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MACHEMBO 2008 (1) ZLR 1 (H)**S v MACHEMBO 2008 (1) ZLR 1 (H)****2008 (1) ZLR p1**

Citation	2008 (1) ZLR 1 (H)
Case No	Judgment No. HH-2-08
Court	High Court, Harare
Judge	Kudya J
Heard	16 January 2008
Judgment	16 January 2008
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal law (common law crimes) — *culpable homicide — constituent elements thereof — proof of negligent conduct and foreseeability of death arising from such conduct — concept of foreseeability discussed*

Headnote

The accused was driving a lorry with eight passengers on a main road at night. On approaching a police roadblock, he defied an order to stop his vehicle. ▯ A policeman at the roadblock fired two warning shots to no effect. He then fired at the lorry killing one of the passengers thereon. The accused then stopped. He was subsequently charged with the crime of culpable homicide. At his trial before a magistrate, he pleaded guilty, was duly convicted and sentenced to pay a fine or in default of payment, to a term of imprisonment. Thereafter, being doubtful of the propriety of the conviction, the scrutinizing regional magistrate referred the case, on review, to the High Court.

Held, that a conviction for culpable homicide is founded on proof, firstly, of negligent conduct and, secondly, of foreseeability of death arising from that conduct. The concept of foreseeability is expressed at times as the natural and probable consequence, or as the direct result, of the act of commission or omission that the accused fails to guard against which results in death.

Held, further, that the accused took a deliberate and conscious act to disobey the police. His actions in failing to stop were grossly negligent. He was therefore negligent in that he created a dangerous situation by driving ^G off from the road block instead of stopping as directed by the police. However, the State case fell on the aspect of the foreseeability of death arising from the accused's failure to obey the instruction to stop. Whether or not he was aware that the police who stopped him before the shooting were armed, a reasonable man would not expect an armed ^H policeman to shoot at a moving lorry with passengers at the back in a bid

2008 (1) ZLR p2

Kudya J

to stop the driver. The death of the deceased was thus caused by the ^A policeman and not by the accused's manner of driving. It was neither the direct result nor the natural and probable consequence of his failure to obey the police instruction to stop.

Held, therefore, that the conviction and sentence must be set aside.

Cases cited ^B

Brandon v Osborne Garret & Co [1924] 1 KB 548

S v Majarira HH-88-03

R v Mhlango 1948 (1) SA 1109 (T)

Legislation considered ^C

Road Traffic Act [*Chapter 13:11*], s 43

Judgment

KUDYA J: This matter was referred for review by the scrutinizing regional magistrate who, on the facts of the case, was unhappy with the propriety of the conviction. ^D

The accused person was charged with the offence of culpable homicide. He pleaded guilty and after the essential elements of the offence were canvassed, he was duly convicted and sentenced to pay a fine of \$1 million or in default of payment 20 days' imprisonment and in addition was ordered to surrender his driver's licence for endorsement.

The facts were that on 24 May 2007, at 10 pm, the accused person who was ^E driving a lorry carrying 8 passengers along the Harare-Mutare road towards Macheke was stopped at a police road block manned by three police officers who were using a beacon light. He was arrested for driving the vehicle which had no tail lights and ordered to drive to the police station. He, however, did not drive towards the police station, resulting in the three giving chase and ^F stopping him after he had traveled for three kilometers. He was asked to alight from the lorry but he refused. He then drove off towards Macheke.

The three police officers contacted Macheke police who manned a road block to stop the accused person. When he arrived at this road block, his path of travel was blocked by a police car and he was requested to stop. He defied the orders, circumvented the police car and drove on. ^G

One of the police officers fired two warning shots into the air but the accused person did not stop. The police officer then fired at the vehicle and hit and killed one of the 8 passengers. The accused then stopped. ^H

2008 (1) ZLR p3

Kudya J

^A It was on the basis of these facts that the accused person was charged with culpable homicide. It was alleged that by failing to obey the order to stop, he acted negligently and that this negligence caused the death of one of his passengers.

The essential elements were put to him in the following manner: ^B

Q. Are the facts correct?

A. Yes.

- Q. Do you admit that on 24 May 2007 and at the 107, 5 kilometer peg along the Harare Mutare road you drove a Volvo lorry registration number AAF 8825?
- A. Yes. c
- Q. Do you admit that you drove negligently in that you failed to stop after you were ordered to do so?
- A. Yes.
- Q. Admit that as a result of your actions you caused the death of Samson Doubt? d
- A. Yes.
- Q. Any lawful right?
- A. No.
- Q. Any defence to offer?
- A. None.

ε Verdict: Guilty as pleaded.

The scrutinizing magistrate questioned why the accused was charged and convicted of culpable homicide when death arose as a result of the shot that was fired by the policeman. Instead, the accused should have been charged with contravening s 43 of the Road Traffic Act [*Chapter 13:11*], which deals f with failure to obey police instructions, the scrutinizing magistrate opines.

The trial magistrate relied on two cases to found conviction. These were *R v Mhlongo* 1948 (1) SA 1109 (T) and *Brandon v Osborne Garret and Co* [1924] 1 K B 548.

The scrutinizing regional magistrate believed that the local case of *S v g Majarira* HH-88-03 did not support the conviction.

The issue that confronts me is to determine whether, on the facts, the accused person was negligent and if so whether death was reasonably foreseeable.

In *Mhlongo's* case, *supra*, the accused person drove a heavy military vehicle h behind a slow moving car. He attempted to overtake it just as it was turning

2008 (1) ZLR p4

Kudya J

across his path and the two collided. The military vehicle was thrown off its a course and the accused swerved to his left to avoid a culvert and hit and killed a pedestrian who was walking off the road some 120 yards from the point of collision. He was convicted of culpable homicide and sentenced to 12 months' imprisonment. On appeal to the Transvaal Provincial Division, the conviction and sentence were confirmed. At pp 1118-9 Roper J stated that:

"*R v Meiring* 1927 AD 41 establishes, however, that there is no difference b between the two aspects of liability for negligence. In criminal cases stronger proof is required than in civil cases, but the test of liability is the same. The question, therefore, is whether the death of the deceased was the result of the negligence of the appellant either alone or in combination with that of Basson. If the deceased had been walking beside the roadway c at the scene of collision and if, in consequence of the collision and the appellants' resulting loss of control, the lorry had run off the roadway and knocked him down at that spot, I think there would have been no doubt that his death was a direct result of the collision which had been brought about or contributed to by the appellant's negligence. Does it make any difference that he was run down approximately 60 yards further down the road? I am unable to see that it does." d

It seems to me that Roper J applied the two pronged test, that is, whether the accused was negligent and, if he was, whether death was a direct result of that negligence.

The trial magistrate indicated that he also relied on the *Brandon* case, *supra*. With respect, the facts that he cites in his minute are incorrect. The facts in ε the *Brandon* case are as follows: a husband and his wife sued the defendant for injuries sustained when a skylight in the roof of the shop was broken due to the negligence of contractors repairing the roof and a portion of the glass fell and struck the husband whose wife who was close by. Reasonably believing her husband was in danger, she tried to pull him from the spot, strained her leg and thereafter suffered from recurrent thrombosis. Both f succeeded on the basis that their respective injuries were the natural and probable consequence of the contractors' negligence.

The *Majarira* case, *supra*, involved a woman who was left in charge of a two year old girl who left some hot water in a bucket in the bathroom into which the child fell and died. She was convicted on her plea of guilty of culpable homicide. Chinhengo J, with the concurrence of Mungwira J, set aside the conviction on the basis that the facts in that case did not establish negligence. At p 6 of the judgment the learned judge stated that:

"The concept of negligence in culpable homicide has two components –the issue of foresight that death would be a consequence of the conduct ^H

2008 (1) ZLR p5

Kudya J

A in question because his blameworthiness arises from a failure to foresee the death in circumstances where the reasonable man would have foreseen it. The second component requires an assessment of what should have been done in order to safeguard against that death occurring. To arrive at the conclusion that the accused negligently caused the death it must be determined what steps should reasonably have been taken to ^B prevent the death and whether the accused in fact took those steps because it is the accused's failure to take those reasonable steps which determines that the accused was negligent in bringing about the death."

The principles that emerge from these three cases are that a conviction for culpable homicide is founded, firstly, on proof of negligent conduct and, secondly on foreseeability of death arising from that conduct. The concept of ^C foreseeability is expressed at times as the natural and probable consequence or as the direct result of the act of commission or omission that the accused fails to guard against which results in death.

In casu, it seems to me that the accused person took a deliberate and conscious act to disobey the police that night. His actions in failing to stop were grossly ^D negligent. In this instance the greater misdeed incorporates the lesser. The accused was, therefore, negligent in that he created a dangerous situation by driving off from the road block instead of stopping as directed by the police.

The State case, in my view, flounders on the aspect of the foreseeability of death arising from his failure to obey the instruction to stop. It was at night. The facts are silent on whether he was aware that the police who stopped him ^E for the third time before the shooting were armed. In any event, the reasonable man would not expect an armed policeman to shoot at a moving lorry with passengers at the back in a bid to stop the driver. The death of the deceased was thus caused by the policeman and not by the accused's manner of driving. It is accepted that by driving away from the roadblock he created a dangerous situation but the death which ensued was not reasonably foreseeable. It was ^F neither the direct result nor the natural and probable consequence of his failure to obey the police instruction to stop.

I agree with the regional magistrate that the conviction for culpable homicide was wrong. The accused should have been charged with the contravention of s 43 of the Road Traffic Act, *supra*. It remains the unfettered prerogative ^G of the Attorney-General to charge him with that offence, if he so wishes.

In my view, the conviction and sentence cannot stand. They are both set aside. It is further ordered that the accused be refunded the fine that he paid.

^H MAKARAU JP agrees.

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PONDORO (PVT) LTD & ANOR v NEMAKONDE & ANOR 2008 (1) ZLR 6 (H)

2008 (1) ZLR p6

Citation

2008 (1) ZLR 6 (H)

Case No	Judgment No. HH-18-08
Court	High Court, Harare
Judge	Hungwe J
Heard	18 January 2008
Judgment	20 January 2008
Counsel	<i>A N B Masterson</i> , for the applicants <i>O O Takaendesa</i> , for the first respondent <i>Ms E Mwatse</i> , for the third respondent
Case Type	Chamber application
Annotations	Link to case annotations

Flynote

Court — *magistrates court — jurisdiction — eviction — interdict amounting c to constructive eviction — such order subject to normal monetary jurisdiction of court*

Court — *review — magistrates court — grounds for review — gross irregularity — includes conduct which though well-intentioned and bona fide, prevented a fair trial d*

Headnote

The applicants were the owners of a farm which had been expropriated by the State. The first respondent was the person to whom the farm had been offered. The first respondent had obtained an eviction order against the applicants from the second respondent, a local magistrate. The magistrate [£] had granted the order in default after the applicants' legal practitioners were late in appearing to answer the application for eviction. This order was made despite the magistrate having earlier recused himself from dealing with another, related, matter between the same parties. The applicants complained that the eviction order had the effect of preventing them from continuing with their farming operations without having been [£] afforded an opportunity to be heard on such a drastic issue. In addition, they averred that the value they stood to lose was far in excess of the court's monetary jurisdiction.

Held, that under s 27 of the High Court Act [Chapter 7:06] the decision of an inferior court may be brought on review on the grounds of, *inter alia*, gross irregularity. Not all procedural irregularities will qualify a superior [£] court to set aside the proceedings leading to the result complained of. The irregularity must be so gross as to have prevented the presiding officer from deciding the issues which he had to decide. Put differently, the irregularity must have resulted in a miscarriage of justice to be sufficient ground for review. It is not merely high-handed or arbitrary [£]

2008 (1) ZLR p7

Hungwe J

A conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues, then it will amount to a gross irregularity.

Held, further, that *in casu*, the magistrate committed two gross procedural [£] errors warranting the court to infer prejudicial bias on his part: (a) having correctly decided that it was appropriate for him to recuse himself, he then went ahead and presided over the same or similar matter. It did not matter that the matter was one proceeding by default; (b) the applicants raised the question

of jurisdiction but because of the procedure the magistrate c adopted he prevented them from placing their case before him when he knew they had a case to present.

Held, further, that a magistrates court can only do those things the Magistrates Court Act expressly prescribes to it. In respect of interdicts, s 12(1) provides that, subject to the limits of jurisdiction prescribed by the Act, the court may grant interdicts. The effect of the wording of the interim d interdict was to shut the applicant out of his home and farm. This in essence was constructive eviction of the applicant and thus was in violation of the monetary jurisdictional limit of the magistrates court.

Held, further, that there is a specific procedure for eviction in respect of land acquired in terms of the Gazetted Lands (Consequential Provisions) Act [Chapter 20:28]. The right to claim eviction is only exercisable by the e acquiring authority. That process is not initiated by a beneficiary under that land reform programme, or by an officer of the acquiring ministry.

Cases cited

Bester v Easigas (Pty) Ltd & Anor 1993 (1) SA 30 (W)

Coetser v Henning & Ente NO 1926 TPD 401

f *Ellis v Morgan; Ellis v Desai* 1909 TS 576

Goldfields Investment Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551

R v Zackey 1945 AD 505

S v Moodie 1961 (4) SA 752 (A)

g *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA)

Legislation considered

Gazetted Lands (Consequential Provisions) Act [Chapter 20:28]

High Court Act [Chapter 7:06] s 27

h Magistrates Court Act [Chapter 7:10] ss 11(1)(iii), 12(1)

2008 (1) ZLR p8

Hungwe J

Case information

A N B *Masterson*, for the applicants a

O O *Takaendesa*, for the first respondent

Ms E *Mwatse*, for the third respondent

Judgment

HUNGWE J: This matter was placed before me under a certificate of urgency on 17 January 2008. I gave directions that it be heard the following day as I b deemed it appropriate that the rules of court be dispensed with in the interests of achieving justice in this particular matter. At the hearing Mr *Takaendesa*, for the first respondent, raised two procedural points *in limine* regarding the lack of appropriate certification of urgency on behalf of the applicants. His second point was that the applicants ought to have anticipated the rule *nisi* rather than approach this court through the chamber book. c

In the exercise of my powers in terms of r 4C of the High Court Rules, I dispensed with the need for certification from a firm other than that preparing the applicant's papers. I accepted Mr *Masterson's* confession of ignorance of a judgment of this court against the practice and that no prejudice was suffered by failure to adhere to the rule as no conflict of interest was apparent on the papers. d

As the matter touched upon the propriety of the handling of a class of cases in the lower courts I deemed it appropriate to deal with it in this court to enable a proper ventilation of the allegations of bias raised on the papers and, if substantiated, give appropriate directions to that court. In any event, I directed that the papers be served on the concerned institution to enable the e appropriate

response to be elicited from that court rather than proceed *ex parte* as Mr Masterson had originally sought on his papers.

The applicants seek the following order:

"1. Final Order sought

- 1.1 The order of the magistrate in Chinhoyi Civil Case No. 22/08 on 8 January 2008 be and is hereby set aside.
- 1.2 The costs of this application are awarded to the applicants.

2. Interim Relief Granted

Pending the finalisation of this application and of any other order that may be given by this court before this matter is brought to finality:

- (a) The order given by the Magistrate Chinhoyi in case No. 22/08 is forthwith suspended.
- (b) No further litigation between the applicants and the first respondent herein shall be dealt with by any of the judicial officers officiating at magistrates court at Chinhoyi." H

2008 (1) ZLR p9

Hungwe J

A At the conclusion of the hearing, I issued the following order:

- "1. The order issued by the magistrate in Chinhoyi Civil Case No. 22/08 on 8 January be and is hereby set aside.
2. The costs of this application are awarded to the applicants."

I have been asked to give reasons for this order. These are they.

B On 8 January 2008, the first respondent (the applicant in the magistrates court) obtained the following order:

- "1. A rule *nisi* do issue returnable to this honourable court sitting at Chinhoyi on 7 February 2008 at 8:30 a.m. or as soon thereafter as the matter may be heard, calling upon the respondents their agents or employees to show cause why they should not be prohibited from: c
 - (a) Continuing to deny the applicant and his employees access to the fields at the Remaining Extent of Romsey Farm;
 - (b) Continuing to carry out agricultural activities at the Remaining Extent of Romsey Farm;
 - (c) Visiting the fields at the Remaining Extent of Romsey Farm.

D INTERIM RELIEF GRANTED

2. That pending the return date hereto, this order operates as a temporary order prohibiting the respondents and their agents or employees from visiting the fields or carrying out agricultural activities at the Remaining Extent of Romsey Farm.
3. That a copy of this order shall be served immediately by the messenger E of court or by a duly attested member of the Zimbabwe Republic Police.
4. That in the event that any of the respondents breaches any terms of this interim order the messenger of court, Chinhoyi, is hereby authorised to enlist the services of the Zimbabwe Republic Police to enforce this order. Should there be any further resistance the Zimbabwe F Republic Police is hereby ordered to detain the respondents upon sight and bring them to court forthwith to answer charges of contempt of court."

The applicants approached this court for urgent relief upon being served with the above order. The first ground of complaint is the irregular manner by which G the order was obtained. The second ground relates to the lack of jurisdiction of the magistrates court to issue the order. The papers show that there has been litigation going on between the parties prior to the order complained of being issued. Particularly disturbing is the following sequence of events.

On 6 December 2007, the magistrate presiding over the matter between these H two parties under case No. B140/07, in which the first respondent was seeking

2008 (1) ZLR p10

Hungwe J

a peace order against the second applicant, recused himself on the basis that A commercial farmers had expressed their misgivings about the partiality of judicial officers at his court. As the respondent was a commercial farmer, he shared the same sentiments as expressed by his

colleagues. The magistrate did not feel that in those circumstances justice would seem to be done if he presided over the matter. He therefore recused himself. He recorded these reasons on the record.

Under B170/07, the same magistrate who had recused himself in B140/07 granted a default judgment against the applicants, where he knew or must have known that the respondents were opposed to the order being sought. B170/07 had been postponed when both parties appeared before him. The reason had been that the application was supported by wrong offer letters. On 13 December 2007, somehow the applicants' legal practitioner could not make it to court by the appointed time of 8:30 a.m. This fact was relayed to the respondents' legal practitioners and the parties were agreed that the applicants' legal practitioners would only be at court at soon after 9:00 a.m. This courtesy was not reciprocated when the matter was duly called. The respondents applied for default judgment before the applicants' legal practitioner arrived at or around 9:30 a.m.

This was in spite of the fact that both the magistrate and the respondents knew the applicants' opposition to the order sought. This was also in spite of the fact that the same magistrate had recused himself from the same case two days before.

As to the contents and effect of the order itself, the applicants complain that the order has the effect of preventing both the applicants from continuing with their farming operations without having been afforded an opportunity to be heard on such a drastic issue.

Secondly, access to the fields and crops already in the ground is an asset worth billions of dollars and, therefore, greatly in excess of the magistrates court jurisdiction. The applicants have grown 40 hectares of tobacco, 300 hectares of soya beans, 30 hectares of maize and 20 hectares of horticultural crops for the current season. The applicants have spent in excess of \$300 billion and will have to spend a further \$100 billion up to harvesting of the crops. The temporary interdict threatens to disrupt farming operations and economically ruin the applicants in the process.

The applicants argued that the magistrates court had no power to issue such an interdict. That such a court could grant such a wide interdict, in the applicants' view, demonstrated the institutional bias against white commercial farmers pervading in this magisterial station.

2008 (1) ZLR p11

Hungwe J

If this was the view of the applicants, the appropriate step for the applicants would have been to apply for the recusal of the specific presiding officer, citing the fact, as Mr *Masterson* did, that such presiding officer could not, by virtue of the fact that he is a beneficiary of the land reform programme, discharge his duties fairly in a given case placed before him.

As demonstrated elsewhere on the papers, judicial officers are keenly aware of their duty not only ensure that justice is done, but that it be seen to be done. As I understood Mr *Masterson*, of particular concern to him was the fact that a senior magistrate at that station now farms on part of his client's farm. Whether it is the Remaining Extent of Romsey was not made clear. There was belief, however, among his clients that Ministry of Lands officers housed in the same building somehow influenced the manner in which matters on former commercial farms were adjudicated at the magistrates court, Chinhoyi.

When pressed by the court on whether, in his view, an application for recusal could not afford his clients appropriate relief rather than a blanket prohibition of such matters being heard at Chinhoyi court, he conceded that such a course was more appropriate. He did not persist on the order he sought on the papers. Where it is intended to make such an allegation as institutional bias, legal practitioners must place before the court such facts as would support such allegations of general institutional bias, especially where judicial officers are involved, if only in the hope that corrective administrative action may be taken. It is not fair for a party to make a blanket and unsubstantiated allegation of bias regarding how judicial matters are presided upon by a magisterial station. When it was brought to Mr *Masterson's* attention that his clients had in fact obtained an order favourable to them, he literally abandoned the allegation of bias. As this prayer was abandoned, nothing more will be said of it.

Mr *Takaendesa*, for the first respondent, argued that the applicants jumped the gun by approaching this court. Their remedy lay in anticipating the rule *nisi* in the magistrates court in terms of the rules of that court. As such, the application should be dismissed on that basis. Secondly, he urged the court to refuse to entertain the application on the basis that they come to court with dirty hands

as they have not complied with the magistrate's court order. In any event, the applicants cannot be heard, for the further reason that their continued stay on the farm constitutes a criminal offence. The farm is now ^D State property and they hold no lawful permission to remain on the farm. That permission which was granted to them expired and was not renewed. He argued that the court will be perpetuating the commission of a criminal offence were it to grant the order sought. He relied on an affidavit from one Marius ^H Dzinoreva, a director for acquisition in the Ministry of State for National

2008 (1) ZLR p12

Hungwe J

Security in the President's Office Responsible for Lands, Land Reform and ^A Resettlement for the submission that the first respondent had a cession of the right to bring the action on behalf of the acquiring authority.

Further, the respondents hold a valid offer letter. It requires them to assume occupation and embark on farming operations. As such, the applicants have no right to be on that piece of land. ^B

The matter before me requires me to decide whether on the papers the applicants have made a case for the setting aside of the temporary interdict granted by the magistrate on 13 December 2007. That order is impugned on the grounds of lack of jurisdiction by the court and gross irregularity in the procedure adopted in obtaining the order.

The first respondent states that, where the magistrate had good reasons to ^C recuse himself, he has previously done so. As there was no basis for refusing to grant, a default judgment he granted it. This was in spite of the fact that this was in a matter in which he had previously recused himself. There could be no basis for setting the matter aside on the ground that this constituted gross irregularity. ^D

Ms *Mwatse*, for the second respondent and in support of the first respondent, relied on the cession of rights by the acquiring authority to the beneficiary. The issue for the decision of this court is whether that court had jurisdiction to grant the order it granted and if so whether, taking into account the manner in which it was granted, it is not liable to be set aside. I believe the matter could be disposed of on these two grounds. ^E

Section 27 of the High Court Act [*Chapter 7:06*] sets out the grounds upon which a decision of an inferior court may be brought on review. Lack of jurisdiction, interest in the cause, bias, malice or corruption on the part of the presiding officer and gross irregularity, among others, are such grounds.

Not all procedural irregularities will oblige a superior court to set aside the ^F proceedings leading to the result complained of. The irregularity must be so gross as to have prevented the presiding officer from deciding the issues which he had to decide. Put differently, the irregularity must have resulted in a miscarriage of justice to be sufficient ground for review.

In *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) ^G at 298C, Harms JA says about this ground of review:

"It is useful to begin with the oft quoted statement from *Ellis v Morgan* where Mason J laid down the basic principle in these terms:

'But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, ^H

2008 (1) ZLR p13

Hungwe J

A some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.'

The *Goldfields Investment* qualification to this general principle dealt with two situations. The one is where the decision-making body misconceives its mandate, whether statutory or consensual. By misconceiving the nature of the inquiry, a hearing cannot in principle be ^B fair because the body fails to perform its mandate. *Goldfields Investment* provides a good example. According to the applicable Rating Ordinance, any aggrieved person was entitled to appeal to the magistrates court against the value put on property for rating purposes by the local authority. The appeal was not an ordinary appeal but involved, in terms of the Ordinance, a rehearing with evidence. The magistrate refused to ^C conduct a rehearing and limited the inquiry to a determination of the question whether the valuation had been 'manifestly untenable'. This

meant that the appellant did not have an appeal hearing (to which it was entitled) at all because the magistrate had failed to consider the issue prescribed by statute. The magistrate had asked himself the wrong question, that is, a question other than that which the Act directed him to ask. In this sense, the hearing was unfair. Against that setting, the words of Schreiner J should be understood:

'The law, as stated in *Ellis v Morgan supra* has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. *The crucial question is whether it prevented a fair trial of the issues.* If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And if from the magistrate's reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits, the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case, it may be said that he is in a sense failing to address his mind to the true point to be decided and, therefore, failing to afford the parties a fair trial. But that is not necessarily the case. *Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial.* One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the court's not merely missing or misunderstanding a point of law on the merits, but to its

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misconceiving the whole nature of the inquiry, or of its duties in a connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial. *I agree that in the present case, the facts fall within this latter class of case, and that the magistrate, owing to the erroneous view which he held as to his functions, really never dealt with the matter before him in the manner which was contemplated by the section.* That being so, there was a gross irregularity, and the proceedings should be set aside" (my emphasis).

From these authorities, it appears, firstly, that the ground of review envisaged by the use of this phrase relates to the conduct of the proceedings and not the result thereof. This appears clearly from the following *dictum* of Mason J in *Ellis v Morgan; Ellis v Desai* 1909 TS 576 at 581 also quoted in *Bester v Easigas (Pty) Ltd & Anor* 1993 (1) SA 30 (W) at 43, where Brand AJ said: c

"But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result but to the method of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined."

See also, for example, *R v Zackey* 1945 AD 505 at 509. d

Secondly, it appears from these authorities that every irregularity in the proceedings will not constitute a ground for review on the basis under consideration. In order to justify a review on this basis, the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his case fully and fairly determined. See, for example, *Ellis v Morgan supra*; *Coetser v Henning and Ente* NO 1926 TPD 401; e *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551; and also *S v Moodie* 1961 (4) SA 752 (A).

It is clear to me that the trial magistrate committed two gross procedural errors warranting this court to infer prejudicial bias on his part. First, having correctly decided that it was appropriate for him to recuse himself, he then went ahead f and presided over the same or a similar matter. It does not matter that the matter was technically one proceeding by default. It was even more relevant that the matter so proceeded because it gave the other side fertile ground to complain that justice was not done. This is even more apparent when regard is had to the fact that the applicants raised the question of jurisdiction. Had they been allowed to fairly state their case, one can say they would have placed this issue g before the trial magistrate who would have directed his mind to all the issues to be decided. Because of the procedure he adopted he has prevented the other side from placing its case before him when he knew they had a case to present. h

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Hungwe J

A A court of the magistrate can only do those things the Magistrates Court Act [Chapter 7:10] prescribes to it. It cannot do or act outside the four corners of the statute creating it. The court cannot ascribe to itself jurisdiction not expressly granted to it by the Act. In respect of interdicts, s

12(1) provides that subject to the limits of jurisdiction prescribed by the Act, the court may grant such interdicts. The effect of the wording of the interim interdict, in my view, ^a is to shut the present applicant out of his home and farm. This, in essence, is constructive eviction of the applicant. I am fortified in this conclusion by the effect of a plain reading of the order. The applicant is prohibited from visiting or working his fields. If he does so, he risks arrest by police on sight on a contempt of court charge. Assuming he can access his homestead without going through his fields, he still is foul of the order. He cannot ask his servants ^c to tend the crops. He is virtually evicted from the land. Clearly, this is in violation of the jurisdictional limit of \$5 million, being the current ceiling of the monetary jurisdiction of the magistrates court. The Act places a statutory limit of \$5 million being "clear value to the occupier" on matters which the magistrate can entertain. I did not hear the respondents argue that the interdict ^d was within the jurisdiction prescribed by s 11(1)(iii) of the Act.

The thrust of the respondents' argument remained that, being the previous owners, the applicants did not have lawful authority to remain on the farm. It is trite that the right to claim eviction in respect of land acquired in terms of the Gazetted Lands (Consequential Provisions) Act [Chapter 20:28] is only exercisable by the holder of the residual rights in the land. Such rights repose ^e only with the acquiring authority. Only the Minister of Lands can bring an action claiming eviction from land on behalf of the President of the Republic of Zimbabwe, being the acquiring authority. That process is not initiated by a beneficiary under that land reform programme, or by an officer of the acquiring ministry. The process is set out in the Act. It is set in motion by a ^f criminal prosecution of the recalcitrant farmer. The farmer is allowed to raise a defence of lawful authority. The court is enjoined to investigate his defence before convicting such a farmer or occupier. Upon conviction by that court the occupier is automatically issued with an order evicting him.

The process is meant to deliver vacant possession of the land to the beneficiary and avoid possible breaches of the peace that otherwise are ^g frequent where a beneficiary is given an offer letter where the former owner is still *in situ*. There can be good reasons for the former owner remaining on acquired land. He could have lawful permission or some such defence to put forward upon being prosecuted. It is therefore up to the acquiring authority to initiate such prosecution, thereby opening the way for orderly take over by ^h the beneficiary. It is sound principle that resort is had only to the law.

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I cannot envisage clearer procedural requirements to deliver vacant possession. ^a

Ms *Mwatse* acknowledged that I have previously pointed out that the acquiring authority ought to prosecute those farmers who, in the authority's view, are in breach of the law by remaining on gazetted land without lawful authority. Upon securing a conviction, and only then, should an offer letter be issued over that land. She advises that no prosecution of these alleged ^b offenders has so far taken place, although my advice has been passed on to the relevant authorities. Such a step, in my respectful view, will help clear the air and give a clearer direction to the land reform programme for the national benefit. The economic benefits following stability, certainty and predictability on the farms cannot be underestimated. It remains for the authorities to adopt their programmes to accord with the law as it stands. ^c

The present application, for the reasons given above, was allowed with costs.

Coghlan Welsh & Guest, applicants' legal practitioners

Mavhunga & Sigauke, first respondent's legal practitioners

Civil Division, Attorney-General's Office, second respondent's legal ^d practitioners

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MIKE CAMPBELL (PVT) LTD & ANOR v MINISTER OF NATIONAL SECURITY RESPONSIBLE FOR LAND, LAND REFORM & RESETTLEMENT & ANOR 2008 (1) ZLR 17 (S)

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Citation	2008 (1) ZLR 17 (S)
Case No	Judgment No. S-49-07
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA, Malaba JA, Gwaunza JA and Garwe JA
Heard	22 March 2007
Judgment	22 January 2008
Counsel	<i>J Gauntlett SC</i> , with him <i>A P de Bourbon SC</i> , for the applicants <i>Ms E Mwatse</i> , with her <i>N Mutsonziwa</i> , for the respondents
Case Type	Constitutional application
Annotations	Link to case annotations

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 11 — protection of fundamental rights — s 52(1) — D protection of such rights not immutable — may be amended, added to or repealed, provided s 52(1) is adhered to*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 16(1) — protection from deprivation of property — doctrine of essential features or core values — s 52(1) — doctrine inapplicable to the Constitution in the light of s 52(1)*

E Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 16B — underlying principle - inherent right of sovereign power to acquire compensation — s 16B a legitimate exercise of legislative power to determine the condition for such acquisition*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of F Rights — s 16B(2)(a) — acquisition of agriculture land — improvement on land acquired by the State — payment of fair compensation within a reasonable time to former owner — such payment not a pre-condition for acquisition*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of G Rights — s 16B(2)(a) — acquisition of agriculture land — whether infringes s 23 — no reference in section to race or colour of owners of land acquired — s 16B(2)(a) not in violation of s 23*

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of H Rights — s 16B(3) — intention of legislature in enacting section —*

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intention was to modify ss 18(1) and 18(9) — both subsections amended A by s 16B(3)

Constitutional law — *Constitution of Zimbabwe 1980 — Declaration of Rights — s 23 — protection against discrimination on grounds of race or color — s 16B(2)(a) — acquisition of agricultural land belonging to white persons — not in contravention of s 23*

Constitutional law — *Constitution of Zimbabwe 1980 — amendment of — s 52(1) — section giving legislature full powers to amend, add to or vary the Constitution — use of word "any" — meaning of in the context of s 52(1)*

Constitutional law — *Constitution of Zimbabwe 1980 — ouster of provisions of the Constitution — general principle relating thereto — need for C clear language before in order to oust the provisions of the Constitution.*

Interpretation of statutes — *constitution — ouster of provisions of a constitution — need for clear language in such circumstances*

Words and phrases — *Constitution of Zimbabwe 1980 — s 52(1) — “any” — meaning of in the context of s 52 (1) — all inclusive effect of the word* **D**

Headnote

Section 11 of the Constitution of Zimbabwe, 1980 provides that the entitlement of persons in Zimbabwe to the fundamental rights specified in Chapter III thereof and to the protection afforded to them by the provisions of the chapter are “subject to the provisions” of the Constitution. These **E** provisions include s 52(1), which allows for the amendment of the Constitution. In other words, the fundamental rights are not immutable. They are subject to being amended, added to or repealed by the legislature in the exercise of the legislative power, provided there is strict compliance with the requirements of the special procedure for the making of fundamental laws prescribed under s 52 (1) of the Constitution. **F**

The applicants were owners of a farm which had been compulsorily acquired as being necessary for the implementation of the land reform program. The acquisition was challenged on a number of grounds, including the allegation that the applicants were deprived of their rights under s 18 of the Constitution and that the provisions of s 23, which prohibits of discrimination on, among other things, grounds of race, were being **G** infringed. It was the applicants’ case that no compensation had been paid in respect of the acquisition of their farm and the question then arose whether the failure by the acquiring authority to pay compensation for the agricultural land in terms of s 16B(2)(a) of the Constitution, within a **H**

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A reasonable time after the acquisition, invalidated the acquisition. Further, during the course of argument, it was submitted on behalf of the applicants that certain essential features or core values of the Constitution were unchangeable and beyond the power of the legislature to amend. This submission was based upon a doctrine established and expounded by the Supreme Court of India in the case of *Kesavananda v Kerala* **B** [1973] Supp SCR I.

Held, that there was nothing in s 16B(2)(a)(i) and the acquisition of the pieces of agricultural land, which resulted from its operation, which referred to the race or colour of the owners of the pieces of land acquired. There was, therefore, no question of a violation of s 23 to be considered.

C **Held**, further, that the doctrine of essential features or core values, as expounded by the Supreme Court of India, was an aid to construction. The language of ss 11, 50 and 52(1) of the Constitution is, however, clear and unambiguous. As such, the doctrine, which is in any event controversial, has no application *in casu*, where no aid to construction is necessary.

D **Held**, further, that the language used in s 52(1) of the Constitution is that which gives the legislature full power to amend, add to or repeal “any” of the provisions of the Constitution. The use of the word “any” shows that all the provisions thereof, including those relating to fundamental rights, share a one common feature of being liable to alteration or repeal.

Held, further, that underlying s 16B of the Constitution is the principle, which **E** is almost a universal law, that every sovereign state has an inherent right to acquire compulsorily private property for public purposes with an obligation to pay fair compensation for the property acquired. Section 16B, which was introduced into the Constitution in terms of s 52(1), is a legitimate exercise of the legislative power to determine the conditions under which private property in agricultural land for public purposes can **F** be validly exercised.

Held, further, that the clear intention of the legislature in enacting s 16B(3) was to modify the provisions of ss 18(1) and 18(9) of the Constitution with respect to any challenges of the acquisition of agricultural land effected in terms of s 16B(2)(a). Section 16B(3) may, therefore, be **G** regarded as an amendment of those two subsections. As it forms part of s 16B, it may also be regarded as an addition to the provisions of the Constitution. However, the right to the protection of law for the enforcement of the right to fair compensation in the case of a breach by the acquiring authority of the obligation to pay compensation has not **H** been taken away.

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Held, further, that while the general provision is that the provisions of the ^A Constitution should not be construed so as to take away the jurisdiction of the courts of law, in very clear language, the legislature has, in s 16B(3), unquestionably said that acquisitions of agricultural land provided for in s 16B(2)(a) of the Constitution shall not be challenged in any court of law.

Held, further, that the payment of fair compensation for improvements ^B effected on such land within a reasonable time after the acquisition is not a pre-condition for the acquisition.

