR 240 (H) at 242D-243C.

The applicant has been in a position of no right in respect to her occupation of the "church house" for the past seven years and the same period of time ^D marks the degree of non-compliance with r 34(1) of the Rules of the Supreme Court. She has blamed her erstwhile legal practitioners for non-compliance with the Rules. There has indeed been no explanation from the legal practitioners concerned for failure to act in terms of r 34(1) at the time the notice of appeal was filed. They failed to appreciate at any time during the period of seven years that the appeal had lapsed and institute appropriate proceedings to regularize ^E it. The absence of an explanation of the non-compliance with the Rules shows a wilful disdain for the Rules of Court, the consequences of which the applicant cannot escape.

In *Beitbridge Rural District Council v Russell Construction Co* 1998 (2) ZLR 190 (S), there was no explanation by the applicant's legal practitioners as to ^F why they had failed to enter appearance to defend the respondent's claim timeously and why they had not applied for the upliftment of a bar which led to the default judgment which was sought to be rescinded being granted. Sandura JA applied the principle that in such a case a court should visit a party with the consequences of the negligence of his legal practitioner. He said ^G at 192H:

"Whilst it is true that the fault was largely that of the appellant's former and present legal practitioners who failed to take appropriate action to protect the appellant's interests, that fact, in my view, does not assist the appellant. This court has, on a number of occasions, clearly stated that ^H non-compliance with or a wilful disdain of the Rules of Court by a party's

2007 (2) ZLR p324

Malaba JA

legal practitioner should be treated as non-compliance or a wilful disdain ^A by the party himself."

In *S v McNab* 1986 (2) ZLR 280 (S), Dumbutshena CJ held that in cases similar to the applicant's case a party should be punished for the negligence of his legal practitioner. He said at 284A-E:

"In my view, clients should in such cases suffer for the negligence of their legal practitioners. I share the view expressed by Steyn CJ in *Saloojee & Anor NNO v Minister of Community Development supra* at 141C-D when he said:

'There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this court ... The attorney, after all, is the representative whom the litigant has chosen for himself and there is little reason why, in regard to condonation of a failure to comply with a Rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.'" D

In this case, not only did the legal practitioner who had attended to the noting of the appeal on behalf of the applicant on 7 January 2000 fail to have deposited with the Registrar of the High Court the estimated cost of the preparation of the record at the time he noted the appeal or give a written undertaking to pay the cost in lieu of the deposit, he did not take heed of the clear warning contained in the letter written by the respondent's legal practitioner on 17 January 2000 to the effect that the appeal had lapsed for failure to comply with r 34(1) of the Rules of the Supreme Court. The only reasonable inference to be drawn from such conduct and absence of an explanation for it is that the legal practitioner was disdainful of the Rules of court.

One is unable to appreciate, in the absence of an explanation for what was F done, the purpose of the written undertaking to pay the cost of the preparation of the record of proceedings given in the letter of 29 November 2000. Failure to appreciate the fact that such an undertaking is required to be given at the time the appeal is noted and the cost estimated, shows that the legal practitioner who wrote the letter did not even bother to read r 34(1).

In the circumstances, the applicant cannot escape the consequences of the G lack of diligence on the part of her legal practitioners. They failed to comply with the Rules of this court on her behalf.

There is yet another equally important principle applicable to the facts of this case. It is the principle that there should be finality in litigation. In H

2007 (2) ZLR p325

Malaba JA

A *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298, Trollip JA observed at 309A that:

"... public policy demands that the principle of finality in litigation should generally be preserved rather than eroded."

See also *Ndebele v Ncube* 1992 (1) ZLR 288 (S) at 290C.

B As the facts show, the court *a quo* made a final determination of the question whether the applicant had a right to use the "church house" as her residence eight years ago and that judgment has not been appealed against for the past seven years. A careful examination of the grounds of the complaint against the judgment is that the learned judge applied the principle of majorities to decide the question whether the applicant had a right to use the "church c house" as her place of residence after the death of her husband. Nowhere is it suggested that the applicant in her individual capacity or as a widow of the late Bishop Maheya has a right to remain in occupation of the church house and what the source of that right is. It is clear that she has no such right. The absence of prospects of success on appeal further justifies the application of the principle that there be finality to the litigation and the rights and obligations D of the parties be as determined by the court *a quo* in the judgment of 13 October 1999.

The application for an order of reinstatement of the appeal against the judgment of the court *a quo* is dismissed with costs.

E *Musunga & Associates*, applicant's legal practitioners

Atherstone & Cook, respondent's legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/CHIMPONDAH & ANOR v MUVAMI 2007 (2) ZLR 326 (H)

CHIMPONDAH & ANOR v MUVAMI 2007 (2) ZLR 326 (H)**2007 (2) ZLR p326**

Citation	2007 (2) ZLR 326 (H)
Case No	Judgment No. HH-81-07
Court	High Court, Harare
Judge	Makarau JP
Heard	9 October 2007
Judgment	21 November 2007
Counsel	<i>R M Fitches</i> , for the applicants <i>P Machaya</i> , for the respondent
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Contract — sale — land — instalment sale — agreement to pay by instalments — agreement made after substantive contract concluded — sale still governed by Contractual Penalties Act [Chapter 8:04]

Practice and procedure — condonation — condonation of non-observance of any time limit — application — factors to take into account

Headnote

It is the settled practice of the High Court to consider the same factors when ^D considering any application for condonation of the non-observance of time limits set by the rules of court. The same considerations have been used in a number of different situations: the late filing of an application for rescission of a default judgment; the late entering of an appearance to defend; the late filing of an application for review; and the late filing ^E of an appeal. The factors taken into account include the length of the delay, the explanation for the delay, the merits of the application and any prejudice to the interests of justice generally.

The provisions of the Contractual Penalties Act [Chapter 8:04] apply to afford protection to all purchasers of land where the purchase price is to be paid in two or more instalments, regardless of when the instalments ^F were agreed upon. Thus, where the parties initially agree on a cash sale but later convert it to an instalment sale, the initial intention of the parties does not override the clear letter of the law as provided for in the Act. The sale does not become an instalment sale by reference to the intention of the parties but by operation of law. Once the parties agree that the purchase price is to be paid over in three or more instalments, the provisions of the Act come into operation and the seller has to give the purchaser the notice provided for in s 8 of the Act. ^H

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Makarau JP

Cases referred to ^A

Ehlers v Standard Chartered Bank Zimbabwe Ltd 2000 (1) ZLR 136 (H)

Kodzwa v Sec for Health & Anor 1999 (1) ZLR 313 (S)

Lewis Cox & Co (Pvt) Ltd v Twentydales Svc Station (Pvt) Ltd 1956 R & N 338 (SR)

Legislation considered ^A

Contractual Penalties Act [*Chapter 8:04*], s 2

Case information

R M Fitches, for the applicants

P Machaya, for the respondent

Judgment

© **MAKARAU JP:**

CONDONATION

At the hearing of this matter, the respondent was automatically barred from appearing before the court as he had not filed his heads of argument within the time prescribed in the rules. A formal court application was filed on 4 ^D September, 2007 seeking the upliftment of the bar. The application was opposed.

After hearing argument from counsel on the application, I granted leave to the respondent to file his heads out of time and indicated that my reasons would follow in the main judgment. I now set them out before I proceed to deal with ^Ethe matter on its merits.

The applicants filed their heads of argument on 6 June 2007. The heads were served on the respondent's legal practitioners on the following day. It would appear that the respondent's legal practitioners had by then closed the file and archived it at the senior partner's residence. It then took the legal practitioners two months to locate and retrieve the record for the purposes of responding ^F to the heads.

It is trite that there is a certain degree of negligence in failing to observe the rules of the court. An application for condonation such as the one before me is, therefore, an application for excusing the negligence of the offending party and the degree of such negligence then becomes a factor, together with other ^G factors that will ensure that at the end of the day justice as between the parties prevails. The factors generally taken into account by the court, when considering an application for condonation, are well established. Importantly, but not exclusively, the court takes into account such factors as the length of the delay, the explanation for the delay, the merits of the application and any ^H prejudice to the interests of justice generally.

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Makarau JP

It would appear to me to be the settled practice of this court to consider the ^A same factors when dealing with any application for condonation for the non-observance of any time limit to take a formal procedure before the court. Thus, the same considerations have been used when determining an application for condonation for the late filing of an application for the rescission of a default judgment (*Ehlers v Standard Chartered Bank Zimbabwe Ltd* 2000 (1) ZLR 136 (H)); ^B to condone the late entering of an appearance to defend; (*Lewis Cox & Co (Pvt) Ltd v Twentydales Service Station (Pvt) Ltd* 1956 R&N 338 (SR)); to condone a late filing of an application for review (*Kodzwa v Secretary For Health & Anor* 1999 (1) ZLR 313 (S)) and to condone the late filing of an appeal.

It is from these cases that I derived the considerations applicable in this matter.

In casu, while I find that the conduct by the applicant's legal practitioner of ^C closing a file and archiving it simply on the basis that the other party had not taken any further steps to set the matter down in six months borders on the ridiculous, I used the discretion vested in me to allow the late filing of the heads of argument because of the need for the parties to have a final judgment on the matter in view of the spate of litigation that they have already been ^D involved in over the same matter. Further, in my view, the point raised by the respondent in his defence is an interesting and

important legal point concerning the definition of instalment sales of land under the Contractual Penalties Act [*Chapter 8:04*].

It is my further view that, when considering an application for condonation for the late observance of a rule of procedure before default judgment is given ^εin the matter, the court should lean towards granting rather than refusing such application. I am, however, not suggesting that, prior to judgment, condonation should be granted for the mere asking. The applicant still has to satisfy the court that there is good cause to excuse the negligence and grant the indulgence. ^ϕ

I now turn to the merits of the matter.

BACKGROUND FACTS

The facts forming the backdrop to this application may be summarized as follows.

In October 2005, the applicants, who are husband and wife, entered into a ^gwritten agreement of sale with the respondent in respect of certain immovable property in Borrowdale, Harare. The property was sold \$4 500 000. The purchase price of the property was to be paid as to a deposit in the sum of \$1 million on the date of the agreement and the balance no later than 21 days from the date of the agreement. ^h

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Makarau JP

^aThe deposit was not paid on the date of the agreement. A sum of \$900 000 was, however, paid on 3 November 2005.

Sometime later, the respondent telephoned the applicants and suggested that, instead of paying the balance of the purchase price as per the agreement, they propose to him less onerous terms of discharging their obligations. In response, the applicants proposed that they pay the balance in 3 instalments, ^bthe last one being paid on or before 9 December 2005. The first instalment of \$1 million fell due on 25 November. It was paid 28 November 2005. The second instalment of \$1million was due and payable on 2 December 2005. A sum of \$600 000 was paid to the agent on 5 December 2005 with a request that a sum of \$100 000 held by the agents in trust be added to make a total of \$700 000. ^cThe balance was to be paid in full on 9 December 2005.

On 6 December 2005, the applicants were informed that the respondent was canceling the agreement of sale. This was acceptable to the applicants on condition the total amount paid to date was all refunded in full. The purchase price could not be refunded upon demand as the money had been invested by the respondent with an asset management company and could not be easily ^dretrieved. Having failed to have the total amount paid to date refunded, the applicants considered that the agreement of sale was thus still binding and on 8 December 2005, they paid the outstanding balance in full. They also paid the transfer fees for the conveyance of title from the respondent to themselves. The respondent refused to effect transfer in favour of the applicants insisting ^ethat he had cancelled the agreement on 6 December 2005.

On 31 October 2006, the applicants filed this application seeking an order compelling the respondent to effect transfer of the property to them.

The application was opposed on two main grounds. *In limine*, it was argued that the matter was *res judicata*, having been before this court under case No HC 132/06, a matter that was incorporated into the application before me by ^freference. Secondly, and in terms of the opposing affidavit filed in HC 132 /06, the respondent maintained that his cancellation of the agreement of sale was valid as the applicants had failed to pay the purchase price of the property in terms of the agreement.

I start with the point raised *in limine*.

^g RES JUDICATA

The requirements for the plea of *res judicata* are settled. Our law recognizes that once a dispute between the same parties has been exhausted by a competent court, it cannot be brought up for adjudication again as there is ^hneed for finality in litigation. To allow litigants to plough over the same ground

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Makarau JP

hoping for a different result, will have the effect of introducing uncertainty into a court decisions and will bring the administration of justice into disrepute.

For the plea to be upheld, the matter must have been finally and definitively dealt with in the prior proceedings. In other words, the judgment raised in the plea as having determined the matter must have put to rest the dispute between the parties by making a finding in law and/or in fact against one of the parties b on the substantive issues before the court or on the competence of the parties to bring or defend the proceedings. The cause of action as between the parties must have been extinguished by the judgment.

A judgment founded purely in adjectival law, regulating the manner in which the court is to be approached for the determination of the merits of the matter, does not, in my view, constitute a final and definitive judgment in the matter. c It appears to me that such a judgment is merely a simple interlocutory judgment directing the parties on how to approach the court if they wish to have their dispute resolved.

It further appears to me that the judgment by Chatukuta J in HC 132/06 was a judgment founded purely in adjectival law and one that did not exhaust the d cause of action between the parties. It did not determine whether the applicants were in breach of the agreement of sale or, conversely, whether the cancellation of the agreement of sale by the respondent was valid. The rights of the parties in terms of the agreement of sale between them were the broad issue that they brought before the court for determination. The learned judge was of the view that the applicants had not made out a cause of action in their e founding affidavit, but that this was appearing in the answering affidavit. On that basis, she declined to go into the merits of the matter. In the circumstances of the matter, the learned judge did not therefore exhaust the cause of action between the parties as she could not have exhausted a cause of action that she could not find. In my view, her judgment impliedly directed the applicants to bring a cause of action in their founding affidavits if they wished to have f their dispute with the respondent resolved.

On the basis of the foregoing, I would dismiss the plea of *res judicata*.

I now turn to consider whether, on the facts of the matter, the respondent was within his rights to cancel the agreement of sale between the applicants and himself. g

VALIDITY OF CANCELLATION OF AGREEMENT

In my view, the issue to determine is whether, as at 6 December 2005, the applicants were in breach of the agreement of sale and whether such breach entitled the respondent to cancel the agreement of sale without giving the applicants notice to remedy the breach. h

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Makarau JP

A The respondent alleges in his papers that he canceled the agreement of sale because the applicants had breached the revised payment plan by failing to pay the instalment that was due on 2 December 2005. The applicants accept that they did not pay this instalment when it fell due but forwarded the sum of \$600 000 to the estate agent on 5 December with a request that the estate agent top up the amount with a sum of \$100 000 that it held in trust. The b applicants proposed to pay off the balance in full on 9 December 2005 when the last instalment of the purchase price was due.

It appears to me to be the common position that the applicants did not pay the instalment that fell due on 2 December 2005 on time. The applicants, however, argue that even if they did not pay this instalment on time, the respondent was c nevertheless not entitled to cancel the agreement of sale. They have raised one main argument in support of their position.

The applicants argue that once the parties had agreed to vary the terms of payment of the balance of the purchase price, by operation of law, the agreement was governed by the provisions of the Contractual Penalties Act [Chapter 9:04] and in terms of s 8 of that Act, the applicants were to be given d 30 days' notice of the seller's intention to cancel the agreement on account of their breach.