Held, further, that the application must be dismissed with each party bearing its own costs. ^C

Cases cited

Bribery Commissioner v Ranasinghe [1964] 2 All ER 785 (PC)

George Divisional Council v Minister of Labour & Anor 1954 (3) SA 300 (C)

Grace Brothers (Pty) Ltd v Commonwealth of Australia (1946) 72 CLR 269 ^D

Kesavananda v Kerala (1973) Supp SCR 1

Isle of Wight Railways Co v Tahourdin (1883) 25 ChD 320

Minister of the Interior and Anor v Harris & Ors 1952 (4) SA 769 (A)

New South Wales v Commonwealth of Australia (1915) 20 CLR 54

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

Pretoria City Council v Modimola 1966 (3) SA 250 (A) ^E

R v Burah (1878) 3 AC 881

R v Hinds & Ors [1977] AC 195 (PC)

R v Hugo 1926 AD 268

R v Liyanage & Ors [1967] AC 259 (PC)

Smith v East Elloe Rural District Council [1956] AC 756 ^F

Winter and Others v Administrator-in-Executive Committee and Another 1973 (1) SA 873 (A)

Zainal bin Hashim v Government of Malaysia [1979] 3 All ER 241 (PC)

Legislation considered ^C

Constitution of Zimbabwe, 1980 ss 3, 11, 16(1), 16A, 16B, 16B(2)(a), 16B(2)(b), 16B(3), 18(1), 18(9), 23(1), 50, 52(1) and 113 ^G

Land Acquisition Act [*Chapter 20:10*], ss 16, 29A and 29D

Case information

J Gauntlett SC, with him *A P de Bourbon SC*, for the applicants

Ms E Mwatse, with her *N Mutsonziwa*, for the respondents

Judgment

MALABA JA: This is an application for redress in terms of s 24(1) of the ^H

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^A Constitution of Zimbabwe ("the Constitution") on the allegation that the enactment of the Constitution of Zimbabwe Amendment (No. 17) Act, 2005 ("the Amendment"), which introduced s 16B into the Constitution, and the acquisition of agricultural land belonging to the first applicant and on which the second applicant resides, violated the Declaration of Rights in relation to the applicants contained in ss 11, 16(1) (the right not to have private property ^B compulsorily acquired without the authority of a law), 18(1) (the right to protection of law), 18(9) (the right to a fair hearing and determination of civil rights or obligations by a court of law) and 23(1) (the right not to be treated in a discriminatory manner on the grounds of race and colour).

The relief applied for by the applicants is an order in these terms: c

1. THAT the Constitution of Zimbabwe Amendment (No. 17) Act, 2005 that introduced s 16B into the Constitution of Zimbabwe, in its effect and implementation with particular regard to the provisions of s 16B(3)(a) thereof constitutes an abrogation of the applicants' fundamental rights to protection of the law (the rule of law) and to due process (the right to a hearing). To that end, the section violates the d essential features or core values of the Constitution insofar as the Constitution's provisions as to security and protection of fundamental rights as contemplated for under section 11 as further read with section 16(1), 16A, section 18(1), section 18(9) and section 23 of the Constitution are concerned. To that end the 'Amendment' is inconsistent with the essential features of the Constitution as to the e right to due process and protection afforded every person in Zimbabwe and accordingly the 'Amendment' is null and void. g
2. THAT it be and is hereby declared that the applicants' right to protection from deprivation of property and to the obligation on the State through the acquiring authority to 'pay fair compensation for the acquisition (of property) before or within a reasonable time after acquiring the property, interest or right' as provided for under section 16(1)(c) of the Constitution of Zimbabwe has been violated. Accordingly to the extent of such declared violation, the acquisition of the applicants' property is declared null and void and of no force and effect.

Alternatively:

THAT it be and is hereby declared that the applicants' right to the payment of 'fair compensation' for improvements on the property and as provided for under section 16(1)(c) of the Constitution of Zimbabwe as further read with sections 29B and 29C of the Land h Acquisition Act [Chapter 20:10] has been violated.

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Accordingly, the State through the acquiring authority is forthwith a and in any event not later than thirty (30) days of the date of this order directed to attend to complying with the provisions of section 29 of the Act subject to the applicants' right and entitlement to challenge such compensation as may be fixed by the Compensation Committee and further subject to the applicants' further rights at law.

3. THAT the first respondent pay the costs of this application." b

The granting of the relief in terms of para (1) of the order depends on an affirmative determination of the question whether there is anything in the provisions of the Constitution, including those relating to fundamental rights, which debarred the Legislature, in the exercise of the powers conferred on it under s 50 and in compliance with the manner and form for the making of c fundamental laws prescribed under s 52(1) of the Constitution, from providing under legislation for the taking away of the right of property in agricultural land by compulsory acquisition for public purposes as well as the right to the remedies provided for its protection.

The granting of d the relief sought under para (2) of the order depends on an affirmative answer to the question whether failure by the acquiring authority to pay fair compensation within a reasonable time from the date of acquisition of the agricultural land, required for resettlement purposes, has the effect of invalidating the acquisition.

The alternative relief is based on the presumed affirmative answer to the question whether there has been a violation by the acquiring authority of the e right of the applicants to be paid compensation for the land acquired to justify the issuing of an order of *mandamus* directing the acquiring authority to perform its duty within thirty days of the date of the order.

I now set out the facts and provisions of the Constitution, the interpretation of the terms of which is material to the determination of the questions raised.

I start with s 11 of the Constitution, which is a preamble at the beginning of f Chapter III headed "DECLARATION OF RIGHTS". It provides:

"11 Preamble

Whereas persons in Zimbabwe are entitled, subject to the provisions of this Constitution, to the fundamental rights and freedoms of the individual specified in this Chapter, and whereas it is the duty of every person to g respect and abide by the Constitution and the laws of Zimbabwe the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations on that protection as are contained herein, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does h

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A not prejudice the public interest or the rights and freedoms of other persons."

By the use of the word "Whereas", the makers of the Constitution intended that two things be considered to have been in existence as a matter of fact at the time of the enactment of s 11. The first was the fact that persons in Zimbabwe were entitled to fundamental rights and freedoms of the individual B specified in Chapter III. The second was the fact that every person has the duty to respect and abide by the Constitution and the laws of Zimbabwe. Section 11 does not, in my view, give to persons in Zimbabwe the fundamental rights and freedoms of the individual specified in Chapter III. The section presupposes the existence of those rights and freedoms and simply reinforces the fact that C persons in Zimbabwe were already entitled to the specified fundamental rights and freedoms. The section goes on to explain why the provisions of Chapter III were enacted. They were enacted for the purpose of affording protection to the fundamental rights and freedoms specified in Chapter III to which the persons in Zimbabwe were already entitled. It is explained under s 11 that the protection shall be subject only to those limitations contained in Chapter III D of the Constitution. It is further explained that the limitations are designed to ensure that the enjoyment of the said rights and freedoms by any person does H not prejudice the public interest or the rights and freedoms of other persons. The provisions relating to the fundamental rights and the limitations thereof are then enacted in confirmation of the fact that what is contained in s 11 was set out by way of a preamble.

E It is important to note that s 11 provides that the entitlement of persons in Zimbabwe to the fundamental rights specified in Chapter III and to the protection afforded to them by the provisions of that Chapter are "subject to the provisions of" the Constitution. One of the provisions of the Constitution, to which the entitlement to fundamental rights specified in Chapter III and the F protection afforded to them under the provisions of the Chapter are subject, is s 52(1) of the Constitution. That section gives the Legislature the power to "amend, add to or repeal any of the provisions" of the Constitution, provided it complies with the special procedure prescribed thereunder.

The fundamental right to property is specified in s 16 of the Constitution. Before the Amendment, the right of property in agricultural land was protected G by the provisions of s 16(1), which prohibited any compulsory acquisition of agricultural land, right or interest in the land by the State except under the authority of a law. No agricultural land could be acquired on the orders of the Executive acting without the authority of a law. Compulsory acquisition of agricultural land had to be on terms prescribed by the Legislature. Further H protection was afforded to the fundamental right of property in agricultural

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land by the requirement that the Legislature had to enact the law authorising A the acquisition in the prescribed terms.

Section 16(1) of the Constitution provides as follows:

"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 B authority of a law that –

(a) requires:

(i) in the case of land or any interest or right therein, that the acquisition is reasonably necessary for the utilisation of that or any other land –

A. for settlement for agricultural or other A purposes; C or

B. for purposes of land reorganisation, forestry, environmental conservation or the utilisation of wild life or other natural resources; or

C. for the relocation of persons dispossessed in D consequence of the utilisation of land for a purpose referred to in subparagraph A or B;

(ii) ...

(b) requires the acquiring authority to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property or having any other E interest or right therein that would be affected by such acquisition; and

- (c) requires the acquiring authority to pay fair compensation for the acquisition before or within a reasonable time after acquiring the property, interest or right; and
- (d) requires the acquiring authority, if the acquisition is ^F contested, to apply to the High Court or some other court before, or not later than thirty days after, the acquisition for an order confirming the acquisition; and
- (e) enables any person whose property has been acquired to apply to the High Court or some other court for the prompt ^G return of the property if the court does not confirm the acquisition, and to appeal to the Supreme Court."

It will be noticed that s 16(1) of the Constitution proceeds upon the basis that the power to compulsorily acquire private property exists and that it can be exercised. ^H

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^A In enacting the Land Acquisition Act [*Chapter 20:10*] ("the Act"), the Legislature complied with these requirements which were designed to afford protection to the fundamental right of property in agricultural land. It required the acquiring authority to give to the owner of the land or any person having a right or interest in the land a preliminary notice of intention to acquire the land and an opportunity to submit written objections to the proposed ^B acquisition. The acquiring authority was obliged to show that the acquisition was reasonably necessary for utilisation of the land for resettlement purposes. It was also required to apply to the Administrative Court for an order authorising the acquisition or confirming the acquisition where it was contested.

Section 16 of the Act, which falls under Part V, provides that the acquiring ^C authority has a duty to pay fair compensation within a reasonable time to the owner of the agricultural land acquired for resettlement purposes or to a person having a right or interest in the land acquired.

Section 29A, which falls under Part VA of the Act, establishes a committee to be known as the Compensation Committee ("the Committee"). The duty of the Committee is to assess and fix the amount of compensation payable to the ^D claimant for improvements on or to the land acquired, provided that compensation shall be payable for the land or interest or right therein where an adequate fund for that purpose is established in accordance with subs (1) of s 16A of the Constitution. The factors and principles to be taken into account by the Committee in the assessment of the amount of compensation ^E payable to the claimant, are laid down under subs (2) of s 16A of the Constitution and Part II of the Act.

Section 16A of the Constitution was inserted by the Constitution of Zimbabwe Amendment (No. 16) Act 2000. It prescribes the factors which must be regarded as of ultimate and overriding importance in regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance ^F with a programme of land reform. These factors are that under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation and that, consequently, the people took up arms in order to regain their land and political sovereignty, resulting in the independence of Zimbabwe in 1980. It declares that the people of Zimbabwe must be enabled to reassert their rights and regain ownership ^G of their land. The section declares further that the former colonial power has an obligation to pay

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compensation for agricultural land compulsorily acquired for resettlement ^A purposes through an adequate fund established for the purpose and, if the former colonial power fails to pay compensation through ^H such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement purposes.

Further protection of the entitlement to the fundamental right of property in agricultural land from compulsory acquisition was provided under subss 18(1) and (9) of the Constitution. Section 18(1) gave the owner of agricultural land or any person having a right or interest in the land, the right to the protection ^B of the law of compulsory acquisition of land contained in s 16(1) of the Constitution and the Act. It also gave them the right to remedies, such as access to courts of law, for the enforcement of that right. The right to protection of law, which the expropriated owner or any person having a right or interest in the land acquired could claim or enforce against the State, included the right to have his or her case heard and the existence of his or her ^C rights or obligations determined within a reasonable time by an independent and impartial court established by law.

The provisions of the Constitution in Chapter III relating to fundamental rights and their protection form part of the fundamental law of the land. They form part of the supreme law of the land by which the validity of ordinary laws such as Acts of Parliament is measured. Section 3 of the Constitution provides that any law inconsistent with the supreme law of Zimbabwe shall, to the extent of the inconsistency, be void. Dicey *The Law of the Constitution* (1889) at pp 22-23 defines constitutional or fundamental law as including "all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the State". Fundamental law is thus mainly concerned with the creation of the three great organs of the State, that is to say, the legislature, the executive and the judiciary, and the distribution of governmental power among them according to their spheres. A fundamental law, being a supreme law, cannot have any other law above it by the authority of which its validity may be tested.

Zimbabwe has a controlled constitution. Its provisions cannot be amended, added to or repealed without compliance with the prescribed special formality. Dicey *op cit* at pp 118-119, says that a controlled constitution "is one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws". The fact that the provisions of the Constitution relating to the fundamental right of property in agricultural land, and the protection of it afforded by the provisions under ss 16(1), 18(1) and 18(9) of the Constitution, could not be taken away or diminished with the same degree of ease and in the same manner as changes to ordinary law could be made, was an additional protection for the fundamental rights.

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A Zimbabwe, like many other nations with controlled constitutions, has, in the Constitution, a section which prescribes with meticulous precision the special procedure for the alteration of its fundamental laws. That section is s 52(1) of the Constitution, to which s 11 makes the provisions relating to fundamental rights subject.

Section 52, as it stood at the time s 16B was enacted, of the Constitution provides:

"52 Alteration of the Constitution

(1) Parliament may amend, add to or repeal any of the provisions of this Constitution:

Provided that except as provided in subsection (6) *no law shall be deemed to amend, add to or repeal any provision of this Constitution unless it does so in express terms* [the emphasis is mine].

(2) A Constitutional Bill shall not be introduced into Parliament unless the text of the Bill has been published in the *Gazette* not less than thirty days before it is so introduced.

(2a) A Constitutional Bill shall not be deemed to have been duly passed by Parliament unless, at the final vote thereon in Parliament, it received the affirmative votes of not less than two-thirds of the total membership of Parliament.

(3)-(4) ...

(5) Subject to the provisions of subsection (8), a Constitutional Bill shall not be submitted to the President for assent unless it is accompanied by a certificate from the Speaker that on the final vote thereon in Parliament the Bill received the affirmative votes of not less than two-thirds of the total membership of Parliament."

Section 50 of the Constitution gives the Legislature, consisting of the President and Parliament, full power to make laws for the peace, order and good government of Zimbabwe. This means that the decision as to the matters which require legislative control is for the Legislature alone to make. It also means that no law made by the Legislature can be declared repugnant to an international instrument on the fundamental rights unless a provision of the Constitution or an Act of Parliament has incorporated it into the law of the country, as required by s 111B(1) of the Constitution.

The circumstances which gave rise to the enactment of the Amendment are these.

The acquiring authority showed interest in compulsorily acquiring the farm known as Mount Carmel of Railway 19, situated in the District of Hartley measuring 1200.6484 hectares ("the land") for resettlement purposes under the

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provisions of the Act in 1997. The land was then registered in the second applicant's name. It was transferred into the first applicant's name in 1999 under Deed of Transfer No. 10301/99.

Commercial farming activities undertaken on the land included horticulture, fruit-growing and ranching. The second applicant is a director and shareholder in the first applicant.

On 28 November 1997, the acquiring authority served on the second applicant ^B a preliminary notice of intention to acquire the land for resettlement purposes in terms of subs (1) of s 5 of the Act. The preliminary notice had been published in the *Gazette* and *The Herald* newspaper. A written objection to the proposed acquisition was lodged with the acquiring authority on the ground that the acquisition was not reasonably necessary for utilisation of the land for settlement for agricultural purposes. The preliminary notice was withdrawn ^C by the acquiring authority on 15 March 1998.

On 22 June 2001, another preliminary notice was served on the applicants. The proposed acquisition of the land was opposed on the same ground, namely, that it was not reasonably necessary for the purposes of utilisation of the land for settlement for agricultural purposes. An order for compulsory acquisition of the land was nonetheless made by the acquiring authority in terms of ^D subs (1) of s 8 of the Act on 4 April 2002. An application for an order of confirmation of the acquisition was made by the acquiring authority to the Administrative Court on 10 May 2002. On 11 December 2002, the preliminary notice issued on 22 June 2001, on the authority of which the order of acquisition made on 4 April 2002 had been made, was declared invalid and set ^E aside by the High Court.

On 23 July 2004, a fresh preliminary notice of the intention to compulsorily acquire the land was published in the *Gazette* and *The Herald* newspaper as required by s 5 of the Act. A written objection to the proposed acquisition was served on the acquiring authority on the same day. No order of acquisition ^F was made in terms of subs (1) of s 8 of the Act, nor was an application made by the acquiring authority to the Administrative Court for an order authorising the acquisition.

It appears from the opposing affidavit deposed to by the first respondent, who is the acquiring authority, and from Schedule 7 to s 16B of the Constitution, that owners or occupiers of at least one hundred and fifty-seven pieces of ^G agricultural land, in respect of which the acquiring authority issued preliminary notices of the intention to acquire them during the period extending from 2 June 2000 to 8 July 2005, submitted written objections to the proposed acquisitions. The litigation in the Administrative Court was viewed as obstructive of the land reform programme. The first respondent alleges in the ^H

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^A opposing affidavit that litigation was being mounted by the owners of the pieces of agricultural land earmarked for compulsory acquisition for purposes of delaying the finalisation of the land reform programme, in the hope that it could be reversed.

To stop what was considered obstructive litigation and secure finality in cases of compulsory acquisition of agricultural land for public purposes, the ^B Legislature enacted the Constitution of Zimbabwe Amendment (No. 17) Act, 2005 on 14 September 2005. After stating that its purpose is to amend the Constitution, it provides as follows:

"2 New section inserted in Constitution

The Constitution is amended by the insertion after section 16A of the ^C following section –

16B Agricultural land acquired for resettlement and other purposes

(1) In this section –

'acquiring authority' means the Minister responsible for Lands or any other Minister whom the President may appoint as an ^D acquiring authority for the purposes of this section.

'appointed day' means the date of commencement of the Constitution of Zimbabwe Amendment (No. 17) Act, 2005.

(2) Notwithstanding anything contained in this Chapter –

(a) all agricultural land – ^E

(i) that was identified on or before the 8th July 2005, in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land Acquisition Act [*Chapter 20:10*], and which is itemised in Schedule 7, being agricultural land required for resettlement purposes; or ^F

(ii) that is identified after the 8th July 2005, but before the appointed day, in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land Acquisition Act [*Chapter 20:10*], being agricultural land required for resettlement purposes; or

- (iii) that is identified in terms of this section by the acquiring authority after the appointed day in the *Gazette* or *Gazette Extraordinary* for whatever purpose, including, but not limited to –

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- A. settlement for agricultural or other purposes; or
- B. the purposes of land reorganisation, forestry, environmental conservation or the utilisation of wild life or other natural resources; or
- C. the relocation of persons dispossessed in consequence of the utilisation of the land referred to in subparagraph A or B;

is acquired by and vested in the State with full title therein with effect from the appointed day or in the case of land referred to in subparagraph (iii) with effect from the date it is identified in the manner specified in that paragraph; and

- (b) no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.

(3) The provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day and the provisions of section 18 (1) and (9) shall not apply in relation to land referred to in subsection (2)(a) except for the purpose of determining any question related to the payment of compensation referred to in subsection (2)(b), that is to say, a person having any right or interest in the land –

- (a) shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge;
- (b) may, in accordance with the provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, challenge the amount of compensation payable for any improvements effected on the land before it was acquired.

(4) As soon as practicable after the appointed day, or after the date when the land is identified in the manner specified in subsection (2)(a)(iii), as case may be, the person responsible under any law providing for the registration of title over land shall, without further notice, effect the necessary endorsements upon any title deed and entries in any register kept in terms of that law for the purpose of formally cancelling the title deed and registering in the State title over the land.

(5) Any inconsistency between anything contained in –

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- (a) a notice itemised in Schedule 7;
- (b) a notice relating to land referred to in subsections (2)(a) (ii) or (iii);
and the title deed to which it refers or is intended to refer, and any error whatsoever contained in such notice, shall not affect the operation of subsection (2)(a) or invalidate the vesting of title in the State in terms of that provision.

(6) An Act of Parliament may make it a criminal offence for any person, without lawful authority, to possess or occupy land referred to in this section or other State land.

(7) This section applies without prejudice to the obligation of the former colonial power to pay compensation for land referred to in this section that was acquired for resettlement purposes.”

Schedule 7 contains a list of one hundred and fifty-seven preliminary notices published in the *Gazette* or *Gazette Extraordinary*, on the basis of which the pieces of agricultural land to which they related were acquired by and vested in the State with full title therein with effect from the appointed day, that is to say, 14 September 2005. Mount Carmel was acquired by the State on the appointed day in terms of s 16B(2)(a)(i) of the Constitution, by virtue of the preliminary notice published in the *Gazette* on 23 July 2004. At the time of the hearing of the application by the Supreme Court, the amount of compensation payable for the land acquired had not been fixed. It must be stated, at this stage, that the law as embodied in the provisions of s 16B(2)(a)(i) of the Constitution and the acquisitions of the pieces of agricultural land, which resulted from its operation, had no reference at all to the race or colour of the owners of the pieces of land acquired. There was no question of violation of s 23 of the Constitution to be considered in this case. No more shall be said on the alleged violation of s 23 of the Constitution.

Section 16B of the Constitution is a complete and self-contained code on the acquisition of privately owned agricultural land by the State for public purposes. Its provisions relate exclusively to the

acquisition of agricultural land. By the use of the *non obstante* clause, “notwithstanding anything contained in this Chapter” at the beginning of subs (2), the Legislature gave the provisions of s 16B overriding effect in respect of the regulation of matters relating to the acquisition of all agricultural land identified by the acquiring ^g authority in terms of s 16B(2)(a).

Underlying s 16B is the principle, which is almost a universal law, to the effect that every sovereign, independent state like Zimbabwe has an inherent right to compulsorily acquire private property within its territory for public purposes with an obligation to pay fair compensation for the property acquired. The ^h makers of our Constitution proceeded from the position that, as the power to

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compulsorily acquire private property for public purposes is inherent in the ^a state, the duty on the legislature was to determine the restrictions or conditions under which the power was to be exercised. As a result of the operation of this fundamental principle, two separate but related procedures underlie the provisions of s 16B.

The first procedure under s 16B(2)(a) relates to the actual acquisition of the ^b land, whilst the second procedure under s 16B(2)(b) relates to the right to payment of fair compensation. Under the first procedure, the acquisition is made to depend on the existence of a state of facts established by purely administrative acts of the acquiring authority. These facts are that the Minister responsible for Lands, or any other Minister whom the President may appoint as an acquiring authority, publishes a notice in the *Gazette* identifying the ^c agricultural land to be acquired and stating therein the purpose for which the land is required.

It is to be noticed that under the new procedure for compulsory acquisition of agricultural land for public purposes, a number of restrictions and conditions imposed in the process of the acquisition have been removed. There is no ^d requirement for a notice of intention to acquire to be given to the owner of the land before acquisition. The acquiring authority does not have to state that the acquisition is reasonably necessary for utilisation of the land for resettlement purposes. Reasonable necessity of the acquisition would have been a judicial question, the determination of which would have required the exercise of judicial power. The acquiring authority is no longer under a duty ^e to apply to a court of law for an order confirming the acquisition. Acquisition, in terms of s 16B(2)(a) of the Constitution, is a lawful acquisition of the agricultural land affected. As the acquisition of agricultural land in terms of s 16B(2)(a) is lawful, s 16B(3) provides that subss 18(1) and (9) of the Constitution, which provide the right to protection of law and appropriate remedies against unlawful interference with or infringements of fundamental ^f rights, shall not apply to the acquisition. An application to a court of law to challenge a lawful acquisition would, in effect, be an abuse of the right to protection of law. The provisions of s 16B(3) would not afford protection from the application of the provisions of subss 18(1) and (9) of the Constitution to an acquisition of agricultural land, which is not in terms of s 16B(2)(a) of the ^g Constitution. The section does not apply to an acquisition of property in any other land, which is not agricultural land. The provisions of s 16(1), 18(1) and (9) of the Constitution continue to regulate the acquisition of any property other than agricultural land. ^h

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^a The provisions of s 52(1) of the Constitution empower the Legislature to enact any law the effect of which is the taking away of any of the fundamental rights specified in Chapter III, provided the restrictions or conditions of the exercise of that power prescribed thereunder are complied with. In enacting s 16B of the Constitution, the Legislature complied with all the requirements of the special procedure for making fundamental law prescribed under s 52(1) of the ^b Constitution. The Constitutional Bill, which became s 16B, was published in the *Gazette* thirty days before it was introduced into Parliament. It contained express terms to the effect that its purpose was to amend the Constitution. The subject matter of the Constitutional Bill, that is to say, acquisition of agricultural land by the State for public purposes is a matter in respect to which the Legislature has power to make law. At the final reading, the Constitutional Bill ^c received the affirmative vote of two-thirds of the total membership of Parliament. When it was presented to the President for his assent, the Constitutional Bill was accompanied by the requisite certificate of the Speaker of Parliament.

It is important to appreciate the fact that the Constitution does not have a section, the provisions of which entrench any of the provisions of fundamental rights beyond the reach of the exercise of the legislative power "to amend, add to or repeal any of the provisions of the Constitution". The ultimate protection, which afforded fundamental rights specified in Chapter III, is the requirement that the provisions of the Constitution relating to them cannot be altered or repealed by ordinary law-making process and that the Legislature must comply with the requirements of the special procedure prescribed under s 52(1) of the Constitution. Section 11 provides that the entitlement of persons in Zimbabwe to the fundamental rights specified in Chapter III, including the right to the protection of law, is subject to the provisions of s 52(1) of the Constitution. In other words, the fundamental rights are not immutable. They are subject to being amended, added to or repealed by the Legislature in the exercise of the legislative power, provided there is strict compliance with the requirements of the special procedure for the making of fundamental laws prescribed under s 52(1) of the Constitution.

I now turn to consider closely the contentions advanced on behalf of the applicants. The first is based on the doctrine of essential features or core values of a Constitution. The doctrine established and expounded by the Supreme Court of India in *Kesavananda v Kerala* [1973] Supp SCR 1, is to the effect that certain provisions of the Constitution of India constitute essential features or core values or basic elements of that Constitution, so that they are unchangeable by the exercise of the amending power conferred on the Legislature under art 368 of that country's Constitution. In my view, the

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doctrine is irrelevant to the determination of the question of what limitations there are to the scope of the legislative power conferred on the legislature under s 50 and its exercise under s 52(1) of our Constitution. It appears to me that the proviso to s 52(1) of the Constitution is a rule of construction directed to the courts to assist them in applying the law so that they do not rely on the doctrine of necessary intendment or implied limitation, which is not different from the doctrine of essential features or core values of a Constitution.

The doctrine of essential features or core values of a Constitution was expounded by the Supreme Court of India as an aid to the construction of the language used in art 368 of the Indian Constitution to find the intention of the makers of that Constitution. The power conferred on the legislature in terms of art 368 was "to amend the Constitution by way of addition, variation or repeal" of any provision of the Constitution. The question which arose for determination was due to the language used, which was unfortunately not so clear and unambiguous. It was whether or not the legislature could, in the exercise of the power so conferred on it by the terms of art 368, annihilate the whole Constitution.

It was in the course of grappling with the difficult question of the construction of art 368 that six of the thirteen learned judges held that provisions of the Constitution of India relating to fundamental rights constituted essential features or core values of that Constitution and, as such, were unchangeable by the legislature in the exercise of the constituent power. Kanna J and six other judges, whilst accepting the proposition that there was a basic structure or framework of the Constitution which could not be destroyed by the exercise of the amending power as defined under art 368 of the Indian Constitution so as to annihilate the entire Constitution, did not accept the proposition that fundamental rights specified in Part III constituted essential features or core values of the Constitution so as to be unchangeable by the Legislature in the exercise of the constituent power. It is a controversial doctrine which has not received much support outside India, for the simple reason that its application depended upon the construction of the language used in that country's Constitution and over which the learned judges failed to agree.

Ray J, at p 409 of the judgment, said that the petitioner's submission that the fundamental rights were unamendable was "a baseless vision". He went on to state at pp 409-410:

"To find out essential or non-essential features is an exercise in imponderables. When the Constitution does not make any distinction between essential and non-essential features it is incomprehensible as to how such a distinction can be made. Again, the question arises as to who

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A will make such a distinction. Both aspects expose the egregious character of inherent and implied limitations as to essential features or core of essential features of the Constitution being unamendable."

Palekar J at p 600 said:

"Whatever one may say about the legitimacy of describing all the rights conferred in Part III as essential features, one thing is clear. So far as the B right to property is concerned, the Constitution, while assuring that nobody shall be deprived of property except under the authority of law and that there shall be a fair return in case of compulsory acquisition [Article 31(1) and (2)], expressly declared its determination, in the interest of the common good, to break up concentrations of wealth and means of production in every form and to arrange for redistribution of ownership C and control of the material resources of the community. That is the central issue in the case before us, however dexterously it may have been played down in the course of an argument which painted the gloom resulting by the denial of the fundamental rights under art(s) 14, 19 and ... in the implementation of that determination."

The restrictions or conditions imposed on the exercise of a power of the state D conferred on any of the three organs of state must be ascertained from the language of the Constitution. The language used in the provisions of ss 11, 50 and 52(1) of the Constitution is clear and unambiguous. The question of construction, which would have required the application of the doctrine of essential features or core values as an aid to the ascertainment of the intention of the makers of the Constitution, does not arise in this case. The words used E in these provisions define with express precision the only restrictions and conditions which the Legislature has to comply with in the exercise of the power conferred on it. There is no room for implied limitations.

Maxwell Interpretation of Statutes 12 ed at pp 1-2 states that:

"If there is one rule of construction for statutes and other documents it is F that you must not imply anything in them which is inconsistent with the words expressly used ... if the language is clear and explicit, the court must give effect to it for in that case the words of the statute speak the intention of the legislature."

At p 29, the learned author states:

G "Where the language is plain and admits of but one meaning the task of interpretation can hardly be said to arise. Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced, however harsh or absurd or H contrary to common sense the result may be."

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There is nothing in the provisions of Chapter III and s 52(1) of the Constitution A to indicate that a limitation, other than the special and explicit restrictions and conditions prescribed thereunder, was intended on the power to amend or repeal when it is exercised to take away or diminish fundamental rights. To the contrary, s 11 makes the entitlement to the fundamental rights specified in Chapter III and the rights to remedies thereto, subject to the provisions of s 52(1) of the Constitution. The effect of s 11 is that there is nothing in the B Constitution which confers on the Legislature any power to amend, add to or repeal any of the provisions of the Constitution otherwise than in such manner and form as is provided in s 52(1). If the intention was to immunise the fundamental rights specified in Chapter III from the reach of the exercise of the legislative power to amend, add to or repeal conferred in terms of s 52(1) of the C Constitution, it would have been easy for the makers of the Constitution to express that intention in language of equal clarity.

The language used is that which gives the Legislature full power to amend, add to or repeal any of the provisions of the Constitution. Nothing can be more mischievous than an attempt to cut back power given by the Constitution in so wide language. The use of the word "any" shows that all the provisions D of the Constitution, including those relating to fundamental rights, share one common feature of being liable to alteration or repeal.

In *Isle of Wight Railways Co v Tahourdim* (1884) 25 ChD 320, it was said that the word "any" is a word which ordinarily excludes limitation or qualification.

In *George Divisional Council v Ministry of Labour & Anor* 1954 (3) SA 300 (C) at 307D, E Herbstein J said that the word "any" in its natural and ordinary meaning is an indefinite term which included all of the things to which it relates.

In *R v Hugo* 1926 AD 268 at 271, the word "any" was described as a word which is, upon the face of it, a word of wide and unqualified generality. F

The word “provisions” does not refer to the formal statements set out in sections of the Constitutional document only, but refers mainly to the particular matters; that is to say, rights or powers and obligations provided for by the words used in the formal statements.

It would be improper for the court to create by construction its own limitations, ^g restrictions or conditions in addition to those imposed in express terms by the makers of the Constitution under s 52(1) of the Constitution. So, in deciding the question whether fundamental rights guaranteed to individuals in a Constitution can be diminished, modified or abolished, one must look not so much at the courts as at the nature of the power to alter the Constitution and in particular the limitations embodied in it. ^h

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^A In *R v Burah* (1878) 3 AC 889, Lord Selborne stated at pp 904-905:

“The established courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity, determine that question and the only way in which they can properly do so, is by looking to the terms of the instrument by which affirmatively the legislative powers were created and by which negatively they are restricted. If what ^b has been done is legislation, within the general scope of the affirmative words which give the power and if it violates no express condition or restriction by which the power is limited ... it is not for any court of justice to enlarge constructively those conditions or restrictions.”

Section 52(1) of the Constitution gives the Legislature the power by law to take away or diminish any fundamental rights specified in Chapter III and amend ^c or repeal the provisions of the Constitution relating to them, provided it complied with the requirements of the prescribed special procedure.

Section 16B of the Constitution, which makes provision for the valid acquisition of agricultural land by the State, is legislation which falls within the general scope of the affirmative words by which the power is given under s 52(1) of ^d the Constitution and in its enactment the Legislature did not violate any of the conditions by which the power is limited.

The proposition that the duty of the court in the circumstances is limited to the determination of the question whether, in enacting s 16B, the Legislature complied with the prescribed procedural and substantive requirements under s 52(1) of the Constitution also finds authority in *Minister of the Interior & ^e Anor v Harris & Ors* 1952 (4) SA 769 (A). The Appellate Division of the Supreme Court of South Africa in that case had to decide the question whether Act 35 of 1952, which had established a High Court of Parliament consisting of all senators and members of the House of Assembly with power to review decisions of the Appellate Division of the Supreme Court of South Africa and ^f altered s 152 of the Constitution of South Africa, was valid, as it had not been passed in the manner prescribed by the second proviso to s 152. Centlivres CJ said at 779D-G:

“Section 152 of the Constitution enacts that ‘Parliament may by law repeal or alter any of the provisions of this Act’. There are two provisos, the first of which is irrelevant. The second proviso, insofar as it is material to this ^g case, enacts that:

‘No repeal or alteration of the provisions contained in this section ... or in sections 35 and 137 shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together and at the third reading be agreed to by not less than two-thirds ^h of the total number of members of both Houses.’

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It is clear from ss 35, 137 and 152 of the Constitution that certain rights are ^A conferred on individuals and that these rights cannot be abolished or restricted unless the procedure prescribed by s 152 is followed.

In construing these sections, it is important to bear in mind that these sections give the individual the right to call on the judicial power to help him resist any legislative or executive action which offends against these sections or, to put it another way, these sections contain constitutional ^B guarantees creating rights in individuals the duty of the courts, where the question arises in litigation being to ensure that the protection of the guarantee is made effective, *unless and until it is modified by legislation in such a form as under the Constitution can validly effect such modification*” (the emphasis is mine).

It is clear from the above statement that the *ratio decidendi* of the case was ^c that compliance with the requirements of the prescribed procedure for the enactment of legislation repealing or altering

especially entrenched provisions of the Constitution was the only measure of the validity of the exercise of the affirmative legislative power the court had to consider.

The case of *Bribery Commissioner v Ranasinghe* [1964] 2 All ER 785(PC) is ^d also illustrative of the application of the principle of law under discussion. The voting and legislative powers of the Ceylon Parliament were dealt with under s 18 and s 29 of the Constitution of Ceylon. The sections provided that:

"18. Save as otherwise provided in subsection (4) of section 29 any question proposed for decision by either Chamber shall be determined by a majority of votes of the senators and members, as the case may be, ^e present and voting ...

29(1) Subject to the provisions of this order, Parliament shall have power to make laws for the peace, order and good government of the Island.

(2) No such law shall –

(a) prohibit or restrict the free exercise of any religion." ^f

There followed subss (b), (c) and (d) which set out further entrenched religious and racial matters, which were not to be the subject of legislation. They represented the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which *inter se* they accepted that Constitution, and were therefore unalterable under that Constitution. Section 29 then continued: ^g

"(3) Any law made in contravention of subsection (2) of this section shall, to the extent of such contravention, be void.

(4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this order, or of any other order of Her Majesty in Council in its application to the Island: ^h

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^A Provided that no bill for the amendment or repeal of any of the provisions of this order shall be presented for the royal assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of members of the House (including those not present).

^B Every certificate of the Speaker under this subsection shall be conclusive for all purposes and shall not be questioned in any court of law."

The Bribery Amendment Act 1958 was not endorsed with the Speaker's certificate. There was nothing to show that it had been passed by the requisite majority of two-thirds of the whole number of members of the House. There was a conflict between s 41 of the Act of 1958 and s 55 of the Constitution. ^c

The Judicial Committee of the Privy Council held that where an Act involves a conflict with the Constitution, the certificate of the Speaker is a necessary part of the Act-making process and its existence must be apparent. Where the certificate is not apparent, there is lacking an essential part of the process necessary for amendment.

^d Lord Pearce, delivering the Board's opinion, remarked at 792 D-I that:

"... a legislature had no power to ignore the conditions of lawmaking that are imposed by the instrument which itself regulates its power to make law. Such a constitution can indeed be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with: and the alteration or amendment may ^e include the change or abolition of those very provisions ... In the present case ... the legislature has purported to pass a law which, being in conflict with s 55 of the Order in Council, must be treated, if it is to be valid, as an implied alteration of the constitutional provisions about the appointment of judicial officers. Since such alterations, even if express, can only be made by laws which comply with the special legislative procedure laid ^f down in s 29(4), the Ceylon legislature has not got the general power to legislate so as to amend its Constitution by ordinary majority resolutions ..."

The *ratio decidendi* of the *Bribery Commissioner* case *supra* was that, if the legislature of Ceylon intended to effect an amendment to that country's Constitution by the exercise of legislative power, it was "compelled to operate ^g a special procedure in order to achieve the desired result". See also *R v Hinds & Ors* [1977] AC 195 (PC) at 213.

The clear indication is that the makers of the Constitution did not intend to make the fundamental rights and freedoms specified in Chapter III immune ^h from the exercise of legislative power to effect constitutional amendments in

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compliance with the special procedure prescribed under s 52(1) of the ^A Constitution. The fundamental rights bind the three organs of the State, that is to say, the legislature, the executive and the judiciary and are directly enforceable by law until the legislature, in the exercise of legislative power, acts in terms of s 52(1) of the Constitution.

As for s 16B of the Constitution, it is clear that in prescribing the requirements ^B for the acquisition by the State of agricultural land owned by individuals for resettlement purposes, the makers of the Constitution definitely refused to accept the doctrine of essential features or core values with regard to the fundamental right to property where the land was required for public purposes. The form taken by s 16B of the Constitution is not uncommon. The wording of s 16B(2)(a) is similar to the wording of s 3 of the Wheat Acquisition Act 1914 ^C of the State of New South Wales, which provided that the Governor might:

“... by notification published in the *Gazette* declare that any wheat therein described or referred to is the property of His Majesty, and that upon such publication the wheat shall become the absolute property of His Majesty, and the proprietary rights of every person in the wheat at the date of publication shall be taken to be converted into a claim for compensation ^D in pursuance of the provisions of the Act relating to compensation.”

Section 15(2) of the Lands Acquisition Act 1906-1936 of Australia was in similar terms with regard to compulsory acquisition of land by the State for public use. See *New South Wales v Commonwealth of Australia* (1915) 20 CLR 54 at 65-66; *Grace Brothers (Pty) Ltd v Commonwealth of Australia* ^E (1946) 72 CLR 269; *Pretoria City Council v Modimola* 1966 (3) SA 250 (A).

Section 16B of the Constitution is a legitimate exercise of the legislative power to determine the conditions under which the power inherent in the State to compulsorily acquire private property in agricultural land for public purposes can be validly exercised.

The next point on the relief sought under para (1) of the order was that the ^F taking away of the fundamental rights under subss 18(1) and (9) by the enactment of s 16B(3) of the Constitution is not an exercise of the power to amend the provisions of those subsections.

I do not agree. The argument is based on an unnecessarily restrictive interpretation of s 52(1) of the Constitution. Section 113(1) of the Constitution ^G provides that, unless the context otherwise requires, the word “amend”, as used in the Constitution, “includes vary, alter, modify or adapt”. A material alteration of the substance of a provision, such as the taking away of a right granted thereunder, would *pro tanto* have the effect of amending the provision within the meaning of that concept in s 52(1) of the Constitution. The ^H

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^A amendment is effected by way of providing for the taking away from an individual the rights of property in agricultural land only and denying him or her the rights under s 18(1) and (9) in respect of the acquisition of agricultural land, whilst leaving the same provisions of the Constitution unchanged in respect of all other cases of compulsory acquisition of property.

The provisions of s 16B were not part of the Constitution until that section ^B was inserted after s 16A. It is clear that the provisions of s 16B are an addition to the provisions of the Constitution. That makes the provisions of subs (3) of s 16B an addition to the provisions of the Constitution. The clear intention of the Legislature in enacting s 16B(3) was to modify the provision of subss 18(1) and (9) of the Constitution with respect to any challenges of the ^C acquisition of agricultural land effected in terms of s 16B(2)(a) of the Constitution. The fact that s 16B(3) has the effect of taking from the expropriated owner of the land referred to in s 16B(2)(a) of the Constitution the fundamental right in question does not detract from the fact that its provisions were added to the other provisions of the Constitution. There is in fact no contextual amendment of the provisions of subss 18(1) and (9) by the provisions of s 16B(3).

^D In *Zainal bin Hashim v Government of Malaysia* [1979] 3 All ER 241(PC), art 135(1) of the Federal Constitution of Malaysia provided that no members of the police force should be dismissed by an authority subordinate to that which at the time of the dismissal had power to appoint a member of that service of equal rank. The Malaysian Police Force Commission, under power conferred on it by the Constitution, delegated to chief police officers the power to ^E dismiss constables but not the power to appoint them. On 20 January 1972, a chief police officer made an order dismissing the

appellant

from the police force, with effect from the date of his conviction. The appellant brought an action against the Malaysian Government, claiming a declaration that his dismissal was void and inoperative. On 21 March 1975, the trial judge gave judgment in favour of the appellant on the ground that his dismissal ^F contravened art 135(1) because the chief police officer had no power to appoint constables. On 27 August 1976, a proviso to art 135(1) was inserted by the Constitution (Amendment) Act in these terms:

"And provided further that this clause shall not apply to a case where a member of any of the services mentioned in that clause is dismissed or ^G reduced in rank by an authority in pursuance of a power delegated to it by a commission to which this Part applies ..."

It was accepted by the Judicial Committee of the Privy Council that the proviso was an addition to the provisions of the Constitution despite the fact that its effect was to render Article 135(1), by referential operation, inapplicable ^H through the use of the device of the words "shall not apply to".

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Referring to *Zainal's* case *supra* in *Nkomo & Anor v Attorney-General & Ors* ^A 1993 (2) ZLR 422 (S) for purposes of the illustration of the application of the rule on the presumption against the retrospective construction of statutes, Gubbay CJ accepted at p 430B, as a fact, that the proviso to art 135(1) was an addition to the provisions of the Federal Constitution of Malaysia and *ipso facto* that the effect it had on the substance of art 135(1), by referential ^B operation, through the use of the exclusionary words "shall not apply to", was a reduction of rights.

Section 16B(3) also affects the provisions of subss 18(1) and (9) of the Constitution, by referential operation, by providing that they "shall not apply in relation to land referred to in subsection (2)(a)" of s 16B. The terms of the provisions of s 16B(3) are express and directed specifically at the operation ^C of s 18(1) and (9) of the Constitution with respect to the institution of proceedings in any court of law to challenge the acquisition of agricultural land secured in the prescribed manner.

The effect of s 16B(3) on the provisions of subss 18(1) and (9) of the Constitution is the taking away of the right to protection of law afforded to ^D the right of property in agricultural land acquired in terms of s 16B(2)(a), just as the effect of the proviso on the provisions of art 135(1) of the Federal Constitution of Malaysia was the taking away of the right of a member of the police force not to be dismissed from the force by a police officer with no power to appoint members of his rank. In other words, the effect of the added proviso was to deprive a constable dismissed for misconduct by a chief police officer, ^E to whom power to dismiss him had been properly delegated, of the right to maintain that his dismissal was invalid, owing to the omission to delegate to the chief police officer power to appoint constables.

So, s 16B(3) may be regarded as an amendment of subss 18(1) and (9) of the Constitution. As it forms part of s 16B, it may also be regarded as an addition ^F to the provisions of the Constitution. The enactment of s 16B(3) was in compliance with the requirements of s 52(1) of the Constitution. It is a legitimate expression of the exercise of the power to amend or add to any of the provisions of the Constitution.

The last point taken on the relief sought in para (1) of the order was in respect of the ouster of the jurisdiction of courts of law under s 16B(3) of the ^G Constitution from cases in which the acquisition of land in terms of s 16B(2)(a) would have been sought to be challenged. The contention advanced by Mr *Gauntlett*, on behalf of the applicants, was that the right of access to a court of law and the right to be heard by such a tribunal in the determination of rights or obligations are fundamental to the protection an individual has ^H

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^A under the Constitution against the demands of the Government. The contention was that any law having the effect of taking these rights away from an individual must be declared invalid for interfering with essential features or core values of the Constitution. The essential features or core values referred to were the principles of the separation of powers of the State and rule of law.

The question whether the Legislature had power to take away the right of ^B access to courts of law and the right to be heard from an expropriated owner or a person having a right or interest in the

agricultural land acquired by ousting the jurisdiction of courts of law from a case in which he sought to challenge the acquisition, is of great importance, as are all other questions which run along the line of the validity of the exercise of legislative power to interfere with the protection the individual has under the Constitution against the demands of Government.

The question what protection an individual should be afforded under the Constitution in the use and enjoyment of private property is a question of a political and legislative character. In other words, what property should be acquired and in what manner is not a judicial question. The general principle is that provisions of the Constitution should not be construed so as to take away the jurisdiction of courts of law. It is, however, subject to the first of all principles of construction that, when in clear and unambiguous language, the Legislature, in the proper exercise of its powers, has provided that courts of law shall not have jurisdiction in a specific class of cases not pending before the courts at the time the ouster is made operational, the intention of the Legislature must be respected and enforced.

In *Winter and Others v Administrator-in-Executive Committee and Another* 1973 (1) SA 873 (A) at 884, Ogilvie Thompson CJ said:

"The legislature's competence to enact a statutory provision ousting the jurisdiction of the courts in respect of certain matters (however undesirable in itself) is indisputable."

See also *Smith v East Elloe Rural District Council* [1956] AC 736 at 750-751.

By the clear and unambiguous language of s 16B(3) of the Constitution, the Legislature, in the proper exercise of its powers, has ousted the jurisdiction of courts of law from any of the cases, in which a challenge to the acquisition of agricultural land secured in terms of s 16B(2)(a) of the Constitution could have been sought. The right to protection of law for the enforcement of the right to fair compensation in case of breach by the acquiring authority of the obligation to pay compensation has not been taken away. The ouster provision is limited, in effect, to providing protection from judicial process to the acquisition of agricultural land identified in a notice published in the

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Gazette in terms of s 16B(2)(a). An acquisition of the land referred to in s 16B(2)(a) would be a lawful acquisition. By a fundamental law the Legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There cannot be any clearer language by which the jurisdiction of the courts is excluded.

The right to protection of law under s 18(1) of the Constitution, which includes the right of access to a court of justice, is intended to be an effective remedy at the disposal of an individual against an unlawful exercise of the legislative, executive or judicial power of the State. The right is not meant to protect the individual against the lawful exercise of power under the Constitution. Once the state of facts required to be in existence by s 16B(2)(a) of the Constitution does exist, the owner of the agricultural land, identified in the notice published in the *Gazette*, has no right not to have the land acquired. The conduct and circumstances of the owner of the agricultural land identified for compulsory acquisition would be irrelevant to the question whether or not the expropriation of his or her property in the land in question is required for any of the public purposes specified in s 16B(2)(a) of the Constitution. In the circumstances, there is no question of prejudice to the rights of the individual since his personal conduct or circumstances are irrelevant to the juristic facts on which the lawful acquisition depends. No purpose would be served in giving the expropriated owner the right to protection of law under s 18(1) and (9) of the Constitution when an attempt at the exercise of the right would amount to no more than its abuse.

Section 16B(3) of the Constitution has not however taken away, for the future, the right of access to the remedy of judicial review in a case where the expropriation is, on the face of the record, not in terms of s 16B(2)(a). This is because the principle behind s 16B(3) and s 16B(2)(a) is that the acquisition must be on the authority of law. The question whether an expropriation is in terms of s 16B(2)(a) of the Constitution and therefore an acquisition within the meaning of that law is a jurisdictional question to be determined by the exercise of judicial power. The duty of a court of law is to uphold the Constitution and the law of the land. If the purported acquisition is, on the face of the record, not in accordance with the terms of s 16B(2)(a) of the Constitution, a court is under a duty to uphold the Constitution and declare it null and void. By no device can the Legislature withdraw from the determination by a court of justice the question whether the state of facts, on

the existence of which it provided that the acquisition of agricultural land must depend, existed in a particular case as required by the provisions of s 16B(2)(a) of the Constitution. ^h

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^A Taking into account the narrow ambit of the application of the provisions of s 16B(3) of the Constitution, I do not find attractive the argument that the provision undermines the balance of powers of the State between the Legislature and the Judiciary. The taking away of the functions of judicial power and giving them to a tribunal, which is not a court of law, is as valid an exercise of legislative power as the taking away of the functions and letting ^B them lie dormant without giving them to any other body to discharge. What is objectionable as being in violation of the principle of separation of powers is for the Legislature to take the functions of judicial power and exercise them itself under the guise of a legislative judgment over facts and circumstances of a particular case. See *R v Liyanage & Ors* [1967] AC 259 (PC) at p 291.

^C It appears to me that without the misconception of its enactment as a violation of the principle of separation of powers of the State, the ouster of the jurisdiction of court in the limited circumstances prescribed in s 16B(2)(a) of the Constitution does not have the obnoxious effect on the principle of the rule of law which was suggested in the course of the argument against the ouster provision.

^D The relief sought under para (2) of the order depended upon an affirmative answer to the question whether failure by the acquiring authority to pay compensation for the agricultural land acquired in terms of s 16B(2)(a) of the Constitution, within a reasonable time after the acquisition, invalidates the acquisition. The acquisition of land referred to in s 16B(2)(a) of the Constitution ^E is a lawful acquisition. It takes place by operation of the law on account of the existence of the state of the specific facts prescribed under that subsection. The right to fair compensation moves with title in the sense that, upon the acquisition of private property in the agricultural land for public purposes having taken place, the acquiring authority assumes the obligation to pay the expropriated owner or the person having a right or interest in the land acquired, ^F fair compensation for the improvements effected on such land before it was acquired.

The right to fair compensation arises by operation of the law on the state of the facts, on the existence of which the validity of acquisition depends. The ability to pay the amount of compensation within a reasonable time after the acquisition is not, however, one of the juristic facts upon which the law ^G operates to effect the acquisition. The duty on the acquiring authority is to pay the amount of compensation payable, which means that the determination of the question whether a reasonable time has expired must take into account all the circumstances bearing upon the question of assessment and the fixing ^H of the amount of compensation payable.

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The legal consequences of an acquisition in terms of s 16B(2)(a) of the ^A Constitution, such as the right in the State to demarcate, allocate and without delay register full title in the land acquired, are consistent with the view that payment of fair compensation for improvements effected on such land, within a reasonable time after the acquisition, is not a pre-condition for the acquisition. If authority is required for this statement of law, it is provided by the case of *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508. In his speech at ^B p 542, Lord Atkinson said:

"... the legal obligation to pay for the land or its use, temporarily or permanently acquired, is not a restriction upon the acquisition of either or a condition precedent to its acquisition."

At p 551, Lord Moulton said: ^C

"The duty of payment of compensation cannot be regarded as a restriction. It is a consequence of the taking but in no way restricts it."

Lord Sumner at p 558 also said:

"The obligation to pay compensation to the dispossessed owner which that Act provides for is, however, not a restriction on the acquisition of ^D his land. It might discourage the exercise of the power of acquisition but it does not limit that power. The power is complete independently of payment and it is fully exercised before the obligation to pay arises."

The lawfulness of the acquisition of the land by the State is founded upon a state of facts which does not change, whether or not compensation has been paid to the expropriated owner or a person

having a right or interest in the land ^ε acquired within a reasonable time. The requirement that compensation be paid within a reasonable time after the acquisition is based on provisions of the Constitution and the Act relating to compensation for property lawfully acquired. What would have happened would not be described as an acquisition of agricultural land by the State unless it would have happened in accordance with the provisions of s 16B(2)(a) of the Constitution. It is clear from the ^φ wording of s 16B(3) of the Constitution, that the intention of the Legislature is that the acquisition of agricultural land in terms of s 16B(2)(a) must not be put in the category of justiciable controversies. Although Mr *de Bourbon* argued that failure by the acquiring authority to pay fair compensation within a reasonable time after acquisition invalidates the acquisition, he failed to ^ς point out any provision of the Constitution or the Act to that effect.

The right of the owner of the land acquired or any person having a right or interest in the agricultural land acquired to fair compensation is legally guaranteed. It is an absolute right, the conferment of which on the owner of the land acquired or a person having a right or interest in the land is not ^η

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A reversible upon failure by the acquiring authority to pay the amount of compensation within a reasonable time. Like any other legal right, its enforcement upon established violation may be secured by legal remedies ordinarily available in a court of law. To hold that failure by the acquiring authority to pay the amount of compensation for the land acquired within a reasonable time after the acquisition invalidates the acquisition, would defeat ^β the clear intention of the Legislature to define the acquisition as a political and legislative question on the one hand and the payment of fair compensation, which arises after acquisition has taken place, as a judicial question on the other. The contention is rejected.

The alternative relief sought raises the question whether this court has the ^ς legal basis of granting the order of *mandamus* sought in the terms directed to the acquiring authority. Ordinarily, an order of *mandamus* will be made to compel the performance of a public legal duty which the person, who is subject to the duty, has refused to perform in a case where the performance of the duty cannot be enforced by any other adequate legal remedy.

The duty to pay the amount of compensation to the owner of agricultural land ^δ acquired or to any other person, whose right or interest in the land has been acquired in terms of s 16B(2)(a) of the Constitution, is imposed on the acquiring authority under s 16(1) of the Act. The acquiring authority can only discharge that duty once the amount of compensation payable to a claimant has been assessed and fixed by the committee established in terms of s 29A of the Act. ^ε It is the duty of the committee to determine the compensation payable. The procedure the committee has to follow in the discharge of its duties is set out under s 29B of the Act.

The duty of the Minister, who is the acquiring authority, is to appoint members of the committee in terms of the power conferred on him by s 29A of the Act. He does not have a direct influence on the discharge by the committee of its ^φ functions under the Act. Under s 29D, the Minister can appeal to the Administrative Court against an assessment by the committee of the compensation payable to a claimant if he considers that in assessing the compensation the committee did not observe any of the principles prescribed under ss 21 or 29C of the Act.

^ς There is nothing in the application to show that the Minister refused to perform his duty to appoint members of the committee. It was not argued that the committee does not exist. The committee has not been cited as a party to these proceedings and no order of *mandamus* directed to it to compel it to perform the public legal duty imposed on it under s 29A of the Act has been sought ^η from the court. As the acquiring authority is not subject to the duty imposed

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on the committee, he cannot be found to have refused to perform the duty to ^α assess and fix the amount of compensation payable to the applicants within a reasonable time after the agricultural land was acquired by the State. There is no basis on which an order of *mandamus* may be made against the acquiring authority in this case. This last contention also fails.

The respondents did not seek costs should the application be unsuccessful, ^b perhaps because this was a constitutional matter raising questions of national importance. It appears to me that under the circumstances, the proper order to make is that each party bears its own costs.

The application is accordingly dismissed. Each party should bear its own costs. ^c

CHIDYAUSIKU CJ, ZIYAMBI JA, GWAUNZA JA & GARWE JA concurred.

Gollop & Blank, applicants' legal practitioners ^d

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

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MANN v REPUBLIC OF EQUATORIAL GUINEA (1) 2008 (1) ZLR 49 (H)

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Citation	2008 (1) ZLR 49 (H)
Case No	Judgment No. HH-01-08
Court	High Court, Harare
Judge	Makarau JP & Patel J
Heard	26 July 2007
Judgment	23 January 2008
Counsel	<i>J Samukange</i> , for the appellant <i>J Jagada</i> , for the respondent
Case Type	Extradition appeal
Annotations	No case annotations to date

Flynote

^c **Criminal procedure** — extradition — appeal — nature of — appeal in the wide sense — not necessary to rely on misdirections by court a quo

Criminal procedure — extradition — prima facie case — meaning of — what evidence is required before extradition may be ordered

Criminal procedure — extradition — when prohibited — prohibition where ^d extradition would conflict with international obligations — UN Convention on Torture — applicability of

Headnote

An appeal in terms of s 18 of the Extradition Act [*Chapter 9:08*] is an appeal in the wide sense, that is, the appeal court need not first establish any ^e misdirection on the part of the lower court. It re-hears the request as argued before, together with any additional considerations of a humanitarian nature that may be placed before it during the appeal hearing. The correctness or

otherwise of the approach adopted by the lower court in coming to the conclusion that it did are therefore not issues before the appeal court.

- ¶ Before a court can make a finding that there are substantial grounds for believing that the appellant will be subjected to torture or to cruel, inhuman or degrading treatment if extradited, there must be expert evidence concerning the efficacy and fairness of the justice delivery system in the country seeking extradition. A report, even from a body of international standing such as Amnesty International or the International ^g Bar Association, cannot be accepted without some further basis having been laid as to the authors of the report and their expertise in issues relating to torture and the legal system of the country in question.

Torture is universally proscribed at the international level, in instruments of ^h global, as well as regional, application. This has two consequences: (a)

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it imposes upon every State obligations which are applicable towards all ^a other States, which are then endowed with correlative rights; and (b) the principle against torture has evolved into a peremptory norm or *jus cogens*, that is, a principle endowed with primacy in the hierarchy of rules that constitute the international normative order. As such, it cannot be derogated or deviated from by any State or group of States. The overarching nature of the principle against torture imposes certain ^b additional duties on States. It requires States to do more than simply eschew the practice of torture. They must give more positive and wider effect to the principle in the fulfilment of their international obligations. Consequently, although Zimbabwe is not yet a party to the United Nations Convention against Torture and Other Cruel, Inhuman or ^c Degrading Treatment or Punishment, it nonetheless has an obligation not to extradite any person to a country where there are substantial grounds for believing that the person so expelled, returned or extradited would be in danger of being subjected to torture.

A *prima facie* case for the purposes of s 17 of the Act is established by evidence tending to prove the offence and linking the person whose ^d extradition is sought to the offence. It does not require evidence proving the guilt of the person concerned of the charged offence. A magistrate can only order the extradition of a person if such evidence is produced as would have, under the defunct procedure of preparatory examinations, justified the committal for trial of the person if the crime had been committed in Zimbabwe. The standard of proof required at this stage is ^e not such as to put the appellant to his defence during a trial or evidence upon which a court may convict, but evidence tending to link the appellant to the alleged offence and to which he has to proffer an answer when charged.

Cases cited ^f

A & Ors v Secretary of State for the Home Dept (No 2) [2006] 2 AC 221 (HL)

Agricultural Labour Bureau & Anor v Zimbabwe Agro-Industry Workers Union 1998 (2) ZLR 196 (S)

Bozimo Trade & Development Co (Pvt) Ltd v First Merchant Bank of ^g Zimbabwe Ltd & Ors 2000 (1) ZLR 1 (H)

Charuma Blasting & Earthmoving Svcs (Pvt) Ltd v Njainjai & Ors 2000 (1) ZLR 85 (S)

Cooper v Leslie & Ors 2000 (1) ZLR 14 (H)

Kaunda & Ors v President of the Republic of SA 2004 (5) SA 191 (T) ^h

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

Soering v United Kingdom (1989) 11 EHRR 439

Sultan v Fryfern Enterprises (Pvt) Ltd & Anor 2000 (1) ZLR 188 (H)

Legislation considered

Extradition Act [Chapter 9:08], ss 15, 17, 18 & 32

▫ International conventions considered:

African Charter on Human and Peoples Rights

European Convention on Human Rights

International Covenant on Civil and Political Rights, art 7

United Nations Convention on Torture, art 3

Case information

c *J Samukange*, for the appellant

J Jagada, for the respondent

Judgment

MAKARAU JP: The appellant, a foreign national, was arrested and prosecuted in Zimbabwe for violating the national laws regulating dealings in arms and ▫ munitions. He was sentenced to a term of imprisonment. Arising out of the charges and whilst the appellant was still serving his term of imprisonment in Zimbabwe, the respondent made a formal request to Zimbabwe in terms of the Extradition Act [*Chapter 9:08*] ("the Act"), for the extradition of the appellant. In its request, the respondent alleged that the appellant had illicitly dealt in ▫ arms and munitions in Zimbabwe as he was en route to the respondent where he had conspired to kill the Head of that State or to illegally change the Government of the respondent through unconstitutional means. The request was heard by a magistrates court sitting at Harare. At the end of the hearing, the court *a quo* granted the request, prompting the appellant to note this appeal before us in terms of s 18 of the Act.

▫ NATURE OF APPEAL

The point was raised and argued *in limine* that an appeal under s 18 of the Act is an appeal in the wide sense and this court does not first have to find a misdirection on the part of the court *a quo* to substitute its own decision in the matter. It was further argued that the appeal connotes a re-hearing of the ▫ request and the making of an order that the lower court should have made in the circumstances of the matter.

Section 18 of the Act reads:

"(1) Any person, including the government of the designated country ▫ concerned, who is aggrieved by an order made in terms of section

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seventeen may, within seven days thereafter, appeal against the order of ▫ the High Court which may, upon such appeal, make such order in the matter as it thinks the magistrate ought to have made.

(2) In addition to the jurisdiction conferred upon it in terms of subsection (1), in any appeal in terms of that subsection, the High Court may direct the discharge of the person whose extradition has been ordered if the High Court is of the opinion that, having regard to all the circumstances of the ▫ case, it would be unjust or oppressive to extradite such a person –

- (a) by reason of the trivial nature of the offence concerned; or
- (b) by reason of the lapse of time since the commission of the offence concerned or since the person concerned became unlawfully at large, as the case may be; or
- (c) because the accusation against the person concerned is not ▫ made in good faith in the interests of justice; or
- (d) by reason of the state of health or other personal circumstances of the person concerned."

The distinction between "wide" appeals and appeals in the narrow sense as raised in this appeal is not a novel argument in this jurisdiction. It is a ▫ distinction that is argued in this court regarding the determination of appeals from the refusal to grant bail by lower courts and in the Supreme Court regarding appeals from labour relations adjudicating bodies set up in terms of the Labour Act. The position was, in my view, succinctly clarified by McNally JA in *Agricultural Labour Bureau & Anor v Zimbabwe Agro-Industry ▫ Workers Union* 1998 (2) ZLR 196 (S) in the following words:

"Perhaps one can clarify the position by looking at the widely accepted classification of appeals as formulated by Trollip J in *Tickly & Ors v Johannes NO & Ors* 1963 (2) SA 588 (T), and approved by the

Appellate Division in South Africa in *S v Mohamed* 1977 (2) SA 531 (A) at 538 and again in what is now KwaZulu-Natal in a case similar on the facts to the present one, *Metal & Allied Workers Union v Min of Manpower* 1983 (3) SA 238 (N) at 242B-D.

The three classes of appeals, re-stated in the last of these cases, are:

1. an appeal in the wide sense, i.e. a complete rehearing of and fresh determination on the merits of the matter with or without additional evidence or information; ^g
2. an appeal in the ordinary strict sense, i.e. a rehearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong; ^h

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3. a review in which the question is not whether the decision was correct or not, but whether those who made it had exercised their powers honestly and properly.”

On the basis of the above, I am of the view that an appeal brought in terms of s 18 of the Act is an appeal in the wide sense. This is due to the language used in the section that gives the appeal court wide discretion to substitute its own ^b decision on the same facts that were before the lower court, in addition to granting power to the court to take into account other factors of a humanitarian nature. Thus, in my further view, in determining an appeal such as the one before us, the appeal court need not first establish any misdirection on the part of the lower court. It re-hears the request as argued before, together with any additional considerations of a humanitarian nature that may be placed before ^c it during the appeal hearing. The correctness or otherwise of the approach adopted by the lower court in coming to the conclusion that it did are therefore, not issues before this court.

The above is the approach we take in determining this appeal.

GROUND OF APPEAL

^d The appellant raised three main grounds on appeal why he should not be extradited to the respondent. Firstly, he contended that the lower court erred in holding that the respondent had established a *prima facie* case. Secondly, he contended that the court did not specifically address its mind as to whether Zimbabwe would be violating any of its international obligations should it ^e extradite the appellant to the respondent. Finally, he urged this court to take into account his failing health and to hold that it would be unjust or oppressive to have him extradited to the respondent.

The first two grounds of appeal are founded on the provisions of s 17(1) of the Act which provides guidelines to lower courts in determining when to ^f grant an order in favour of the requesting State. The section provides as follows:

“(1) Where a person has been brought before a magistrates court in terms of subsection (8) of section *sixteen* the court, if satisfied that –

- (a) the person concerned is the person named in the warrant under which he was arrested; and ^g
- (b) the extradition is not prohibited in terms of this Act; and
- (c) either –
 - (i) a *prima facie* case is established; or
 - (ii) in a case in which a record of the case has been submitted ^h in terms of the proviso to paragraph (b) of subsection (1)

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of section *sixteen*, that the record of the case indicates, ^a according to the law of the designated country concerned;

that the person concerned has committed the offence to which the extradition relates or that he has been convicted of such offence and is required to be sentenced or to undergo any sentence therefor in the designated country concerned, as the case may be; ^b

shall, subject to section *nineteen*, order that such person be extradited to the designated country concerned ...”

In casu, there is no dispute as to the identity of the appellant and the fact that the warrant of arrest produced by the respondent relates to the appellant. The first two grounds of appeal arise from whether the extradition of the appellant ^c to the respondent is prohibited in terms of the Act and, if

not, whether a *prima facie* case has been established by the evidence submitted by the requesting State.

It appears to me convenient to deal with the appeal on the basis of the above three contentions made on behalf of the appellant, in the order in which they appear in the legislation cited above. In other words, the first inquiry will be [Ⓓ] whether the extradition of the appellant is [Ⓔ] prohibited in terms of the Act. In my view, once that issue is determined against the extradition of the appellant, that will mark the end of the inquiry as the three pre-requisites laid out in s 17 of the Act are cumulative rather than disjunctive.

WHETHER THE EXTRADITION OF THE APPELLANT IS

PROHIBITED IN TERMS OF THE ACT

It is the appellant's contention that his extradition from Zimbabwe is prohibited in terms of the Act in that it will conflict with the obligations of Zimbabwe under various international and regional treaties. In particular, we have been urged to have regard to the International Covenant on Civil and Political Rights and [Ⓕ] to the African Charter on Human and Peoples Rights, to which Zimbabwe is a State party, as creating those obligations at both international and regional levels. Both instruments do not carry specific non-refouler provisions.

It is correctly submitted on behalf of the appellant that it is in terms of art 3 of the United Nations Convention against Torture and Other Cruel, Inhuman [Ⓖ] or Degrading Treatment or Punishment that specific prohibition against expelling, returning or extraditing a person to another State where there are substantial grounds for believing that the person so expelled, returned or extradited would be in danger of being subjected to torture is provided for.

Zimbabwe is not yet a party to the convention and has thus not assumed the [Ⓗ]

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[Ⓐ] obligations imposed by art 3 of the convention. By not voluntarily assuming the obligations set out in the UN Convention against torture, Zimbabwe may nevertheless have those obligations imposed upon it by the application of international customary law as fully explained in the judgment by Patel J, the draft of which I have had sight of and agree with. It is the position now, that certain human rights may be regarded, by their content and universal acceptance, [Ⓑ] as having entered into the realm of customary law and thus become applicable to nations that may not have assented to the particular instruments protecting these rights by virtue of the superiority of international customary law over all other laws. These rights include the prohibition of slavery, genocide and torture. See Malcolm N Shaw *International Law* 4 ed at p 204.

[Ⓒ] Having arrived at the conclusion that Zimbabwe has an obligation not to extradite any person to a country where there are substantial grounds for believing that the person so expelled, returned or extradited would be in danger of being subjected to torture, I will now proceed to deal with the issue of whether the apprehension by the appellant that, if extradited to the respondent, he is likely to be tortured is well founded.

Ⓓ WHETHER THERE ARE SUBSTANTIAL GROUNDS FOR BELIEVING THAT THE APPELLANT WILL BE SUBJECTED TO TORTURE OR TO CRUEL, INHUMAN OR DEGRADING TREATMENT IF EXTRADITED

The appellant has sought to rely on the Report presented by Mr Gustavo Gallon, a Special Representative for Equatorial Guinea to the UN Commission on Human Rights, a report by the International Bar Association on a fact finding mission conducted in 2003, a report by an observer of the International Bar Association on the trial of du Toit, and a report by Amnesty International on the same trial. All these reports were adduced into evidence before the magistrate conducting the hearing. The appellant also led *viva voce* evidence [Ⓕ] from Mr Andrew Chigovera, former Attorney-General of Zimbabwe and Commissioner on the African Commission for Human and Peoples' Rights.

Similar reports to those adduced into evidence in this hearing were adduced into evidence before Ngoepe JP in South Africa in the matter of *Kaunda & Ors v President of the Republic of South Africa* 2004 (5) SA 191 (T). In addition [Ⓖ] to the report by the International Bar Association of 2003,

the applicants before Ngoepe JP also relied on reports that had been compiled in 2004 by the Human Rights Committee of the General Council of the Bar of South Africa and a report by Mr Henning SC, of the office of the National Director of Public Prosecutions in South Africa, who visited Equatorial Guinea after the arrest ^H of certain South Africans in connection with the matter for which the

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extradition of the appellant is being sought. In treating the evidence adduced ^A in the from of the reports detailed above, Ngoepe JP was of the view that it did not constitute expert evidence of the efficacy and fairness of the justice delivery systems in both Zimbabwe and Equatorial Guinea and he declined to make declarations based on these reports which condemned the justice delivery systems in both countries. ^B

I am compelled to agree with the learned judge. It is generally accepted that the International Bar Association and Amnesty International are international bodies of standing. It is also generally accepted that they have dealt with matters relating to human rights for a considerable period. Despite the international standing of the International Bar Association, Ngoepe JP was not swayed to accept the report of 2003 as constituting expert evidence on the ^C efficiency and fairness of the justice delivery system in Equatorial Guinea. The same report was adduced into evidence before the trial court, without any further basis having been laid as to the authors of the report and their expertise in issues relating to torture and the legal system of Equatorial Guinea. While the report may not be false or biased, as alleged by the Attorney-General of Equatorial Guinea, it does not constitute expert evidence before the court for ^D the purposes of the law. The same observations apply to the report by Amnesty International.

In passing, I note that the reports paint a bleak picture of the justice delivery system in the respondent State and, if true, then the apprehension of the appellant that he will not be afforded a fair trial are well founded. It is, however, ^E my finding that the reports fall short of affording the court expert evidence on the fairness or otherwise of trials in the Equatorial Guinea and of the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the respondent State.

The appellant also adduced into evidence a report by Mr Gustavo Gallon, a ^F Special Representative for Equatorial Guinea to the UN Commission on Human Rights. The expertise of the UN in human rights issues is beyond dispute. The expertise of Mr Gallon on Equatorial Guinea was however not laid out, and in any event, the report was produced in 2001, depicting the conditions then. In my view, it can hardly constitute evidence of the state of things in 2007. ^G

As indicated above, the appellant led *viva voce* evidence from the former Attorney-General for Zimbabwe and Commissioner on the African Commission for Human and Peoples' Rights. His evidence was, in essence, to the effect that when he was Commissioner with the African Union, he would receive reports similar to the ones that were adduced into evidence by the appellant. ^H

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^A The contents of these reports did not therefore surprise him. With respect, the witness did not testify of any first hand experiences where the respondent State violated human rights as alleged by the appellant. His views that the appellant was unlikely to receive a fair trial were derived from the reports and others that he had received as Commissioner.

Again with respect, while the witness had spent a long time dealing with ^B human rights issues, his expertise on the human rights record and history of the respondent State was hardly set out. His knowledge of the alleged record of the respondent State appears to be limited to the reports that he read and, in my view, that barely places him above the court to which such reports have also been made available.

^C On the basis of the above, we are therefore, unable to hold that we have sufficient evidence before us that the appellant is at risk of being subjected to torture if extradited to Equatorial Guinea. It appears further that, while the appellant may have good grounds for fearing that he stands the risk of being tortured if extradited to the respondent, his apprehension stems from the reports that I have detailed above. The history depicted by the reports is, in ^D my view, to be viewed in light of the concessions made by the respondent's Attorney-General that not only will the respondent

appoint a judge from outside the respondent to try the matter, but it will open up the trial to international observers and will not seek the death penalty in the event that the appellant is convicted. These may be mere promises, but no evidence was placed before us that the respondent will not honour such promises. We therefore have no basis at law for not believing the respondent in this regard. The effect of the concession made by the respondent's Attorney-General is to minimize the risk that the appellant will be subjected to torture if extradited to the respondent.