An instalment sale of land is defined in s 2 of the Contractual Penalties Act as:

"A contract for the sale of land whereby payment is required to be made – e

(a) in three or more instalments; or

(b) by way of a deposit and two or more instalments; ..."

I agree with the submissions by Mr *Machaya* on behalf of the respondent that the parties only agreed to vary one obligation of the applicants and that, instead of paying off the purchase price in lump sum, the applicants were now ^F to discharge their obligation in three instalments.

In his view, this did not change the nature of the agreement between the parties from a non-installment sale of land to an instalment sale of land as provided for in the Act. I am unable to agree with this, the second leg of his submissions.

While the intention of the parties was clearly to enter into an almost cash sale ^G initially, the parties varied the terms relating to the payment of the balance of the purchase price in such a manner as to bring it within the ambit of the Act.

Mr *Machaya* referred me to the remarks by Christie *Law of Contract in South Africa* 3 ed at p 466 where the learned author makes a distinction between a subsequent agreement to pay an existing debt by instalments and a contract ^H which, as part of the same transaction, creates the debt and the method of

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Makarau JP

paying it by instalments. I agree with the correctness of the remarks by the ^A learned author and that in a transaction governed by common law, this position will prevail.

However, I am of the view that the provisions of the Act are quite clear and do not admit of two or more meanings. It is my further view that the provisions of the Act apply to afford protection to all purchasers of land where the ^B purchase price is to be paid in three or more instalments regardless of when the instalments were agreed upon. Thus, where the parties initially agree on a cash sale but later convert it to an instalment sale, the initial intention of the parties does not override the clear letter of the law as provided for in the Act. It is yet my further view that the sale does not become an instalment sale by reference to the intention of the parties but by operation of law. Once the ^C parties agree that the purchase price is to be paid over in three or more instalments, in my view, the provisions of the Act come into operation and the seller has to give the purchaser the notice provided for in s 8 of the Act.

On the basis of the above, it is my view that the protection afforded purchasers of land on instalments under the Act is not available to the applicants before me. ^D

It is therefore, my finding that the cancellation of the agreement of sale by the respondent in the circumstances was invalid and cannot be upheld and given effect to. The applicants are entitled to the relief that they seek.

In the result, I make the following order:

1. The respondent is ordered to take all necessary steps and to sign all ^E necessary documents to pass transfer to a applicants of stand No. 658 Quinington Township of Subdivision 6 of Quinington of Borrowdale, within 14 days of the date of this order failing, which the Deputy Sheriff is hereby empowered and authorized to sign all the necessary documents on behalf of the respondent. ^F
2. The respondent is to pay the costs of this application.

Linda Chipato Legal Practitioners, applicant's legal practitioners

Chingore & Associates, respondent's legal practitioners ^G

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IN RE MAPOSA 2007 (2) ZLR 333 (H)**2007 (2) ZLR p333**

Citation	2007 (2) ZLR 333 (H)
Case No	Judgment No. HB-115-07
Court	High Court, Bulawayo
Judge	Cheda J
Heard	8 November 2007
Judgment	22 November 2007
Counsel	<i>T Hara</i> , for the applicant
Case Type	Chamber application for guardianship
Annotations	Link to case annotations

Flynote

Family law — *child* — *guardianship* — *grant of to person other than child's parent* — *principles* — *removal of child from jurisdiction by such person* — *what must be shown*

Headnote

The applicant was the aunt of a minor child. The child's mother had died but ^D his father, who was unemployed, was still alive. With the consent of the child's father, she applied for sole guardianship of the child, her intention being to remove the child from Zimbabwe to the United Kingdom, where she lived and worked.

Held, that while guardianship of a minor child can be granted to one parent to the exclusion of the other, the courts should be slow in granting that ^E status to a third party. The reason is that the court, being the upper guardian of all minors, should grant guardianship and order subsequent removal from its own jurisdiction only after serious consideration of the circumstances surrounding such application. While the best interests of the child are the first and paramount consideration, they are not the sole consideration in the determination of the suitability of an applicant for ^F guardianship. Other considerations come into play. The wishes of an unimpeachable parent undoubtedly stand first. Although *in casu* the minor's father expressed wish was in favour of guardianship by the applicant, the applicant still had to satisfy the court as to her suitability as a new parent. She should satisfy the court that she was in a position to look after the child adequately and was a fit and proper person to adopt ^G the child. In that regard, the child's welfare should not be measured only by money or physical comforts, but by all factors that will affect its future. The court should not rely on the applicant's ability to support the child by her mere say-so in an affidavit; she must go further and convince the court by authentic documentary proof of her capacity to do so. This she ^H had failed to do.

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Cheda J

Cases cited ^A*Au v Au* [1979] FLR 116 (CA)*Boylan v Hunter* [1922] SC 80*Brooks v Blount* [1923] 1 KB 257

Chamberlain v de la Mare [1983] FLR 434 (CA)

Re J (an infant) 1981 (2) SA 330 (Z) ^B

Thain v Taylor [1926] Ch 676

Case information

T Hara, for the applicant

Judgment

CHEDA J: This is an *ex parte* application for guardianship of a minor child. The salient facts of the matter are that the appellant is the aunt of a minor child, ^C whom I will refer to as "X". X's mother is deceased but his father is alive. He is unemployed and is resident here in Zimbabwe. The applicant, in her affidavit, states that she is an Information Technology adviser in the United Kingdom and that she has X's father's consent to apply for sole guardianship. Her reasons for this application are that:

- (a) she intends to take the child to the United Kingdom where she is ^D employed.
- (b) the child's father is unemployed and has no adequate means to support the minor child to its full potential; and
- (c) it is in the best interests of the minor child if its guardianship is awarded to her. ^E

At common law, the rights, liabilities and duties of parents are inalienable, see *Boylan v Hunter* [1922] S C 80 and *Brooks v Blount* [1923] 1 KB 257.

Although such practice is now part of our law, the principle is founded on equity which results in a third party, in the form of a relative or stranger, putting himself *in loco parentis* towards a child by undertaking the office and duty ^F of a father or mother, thereby assuming a judiciary relationship with the said child. Therefore, while it is trite law that guardianship of a minor child can be granted to one parent to the exclusion of the other, the courts should be slow in granting that status to a third party. The reason is that, this court, being the upper guardian of all minors, should grant guardianship and order subsequent removal from its own jurisdiction only after serious considerations of the ^G circumstances surrounding such application.

The first and paramount consideration is the welfare of the minor, in other words the best interests of the child: See *Chamberlain v de la Mare* CA [1983] FLR 434 and *Au v Au* [1979] FLR 116 (CA). While the best interests of the child ^H

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Cheda J

^A is the first paramount consideration, it is not the sole consideration in the determination of the suitability of the applicant. Other considerations come into play as it will be shown below. The wishes of an unimpeachable parent undoubtedly stand first. See *Thain v Taylor* [1926] Ch 676 at 864 (CA). In the present case, the minor's father's expressed wish is indeed in favour of guardianship by the applicant. However, the applicant must satisfy the court ^B of her suitability as a new parent.

In my opinion, in order to determine the child's welfare, the applicant should satisfy the court that she is in a position to look after the child adequately. The court or judge should be satisfied that the adoptive parent is a fit and proper person to adopt the child in question.

^C The courts have a duty to ensure that a minor child, when removed from its jurisdiction, will be removed to a place where the *status quo* of his life will continue or will be enhanced. In order to safeguard the child's interest, it is essential for the courts to bear in mind that the removal may catapult the child into illegal or immoral surroundings, thereby prejudicing its interests.

It is not enough for the applicant to aver that she has been financially ^D supporting the child from the United Kingdom. The court should not, in my opinion, rely on her mere say-so in an affidavit. The applicant must go further and convince the court or judge by authentic documentary proof of her capacity to do so.

Therefore, in such an application, the applicant must adduce the following ^E evidence to the satisfaction of the court or judge:

- (a) her relationship to the minor child;

- (b) proof of her residential status in the United Kingdom;
- (c) proof of employment or financial support or regular income;
- (d) proof of suitable accommodation/title deed or lease agreement;
- (e) in the case of a child of school-going age, proof of adequate schooling arrangements for the child.

The list is inexhaustive, as each case will depend on its own merits.

The court or judge should be satisfied that the adoptive parent is a fit and proper person to adopt the child. In that regard, the child's welfare should be measured not only by money or physical comforts, but also by all factors that will affect its future. See *Re J (An Infant)* 1981 (2) SA 330 (Z). While the court should not lightly interfere with the reasonable way of life chosen by the parent bestowed with guardianship, by reason of a court order or other practical circumstances, e.g. by agreement of the parents of the minor child

2007 (2) ZLR p336

Cheda J

or members of the wider family, the above requirements should be seriously considered in the determination of the removal of the said child/children from the court's jurisdiction.

In casu, the applicant has failed to satisfy me as to her suitability and for that reason this application is dismissed.

T Hara and Partners, the applicant's legal practitioners

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CHAPFIKA v RESERVE BANK OF ZIMBABWE 2007 (2) ZLR 337 (H)

2007 (2) ZLR p337

Citation	2007 (2) ZLR 337 (H)
Case No	Judgment No. HH-77-07
Court	High Court, Harare
Judge	Patel J
Heard	18 June 2007; 26 June 2007
Judgment	26 November 2007
Counsel	<i>G Mandizha</i> , for the plaintiff <i>Ms N G Maphosa</i> , for the defendant
Case Type	Civil trial
Annotations	Link to case annotations

Flynote

Exchange control — offences under exchange control legislation relating to foreign currency — reward payable to person providing information regarding such offences — when reward payable — only payable when foreign currency recovered

Revenue and public finance — public moneys — expenditure or disbursement of — must be authorised or sanctioned by Parliament

Headnote

The plaintiff had gathered information about breaches of the exchange control legislation perpetrated by a merchant bank. These breaches involved the externalisation of foreign currency. His information led to the bank being prosecuted and fined. The trial court did not, however, order the forfeiture of the funds involved; the funds had been exported with the requisite authority but without the bank having complied with the conditions stipulated in terms of that authority.

The plaintiff, relying on the defendant's Monetary Policy Statement which set up a "whistle blower's fund", demanded the payment to him of ten percent of the sum involved. The policy statement was somewhat ambiguous in its wording, but could be read as entitling a "whistle blower" to the reward either after recovery of the funds involved or upon provision of prosecutable proof of an offence. The defendant refused to pay the reward, arguing *inter alia* that the plaintiff was not legally entitled to it.

Held, that one of the fundamental principles of public finance is that any expenditure or disbursement of public moneys, whether under a contract or otherwise, must invariably be authorised or sanctioned by Parliament. This basic principle of English constitutional law is reflected in the Constitution of Zimbabwe.

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Patel J

Held, further, that the entitlement of a "whistle blower" to the prescribed monetary reward for providing information about exchange control offences is prescribed by s 10 of the Exchange Control Act [Chapter 22:05], as amended by Act No. 16 of 2004. The clear meaning of the section is that the payment of a reward to a "whistle blower" is contingent upon the detection and prosecution of such an offence and the consequent recovery and forfeiture of funds or the recovery of funds *per se*, notwithstanding that no prosecution of an offence is instituted. In both scenarios the common and essential prerequisite is the recovery of convertible foreign currency. Once such recovery is effected, the informant is entitled to be awarded ten percent of the amount recovered. If no recovery is effected, the informant is entitled to nothing, even if a successful prosecution takes place and a fine is imposed. The imposition of a fine cannot be regarded as tantamount to recovery of the funds; a fine and a forfeiture order are quite distinct, both in their objectives and their consequences.

Cases referred to

A-G v Great Southern & Western Ry Co of Ireland [1925] AC 754

Auckland Harbour Board v R [1924] AC 318 (PC)

Churchyard v R (1865) LR 1 QB 173

Legislation considered

Constitution of Zimbabwe 1980, s 102

Exchange Control Act [Chapter 22:05], s 10

Case information

G Mandizha, for the plaintiff

Ms N G Maphosa, for the defendant

Judgment

PATEL J: The plaintiff in this matter, Robson Chapfika, is a businessman and finance consultant. He claims from the defendant, the Reserve Bank of ^F Zimbabwe, specific sums of money sounding in various convertible currencies and equating to *circa* US\$450 000, being ten percent of the illegally exported amounts that he avers were identified or recovered by dint of his intervention as a so-called whistleblower. The defendant denies the plaintiff's role in the identification or recovery of these amounts and, in any event, it disputes the ^G legal basis of his claim.

EVIDENCE FOR THE PLAINTIFF

The plaintiff testified as follows. In December 2003, the Governor of the Reserve Bank delivered the Bank's monetary policy statement, through which it offered to any person who provided information on any improperly processed ^H

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Patel J

^A moneys the equivalent of ten percent of such moneys. He consequently gathered various documents proving certain illegal activities on the part of the National Merchant Bank (the NMB Bank). He obtained these documents in strict confidence from a senior official at the bank. On 2 March 2004, he wrote to the defendant and forwarded copies of the papers to one Kahuni who was the head of the defendant's investigation office. Kahuni then invited him to ^B a meeting with the police investigation team in March or April 2004, after which he rendered full assistance in the investigation process over a period of two months. The documents that he furnished showed the illegal externalisation of funds by the NMB Bank over a specific period. After he provided the original documents to the investigating team in July 2004, a docket was ^C prepared and the trial date for the prosecution of the NMB Bank was set for 13 September 2004. He subsequently went to the defendant's offices with members of the team to claim his payment but encountered difficulties. After several meetings and correspondences he belatedly received a letter in June 2005 stating that the information he had provided was of no value as the defendant already had it in its possession from another source. He then wrote ^D to the defendant in August 2005 threatening legal action but received no positive response and eventually referred the matter to his present legal practitioners.

According to the plaintiff, the information that he had supplied identified the perpetrators as well as the value of the moneys that were externalised. The information was contained in various internal memoranda of the NMB Bank ^E which were not previously availed to the defendant or the investigation team from any other source. The exchange control violations by the NMB Bank referred to in the defendant's internal memorandum dated 27 February 2004 were different from the offences divulged by the information provided by the plaintiff. It was on the basis of this information that the NMB Bank and its ^F directors were duly convicted on 30 September 2005. Moreover, as is reflected in a letter from the defendant to the NMB Bank dated 30 December 2004, the defendant recovered an amount of US\$1 700 000 from the NMB Bank. This amount was forfeited to the State at the end of the NMB Bank's criminal trial. In any event, according to the defendant's Monetary Policy Statement of December 2003 [Exhibit E], the plaintiff was entitled to claim his ten percent ^G either upon recovery of the funds in question *or* upon furnishing proof of a prosecutable offence. Once the offenders identified were convicted, the question of recovery was a matter for the defendant to initiate and implement.

When questioned by the court, the plaintiff explained that the NMB Bank was charged and convicted of 105 counts as set out in the charge sheet and the ^H schedules attached thereto. Counts 1-98 and 104-105 related to unauthorised

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Patel J

sales of foreign currency, while counts 99-103 dealt with the illegal exportation ^A of foreign currency. The information provided by the plaintiff, in particular, the NMB Bank's internal memoranda, resulted in the conviction of the bank in respect of counts 99-105. The plaintiff's claim was founded on the amounts involved in counts 99-105. All of this was confirmed in a letter to the defendant dated 13 July 2004 from the head of the Special Investigations Unit, Chief Superintendent Mhene, which clearly identified the plaintiff as the ^B whistleblower concerned.

Thomas Kahuni was employed as the Chief Investigations Officer in the defendant's Exchange Control Department until the end of March 2004 when he left to join Barclays Africa. He testified

that the plaintiff first telephoned him in March 2004. He later arrived with an envelope containing certain c documents relating to the NMB Bank's foreign currency dealings and a covering letter. The witness considered these papers to be critical and referred them to another official, Henry Mkurazhizha, who was to take over from him at the end of March 2004. Mkurazhizha indicated that the papers contained new and vital information relating to the NMB Bank. He in turn referred the witness to Chief Superintendent Mhene who was heading the relevant police d investigation team. The witness then arranged a meeting which included himself, the plaintiff, Mhene and two others. At that meeting, it was agreed that the plaintiff should interact directly with the police in providing information and assistance in the matter. At that time, the witness was not aware of any specific Reserve Bank structures having been set up to deal with whistleblowers e in particular. There was a communications centre but this was in its infancy at that stage.

Nicholas Mhene was formerly a Chief Superintendent with the police until April 2005. In February 2004, he was assigned together with three other police officers to investigate the externalisation of foreign currency by the NMB Bank. The witness was the head of this team and liaised with officials from the f Reserve Bank and the Attorney-General's Office. In March 2004, Mkurazhizha provided further information of exchange control violations by the NMB Bank involving the London Trust Bank in the United Kingdom. Soon thereafter, Kahuni arranged a meeting attended by the new informant, who was the plaintiff. In the ensuing investigations from March to June 2004, the plaintiff g met with the team two or three times a week and provided useful assistance. He also furnished the originals of the copied documents that he had provided earlier. After the trial date was fixed for September 2004, the witness was requested by the plaintiff to accompany him to the defendant's offices regarding the plaintiff's ten percent reward. The relevant official, Mirirai h

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A Chiremba, asked for written confirmation and this was duly provided by the witness on 13 July 2004. Several months later, the plaintiff wrote to the witness enquiring about his position and the latter then wrote again to Chiremba on 22 March 2005. According to this witness, the memoranda supplied by the plaintiff were later authenticated by two NMB Bank officials. Of the 105 counts preferred against the NMB Bank, counts 99-105 were framed solely on the b basis of the memoranda and information supplied by the plaintiff. This information was attributed exclusively to the plaintiff and no other source or informant. It was not contained in any of the 18 files that had been previously seized from the NMB Bank in February 2004. The outcome of the NMB Bank prosecution was summarised in an internal police memorandum dated 5 October 2005. As shown therein, the bank was fined \$405 million for counts c 1-98 and \$1.34 billion in respect of counts 99-105. However, the witness was not aware of any forfeiture order forming part of the sentence imposed upon the bank.

[The learned judge then considered the evidence for the defendant and continued:]

D FINDINGS

It is common cause that the NMB Bank was convicted and sentenced in August and September 2005 on 105 counts of contravening the Exchange Control Act [*Chapter 22:05*] as read with the Exchange Control Regulations 1996. Of these 105 counts, counts 1-98 and 104-105 pertained to unauthorised e sales of foreign currency, while counts 99-103 dealt with the illegal exportation of foreign currency.

On the evidence and documents adduced *in casu*, it is abundantly clear that the NMB Bank's internal memoranda formed the basis of the charges against the bank in respect of counts 99-105 and that the bank's conviction on those counts eventuated from that evidence. On a balance of probabilities, it is also f relatively clear that it was the plaintiff who furnished these memoranda to the relevant authorities for the purposes of prosecution. In this regard, it is immaterial whether he provided this information to the Reserve Bank through the proper channels or how it was relayed and availed to the police investigation team. It is possible that the plaintiff might have obtained the memoranda by g improper means. However, this allegation was purely conjectural and not supported by anything other than circumstantial inference. In any event, what matters for present purposes is that it was the plaintiff's information that led to the prosecution and eventual conviction of the NMB Bank on counts 99-105. It follows that it was the plaintiff who provided the requisite prosecutable h proof of these offences by the bank.

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Turning to the question of recovery, the position is somewhat less clear. The ^A probabilities strongly favour the defendant's version that the sum of US\$1.7 million that was remitted by the NMB Bank towards the end of 2004 was intended to liquidate certain diaspora funds for distribution to local beneficiaries in local currency. This sum appears to have been unconnected to the prosecution and conviction of the bank for its illegal exportation of ^B foreign currency or its dealings on the parallel market. Moreover, there is no evidence whatsoever of any forfeiture order with respect to the sum of US\$1.7 million. Indeed, that figure does not in any way tally with the amounts involved in counts 99-103 relative to the illegal exportation of foreign currency by the bank, i.e. *circa* US\$3.7 million.

At any rate, what is undisputed is that the convicting court did not order any ^C forfeiture in relation to counts 99-103. The reason for this was that the bank was found to have exported the foreign currency in question with the requisite authority but without having complied with the conditions stipulated in terms of that authority, i.e. by failing to record the transfer of funds in the relevant "nostro" account. In other words, the bank did not export any currency that could not or should not have been exported and, therefore, there was nothing ^D that the bank could be ordered or required to repatriate. In the absence of any prejudice to the State, the court quite correctly did not order any forfeiture or repatriation of the amounts that had been exported by the bank.

MONETARY POLICY STATEMENT

Paragraph 19 of the Reserve Bank's Monetary Policy Statement of December ^E 2003 (the MPS) provides for the setting up of a Whistle Blower's Fund. The conditions for payment that are stipulated in the MPS are somewhat ambiguous as to whether the information provided by a whistleblower should invariably lead to the recovery of funds (see paras 19.1, 19.3 and 19.7). In any event, on a liberal construction of the MPS, it is arguable that payment of the ten percent ^F reward is due after the recovery of funds *or* upon the provision of prosecutable proof of an offence. If this construction is correct, the plaintiff, having provided the necessary prosecutable proof of offences by the NMB Bank, should be entitled in terms of the MPS to a reward of ten percent of the amounts involved, whether or not those amounts were in fact recovered. For the reasons that follow, however, the MPS *per se* cannot constitute a proper legal ^G basis for the payment of any reward either to the plaintiff or to any other whistleblower. To the extent that it purports to do so, the undertakings that are made in it are not binding or enforceable. ^H

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A EXPENDITURE OF PUBLIC FUNDS

One of the fundamental principles of public finance is that any expenditure or disbursement of public moneys, whether under a contract or otherwise, must invariably be authorised or sanctioned by Parliament. This basic principle is derived from English constitutional law. See *Churchward v R* (1865) LR 1 QB 173 at 209-210; *Auckland Harbour Board v R* [1924] AC 318 at 326-327; ^B *Attorney-General v Great Southern & Western Railway Co of Ireland* [1925] AC 754 at 773. In the *Auckland Harbour Board* case, a decision of the Privy Council, Viscount Haldane expounded the principle as follows:

"... no moneys can be taken out of the consolidated fund into which the revenues of the State have been paid, excepting under a distinct ^C authorisation from Parliament itself. The days have long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorisation or ratify an improper payment. Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and *ultra vires*, and may be recovered by the Government if it can, as here, be traced."

^D The rigour of the constitutional principle enunciated in the English cases has not in any way been diminished in our law. By virtue of s 102 of the Constitution of Zimbabwe:

"(1) No moneys shall be withdrawn from the Consolidated Revenue Fund except –

- (a) to meet expenditure that is charged upon that Fund by this ^E Constitution or by an Act of Parliament; or
- (b) where the issue of those moneys has been authorized by an Appropriation or other Act made pursuant to the provisions of section 103.

(2) ...

⌚ (3) No moneys shall be withdrawn from any public fund, other than the Consolidated Revenue Fund, unless the issue of those moneys has been authorized by or under an Act of Parliament.

(4) An Act of Parliament may prescribe the manner in which withdrawals may be made from the Consolidated Revenue Fund or any other public fund.

⌚ (5) ...

(6)..."

It follows from the foregoing that the Reserve Bank cannot, whether through its monetary policy statements or otherwise, purport or undertake to expend ⌚ public moneys without parliamentary authority enabling it to do so. Whatever

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may be the practical exigencies of the prevailing economic environment, the ⌚ Reserve Bank, like any other instrumentality of the State, is subject to the strictures of the Constitution and must perform its functions accordingly.

STATUTORY AUTHORITY

The statutory provisions implementing para 19 of the MPS were initially prescribed in the Presidential Powers (Temporary Measures) (Financial Laws ⌚ Amendment) Regulations 2004 (SI 14 of 2004). For this purpose, Part IV of the Regulations, which came into operation on 30 January 2004, inserted a new section in the Exchange Control Act [*Chapter 22:05*]. By virtue of s 6 of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*], the temporary amendment effected by the Regulations would have expired and lapsed 180 days after the date of commencement of the Regulations, viz. at the end of July ⌚ 2004. Thereafter, Part IV of the Financial Laws Amendment Act 2004 (Act No. 16 of 2004) re-enacted and revived the amendment to the Exchange Control Act by the insertion of a new s 10 in the same terms as was enacted by the Regulations. Although Act No. 16 of 2004 was only promulgated on 8 October 2004, s 32 of the Act provides for the saving of everything done ⌚ under the lapsed Regulations in the following terms:

"Everything done in the valid exercise of any power in terms of the Presidential Powers (Temporary Measures) (Financial Laws Amendment) Regulations, 2004, published in SI 14 of 2004, shall (notwithstanding any lapsing or defect in the validity of those regulations) be deemed to have been validly done in terms of this Act." ⌚

What this means in essence is that s 32 of Act No. 16 of 2004 operates with retrospective effect to backdate the provisions of s 10 of the Exchange Control Act to the date of commencement of the lapsed Regulations, i.e. 30 January 2004. The new s 10, in its relevant portions, provides for the establishment and operation of the Recovered Foreign Currency Fund as follows: ⌚

"(1) ...

(2) ...

(3) The moneys of the Recovered Foreign Currency Fund shall consist of –

- (a) all convertible foreign currency that is declared to be forfeited to the State in terms of section seven; and ⌚
- (b) convertible foreign currency purchased by the Reserve Bank for the purposes of the Recovered Foreign Currency Fund.

(4) ...

(5) ... ⌚

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⌚ (6) The Board of the Reserve Bank shall award to any person a monetary reward for information provided or any measure taken –

- (a) which results in detection and prosecution of an offence in terms of section five and the consequent recovery of convertible foreign currency that is declared to be forfeited to the State in terms of section seven; ⌚
- (b) which results in the recovery of convertible foreign currency, notwithstanding that no prosecution of an offence in terms of section five is instituted.

(7) Any amount to be awarded in terms of subsection (6) shall be at the rate of ten *per centum* of the convertible foreign currency that is – c

(a) declared to be forfeited in terms of paragraph (a) of section seven; or

(b) recovered in terms of paragraph (b) of section seven;

as the case may be.

(8) At the end of the financial year of the Recovered Foreign Currency Fund, the balance of the total amount of convertible foreign currency d remaining in the Fund after the payment of the amounts awarded during that financial year in terms of subsection (6) shall form part of the Consolidated Revenue Fund.”

Apart from the obviously anomalous and incorrect references in subs (7) to paras (a) and (b) of s 7, which drafting error appears to have been replicated from the precursor Regulations, the meaning of the above-cited provisions is e unmistakably clear. The entitlement of a whistleblower to the prescribed monetary reward is contingent upon the detection and prosecution of an exchange control offence and the consequent recovery and forfeiture of funds or the recovery of funds *per se* notwithstanding that no prosecution of an offence is instituted. In both scenarios, the common and essential f prerequisite is the recovery of convertible foreign currency. Once such recovery is effected, the informant is entitled to be awarded ten per cent of the amount recovered. If no recovery is effected, the informant is entitled to nothing.

In this regard, Mr. Mandizha’s submission that the imposition of a fine is tantamount to recovery is patently untenable. Where an offence is committed, g the convicting court is empowered and enjoined by s 7 of the Act both to impose a monetary fine and to order the forfeiture of any moneys recovered, as cumulative and separate penalties. It is quite absurd to equate the imposition of a pecuniary penalty for the commission of an offence with the recovery and forfeiture of the moneys used or deployed to commit that h offence. The two processes are manifestly distinct, both in their objectives

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and in their consequences. Moreover, there can be no doubt as to the nature a of the recovery to be made and the reward to be paid. Both must be effected in *convertible foreign currency*. The entire provision is predicated and formulated on that premise.

DISPOSITION

Consequent upon the findings made earlier, the plaintiff has succeeded in b showing that he was the provider of the requisite prosecutable proof of the offences committed by the NMB Bank and that the bank was duly convicted and penalised on the basis of the information that he had furnished. However, he has failed to clear the second hurdle confronting his claim, viz., to establish that any convertible foreign currency was recovered pursuant to that c information or the assistance that he had afforded to the relevant authorities. In the result, his claim must be dismissed with costs.

Mandizha & Co., plaintiff’s legal practitioners

Sawyer & Mkushi, defendant’s legal practitioners d

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Source:

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PRIME SOLE (PVT) LTD v KAZI 2007 (2) ZLR 347 (S)

2007 (2) ZLR p347

Citation

2007 (2) ZLR 347 (S)

Case No	Judgment No. S-42-07
Court	Supreme Court, Harare
Judge	Cheda JA, Gwaunza JA & Garwe JA
Heard	26 June 2007
Judgment	26 November 2007
Counsel	<i>H Zhou</i> , for the appellant <i>L Mazonde</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Insolvency — debtor — who is — officer of a company — creditor of company — cannot seek sequestration of officer's estate unless corporate veil lifted

Insolvency — sequestration — provisional — application for — respondent a representative for a company — failure by applicant to lift the corporate veil — respondent's identity separate from that of the company

Headnote

In terms of an oral agreement negotiated by the parties, the respondent undertook to see to it that the appellant's monetary obligations to its South African suppliers were met from free funds held outside Zimbabwe. In return therefor, the appellant was to pay three companies agreed amounts in local currency. In terms of the agreement it duly made payment in staggered amounts. However, for the most part, and contrary to the agreement, the appellant's obligations to its suppliers were not met. The appellant thereupon sought reimbursement of the outstanding amount which remained unpaid to the suppliers. Upon threatening legal action, the appellant received three undated cheques, all signed by the respondent and drawn upon one of the three companies to whom the appellant had made payment in local currency. All three cheques were dishonoured, being drawn on a closed account. The appellant thereupon took the legal action it had threatened and applied to the High Court seeking an order placing respondent's estate under provisional sequestration.

While the appellant submitted to the High Court that the respondent was acting on his own behalf when the agreement was negotiated and was thus personally liable under the Insolvency Act [Chapter 6:04], the respondent contended that he was acting as no more than the representative of one of the other of the three companies which had

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issued to the appellant the two invoices totalling the amount to be paid in terms of the agreement. The respondent submitted that it was to this company, and not him, that the appellant should look for reimbursement. Notwithstanding this, the appellant was wholly unable to offer any proof that the respondent was acting on his behalf rather than as a representative of the application, the judge held that, unchallenged by the appellant, the respondent was a separate and distinct person from the three companies, including the company which had issued the receipts, and that, further, nothing turned on the fact that it was the respondent who had signed the three dishonoured cheques. On appeal:

Held, that the relevant part of the Insolvency Act [Chapter 6:04] defines "debtor" as a person who "is a debtor in the usual sense of the word". The definition specifically excludes a body

corporate or company or other association of persons which may be placed in liquidation or wound up in terms of the law relating to companies. Thus a debtor, according to this definition, must be a natural person.