PRIMA FACIE CASE

The Act provides in s 16 that the request for extradition submitted to the Minister must be accompanied by such evidence as would constitute a *prima facie* case in a court of law in Zimbabwe. The Act further provides in s 17 that the court hearing the request must order the extradition of the person concerned if it is satisfied that the two pre-requisites set out above have been met and, in addition, that a *prima facie* case has been established against the person whose extradition is sought.

It was contended on behalf of the appellant that the respondent had failed to establish a *prima facie* case against the appellant. In my view, the concept of a *prima facie* case is one of those legal concepts that are easier to recognize than to define. The concept eludes definition, not only due to the fact that it

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deals with subjective measures of the cogency of evidence presented before a trier of fact, but also because the term is used loosely in both civil and criminal proceedings without a distinction having been attempted. It appears to me that in civil cases, our courts have adopted the attitude that for interim protection by the court, in the form of an interdict pending the determination of some other suit between the parties, a *prima facie* case is established once a cause of action is established, even where the chances of the applicant to succeed in sustaining the cause of action are open to doubt. See *Bozimo Trade & Development Co (Pvt) Ltd v First Merchant Bank of Zimbabwe Ltd & Ors* 2000 (1) ZLR 1 (H); *Cooper v Leslie & Ors* 2000 (1) ZLR 14 (H); *Charuma Blasting & Earthmoving Services (Pvt) Ltd v Njainjai & Ors* 2000 (1) ZLR 85 (S).

That a *prima facie* case in civil suits for the obtaining of interim protection is simply the setting out of facts establishing a possible and plausible claim against the respondent, without the evidence necessary to prove such a claim, appears to me clearly from the following remarks by Chatikobo J in *Sultan v Fryfern Enterprises (Pvt) Ltd & Anor* 2000 (1) ZLR 188 (H):

"I have deliberately refrained from making definitive findings of fact because it may well be that further affidavits (if any are filed by the return date) or oral evidence may justify a different conclusion. At this stage I am concerned only with the question whether a *prima facie* case has been shown. I am satisfied it has."

It then appears to me that a different test is used when a *prima facie* case has been established by a plaintiff in a civil trial to avoid absolution from the instance being granted at the close of his or her case. The test requires the establishment of more than a cause of action. Evidence must be adduced to prove the cause of action and it must be so cogent as to enable a court to give judgment on it in favour of the plaintiff unless it is successfully rebutted. It is my view, that the test used to establish a cause of action at the end of the plaintiff's case is the same used to establish a case at the end of the prosecution case to avoid a discharge of the accused person. It is the adducing of evidence upon which a court may convict unless such evidence is rebutted. See *S v Kachipare* 1998 (2) ZLR 271 (S). Obviously, the different burdens of proof applicable in civil and in criminal proceedings apply in establishing *prima facie* cases in both proceedings. The test however appears the same to me.

While it is accepted that extradition proceedings are not criminal proceedings *per se*, it appears to me that the standard of when a *prima facie* case has been established as used in civil proceedings is not applicable in extradition.

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a proceedings, for the main reason that the powers granted to a magistrate conducting a hearing in terms of the Act are similar to the powers of a magistrate conducting a preparatory examination under the Criminal Procedure and Evidence Act [*Chapter 9:07*]: see s 17(4) of the Act) a procedure that is now defunct, having been deleted from the criminal procedure due to non-use.

I would venture to suggest that, by specifically granting to magistrates the b powers they enjoyed when conducting the now defunct preparatory examinations, and by directing them to "receive evidence in the same manner", the legislature intended that the test to be employed under s 17 of the Act as to when a *prima facie* case has been established must be similar to that which was used at preparatory examinations. I cannot envisage a situation where, c having granted magistrates powers to conduct extradition hearings as if they were conducting a preparatory examination, the legislature intended them to use tests other than the ones used at such proceedings. If this was its intention, it would have used specific language to that effect or would have defined what constitutes a *prima facie* case for the purposes of the section.

In commenting on the test used at a preparatory examination, John Reid- d Rowland *Criminal Procedure in Zimbabwe* had this to say at 9-16:

"At the end of a PE, the question which the magistrate has to answer is whether the evidence put before him by the prosecution and the defence raises a *prima facie* case against the accused. The magistrate does not have to be satisfied that he would convict on that evidence. The standard of proof that the prosecution must satisfy at a PE is thus a very low one."

e It thus appears to me that the standard of proof required at the close of a preparatory examination is somewhat lower than that required at the close of State case during a trial. It is trite that, at the close of the prosecution case, the trial court must be satisfied that it has before it evidence upon which it may convict the accused of the offence charged. The learned author has specifically f opined that such evidence is not necessary at the close of a preparatory examination, although he has used the term "*prima facie* case" without attempting to define the term. I would further hazard that a *prima facie* case for the purposes of s 17 of the Act is established by evidence tending to prove the offence and linking the person whose extradition is sought to the offence. It does not require evidence proving the guilt of the person concerned of the g charged offence.

In this regard, I am in agreement with the submissions made by Mr *Samukange* on behalf of the appellant, that a magistrate can only order the extradition of a person if such evidence is produced as would justify the committal for trial h of the person if the crime had been committed in Zimbabwe.

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Thus, the question that a court hearing a request to grant an extradition order a has to ask itself at the end of the hearing is whether it has received such evidence as would, in its opinion, justify putting the person concerned on trial.

At the hearing, Mr *Samukange* directed most of his challenges against the admissibility of certain documentary evidence that was produced by the respondent. In this regard, he was of the view that such was secondary b evidence and was not admissible in terms of s 32 of the Act.

It is in this regard that I do not agree with the submissions made by Mr *Samukange*. It is trite that, at a preparatory examination, the rules relating to the admissibility of evidence are somewhat more relaxed than at a trial. Thus, at a preparatory examination, evidence that would constitute hearsay evidence at the trial is admissible, as affidavits are generally admissible. Thus, the c admissibility of evidence at an extradition hearing is governed not only in terms of s 32 of the Act but also in terms of the Criminal Procedure and Evidence Act before the amendment.

In particular, Mr *Samukange* has sought to challenge the admissibility of the statements from the appellant and from Servaans du Toit on the technical d grounds that the statement by the appellant was not freely and voluntarily made, while that by du Toit was not authenticated in terms of s 32 of the Extradition Act.

In my view, even if the challenges against these two statements are sustained, there is still enough evidence establishing a *prima facie* case against the appellant. The oral evidence of Detective Chief Superintendent Madzingo e that he recorded a statement from du Toit in which the appellant was directly implicated cannot be challenged. The evidence of the Attorney-General of the respondent

that his country is in possession of information regarding the alleged offence and implicating the appellant cannot be challenged. Further, the statements of agreed facts in the trials of Mark Thatcher and Jacob Carlse in South Africa did not require authentication in terms of s 32 of the Act as F they were not originating from the respondent but from South Africa. Such statements implicate the appellant in the alleged offence and are admissible as they would have been admissible at a preparatory examination in this country.

It has been argued that Jacob Carlse may not be available to testify on behalf G of the respondent in that country. That, in my view, is beside the point. At this stage of the inquiry, the guilt or otherwise of the appellant is not in issue. We do not in this hearing have to be satisfied that there will be evidence upon which the appellant will be convicted of the offence. The evidence adduced by the respondent may not be forthcoming or may not be sufficient to sustain H

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A the charges but, in my view, it does establish a *prima facie* case for the purposes of having the appellant committed for trial if the offence had been committed in Zimbabwe. As discussed above, the standard of proof required at this stage is not such as to put the appellant to his defence during a trial or evidence upon which a court may convict, but evidence tending to link the appellant to the alleged offence and to which he has to proffer an answer when B charged.

On the basis of the above, we are of the view that a *prima facie* case has been established against the appellant.

ADDITIONAL CONSIDERATIONS

As an appeal court, we are enjoined by s 18(2) of the Act to determine whether C there are any additional considerations upon which we may bar the extradition of the appellant. At the time of the hearing of the inquiry before the court a quo, the appellant had developed a life-threatening hernia that then required immediate surgery. That was six months ago. It is hoped that in the time it has taken us to make a determination in this appeal, the condition has been suitably D attended to and has consequently reduced in its threat to the appellant's life. Additionally, in this regard, we note and take into account the contents of an affidavit dated 23 July 2007 and filed before this court. The affidavit is sworn to by a Dr Motu who is based at the Malabo Prison Hospital in Equatorial Guinea. In essence, Dr Motu certifies that the medical staff at Malabo Prison Hospital and staff at other hospitals in Malabo are fully competent to carry E out hernia operations. Without in any way attempting to downplay the appellant's medical condition, it is our view that his state of health is not such that, having regard to all the circumstances of the matter, it would be unjust or oppressive to extradite him to the respondent.

In the result, the appeal is dismissed.

PATEL J: One of the grounds of appeal in this matter raises an issue not E previously canvassed by our courts. This pertains to the status of the United Nations Convention against Torture of 1985 at international law and its impact on the law of extradition in Zimbabwe.

Article 3 of the Convention provides as follows:

- "1. No State Party shall expel, return ('refouler') or extradite a person to G another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant H considerations including, where applicable, the existence in the State

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concerned of a consistent pattern of gross, flagrant or mass violations A of human rights."

Also relevant for present purposes are the provisions of the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples Rights. Article 7 of the International Covenant prohibits the subjection of any person "to torture or to cruel, inhuman or degrading treatment or B punishment". In similar vein, art 5 of the African Charter enjoins respect for "the dignity inherent in a human being" and proscribes, *inter alia*, "torture, cruel, inhuman or degrading punishment and treatment". While both instruments are explicit in their rejection and condemnation

of torture *per se*, they are silent as to the non-refoulement principle expressly embodied in Article 3 of the Convention against Torture. ^c

Turning to our domestic law, Part III of the Extradition Act [*Chapter 9:08*] ("the Act") deals with the rendition of persons to and from designated countries, including the respondent State. Section 15 of the Act, in its relevant portion, stipulates that:

"No extradition to a designated country shall take place in terms of this Part – ^d

(a) if the grant of the request for extradition would conflict with the obligations of Zimbabwe in terms of any international convention, treaty or agreement;

..."

It is common cause that Zimbabwe is a party to the International Covenant and ^e the African Charter and that it is consequently obligated to adhere to the provisions of these two august instruments. It is also not in dispute, despite Mr *Jagada's* erroneous concession to the contrary, that Zimbabwe has neither signed and ratified nor acceded to the Convention against Torture. Zimbabwe is not alone in its non-adhesion to the Convention. There are many ^f other States that have not as yet subscribed to the Convention or that have done so with reservations. In any event, the question that arises in the present context is this: does the fact that Zimbabwe is not a party to the Convention against Torture entitle it to disregard the requirements of art 3 and extradite an alleged offender to a State where he would be in danger of being subjected to torture? In my view, the answer to this question must be predicated on an ^g analysis of the principle against torture in the international sphere.

It is axiomatic that every treaty or convention must be interpreted and applied in a wider international context. It is also incontrovertible that torture is universally prohibited at the international level. This prohibition is encapsulated not only in instruments of global application, *viz.*, the Universal Declaration ^h

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A of Human Rights of 1948 and the International Covenant of 1966, but also in regional human rights instruments applicable in Europe, Latin America and Africa. It was further restated by the United Nations General Assembly in its Resolution 3452 (XXX) of 1975 and eventually culminated in art 2 of the Convention against Torture. See *A & Ors v Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221, at 254-259 (a decision of the House of Lords).

The first corollary of the universal proscription of torture is that it imposes upon every State's obligations which are applicable *erga omnes*, that is to say, towards all other States, which are then endowed with correlative rights. The second corollary is that the principle against torture has evolved into a ^c peremptory norm or *jus cogens*, *viz.*, a principle endowed with primacy in the hierarchy of rules that constitute the international normative order. As such, it cannot be derogated or deviated from by any State or group of States. See the judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Furundzija* (unreported) case No. IT 95-17/I 10 (1998), paras 147-157, cited in the case of *A & Ors supra* at 259-262.

^d The overarching nature of the principle against torture imposes certain additional duties on States. It requires States to do more than simply eschew the practice of torture. They must give more positive and wider effect to the principle in the fulfilment of their international obligations. In this respect, the decision of the European Court of Human Rights in *Soering v The United ^e Kingdom* 11 EHRR 439, at paras 80-91, is particularly instructive and highly persuasive. In interpreting art 3 of the European Convention on Human Rights *vis-à-vis* art 3 of the Convention against Torture, the Court held as follows, at para 88:

"The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an ^f essentially similar obligation is not already inherent in the general terms of art 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention ... were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. ^g Extradition in such circumstances, while not explicitly referred to in the brief and general wording of art 3, would plainly be contrary to the spirit and intendment of the article ..."

I fully concur with, and respectfully adopt, this holistic approach to the ^h obligations of States with respect to the principle against torture. In my view

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the principle entails the duty of States to interpret and implement the requirements of human rights treaties that they have subscribed to in a manner that affirms and advances, rather than one that negatives or dilutes, the principle. Accordingly, the general prohibition against torture contained in art 7 of the International Covenant and in art 5 of the African Charter must be construed to incorporate, by necessary intendment, the principle of non-refoulement embodied in art 3 of the Convention against Torture. It follows ^B that, in order to comply with its general obligations against torture under the International Covenant and the African Charter, Zimbabwe is required to abide by, and take into account, the specific prohibition against extradition to a State where there exists the danger of the person extradited being subjected to torture. This is so notwithstanding that Zimbabwe is not a party ^C to the Convention against Torture. To construe the general prohibition against torture otherwise would inevitably operate to render the prohibition nugatory and illusory on the international plane.

To conclude, I take the view that the extradition of any person to a designated country where he or she would be placed in danger of being subjected to torture would conflict with the obligations of Zimbabwe in terms of the ^D International Covenant and the African Charter. It would therefore, be contrary to, and prohibited by s 15(a), as read with s 17(1)(b) of the Act. In any event, insofar as concerns the appellant *in casu*, I am inclined to agree with the Judge President, albeit tentatively, that the appellant has failed to adduce the evidence necessary to sustain his appeal on the ground that he would be ^E subjected to torture in the respondent State. In addition, I fully agree that the respondent State has established the requisite *prima facie* case against the appellant in terms of s 17(1)(c)(i) of the Act. I am also satisfied that there are no additional considerations under s 18(2) (d) of the Act precluding the appellant's extradition to the respondent State. ^F

In the result, the appeal must be dismissed.

Byron Venturas & Partners; appellants' legal practitioners

Attorney-Generals Office, respondent's legal practitioners

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ZIMBABWE DEVELOPMENT BANK & ANOR v SCOTT & ORS 2008 (1) ZLR 65 (H)

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Citation	2008 (1) ZLR 65 (H)
Case No	Judgment No. HH-25-08
Court	High Court, Harare
Judge	Gowora J
Heard	27 January 2007
Judgment	23 January 2008
Counsel	<i>E W W Morris</i> , for the applicants <i>A Mugandiwa</i> , for the first and second respondents
Case Type	Opposed application

Annotations

No case annotations to date

Flynote

Companies — liquidation — liquidation and distribution accounts — when may be re-opened — account confirmed and creditors already paid — account may not be re-opened — procedure to be followed where person aggrieved by decision of Master — necessary to bring matter on review **C** — need to follow normal review procedures

Practice and procedure — affidavit — signatory to — authority to depose to an affidavit — authority to depose to an affidavit must be established.

Practice and procedure — review — review of Master's decision under s 296 of Companies Act [Chapter 24:03] — need to comply with r 259 of High Court Rules

Headnote

The applicants sought to have the liquidation and distribution accounts of a company which had been placed in liquidation set aside and re-opened. They had, in August 2003, petitioned that the company be placed under liquidation. The first respondent was appointed liquidator. They proved **E** claims which were stated in US dollars. The second respondent paid out the creditors' proven claims in local currency. The applicants returned the cheques, claiming that the second respondent had erred by using a conversion rate against the US Dollar which was prevailing at the time of liquidation instead of the rate prevailing when payment was actually effected. The applicant therefore sought an order to have the distribution **F** account re-opened and for the recalculation of the Zimbabwe dollar equivalent of their claims.

Held, that the applicants could only rely on the provisions of the Companies Act [Chapter 24:03] for whatever relief they sought. The effect of placing a company in liquidation is to replace contractual rights that **G** existed prior to liquidation with special rights created and governed by the Companies Act. They had to look to the Act in seeking redress in the event that the liquidator had not performed the duties required of him by the Act.

Held, further, that the right they sought to be exercised was derived from s **H** 283 of the Act. In terms of s 296, any person aggrieved by any decision,

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ruling, order, appointment or taxation of the Master under the Act may **A** bring it under review by the court. As the Act does not make provision for the manner in which the review proceedings must be launched, proceedings for review have to be done in accordance with the High Court Rules. Under the Rules, an application for review must be brought within a period of eight weeks from the date on which the suit, action or **B** decision being complained of occurred. The applicants had only launched proceedings over a year after becoming aware of the decision.

Held, further, that *in casu*, all the creditors had been paid and the account was confirmed some fourteen or so months before the applicants thought of launching proceedings. Before a distribution account can be set aside it must be re-opened, and the applicants can only have it re-opened in **C** terms of the Act. Section 283 of the Act precludes the re-opening of a final distribution account where there has been payment of a dividend. A court is only allowed to open an account where no dividend has been paid. Even an argument based upon a *restitutio in integrum* must fail where a dividend has been paid.

Held, further, that the basis upon which a signatory to an affidavit is **D** authorized to depose thereto must be established before a court can place reliance thereon.

Cases cited

Barclays Bank Zimbabwe Ltd v Sheriff of Zimbabwe & Anor 2000 (2) ZLR 143 (S) **E**

Central Africa Building Society v Pierce NO 1969 (1) RLR 90 (A); 1969 (1) SA 445 (RA)

RB Ranchers (Pvt) Ltd v Est McLean 1985 (2) ZLR 24 (H)

Uzande v Katsande 1988 (2) ZLR 47 (H)

Wispeco (Pty) Ltd v Herrigel NO & Anor 1983 (2) SA 20 (C) F

Legislation considered

Companies Act [Chapter 24:03], ss 283 and 296

High Court Rules 1971 (RGN 1047 of 1971), r 259

Case information

E W W Morris, for the applicants G

A Mugandiwa, for the first and second respondents

Judgment

GOWORA J: The applicants have jointly approached this court for an order in the following terms:

1. That the confirmation of the liquidation and distribution account by the third respondent in respect of Shagelok Chemicals (Pvt) Ltd (in liquidation) H

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A be and is hereby set aside.

2. That the third respondent be and is hereby directed to re-open the account referred to above for inspection for a period of 14 days with effect from the date of judgment in this matter.
3. It is hereby declared that the exchange rate to be applied regarding any B conversion of foreign currency on the applicants' claim regarding Shagelok Chemicals (Pvt) Ltd (in liquidation) is the going rate on the date of payment.
4. That the first and second respondents jointly pay the costs of suit on a legal practitioner and client scale.

The background to this application is based on the following facts. C On 23 August 2003, the applicants jointly petitioned with this court that a company called Shagelok Chemicals (Pvt) Ltd be placed under liquidation. The first respondent was appointed liquidator for the process of liquidation of Shagelok. At a creditors' meeting held before the third respondent (the Master) the applicants proved claims as follows: US\$ 1 600 000 for the first D applicant and US\$1 944 757.70 for the second applicant. In the execution of his duties the first respondent disposed of assets belonging to Shagelok and from the proceeds paid out the creditors' proven claims. The second respondent dispatched cheques in the sums of Z\$35 789 794.20 for the first applicant and Z\$36 338 172.05 for the second applicant. The applicants returned the payments on the grounds that the second respondent had erred by using a conversion E rate against the US dollar which was prevailing at the time of liquidation instead of the rate prevailing when payment was actually effected. To this end, the applicants were therefore seeking that the court grant the order to have the distribution account re-opened and for the recalculation of the Zimbabwe dollar equivalent of their claims. The fourth to seventh respondents were concurrent creditors in the liquidation process. They have not responded to F the application. The Master has not filed any papers in response to the order being sought.

The respondents have, in addition to opposing the matter on its merits, raised preliminary issues which I must dispose of before I delve into the merits of the application. The first issue relates to whether or not the second applicant is G properly before me. In the founding affidavit deposed to by one Dumisani Sibanda, a credit controller in the employ of the first applicant, the second applicant is described as a division of the World Bank. The deponent, it is common cause, is not an employee of the second applicant and there has been no document filed which authorizes the deponent to depose to an affidavit on H behalf of the second applicant. Attached to the papers filed by the applicants

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is a document titled "Affirmation of Affidavit", signed by one Michael Tiller A at Johannesburg. He describes himself as an authorized signatory and in the document he confirms that Dumisani

Sibanda is authorized to depose to an affidavit on behalf of the second applicant. There is no indication in the affirmation as what position the "authorized signatory" holds in the second applicant and whether or not he has the capacity to give authority to Sibanda to represent the applicant. I have not been appraised as to the exact nature of the "affirmation", which does not pretend to be a resolution by the second applicant. In the premises, I must uphold the objection of the respondents as to the capacity of Sibanda to represent the second applicant in these proceedings and I accordingly find that the second applicant is not properly before me. ^c

The respondents have also raised the question of the citation of the second respondent as a party and have contended that the first respondent was appointed as a liquidator in his personal capacity and therefore should be the only party cited in connection with the liquidation process. They argue that there is no substantive relief sought against the second respondent and that accordingly its inclusion in this suit is irregular if the contention is that the ^d second respondent was acting as an agent for the first respondent. It is not pertinent in my view, that I determine this point as nothing turns on it. Whether or not the second respondent has been incorrectly cited, the fact of the matter is that it is before me and in the event that I grant the relief sought by the applicants, such relief would only be effective against the first and third ^e respondents. In the event an order for costs would then follow for the benefit of the second respondent, if incorrectly cited.

The respondents have questioned the nature of the relief sought by the applicants and, whether if what is sought is a review, the applicants have complied with the High Court Rules in so far as time limits relating to reviews are concerned and the requirements of the rules in so far as the form of the ^f application is concerned. The applicants are of the view that what they seek is not a review but an order setting aside the confirmation of the liquidation and distribution account.

The application is predicated on the manner in which the first respondent is alleged to have performed his duties as a liquidator of Shagelok and it is ^g obvious therefore that the applicants can only rely on the provisions of the Companies Act for whatever relief they seek. The effect of placing a company in liquidation is to replace contractual rights that existed prior to liquidation with special rights created and governed by the Companies Act [Chapter 24:03] (the Act). See *Central Africa Building Society v Pierce* 1969 ^h

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Gowora J

^a (1) SA 445 (R.AD). The rights of creditors against a company in liquidation are derived from the provisions of the Act and it follows, therefore, that the applicants must look to the (the Act) in seeking redress in the event that the first respondent has not performed his duties as is required of him by the Act. Strangely, the applicants have not referred to any provision in the Act on which they seek reliance. It has been left to the respondents to point to the ^b pertinent sections of the Act which would be operable in the circumstances.

According to the respondents, the right sought to be exercised by the applicants is derived from s 283 of the Act and further that the procedure for the exercise of those rights has been prescribed in terms of the Act. Therefore, contend the respondents, the applicants should have followed the outlined ^c procedure in seeking to have those rights enforced by this court. Critically, the respondents argue, the applicants ought to have proceeded by way of a review, which they have not done, and further that it is not clear what procedure they have adopted in seeking redress.

The Act, in s 296, provides as follows:

^d "(1) Any person aggrieved by any decision, ruling order appointment or taxation of the Master under this Act may bring the same under review by the court and to that end may apply to the court by motion, after due notice has been given to the Master and to any person whose interests are affected:

Provided that where the general body of creditors or contributors is ^e affected notice to the liquidator shall be notice to them.

(2) ... not applicable

(3) Nothing in this section shall authorize the court to re-open any duly confirmed account or plan of distribution or of contribution otherwise than as provided for in section two hundred and eighty three."

Apart from providing for the bringing of a review of the decision of the Master ^f under the said section, the Act does not make provision for the manner in which the review proceedings must be launched. The High Court, in the exercise of its functions, has made provision for rules of court which govern its procedures. It stands to reason therefore that the proceedings for review have to

done in accordance with those rules as the Act does not provide for ^g the procedure to bring the decision of the Master for scrutiny under a process of review. Accordingly, the applicants were obliged to comply with Order 33 r 259, which requires that an application for review be brought within a period of eight weeks from the date on which the suit, action or decision being ^h complained of, occurred.

2008 (1) ZLR p70

Gowora J

In casu, the final liquidation and distribution account, which is the subject ^a matter of these proceedings, was confirmed by the Master on 29 September 2004. The applicants became aware of the decision on 4 October 2004, yet it was not until 18 November 2005 that an application to have the decision to confirm the account set aside was launched. Clearly, the applicants are out of time in so far as the review of the confirmation of the account is concerned. ^b They have not, as one would have assumed, sought condonation for the failure to abide by the provisions of Order 33 despite an indication in the opposing papers that the application was out of time in so far as the Rules were concerned. I am inclined to think that, in approaching this matter, the applicants and their legal practitioners did not have recourse to the Act, because, if they had, they would have noted that the correct way of seeking ^c redress was by filing an application for review. Their failure to do so can only mean they had not read the Act.

The re-opening of an account, in terms of the Act, is provided for in terms of s 283. The relevant portions of the section are in following terms:

“When an account has been open to inspection as herein-before prescribed, ^d and —

- (a) no objection has been lodged; or
- (b) (not applicable)
- (c) (not applicable)

the Master shall confirm the account and his confirmation shall have the effect of a final sentence, save as against such persons as may be ^e permitted by the court to re-open the account before any dividend has been paid thereunder.”

As matters stand in this application, all the creditors have been paid and, in fact, as pointed out by the respondents, the account was confirmed some fourteen or so months before the applicants thought of launching these ^f proceedings. There is no doubt that the section precludes the re-opening of a final distribution account where there has been payment of a dividend. The court is allowed to open an account where no dividend has been paid. In this jurisdiction the question has not yet come up for discussion by the court. I am therefore indebted to the respondents for providing the court with an authority from South Africa. In *Wispeco (Pty) Ltd v Herrigel NO & Anor*, 1983 (2) SA 20 (C) ^g the court therein had to consider an application for the re-opening of an account in an insolvent estate. The applicant, one of the creditors to the estate had submitted an account which had been accepted. The claim was presented as a preferent claim as it had been secured by a general covering cession and pledge but when the claim was submitted to the Master by the ^h

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Gowora J

a trustee it was reflected as a concurrent one. A query was raised with the trustee who gave an explanation to the Master. The account was thereafter advertised for inspection but no objections were lodged and accordingly the Master confirmed the account. An hour after such confirmation it became known to the applicant that the account had been confirmed and that cheques for dividends had been prepared and sent out for posting to the creditors. The ^b applicant filed an application for a rule *nisi* for the respondents to show cause on the return day why the confirmation of the account should not be set aside and for the account to be re-opened. At issue in the application was the meaning to be ascribed to s 112 of the Insolvency Act 24 of 1936 of South Africa, which provided that when a trustee account had been open to inspection by creditors and no objection had been made, or having been made, ^c the account was amended or an objection, once made, had been withdrawn, then the Master shall confirm such account and that such confirmation shall be final save as against a person who may have been permitted by the court before any dividend had been paid under the account, to re-open it. The provision is almost identical to s 283 of our Companies Act. After reviewing ^d a number of authorities, the court found that once a dividend had been paid under an account the court was precluded from re-opening the account. ¹ In so far as the payment of the

dividend is concerned, it matters not whether payment has been made to one or more creditors; once a payment having been made, the court is precluded from opening the account. I have not been able to have sight of Mars *The Law of Insolvency* on which reliance was sought ^ε by the respondents in opposing the application. I have had occasion to peruse *The Law of Insolvency* by Catherine Smith 3 ed. At p 272 of her book, the learned author states that once a dividend has been paid under an account, the court is precluded from re-opening the account. The learned author goes further to state:

“The intention of the legislature was to ensure that once an account has been confirmed, without objection prior to confirmation, and a dividend has been paid, the trustee should not be put in a position subsequently of having to try to recover that dividend from those to whom he has made distribution as required of him by the Act. There must be actual payment of a dividend and such payment has not taken place where dividend cheques, although posted to creditors were stopped by the trustee; ^ς accordingly a creditor was not precluded from applying for an order for the re-opening of an account by the mere posting of cheques by the trustee. One cannot ignore the confirmation of the account and the

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Gowora J

payment of dividends. The extent of the relief which can be granted in ^α terms of s 111 is limited; it grants an aggrieved party the right to contest the master's decision prior to confirmation of the account and payment of dividends. After confirmation and payment of dividends the court has no power to grant the relief envisaged in s 111(2)(a) read with s 112.”

As I have already indicated above the applicants did not attempt to invoke the provisions of the Act in seeking redress herein. They have applied for an ^β order for *restitutio in integrum* on the basis that there is a just cause for the relief being sought. Despite this matter having arisen as a result of the perceived irregularities in the manner in which the liquidator performed his duties, they have completely overlooked the provisions of the Act and whether or not such relief is provided for in the Act. The authorities that they ^γ seek to rely are not, in my view, apposite to the resolution of this matter. The case of *Uzande v Katsande* 1988 (2) ZLR 47 (H) concerned an application for rescission of a judgment granted in default and the court had to consider what constituted just cause for the granting of the application for rescission. The case of *R B Ranchers v Estate McLean* 1985 (2) ZLR 24 is also of no assistance to the application as the court did not go into the criteria for the re-opening ^δ of an account. The court focused on the alleged breach of contract, implied terms in the contract and the payment of cheques under the Bills of Exchange Act [Chapter 277 of 1974]. In *Barclays Bank of Zimbabwe Ltd v Sheriff of Zimbabwe & Anor* 2000 (2) ZLR 143 (S) the court had to consider an appeal on the issue as to whether it was permissible for a court, and if so in what circumstances, to set aside a plan of distribution prepared by the Sheriff ^ε subsequent to a sale in execution, after confirmation by the Sheriff of such account and implementation thereof in terms of the rules. In considering the appeal, Gubbay CJ had recourse to cases on insolvency and acknowledged that the principles applicable to the confirmation of distribution accounts in the law of insolvency served as guideline. In *Central Africa Building Society v Pierce* NO 1969 (1) SA 445 at 455H Beadle CJ stated thus:

“... There is no doubt that under the provisions of s 250 of the Companies Act [Chapter 223], the confirmation of a distribution account has the effect of a final sentence; it has precisely the same effect as a judgment of a court, and, before another court can go behind such a judgment, an application must be made to have it set aside.” ^ς

Before, therefore, the distribution account can be set aside it must be re-opened, and the applicants can only have it re-opened in terms of the Act. The court is precluded, in terms of the Act, from re-opening an account once a dividend has been paid. The purpose of the Act is to provide for a speedy liquidation and distribution of monies to creditors, which is why the court is ^η

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Gowora J

^α in terms of the Act precluded from re-opening the accounts once there has been confirmation of such by the Master. Before payment, a person wishing to have an account set aside has to show that his failure to object to the account was induced by *justus error* or by fraud. Once an account has been confirmed by the Master, it has the effect of a final sentence and cannot be re-opened by the court under the provisions of the Act. The question as to ^β whether there could be merit for the re-opening of the account on the grounds of a *restitutio in integrum* do not here arise due to the clear provisions of the Act in prohibiting the re-opening upon the confirmation of the account and

payment of any dividend. For purposes of this matter, it is not necessary that I determine whether or not those grounds would have assisted the applicants, in view of the finding that the payment of a dividend precludes the court from re-opening the account. The court in fact has no discretion to re-open the account once the dividend has been paid. The application for the re-opening of the account is therefore, not properly premised.

The parties have gone into the issue whether or not *concursum creditorum* had been reached. Having determined that the court has no discretion to re-open the account, I do not see how I can go ahead to determine the question of a *concursum creditorum*. That issue would, in my view, arise if I had found that it was necessary to re-open the account. A finding that the account cannot be re-opened is, in my view, the end of the matter. To go into the question of *concursum creditorum*, would, in the circumstances, be to embark on an exercise for the sake of the same. That is not, in my view, necessary in this matter.

The application was not well taken and is hereby dismissed. The applicants are ordered to pay the respondents' costs.

Sawyer & Mkushi, applicants' legal practitioners

Wintertons, first and second respondents' legal practitioners

1 At p 26E-F

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MUNGOFA v SANDE & ANOR 2008 (1) ZLR 74 (H)

2008 (1) ZLR p74

Citation	2008 (1) ZLR 74 (H)
Case No	Judgment No. HH-29-08
Court	High Court, Harare
Judge	Chatukuta J
Heard	21 September 2006
Judgment	23 January 2008
Counsel	<i>J Dondo</i> , for the applicant <i>A Muchadehama</i> , for the first defendant
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Practice and procedure — parties — joinder of — claim in reconvention by c defendant in main action — not permissible to join another party as co-defendant in the claim in reconvention

Headnote

The applicant was the defendant in an action being brought by his wife (the second respondent in this application) for divorce. He filed a counter-claim ^D against her and cited the first respondent as co-defendant, claiming damages from the first respondent for his alleged adultery with his (the applicant's) wife.

Held, that joinder of a party in terms of r 87 of the High Court Rules is a joinder to the main claim. The cause of action remains the same, but there is an addition of either a co-plaintiff or a co-defendant. ^E

Held, further, that a claim in reconvention can only be made against the plaintiff in the action. Such a claim is dependent upon allegations which would defeat the plaintiff's claim in convention. In order for the applicant to be able to join the first respondent as a co-defendant in the claim in reconvention, the first respondent must have had a basis for defending the claim for divorce that was brought by the second respondent. ^F Rule 120 of the High Court Rules does not provide for a claim in reconvention against any person other than the plaintiff in convention. In any event, the applicant's counter-claim for divorce on the basis of adultery could not strictly be termed a counter-claim in light of the Matrimonial Causes Act [Chapter 5:13], since fault is no longer a pre-requisite for divorce (before the amendment of the Act in 1985, fault and ^G misconduct were relevant to the existence of grounds for divorce and it was possible to counter-claim for divorce on the basis of a different fault cited by the plaintiff in her or his claim for divorce). Joinder of the first respondent was thus not competent. ^H

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Cases cited ^A

Baker v Baker 1930 CPD 230

Eorfino v de Pretto (Eorfino intervening) 1959 (3) SA 787 (W)

Marimba v Marimba 1999 (1) ZLR 87 (H)

Soundprops 1160 CC & Anor v Karlshavn ^F *Farm Partnership & Ors* 1996 (3) SA 1026 (N) ^B

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 87(2) & 120

Case information

J Dondo, for the applicant

^c *A Muchadehama*, for the first defendant

Judgment

CHATUKUTA J: The second respondent instituted proceedings for divorce and ancillary relief in case No. HC 1195/04 against the applicant. The applicant filed a counter-claim in which he cited the first respondent as the second defendant in that matter. He claimed from the first respondent adultery ^D damages, alleging that the first respondent was the man with whom the second respondent had committed adultery. During the pre-trial conference, the court queried the propriety of joining the first respondent in a counter-claim. The applicant now seeks, in terms of Order 13 r 87 of the High Court Rules, to join the first respondent to HC 1195/04.

^E Mr *Dondo*, for the applicant, submitted that it was proper and convenient to join the first respondent to the proceedings in case No. HC 1195/04 for the avoidance of multiplicity of actions. This would be cost saving. Mr *Dondo* submitted that a counter-claim stands as summons and declaration. Therefore, the applicant was *dominus litis* in respect of the counter-claim. He submitted that such a joinder was consistent with r 276 of the High Court Rules, which ^F allows for the service of summons and any pleadings upon a paramour who is cited in the summons and pleadings.

The applicant further submitted that the first respondent did not proceed by way of exception but made a request for further particulars. He filed a plea and a counter-claim claiming defamation damages. It was contended that this was ^g an indication that the first respondent had not objected to being joined to the proceedings.

Mr *Muchadeham*, for the first respondent, submitted that the first respondent had not been properly joined and it still was not proper to join him to case No. HC 1195/04 in a counter application. He submitted that the applicant did not ^h institute proceedings in case No. HC 1195/04 and therefore he could not be

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the *dominus lituis* in that case. The applicant was attempting to clothe a wrong ^a joinder with legality without having withdrawn the claim against the first respondent first. It was further submitted that the first respondent did not have any interest in the divorce proceedings and did not want to be part of proceedings. He would therefore, be inconvenienced by required sit in during the divorce proceedings. The first respondent submitted that he filed pleadings ^b in the main case out of an abundance of caution.