Held, further, that while the appellant dealt with the respondent in negotiating the agreement in question, it tendered no proof that the respondent was ^D representing himself personally. Given the latter's averment that he had negotiated with the appellant in his capacity as a representative of one of the companies, the appellant had a heavy burden of laying a basis for a finding by the court that the respondent was acting on his own personal behalf. The appellant had not discharged that burden. The appellant took a risk when it failed to ensure that such a weighty transaction was ^E reduced to writing. The appellant did not dispute the existence of the companies, which held active bank accounts into which the funds were deposited. In the face of this, as long as the appellant did not lift the corporate veil of these companies, they remained separate and distinct from the respondent. Thus, when one of these companies, whose separate identity from the respondent the appellant had failed to challenge, ^F generated invoices and the appellant of its own accord made payment to that company, it became difficult to challenge the respondent's assertion that he had negotiated the agreement in question on behalf of that company.

Held, further, that the court *a quo* was also correct in holding that little turned on the fact that the respondent had signed the three dishonoured ^G cheques. Signing a cheque on behalf of a company, even where the account on which the cheque is to be drawn may be closed, does not of itself transfer the liability of the company to the individual who signs the cheque. That such an act might have implications in respect of criminal law was not relevant to the dispute at hand. ^H

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^A *Held*, further, that accordingly the respondent could not be termed a "debtor" in terms of the Insolvency Act [Chapter 6:04]. He was not in his personal capacity, the appellant's debtor.

Legislation considered

^B Insolvency Act [Chapter 6:04], ss 11(1) and 13

Case information

H Zhou, for the appellant

L Mazonde, for the respondent

Judgment

GWAUNZA JA: The appellant approached the High Court seeking an order ^C placing the estate of the respondent under provisional sequestration. It also sought an order for the appointment of a trustee to run and manage the financial and business affairs of the respondent. The High Court found that the appellant had failed to prove it was owed any money by the respondent, or that the respondent had committed an act of insolvency as defined in the Insolvency Act [Chapter 6:04] ("the Act"). The court was also not satisfied ^D on the facts before it that there was justification for declaring the respondent a debtor as defined by the Act. The court *a quo* having, consequently, dismissed the application, the appellant has now appealed to this court.

In its grounds of appeal, the appellant alleges error and misdirection on the part of the court *a quo* in finding: ^E

- (i) that the respondent had not committed an act of insolvency; and
- (ii) that it (the appellant) had failed to establish the respondent's liability to it.

The appellant also charges that the court *a quo* misdirected itself in failing to find that the respondent had "executed a premeditated fraud on the appellant ^F and deliberately generated invoices in the name of a third party and spread payments through his other companies and nominees as a way to disguise his plot to defraud the appellant of its money".

The facts of the matter are largely undisputed. The appellant and the respondent negotiated an agreement, (which they did not reduce to writing) ^G in terms of which the latter was to see to it that the former's obligations to its suppliers in South Africa, to the value of US\$108 950, were met. This

was to be effected through the use of free funds held outside the country. The applicant in its turn was to pay, in local currency, and in Zimbabwe, the Zimbabwean dollar equivalent of the funds owing, which was worked out at ^h \$5 687 839 653.75. With discount, the amount was reduced to \$5 289 690 877.

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The applicant thereafter made staggered payments between 12 July and ^a 17 August 2005, totaling the discounted amount referred to. However none of the payments were made directly to the respondent. Instead, the payments were made to three companies, Maniam Investments, Guistein Investments, and Gangnet Enterprises, while one payment was made to someone referred to as I. Sutcliffe. ^b

Despite these payments and contrary to the agreement between the parties, the appellant's obligations to its suppliers in South Africa were for the most part not met, since only ZAR55 830 had been paid towards the discharge of such obligations. Going by the, then prevailing exchange rate, this amount was said to represent US\$8 589. This therefore left obligations worth US\$100 361 still to be discharged. When it became evident that the rest of its ^c obligations, despite promises from the respondent, were not to be met, the appellant made repeated demands for re-imbursement of the US\$100 361. These demands yielded no results, a circumstance that prompted the appellant to write to the respondent, threatening to take legal action against him. It was then that the appellant received three undated cheques each with a face value of \$450 000 000 and drawn on the account of Guisten Investments. It is not in ^d dispute that these cheques, which bore the signature of the respondent, were dishonoured by the bank upon presentation. The reason was that the account on which they were drawn had been closed. The appellant avers that it received no further repayment of the money that it had paid. It therefore proceeded to take the legal action it had threatened to take, which took the form ^e of an application in the court *a quo* for the provisional sequestration of the respondent's estate.

The main dispute between the parties relates to the capacity in which the respondent acted in negotiating the agreement in question. He contends he was acting as a representative of Maniam Investments, the company that had issued to the appellant, two invoices totaling the amount that it was to pay ^f in terms of the agreement. The respondent argues on the basis of this that it is to Maniam Investments, and not him, that the appellant should look for repayment of the US\$100 361. The appellant, on the other hand, insists that the respondent acted on his own behalf when he negotiated the agreement, and was therefore personally liable in terms of the Insolvency Act. ^g

According to s 13 of that Act, the High Court shall not grant an order of provisional sequestration unless it is of the opinion that, *prima facie* –

- (a) the debtor has committed an act of insolvency;
- (b) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated; and ^h

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Gwaunza JA ^a

- (c) the petitioner has a claim against the debtor to the extent referred to in subs (1) of s 12 of the Act.

The court *a quo* correctly considered, as a starting point, whether on the facts before it, the respondent could be described as a debtor as defined in the Act. It found that he could not, and opined as follows at p 8 of the judgment:

^b "The applicant in the circumstances was under a most onerous burden to establish that the respondent was a debtor as defined by the Act. The applicant describes the companies into whose account it paid monies as the nominees of the respondent and yet has adduced no evidence to that effect. The respondent is alleged to be the principal officer of one of these companies, but that does not make the company in question a nominee of the respondent. It is trite that a company is separate from its members ^c and the applicant has not even alleged that the respondent owns shares or is the controlling shareholder in any of the companies. The applicant has not made any effort to open up the relationship between the respondent and the companies it calls the nominees of the respondent. Without lifting the corporate veils of the said companies they remain distinct and separate from the respondent."

^d I respectfully agree with the learned judge's reasoning and conclusion as outlined.

The relevant part of the definition of “debtor” in the Insolvency Act defines debtor as a person who “is a debtor in the usual sense of the word”. The definition specifically excludes a body corporate or company or other ^E association of persons which may be placed in liquidation or wound up in terms of the law relating to companies. Thus a debtor, according to this definition, must be a natural person. Such person is defined in the *Concise Oxford Dictionary* as “one who owes money or an obligation”.

While the appellant clearly dealt with the respondent in negotiating the agreement in question, it has not tendered any proof that the respondent was ^F representing himself personally. Given the latter’s averment that he negotiated with the appellant in his capacity as a representative of Maniam Investments, the appellant did indeed have the onerous burden of laying a basis for a finding by the court that the respondent was acting on his own personal behalf. The appellant has not discharged that burden. Quite clearly, the appellant took a risk when it failed to ensure that a weighty transaction such as the agreement ^G in question, was reduced to writing.

It may very well be true that the respondent did not deal with the appellant in good faith, and that he also engineered events in such a way as to shield himself from personal liability. However, in the absence of evidence to corroborate the appellant’s assertions, it is difficult to accept its assertion as ^H regards the respondent’s allegedly fraudulent conduct towards it.

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Gwaunza JA

As for the companies to which payment of the disputed amount was made, ^A it is evident the appellant has not said anything to dispute their existence. The contrary is, in effect, suggested by the fact that such companies held active bank accounts into which the funds in question were deposited. In the face of this, the court *a quo* was correct to observe that as long as the appellant did not lift the corporate veil of these companies, they remained separate and ^B distinct from the respondent. Thus, when one of these companies, whose separate identity from the respondent the appellant has failed to challenge, generates invoices and the appellant of its own accord makes payment to that company, it becomes difficult to challenge the respondent’s assertion that he had negotiated the agreement in question on behalf of that company. If anything, such documentary evidence as the invoices and Real Time Gross ^C Settlement (RTGS) forms in favour of Maniam Investments, does more to substantiate the respondent’s assertions than disprove them.

The learned judge was also correct in her finding that nothing much turned on the fact that the respondent had signed the three dishonoured cheques that were drawn on a closed Guisten Investments account. Companies, being artificial persons, do act through natural persons, and that includes the ^D signing of cheques. Signing a cheque on behalf of a company – even where the account on which the cheque is to be drawn may be closed – does not of itself transfer the liability of the company to the individual who signs the cheque. That such an act might have implications in respect of criminal law is not relevant to the dispute at hand. The argument that companies act ^E through natural persons without the latter assuming the former’s liability applies with equal force to the appellant’s submission that the respondent was the principal officer of one of the companies concerned.

It was, therefore, evident in view of the foregoing, that the appellant failed in all respects to prove that the respondent was a debtor with regard to the debt in question, and in any case, for purposes of the Insolvency Act. ^F

Having failed to prove that the respondent was its debtor, it followed that whatever act of insolvency the respondent might have committed had no bearing on the appellant’s claim. In terms of s 11(f) of the Insolvency Act, a debtor shall be deemed to have committed an act of insolvency if –

“He gives notice to any of *his creditors* that he has suspended or is about ^G to suspend payment of his debts or if he has suspended payment of his debts; or ...” (my emphasis).

The meaning of this provision is, in my view, quite clear. A person who owes money or other obligation, i.e. a debtor, commits an act of insolvency if, rather than pay such debt, he lets the people that he owed the money to, that is, his ^H

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Gwaunza JA

A creditors, know that he has suspended or is about to suspend payment of what he owes.

I have already determined that the respondent in his personal capacity was not the appellant's debtor nor, conversely, was the appellant the respondent's creditor. As correctly observed by the *court a quo*, the respondent's conduct can only be examined in circumstances where he could be termed a debtor in B terms of the Act.

The finding of the court on the questions of whether the respondent was a debtor, or had committed an act of insolvency, is dispositive of this appeal and makes it unnecessary for me to consider the other requirements listed in the Act for a provisional sequestration order.

c I find in the result that the appeal has no merit.

It is accordingly ordered as follows –

The appeal be and is hereby dismissed with costs.

D CHEDA JA & GARWE JA concurred.

Gill, Godlonton & Gerrans, appellant's legal practitioners

E Ahmed & Ziyambi, respondent's legal practitioners

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KOVI v ASHANTI GOLDFIELDS ZIMBABWE LTD & ANOR 2007 (2) ZLR 354 (H)

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Citation	2007 (2) ZLR 354 (H)
Case No	Judgment No. HH-83-07
Court	High Court, Harare
Judge	Kudya J
Heard	8 November 2007
Judgment	28 November 2007
Counsel	<i>H Mucheche</i> , for the applicant <i>T Magwaliba</i> , for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Contract — formation — sale — essential requirements — if all requirements are present, absence of detail does not vitiate agreement

Headnote

On 1 November 2003, the respondent company, represented by its general manager and finance director, executed a memorandum of agreement with ^D its employees, who were represented by the chairman and two committee members of the workers committee. Under the agreement, the company agreed to "dispose of" various of its housing units to its employees "who were sitting tenants effective 1 December 2003". An attachment to the agreement contained the names of the employees, the relevant house ^E numbers, the new valuations and the monthly repayment rates. On 10 December 2003, the company entered into a five year lease agreement with the applicant, commencing on 1 January 2004. The stated rent, with a provision for escalation, was to be deducted from the applicant's salary. The agreement gave the applicant the option to buy the property after 60 months and provided that the rentals paid would reduce the ^F purchase price. It also provided that if employee left the service of the respondent, the respondent was entitled to terminate the agreement. Rents were never deducted from the applicant's salary, but over the next three years he paid the full purchase price in three instalments. When he asked for transfer of the property, the respondent disputed that an agreement of sale had been concluded. It averred that the subsequent ^G lease agreement complemented the original agreement, which it said was merely an expression of intent. At the hearing, the issues were whether the original agreement constituted an agreement of sale; whether the lease agreement was a valid and binding agreement and whether the relief of specific performance was available to the applicant.

H

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Kudya J

^A *Held*, that in interpreting contracts, courts give effect to the grammatical and ordinary meaning of the words used in the particular contract. In this case, "to dispose of", in the context of the memorandum of agreement, should be interpreted to mean "to sell". The date on which the sale was to commence was not indicated in the memorandum of agreement: it was neither the date of signature nor 1 December 2003. The sale would ^B commence on some unknown future date to those employees who were sitting tenants as from 1 December 2003. Until the lease agreement was concluded, the applicant was not a "sitting tenant".

Held, further, that as long as the essential requirements of an agreement of sale are present, the absence of detail does not vitiate the agreement. There are three essential requirements of a contract of sale. These are ^C agreement (*consensus ad idem*); a thing sold (*merx*); and a price (*pretium*). Neither delivery nor payment is necessary to the creation of the contract, for they both fall within the category of its performance. *In casu*, both the price and the thing to be sold were clearly identifiable in the memorandum. As to whether both parties mutually evinced an intention to be bound ^D by the agreement, the first respondent agreed to sell the house to the applicant for an agreed price (the valuation figure), once he became a sitting tenant.

Held, further, that this was not an inchoate agreement, where the offeree knew or ought to have known that it was intended to be accepted on a provisional basis only and that the conclusion of a binding contract was ^E to be dependent on agreement on further points. The parties entered into a valid agreement of sale on 1 November 2003. That agreement would come into effect on the execution of a lease agreement, such an agreement being a condition precedent of the agreement of sale. The lease agreement did not novate, annul or supplant the agreement of sale. It was designed to make the payment of the purchase price easier for the employee.

^F *Held*, further, that by accepting the full amount of the purchase price in circumstances where it was clear that it was not for rental but for the payment of the house, the first respondent was deemed to have waived the operation of the clause in the lease agreement which gave an option to purchase after 5 years. Once the applicant had paid the purchase price ^G in full, he could not be evicted if he left the respondent's service. Consequently, as the applicant had fulfilled his part of the bargain by ^H paying the purchase price in full, he was entitled to specific performance.

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Kudya J

Cases referred to ^A

Burroughs Machines Ltd v Chenille Corp of SA (Pty) Ltd 1964 (1) SA 669 (W)

Chikoma v Mukweza 1998 (1) ZLR 541 (S)

Dijkstra v Janowsky 1985 (3) SA 560 (C)

Jammie v Lowry 1958 (2) SA 430 (T)

Malaba v Takangovada 1991 (1) ZLR 1 (H) ^B

Margate Ests Ltd v Moore 1943 TPD 54

Patel v Adam 1977 (2) SA 653 (A)

Presbyterian Church of Southern Africa v Shield of Zimbabwe Ins Ltd 1991 (2) ZLR 261 (H)

Sawyer v Chioza & Ors 1999 (1) ZLR 203 (H) ^C

Wizard Pools (Pvt) Ltd v Mashonaland Turf Club 1996 (2) ZLR 293 (S)

Case information

H Mucheche, for the applicant

T Magwaliba, for the respondent

Judgment

KUDYA J: This application involves the interpretation and effect of two ^D agreements that were executed by the Ashanti Goldfields Zimbabwe Ltd ("Ashanti") with the applicant. The applicant seeks the transfer of stand No. 591 Waterbury Crescent, Bindura, from Ashanti and costs of suit. It is opposed.