The first respondent prayed for costs on a high scale against the applicant. It was submitted that the propriety of joining the first respondent in the action by the second respondent was first raised by the first respondent in his plea to the main action. It was again raised by the court during the pre-trial conference. The applicant still persisted with his application. ^c

The main issue for determination is, therefore, whether it is competent for the applicant to join the first respondent as a co-defendant by way of a counter-claim.

Order 13 r 87(2) of the High Court Rules 1971 permits the joinder of any person to any proceedings. Rule 87(2) provides: ^d

“(2) At any stage of the proceedings in any cause or matter, the court

may on such terms as it thinks just and either of its own motion or on application –

- (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, cease to be a party; ^e
- (b) order any person who ought to have been joined as a party or whose presence before the court *is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party* (my emphasis).

The joinder envisaged in r 87 is a joinder to the main claim. In other words, the ^f cause of action remains the same, but there is an addition of either the plaintiff or the defendant. In this case, the joinder of a co-defendant would be to “ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon”. The applicant was emphatic that he did not seek an order to join the first respondent to the main claim but ^g as a co-defendant to the counter-claim.

It was difficult for this court to fathom how the first respondent can be a co-defendant to either the main claim or the counter-claim. In relation to the counter-claim, r 120 makes clear the effect of a counter-claim or claim in reconvention. The rule provides: ^h

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^a“(1) The defendant in an action may set up by way of claim in reconvention any right or claim he may have against the plaintiff, and such claim in reconvention shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action both on the original claim and on the claim in reconvention.”

The effect of the counter-claim is that it becomes a cross-action, where the ^b plaintiff in the main matter becomes the defendant and the defendant who has counter-claimed becomes the plaintiff.

The general principle on whether or not the applicant can counter-claim as he has done is set out in Nathan and Barnett *Rules and Practice in the Supreme Court of South Africa* 1 ed at p 49 where it is stated:

^c“A defendant cannot claim in reconvention against any other party (e.g. a defendant) than the plaintiff in the action.”

This is premised on the understanding that a reconventional claim is dependent upon an allegation which would defeat the plaintiff's claim in convention. Therefore, in order for the applicant to be able to join the first respondent as a co-defendant, the first respondent must have a basis for defending the claim ^d for divorce that was brought by the second respondent.

The present matter is on all fours with *Soundprops 1160 CC & Anor v Karlshavn Farm Partnership & Ors* 1996 (3) SA 1026 (N). In that case, the applicants, as plaintiffs, had issued summons against the first respondent, a partnership comprising 20 individuals who included the second and third respondents, as defendants, for the payment of moneys which had been ^e advanced as loans to the partnership. Only the second and third respondents and one other partner of the first respondent, defended the action. The second and third respondents filed a joint plea and, together with their plea, they had filed a document in which they claimed certain relief from the remaining partners. The document cited the second and third respondents as the first and second defendants and the remaining partners as the third to twentieth ^f defendants. The court held that the claim in reconvention by the second and third respondents was irregular because it was directed, not against the plaintiff, but by two defendants against their co-defendants. Page J had this to say at 1031B-G:

"In support of the application, counsel for the applicants has correctly pointed out that the claim is not a claim in reconvention since it is directed, ^g not against a plaintiff, but by two defendants against their co-defendants. The weight of authority was that it was not competent for one defendant to join a co-defendant as a defendant in a claim in reconvention; but this matter is now regulated by r 24, which deals with claims in reconvention in general. Rule 24(2) provides the following:

^h 'If the defendant is entitled to take action against any other person and

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the plaintiff, whether jointly, jointly and severally, separately or in the ^a alternative, he may with the leave of the court proceed in such action by way of a claim in reconvention against the plaintiff and such other persons, in such manner and on such terms as the court may direct.'

It is apparent on a proper reading of this rule that it is limited to a claim in reconvention against the plaintiff and the other person and cannot be invoked where there is no claim in reconvention against the plaintiff. It ^b also requires the leave of the court.

It seems clear that the only means whereby the respondents could permissibly bring a claim against their co-defendants in the action in the absence of any counterclaim against the plaintiff would be by virtue of the provisions of r 13, which regulates third party procedure. Rule 13(1) provides the following: ^c

'Where a party in any action claims –

- (a) as against any other person not a party to the action (in this Rule called "a third party") that such party is entitled, in respect of any relief claimed against him, to a contribution or indemnification from such third party, or ^d
- (b) any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between such party and the third party, and should properly be determined not only as between any parties to the action but also as between such parties and the third party or between any of them,

such party may issue a notice, hereinafter referred to as a third party ^e notice, as near as may be in accordance with Form 7 of the First Schedule, which notice shall be served by the sheriff'."

Whilst the South African rule permits a defendant to file a cross application against the plaintiff and any other person, the equivalent rule in our jurisdiction, r 120, cited above, does not provide for a claim in reconvention on other person other than the plaintiff. Although *Soundprops 1160 CC & Anor v Karlshavn ^f Farm Partnership & Ors* dealt with the joinder of defendants who were already co-defendants, the general principle, enunciated in that case apply to the present case and more particularly so where the applicant seeks to introduce a third party. The applicant filed a counter-claim against the second respondent in relation to the claim raised for divorce and ancillary relief against the applicant. The counter-claim which seeks to introduce the first respondent ^g as a defendant cannot be considered as a counter-claim to the first respondent's on the grounds that the applicant does not seek any relief against the first respondent.

In any event, it should be noted that the applicant's counter-claim for divorce on the basis of adultery cannot be strictly termed a counter-claim in light of ^h

2008 (1) ZLR p79

Chatukuta J

a the Matrimonial Causes Act [Chapter 5:13]. Prior to amendment of that Act in 1985, fault and misconduct were relevant to the existence of grounds for divorce. Therefore, it was possible to counter-claim for divorce on the basis of a different fault cited by the plaintiff in her or his claim for divorce. The relevance of the fault factor is adequately dealt with in *Marimba v Marimba* 1999 (1) ZLR 87 (H). At 91G-92C, Gillespie J observed as follows:

b "Certainly, it is not relevant to the existence of grounds for divorce. Once evidence establishes the irretrievable breakdown of the marriage, then it is neither helpful nor proper to enquire further into whether those grounds constitute misconduct by, or disclose the fault of, either party unless the existence of misconduct is relevant to some issue other than grounds for divorce.

c For instance, the alleged misconduct of one or other party might be advanced in support of the proposition that that party is not fit to be a custodian of minors. Reluctant as the courts are to delve into the general issue of marital misconduct, they will not shrink from the task if it will assist in determining the best interests of children.

The related principle is more difficult to formulate when it is suggested that d the conduct of a party is such that it should have a bearing on a property distribution order. Mindful of the move away from the fault system of divorce, judges in this jurisdiction have set their faces against any invitation to delve into the 'minutiae of ancient domestic grievances' (cf Gibson J in *Kassim v Kassim* 1989 (3) ZLR 234 (H) at 239C). They have declined to permit counsel 'to resurrect the old spectre of guilt and e innocence and drag the judge to hear their mutual recriminations and go into their petty squabbles for days on end, as he used to do in the old days' (per Korsah JA in *Ncube v Ncube* 1993 (1) ZLR 39 (S) at 41C). And rightly so.

Nevertheless, the relevant legislation specifically preserves the potential relevance of marital misbehaviour to the question of a division of f property. The court is enjoined to –

'endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses ... in the position they would have been in had a normal marriage relationship continued ...' (Matrimonial Causes Act [Chapter 5:13], s 7(3))."

The applicant also sought to justify the relief claimed by relying on r 273. g Subrule (1) clearly relates to a situation where the plaintiff, who is *dominus lituis*, is making allegations of adultery against the defendant and another person in the summons and declaration. Going back to the general principle stated above, that a defendant cannot claim in reconvention against any other h party other than the plaintiff in the action where it has not filed a claim against the

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plaintiff, it is my view that r 273 therefore does not take the matter any a further.

As submitted by the first respondent, the applicant did not advance any meaningful authority in support of his submissions. It has been pronounced in a number of matrimonial cases that a claim for divorce against a spouse where allegations of adultery are made can be heard together with a claim for adultery damages against the paramour. In *Baker v Baker & Anor* 1931 CPD b 230 at 233, Gardiner JP held that it was proper for an action for divorce against a wife and an action for adultery damages against a co-defendant be heard at the same time. In that case, the plaintiff brought an action against his wife and co-defendant in which he claimed against the wife a decree of divorce and against the second defendant damages for his adultery with his wife. The wife c did not enter an appearance to defend and was accordingly barred. The second defendant had entered an appearance to defend. The plaintiff sought to have the matter heard against the second defendant.

In *Eorfino v de Pretto (Eorfino intervening)* 1959 (3) SA 787 (W), the court ruled in favour of hearing a claim for divorce against one defendant and a claim for adultery damages be heard at the same time. In that case, the plaintiff sued d for damages for adultery alleged to have been committed by the defendant with the plaintiff's wife. In a separate case, which was pending between plaintiff and his wife, the plaintiff claimed a divorce against his wife on the grounds of adultery with the defendant in the present action, and the defendant's wife counter-claimed for a divorce on the ground of the husband's adultery with another woman and also on the ground of constructive malicious e desertion. The defendant's wife intervened in the action against Pretto seeking a consolidation of the two cases.

What is apparent from these cases is the fact that it was the plaintiff who brought the action against both the spouse and the paramour. In *Baker's* case, the spouse and the paramour were the co-defendants in the one action. In *Eorfino's* case there were two separate actions initiated by the same plaintiff f against his spouse and the paramour.

As rightly submitted by Mr *Muchadehama*, the first respondent was misjoined to the main action in case No. HC 11961/06. This was not a proper case for the exercise of judicial discretion to condone or permit a misjoinder of the first respondent as sought by the applicant. ^g

The application is accordingly dismissed with costs.

Chinamasa, Mudimu, Chinogwenya & Dondo, applicant's legal practitioners ^h

Mbidzo, Muchadehama & Makoni, first & second respondent's legal practitioners

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RAILWAY ARTISANS UNION & ORS v RAILMED & ORS 2008 (1) ZLR 81 (H)

2008 (1) ZLR p81

Citation	2008 (1) ZLR 81 (H)
Case No	Judgment No. HH-111-08
Court	High Court, Harare
Judge	Gowora J
Heard	29 January 2008
Judgment	29 January 2008
Counsel	<i>L T Biti</i> , for the applicants <i>P Machaya</i> , for the respondents
Case Type	Civil Application
Annotations	No case annotations to date

Flynote

^c **Employment** — contract — variation of terms — conditions of service — what constitute — provision of medical aid — employers' obligation to pay contributions to medical aid society — medical aid society altering levels of benefits in accordance with contributions — not a change in employees' conditions of service

Headnote

- ^d The first respondent was a registered medical aid society, the object of which was to provide medical aid to persons associated with the railway industry. In terms of its constitution, the respondent could set the schedule of rates payable by different categories of members, and could determine the range and scope of benefits to be afforded by it to its members. Benefits which the employees received were originally not ^e related to the level of payment by the beneficiary. The first respondent then put into effect a three tier system where benefits were structured according to the level of contributions paid by respective members. The applicant trade unions sought an order to set aside the new system. It was argued that the first respondent's actions in altering the benefit ^f structure being offered to their members were an alteration of the conditions of

service of the unions' members. Most of the unions' members were not actually employed by the first respondent, but by the railways and associated entities. The applicants argued that they had a legitimate expectation to be heard before the implementation of the new system. They contended that the first respondent was a public body and, ^a as such, it had the obligation, before making any decisions which would adversely affect the rights of the members of a medical aid society, to give them a right to be heard.

Held, that conditions of service can only exist where services of a personal nature are rendered, with one party being the employer and the other the ^b employee. *In casu* there were no services of a personal nature being

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rendered by the applicants' members to and on behalf of the first ^a respondent. While presumably the contracts of employment between the applicants' members and their employers provided for contributions by the employers for subscriptions to a medical aid society, the level and extent of benefits afforded to members was within the discretion of the first respondent and the employers had no input into such assessment. The condition of service was the entitlement to membership in terms of ^b the contract of employment, coupled with the employer's obligation to contribute an equal measure as the employee. Since the employer did not determine the level of benefits afforded by the first respondent, the fact the benefits were reduced did not alter the conditions of service, which remained unchanged. ^c

Held, further, that the first respondent had the power to regulate the range and scope of the benefits to be afforded by the medical aid scheme. There would be no practical benefit for a medical aid society to have the power to set the schedule of rates of contributions to be paid by the different categories of members but not the power to set the range and scope of the benefits to be afforded to the membership. It would be only logical ^d that the range and scope of benefits be set and then the contributions be calculated.

Held, further, that as the first respondent was a restricted medical aid society on the basis of employment or association therewith, it could not be deemed to be a public body. There was thus no basis of public law on which the first respondent's actions could be challenged. The court was ^e concerned only with the rights and obligations which flowed from the contract.

Held, further, that there is a presumption in favour of applying the *audi alteram partem* rule when the decision is made in the exercise of a statutory power (unless the rule is expressly excluded). There is no such ^f presumption when a decision is taken in the exercise of a contractual right, because the question then is whether or not the failure to hear the other party constituted a breach of contract. A party cannot be in breach of an obligation which has not been made an express or implied term of the contract. ^g

Cases cited

Administrator, Transvaal & Ors v Traub 1989 (4) SA 731 (A)

Chirasasa & Ors v Nhamo NO & Anor 2003 (2) ZLR 206 (S)

OK Bazaars (1929) Ltd v Madeley NO & Anor 1943 TPD 392 ^h

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Legislation considered ^a

Constitution of Zimbabwe 1980, s18 (1) and (9)

Medical Services Act [*Chapter 15:13*], ss 2, 9(5) & 10

Case information

^L *T Biti*, for the applicants

^b *P Machaya*, for the respondents

Judgment

GOWORA J: This matter was initially placed before me under a certificate of urgency. As the final and interim relief sought on the provisional order were the same, I wrote an endorsement on the face of the application, querying the manner in which the relief had been framed. The letter of explanation was not placed before me and it was not until after some months that the matter was then brought to my attention. In the event, it was set down before me in chambers to be argued as an urgent application. The respondents indicated a desire to file affidavits in opposition and it was agreed between the parties that the best way was for the matter to be dealt with as an opposed application. The parties thereafter filed their documents including heads of argument and the matter was then argued in court.

On the date of hearing, Mr *Biti*, for the applicants, made reference to a number of authorities to which I had no access. He promised to avail them to me shortly thereafter but it was not until the 31 May 2007 that this request was complied with. It was, as a consequence, virtually impossible to render a judgment soon after the hearing, as I then was heavily committed in other duties. I turn now to the application before me.

The applicants are unions representing members in the employ of the second respondent. The first respondent is a medical aid society set up for the benefit of the employees of the second respondent and would appear to have been set up by virtue of a collective bargaining agreement between the second respondent and its employees. It is common cause that the first respondent was collecting subscriptions from the employees and the second respondent. Benefits which the employees received were not related to the level of payment by the beneficiary and it was, consequently, a fact that the second respondent was operating as a welfarist society with its members being afforded the same benefits. In August 2006, the second respondent (whom) I shall henceforth refer to as the "respondent") put into effect a three tier system where benefits were structured according to the level of contributions paid by respective members. Following representations made to the respondent, the changes were not put into effect immediately as the parties attempted to find a common position. However, at the end of August 2006, the respondent gave notice of

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its intention to put the changes into effect at the beginning of October 2006. The changes were put into effect and the system is now operational. In view of the reasons I alluded to earlier, an attempt to have a temporary interdict stopping the implementation was still-born. It therefore only leaves the final relief for determination. The terms of the final relief are in the following terms:

- 1 That the implementation and execution of the tiered system by the first respondent effected on 1 October 2006 be and is hereby set aside.
- 2 That the first respondent be and is hereby ordered to cease/stop and be inducted from implementing the tiered system introduced on 1 October 2006.
3. That the first respondent pays the costs of suit.

Extensive heads of argument were filed on behalf of the parties. In addition, both counsel addressed the court orally. Mr *Biti*, for the applicants, argued that there were three issues for determination. The first issue was whether or not the first respondent had powers in terms of its constitution to alter the medical aid scheme in existence since its inception. Counsel invited me to look at the narrow positivist meaning of clause 11(2) as well as the context of the agreement. The second issue was whether or not the Board of the third respondent had issued a directive to the first respondent following upon a meeting held on 20 October 2006 and the last issue was whether or not the applicants had a legitimate interest to be heard before a decision was made to link benefits to subscriptions.

Mr *Machaya* argued almost on the same premise as Mr *Biti*, viz whether the respondent had the power to introduce the benefit structure that it did. His argument was that the applicants had considered the structure of the third respondent in isolation of the statute. He submitted that the first respondent had the power to alter the benefits accorded to its members. In so far as the third respondent was concerned, it was his contention that it had not issued a directive to the first respondent to stop implementing the alteration in the benefit structure. Lastly, it was argued on behalf of the first respondent that the provision of medical services by the first respondent to members of the applicants was not a condition of service and that therefore there was no need for the applicants' members to be consulted prior to the implementation of the changes.

I think the logical place to start in this matter is the examination of the relationship between the applicants and the first respondent. The first respondent was established by the National Industrial Council for the Railway Industry in 1970. One of its objects was to afford members the facility of obtaining medical and surgical treatment for themselves and their dependants, ^H

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^A including the provision of drugs and medicines. According to the constitution in terms of which the first respondent was set up, its members comprised the following: employees of Railways, employees of National Railways of Zimbabwe, Railmed, National Railways of Zimbabwe Pension Fund, RAE, RAU, RAYOS, REC, RMS, and Z A R W U who are entitled to membership in terms of their conditions of employment. Also included in the list of people ^B entitled to be members are pensioners of the various institutions described above and the widows or widowers of those persons who had been in employment in the same and were members of the first respondent.

The applicants, being unions, are representing the persons employed by the various bodies I have referred to. Except for those employed by the first ^C respondent, none of the members of the applicants can say that they are employees of the same. The greater number of the applicants' members, therefore, are employed by the other bodies. Going by the objects of the constitution of the first respondent, the applicants' members have a relationship with the first respondent, whereby the latter has undertaken to afford the members facility for the provision of medical and surgical treatment as well as ^D drugs and medication. Nowhere in their papers have the applicants' alluded to any other contract with the first respondent except for the provision of the services I have described above. Yet, in addressing the question of the first respondent's actions in altering the benefit structure being offered to their members, the applicants contend that the actions of the first respondent are in fact an alteration of their conditions of service. In order to dispose of the ^E issue of the relationship between the applicants and the first respondent it then becomes necessary to arrive at a decision as to the meaning to be ascribed to the phrase "conditions of service". When one is in service one is in employment and therefore conditions of service are the same as conditions of employment. In *OK Bazaars (1929) Ltd v Madeley NO & Anor* 1943 T P D ^F 392, conditions of employment were described as:

"Conditions of employment in the present context means simply the terms, either express or implied, contained in a contract of employment".

The terms and conditions of the employment contracts of the applicants' members are not in the purview of the first respondent. In my view, conditions of service can only exist where services of a personal nature are rendered, the ^G one being the employer, the other the employee. We do not have services of a personal nature being rendered by the applicants' members to and on behalf of the first respondent. I presume that the contracts of employment provide for contributions by the employer for subscriptions to a medical aid society. Beyond that I refuse to go, as the contracts are not before me and any further ^H comments on my part would be mere speculation.

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The point is made by Mr *Biti* that the effect of the alteration put in place by ^A the first respondent was to fundamentally alter the structure of the Medical Fund from one based upon the principle of equal contributions from the employer and employee and equal unlimited benefits to a new principle of a scheme based on full recovery. I accept that the entitlement to the medical aid benefit, on the basis of the equal contribution with the employer and attendant benefits, is a condition of service. I do not accept, as contended by Mr *Biti*, ^B that receiving equal benefits with other members, where the one pays less than another member, is a condition of service. However, the linking of the benefits to the level of subscriptions paid by the first respondent's members does not affect the terms on which the members of the applicant are afforded employment by their respective employers. The level and extent of benefits afforded to members is within the discretion of the first respondent and the employer has ^C no input in such assessment. There is no suggestion that, under the new scheme, the employer will contribute less than it has been contributing, because if that were the case then the applicants' members would have been on very firm ground in arguing that their conditions of service had been altered. All the scheme does is to ensure that contributors obtain services ^D according to the level to which they can contribute in terms of subscriptions. The employer's obligation is not lessened in any manner, as he is still obliged to contribute in equal

measure to the contributions made by the member. The condition of service is the entitlement to membership in terms of the contract of employment, coupled with the employer's obligation to contribute an equal measure as the employee. Since the employer does not determine the level of ^E benefits afforded by the first respondent, the fact the benefits are reduced does not alter the conditions of service which remain unchanged. I am unable to find, therefore, that the scheme has the effect of altering the conditions of service of the first respondent's members.

I move on. The next issue I have to determine is whether the first respondent has the power under the constitution to alter the benefit scheme in the manner ^F that it did. The powers of the first respondent must of necessity be examined in the conjunction with the provisions of the Medical Services Act [*Chapter 15:13*] ("the Act") which regulates the manner in which medical aid societies conduct their business, as well as the manner in which they are managed. Although the first respondent as an entity was set up in 1970, which was prior to the promulgation of the Act, its registration was deemed in terms of s 17 of ^G the Act. I start with the definition section which not only describes what a medical aid society but also specifies its purposes. The definition in s 2 of the Act is as follows:

"... any association or organization which accepts subscriptions from members or other persons wholly or mainly for the purposes of — ^H

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- (a) paying any expenses incurred by such members or persons and additionally, or alternatively, their dependants or employees, in respect of medical or dental treatment; and
- (b) meeting the whole or part of any expenses incurred by such members or persons and additionally, or alternatively, their employees, in respect of medical or dental treatment".

^B The registration of a medical aid society is provided for in s 9. Section 9 (5) provides that the Secretary shall be satisfied in relation to the following before he can register a medical aid society:

- (a) the minimum cover for medical services to be provided by the medical aid society is adequate for the purpose of meeting the costs of medical services at such level as may be prescribed; and ^C
- (b) adequate financial provisions have been made for the proper maintenance of the medical aid society.

In terms of s 10 of the Act, the Secretary is empowered to cancel the registration of any medical aid society which fails to comply with the provisions of s 9 (5). My view is that the powers granted to the first respondent in terms of the ^D constitution have of necessity to be considered in conjunction with the provisions of ss 9 and 10 of the Act. The constitution provides for the creation of a board to administer the affairs of the first respondent. Ten members are required to sit on the board, five of whom shall be appointed by National Railways of Zimbabwe and the last five from the other entities mentioned earlier on in the judgment, from those institutions whose employees or ^E members are entitled to membership of the first respondent. Clause 11 from which the board derives its powers is phrased thus:

"Powers and Functions of the Board of Management

(1) Subject to the provisions of the Medical Services Act, the regulations made in terms thereof and any other law, it shall be the duty of the board to administer the affairs of Railmed in a judicious manner at all times and ^F always to act in the best interest of both Railmed and its individual members and to implement the directives of the Secretary responsible for the Health Ministry and REC as may be given from time to time.

(2) It shall have the power to:

- (a) formulate and issue Rules of Railmed to include the schedule of ^G rates payable by different categories of members;
- (b) modify, amend, repeal, substitute or suspend any or all of such Rules where general or specific circumstances require such action;
- (c) determine the range and scope of benefits to be afforded by ^H Railmed; and

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- (d) refuse, terminate or restrict benefits in respect of any beneficiary ^A who contravenes any Rule of Railmed."

Although they have been placed before me, I have not been referred to the Rules of Railmed specifically and I cannot comment further on them other than to say that the first respondent does

have the power, in formulating such rules, to regulate the rates payable by the different categories of members which, of necessity, taking into account the different levels of employees in the undertakings must go with a medical aid society. In real terms, the first respondent would have to set the level and range that each category of membership would have to pay as subscription for the services to be availed to such member. It follows, therefore, that the rates of contributions set by the first respondent would then have a bearing on the range of benefits that can be accorded for the categories of rates of contributions set in the Rules. It is only fitting, therefore, that, consistent with the power to regulate the schedule of rates of contributions to be paid by the various categories of the members, the first respondent also be endowed with the power to regulate the range and scope of the benefits to be afforded by Railmed. I cannot see the practical effect of a medical aid society having the power to set the schedule of rates of contributions to be paid by the different categories of members but not having the power to set the range and scope of the benefits to be afforded to the membership. It would, in my view, be only logical that the range and scope of benefits be set and then the contributions be calculated. The one cannot exist independently of the other. I venture to suggest that, in arriving at the benefits and contributions that are attendant thereon, the board of the first respondent has to bear in mind the provisions of the Act, in particular that it act in the best interests of the members and the society itself. I am fortified in this view by the intent of the first respondent as spelt out in its objects – that, primarily, of providing members the facility of obtaining medical and surgical treatment for themselves and their dependants, including the provision of drugs and medicines. The objects of the first respondent would not be met if the first respondent were curtailed in its power as to what benefits it can offer to its members. If that were a matter for the decision of the REC, then the latter would have been specifically accorded those powers. It has not. It merely has the power to make decisions of a strategic nature. This brings me to the next rung. Is the decision regarding the extent of benefits to be afforded to the members of the first respondent one that can be termed strategic in nature?

According to Mr *Biti*, even though the first respondent had the power under its constitution to determine the range and scope of the benefits to be afforded to its members, it did not have the power to change the society from a welfarist one to one run on market principles with the aim of full cost recovery. I find

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It is hard to comprehend why the restriction on the power afforded to the first respondent under the constitution was framed in such a vague manner. If it was the intention that the REC gives directives of a long-term plan to the first respondent, it was simpler, in my view, to have phrased it as such. Mr *Biti* went further and argued that the three tier system that was adopted by the first respondent was not a mere scheduling of the rates and contributions or the mere determination of the range of scope of benefits, but was, rather, the essence and product of the first respondent's strategic recovery plan which was prepared in 2004 and commissioned in 2005. He premises his view on the argument that the entitlement to medical benefits is a condition of service. I have already found that the medical benefit is not a condition of service, but that what was a condition of service was the entitlement to membership and the concomitant contribution by the employer on behalf of the employee. It is pertinent to note that the contracts of employment where the conditions are spelt out were not displayed to the court, as much of the argument is based on the alteration of the same.

The constitution does not define what it means by "strategic". From the argument pursued by Mr *Biti*, it is clear that the meaning he ascribes to "strategic" is to do with an alleged alteration of conditions of service. I have above already discussed on whether the introduction of the three tier system of benefits by the first respondent constituted a change in the members conditions of service and my conclusion was that it did not constitute such.

I turn next to the question whether or not the REC issued a directive to the first respondent. The REC wrote two letters to the first respondent subsequent to the adoption by it of the three tier system of benefits. The first letter to the first respondent was phrased as follows:

"RE: INTRODUCTION OF THE THREE-TIER SYSTEM EFFECTIVE 1 OCTOBER 2006

1. On 20 October 2006, the Railway Employment Council met and decided as follows:
 - 1.1. The introduction of the proposed Three-Tier Scheme is to be suspended with immediate effect, viz from the 20th instant and it shall remain so suspended until you are advised to the contrary in due course.

- 1.2. The suspension is intended to enable the Railway Employment Council to have the matter resolved and you are advised accordingly.
2. In the meantime the deductions for the remission to you shall be as hitherto was the case before the purported introduction of the Three- ^h Tier System by yourselves."

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The letter was written by the chairman of the REC and, on receipt of this letter, ^a the chairman of Railmed sought clarification, as in his view it appeared that the four trade unions and NRZ had not resolved to direct the board of Railmed to suspend the three-tier system. A letter was dispatched from the office of the chairman of the REC in the following terms:

"I merely advised you that the feeling in Council was that the introduction ^b of the proposed three-tier system be suspended with effect from the 20th instant. This was necessary in order to enable the members of the Council to reach an agreement.

However, you may choose to ignore my advice but you do not have any reason to misunderstand what I said.

I never pretended to say that the trade unions and NRZ resolved to direct ^c the Railmed Board to suspend the three tier-system. I have no power to direct any member or constituent member of the REC to do anything".

What emerges from the last quoted letter is that the Board of the REC had not passed a resolution which would have issued a directive to the first respondent to suspend the introduction of the three-tier system. It also emerges clearly from the chairman's letter that he was talking about a feeling in Council. There ^d had been no agreement that the three-tier system be suspended. The letter from the chairman is very clear and it seems to me that if the applicants wish to contradict him and put forward a version that differs from his statement in the letter, then they should have produced minutes of the meeting where the directive was given. In the meeting of the REC Board held on 20 October 2006, the chairman had noted that "the Council had no jurisdiction to instruct ^e Railmed to cease the implementation of the scheme". In fact, the meeting could not agree on what action to take and the chairman indicated that he would write to Railmed and state that Council's position was that the status *quo*, as it was before the introduction of the three-tier system (for whatever merit), should prevail until Council wrote to Railmed on the position. This then led to the ^f crafting of the letter initially sent to the first respondent, which letter was subsequently clarified. When the two letters are read in conjunction with the minutes, it becomes clear that REC did not take a position on the implementation because of the divergence of views expressed by the board members present. Further, I did not understand from my reading of the minutes that REC had resolved to give a directive to the first respondent to stop implementing the ^g new system. In the absence of that, I have to find that the REC did not issue a directive to the applicants to suspend the introduction of the three tier system of benefits.

It remains for me to deal with the question raised by counsel for the applicants as to whether or not before the system of benefits was introduced the ^h

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^a applicants should have been consulted. In other words, Mr *Biti* contends that the applicants had a legitimate expectation to be heard before the implementation of the three tier system. In this regard, the first argument advanced by Mr *Biti* was to the effect that when the board members of the first respondent sit on the board they owe a duty of care to the board of the first respondent only as that is the primary responsibility of any board member. I ^b think this submission is made in total disregard of the provisions of the first respondent's constitution, in particular clause 11 which enjoins the board, in the administration of the first respondent, to act in the best interests of both Railmed and its individual members. It is of course understandable that Mr *Biti* would seek to convince me that in making the decisions that it made, and not consulting the members, the first respondent was motivated by a duty to ^c protect its interests to the exclusion of that of the membership. This argument flies in the face of the specific duty imposed by the constitution on the board to take into account the interests of the medical aid society and those of its individual members.

In support of the contention that the applicants had a legitimate expectation to be heard, counsel has referred me to various authorities. He has made ^D mention of s 18(1) and s 18(9) of the Constitution. He has argued further that principles of natural justice, as codified in the quoted sections, would have required that the applicants be heard. An examination of the quoted subsections reveals the following:

“18(1) Subject to the provisions of this Constitution, every person is ^E entitled to the protection of the law.

18(9) Subject to the provisions of this Constitution, every person is entitled to a fair hearing within a reasonable time by an independent and impartial court other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations”.

The manner in which the argument is developed is that counsel contends that ^F the first respondent is a public body and, as such, it has the obligation, before making any decisions which would adversely affect the rights of the members of medical aid society, to give them a right to be heard. It cannot be disputed that the members of the applicants would have rights in so far as their relationship with the first respondent is concerned. I note with interest that the majority of decisions cited by him are concerned with the relationship ^G between an employer and an employee. The reality is that the relationship between the applicants’ members and the first respondent is regulated by contract and it is that in light that the question as to the claimed right to be heard should be examined. In my view, the remarks that are appropriate in this case are to be found in *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) ^H in which Corbett CJ had this to say at 748G-H:

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“When a statute empowers a public official or body to give a decision ^A prejudicially affecting an individual in his liberty, or property or existing rights the latter has a right to be heard before the decision is taken (or in some instances thereafter: see *Chikare’s case supra* at 379 unless the statute expressly or by implication indicates the contrary”.

The principle has been applied in appropriate circumstances to decisions made in the exercise of contractual rights. Whether or not the *audi* rule is ^B applicable to a particular decision will depend on the circumstances of the case, particularly whether the express or implied terms of the statute or contract under which the decision is taken requires its observance.

There is a presumption in favour of the application of the *audi* rule when the decision is made in the exercise of a statutory power, unless the rule is ^C expressly excluded. There is no such presumption when a decision is taken in the exercise of a contractual right, because the question in area of contract is whether or not the failure to hear the other party constituted a breach of contract. A party cannot be in breach of an obligation which has not been made an express or implied term of the contract.

In *Chirasasa & Ors v Nhamo NO & Anor* 2003 (2) ZLR 206 (S) at 216D-E the ^D full bench of the Supreme Court of Zimbabwe, in a judgment rendered by Malaba JA, with the concurrence of the entire bench states as follows:

“The next question to determine is whether the right given to the employer to terminate the contract of employment on giving the appellants one month’s notice for non-disciplinary reasons could be exercised without ^E regards to the principle of natural justice expressed in the maxim *audi alteram partem* (‘the *audi* rule’). The *audi* rule is a common law principle which has been applied by courts in review proceedings as part of administrative law, to grant relief to persons whose rights, liberty, property, or legitimate expectation have been adversely affected by decisions made by public authorities or bodies in the exercise of statutory ^F (public) powers without having been afforded the opportunity to be heard.”

The first thought that one has is that the first respondent, in making the decision that it did, was not exercising functions granted in terms of a statutory provision. The powers that the first respondent was exercising are derived from the constitution of the first respondent and it then begs the question how ^G the obligation imposed on the first respondent — to hear the applicants’ members before implementing the changes it did — allegedly arose. This brings me a discussion on the reliance by the applicants on the provisions of s 18 of the Constitution. I cannot find that the reference to s 18(9) of the Constitution is appropriate *in casu*. The first respondent is not an adjudicating ^H

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A authority, nor is it a court or tribunal. It has not been stated precisely how the provisions of s 18(1) and (9) would apply in this case.

I must commend Mr *Biti* for advancing what clearly is an ingenious argument, that the first respondent is a public body and that, as such, the *audi* rule applies to it. He has not seen it fit to define for the benefit of the court what a public B body constitutes and whether or not the first respondent fits into the mould of such a body. I will therefore confine myself to the status of the first respondent as it is stated in the constitution and also its stated objectives. The first respondent was established in 1970 by the National Industrial Council for the Railway Industry which has now been named the Railway Employment Council. Its legal status is that of a body corporate which is capable of suing C and being sued in its own name. I think that the question of whether or not it is a public body emerges from the entitlement to membership set out in clause 8 of its constitution. According to the clause eligibility to membership is confined to the following persons or organizations:

- (a) employees of the Railways as required by the rules and as defined in the rules of Railmed; D
- (b) employees of National Railways of Zimbabwe, Railmed, National Railways of Zimbabwe Pension Fund, RAE, RAU, REC, RMS, and ZARWU, who are entitled to membership in terms of their conditions of service;
- (c) a widow/widower of an employee deceased during employment with the bodies stated in a) above; and E
- (d) all persons who were, as at 30 April 1970, members of the Fund as constituted up to and including that date.

What emerges from the list of persons or organizations entitled to membership is that only those associated with the railway industry can claim eligibility for membership in the first respondent. Membership in the first respondent is, F therefore, restricted. I am therefore not certain that the applicants appreciate that the size of the first respondent is not what determines whether or not it is a public or private enterprise. Neither is the number of organizations within the railway industry whose employees or former employees who are entitled to claim such membership a factor. The most pertinent feature is that the first respondent's constitution excludes every other person who is not employed G or connected with the railway industry from becoming or claiming a right to membership. As such, it is a restricted medical aid society on the basis of employment or association therewith and it cannot on that be termed to be a H public body.

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We are therefore not here concerned with issues of public law as argued on A behalf of the applicants. *In casu*, this court is concerned with the rights and obligations which flow from a contract and the law in this country is no different from that of South Africa when it comes to the application of the *audi* principle. In our law the principle as to whether the *audi* principle applies outside the realm of public law was concretized in *Chirasasa & Anor v Nhamo B N O & Anor (supra)* at 219C-D where Malaba JA opined:

"The decision to terminate the appellants' contracts of employment on notice was made in the exercise of a contractual right. Mr *Hwacha* argued that this was a case of a mere contract between private individuals. It was not an express term of the contract of employment containing the right to terminate that the appellants should be heard before the decision to give C them notice was taken. There is no basis on which such an obligation can be implied into the contract. That is particularly the case when termination for misconduct is expressly provided for in the Code of Conduct".

Given that the applicants wish to enforce rights arising out of a contract between their members and the first respondent, such rights have to be given effect to in accordance with the terms of the contract the parties concluded. D The court is not permitted to go outside the terms of the contract, which, however, has not been exhibited to the court. The error on the part of the applicants was to elevate the benefits afforded to their members by the first respondent to a condition of service and not appreciate that the condition of service was the actual membership in the first respondent and not the benefits themselves. Had the applicants appreciated the distinction, they might have E then accepted that what was at stake in this matter was the relationship between different contracting parties and the rights and obligations flowing from such a relationship. The contract has not been invoked in these proceedings and I am unable to give effect to a right which has not been established. The basis on which the applicants claim a right to be heard is not F well premised and,

in my view, the right to be heard before the decision to alter the benefit structure has not been established. I therefore find for the respondents in this matter.

In the premises, the application is dismissed and the applicants are ordered, jointly and severally, the one paying the others being absolved, to pay the respondents' costs. ^g

Honey & Blanckenberg, legal practitioners for the applicants

Mbidzo, Muchadehama & Makoni, legal practitioners for the respondents ^h

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Citation	2008 (1) ZLR 95 (S)
Case No	Judgment No. S-1-08
Court	Supreme Court, Harare
Judge	Chidyausiku CJ (in chambers)
Heard	30 January 2008
Judgment	30 January 2008
Counsel	<i>J Samukange</i> , for the applicant <i>Ms F Ziyambi</i> , for the respondent
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Constitutional law — *Constitution of Zimbabwe 1980 — s 24 — enforcement of protective provisions — application to Supreme Court under s 24(1) — may not be made where applicant is party to proceedings in High Court or subordinate court — exceptions*

Headnote

The applicant appealed to the High Court against a judgment of the magistrates court in respect of an extradition request made by the respondent. ^b Judgment was reserved. Before judgment was delivered, one of the judges (Patel J) was appointed Acting Attorney-General. After his appointment, the matter was set down for delivery of judgment. The day before the set-down date, the applicant applied for an order interdicting the High Court from handing down the judgment. That application was ^e dismissed on the grounds that the correct procedure was that the applicant should have asked Patel J to recuse himself.

A chamber application was brought in the Supreme Court, seeking to prevent the High Court from delivering its appeal judgment, pending the determination of the appeal against its dismissal of the application to prevent delivery of the appeal judgment. In addition, the applicant F brought an application to the Supreme Court in terms of s 24(1) of the Constitution, seeking to set aside the High Court's appeal judgment, requiring Patel J to recuse himself and ordering a re-hearing before a differently constituted court. The applicant claimed that his entitlement under s 18 to due process would be violated if the judgment were handed down by the court as originally composed.

G *Held*, that the alleged violation of the applicant's rights arose during proceedings in the High Court. It is not open to a party in proceedings in the High Court or a subordinate court to apply to the Supreme Court in terms of s 24(1) except where the presiding officer violates the H applicant's right in the process of considering the application for referral.

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Chidyausiku CJ

If, for example, he had, out of selfish interest and in bad faith, held that A the raising of constitutional question by the applicant was merely frivolous or vexatious, he would have infringed the applicant's right to the protection of the law guaranteed under s 18(1) and an application could be made under s 24(1). Otherwise, the applicant's recourse was to apply under s 24(2) for the presiding officer to refer the constitutional B question to the Supreme Court.

Held, therefore, that the application was a nullity and that the chamber application was predicated on a nullity. The High Court should complete the matter and, if the applicant was aggrieved by the decision, he should take the matter on appeal, raising, if necessary, issues relating to the constitutionality of the appeal proceedings in the High Court. C

Cases referred to

Jesse v A-G 1999 (1) ZLR 121 (S)

Mandirwe v Min of State 1986 (1) ZLR 1 (A)

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

Legislation considered

Constitution of Zimbabwe 1980, s 24(1) & (2)

Case information

J Samukange, for the applicant

Ms F Ziyambi, for the respondent

Judgment

CHIDYAUSIKU CJ (in chambers): This is an urgent chamber application in which the applicant is seeking the relief set out in the draft order. The draft order reads in part as follows:

"It is hereby ordered that:

1. Judgment in the appeal by the applicant in case No. HC CA 507/07 F shall not be delivered pending the determination of the appeal against the judgment in case No. HC 462/08.
2. The appeal against the judgment in case No. HC 462/08 shall be set down as a matter of urgency by the Registrar of this Honourable Court.
3. The parties to the said appeal shall file heads of argument in G accordance with directions of the said Registrar.
4. Costs shall be costs in the cause of the appeal."

After hearing submissions from counsel, I dismissed the application with no order as to costs. H

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Chidyausiku CJ

A The facts giving rise to the urgent chamber application are, briefly, that the Judge President and Patel J heard an appeal from the magistrates court some time in July 2007. In that appeal, the applicant was the appellant. It was an appeal against a judgment of the magistrate's court. After hearing submissions from counsel, the learned judges reserved judgment. Some time in December 2007 Patel J was appointed Acting Attorney-General. Subsequent to Patel J's appointment as Acting Attorney-General, the High Court set down the appeal for the handing down of judgment. Judgment was not handed down on the set down date following representations made to the Judge President by the applicant. The matter was reset down for the handing down of judgment on 30 January 2008. The day before the judgment was due to be handed down, the applicant made an urgent application to the High Court seeking an order c to interdict the High Court from handing down the judgment. Hlatshwayo J dismissed the application. I am advised that the reason for dismissal was that the learned judge was of the view that the applicant should have applied to Patel J for him to recuse himself.

Following the dismissal of the application by Hlatshwayo J, the applicant d launched two applications to this court. The one was a court application made in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution"). The other was this chamber application. I have already set out the relief sought in the chamber application. The relief sought in the court application is:

"It is hereby ordered that:e

1. The hearing on the 26th of July 2007 before the Judge President, Mrs Justice Makarau, and Mr Justice Patel is hereby set aside.
2. That Mr Justice Patel is recused from hearing or handing down judgment in the appeal under case No. HC CA 507/07 between Simon Francis Mann and the Republic of Equatorial Guinea.
3. That a declaration that the High Court has no jurisdiction to determine f the applicant's appeal as presently constituted and that the appeal should accordingly be reheard by a freshly constituted court of at least two judges.
4. That the respondent pays costs."

When I dismissed the urgent chamber application with no order as to costs, g I indicated that reasons for judgment would follow and these are they.

The chamber application does not state in terms of which rule of the Supreme Court Rules it is being made. It would appear the chamber application is being made on the basis that the chamber application relates to the appeal against the judgment of Hlatshwayo J; alternatively, the chamber application h relates to the court application filed at the same time as this chamber

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Chidyausiku CJ

application. The latter basis was merely argued and has no factual basis in the A founding affidavit. On that basis alone, it can be safely dismissed, but I will deal with its merits. I will deal with this contention first.

The court application was made in terms of s 24(1) of the Constitution, which provides as follows:

"24 Enforcement of protective provisions B

(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 c (3), apply to the Supreme Court for redress."

The applicant contends that his entitlement to due process, guaranteed in terms of s 18 of the Constitution, will be violated if judgment in the matter is handed down. On the applicant's version of events, the alleged violation of the Declaration of Rights has arisen in proceedings of the High Court. Where any question arises as to a contravention of the Declaration of Rights in any d proceedings in the High Court or in any court subordinate to the High Court, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.

The submission by Mr *Samukange*, for the applicant, that the proceedings e in the High Court were not "proceedings" because the court was not properly constituted is simply not tenable. What constitutes proceedings in the High Court was defined by this court in *Tsvangirai v Mugabe & Anor* 2006 (1) ZLR 148 (S), where the court held that:

"(1) The word 'proceedings' in s 24(2) is a general term, referring to the action or application itself and the formal and significant steps taken by F the parties in compliance with procedures laid down by the law for the purpose of arriving at a final judgment on the matter in dispute. There are proceedings in being in the High Court from the moment an action is commenced or an application made until termination of the matter in dispute or withdrawal of the action or application. There was no need to limit the very general words of s 24(2) by saying that the question as to G the contravention of the Declaration of Rights arises only when the court is actually sitting. The proceedings in the High Court were still pending. Whilst the request for the reference of the question to the Supreme Court must be made to the judge whilst he is actually sitting in court, the question itself does not have to arise when the court is sitting. It may arise on the H

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Chidyausiku CJ

A pleadings or from the circumstances of the case. The applicant should have had the application for reference of the question set down for hearing by the judge.

(2) The argument that the judge would have become a judge in his own cause had the request been made of him to refer the question to the Supreme Court for determination ignores the fact that compliance with the B procedure prescribed in s 24(2) is mandatory. If the judge had, out of selfish interest and in bad faith held that the raising of the question by the applicant was merely frivolous or vexatious, he would have infringed the applicant's right to the protection of the law guaranteed under s 18(1). The applicant would then have been entitled to apply to the Supreme Court for redress in terms of s 24(1) of the Constitution. He would have C discharged his duty to comply with the procedure prescribed in s 24(2)." *

On this definition, there can be no doubt that the alleged violation of the applicant's rights arose during proceedings in the High Court. The applicant should then have applied for a referral in terms of s 24(2) of the Constitution.

Subsection (2) of s 24 of the Constitution sets out the procedure to be followed when any question arises as to the contravention of the Declaration of Rights D in any proceedings in the High Court. It provides as follows:

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

It is not open to a party in proceedings in the High Court or a subordinate court to apply to this court in terms of s 24(1) of the Constitution, except in the circumstances alluded to in *Tsvangirai's* case *supra*. Subsection (3) of s 24 of the Constitution specifically prohibits such a procedure. It provides as F follows:

"(3) Where in any proceedings such as are mentioned in subsection (2) any such question as is therein mentioned is not referred to the Supreme Court, then, without prejudice to the right to raise that question on any appeal from the determination of the court in those proceedings, no application for the determination of that question shall lie to the Supreme Court under G subsection (1)."

Apart from the explicit language of subss (2) and (3) of s 24 prohibiting the use of s 24(1) of the Constitution for approaching this court directly in respect of

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Chidyausiku CJ

violations of the Declaration of Rights arising during proceedings of the High A Court and subordinate courts, the cases of *Tsvangirai v Mugabe & Anor supra*, *Mandirwe v Minister of State* 1986 (1) ZLR 1 (S) and *Jesse v Attorney-General* 1999 (1) ZLR 121 (S) make it very clear that such a procedure is not permissible except where the presiding officer violates the applicant's right in the process of considering the application for referral. B

In the light of the above authorities, the inescapable conclusion is that the applicant's court application filed with this court is a nullity and this chamber application cannot be predicated on that nullity.

The other basis for bringing this chamber application is that an appeal against the judgment of Hlatshwayo J is pending in the Supreme Court. This chamber application is in relation to that appeal. C

The respondent, in response to this contention, averred that the judgment of Hlatshwayo J was an interlocutory order. Leave to appeal against an interlocutory order is required in terms of s 44(5) of the High Court Act [*Chapter 7:06*]. The applicant has not obtained such leave. Accordingly, the purported appeal is also a nullity. The applicant has not disputed this ^D contention. On this basis, there is no appeal pending in this court against the judgment of Hlatshwayo J. This court cannot therefore assume jurisdiction to hear this chamber application on the basis of a pending appeal. That ground also falls away.

Finally, I wish to make the following observations:

The High Court is seized with this matter. It heard submissions and reserved ^E judgment and was about to deliver judgment when applications to stop the handing down of judgment were launched. I have serious doubts as to whether the High Court has the jurisdiction to set aside its own proceedings and order the hearing of the appeal *de novo*. I do no more than express serious doubts in this regard because the matter has not been fully argued before me. ^F That issue is therefore left open.

It also is apparent to me that the best way forward in the interests of finalising this matter expeditiously is to allow the proceedings in the High Court to proceed to finality. That is, to allow the High Court to give its judgment in this matter. Once judgment is given, whichever party is aggrieved by that judgment ^G can take that judgment on appeal. In the event of the judgment going against the applicant, it is open to him to raise on appeal all the issues he has raised relating to the constitutionality or otherwise of the judgment. The applicant is not being left without a remedy. The dismissal of the chamber application does not in any way prejudice the applicant. All that the applicant is being required to do is to follow the correct procedure in approaching this court. ^H

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Chidyausiku CJ

^A It was for the above reasons that the chamber application was dismissed with no order as to costs.

Byron Venturas & Partners, applicant's legal practitioners

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

* The quoted words are taken from the summary of the case prepared by the Legal Resources Foundation, Harare, and published on its website — *Editor*

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MADONDO NO v ZIMBANK 2008 (1) ZLR 102 (H)

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Citation	2008 (1) ZLR 102 (H)
Case No	Judgment No. HH-4-08
Court	High Court, Harare
Judge	Garwe JA
Heard	4 April 2006; 15 February 2007; 15 November 2007

Judgment	30 January 2008
Counsel	<i>Mutangamira & Associates</i> , applicant's legal practitioners <i>Gill, Godlonton & Gerrans</i> , respondent's legal practitioners
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Bank — overdraft — when an overdraft can be said to have been agreed upon — bank continuing to honour client's cheques even when insufficient funds stood in client's account — bill deposited as security for overdraft — bank not entitled to negotiate bill

Insolvency — undue preference — disposition made in ordinary course of business — what is — bank belatedly insisting on security for overdraft and then securing only a fraction of amount lent — bank not entitled to liquidate security

Headnote

The applicant was the liquidator of a discount house which had an account ^ε with the respondent bank. The bank had allowed the discount house's account to go into overdraft in an amount far exceeding the value of the bills, even though there was no formal arrangement for overdraft facilities. Because the discount house had, more than once, not promptly liquidated its overnight facility, it had, in December 2003, deposited with the bank bills issued by the Grain Marketing Board as security for its overnight ^ϕ loans. Early in January 2004, the Reserve Bank had closed down the discount house as being an "ailing institution". Two days later, the respondent bank liquidated the GMB bills for approximately a quarter of the value of the overdraft owed. The discount house was placed under liquidation by order of the High Court later in the same month.

The liquidator of the discount house sought an order that the respondent ^g bank had violated ss 42, 43 and 112 of the Insolvency Act [*Chapter 6:04*], in that it allowed itself to obtain security on a previously unsecured debt and thereafter liquidated the security in circumstances which amounted to undue preference. He also contended that the bills were liquidated at a time when the Reserve Bank had closed the discount house and it was ^h

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Garwe JA

^A therefore improper for the respondent to have liquidated the bills without the approval of the Reserve Bank. Finally, he contended that the disposition of the bills was a breach of s 184 of the Act, which makes it an offence for any person, before or after the sequestration of an estate, to dispose of an asset of the estate with intent to prejudice creditors of the estate, unless such disposition was proved to have been made in the ^B ordinary course of business.

The respondent denied that the discount house was operating an overdraft in the normal sense. If the discount house could not meet its cheques from the funds in its account, it applied for an overnight facility, which had to be liquidated the following day, otherwise its cheques would not be met. Sometimes, though, an overdraft situation arose because the ^c discount house did not liquidate its overnight facility, and for that reason security, in the form of the bank bills, was deposited.

Held, that the suggestion by the respondent that there was no overdraft in the ordinary sense was not borne out by the facts. An overdraft is money lent. A banker is obliged to let his customer overdraw only if he had ^D agreed to do so or such agreement can be inferred from a course of business. Here, whilst there may not have been an express request for an overdraft, it is clear from the respondent's conduct that in continuing to honour the discount house's cheques when the account did not have sufficient funds the respondent was agreeable to an overdraft.

Held, further, that the liquidation of the bills *prima facie* had the effect of ^E preferring the respondent against the other creditors. Under s 42 of the Act, such a disposition is voidable

unless it is shown that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.

Held, further, that this disposition was not made in the ordinary course of business. Before the security was delivered, it must have been evident ^F that the discount house was unable to pay its debts. The security that was delivered was not even sufficient to cover the discount house's indebtedness to the respondent at that stage. There was a conscious effort on the part of the respondent to ensure that it, and it alone, benefited from the liquidation of the bills, even though it must have been ^G apparent that the discount house had other creditors.

Held, further, that the respondent had no right to deal with the bills as owner and had no preference in the event of insolvency should it come about before the security had been realized. Where a bill is deposited as security for an advance, a bank is not entitled to negotiate the bill unless ^H the pledgor has allowed the pledgee to do so.

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Garwe JA

Held, therefore, that the bills were the property of the applicant and that the ^A applicant was entitled to recover the full maturity value of the bills, plus interest.

Legislation considered

Insolvency Act [Chapter 6:04], ss 42 and 184 ^B

Judgment

GARWE JA: This matter was heard on 4 April 2006 before me. Not long after this, I was elevated to the Supreme Court bench. In the ensuing process of moving to the Supreme Court, the file in this matter together with other documents, were misplaced but these were subsequently found. Thereafter the issue that arose was whether, as a judge of the Supreme Court, I had the ^C jurisdiction to determine this matter. The issue was subsequently discussed with both parties as well as the Chief Justice. Those discussions cleared the way for the preparation of this judgment. A further point of law arose on the papers which necessitated calling both parties. The resultant delay in the finalization of the matter is regretted.

The relief sought in this application is for a declaratory order that certain Grain ^D Marketing Board (GMB) bills belonging to Century Discount House (CDH) and delivered to the Zimbabwe Banking Corporation (Zimbank) on 5 December 2003 are assets of CDH and that consequently the liquidator of CDH is entitled to recover from Zimbank the full maturity value of the bills, namely \$4 billion (\$4 million in the new currency), together with interest thereon from 3 March ^E 2004 being the date of maturity of the bills to date of payment.

There is a dispute as to the nature of the accommodation accorded to CDH by Zimbank which necessitated the delivery of these bills to Zimbank by CDH. Certain aspects of this are, however, not in dispute. Zimbank had for sometime been granting CDH overnight accommodation. It is not in dispute that this is an arrangement commonly used in the market between individual banks and ^F the Reserve Bank of Zimbabwe (RBZ), in terms of which the bank requesting the facility is credited, overnight with the agreed amount of the facility and the amount repaid the following day.

The overnight facilities granted to CDH were not secured. By letter dated 11 March 2003, Zimbank, whilst acknowledging that the repayment of overnight ^G loans by CDH had been undertaken smoothly in most instances, advised CDH of the conditions which applied to such loan facilities. The conditions included the need for security and the requirement that such security be deposited with Zimbank by 4 pm on the day of the transaction, except Wednesdays and Saturdays. Zimbank does not appear to have insisted on ^H

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Garwe JA

^A compliance with these conditions and nothing of importance appears to have happened until 20 November 2003, when CDH wrote to Zimbank confirming that its account had gone into excess and requiring time to liquidate the excess. On 5 December 2003, CDH, who were the holder and owner of GMB bills with a maturity value of \$4 billion, executed a security deposit form and delivered this to Zimbank. The CDH account with Zimbank at that stage was overdrawn ^B to the tune of about \$12

billion. On 30 December 2003, Zimbank dishonoured all cheques issued by CDH and on 5 January 2004 Zimbank liquidated the GMB bills in its possession for an amount of \$3 077 100 273.97.

In the meantime, the RBZ had on 2 January 2004 closed the doors of CDH after concluding that it was an ailing institution. On 22 January 2004, at the instance of the RBZ, the High Court granted an order placing CDH in liquidation.

At the centre of the dispute in the matter is the nature of the facility which was granted to CDH and whether the act of liquidating the bills by Zimbank amounted to an undue preference in terms of the Insolvency Act [Chapter 6:04].

The applicant, who is the liquidator of CDH, in his founding papers says the facility was an unsecured overdraft. He further contends that the bills were liquidated at a time when the Reserve Bank had closed CDH and it was therefore improper for Zimbank to have liquidated the bills without the approval of the Reserve Bank. The applicant further contends that Zimbank violated ss 42, 43 and 112 of the Insolvency Act in that it allowed itself to obtain security on a previously unsecured debt and thereafter liquidated the security in circumstances which amounted to undue preference. The applicant further says it is evident that the bills in question were demanded at a time when the insolvency of CDH seemed imminent.

Zimbank, in its papers, denies that CDH was operating an overdraft facility in the normal sense. CDH operated an account with Zimbank through which it paid its debtors. Whenever CDH found that it could not meet its cheques from the funds in its account, it would apply to Zimbank for an overnight facility. If the facility was not repaid the following day, cheques drawn on the account would be liable to be dishonoured. Penalty interest would be charged where the facility was not liquidated and a further overnight facility had to be applied for if the overnight facility was not liquidated by the end of the day. Zimbank says that, by letter dated 11 March 2003, it advised CDH of the need for security for its overnight facilities. Because of an improvement in the operation of the CDH account and the fact that no overnight facilities were required for a while, no persistent reminders on the question of security were sent to CDH. In November 2003, CDH started having problems regularizing its overnight

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Garwe JA

position and, as a consequence, the GMB bills were delivered to Zimbank on 5 December 2003. Zimbank denies that the security given on 5 December 2003 was for a facility granted, some 25 days later, on 30 December 2003. Zimbank says overnight facilities were granted on a frequent basis from the inception of the respondent's relationship with CDH. Had the security not been given on 5 December 2003, no further overnight accommodation would have been allowed.

Whilst stating that CDH was at no time granted an overdraft facility in the normal sense of the word, Zimbank accepts that an overdraft arose from time to time owing to the failure by CDH to liquidate its overnight facility, resulting in an overdrawn position on its current account. Zimbank further submits that the bills were in a negotiable state and, since CDH was not in liquidation, there was nothing to stop the bank from liquidating the security. The security was obtained for overnight accommodations that were continuing and a new debt arose every time an overnight accommodation was granted. The security was given to secure future overnight facilities. On 30 December 2003, Zimbank decided to liquidate the security and honour no further cheques owing to the manner in which CDH was operating its account. The security was not given to secure the overnight accommodation for 30 December 2003, but was to enable Zimbank to continue to grant these facilities. In practice, when an overnight facility is liquidated, the current account is credited, as that is the only account which CDH had with the respondent. The security was liquidated on 5 January 2004, although the decision to liquidate the security was made on 30 December 2004.

In his answering affidavit, the applicant submits as follows. If the security was delivered because CDH was having problems with regularizing its overnight position, it follows that CDH had by then accumulated an overdraft. When the security was delivered to Zimbank on 5 December 2004, the CDH current account was overdrawn to the extent of \$12 billion. The \$4 billion worth of grain bills, therefore, were delivered, not to cover future overnight accommodations, but rather to secure a previously unsecured overdrawn position. The applicant further submits that the nature of an overnight accommodation is such that one may not place security to cover future anticipated accommodations. Security is placed equivalent to the value by which the party requesting accommodation is short. Further, even if it were to be a trend that one is invariably short every

other day, such shortage cannot be forecast with such exactness as to warrant a certain fixed amount of security to be continually in place. ^H

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Garwe JA

^A By consent, Zimbank filed further opposing affidavits. These were intended to deal with what Zimbank considered were new assertions made by the applicant in the answering affidavit. The first affidavit is by Gladmore Mutoko, Assistant Head of Zimbank Group Treasury. He emphasizes that Zimbank was the applicant's banker and maintained a current account into and from which deposits and withdrawals would be made, respectively, in the normal course ^B of banking business. The operation of this account was separate and distinct from the question of overnight accommodation. He makes four points. The first is that it is normal banking practice to cover future overnight accommodation. Secondly, the applicant's current account was not constantly in debt and the grain bills were not delivered to secure a previously unsecured ^C position. Thirdly, there is nothing in the nature of overnight accommodation to preclude security being put in place to cover future accommodation; and, fourthly, as with any security of this nature, security is accepted at a value which is felt would be wholly or partly adequate to protect the bank's position.

The second affidavit is by Andrew Taruwona, General Manager – Banking Operations, African Banking Corporation. He states that it is the invariable ^D practice of an institution, such as CDH when it was operational, to maintain a current account with a commercial bank such as the respondent. The current account would be maintained in the normal way, with receipts coming in and drawings being made from that account. The granting of an overnight facility is an entirely separate issue. He makes the further point that it is perfectly normal banking practice for security to be lodged with a commercial bank to ^E secure future overnight facilities to be granted and that such security would be in an amount which the commercial bank estimates to be adequate or substantially adequate to secure its position, notwithstanding the fact that the precise amount of such future facility will be unknown.

On a careful analysis of the facts of this case, I am satisfied that the apparent ^F dispute on the facts can be resolved by adopting a robust approach. A number of facts are common cause, whilst others are apparent from the circumstances as a whole. It is clear that CDH operated a current account with Zimbank. By whatever name one may call it, CDH enjoyed an unsecured overdraft facility with Zimbank. No security had been registered against the overdraft and interest would be calculated on the debit balances. I would agree with the ^G applicant that the arrangement was informal and seemed to suit both parties for a while. The amount of the overdraft fluctuated daily, depending on the deposits and withdrawals made. As at 5 December 2003, the CDH account had ^H accumulated a debit balance of about \$12 billion.

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Garwe JA

The suggestion by the respondent that there was no overdraft in the ordinary ^A sense is, therefore, not borne out by the facts. As stated at p 182 Paget's *Law of Banking* 10 ed:

"An overdraft is money lent. A payment by a bank under an arrangement by which the customer may overdraw is a lending by the bank to the customer of the money. A banker is obliged to let his customer overdraw ^B only if he had agreed to do so or such agreement can be inferred from a course of business; borrowing and lending are a matter of contract, express or implied."

Whilst there may not have been an express request for an overdraft, it is clear from the respondent's conduct that, in continuing to honour CDH's cheques when in fact the account did not have sufficient funds, the respondent was ^C agreeable to an overdraft. For how else can one explain the fact that at the time the bills were delivered the account was overdrawn to the extent of almost \$12 billion?

There has also been argument on whether the security was intended to cover overnight facilities or CDH's general indebtedness. One may accept that, initially, the arrangement between the parties was that there should be ^D overnight accommodation and that some security may have been necessary. Indeed, one must accept that security can be made available to cover future overnight accommodation. However, the circumstances of this case show quite clearly that, whilst the respondent had at some stage indicated that there may be need for some security, such security had not been insisted on. It is ^E clear that, by the end of November 2003, CDH was having serious

problems in trying to regularize its account and by 5 December 2003 it had overdrawn its account to the tune of almost \$12 billion. It was only then that the bills were executed as security for such indebtedness. The security was clearly inadequate, taking into account the size of the overdraft. CDH clearly was in dire financial straits and it is also clear that CDH was never able thereafter to clear its indebtedness with the respondent.

The question that now arises is whether what Zimbank did was permissible in terms of the law and, in particular, in terms of the Insolvency Act. The Insolvency Act applies in this case pursuant to the provisions of ss 269 and 270 of the Companies Act [Chapter 24:03]. Section 42 of the Insolvency Act provides as follows:

"42. Voidable Preferences

(1) ...

(2) Subject to this section every disposition of his property made by a debtor within the period of six months immediately preceding: H

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Garwe JA A

(a) the sequestration of his estate; or

(b) ...

which has the effect of preferring one of his creditors above another may be set aside by a court if, immediately after the making of the disposition, the liabilities of the debtor exceeded the value of his assets.

(3) A disposition shall not be set aside in terms of subsection (2) if the B person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another."

Section 184 of the Act goes further and makes it a criminal offence for any person who, before or after the sequestration of an estate, removes, disposes C of, deals with any asset belonging to that estate with intent to defeat an attachment by virtue of a sequestration order or with intent to prejudice creditors in that estate. That section further provides that, where it is proved that any removal, disposal, etc., had the effect of defeating or was calculated to defeat the attachment, it shall be presumed, unless the contrary is proved, to have been done with such intention.

D Century Discount House was placed under liquidation by order of the High Court dated 22 January 2004. The disposition was made on 5 December 2003. This was within the period of six months contemplated in s 42 of the Act. The disposition *prima facie* had the effect of preferring Zimbank against the other creditors.

E Zimbank appears to accept that the disposition had that effect. However, Zimbank argues that the bills were disposed of in the ordinary course of business and that the disposition was not done with an intention to prefer. Zimbank also argues that the transaction whereby CBH furnished the bills was a pledge of the bills, which conferred a real right to deal with them as owner or holder on a preference on insolvency, should it come about before the F security had been realized.

On the facts of this case, I am not persuaded that the disposition was made in the ordinary course of business. It must have been evident by the end of November 2003 that CDH was unable to pay its debts. Indeed, Zimbank accepts that CDH was having difficulties regularizing its position and it was G for this reason that security was insisted on and thereafter delivered on 5 December 2003. At that time, as is common cause, CDH owed Zimbank close to \$12 billion. The security that was delivered was not even sufficient to cover CDH's indebtedness to Zimbank at that stage.

On the papers, the inference is irresistible that CDH was allowed by Zimbank H to operate an unsecured overdraft. Whilst initially the arrangement had been

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to cater for CDH overnight accommodation requirements, the position A eventually changed and CDH was allowed to operate an unsecured overdraft facility.

At the time the securities were delivered, both CDH and Zimbank must have been aware of CDH's precarious financial position. Indeed, Zimbank proceeded to unpay cheques presented by CDH on 30 December 2003. Zimbank thereafter B proceeded to liquidate the bills for less than their maturity

value at a time when the doors of CDH had been closed to the public and liquidation of the institution appeared imminent. It also appears not to be disputed by Zimbank that a run on deposits had occurred, having been triggered by the ENG saga.

I am satisfied that, at the time the securities were delivered and subsequently discounted, there was an intention to prefer Zimbank, amongst other creditors. ^c I am also satisfied that the delivery of the securities as well as their liquidation was not done in the ordinary course of business. There was a conscious effort on the part of Zimbank to ensure that it, and it alone, benefited from the liquidation of the bills, even though it must have been apparent that CDH had other creditors. ^d

Zimbank has submitted that it had the right to deal with the bills as owner and that it had a preference in the event of insolvency should it come about before the security had been realized. I do not agree with this submission. Where a bill is deposited as security for an advance, a bank is not entitled to negotiate the bill: *Paquet's Law of Banking* p 546. The exception, of course, would be where the pledgor has allowed the pledge to negotiate the bill. That is not the ^e position in this case. Most importantly, however, once it is accepted that delivery of the securities amounted to an undue preference and that the disposition was not made in the ordinary course of business but rather at a time when the financial position of CDH was dire, then the disposition cannot be allowed to stand.

In view of the above conclusion, it is not necessary to decide whether or not ^f what Zimbank did amounts to a criminal offence in terms of the Insolvency Act.

In the result, it is ordered as follows:

1. The GMB bills with a face value of \$4 000 000 (new currency) delivered to Zimbank at the instance of CDH on 5 December 2003 are the property of the applicant. ^g
2. The applicant is entitled to recover from Zimbank the full maturity value of the GMB bills plus interest from the date of maturity, being 3 March 2004, to date of payment in full at the Century Bank Ltd minimum lending rate. ^h

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3. The respondent is to bear the costs of this application.

Mutangamira & Associates, applicant's legal practitioners

^b *Gill, Godlonton & Gerrans*, respondent's legal practitioners

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DIOCESE OF HARARE v CHURCH OF PROVINCE OF CENTRAL AFRICA & ANOR (1) 2008 (1) ZLR 112 (H)

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Citation	2008 (1) ZLR 112 (H)
Case No	Judgment No. HH-6-08
Court	High Court, Harare
Judge	Hungwe J
Heard	13 December 2007
Judgment	30 January 2008

Counsel	<i>J P Mutizwa</i> , for the applicant <i>E T Matinenga</i> , for the respondent
Case Type	Urgent chamber application
Annotations	Link to case annotations

Flynote

Church — government of — church's constitution — members and clergy bound by such constitution — effect of failure to follow procedures laid down in constitution — diocese purportedly withdrawing from province to which it belonged — diocese not following laid down procedures — legal action instituted in name of diocese — applicant having no *locus standi*

Practice and procedure — parties — *locus standi* — spoliation order — need for applicant to show he has *locus standi*

Property and real rights — spoliation order — requirements for — need for applicant to show he was in exclusive possession of property — member of a church — cannot possess church premises to exclusion of other church organs or members — spoliation of incorporeal right — meaning — bishop being invited by faithful to minister to them — not an unlawful dispossession of any rights held by ordained bishop — *locus standi* to bring application for spoliation — applicant must show he has *locus standi*

Headnote

The applicant sought an urgent spoliation order against the first respondent, the Anglican Church's Province of Central Africa, and the second respondent, the bishop recognised by the Province as the Bishop of Harare. The applicant claimed to have broken away from the Province and thus sought to prevent the respondents from using the churches in the diocese and holding the second respondent out as being the Bishop of Harare.

There are 15 dioceses, including the applicant, which make up the first respondent. The Province is spread over Botswana, Malawi, Zambia and

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^A Zimbabwe. It is governed by a Constitution and other canons. Where a diocese wishes to withdraw from its Province to join another Province, that diocese must act in terms of the Constitution and obtain the relevant approval for its intended course of action. The former Bishop of Harare and his group did not follow the laid down procedures in order for their move to obtain the requisite approval for their withdrawal from the ^B Province.

The respondents claimed that the applicant's "withdrawal" was unprocedural and therefore illegal, as it was never endorsed by the relevant church organs as is required by the Constitution. Accordingly, the Diocese of Harare remained an integral part of first respondent as it has always been ^C in the past. The other bishop could not claim to have taken the diocese out of the Province. As such, the second respondent contended, the Diocese had not instituted this action. Further, the respondents disputed that the applicant was in possession of the various church premises. These were owned by the first respondent which exercises its ownership through the Provincial Synod and, at diocese level, the individual ^D Diocesan Trusts. The Diocesan Trusts thus held ownership for and on behalf of the first respondent. The possession and physical control of the church buildings, however, was vested in church wardens of the individual churches who are elected by the parishioners of the area. It is these wardens who are in physical possession and control of the churches and, accordingly, only church wardens could, in appropriate ^E circumstances, bring an application for spoliation.

The applicant argued that in an application for spoliation, the issue is whether there has been or has not been unlawful dispossession. The court, therefore, ought not to consider the issue of *locus standi*. The applicant also argued that it was entitled to a *mandament* in respect of the incorporeal right it had to minister to the faithful of the diocese. It claimed ^F that the second

respondent, by preaching in church premises under the Diocese of Harare, committed acts which amount to spoliation.

Held, that the applicant had no *locus standi in judicio* to bring the application. The applicant, through its agents in the person of the former bishop, elected not to follow the laid down procedures for withdrawing from the ^g Province, thereby putting itself out of court. At law, the applicant did not exist and therefore lacked capacity to sue.

Held, further, that the question of *locus standi* was central to the determination of the availability of the remedy to the parties before a court. If the applicant's argument were taken to its logical conclusion, it would mean ^h that anyone could claim spoliation on behalf of a juristic person without

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the issue of that party's *locus standi* being inquired into. This would ^a result in untenable situations and produce unintended consequences.

Held, further, that a church is a voluntary association and the general principles applicable to such associations should apply. A voluntary association is founded on the basis of mutual agreement, which entails an intention to associate and consensus on the essential characteristics ^b of the objectives of the association. The constitution of a voluntary association, which, together with its rules or regulations, constitutes the agreement entered into by its members, not only determines the nature and scope of the association's existence but also prescribes and demarcates the powers of the association and its office-bearers. By accepting appointment to the office within the church, a minister or ^c bishop, like any other officer-bearer, impliedly undertakes and affirms his wish to be bound by the constitution of that church. Conversely, the church, by accepting the membership of its office-bearers also impliedly confirms its obligation to act in terms of its own constitution in the event that there is dispute regarding any aspect of the administration of the church. The applicant could not exist outside the constitution of the first ^d respondent. It has no separate constitution of its own and has no structures of its own other than those set out in the constitution.

Held, further, that in any event, the applicant did not meet the requirements for a *mandament van spolie*. Civil possession, which is physical possession, *detentio*, accompanied by intention to hold such possession to the exclusion of everyone else, *animus possidendi*, would certainly ^e qualify an applicant for the *mandament*. An applicant for the *mandament* must demonstrate that he was in exclusive possession of the property before he is entitled to the *mandament*. It should be recalled that the real purpose of the *mandament* is to prevent breaches of the peace. It is intended to protect possession, not access. Assuming that the applicant ^f was in possession of the church premises in issue, a church organ, such as the applicant, could not possess church premises to the total exclusion of other church organs and its membership, such as the respondents. By their very nature, it is inconceivable that the applicant and the first respondent could competently claim the *mandament* over church premises, as neither can possess a church building to the total exclusion of the other.

Held, further, that in assessing whether any act of spoliation has been committed, the court has to balance the constitutional rights of the parishioners to worship, their right to be ministered by one of theirs, and their right to enjoy communion against the alleged unlawful invasion of ^h

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^a the bishop's right to minister his flock. The inquiry must confine itself to whether, by preaching at various churches the second respondent committed an unlawful dispossession of a legally recognized right held by the bishop. It could not be said that, where a bishop of one diocese is invited by the faithful to minister in a different diocese and accepts that invitation, the services he may conduct amount to unlawful dispossession ^b of whatever rights are held by the ordained bishop for the locality.