The facts are common cause. It all started on 1 November 2003. Ashanti, ^E represented by its general manager and finance director executed a memorandum of agreement with its employees, represented by the chairman and two committee members of the workers committee. It states as follows:

"Ashanti Goldfields Zimbabwe agrees to dispose of its housing units situated in Chiwaridzo, Grey Line Flats and Low Density to its employees who are sitting tenants effective 01 December 2003. Find the agreed prices ^F attached."

The attachment, which was compiled by Kingstone Mujati under the instructions of the finance director, is three pages long. It contains the name, house number, new valuation and monthly repayment columns. The applicant's name appears in s 3 under the low density disposal price list. The house ^G number is given as 591 Mt Darwin Road, the new valuation is \$6 839 145 000 and the monthly repayment is \$113 985.75.

On 10 December 2003, Ashanti, represented by its financial director, entered into a five year lease agreement commencing on 1 January 2004 with the applicant. Rent, with a provision for escalation, was chargeable at \$113 985.75. ^H

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^A It was to be deducted from the applicant's salary by Ashanti. It gave the applicant, in clause 3, the option to buy the property after sixty months and further provided that the rentals paid would reduce the purchase price. Clause 15 was a non-waiver clause which protected Ashanti's rights. Clause 16 dealt with termination of the lease agreement. It could be terminated for breach that was not remedied within seven days. It could be terminated on death or if the ^B applicant for any reason left the employment of Ashanti, but only after Ashanti consulted the applicant or his legal representative.

Ashanti never deducted any rentals from the applicant's salary. It received payment of a total of \$7 million from the applicant between 1 October 2005 and 26 January 2006. I find that the first payment of \$1 million was paid on 1 October ^C 2005. It could not have been in 2006 as by then our currency had been reconfigured nor could it have been in 2007 as the application had already been filed. The receipt number precedes those of 10 November 2005 where an amount of \$1 million was paid and 26 January 2006 where \$5 million was paid. The last and first receipts are written "for payment of a house".

On 25 July 2006, the applicant wrote to Ashanti seeking transfer. The erstwhile ^D legal practitioners of Ashanti responded on 9 August 2006 disputing that an agreement of sale had been concluded.

They averred that the subsequent lease agreement complemented the original agreement, which they viewed as an expression of intent. By the time the applicant resigned from employment on 26 March 2007, the dispute had not been resolved. Ashanti indicated that ^E he was obliged to vacate the house as he had resigned.

The applicant filed the present matter on 3 April 2007.

He filed heads of argument on 1 July 2007. At the hearing, the failure to file heads timeously by the first respondent was, by consent, condoned. The supplementary affidavit filed by the applicant to show that the house had title deeds was also admitted by consent.

^F Three issues were raised and argued at the hearing. These were whether the original agreement constitutes an agreement of sale; whether the lease agreement is a valid and binding agreement and whether the relief sought is available to the applicant.

Mr *Mucheche*, for the applicant, contended that the original agreement was ^G a valid and enforceable agreement of sale. He anchored his submission in the definition of sale that is found in *Christie Business Law in Zimbabwe* 2 ed at p 141. The essential requirements of a sale are a thing that is capable of being sold, a price and an agreement. Mr *Magwaliba*, for Ashanti, contended that ^H the original agreement was a valid agreement of an intention to sale and not

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of sale. He sought to distinguish an agreement to dispose from an agreement ^A of sale.

Counsel found common ground in the approach the courts use in interpreting commercial contracts in the case of *Chikoma v Mukweza* 1998 (1) ZLR 541 (S). It is that the common intention of the parties must prevail, notwithstanding that the document is not couched in formal legalese. Gubbay CJ quoted with ^B approval Colman J in *Burroughs Machines Ltd v Chenille Corp of SA (Pty) Ltd* 1964 (1) SA 669 (W) at 670G-H that "inelegance, clumsy draftsmanship or the loose use of language in a commercial document purporting to be a contract, will not impair its validity as long as one can find therein, with reasonable certainty, the terms necessary to constitute a valid contract."

Mr *Magwaliba* submitted that the absence of the terms and conditions that ^C are normally associated with an agreement of sale such as the conditions of payment of the purchase price; interest; transfer and breach indicate an absence of an agreement of sale. His submission in this regard runs contrary to the sentiments expressed in *Chikoma's* case *supra*. It seems to me that as long as the essential requirements of an agreement of sale are present, the absence of detail does not vitiate the agreement. ^D

It is correct that, in interpreting contracts, courts give effect to the grammatical and ordinary meaning of the words used in the particular contract. See *Presbyterian Church of Southern Africa v Shield of Zimbabwe Insurance Ltd* 1991 (2) ZLR 261 (H) at 267B and *Malaba v Takangovada* 1991 (1) ZLR 1 (H) at 5E. It is however, not the duty of the court to make the contract for the parties. ^E

The memorandum of agreement uses two words which are couched in the present participle tense. These are "agrees" and "are". Ashanti was agreeing to dispose its housing units. The phrase "to dispose" when read together with "find the agreed prices attached", means "to sell". I therefore agree with Mr *Mucheche* that "to dispose" in the context of the memorandum of ^F agreement should be interpreted to mean "to sell". It is noteworthy that Mr *Magwaliba* did not suggest any other meaning that can possibly be rendered to it, in context. The beneficiaries of the agreement were its employees. It seems to me that the phrase "who are sitting tenants effective 1 December 2003" is a single phrase which describes the employee who is eligible to qualify for the scheme. This is because of the absence of a comma between "tenants" and ^G "effective 1 December 2003." I therefore, agree with Mr *Magwaliba* that the date on which the sale was to commence was not indicated in the memorandum of agreement. It was neither the date of signature nor 1 December 2003. The sale would, thus, commence on some unknown future date to those employees who were sitting tenants as from 1 December 2003. ^H

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Kudya J

A It was not in dispute that between 20 June 1990 and 9 December 2003, the applicant gratuitously occupied the house in question as an employee of the first respondent. He did not pay any rentals. He was therefore not a sitting tenant. He could only become a sitting tenant after the conclusion of a lease agreement. In this regard see Kerr *The Law of Lease* 2 ed at pp 1 and 18; and Lee and Honoré *The South African Law of Obligations* 2 ed paras 305 and 314.

B Mr *Mucheche* submitted that the memorandum of agreement satisfied the two essential elements of a sale. He identified these as the thing to be sold and the price at which it was sold. In his written heads of argument, he did not address the third essential element of a sale, that is, *animus contrahendi*. In his oral submissions, he obliquely referred to it by contending that "a mere reading of the memorandum indicates the presence of *animus contrahendi* to enter into a valid and enforceable agreement of sale." He contended that the detailed nature of the price in the attachment to the memorandum, the signatures of the employees (through their representatives) and of Ashanti was evidence that a firm offer had been made to sell the house at the stated price, which offer had been accepted by the applicant. He therefore argued that both parties D exhibited a genuine intention to be bound by their undertakings.

Mr *Magwaliba* made three contentions on the nature and character of the memorandum of agreement in question. The first was that it was an inchoate agreement in which the parties contracted to contract. He submitted that it was a record of the first respondent's statement of intention. Secondly, he E contended that *animus contrahendi* was not present in the memorandum, and thirdly, that the absence of material terms to the agreement consigned it to the realm of void agreements.

I deal first with the issue of *animus contrahendi*. Christie *The Law of Contract in South Africa* 3 ed at pp 30-33 deals with this concept. He defines it at p 30 as "the expressed or implied intention to be bound by the offeree's acceptance". F Mackeurtan's *Sale of Goods in South Africa* 5 ed by Dr G R J Hackwill at pp 5-6 also deals with the same concept. The learned author states that there are three essential requirements of a contract of sale. These are agreement (*consensus ad idem*); a thing sold (*merx*); and a price (*pretium*). He warns that neither delivery nor payment is necessary to the creation of the contract, for G they both fall within the category of its performance.

Dr Hackwill writes thus:

"The requirements of agreement in the contract of sale do not differ in principle from those governing other contracts ... In relation to sale they may be briefly stated as follows: H

1. There must be an agreement of the minds of the contracting parties,

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mutually communicated, with the intention of contracting a sale—or A in other words a '*concursus animorum animo contrahendi*'.

2. It must exist with certainty as to –
 - (a) the subject-matter of the sale and its essential characteristics;
 - (b) the price to be paid;
 - (c) any other term raised in the negotiations and expressly or B impliedly regarded by the parties as material.
3. The agreement must be free, in the sense that it must not be induced by fraud, misrepresentation, duress or undue influence.
4. It must be rational. It cannot therefore exist in cases of extreme youth, irrational intoxication or insanity.

If these essentials are complied with there will be *consensus ad idem*; but C subject to the qualification that though the external *indicia* of agreement are present, it may not exist as a fact because of mistake or other factors vitiating consent."

In casu, it seems to me that both the price and the thing to be sold are clearly identifiable in the memorandum. The question that presents itself for D determination is whether both parties mutually evinced an intention to be bound by the agreement. It seems to me that the first respondent agreed to sell the house to the applicant for the agreed price of \$6 839 145, once he became a sitting tenant.

It appears to me that the first respondent evinced a genuine intention to sell the house for the set price once the applicant became a sitting tenant, hence E the endorsement on the annexure to the

memorandum "please amend tenancy changes". The applicant also evinced a genuine intention to buy the house once he became a sitting tenant, through the signatures of his agents, members of the workers committee. A binding contract was therefore concluded between the parties. ^F

Mr *Magwaliba* based his contention that the memorandum was a statement of intent to sell at some future date on *Sawyer v Chioza & Ors* 1999 (1) ZLR 203 (H). The case involved a lease which gave the lessee the right of first refusal. It is correct that such a right is made in the contract of lease. It embodies an offer to the lessee to purchase the property first at a price often set by a third party. If the lessor exercises the right at the appropriate future date, then ^G a second contract contemplated in the first contract is concluded.

It is the same "as a contract to bring into being a contract of sale" that was noted by Greenland J in *Malaba's case supra*, at 6G.

Mr *Magwaliba* further described the memorandum as an inchoate agreement. ^H

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^A He buttressed his contention by reference to Christie *op cit* at p 36 (p 37 in 2 ed). He argued in like manner that the memorandum was a partial agreement that recorded the progress that the parties made in their complicated and protracted negotiations, leaving out other points, which would form the basis of the complete contract outstanding. He contended that, as the complete contract was never concluded, the applicant could not sue on the partial contract, as ^B the parties genuinely intended to be bound by the complete contract and not the partial contract.

The existence of an inchoate agreement is founded on *animus contrahendi*. Christie *op cit* at p 37 states the method used by courts to analyze whether an agreement is inchoate. He writes thus:

^C "The most satisfactory analysis of such cases is to isolate the offer and ascertain whether the evidence shows that the offeree knew or ought to have known that it was intended to be accepted on a provisional basis only and that the conclusion of a binding contract was ^E to be dependent on agreement on further points."

It seems to me that the memorandum was a complete agreement and not a ^D proposal that awaited the birth of a full agreement.

Reference was made by Mr *Magwaliba* to *Margate Estates Ltd v Moore* 1943 TPD 54 at 58-59, *Dijkstra v Janowsky* 1985 (3) SA 560 (C) at 564G-565A, *Jammie v Lowrie* 1958 (2) SA 430 (T) at 431B and *Patel v Adam* 1977 (2) SA 653 (A) at 666A-C for the proposition that the method of payment of the ^E purchase price is a material term of the contract of sale of immovable property whose absence in a contract would invalidate it.

The cases relied on by Mr *Magwaliba* all involved the sale of land in South Africa. In *Patel's case supra*, at 665G-666A, Rabie JA outlined the relevant statutory provisions of s 30 of Proclamation 8 of 1902 (Transvaal) and s 1(1) of the Contracts of Sale of Land Act, 71 of 1969. He stated that these statutory ^F provisions required the contract of the sale of land to be in writing for it to be valid and held that all such terms as are essential to the creation of a valid contract of sale, like the manner of payment, must be in writing.

There is no requirement in Zimbabwe that a contract of sale be in writing. The absence of the method of payment in the memorandum would not make the ^G agreement void, as long as the essential requirements of a contract of sale are present. See the sentiments of Mackeurtan's *Sale of Goods in South Africa, supra* at p 5. It would appear to me that the position outlined in Voet 19.1.17 that where parties to an agreement of sale agree that the purchaser may pay the purchase price when he wishes or after he shall have set out for Rome gives ^H a purchaser a wide discretion on when to pay, which is ended by his death,

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may very well still be part of our law. If it is not, then the duty would lie on the ^A seller to place the buyer *in mora*.

I therefore, hold that the parties entered into a valid agreement of sale on 1 November 2003. That agreement would, however, come into effect on the execution of a lease agreement. The execution of the lease, as the future uncertain event that suspended the obligations flowing from the contract ^B

requiring fulfillment before the contract of sale came into being, became a condition precedent of the agreement of sale. I accordingly determine the first issue in the applicant's favour.

The second issue for determination is whether the lease agreement of 10 December 2003 was valid and binding between the parties.

Mr *Mucheche* abandoned his earlier submission that the lease of 10 December c 2003 was not a lease. It was therefore common cause that it was a lease. It was entered into by the applicant in the full knowledge of the pre-existing agreement of sale. That he had such full knowledge is apparent from the fact that he signed it. The party who represented the first respondent was its financial director while the persons who witnessed for the applicant were the D workers committee members who signed the agreement of sale on his behalf. The suggestion made by the applicant in his answering affidavit that he was tricked into signing the lease by the first respondent is an afterthought, and is without merit. He must have signed the lease with the encouragement of the members of the workers committee, who represented him in the earlier agreement, in order to activate the agreement of sale. At the time of execution, E it correctly depicted the first respondent as the owner. It set out the rental and method of payment.

The important clauses for our purposes are clauses 3 and 16. These are the option to purchase F and termination clauses, respectively. Clause 3 states as follows:

"3. OPTION TO PURCHASE

- 3.1 The lessee shall have the option to purchase the property after sixty months.
- 3.2 The rentals paid by the lessee to the lessor in terms hereof shall be taken into account and be deducted from the amount due in respect of the purchase price determined in accordance with the G provisions of clause 3.1 (above)."

Clause 16 reads as follows:

"16. TERMINATION

In the event of the lessee committing any breach of this agreement H and failing to remedy such breach within seven (7) days after the

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Kudya J

A receipt from the lessor of written notice requiring the lessee so to remedy such breach, or in the event of any attachment being effected of any of the lessee's property or any execution being levied against such property or the lessee taking any steps to place himself or have himself placed in sequestration or any *bona fide* application being made to court for the placing of the lessee in sequestration or any B application being made to the court for an order convening a meeting of creditors of the lessee then in such event the lessor shall be entitled forthwith to cancel this lease without prejudice to any action for the recovery of rent or for any loss or damages arising out of any antecedent breach of this agreement by the lessee or otherwise howsoever. C

- 16.1 in the event of the death of the lessee or in the event of the lessee leaving the employ of the lessor for any reason including ill health, retirement, dismissal, or resignation, the lessor shall be entitled to terminate this agreement, but only after consultation with the lessee or his legal representative.
- 16.2 in the event of a separation the lessee shall be entitled to receive D from the lessor any excess amount which he may have paid during the period of this agreement over and above any minimum rental payable for such premises in terms of any relevant legislation in force in Zimbabwe provided that the manner of such payment shall be within the sole discretion of the lessor."

E Both counsel were agreed that the lease agreement did not novate the agreement of sale. Mr *Mucheche* submitted that the lease agreement did not annul the agreement of sale. He stated that it could not alter the greater rights that the applicant derived from the earlier agreement. Mr *Magwaliba* argued that the lease agreement was an extension of the earlier agreement. He contended that both agreements were valid. He asked me to call in aid the rule F of interpretation that *generalia specialibus non derogant*. This rule was discussed in *Wizard Pools (Pvt) Ltd v Mashonaland Turf Club* 1996 (2) ZLR 293 (S) and the cases therein cited at pp 296G-297A. It was discussed in most and applied in some of these cases, which all dealt with conflicting statutes. The discussion centered on whether a general statute that was promulgated after a special statute could override the special statute. The general rule was G that it could not, but there were exceptions to the maxim. In the *Wizard* case *supra*, McNally JA at 300G interpreted the words to mean "general

provisions do not override pre-existing particular provisions” and compared his interpretation to the one by *Claassen’s Dictionary* that “general provisions ^H do not derogate from special”. At 300H, he suggested that the maxim could

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Kudya J

not be reversed to mean “special provisions do derogate from general”. The ^A suggestion by Mr *Magwaliba* that special provisions in the lease agreement overrode the general ones in the agreement of sale is not borne out by any of the cases that are cited in *Wizard Pools* case, *supra*. It must be borne in mind that the duty of the court is to effect the intention of the parties as revealed in the documents under discussion.

In casu, it seems to me that the coming into existence of the lease agreement ^B was presaged by the agreement of sale. The terms and conditions in the lease agreement must be read in conformity with the contents of the earlier agreement.

As I understand clause 3.1, it postponed the exercise of the option to buy by five years. It did not set the purchase price or the formula for calculating it. ^C Clause 3.2, other than guaranteeing that the rentals would go towards reducing the purchase price, was a rather meaningless clause. It seems to me that it could not seek to alter the purchase price that the first respondent had consented to on 1 November 2003. It was fixed in perpetuity and could not be altered by the first defendant at will.

The intention of the parties that I discern from the lease agreement was that ^D the first defendant sold its houses to those employees with whom it executed lease agreements. The employees accepted the sale by fulfilling the condition precedent. The duty fell on the employer to deduct rentals, which it never did, from the applicant’s salary. These deductions would go towards the payment of the purchase price. The rentals were never reviewed upwards but remained ^E static, confirming the fact that the purchase price was fixed. It was also not coincidental that it equated to the monthly repayments agreed to on 1 November 2003.

The lease agreement, in my view, did not supplant the agreement of sale. It was designed to make the payment of the purchase price easier for the employee. ^F It was a document designed for the employee’s advantage. See *Malaba v Takangovada* *supra* at 6G-7D. *In casu*, the employee paid the full purchase price in three installments before the expiration of the five years. The money was accepted, not as rentals, but as payment of the purchase price. The failure to deduct rentals appears to me to have been a deliberate act by the first respondent, which gives credence to the view that it was not really interested ^G in the rentals but in fulfilling the condition in the agreement of sale for the creation of a tenancy relationship between the parties. The fulfillment of this condition precedent led the applicant to pay the purchase price, which amount was accepted by the first respondent as payment of a house. It must have been clear to the first respondent that the payment was not for rentals as the manner ^H

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Kudya J

^A of paying rent was stipulated in the lease agreement. It does not appear to me that the first respondent ever intended the lease agreement to operate as a lease agreement.

I therefore hold that to the extent that the option clause conflicted with the greater rights he had in the original agreement; it was of no effect. But even if I am wrong, it seems to me that by accepting the full amount in circumstances ^B where it was clear that it was not for rental but for the payment of the house, the first respondent is deemed to have waived the operation of clause 3.1 of the lease agreement. Once the applicant had paid the purchase price in full, he fell out of reach of clause 16 of the lease agreement. He could not be evicted.

I accordingly, find that the lease agreement was only valid for the purpose of ^C making the applicant a sitting tenant.

The last issue devolves on whether the applicant is entitled to specific performance. I am satisfied that he fulfilled his part of the bargain by paying the purchase price in full. The first respondent abandoned its pretensions that the house could not be transferred due to the absence of title. The applicant demonstrated that it has title, which was surrendered to the first respondent ^D by Coghlan, Welsh and Guest on 11 January 2005 in anticipation of transfer of title to its employees.

Accordingly, it is ordered that:

1. The first respondent signs all such necessary documents to transfer title in stand No. 591 Waterbury Crescent, Bindura to the applicant within ϵ seven days of the service of this order upon it, failing which the Deputy Sheriff be and is hereby authorized to sign all the necessary documents to effect such transfer of the property in question on its behalf.
2. The first respondent shall pay the applicant's costs.

ϵ *Donsa-Nkomo Legal Practice*, applicant's legal practitioners
Magwaliba and Kwirira, first respondent's legal practitioners

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SHELL ZIMBABWE (PVT) LTD v ZIMSA (PVT) LTD & ANOR 2007 (2) ZLR 366 (H)

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Citation	2007 (2) ZLR 366 (H)
Case No	Judgment No HH-84-07
Court	High Court, Harare
Judge	Makarau JP
Heard	15 October 2007; 16 October 2007
Judgment	28 November 2007
Counsel	<i>W Ncube</i> , for the plaintiff <i>M Kamdefwere</i> , for the defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Arbitration — agreement — arbitration clause — what is — need for arbitration to be expressed or implied first choice of parties as method for resolving dispute — clause requiring parties to refer matter to mediation, failing which to refer to arbitration — not an arbitration clause ousting jurisdiction of court $\mathfrak{d}$

Headnote

A clause in the lease agreement between the parties provided that any dispute arising between the parties in connection with the agreement should in the first instance be submitted to and decided by mediation, but if mediation did not resolve the dispute within seven days and the ϵ parties failed to agree on an extended time for mediation, then either party would be entitled to refer the matter to arbitration. A dispute arose and the plaintiff sought the eviction of the defendant from the premises. The defendant raised a special plea *in limine*, requesting the court to refer the matter to arbitration. The plaintiff argued that the clause was not an arbitration clause, as it

did not put arbitration in the forefront but referred ^F to it as a fall back position in the event that mediation failed.

Held, that in terms of Article 8(1) of the UNCITRAL Model Law, as modified, which is set out in the Schedule to the Arbitration Act [*Chapter 7:15*], where one of the parties to a dispute subject to an arbitration clause requests to go to arbitration, the court has no option but to stay ^G proceedings and refer the matter to arbitration unless the court finds that the arbitration clause is null and void or inoperative or incapable of performance. However, the jurisdiction of the court remains intact. Arbitration is an alternative to litigation and cannot take away the inherent jurisdiction of the court. For an arbitration clause in an agreement to have the effect of staying court proceedings in terms of the Act, the ^H

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Makarau JP

A clause must be clear and unequivocal and the parties must intend arbitration to be the procedure of first instance in resolving their disputes. In all other instances, the inherent power of the court to stay its own proceedings remains intact and the discretion rests with the court to stay proceedings or not.

Held, further, that the jurisprudential bases underlying the place and role of ^B arbitration procedures are (a) the apparent speed with which such procedures can yield results and (b) the contractual autonomy of the parties, not only to agree on their main obligations under the contract, but on how to resolve differences that may occur between them as they perform their respective obligations under the contract. The contractual ^C autonomy to choose the method of resolving their differences has been described as paramount in the arbitration regime in this jurisdiction and explains the respect with which arbitration awards are treated by the courts. However, this contractual autonomy has to be viewed in the context of the inherent powers of the court to dispense justice to all who seek it from the court. While the court is bound to give effect to arbitration ^D clauses in agreements, it is not bound to do so in circumstances where arbitration is not the expressed or implied first choice dispute resolution mechanism of the parties. *In casu* the parties did not intend arbitration to be the first procedure to be resorted to; they chose mediation in the first instance. It would be appropriate to describe this agreement as one ^E subject to a mediation clause.

Cases cited

Waste Management Services v City of Harare 2000 (1) ZLR 172 (H)

Legislation considered

^F Arbitration Act [*Chapter 7:15*], First Schedule, art 8(1)

Case information

W Ncube, for the plaintiff

M Kamdefwere, for the defendants

Judgment

MAKARAU JP: The material facts of this matter are to a large extent common cause. The parties however led evidence and I shall summarize this in due course.

It is common cause that the parties concluded a written agreement of lease in respect of Willowvale Service Station in Harare on 8 March 2006. Prior to that, ^H the parties had concluded a similar agreement or similar agreements in respect

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Makarau JP

of the same premises, as the legal relationship between the parties commenced ^A in or about 2000.

It was a specific term of the written agreement between the parties that the defendants as lessees would only accept delivery and sell products supplied to the service station by the plaintiff who in turn agreed and bound itself to supply the defendants with at least 75 per cent of its requested

deliveries of **b** fuels, oils and lubricants. It was further provided that the lessee could receive and accept delivery of products from third parties upon certain terms and conditions and with the consent and knowledge of the plaintiff.

The condition restricting the receipt of third party products was known to the defendant's employees especially one Simon Tirivangani, who, on or about 6 December 2006, accepted delivery from a third party without the defendants **c** having first observed the procedures set out in the lease agreement.

Having failed to meaningfully engage the second defendant, who is the managing director of the first defendant, the plaintiff issued summons out of this court on 30 November 2006, praying for an order evicting the first defendant from the leased premises and holding over damages from 1 **d** December 2006 to date of eviction.

The defendants defended the matter on two fronts. Firstly, a special plea was filed requesting this court to refer the dispute between the parties to arbitration in terms of clause 14 of the agreement which provides for mediation in the first instance and for arbitration in the event that mediation fails. I shall refer to this clause in detail shortly. Regarding the merits of the matter, the defendants **e** denied that there was a material breach of the lease agreement and in the alternative, that clause 7 of the lease agreement, providing for third party deliveries, is unduly oppressive and should not be enforced against the defendant in view of the prevailing situation where all fuels are scarcely available.

I revert to the point *in limine*. This is the special plea seeking to oust the **f** jurisdiction of this court in favour of arbitration and based on clause 14 of the lease agreement between the parties.

Clause 14 of the agreement of lease provides as follows:

"14.1 Any dispute, question or differences arising at any time between **g** the parties to this agreement out of or in regard to any matter arising out of the rights and duties of the parties hereto, or the interpretation of or the rectification of this agreement shall in the first instance be submitted to and decided by mediation on notice given by either party to the other in terms of this clause. **h**

2007 (2) ZLR p369

Makarau JP **a**

- 14.2 Such mediation shall be held in Zimbabwe and concluded, if possible, within seven days after it has been demanded.
- 14.3 In the event that mediation does not resolve the dispute within seven days time period referred to in sub-clause (2) above, and the parties fail to agree on extended time for mediation, then either party shall be entitled to refer the matter to arbitration, which shall be **b** conducted in terms of the rules and procedures set out in the Arbitration Act of Zimbabwe.
- 14.4 ...
- 14.5 ...
- 14.6 ..."

c The issue that falls for determination is whether the above clause is an arbitration clause as provided for in the Arbitration Act [*Chapter 7:15*]. Mr *Ncube* was of the firm view that it is not. His argument was simply that the clause did not put arbitration in the forefront but referred to it as a fall back position in the event that mediation failed.

In my view, it is important to determine whether the clause in the agreement **d** between the parties is an arbitration clause as provided for in the Act because the Act provides in Article 8(1) of the Model Law as modified, which is set out in the Schedule to the Act, as follows:

"A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, **e** *stay those proceedings* and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

The interpretation of the above section was, in my view, correctly rendered by Smith J in *Waste Management Services v City of Harare* 2000 (1) ZLR 172 (H), where he held that where one of the parties to a dispute subject to an **f** arbitration clause requests to go to arbitration, the court has no option but to stay proceedings and refer the matter to arbitration unless the court finds that the arbitration clause is null and void or inoperative or incapable of performance.

It is worth noting that prior to the amendment of the Arbitration Act in 1996, the court had a discretion to stay proceedings and refer the matter to ^G arbitration. With the repeal of the old Act and its substitution with Act No. 6 of 1996 adopting the UNCITRAL Model Law, the discretion of the court to stay proceedings has been modified as provided for in Article 8 cited above.

The jurisdiction of the court, however, remains intact. Arbitration is an alternative to litigation and cannot take away the inherent jurisdiction of this ^H court.

2007 (2) ZLR p370

Makarau JP

The jurisprudential bases underlying the place and role of arbitration procedures ^A in our law appear to me to be the apparent speed with which such procedures can yield results and the contractual autonomy of the parties, not only to agree on the main obligations under the contract, but also on how to resolve differences that may occur between them as they perform their respective obligations under the contract.

While it is generally true that matters referred to arbitration are concluded ^B faster than those that follow the litigation route, this is not the case in this matter and one would be forgiven for gaining the impression that arbitration is being raised as a preliminary defence in this matter, not to speed up the resolution of the dispute but further to delay it. In this regard, I have noted that since the issuance of summons in this matter, the defendant has not taken ^C any steps to have the matter referred to arbitration and, in my view, raises arbitration not to benefit from the renowned speed of the procedure but to stave off the judgment of this court.

It is the second jurisprudential basis of arbitration that concerns me most in this matter. This relates to the contractual autonomy of the parties to choose ^D the method of resolving their differences under the agreement. This autonomy has been described as paramount in the arbitration regime in this jurisdiction and explains the respect with which arbitration awards are treated by the courts. It is however, my view that this contractual autonomy on the part of the parties has to be viewed in the context of the inherent powers of the court to dispense justice to all who seek it from the court. Thus, in my view, while ^E the court is bound to give effect to arbitration clauses in agreements, it is not bound to do so in circumstances where arbitration is not the expressed or implied first choice dispute resolution mechanism of the parties. The turning point in any such inquiry, in my view, ought to be the intention of the parties.

It is my further view, that the parties *in casu* did not intend arbitration to be the first procedure to be resorted to in resolving differences arising from their ^F lease agreement. They chose mediation in the first instance. It is, therefore, not out of place to suggest that this was an agreement subject to a mediation clause.

It is my finding that for an arbitration clause in an agreement to have the effect of staying court proceedings in terms of the Act, such clause must be clear ^G and unequivocal and the parties must intend arbitration to be the procedure of first instance in resolving their disputes. In all other instances, the inherent power of the court to stay its own proceedings remains intact and the discretion rests with the court to stay proceedings or not. ^H

2007 (2) ZLR p371

Makarau JP

^A Exercising my discretion in this matter, I take into account the delay that will further ensue in the matter were I to refer it to mediation to be followed by arbitration. I further take note of the fact that meetings between the parties prior to the issuance of summons failed to take place for one reason or another, and that notwithstanding the mediation clause in the agreement, neither party chose that route to resolve the dispute between them. I therefore decline to ^B stay proceedings in this matter.

I now turn to the merits of the matter.

As stated above, the facts giving rise to the dispute are largely common cause.

In dispute between the parties was whether the delivery of the third party fuel to the first defendant's premises was in breach of the agreement between the ^C parties. In their joint plea, the defendants denied that they had breached the lease agreement and argued that the delivery had been done to the first defendant in error. In the alternative, the defendants argued that the product

from the third party had been sourced in substantial compliance with the terms of the lease agreement. (This defence was however not persisted with at the **D** hearing.)