Cases referred to

de Beers v Zimbali Estate Management Assn (Pty) Ltd & Anor 2007 (3) SA 524 (N)

Mans v Loxton Municipality and Another 1948 (1) SA 966 (C)

c Nino Bonino v de Lange 1906 TS 129

Ross v Ross 1994 (1) SA 865 (E)

Shahmahomed v Hendricks & Ors 1920 AD 151

Telcom SA Ltd v Xsinet (Pty) Ltd 2003 (5) SA 309 (SCA)

Legislation considered ^D

Constitution of Zimbabwe 1980, ss 19, 20 & 21

Case information

J P Mutizwa, for the applicant

E T Matinenga, for the respondent

Judgment

¶ **HUNGWE J:** The applicant seeks the following interim relief:

“Pending the final determination of this matter, the applicant is granted the following interim relief –

That the first and second respondents and their followers be and are hereby interdicted from conducting church services in properties controlled ^F by the applicant, or interfering with the business and ministry of the applicant.

That the second respondent be and is hereby interdicted from holding himself out as a Bishop of the applicant, and conducting his ministry as such.”

The applicant is the Diocese of Harare within the Anglican Church. The first ^G respondent is the Church of the Province of Central Africa. It is the highest organ in the Anglican Church structures in the region. It consists of 15 dioceses, including the applicant.

The applicant, through its Diocesan Secretary, one Barnabas Machingauta, ^H sets out the background to the application by pointing out that the applicant

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broke away from the first respondent in September 2007. The applicant avers ^A that the first respondent tacitly accepted the breakaway as is implied by its action against Bishop Kunonga in case No. HC 6644/07. At the time of the applicant's withdrawal from the first respondent, the applicant contends that it was in peaceful and undisturbed possession and control of various movable and immovable properties, which include church buildings, chaplaries, houses, ^B offices and motor vehicles.

The applicant avers that the first respondent sought, by way of an urgent application in case No. HC 5637/07, an order interdicting Bishop Kunonga from working or doing business from named properties belonging to the Church, as well as from transactions on the first respondent's bank accounts held at a specified branch. This application was dismissed. By implication, the ^C applicant contends that its undisturbed possession and control of this property was confirmed by this court. Therefore, so the contention goes, by bringing proceedings against Bishop Kunonga in case No. HC 6464/07 seeking an order that he delivers to the first respondent certain motor vehicle in his possession to the Trustees of the first respondent, the latter is seeking to get by through the back door what it had failed to achieve in case No. ^D HC 56377/07.

The applicant goes on to chronicle how the second respondent has attended church services at one of the premises under the control of the applicant, calling himself Bishop of the Diocese of Harare. This act, so the applicant argues, demonstrates how both the respondents have taken the law into their ^E own hands by invading the space of the applicant. There is a complaint about how the second respondent received donations during the service he conducted at one such church and put it to his own use, when this belonged to the applicant. But the general complaint against the respondents is that they have taken the law into their own hands by ministering in churches which the applicant controls and that this behaviour is likely to cause a breach of the ^F peace.

The respondents vehemently oppose the application and advance various grounds in opposition to the application. In his opposing affidavit, the second respondent generally takes issue with averment of facts by the applicant. He challenges the claim that the matter is urgent. He puts into issue the identity ^G of the applicant, averring that as far as he was concerned, it was Bishop Kunonga and a few other sympathizers who were opposed to the first respondent asserting its authority over church property. The majority of worshippers, he says, were content to remain within the jurisdiction of the first respondent after Bishop Kunonga left the Province. The respondents contend ^H

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^A that the requirements for spoliation have not been met. Kunonga and his group are not in possession of any of the properties in question. The applicant has not in any way been unlawfully deprived of any control of the property in issue.

As I understood it, the respondents' contention is as follows. There are 15 dioceses which make up the first respondent. The applicant is one of them. ^B The first respondent is spread over Botswana, Malawi, Zambia and Zimbabwe. It is governed by a Constitution and other canons. The make up or composition of a Province is governed by this Constitution. Thus, where a diocese wishes to withdraw from its Province to join another Province, that diocese must act in terms of the Constitution and obtain the relevant approval for its intended ^C course of action. Bishop Kunonga and his group did not follow the laid down procedures in order for their move to obtain the requisite approval for the proposed "withdrawal". Their "withdrawal" remains unprocedural and therefore illegal, as it was never endorsed by the relevant church organs as is required by the Constitution. The Diocese of Harare remains an integral part of the first respondent as it has always been in the past. Kunonga cannot claim ^D to have taken the Diocese of Harare out of the Province. As such, the second respondent contends that, the Diocese has not instituted this action.

Further, the respondents dispute that the applicant is in possession of the various church premises as contended by the applicant. The various churches are owned by the first respondent, which exercises its ownership through the ^E Provincial Synod and, at diocese level, the individual Diocesan Trusts. Thus the Diocesan Trusts hold ownership for and on behalf of the first respondent. The possession and physical control of the Church buildings, however, is vested in church wardens of the individual churches who are elected by the parishioners of the area. It is these wardens who are in physical possession and control of the churches. As such, only church wardens can, in appropriate ^F circumstances, bring an application for spoliation. Bishop Kunonga is in control and occupation of Paget House, which is the first respondent's Head Office. The respondents do not intend to take control unlawfully of Paget House from Bishop Kunonga. They, however, deny that the applicant is in physical possession and control of each and every church and chapel that comprise the Diocese of Harare.

^G When the second respondent conducts a church service anywhere in the diocese, it has been at the invitation of the church warden of the church concerned. The respondents deny that they acted unlawfully in this regard. The respondents raise a further point in respect of the effect of the order ^H sought. The order sought, if granted in its form, will effectively deprive the

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parishioners of their constitutional right of freedom of assembly and of ^A association without them being heard.

Two grounds, in my view, will dispose of this matter. The first is that the applicant has no *locus standi in judicio* to bring this application. The respondents argue that it is not the Diocese of Harare which has brought these proceedings but Bishop Kunonga and a few of his sympathizers, who include ^B the deponent to the founding affidavit. They point to the fact that the Diocese of Harare, like any other, is governed by a Constitution which identifies it as part of the first respondent. There are, within that Constitution, laid down procedures in terms of which such matters as withdrawal from or accession to the Province are dealt with. The applicant, through its agents in the person of the reverend Bishop, has elected not to follow that procedure, thereby ^C putting itself out of court. Until such time as the applicant complies with those requirements, it has no *locus* to bring this application. At law, the applicant does not exist and therefore lacks capacity to sue.

The Constitution of the Province of the Church of Central Africa contains as one of its Fundamental Declarations the following fundamental declaration, which states: ^D

“No alteration in these Fundamental Declarations may be made unless the proposed amendment, after having been provisionally approved by the Provincial Synod, has been approved by the Synod of each Diocese in the Province, and confirmed by a two-thirds majority of those present, and confirmed by the Provincial Synod by a two-thirds majority of those present, and has subsequently been endorsed by the Archbishop of ^E Canterbury as not affecting the terms of Communion between the Church of this Province, the Church of England and the rest of the Anglican Communion.”

It follows that, in order to be binding, the withdrawal of the applicant from the first respondent would have to be supported and endorsed by the other ^F dioceses making up the first respondent. This never occurred. Even assuming that certain of the dioceses did endorse this move by the applicant, the next stage of approval, i.e. by the Provincial Synod of the applicant, was never sought or obtained. There was certainly no approval from the Archbishop of Canterbury. The Constitution clearly requires this.

The applicant's answer to this is that at this stage of the litigation, the question ^G of the applicant's decision to leave the Province is not before the court. What the court should deal with is the claim for spoliation. In an application for spoliation, the issue is whether there has been or has not been unlawful dispossession. The court, therefore, ought not to consider the issue of *locus standi*. ^H

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A I disagree. The question of *locus standi* is central to the determination of the availability of the remedy to the parties before a court. If the applicant's argument is taken to its logical conclusion, it will mean that anyone could claim spoliation on behalf of a juristic person without the issue of that party's *locus* being inquired into. This would result in untenable situations and produce unintended consequences. A church is a voluntary association. As such, the ^B general principles applicable to such associations should, in my view, apply. A voluntary association is founded on the basis of mutual agreement, which entails an intention to associate and consensus on the essential characteristics of the objectives of the association. The constitution of a voluntary association, which, together with its rules or regulations, constitutes the agreement entered into by its members not only determined the nature and scope of the ^C association's existence but also prescribes and demarcates the powers of the association and its office-bearers.

By accepting appointment to the office within the church, a minister or bishop, like any other officer-bearer, impliedly undertakes and affirms his wish to be bound by the constitution of that church. Conversely, the church, by ^D accepting the membership of its office-bearers, also impliedly confirms its obligation to act in terms of its own constitution in the event that there is a dispute regarding any aspect of the administration of the church. The constitution of the church and its rules determine what procedure is to be followed where one diocese decides to secede from the Province and what act would qualify as misconduct requiring disciplinary action. The Constitution ^E of the Church of the Province of Central Africa, sets out the procedure to be followed where it is decided to alter any of its fundamental constitutional structures. For example, it has power to admit to membership any diocese which was formed after its inauguration; it may reconstitute itself where it has been decided to join another Province, subject to the provisions of the ^F constitution.

The applicant avers that it seceded from the first respondent on or about 21 September 2007. The respondent refuses to recognize such secession. The first respondent contends that that juristic act cannot be of any legal force as it did not comply with the requirements set out in Declaration VII, this being one such alteration as would change the structure of the first respondent. In ^G short, the applicant does not at law exist. There is merit in this contention. The applicant cannot exist outside the constitution of the first respondent. It has no separate constitution of its own. It therefore has no structures of its own, other than those set out in the constitution. The assets under contention are ^H assets which the first respondent lays claim to. The question of ownership of

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these assets is not presently before me. What I should decide is whether the ^A applicant, as presently constituted, has *locus standi* to bring this action. As I have demonstrated, the Diocese of Harare for the time being is that as presently constituted. It is made up of those parishes or

ecclesiastical divisions, listed in the annexure to the applicant's founding affidavit. In order for it to secede lawfully and sever its ties with the first respondent, the diocese ^b should have passed a resolution to that effect. That resolution should have been approved by the Synod of each diocese in the Province, after it had been provisionally approved by the Provincial Synod and confirmed by a two-thirds majority of those present. Thereafter, the resolution for secession from the Province would have to be endorsed by the Archbishop of Canterbury as not affecting the terms of Communion of the Anglican Church. ^c

It is clear to me that the applicant has come nowhere near demonstrating that it has placed itself within the purview of those who confess to be Anglicans and who abide by the Constitution of their church. There is no claim that there was a resolution of the Synod of the diocese adopting this alleged breakaway. What the papers do show is that Bishop Kunonga and the Diocesan Secretary and a handful of other worshippers decided to leave the first respondent. They ^d have, however, not followed the Church's constitution. As such, they cannot seek to rely on a constitution that they have so much violated. They claimed that they have been despoiled by the acts of the second respondent whose only offence was to minister to members of the first respondent.

Even if I were wrong to hold that the applicant has not established *locus standi* ^e to bring this application, I am of the firm view that its application would have failed on different grounds. It is that the applicant has not met the requirements of a spoliation order.

The requirements for obtaining an order *mandament van spolie* are met when:

- (a) a person has been deprived unlawfully of the whole or part of his ^f possession of movable or immovable; and also
- (b) a person has been deprived unlawfully of his quasi-possession of a movable or immovable incorporeal. See *Nino Bonino v de Lange* 1906 TS 129; *Shahmahomed v Hendricks & Ors* 1920 (AD) 151; *Mans v Loxton Municipality and Another* 1948 (1) SA 966 (C).

In *Ross v Ross* 1994 (1) SA 865, at 869 Erasmus J expressed himself on the ^g quality of possession required thus:

"Price *The Possessory Remedies in Roman-Dutch Law* at 107 declares as follows –
'Spoliation Order ... "*Possession*" is somewhat widely interpreted; it has ^h

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^a *been allowed to an agent, a trustee, a lessee, a depositary, a bona fide possessor who is legally incapable of owning the property in dispute, and, in fact, to any person holding property with the intention of securing some benefit to himself, either as agent of the owner, such as a borrower, or even as against the owner, such as one claiming a lien or a pledge, or possession under a hire-purchase agreement ...'*

^b There is however, in my view, clearly no *numerus clausus* of persons to whom the remedy is available. Neither is it necessary for the applicant to place himself in a special legal category of persons who have a possessory relationship with an object: proof of the existence of any such sufficient relationship at the relevant time will do. The question of the nature of the requisite possession has been approached from the point of the objects ^c of the remedy, with regard to the harm it is designed to prevent. In such regard, the abovementioned quotation from Price (*loc cit*), continues as follows:

'... indeed, there are many cases which seem to imply that the court is even more interested in discouraging conduct conducive to a breach of the peace or calculated to bring the law into contempt or to undermine ^d respect for orderly conduct than in assisting the dispossessed person, and that it will therefore not look too closely into the juridical nature of the possession alleged, provided that some reasonable or plausible claim can be maintained, together with an attempt by the respondent to "take the law into his own hands", in which case he will be required to restore the *status quo ante*" ...'."

^e In *de Beers v Zimbali Estate Management Assn (Pty) Ltd & Anor* 2007 (3) SA 524 (N), Nicholson J, after a discussion of the topic, concluded that:

"A summary of the above cases would seem to me to indicate that the mandament is there to protect possession, not access. Such possession must be exclusive in the sense of being to the exclusion of others. The possession of keys by a multiplicity of parties waters down their ^f possession, and in the present case it becomes so dilute that it ceases to be the sort of possession that is required to achieve the protection of mandament. It must be recalled that the real purpose of the mandament was to prevent breaches of the peace. If someone is in exclusive possession and exercises such possession, then deprivation thereof can, and often does, lead to a breach of the peace. No such breach would in the ordinary ^g course of events take place where a large number of persons have access, rather than possession, of the property in question."

The applicant claims it has been unlawfully dispossessed of its control of the various properties under its control. It says in para 16:

"However, on 25 November 2007, the second respondent attended at St H Michael's and All Angels, a church which is in the possession of the

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Diocese of Harare and actually conducted a church service in the building A there, calling himself the Bishop of Harare of the Diocese of Harare. I submit that the first and second respondents have taken the law into their own hands by invading the space of the applicant who did not give them and withholds its consent to these actions."

By that, I understand it to imply that it was in physical control of the property but that control has been taken over by the respondents. What is being B complained of is access by the respondents to the church premises, not possession in the sense that meets the criteria required to qualify for the grant of the *mandament*. Civil possession, which is physical possession, *detentio*, accompanied by intention to hold such possession to the exclusion of everyone else, *animus possidendi*, would certainly qualify an applicant for the C *mandament*. An applicant for the *mandament* must demonstrate that he was in exclusive possession of the property before he is entitled to the *mandament*. It should be recalled that the real purpose of the *mandament* was to prevent breaches of the peace. It is intended to protect possession not access. I am unable to find that, assuming that the applicant was in possession of the church premises in issue, a church organ, such as the applicant, could possess D church premises to the total exclusion of other church organs and its membership, such as the respondents. By their very nature, it seems to me, it is inconceivable that the applicant and the first respondent could competently claim the *mandament* over church premises, as neither can possess a church building to the total exclusion of the other.

The only other aspect relates to the incorporeal right that the applicant could E claim relates to ministering to its membership. I will assume in the applicant's favour that this right is one that is recognized in terms of the law. Indeed, I did not hear the respondents to argue that the applicant has no such right. The question of the application of the *mandament* for incorporeal rights has been subject of discussion in case law and in academic circles. In *Telcom SA Ltd F v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA), Jones AJA deals with the origins and development of the *mandament* as follows in para (9) at 312G-313B:

"Originally, the *mandament* only protected the physical possession of movable and immovable property. But in the course of centuries of development, the law entered the world of metaphysics. A need was felt to protect certain rights (tautologically called incorporeal rights) from G being violated. The *mandament* was extended to provide a remedy in some cases. Because rights cannot be possessed, it was said the holder of a right has quasi-possession of it when he has exercised such right. Many theoretical and methodological objections can be raised against this construct, *inter alia*, that it confuses contractual remedies and H

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A remedies designed for protecting real rights. However, be that as it may, the semantics of 'quasi-possession' has passed into our law. This is all firmly established."

The applicant says that the second respondent, by preaching in church premises under the Diocese of Harare, committed acts which amount to spoliation, if I understood its argument correctly. The acts could occasion a B breach of the peace. The respondents must be restrained by an order of spoliation. The further argument pressed on behalf of the applicant was that its Bishop Kunonga has an inherent right to minister at these premises. No other officer of the first respondent could do this without his consent. As Bishop Kunonga never consented to the second respondent ministering at the various churches under the jurisdiction of the applicant, therefore such C acts amount to taking the law into his hands by the second respondent. He must be visited with a *mandament*.

The right to exercise one's freedom of religion is recognized by the law. It is the ultimate exercise of one of the fundamental freedoms enshrined in our Constitution. Our Constitution recognizes the freedom of worship, association, D assembly and a host of other individual liberties (see ss 19, 20 and 21 of the Constitution of Zimbabwe). The question that arises then, is whether the applicant, through the reverend bishop, has been unlawfully dispossessed of this right. In assessing whether any such act of spoliation has been committed, the court has to balance the rights of those parishioners to worship, their right to be ministered to by one of theirs, their right to enjoy E

communion against the alleged unlawful invasion of the bishop's right to minister to his flock. The inquiry, in my view, must confine itself to whether, by preaching at various churches, the second respondent committed an unlawful dispossession of a legally recognized right held by the bishop. Applying the principles discussed above, I am unable to hold that where a bishop of one diocese is invited to minister in a different diocese and he accepts such invitation by the faithful, such services as he may conduct amount to unlawful dispossession of whatever rights are held by the ordained bishop for the locality. The applicant urged this court to hold thus. I am in respectful disagreement with that view for the further reason that the right of the two bishops in this unfortunate saga must surely rank *in pari passu* to each other, in respect of the ministering to the members of the Anglican Church. There is no reason in logic why such rights cannot be rationally exercised over the same congregation at given times. Neither of the two sides in this matter, claims exclusive right to preach or minister to certain sections of the congregation to the total exclusion of the other. This is the essence of this matter. If, then, this is so, there could be no unlawful dispossession of this perceived right.

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Hungwe J

In my respectful opinion, no unlawful dispossession occurred in this matter. ^a

To argue that entry into a church premise by a bishop of a separate diocese constitutes dispossession would be to stretch the *mandament* too far. It was never meant for application in situations as arose in the dispute within this particular church. In my respectful opinion, the parties to this dispute, being men of the cloth, ought to resolve their disagreements in a God-fearing manner ^b and respect the holy tenets of their church, bearing in mind their sacred vows to God Almighty. These are not matters which should burden such courts as the present one, but the proper province of the ecclesiastical organs of the Church of England.

In the result therefore, the application is dismissed with costs. ^c

Chihambakwe Mutizwa & Partners, applicant's legal practitioners

Gill Godlonton & Gerrans, respondents' legal practitioners ^d

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 1/MUSHORIWA v ZIMBANK 2008 (1) ZLR 125 (H)

MUSHORIWA v ZIMBANK 2008 (1) ZLR 125 (H)

2008 (1) ZLR p125

Citation	2008 (1) ZLR 125 (H)
Case No	Judgment No. HH-23-08
Court	High Court, Harare
Judge	Gowora J
Heard	30 January 2008
Judgment	30 January 2008
Counsel	<i>L T Biti</i> , for the applicant <i>R Y Phillips</i> , for the respondent

Case Type Civil application

Annotations None

[Link to case annotations](#)

Flynote

C Court — High Court — jurisdiction — labour matters — application for declaratory order — only labour matter over which High Court has jurisdiction — need for court to examine precise nature of relief sought — application for declaratory order involving a scrutiny of the process by which the applicant was dismissed from employment — such scrutiny in effect a review of the process of dismissal — High Court declining D jurisdiction to hear the matter

Employment — Labour Court — jurisdiction — labour matters — declaratory order — no jurisdiction to grant declaratory order — High Court retaining jurisdiction

Headnote

¶ The applicant had been employed by the respondent as a banker but his employment had been unilaterally terminated in 2005. He brought an action before the High Court seeking to have his termination of employment set aside. Relying on s 89(6) of the Labour Act [Chapter 28:02], the respondent argued that the High Court had no jurisdiction to entertain the application, which was, in effect, a review of his dismissal F from employment. As such, it was submitted, it fell within the jurisdiction of the Labour Court. The applicant, on the other hand, argued that what he sought was not a review but a declarator based upon the proposition that his dismissal was null and void. In this event, he submitted, the High Court would have jurisdiction to entertain his application. The applicant placed reliance upon s 12 of the Act which provides for the duration, G particulars and termination of contracts of employment.

Held, that in terms of 89(6) of the Act, no court, other than the Labour Court, has jurisdiction in the first instance to hear and determine any application, appeal or matter regarding labour matters. This includes seeking a review H in regard to a labour matter. However, the power to issue a declaratory

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Gowora J

order is specific to the High Court. The Labour Court, unlike the High A Court, has not been specifically empowered to issue declaratory orders and cannot create such a relief or the procedure for granting such relief as it is not a court of inherent jurisdiction. Consequently, if the relief that an applicant seeks is in the nature of a declaratory order, the High Court would have original jurisdiction as that power has not been specifically ousted by statute (*dicta per* Makarau J in *Sibanda & Anor v Chinemhute NO & Anor* HH-131-2004 B followed).

Held, further, that in determining the nature of the relief that is sought by a litigant, a court is bound to examine the process by which the relief sought can be achieved. An exercise undertaken by the court to examine the manner in which the respondent effected the dismissal of the C applicant would be no more than a review of that process. Any argument by the applicant that what he seeks is a declaration of nullity does not detract from the nature of the relief sought by the applicant. In determining the nature of the relief that is sought by a litigant a court is bound to examine the process by which the relief being sought can be achieved. A draft order cannot *per se* be the determining factor of the nature of such relief, as the draft order is achieved or arrived at through a process. Where one cannot determine the matter without subjecting the conduct of the respondent to scrutiny in light of the provisions of s 12 of the Act, such process, no matter what the applicant may choose to name it, is a process of review. Where a declaration of nullity sought by the applicant could only come about after a process of review, the High Court would not have E jurisdiction.

Cases cited

Gumbo v Norton-Selous Rural Council 1992 (2) ZLR 403 (S)

Masasi v Posts and Telecommunications Corporation 1991 (2) ZLR 73 (H) ^F

Sibanda & Anor v Chinemhute NO & Anor HH-131-04

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

Legislation considered

Labour Act [*Chapter 28:01*], ss 12, 12A, 12B, 12C, 89(1) and 89(6) ^G

Case information

L T Biti, for the applicant

R Y Phillips, for the respondent

Judgment

GOWORA J: The applicant filed an application in this court seeking relief which is stated in the draft order as follows: ^H

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Gowora J

^A The respondent's termination of the applicant's contract of employment effected on 8 April 2005, and communicated to him by way of a letter dated 9 May, be and is hereby set aside.

Prior to this dispute the applicant was employed by the respondent as a personal banker until 8 April 2005 when his contract of employment was unilaterally terminated by the respondent. The background to the unilateral ^B termination aforementioned is as follows. On 4 April 2001, the parties herein concluded an agreement in terms of which the respondent availed to the applicant sabbatical leave to permit him to perform his duties as a member of the Parliament for Zimbabwe, the applicant having been elected to that office on the Movement for Democratic Change (MDC) party ticket. In terms of the ^C agreement, the sabbatical leave was for the duration of that term of Parliament. In March 2005, after the term envisaged came to an end, the applicant again stood for re-election. He was successful in his endeavours and thus was a member of the Parliament for the subsequent term. After the elections he reported for duty on 3 April 2005 and was advised his services were no longer needed. On 9 April 2005, he then received a letter advising him that his contract ^D of employment had been terminated. He has therefore, filed these proceedings for an order "setting aside the termination".

Two preliminary issues have risen for determination. The first is whether or not the deponent to the opposing affidavit had the necessary authority to depose to the same and thus defend the application. The second is whether ^E the application is properly before this court, in view of the provisions of s 89 of the Labour Act [*Chapter 28:01*] (the Act), which ousts the jurisdiction of other courts or tribunals in certain instances to do with labour matters. It would be in order to deal with the question of jurisdiction before I determine whether or not the affidavit by the deponent to the opposing affidavit has been sworn to by a person with the requisite authority to do so.

^F In terms of s 89(1) amongst the powers bestowed on the Labour Court by the enabling Act is the power, in subs (1)(di), to exercise the same powers of review as would be exercisable by the High Court in respect of labour matters. This was the amendment ushered in by the Labour Amendment Act 7 of 2005. The application was filed on 9 March 2006. It is therefore common cause that, when the application was filed, the Labour Amendment Act 7 of 2005 had already ^G been promulgated. That Act came into effect on 30 December 2005. The effect of this, contends the respondent, is to oust the jurisdiction of the High Court in labour matters even where the issue concerns a review. The respondent in this contention relies on s 89(6) of the Labour Act [*Chapter 28:01*]. According ^H to the respondent the section brings about a statutory ouster of jurisdiction

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Gowora J

by the High Court where applications, appeals or matters referred to in subs ^A (1) are concerned. The section is in the following terms:

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

The applicant does not dispute that the application is before this court as a ^a court of first instance. He however disputes that the nature of the relief that he seeks is what is provided for in s 89(1). He contends that what he seeks is a declarator in which event the High Court would have jurisdiction to hear and determine the application. According to the respondent, the applicant, whatever he wishes to call his application, is seeking a review of the decision to terminate his employment. ^c

In the body of the founding affidavit, at this juncture, it is only proper that I mention the grammatical inadequacy of the said affidavit. The applicant avers that what he seeks is a declarator, the effect of which is to declare that the termination of employment is null and void. The basis for nullity of the termination of employment has not been specified in the affidavit. It is only ^d in the answering affidavit that the applicant, in a terse sentence, for the first time mentions that in terminating the contract of employment, the respondent should have had recourse to the registered code of conduct, which is the instrument that ought to have been used. In this manner is the question of illegality raised. It is not referred to in any other form. In the answering affidavit, the applicant then states that his right to freedom of assembly, as enshrined ^e in ss 20 and 21 of the Constitution have been violated by the respondent as he was given express permission to participate in the elections. Further, he contends that the respondent is violating his rights as guaranteed by sections 8(1) and 8(9) of the Constitution. He avers that he is entitled to due process and thus he is entitled to be heard before an adverse decision is taken. He avers that the respondent had breached the labour laws of this country as it had not ^f followed the provisions of s 12B or 12C of the Act in terminating his contract of employment. He concludes by stating that he had approached this court directly, notwithstanding the provisions of s 93 of the Act, because of the constitutional issues raised in the affidavit.

The incidence of s 89(6) of the Act resulted in a number of judgments from this ^g court in relation to the instances where it would retain jurisdiction in the first instance, to determine issues relating to labour matters. In *Tuso v City of Harare* 2004 (1) ZLR 1 (H), Bhunu J decided that this court did not have jurisdiction to consider reviews arising out of contracts of employment, as that power had been bestowed on the Labour Court by virtue of s 89(6) and also ^h

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Gowora J

^a ousted the power of the High Court to review such decisions. In *Sibanda & Anor v Chinemhute NO & Anor* HH-131-04, Makarau J (as she then was) had to consider whether or not, in the construction of s 89(6), this court still retained the power to issue declaratory orders. This is what she had to say:

“Thus, the power to issue a declaratory order is not available in all courts that apply common law. It is specific to this court.

^b It is common cause that the Labour Court has not been specifically empowered to issue declaratory orders as this court has been. It cannot create such a relief or the procedure for granting such relief as it is not a court of inherent jurisdiction.” ¹

It stands to reason, therefore, that if the relief that the applicant seeks is in the ^c nature of a declaratory order, this court would have original jurisdiction as that power has not been specifically ousted by statute. The draft order annexed to the application is in the following terms:

“The respondent’s termination of the applicant’s contract of employment effected on 8 April 2005, and communicated to him by way of a letter dated 9 May 2005, be and is hereby set aside.”

^d According to the respondent, it is not what the applicant wishes to call his application that matters but rather the substance of the relief he claims that is important. What the applicant seeks from this court is the court grants him an order for reinstatement in his former position. To that end, he has invoked the *audi alteram partem* principle to the effect that he was not heard before ^e the respondent made a decision dismissing him from his employment. It is trite that the *audi alteram partem* rule is a ground for review. Reviews relating to labour matters, being issues for determination at first instance, are one of the matters specifically reserved for the Labour Court. The jurisdiction of the High Court to determine such reviews has been ousted by the legislature under the Act and the applicant would therefore not be afforded relief by this court in ^f respect of the same.

In addition to the above ground, the applicant has contended further that the respondent had, by its failure to proceed in terms of its registered code of conduct in dismissing him from employment, “breached the labour laws” of the country. The applicant, in his affidavit, makes reference to the

provisions of s 12 of the Act. In heads of argument filed on his behalf, extensive reference ^g to the Act and provisions of SI 130 of 2003 is made by the applicant which submissions, in my view, raise legal issues pertinent to the appropriateness of the dismissal of the applicant on the merits of such dismissal. For instance,

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Gowora J

the applicant has contended in his heads of argument that the respondent did ^a not have the right to terminate the contract of employment between the two parties hereto except in accordance with the provisions of the Act, either on the basis of SI 130 of 2003 for disciplinary reasons or, alternatively, in terms of a registered code of conduct, or by means of a no fault terminations which is provided for in terms of s 12C of the Act. ^b

The further contention by the applicant is that in view of the clarity and lack of ambiguity of s 12 of the Act and s 2 of SI 130 of 2003, an employer can only terminate a contract of employment in accordance with the provisions of a registered code of conduct or the Act. Therefore, so the argument goes, any purported termination which does not accord with the provisions of a registered code of conduct or which has not been done in terms of the Act and ^c the regulations is, as a consequence, null and void. The respondent did not proceed either in terms of a registered code or the Act and regulations and therefore the purported termination is rendered null and void. For this contention, the applicant has sought reliance on *Masasi v Posts and Telecommunications Corporation* 1991 (2) ZLR 73 (H) and *Gumbo v Norton-Selous Rural Council* 1992 (2) ZLR 403 (S). My reading of the authorities cited does not make me come to the same ^d conclusion as the applicant. The issue for determination in those authorities was concerned with whether or not the Act applied to the employees of the PTC and the rural council. Consequently the *dicta* in the authorities is to the effect that the Act is applicable to employees of the PTC and the rural council.

Section 12 of the Act provides for the duration, particulars and termination of ^e contracts of employment. Section 12A provides for the remuneration of an employee and deductions from such remuneration. Section 12B is concerned with the dismissal of employees from employment whilst 12C deals with the question of retrenchments. By arguing that his dismissal from employment was not effected in terms of the provisions of s 12, the applicant is inviting this court to view the manner of his dismissal *vis-à-vis* the provisions of the Act. ^f In order then to determine whether or not the dismissal was null and void, this court would have to have regard to the provisions of s 12 of the Act and come to a finding as to what the section requires of an employer before he can dismiss an employee. The provisions of the section then have to be considered in the light of the actions or omissions on the part of the respondent in effecting the dismissal of the applicant. ^g

Thus, an exercise undertaken by this court to examine the manner in which the respondent effected the dismissal of the applicant is, in this case, no more than a review of that process. The argument by the applicant that what he seeks is a declaration of nullity which form of relief is not reserved by the Act to the ^h

2008 (1) ZLR p131

Gowora J

A jurisdiction of the Labour Court does not, to my mind, detract from the nature of the relief sought by the applicant. In determining the nature of the relief that is sought by a litigant, a court is bound to examine the process by which the relief being sought can be achieved. A draft order cannot *per se* be the determining factor of the nature of such ^d relief, as the draft order is achieved or arrived at through a process. In this case, it is pertinent to note that one ^b cannot determine the matter without subjecting the conduct of the respondent to scrutiny in light of the provisions of s 12 of the Act. Such process by a judicial officer in the circumstance pertaining in this application, no matter what the applicant may choose to name it, is a process of review. Thus, a declaration of nullity by this court can only come about in this case after a ^c process of review. This court, in view of the provisions of the Act, is strictly precluded from exercising powers of review in the first instance over matters to deal with labour issues as that function has been specifically reserved for the Labour Court. Thus, I decline jurisdiction in this matter.

Over and above this, the applicant has, in his founding affidavit and heads of argument, made certain averments and conclusions as to the contractual ^d nature of his relationship with the respondent and the effect on the contract of the actions of the latter in terminating the same. The

applicant contends that the nature of an employment contract are such that the terms are fixed and that neither party thereto can unilaterally vary the same unless the original contract provides for such variation. It cannot have escaped the applicant, in having submissions of this tenor made on his behalf, that the court is being asked to ^εpronounce on the terms and conditions pertaining to a contract of employment and whether or not the termination by the employer was done in accordance with our law. According to the Act, in particular s 3, thereof, the Labour Act applies to all employers and employees, save where the employment is in terms of the Constitution. The applicant was not employed in terms of the Constitution. ^ϕThis application therefore falls under the provisions of s 89(1) of the Act and this court does not have the jurisdiction to determine the matter.

It is not important, in view of my finding above, that I determine the other preliminary issue as this court does not jurisdiction to consider the merits of the application.

Accordingly, I find that the application is not properly before this court and ^git is hereby dismissed with costs.

Honey & Blanckenberg, applicant's legal practitioners

^h *Gill Godlonton & Gerrans*, respondent's legal practitioners

1 At p 7 of the judgment

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Source:

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MOYO & ANOR v MUGABE NO & ORS 2008 (1) ZLR 132 (H)

2008 (1) ZLR p132

Citation	2008 (1) ZLR 132 (H)
Case No	Judgment No. HH-33-08
Court	High Court, Harare
Judge	Guvava J
Heard	11 February 2008
Judgment	12 February 2008
Counsel	<i>C Mhike</i> , for the applicants <i>Mrs V Mabhiza</i> , for the first and third respondents <i>C Chikumbirike</i> , for the second respondent
Case Type	Election application
Annotations	No case annotations to date

Flynote

Election — *constituencies and wards — boundaries of — publication of — c proclamation itself not defining boundaries but incorporating them by reference to report of Delimitation Commission — such report thereby becoming part of proclamation*

Headnote

The applicants, candidates in the forthcoming Parliamentary elections, ^D complained that the proclamation in terms of which the President was supposed to publish the boundaries of constituencies and wards did not comply with the requirements of s 61A(11) of the Constitution. This provides that within fourteen days after receiving the Electoral Commission's final delimitation report, the President shall publish a proclamation in the *Gazette* declaring the names and boundaries of the ^E wards and the House of Assembly and senatorial constituencies of Zimbabwe. The proclamation published by the President did not describe the wards as set out in the delimitation report; instead, it stated that the descriptions of the boundaries of these wards were contained in the Zimbabwe Electoral Commission's final delimitation report, which descriptions were incorporated by reference and that the report could be ^F inspected free of charge during normal working hours at the various provincial offices of the Electoral Commission.

Held, that the proclamation did describe the boundaries of the wards as it specifically incorporated the delimitation report by reference. "Incorporate" means to "include as a part or ingredient, unite (in one ^G body)". Once the Proclamation incorporated the report, the report became part of the Proclamation. The intention of the Legislature in enacting s 61A(11) was to make available to the public the description of the boundaries as set out in the report. Incorporating the report as part of the Proclamation complied with the requirements of the Legislature. ^H

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Guvava J

. ^A There could be no prejudice to persons in the position of the applicants who wanted to make use of it for election purposes.

Cases cited

Dilwin Investments (Pvt) Ltd v Jopa Engineering Co (Pvt) Ltd HH-116-98

Kuvarega v Registrar-General & Anor 1998 (1) ZLR 188 (H)

^B *Musunga v Utete & Anor* HH-90-03

Washaya v Washaya 1989 (2) ZLR 195 (H)

Legislation considered

Constitution of Zimbabwe 1980 s 61A (11)

High Court Rules 1971 (RGN 1047 of 1971) r 244

^C Proclamation 2 of 2008 (SI 7A of 2008)

Proclamation 3 of 2008 (SI 11 of 2008)

Proclamation 4 of 2008 (SI 13A of 2008)

Case information

^C *Mhike*, for the applicants

^D *Mrs V Mabhiza*, for the first and third respondents

^C *Chikumbirike*, for the second respondent

Judgment

GUVAVA J: This matter was filed in this court by way of urgent chamber application on 4 February 2008. After hearing the matter, I dismissed the application without giving reasons. These are the reasons for my decision.