In support of its case, the plaintiff called three witnesses. These were Beverley Culverwell, Lewis Zulu and Tendai Muzanenhamo. Beverley Culverwell is the plaintiff's retail manager and signed the agreement between the parties on behalf of the plaintiff. She was responsible for ensuring that the lease was being complied with fully and it is in that capacity and on account of her **E** responsibilities that Lewis Zulu telephoned her when he saw a third party vehicle decanting diesel at the defendant's service station. After the event, the second defendant made efforts to communicate with the witness and was informed that there needed to be a formal meeting with the witness's superiors. A meeting was duly scheduled but a few minutes before, she received a message sent to her telephone by the second defendant that she could not **F** make it to the meeting. The defendants were then advised that the plaintiff was terminating the lease agreement. No request was received by her to refer the matter to mediation or to arbitration.

I formed a favourable impression of the witness who gave her evidence clearly and with much confidence. She did not seek to exaggerate and readily **G** conceded that the plaintiff was unable to supply the defendant with the requisite levels of products.

Lewis Zulu is the witness who actually first witnessed the decanting of the third party diesel. He then telephoned the last witness who requested him to **H** remain on site while the area manager, Tendai Muzanenhamo, was contacted.

2007 (2) ZLR p372

Makarau JP

When Tendai arrived at the service station, together they carried out some **A** investigations.

The evidence of this witness was necessarily short as it was largely common cause. I have no reason to discount any of his testimony.

The third witness to give evidence on behalf of the plaintiff was Tendai Muzanenhamo. His evidence was largely similar to that of Lewis Zulu. In **B** addition, he testified that when he asked the defendant's personnel on site about the delivery, he was given conflicting stories. One said it was meant for farmers under a special program while another said the fuel was destined for a service station across the road. After their investigations, the last two witnesses presented their findings to their superiors. A day after the delivery, Muzanenhamo went to the service station and disabled the pumps to stop **C** dispensation of fuel from the affected tanks. He took with him a fitter who removed some gadgets from the pumps. A few days later, he passed through the service station and saw the pumps working. The defendants were dispensing the product.

Again, I have no reason to discount the evidence of this witness. **D**

The second defendant gave evidence on her behalf and on behalf of the first defendant. She is the managing director of the first defendant.

The delivery of diesel that was made on 6 November 2006 was destined for another service station. One of her employees, by the name Simon, accepted the delivery without first consulting the witness. Simon was under instructions **E** to only accept deliveries from the plaintiff. When she established that the delivery was for one Yves Kunaka, she advised this to the plaintiff through a letter.

In her experience, the plaintiff would collect penalties and handling charges if she received a third party product. They would not proceed to cancel the lease. She did not attend a meeting that was called for by the plaintiff as by **F** the time she received the plaintiff's letter inviting her to the meeting, she had already engaged legal practitioners who advised her not to attend the meeting as they would engage the plaintiff in dialogue.

The witness impressed me as a sharp and articulate business woman. She however, contradicted herself in her evidence in one or two material respects. **G** For instance, while she initially testified that she was aware of the call for a meeting made by the plaintiff immediately after the decanting of the third party product, she later wanted to disclaim any knowledge of the meeting, alleging that she was in Kariba at the time. **H**

2007 (2) ZLR p373

Makarau JP

A She was longwinded in her responses to questions put to her in cross-examination and at times would not answer the questions at all, proffering explanations that had not been called for.

Being such an astute person, she would have produced ample documentary evidence to show that the third party product was destined for another service station if such existed. I therefore find that the second defendant was an B unreliable witness and will only rely on her evidence where it is corroborated by other reliable evidence.

The factual issue that falls for determination in this matter is whether the delivery of the third party product to the defendants' service station was in error as is alleged by the defendants. That there was such a delivery is common C cause. The acceptance of the delivery, which constitutes conduct on the part of the defendant and not of the truck driver, was not in error.

Firstly, assuming that the delivery was in error and was meant for a service station across the road, the most logical and common sense response to such an error would have been for the truck ferrying the diesel to be directed to the correct service station. This was not done, meaning that both the truck driver D and the recipient of the fuel were satisfied that the delivery was being correctly effected.

Secondly, if the fuel had been delivered to the defendants' service station in error, documents of the correct destination of the fuel would have been made available to the plaintiff and to the court to prove the error. No such documents E have been produced and no explanation has been proffered by the defendants for failing to produce the documents.

Thirdly, evidence led from Tendai Muzanenhemo that he had the pumps disabled to prevent the defendants from dispensing fuel from the affected pumps was unchallenged. It appears to me that if the fuel was meant for a third F party, the defendants would not have been at pains to bypass the disablement placed by the plaintiff on the affected pumps and dispense the fuel.

Fourthly, no evidence was led as to how the delivered fuel was then given back to the rightful recipient.

Fifthly, it was the second defendant's belief that if she were found to be receiving third party products, the most that the plaintiff would do would be G to charge her penalties and handling charges. In my view, she did not consider this to be such a breach of the lease agreement as to entitle the plaintiff to cancel the lease agreement. She had committed a similar breach before and the H lease had not been cancelled.

2007 (2) ZLR p374

Makarau JP

On the basis of the above, I am satisfied that on a balance of probabilities, the A diesel that was decanted at the defendants' service station on 6 November 2006, was not delivered in error and was duly accepted by the defendants in breach of the lease agreement between the parties.

It was submitted by Mr *Kamdefwere* that having breached the lease agreement, the defendants were entitled to be placed *in mora* before the lease was B cancelled. In my view, the correct position is as submitted by Mr *Ncube*. The defendants were placed *in mora* on 9 November 2006 by letter informing them of the intention of the plaintiff to cancel the lease. Instead of taking steps to remedy the breach, the defendants proceeded to breach the security measures that had been taken by the plaintiff to disable the pumps and continued to dispense the third party diesel. C

I therefore, find no basis upon which I can deny the plaintiff the relief that it seeks against the defendants.

In the result, I make the following order:

1. The cancellation of the lease over stands Nos. 37A and B Lochnivar is hereby confirmed. D
2. The defendants and all those occupying through them are to vacate the leased premises within seven days from the date of this order, failing which the deputy sheriff is hereby authorized to eject the defendants and all those occupying through them from the leased premises.
3. The defendant shall bear the plaintiff's costs of suit. E

Coghlan, Welsh & Guest, plaintiff's legal practitioners

Musunga & Associates, defendant's legal practitioners F

Document 45 of 46**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2007/Volume 2/MUROWA DIAMONDS (PVT) LTD v ZRA & ANOR 2007 (2) ZLR 375 (H)

MUROWA DIAMONDS (PVT) LTD v ZRA & ANOR 2007 (2) ZLR 375 (H)**2007 (2) ZLR p375**

Citation	2007 (2) ZLR 375 (H)
Case No	Judgment No. HH-88-07
Court	High Court, Harare
Judge	Makarau JP
Heard	28 November 2007
Judgment	12 December 2007
Counsel	<i>A P de Bourbon SC</i> , for the applicant <i>A Moyo</i> , for the first respondent No appearance for the second respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

C Interpretation of statutes — *meaning of words* — *primary and ordinary meaning of word* — *secondary meaning should not be used where primary meaning is clear*

D Revenue and public finance — *duty and value-added tax* — *payment of in foreign currency when certain goods imported* — *goods paid for with funds "obtained" from authorised dealer* — *resident of Zimbabwe exempt from paying duty in foreign currency*

Headnote

The applicant imported motor vehicles, using funds from its foreign currency ^ε account to pay for them. The revenue authorities demanded that duty be paid in foreign currency, as the goods fell under the description of "luxury goods" in the Customs and Excise (Designation of Luxury Items) Notice, 2007 (SI 80A of 2007). The applicant argued that it was exempt in terms of s 3 of the Notice, which provides that "every resident of ^ε Zimbabwe who imports luxury items that were purchased using funds obtained otherwise than through an authorised dealer" must pay duty in foreign currency. The respondent argued that when a person uses foreign currency in his account, he is merely accessing those funds and is not "obtaining" the funds from an authorized dealer for the purposes of the Notice.

^ε *Held*, that the applicant was a resident of Zimbabwe and the funds employed in the purchase of the vehicles in dispute were funds processed from a foreign currency account that it held with its commercial bank, an "authorised dealer" in terms of the Notice. The ordinary or every-day meaning of "to obtain" is "to come into possession of"; "to get" or "to ^η acquire". The effect of replacing "obtain" with "get" would be that

Makarau JP

residents of Zimbabwe who “get” funds to import a luxury item, other than through an authorised dealer, are liable to pay duty and value-added tax in foreign currency. Those who “get” funds through an authorised dealer are exempt. Thus, those who have such funds processed through an authorised dealer, in whatever form is appropriate for the importation, are exempt from paying duty and tax in foreign currency. The exact nature ^B of the process through which the funds are “got” is immaterial. Such funds may be got from funds already held to the credit of an account, they may be purchased from the bank or, where appropriate and acceptable, a line of credit may be extended to the importer through arrangements made by the authorised dealer. The material issue is not so much how the funds are accessed, but from whom such funds are got. The meaning that ^C the respondents would have the court use for the word “obtain” is clearly a departure from its primary and ordinary meaning. There was no scope for the court to ascribe a secondary meaning to the word “obtain,” in the face of a clear primary meaning of the word. It was nonsense to say that one “owns” the foreign money deposited with a bank. This would cast such a burden on banks as to destroy the economic concept of money ^D that has so eased commerce over the years. It is the value of the money, not the physical notes and coins, that one owns when one says one has money in a bank. There is nothing in the language used by the law maker in the Notice or the context of the legislation to justify the expansion of the word as urged by the respondents. ^E

Cases cited

Registrar-General of Elections & Ors v Tsvangirai 2002 (1) ZLR 204 (S)

S v Scher 1968 (1) SA 238 (C)

Vestey (Lord) Executors & Anor v Inland Revenue Commissioner [1949] 1 All ER 1108 (HL) ^F

Legislation considered

Customs and Excise (Designation of Luxury Items) Notice, 2007 (SI 80A of 2007)

Case information

A P de Bourbon SC, for the applicant

A Moyo, for the first respondent ^G

No appearance for the second respondent

Judgment

MAKARAU JP: As its name suggests, the applicant is a diamond mining company, carrying out its mining activities in Zvishavane. Its registered offices are in Harare. ^H

Makarau JP

^A The facts of this application are all common cause. I summarise them as follows:

The applicant maintains a foreign currency account with a local commercial bank, Barclays Bank Zimbabwe Ltd. In April 2007, the applicant resolved to purchase motor vehicles for its use from outside the country, using proceeds from its foreign currency account. The question then was, in which currency ^B its liability for duty and value-added tax would be, in view of the provisions of SI 80A of 2007 which came into force on 5 April 2007. Having consulted its freight company on the matter, the applicant was advised that its liability for duty and value-added tax would be in local currency. Armed with that advice, the applicant approached its bank for the necessary permission to utilize the ^C funds in its foreign currency account for the purchase of the two motor vehicles. The necessary permission from the Central Bank was granted and the two vehicles were purchased and duly imported into the country. Initially, duty and value-added tax for the two vehicles was demanded and paid for in local currency at the first respondent’s offices at the border post of Beitbridge. Subsequently, the first respondent insisted that payment for duty and ^D value-added tax

be made in foreign currency and, on that basis, refused to release the motor vehicles to the applicant.

In insisting that payment for duty and value-added tax be made in foreign currency, the first respondent was relying on the provisions of SI 80A of 2007 which provides, in ss 2 and 3, as follows:

- "2(1) Subject to s 3, the Minister of Finance designates the items of goods whose tariff codes and rates of customs duty are listed in the first and third columns of the schedule below as luxury items for the purpose of section 115(2) of the Act.
- (2) Payment of customs duty and value-added tax on the importation of any item of goods designated as luxury item under subsection (1) shall ^F be payable in United States dollars, Euros or any other currency denominated under The Exchange Control (General) Order, 1996 (SI 110 of 1996).
- 3. The following persons shall be liable to pay duty and value-added tax on luxury items in terms of section 2 –
- (a) every resident of Zimbabwe who imports luxury items that were ^G purchased using funds obtained otherwise than through an authorised dealer;
- (b) ..."

It is common cause that the vehicles imported by the applicant fall within the ^H definition of luxury items.

2007 (2) ZLR p378

Makarau JP

The applicant contends that the two motor vehicles were purchased from ^A funds that were obtained through an authorized dealer and thus fall outside the provisions of the statutory instrument. The applicant thus seeks an order from this court compelling the first respondent to release the motor vehicles, acknowledging that the payment of duty and value-added tax in local currency discharges the obligations of the applicant to the fiscus. The first applicant ^B has opposed the application, mainly on the basis that the statutory instrument does not exempt residents who use proceeds from their foreign currency accounts to make purchases of luxury items from paying duty and value-added tax in foreign currency. Its argument is that when one uses foreign currency in one's account, one is merely accessing those funds and is not "obtaining" the funds from an authorized dealer for the purposes of the ^C statutory instrument. Thus, the issue that falls for determination in these proceedings becomes very easy to formulate. It is not equally easy to resolve. In my view, the narrow issue that falls for determination is to interpret the meaning of the word "obtain" as employed in s 3 of the Statutory Instrument.

It is not in dispute that the applicant is a resident of Zimbabwe, and that the funds employed in the purchase of the vehicles in dispute were funds ^D processed from a foreign currency account that it holds with its commercial bank, an authorised dealer in terms of the Statutory Instrument.

As I understand it, the argument by the first respondent is that residents who utilize funds from their foreign currency accounts with authorised dealers are not exempt from paying duty in foreign currency if they import luxury items. ^E The argument proceeds to hold that such residents do not "obtain" the funds from their banks for the purposes of the Statutory Instrument, but simply access such funds through the agency of their banks. Put differently, the first respondent argues that s 3 of the Statutory Instrument excludes funds held in a foreign currency account, for to include such would be to render the provisions of the Statutory Instrument open to avoidance and thereby ^F undermine the intention of the law-maker.

The word "obtain" has an ordinary or every-day meaning that was judicially accepted in *S v Scher* 1968 (1) SA 238 (C). In that case, van Winsen J interpreted the word "obtain" in its ordinary meaning to mean to "come into possession of", "to get" or "to acquire", following the meaning ascribed to ^G it by *Oxford English Dictionary*. This is the meaning that the applicant urges me to put on the word.

In interpreting the word as used in the section, I am enjoined to look naturally to its ordinary meaning, as well as to the context in which it is used. This is the settled approach of the courts in interpreting words used in enactments. ^H

2007 (2) ZLR p379

Makarau JP

A The natural meaning of the word appears to me to be clear. It means “get” in common language. Thus, a rendition of the section replacing the word “obtain” with get” will be to the effect that residents of Zimbabwe who “get” funds to import a luxury item, other than through an authorised dealer, are liable to pay duty and value-added tax in foreign currency. Those who “get” funds through an authorised dealer, are exempt. Thus, those who have such B funds processed through an authorised dealer in whatever form is appropriate for the importation are in my view, exempt from paying duty and tax in foreign currency. The exact nature of the process through which the funds are “gotten” is in my further view, immaterial. Such funds may be gotten from funds already held to the credit of an account, they may be purchased from the bank or, where appropriate and acceptable, a line of credit may be extended C to the importer through arrangements made by the authorised dealer. The material issue, in my view, is not so much how the funds are accessed but from whom such funds are gotten.

On the other hand, the first respondent urges me to put a different meaning on the word “obtain”, to bring into the taxman’s net all residents who import D luxury items using proceeds from their foreign currency accounts with authorised dealers. To achieve this, I am urged to take into account that holders of foreign currency accounts already have foreign currency at their disposal, from which they can afford to pay duty and value-added tax. I am also urged to take into account that holders of foreign currency do not purchase foreign currency from their banks, but simply apply for permission E to access funds from these accounts, and in that sense, cannot be said to “obtain” funds from their banks for the purposes of the law. In that sense, the word “obtain”, as used in the Statutory Instrument, can only refer to instances where the resident purchases foreign currency from the authorised dealer.

In my view, the meaning that the first respondents would want me to put on F the word “obtain” is clearly a departure from its primary and ordinary meaning. I see no scope for me to ascribe a secondary meaning to the word “obtain” in the face of a clear primary meaning of the word. In this respect, I am guided by the remarks of the Chidyausiku CJ in *Registrar-General of Elections v Ors v Tsvangirai* 2002 (1) ZLR 204 (S) at 213G, where the learned Chief Justice was not persuaded to adopt a secondary meaning of a phrase in the Zimbabwean G Constitution when the primary meaning is clear.

Mr Moyo has strenuously argued that the word “obtain” cannot be given its ordinary meaning for the purposes of the Statutory Instrument as holders of foreign currency own and possess the funds in their respective funds. Thus, H they cannot obtain what in essence they already have in their possession. In

2007 (2) ZLR p380

Makarau JP

this regard, he referred me to the provisions of s 7 of the Exchange Control A Regulations of 1996, which restricts the persons who may deal with the money held in a foreign currency account to the holder of that account or his duly authorised agent. While accepting the general principle that money deposited with a bank becomes the property of the bank and not of the depositor, Mr Moyo submitted that the principle was not of application to foreign currency accounts. B

With respect, I find the submission startling in its consequences, if I were to uphold it. Deposits into foreign currency accounts are, in my view, no different from deposits into local currency accounts. Hardly ever do depositors haul into the bank bags of foreign money for safe-keeping with the bank such that they can retain ownership of that “particular” money they deposit. In some C cases, where there is an electronic transfer of the funds, all that is done is to debit the account making the payment and to credit the receiving account. The physical money, in the form of coins and notes, hardly ever moves between banks or from one corner of the bank to the other. To then allege that one owns the foreign money deposited with a bank (and presumably, is able to identify one’s foreign money) in such circumstances is conceptually nonsensical, and D may cast such a burden on banks as to destroy the economic concept of money that has so eased commerce over the years. It is the value of, and not the physical notes and coins, that they own when they say they have money in a bank.

In deciding to interpret the word “obtain” in its primary sense, I am keenly E aware of the wish, on the part of the first respondent, to boost its revenue-collection base by attempting to bring into the net all importers of luxury items who use proceeds from their foreign currency accounts. In view of the depressed foreign currency inflows into the fiscus, the wish on the part of the first respondents

to urge the expanded meaning of the word on the court is appreciated. However, I cannot read into the language of the Statutory ^F Instrument anything that would grant their wish and expand the meaning of the word “obtain” to exclude obtaining funds from a foreign currency account lawfully held with an authorised dealer. It is trite that the law-maker speaks through the language used in an enactment and the court can only read the law-maker’s intention from that language. I see nothing in the language used ^G by the law-maker in the statutory instrument or the context of the legislation to justify an expansion of the word as urged upon me by the respondents. In my view, if the intention of the law-maker was to exclude funds from foreign accounts lawfully held, the language used in the Statutory Instrument would have expressly said so. Alternatively, if it was the intention of the law-maker ^H

2007 (2) ZLR p381

Makarau JP

A to use the word “obtain” to mean “purchase”, then the law-maker would have so defined the word, for the purposes of the SI to make it clear that it only exempted those funds purchased from an authorised dealer.

If I have erred in my interpretation, the intention of the law-maker, it is because in my view, the law-maker did not use clear language to express its intention. I firmly hold that it is not my place or role to make law, by giving the expanded ^B meaning of the word that the first respondent seeks in this matter. The duty remains that of the law-maker to express itself in clear language, that admits of no ambiguity, lest its intentions be misread by the courts. If the law-maker’s intention was to enable the first respondents to collect revenue in foreign currency on all imports purchased from funds held in foreign currency ^C accounts, it should have said so in clear language. It clearly was not the intention of the Legislature to give room to the courts to make law in this regard, for the doctrine of the separation of powers between the three pillars of state is firmly entrenched in our system.

As was stated in 1949 by Lord Normand, in the case of *Vestey’s (Lord) Executors & Anor v Inland Revenue Commissioners* [1949] 1 All ER 1108 (HL) ^D at 1120:

“Parliament in its attempts to keep pace with the ingenuity devoted to tax avoidance may fall short of its purpose. That is a misfortune for the taxpayers who do not try to avoid their share of the burden, and it is disappointing to the Inland Revenue. But the court will not stretch the terms of taxing Acts in order to improve on the efforts of Parliament and ^E to stop gaps which are left open by the statutes. Tax avoidance is an evil, but it would be the beginning of much greater evils if the courts were to overstretch the language of the statute in order to subject to taxation people of whom they disapproved.”

I would rather guard against the greater evil.

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

1. The first respondent is hereby ordered to release the 2007 Toyota Hilux Double Cab and the Jetta VW to the applicant upon service of this order.
2. The first respondent shall bear the costs of this application.

Gill, Godlonton & Gerrans, applicant’s legal practitioners

^G *Kantor & Immerman*, first respondent’s legal practitioners

Civil Division of the Attorney-Generals’ Office, second respondent’s legal ^H practitioners

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Source:

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MUSONZA v THE MASTER 2007 (2) ZLR 382 (H)

2007 (2) ZLR p382

Citation	2007 (2) ZLR 382 (H)
Case No	Judgment No. HH-89-07
Court	High Court, Harare
Judge	Guvava J
Heard	5 April 2007; 30 October 2007
Judgment	20 December 2007
Counsel	C Vuta, for the applicant
Case Type	Civil application
Annotations	No case annotations to date

Flynote

c **Family law** — *child* — *guardianship* — *grant of to person other than child's c parents* — *principles* — *parent willing to transfer guardianship* — *limited circumstances in which parent may do so*

Headnote

The applicant sought an order granting her guardianship of her niece. The child's mother had died but her father was still alive and working in *D* Zimbabwe. He had guardianship and custody rights over the child. He filed an affidavit in support of the application, asking the court to divest him of his rights of guardianship and awarding these to the applicant. The applicant, a nurse, wanted to take the child to go and live with her in England, where she had a job.

Held, that parental power consists of duties and rights which parents have *E* in respect of their minor children. Parents acquire parental power over a legitimate child at the time of its birth. The natural guardianship of parents is identical with parental power. This power cannot be waived or abandoned in favour of someone else, as this is contrary to public policy. The purpose of having a public policy which is against transfer or *F* delegation of parental power in favour of another is basically to protect the child from abuse. This could occur should the parental power fall into the wrong hands. Consequently, transfer of parental power is only allowed in very limited circumstances and normally only after a full enquiry has been conducted so as to safeguard the interests of the minor child concerned. Under the common law there are basically three *G* categories which are recognized by law whereby guardianship or parental power may be lawfully transferred. These are adoption, *legitimatio per subsequens matrimonium* and *venia aetatis* (a grant by a sovereign or a court of the status of majority to a minor). Guardianship cannot be transferred from one person to another if it does not fall under any of *H*

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Guvava J

A these categories. The willingness of parents to give away their guardianship does not appear to have any significance in the ultimate decision by the court of whether or not to grant the guardianship of a minor child to another person. The High Court, as upper guardian of all minor children, may intervene, especially in circumstances where a minor child would effectively be without a guardian. The courts may also divest *B* a parent of guardianship where it is established that to retain guardianship in the parent would pose a danger to the child.

Held, further, that the inquiry into guardianship, like that of custody, cannot be one-sided. It is not only an inquiry into the advantages that will accrue to the child if guardianship is granted to the applicant, but also an inquiry into why the respondent must be divested of his guardianship. Thus,

an inquiry seeking to divest one parent of guardianship in favour of another or of a third party must involve not only an inquiry into why and how the respondent parent must be divested of guardianship but also why the applicant is deemed suitable to be able to discharge those legal obligations that are imposed on natural guardians by law. An inquiry into guardianship is an inquiry into the suitability of a parent to discharge the legal obligations imposed by law on the guardian of a minor child. These issues relate to controlling his estate and assisting him in litigation, among other duties. It is not an inquiry into issues like where the child will live or how and where it will be educated, as those inquiries relate to issues of custody.

Cases cited

In re *Gonyora* 2001 (2) ZLR 573 (H)

Ex p *Sakota* 1964 (3) SA 8 (W)

van der Westerhuizen v van Wyk & Anor 1952 (2) SA 119 (GW)

van Rooyen v Werner (1892) 9 SC 425

Legislation considered

Guardianship of Minors Act [Chapter 5:08], s 9

Case information

G C Vuta, for the applicant

Judgment

GUVAVA J: This application raises a question which has presented itself in a number of matters in recent months. It raises the issue of guardianship rights and the circumstances under which a parent may be divested of such rights.

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FACTS^A

The applicant in this matter is a nurse by profession and like a number of Zimbabweans in the medical profession she is living and working in the United Kingdom. She states in her founding affidavit that she seeks an order granting her guardianship of her sister's minor child B (born 26 September 1998). B's mother passed away on 11 June 2006. Maxwell Makaripe who is B's father is still alive. He is a police officer based at Banket Police Station. He has guardianship and custody rights over his daughter. He filed an affidavit in support of the application asking this court to divest him of his rights of guardianship and awarding these to the applicant. He has not stated in his affidavit why he would wish to divest himself of the guardianship of his child. The applicant however states that she would like to go and live with the minor child in the United Kingdom where she works.

THE LAW

The law relating to rights of parents as guardians of children finds its origins in the Roman Law of *patria potestas*, which was an absolute right of control. This law is no longer in force and what has remained of it is the principle that the parents are the *legitimi tutores* of their children, in other words, guardians by operation of law. See E Spiro *Law of Parent and Child* 4 ed at 47. It is now settled that parental power consists of duties and rights which parents have in respect to their minor children. According to Grotius, children are from birth subject to the guardianship of their father (parent). In *van Rooyen v Werner* (1892) 9 SC 425, the father or parent of a child is described as the natural guardian of his legitimate children until they attain the age of majority. Parents acquire parental power over a legitimate child at the time of its birth. It is considered by a number of authorities that the natural guardianship of parents is identical with parental power and I will therefore use the terms interchangeably. This power cannot be waived or abandoned in favor of someone else as this is considered to be contrary to public policy. Spiro states that the purpose of having a public policy which is against transfer or delegation of parental power in favor of another is

basically to protect the child from abuse. He argues that this can occur should the parental power fall into the wrong hands. In this respect, it is only allowed in very limited circumstances and normally, only after a full enquiry has been conducted so as to safeguard the interests of the ^g minor child concerned.

Under the common law there are basically three categories which are recognized by law whereby guardianship or parental power may be lawfully transferred. These are adoption, *legitimatio per subsequens matrimonium* (which means that children whose parents marry after their birth become legitimated as a ^h

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A result of the subsequent marriage of their parents) and *venia aetatis* (which means a grant by a sovereign or a court of the status of majority to a minor). It seems to me therefore that guardianship cannot merely be transferred from one person to another if it does not fall under any of these categories. The willingness of the parents to give away their guardianship does not appear to have any significance in the ultimate decision by the court of whether or ^b not to grant the guardianship of the minor child to another person.

The facts before me do not show that this application would fall under any one of these categories. The applicant has not sought to legally adopt the minor child nor has the court granted the minor child majority status. The applicant cannot claim under the second category which deals with children born out ^c of wedlock.

Intervention by the legislature, through the Guardianship of Minors Act [*Chapter 5:08*], whilst imposing on the father the duty to consult with the mother on questions on guardianship of their minor child and setting out the powers of this court relating to custody and guardianship of a minor where the parents are no longer living together, has not in my view altered the ^d common law position especially relating to transfer of guardianship. The Act provides primarily for the situation where a minor has no natural guardian or tutor testamentary and sets out a procedure to allow a third party to be appointed as guardian in their stead. It should be noted that the procedure outlined in s 9 of that Act specifically requires that an inquiry be conducted ^e to determine who should be appointed as guardian. In the case of *In re Gonyora* 2001 (2) ZLR 573 (H), it was held that in making the appointment of guardianship the court must consider the minor child's best interests. Although in this case, the court was dealing with a child whose parents were deceased the same principles must be taken into account even in a case such as this where one of the parents is still alive.

^f The High Court, as upper guardian of all minor children, has in some instances intervened especially in circumstances where a minor child would effectively be without a guardian. In the case of *Ex p Sakota* 1964 (3) SA 8 (WLD), the court appointed the applicant in that case guardian of the minor children of his brother. The children's father had been convicted in the High Court of Yugoslavia of killing his wife, the children's mother, and sentenced to 20 ^g years' imprisonment. The court had also made an order divesting him of natural guardianship over his children. The court in South Africa, applying Roman Dutch law, held that a court may deprive a natural guardian of his rights and, since the children now had no natural guardian, it was desirable that a ^h guardian be appointed in South Africa where the children were residing.

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The courts have also divested a parent of guardianship in cases where it has ^a been established that to retain guardianship of the parent would pose a danger to the child. This point was emphasized in *van der Westhuizen v van Wyk & Anor* 1952 (2) SA 119 (GW) when it was held that a court cannot intervene in the guardianship rights of a parent unless there is danger to the child. It seems to me therefore, that the power to divest a parent of guardianship is a common ^b law power which is exercisable only when there is danger to the minor child.

The inquiry into guardianship, like that of custody, cannot in my view, be one sided. In other words it is not only an inquiry into the advantages that will accrue to the child if its guardianship is granted to the applicant but also an inquiry into why the respondent must be divested of his guardianship. Thus, in my view, an inquiry seeking to divest one parent of guardianship in favor ^c of another or of a third party must involve not only an inquiry into why and how the respondent parent must be

divested of guardianship but also why the applicant is deemed suitable to be able to discharge those legal obligations that are imposed on natural guardians by law. An inquiry into guardianship is an inquiry into the suitability of a parent to discharge the legal obligations imposed by law on the guardian of a minor child. These issues relate to D controlling his estate and assisting him in litigation, among other duties. It is not an inquiry into issues like where the child will live or how and where it will be educated, as those inquiries relate to issues of custody.

In my view, the present application does not fall under any of the criteria discussed above. The minor child's father is alive and is gainfully employed E in the police force. There has been no submission made that the parent is incapable of looking after the child or that the child is in any danger. In my view, therefore, there is no basis in this case for the father to seek to be relieved of his obligations. More importantly, no investigation has been conducted as to the suitability or otherwise of the applicant to be a guardian of the minor child and for the court to satisfy itself that it is in the child's best interest for F the applicant to be appointed as guardian.

For these reasons the application is dismissed, with no order as to costs.

Wabatagore & Co, applicant's legal practitioners G

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