^E The applicants were seeking the following interim relief:

1. The date that had been proclaimed under Proclamation 2 of 2008, to be the date for the nomination court to sit, be set aside.
2. No nomination court would therefore sit on the date that had previously been proclaimed under the subject of proclamation. ^f
3. The applicants should be accorded their rights of reasonable access, through the *Government Gazette* and other convenient channels of communication, to the information that makes it fairly easy and possible to determine names and boundaries of wards and constituencies in the country. ^c
4. The terms of this provisional order shall apply and remain in full force and effect notwithstanding any appeal that may be filled against the order.

The facts which brought about this application may be summarized as follows:

The first applicant is a registered voter and is currently the member of ^h Parliament for Tsholotsho constituency in Matabeleland North Province. The

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Guvava J

second applicant is also a registered voter and an aspiring candidate in the ^a forthcoming elections. The first respondent is the President for the Republic of Zimbabwe. He is cited in his official capacity in relation to the proclamations which he issued in accordance with his constitutional mandate. The second respondent is the Zimbabwe Electoral Commission, whose constitutional responsibility includes determining the limits and the boundaries of the wards ^b and constituencies into which Zimbabwe is divided for the purpose of holding elections. The third respondent is the Minister of Justice, Legal and Parliamentary Affairs, who is responsible for legal and parliamentary affairs.

On 24 January 2008, the first respondent published ^c Proclamation 2 of 2008 (SI 7A of 2008) in an *Extraordinary Gazette* dissolving Parliament with effect from midnight on 28 March 2008, fixing Saturday, 29 March 2008 as the day ^c for the general elections and setting Friday, 8 February 2008 as the date for the sitting of the nomination court in relation to the election of President, 60 senators, 210 members of the House of Assembly and 2000 ward councillors. On 1 February 2008, the first respondent ^d published Proclamation 3 of 2008 (SI 11 of 2008) setting out the boundaries for the constituencies in accordance with s 61A(11) of the Constitution. On 6 February 2008, the first respondent published Proclamation 4 of 2008 (SI 13A of 2008) which postponed the date for the sitting of the nomination court from 8 February 2008 to 15 February 2008.

Mr *Mhike* for the applicants submitted that Proclamation 2 of 2008 was defective, in that it did not comply with the requirements of s 61A(11) of the Constitution of Zimbabwe, as the first respondent failed to publish in the ^e *Gazette* a proclamation declaring the boundaries of the wards and constituencies before publishing the nomination day. It was also submitted that Proclamation 3 of 2008 was defective as it did not set out the boundaries of the wards as required by s 61A(11) of the Constitution. The applicants further submitted that they were prejudiced by this and they will not be able to prepare adequately for the nominations. ^f

The respondents opposed the application, although only the second respondent filed opposing papers. It was submitted by Mrs *Mabhiza* that the first and the third respondents had not been served and the only service that had been made was to the Civil Division of the Attorney-General's Office. She stated that because of this she had not filed opposing papers. She however ^g stated that she was mandated to make submissions on behalf of the respondents. Mr *Chikumbirike*, for the second respondent, opposed the application on two grounds. He submitted, firstly, that the matter was not urgent as the relief being sought had been overtaken by events and therefore the application should be dismissed on this point. On the merits, it was ^h

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Guvava J

^a submitted that the respondents had complied fully with the requirements of the law and there was no basis for granting the order sought.

Mr *Chikumbirike* further argued that by the time the application was heard the first respondent had postponed the date of the sitting of the nomination court and as such there was no need to pursue the matter. He stated that this was particularly in view of the fact that the new date for the sitting

of the ^B nomination court was a period which was said to be proper by the applicants in their application i.e fourteen days from the date of publication of the constituency boundaries. He urged the court to dismiss the application on this basis.

Mr *Mhike*, however, insisted that the matter was still urgent. He submitted that ^C the applicants had withdrawn the first application which they had filed on 1 February 2008 but had resubmitted the application as they were of the view that their concerns had not been addressed in Proclamation 3 of 2008. It was his submission that, as the March 2008 elections are ward based, if a party does not know the description of the wards, it would make it difficult for them to prepare for elections.

^D It is trite that no litigant is entitled as of right to have his or her matter heard urgently. Applications filed on a certificate of urgency, as set out in ^r 244 of the High Court Rules 1971, as amended, must relate to matters that are so urgent that the matter cannot wait. The Rules require that a legal practitioner files a certificate specifying the urgency of the matter. In other words, the legal ^F practitioner, as an officer of the court, should satisfy himself or herself that the matter is indeed urgent and warrants to be heard in terms of this rule. In the case of ^B *Musunga v Utete & Anor* HH-90-03, Makarau J (as she then was) stated as follows at p 2 of the judgment:

"The granting of urgent relief by this court is a matter of the court's discretion, and only in deserving cases. Thus, the question of urgency ^F is not tested subjectively. The test for urgency as provided for under the rules is that the matter must be so urgent and the risk of irreparable damage to the applicant so great that the matter cannot proceed within the normal time frame provided for in the rules. In my view, it is not easy nor necessary to catalogue or classify what matters are so urgent and the risk of irreparable harm to the applicant so great that they can only be brought ^G to court by way of urgent application. Each case must depend on its merits."

What constitutes urgency was described by Chatikobo J in *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H) at 193F as follows:

"A matter is urgent, if at the time the need to act arises, the matter cannot ^H wait."

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Guvava J

See also *Dilwin Investments (Pvt) Ltd v Jopa Engineering Company (Pvt) A Ltd* HH-116-98.

An examination of this matter indicates that the relief which was sought by the applicants was no longer in issue at the time that the application was heard. The date for the sitting of the nomination court had been postponed to 15 February 2008, thus complying with paras 1 and 2 of the relief sought. The relief ^B that the applicants were seeking under para 3 in relation to Proclamation 3 of 2008 was not, in my view, urgent. There was nothing on the papers to suggest that they had gone to the Zimbabwe Electoral Commission offices and failed to access the boundaries for the wards after 1 February 2008. The evidence on record shows that the applicants went to look for the information before the Proclamation had been published and thus before the delimitation report ^C became a public document. There was no evidence that the information provided in the Proclamation was not accurate, reliable or accessible to the applicants. Clearly, on the papers before me there was nothing to warrant the bringing of this application on an urgent basis and for these reasons I would dismiss the application.

In the event that I am wrong in coming to the conclusion that this matter is not ^D urgent and dismissing it on that basis, I will deal with the merits of the application.

The issues for determination were narrowed considerably during argument as it was conceded by Mr *Mhike* for the applicant that their argument to the effect that the publication of the proclamations did not follow a logical sequence had ^E fallen away due to the publication of Proclamation 4 of 2008 on 6 February 2008. The publication of the new date for the sitting of the nomination court meant that it now followed after the publication of the boundaries on 1 February, 2008. He however persisted in the argument that Proclamation 3 of 2008 is defective as it does not describe the wards, as required by the Constitution. ^F This then was the sole issue for determination by this court.

Section 61A(11) of the Constitution provides:

"Within fourteen days after receiving the Zimbabwe Electoral Commission's final delimitation report the President shall publish a proclamation in the *Gazette* declaring the names and boundaries of the wards and the House of Assembly and senatorial constituencies as finally determined by the ^G commission to be the wards and House of Assembly and senatorial constituencies of Zimbabwe, and those boundaries shall have effect for the purpose of the next and any subsequent general election."

In pursuit of this mandate, the first respondent published Proclamation 3 of 2008 ("the Proclamation") on 1 February 2008. It is not in dispute that the first H

2008 (1) ZLR p137

Guvava J

A respondent had received the final report on 23 January 2008 and caused the publication of the required proclamation within the fourteen days prescribed by law on 1 February 2008. The complaint of the applicants, however, related to the fact that the proclamation did not describe the wards as set out in the Delimitation Report. Part 1 of the Proclamation provides as follows:

"In the following Part the names and descriptions of the boundaries of the B House of Assembly constituencies are given, followed by the number of the wards of the local government area or areas included in that constituency. The descriptions of the boundaries of these wards are contained in the Zimbabwe Electoral Commission's final delimitation report, which descriptions (together with figures representing Universal Transverse Mercator (UTM) Zone 36 South (S) co-ordinates, based on C the modified Clarke 1880 Spheroid (SA) for both the constituencies and the wards) are hereby incorporated by reference. The report may be inspected free of charge during normal working hours at the following provincial offices of the Zimbabwe Electoral Commission ..."

It was the applicants' argument that mere reference to the Delimitation Report for the description of the wards was insufficient and did not comply with D s 61A(11) of the Constitution. Mr *Mhike* submitted that the wards must be described in full in the proclamation in the same manner as the constituencies for it to comply with the Constitution.

I was, however, not persuaded by this argument. The proclamation did describe the boundaries of the wards, as it specifically incorporated the E Delimitation Report by reference. "Incorporate" is defined in the *Oxford English Dictionary* as "include as a part or ingredient, unite (in one body)". It seems to me that, once the Proclamation incorporated the Delimitation Report, the Report became part of the Proclamation. The Proclamation further advised where interested persons can access the Delimitation Report free of charge for perusal. In my view, the intention of the Legislature, in enacting S F 61A(11), was to avail to the public the description and boundaries as set out in the Delimitation Report. Incorporating the Delimitation Report as part of the Proclamation complies with the requirements of the legislature. There can, therefore, be no prejudice to persons in the position of the applicants who want to make use of it for election purposes.

G I did not understand the applicants to complain that after the publication of the Proclamation they went to the designated places and failed to access the Delimitation Report. In fact, the first applicant states that he only went to Tsholotsho Constituency offices on 26 January 2008. This was clearly before the publication of Proclamation 3 of 2008. It was also not to the Zimbabwe H Electoral Commission offices specified in the Proclamation.

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Guvava J

At the hearing, the second respondent applied for costs *de bonis propriis* A against the applicants' legal practitioners. It was submitted by Mr *Chikumbirike* that the second respondent is a public body wholly funded by tax payers' money. He argued that it was wrong for such funds to be used in defending matters where there was clearly no merit. He argued that once the applicants realized that their case had been overtaken by events they should have withdrawn it instead of insisting on a date of set down by filing a confirmation B of urgency notice.

Mr *Mhike* submitted that he was justified in bringing the application because of the importance of the forthcoming elections. He argued that the applicants should not be punished for bringing matters to court by being made to pay punitive costs. C

It seems to me that the intention of the Legislature, in establishing an Electoral Court to deal with matters arising from elections, was to enable every person who has a grievance in the manner in which the elections are conducted to approach the court for relief. Whilst the court frowns on frivolous applications and would indeed punish an applicant with an award of punitive costs in D deserving cases, case authorities from this court have shown that an order for costs *de bonis propriis* is not lightly given by a court but is used where there has been an abject dereliction of duty on the part of a legal practitioner. See *Washaya v Washaya* 1989 (2) ZLR 195 (H). I am of the view that the case before me was a borderline case. The issue to be resolved related to the interpretation of new provisions which have just been enacted. As such, the court should E err on the side of

leniency. The Zimbabwe Electoral Commission, being a public body involved in the running of elections, will invariably be called upon to explain its actions to affected persons. I will, therefore, award costs to the successful parties on the ordinary scale.

It was for these reasons that I dismissed the application with costs. ^F

Atherstone & Cook, applicants' legal practitioners

Civil Division of the Attorney-General's Office, first and third respondents' legal practitioners

Chikumbirike & Associates, second respondent's legal practitioner ^G

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 1/DIOCESE OF HARARE v CHURCH OF THE PROVINCE OF CENTRAL AFRICA & ANOR (2) 2008 (1) ZLR 139 (S)

DIOCESE OF HARARE v CHURCH OF THE PROVINCE OF CENTRAL AFRICA & ANOR (2) 2008 (1) ZLR 139 (S)

2008 (1) ZLR p139

Citation	2008 (1) ZLR 139 (S)
Case No	Judgment No. S-02-08
Court	Supreme Court, Harare
Judge	Chidyausiku CJ (in chambers)
Heard	6 February 2008
Judgment	13 February 2008
Counsel	Ms <i>V Chizodza</i> , for the applicant <i>E Matinenga</i> , for the respondents
Case Type	Chamber application
Annotations	Link to case annotations

Flynote

Appeal — set-down — set-down on urgent basis — appeal against provisional ruling which would have effect of settling main dispute — desirability of hearing appeal before main case heard — urgent set-down ordered

Headnote

- The parties had been engaged in acrimonious litigation. The litigation followed a split within the Anglican Church in Zimbabwe. The main dispute was which of the two formations was legitimate. Access to, and use of, the church premises and property was hotly contested. The dispute between the parties had given rise to multiple litigation and court applications. The applicant made an urgent chamber application in the ^EHigh Court wherein it sought a provisional order against the respondents. In the provisional order, the applicant sought to prevent the respondents and their adherents from using church property under the control of the applicant and to interdict

the second respondent from holding himself out as bishop of the Diocese of Harare. Before judgment was handed down, further orders were granted by the High Court, regulating the use of the churches in the diocese. When judgment was given in the chamber application, the effect of the judgment was that the applicant was non-existent and had no *locus standi* to bring the matter to court. This judgment, in effect, determined the issues raised in the main case between the parties. The applicant appealed against the ruling and sought to have the appeal set down on an urgent basis. It argued that the issues should not have been determined in a chamber application for the issuance of a provisional order seeking to govern the relationship between the parties in the interim period while awaiting completion of the main case; the ruling would have the effect of tying the hands of the judge deciding the main case.

2008 (1) ZLR p140

Chidyausiku CJ

Held, that the dispute between the parties should be resolved as a matter of urgency.

Held, further, that the appeal against the judgment should be determined before the main trial.

This gave some urgency to the set down of the appeal, and set-down on the earliest available date would be ordered.

Case information

Ms V Chizodza, for the applicant

E Matinenga, for the respondents

Judgment

CHIDYAUSIKU CJ: This is an urgent chamber application in which the applicant seeks the relief set out in the following amended draft order:

"IT IS ORDERED –

- (a) That the urgent appeal hearing for this matter be and is hereby allowed.
- (b) That the first and second respondents and their followers be and are hereby interdicted from conducting Church services in properties controlled by the applicant or the business and ministry of the applicant.
- (c) That the second respondent be and is hereby interdicted from holding himself out as a Bishop of the applicant, and conducting his ministry as such.
- (d) That the respondent(s) pay the costs of this application."

At the commencement of the hearing, I advised the parties that it was not competent to seek the relief set out in paras (b) and (c) of the draft order. Accordingly, the matter proceeded on the basis that this was an application to determine whether the appeal against the judgment of Hungwe should be heard or set down on an urgent basis. The wording of para (a) of the draft order leaves a lot to be desired. The relief sought in that paragraph is not that clear. I have assumed that the applicant in that paragraph is applying for the set down of the appeal on an urgent basis.

The facts of this matter are very ably set out in the judgment by Makarau JP in her judgment in case No. HC 345/08. However, for the purposes of this application, I set out hereunder the following facts which are common cause. The parties to this dispute are members of the Anglican Church that has now split into two formations. Following the split, there is a raging dispute as to which of the formations is legitimate. Access to, and use of, the church premises and property is hotly contested. The dispute between the parties has given rise to multiple litigation and court applications. I will only refer to those applications that have a bearing on this matter. On 3 December 2007, the

2008 (1) ZLR p141

Chidyausiku CJ

A Diocese of Harare made an urgent chamber application wherein it sought a provisional order against the respondents. The provisional order sought interim relief pending the granting of final relief, which was set out in the provisional order. It reads as follows:

"TERMS OF FINAL ORDER SOUGHT

That the first and second respondents and their supporters or followers be and are hereby interdicted from conducting Church services on any property controlled by the applicant or from holding themselves

out as being part of the applicant pending finalisation of case No. HC 6464/07.

That the first and second respondents shall pay the costs of suit.

TERMS OF THE INTERIM ORDER GRANTED

c Pending the finalisation of this matter, the applicant is granted the following interim relief –

That the first and second respondents and their followers be and are hereby interdicted from conducting Church services in properties controlled by the applicant, or interfering with the business and ministry of the applicant.

d That the second respondent be and is hereby interdicted from holding himself out as a Bishop of the applicant, and conducting his ministry as such.”

Hungwe J reserved judgment. Although this matter was heard on an urgent basis, judgment was handed down almost two months later. That is unacceptable. In similar urgent applications, Makarau JP and Karwi J e handed down judgments within two days of hearing the matter. This is how it should be. In between the hearing of the matter and the handing down of the judgment, two further applications between the same parties were heard and judgment given. Thus, on 18 January 2008 an urgent chamber application regarding the use of, and access to, the Church premises was made. The f following day, on 19 January 2008, Makarau JP delivered her judgment, the operative paragraph of which reads as follows:

“1. Pending determination of (case No.) HC 6544-07 (6464-07),

- (a) The fourth respondent (Dr Kunonga) and all those acting under his authority shall have use of the Church premises at times previously slotted for such activities prior to 21 September 2007. g
- (b) The fourth respondent and all those acting under his authority shall make Church premises available to the applicant (now the first respondent) ninety minutes after its activities as detailed in (a) above. h
- (c) The above time slots may be varied by the parties at parish level

2008 (1) ZLR p142

Chidyausiku CJ

provided that such variation is reduced to writing and A communicated to the first, second and third respondents.

- (d) Both the applicant and all those acting under its authority and the fourth respondent and those acting under his authority are not interfering with the activities of the other exercised in terms of this order.
- (e) Each party shall pay its own costs.” b

Soon after the handing down of the judgment of Makarau JP, a dispute as to the meaning of that judgment arose and that led to another chamber application by the respondents. This application was launched on 29 January 2008. Karwi J handed down judgment on 31 January 2008, two days after the hearing of the application. In that judgment Karwi J provided clarification of c Makarau JP’S judgment, in particular in regard to the times at which the different formations of the Church should have access to the church premises. Thus, as of 19 January 2008, the judgment of Makarau JP, as clarified by Karwi J, regulates the access to the Church premises by the two formations pending the determination of the dispute between the two formations in case No. HC 6464/07. On 31 January 2008, as I have already stated, Hungwe J d handed down his judgment. His judgment is to the effect that the applicant is non-existent and has no *locus standi* to bring the matter to court. This judgment in effect determined the issues raised in the main case between the parties, case No. HC 6464/07. I am advised the main case (case No. HC 6464/07) is at pleadings stage. The plea has yet to be filed. The applicant takes issue e with the judgment of Hungwe J. The applicant has filed a notice of appeal on the following grounds:

“GROUNDS OF APPEAL

- 1. The Honourable Judge misdirected himself in finding that the applicant had no *locus standi in judicio* to sue for an interdict.
- 2. The Honourable Judge erred in finding that there are procedures set f out in the Constitution of the Church of the Province of Central Africa for a withdrawal of a Diocese from a Province without evidence on the same.
- 3. The Honourable Judge further erred in finding that the Constitution of the Church of the Province of Central Africa applied to the withdrawal of a Diocese in a situation where such Diocese is paramount g and self-governing in that it is governed by a Diocesan Act, and merely fellowships with a Province and the Universal Anglican Communion so much as much to oust the jurisdiction of the Archbishop of Canterbury and the Church of England over the Diocese of Harare. h

Chidyausiku CJ ^A

4. The Honourable Judge misdirected himself where [when?] he found that the applicant did not exist at law.
5. The Honourable Judge erred in finding that the applicant needed the adoption of an Act made by Synod, in clear circumstances where Acts of Synod do not need adoption after the close of Synod.
6. The Honourable Court erred in finding that the lawsuit before it was ^B at the instance of ... Bishop Nolbert Kunonga and a few of his sympathisers, without evidence that there was no majority vote at Synod and that Synod did not constitute a quorum when it made the Diocesan Act so much as to render the Act null and void.
7. The Honourable Court misdirected itself when it found that there was [sic] the essential elements for spoliatory relief or an interdict were ^C not available so much as to render the order sought incompetent.

Wherefore, the appellant prays that the appeal may succeed against the respondent and for the judgment of [the] court *a quo* to be set aside and substituted by the following –

- (i) The appeal be and is hereby granted. ^D
- (ii) The provisional order granted in case No. HC 3208/07 be and is hereby set aside.”

It is common cause that the main dispute between the parties is awaiting determination in case No. HC 6464/07. That matter is proceeding by way of court action and the pleadings are yet to be completed. The applicant’s complaint in the notice of appeal, and indeed in the submissions before me, ^E is that Hungwe J misdirected himself by determining issues that are to be determined in case No. HC 6464/07 when the main matter goes to trial. Those issues, it was argued, should be determined after a full trial. The issues should not have been determined in a chamber application for the issuance of a provisional order seeking to govern the relationship between the parties in the ^F interim period while awaiting completion of the main case. It was the applicant’s contention that the judgment of Hungwe J will have the effect of tying the hands of the judge who will adjudicate in the main case.

While I accept that the applicant’s contention has substance, it is not relevant to the issue that I have to determine in this chamber application, namely, whether the appeal should be set down on an urgent basis or not. The ^G applicant’s contention will have to be determined in the appeal. The applicant contends that the matter should be set down as a matter of urgency, while the respondents contend that the matter should not be set down on an urgent basis. Rationality seems to have abandoned all the parties and nobody is prepared to make even the most obvious of concessions. The parties could ^H not even agree on whether the appeal should be set down as soon as possible.

Chidyausiku CJ

The interim use of the church premises is presently governed by the judgment ^A of Makarau JP, which sets out how the parties are to access the Church premises. As there is an order regulating the interim use of the Church premises, I see no need to set down the appeal against the judgment of Hungwe J on an urgent basis. The judgment of Hungwe J has no bearing on the interim arrangement over the use of the Church premises. I, however, ^B accept that the dispute between the parties should be resolved as a matter of urgency. That is common cause. The parties are agreed that case

No. HC 6464/07 should be completed as soon as possible, but blame each other for lack of progress towards finalisation of the main case. In my view, the appeal against the judgment of Hungwe J should be determined before the main trial in case No. HC 6464/07. This gives some urgency to the set down ^C of the appeal. The determination of the appeal should not delay the finalising of case No. HC 6464/07. I have therefore come to the conclusion that this matter should be set down on the next set down date of this court, which I am advised is some time in mid-March. The Deputy Registrar is so directed. This order is made on the understanding that a record of the proceedings will be prepared within two weeks of the date that this matter was heard. The undertaking ^D regarding the availability of the record was given by the applicant. In the event of an appeal against the judgment of Makarau JP (the applicant indicated that such an appeal was likely to be noted), it would be advisable to consolidate the two appeals to avoid multiple appeals. The necessary application for consolidation should be made timeously.

In the result, it is ordered that the Deputy Registrar set down this matter on the next set down date available in this court. Costs will be costs in the cause.

M V Chizodza-Chineunye, applicant's legal practitioners

Gill, Godlonton & Gerrans, respondents' legal practitioners

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Source:

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SURTEE v SURTEE 2008 (1) ZLR 145 (H)

2008 (1) ZLR p145

Citation	2008 (1) ZLR 145 (H)
Case No	Judgment No. HH-7-08
Court	High Court, Harare
Judge	Makarau JP & Mavangira J
Heard	7 February 2008
Judgment	13 February 2008
Counsel	<i>R M Fitches</i> , for the appellant <i>E T Matinenga</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

C Court — children's court — custody order granted by High Court — juvenile court having no jurisdiction to vary such order

Court — jurisdiction — children's court — custody order granted by High Court — juvenile court having no jurisdiction to vary such order

Court — jurisdiction — concurrent — two courts having jurisdiction over same matter — one court seized with the matter — other court, even a senior one, having no jurisdiction to deal with the matter

Court — rules of court — departure from — need for departure and reasons therefor to be recorded

Family — child — children's court — custody order granted by High Court — juvenile court having no jurisdiction to vary such order

Family — child — custody — custody order granted by High Court — children's court having no jurisdiction to vary such order

Practice and procedure — rules of court — departure from — need for departure and reasons therefor to be recorded

Headnote

The parties, who had been divorced, were the parents of three minor children. In terms of the consent paper which was made an order of the High Court when the divorce was granted, custody

of the children was awarded to the respondent, the children's father. A year later, the appellant approached the children's court for an order varying the custody order ^G in relation to the two daughters of the marriage. Apart from dealing with procedural issues, the children's court dismissed the application for variation, holding, on the merits, that the appellant had not established that it was in the girls' best interests that custody be awarded to her. In so doing, the court departed from various rules of court in order to ^H expedite the conclusion of the matter. On appeal, the appellant's counsel

2008 (1) ZLR p146

Makarau JP

conceded that the proceedings before the children's court were a nullity ^A as that court did not have jurisdiction.

Held, that while expediency and speed in the resolution of disputes is to be encouraged and commended, where trial courts use their discretion to depart from the rules of court, such departure must be recorded and the reasons for so departing must be stated for the benefit of the appeal court. ^B If the parties had agreed to such a departure, that must also be recorded, not only to prevent either party taking that departure as a ground of appeal, but also to show that the trial court was aware of the issues before it and deliberately decided to take a shorter and more robust approach to the resolution of the issue.

Held, further, that it sometimes happens that two courts both have jurisdiction ^C over the same matter, a situation that obtains between the High Court and the children's court and other lower courts. The question is not which court is the senior, but which course is more conducive to stability of administration. The High Court has over the years adopted the approach that where there is an existing order by a court of competent jurisdiction, another court (including the High Court) cannot, except by way of review ^D or appeal, make an order competing with or overriding it, even if the court making the original order is inferior to the High Court. By the same token, and in reverse order, where there is an order of the High Court regulating the custody of minor children, a lower court cannot make an order seeking to compete with or vary such order. The issue is not that the children's court is an inferior court, but that the courts have to adopt a sensible and ^E practical approach to the matter and avoid dealing with orders that are properly before another court of competent jurisdiction, save as is provided for under the procedure of review. *In casu*, having made an order relating to custody (with the unstated but undisputable condition that the order is subject to variation if circumstances change), the High ^F Court was seized with the custody issue. The children's court could not exercise its parallel jurisdiction in the matter at first instance nor could it purport to vary the order of the High Court.

Cases referred to

de Klerk v de Klerk GS-180-80 ^G

Kunz v Pretorius 1982 (2) ZLR 24 (H)

Raath v Carikas 1996 (1) SA 756 (W)

Reith v Antao S-212-91

Vengesai & Ors v Zimbabwe Glass Industries Ltd 1998 (2) ZLR 593 (H)

Walkinshaw v Walkinshaw 1971 (1) SA 148 (NC) ^H

2008 (1) ZLR p147

Makarau JP

Case information

A R M Fitches, for the appellant

E T Matinenga, for the respondent

Judgment

MAKARAU JP: The parties are parents to three minor children, two daughters and a son. They were divorced by an order of this court under case No. HC 9397/05. In terms of the order of this court

divorcing the parties, matters relating to the custody, access to and maintenance of the minor children were to be governed by the provisions of a consent paper entered into by the parties prior to the granting of the divorce. In terms of the consent paper, custody was awarded to the respondent.

In April 2006, the appellant approached the children's court for an order varying the custody order in relation to the two daughters only. In the application, the appellant acknowledged that the order of this court granted custody of the minor children to the respondent in terms of a consent paper jointly filed by the parties. She specifically requested the children's court to vary the terms of that consent paper on the basis that it is in the best interests of the minor children that there be such a variation. She further alleged that there had been a change in the circumstances of the parties warranting the variation sought. She also explained in detail the reasons why she consented to the respondent having custody of the minor children after this court had initially given her interim custody, pending the determination of the divorce proceedings. She pleaded lack of accommodation, an insufficient income and the toll that the legal battle was taking on her as reasons why she consented to the respondent having custody of the minor children.

The application for variation was duly set down for hearing before the children's court. On the appointed day, the respondent's legal practitioner was late in arriving at court. The application was dealt with as an unopposed application and a default judgment was entered for the appellant. The respondent then filed an application seeking the setting aside of the default judgment. The matter was argued before the trial court which dismissed the application for variation of the custody order and granted the application for rescission of judgment, in that order as the appeal record indicates.

In my view, it is pertinent at this stage that I remark in passing on the procedure adopted by the trial court in this matter. The record indicates that what was before the trial court was an application for rescission of default judgment. The magistrate proceeded to determine the merits of the application for variation although the respondent had not filed a substantive opposing affidavit to that application. She then gave her reasons for dismissing the application first, before she gave her reasons for granting the application for rescission of judgment, all in one breath.

2008 (1) ZLR p148

Makarau JP

I hasten to observe that no prejudice was occasioned by the order in which the trial court dealt with the matter and that no issue has been raised by either party in this regard. I simply point it out for the benefit of the trial court and to remark that, while expediency and speed in the resolution of disputes is to be encouraged and commended, where trial courts use their discretion to depart from the rules of the court, such departure must be recorded and the reasons for so departing must be stated for the benefit of the appeal court. Where the consent of both parties has been obtained for such departure, it must also be recorded, not only to prevent either of the parties from taking that departure as a ground of appeal or review, but also as an indication that the trial court is aware of the issues before it and has deliberately decided to take a shorter and more robust approach to the resolution of the dispute.

The appellant was dissatisfied with the judgment of the court. She noted an appeal to this court. In the notice of appeal, she argued, in the main, that the trial court erred in finding that it was in the best interests of the minor children that their custody be awarded to the respondent and in failing to find that her circumstances had changed such that it was now in the best interests of the two girls that their custody be awarded to her. Like the trial magistrate, the appellant also dealt with the application for rescission of default judgment last. In the final paragraph of her notice of appeal, she attacked the granting of the application for rescission of judgment by arguing that the court erred in holding that the respondent was not in wilful default when the default judgment was granted against him.

At the hearing of the matter in the trial court, the issue of the jurisdiction of that court to vary an order of this court was not raised either by the court *mero motu* or by the legal practitioner then representing the respondent. The point would have remained unearthed were it not for the professionalism of Mr *Fitches* who, in line with his duty to cite adverse authority (a rare occurrence in our courts and so rare an occurrence that Gillespie J likened it to hen's teeth¹), conceded that the determination by the trial court on both applications were a nullity as the approach to the children's court to vary an order of this court was incompetent and did not bring about anything of value.

In this regard, Mr *Fitches* cited *Raath v Carikas* 1996 (1) SA 756 (W), where the court relied on the ordinary rule of law that an order made by a court cannot ^g (except only by way of appeal or review in a higher court) be varied except by the court itself.

2008 (1) ZLR p149

Makarau JP

^AIn my view, the issue takes on a broader jurisprudential dimension as it deals with the relationship between two courts both having jurisdiction over the same matter, the situation that obtains between the High Court and the children's court and other lower courts. The point was made with much clarity and simplicity by McNally J (as he then was) in *Kunz v Pretorius* 1982 (2) ZLR 24 (H) where, after making reference to *Raath v Carikas supra*, he opined ^B at 27A that:

"It seems to me that the question here is not which court is the senior, but which course is more conducive to stability of administration. It is clearly undesirable that I should interfere with an order made by the juvenile court. Indeed, since I have no power to intervene by way of appeal, and since I have already confirmed the order by way of review, it would be quite ^C wrong in my view for this court now to make an order in conflict with the existing order of the juvenile court."

The learned judge went on to remark that a similar view had been taken by van den Heever J in *Walkinshaw v Walkinshaw* 1971 (1) SA 148 (NC) and that he found the approach to be both sensible and practical.

^DIt would appear to me that this court has, over the years, adopted the approach that, where there is an existing order by a court of competent jurisdiction, another court cannot make an order competing with or overriding it, even if the court making the original order is inferior to the High Court. See *de Klerk v de Klerk* G-S-180-80. By the same token, and in reverse order, the position, in my view, is that where there is an order of this court regulating custody of ^E minor children, the lower court cannot make an order seeking to compete or vary such order. The issue is not that the children's court is an inferior court, but as pointed out by McNally J the courts have to adopt a sensible and practical approach to the matter and avoid dealing with orders that are properly before another court of competent jurisdiction, save as is provided for under the procedure of review.

^FI am much persuaded by the reasoning that, having made the original order of custody with the unstated but undisputable condition that such is subject to variation on changed circumstances, this court was seized with the custody issue and, in the circumstances, the children's court could not exercise its parallel jurisdiction in the matter at first instance, nor could it purport to vary ^G the order in a matter before this court.

Thus, applying the general rule in *Raath v Carikas supra* and the approach adopted by this court over the years, the children's court had no jurisdiction to vary the order of this court as it purported to do and the resultant judgment and ruling were a nullity. The natural consequence of so ruling is that there ^H was no appeal before us.

2008 (1) ZLR p150

Makarau JP

In a bid to save the day for the appellant, Mr *Fitches* urged us to use our role ^A as upper guardian of all minors to refer the matter to oral evidence.

Two issues immediately present themselves in the wake of this submission. The first one is that, having ruled that there is no appeal before us as the judgment and ruling appealed against were a nullity, we should immediately rise as there is no issue properly before us. To refer the matter to oral evidence ^B in the same breath or to give any other directions in the matter will be to negate what we have just ourselves said. We cannot give directions in a non-matter.

In my view, the role of the court as upper guardian is to be used to protect the best interests of minor children. It is not a principle that can be used to grant validity to invalid proceedings, all in the name of protecting the best interests of minor children. ^C

Mr *Fitches* referred us to the unreported judgment of the Supreme Court in *Reith v Antao* S-212-91, where the Supreme Court used its role as upper guardian of minor children to examine the issue of access to the minor child by the non-custodian parent by making reference to events that had occurred after the granting of the original order. As such, the court looked at the original ^D order as if it had been varied by the interim order that was to hold until the determination of the appeal. It was in that regard that the learned judge justified the approach of the court by making reference to

its role as the upper guardian of minor children and by invoking its powers to “take any other course that which may lead to the just and inexpensive settlement of the case”.

In my view, the approach by the Supreme Court in the *Reith* case was to use ^Ε its role and other powers, not to deal with a matter that was improperly before it, but to expeditiously deal with the real issues in an appeal properly before the court. On that basis, I would distinguish the judgment.

It is my further view that, to purport to give directions in this matter may have the adverse effect of delaying the proper ventilation of issues in the matter ^Φ while the parties argue over procedure. No averment has been made in any of the papers filed of record that there is immediate danger to the life or morals of the children such that the immediate intervention of the court becomes imperative. To the extent that one can refer to custody matters as ordinary, this appears to me to be an ordinary application ^Γ

.or variation of a custody order made some three years ago. ^Δ

The second issue that arises is, to which court will we refer the matter for oral evidence? Sitting as an appeal court, it is most unusual that we would then sit as a court of first instance to hear evidence in the matter. While two judges of this court may sit as a court of first instance, it is unnecessary that we do ^Η

2008 (1) ZLR p151

Makarau JP

^Α so in this matter as the matter is not properly before us and, in any event, the appellant can bring a properly framed application for variation of the custody order in this court at any time. In view of the fact that the appeal has turned on a point that was raised by appellant’s counsel and in which a concession was properly made, we shall not make an order of costs in favour of the respondent.

^Β In the result, we make the following order:

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

^Γ MAVANGIRA J concurred.

T K Hove and Partners, appellant’s legal practitioners

^Δ *Mhiribidi, Ngarava and Moyo*, respondent’s legal practitioners

¹ See *Vengesai & Ors v Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H) at 596D.

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 1/BINDURA NICKEL CORPORATION LTD v ZIMBABWE REVENUE AUTHORITY 2008 (1) ZLR 152 (H)

BINDURA NICKEL CORPORATION LTD v ZIMBABWE REVENUE AUTHORITY 2008 (1) ZLR 152 (H)

2008 (1) ZLR p152

Citation	2008 (1) ZLR 152 (H)
Case No	Judgment No. HH-30-08
Court	High Court, Harare

Judge	Chatukuta J
Heard	12 October 2006
Judgment	20 February 2008
Counsel	<i>L Mazonde</i> , for the applicant <i>R Matsikidze</i> , for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Interest — *in duplum* rule — applicability — limited to commercial transaction — not applicable to debts owed by taxpayer to the *fiscus*

Practice and procedure — parties — *locus standi* — company — holding company — action in respect of wholly owned subsidiaries — holding companies having *locus standi* ^D

Revenue and public finance — interest — interest owed by taxpayer for unpaid or overdue taxes — accrual of interest — when accrual ceases — not limited by *in duplum* rule

Headnote

For a party to be able to sue, it must have an interest in the subject matter of ^Ethe suit and such interest must be a direct one. Where a company is wholly owned by another and the holding company has a direct pecuniary interest in the affairs of its subsidiary, the holding company would be entitled to bring an action relating to its subsidiary

In terms of s 71(2) of the Income Tax Act [*Chapter 23:06*], as amended in 2003, interest on a tax debt is not payable from the date of notification by the ^Frevenue authority, but from the date when the tax was due in terms of the Act. Interest only ceases to run on the date the tax or any installment thereof is paid in full. Whether or not interest exceeds the capital, the Commissioner of Taxes is entitled to charge interest on any tax that remains unpaid. ^G

The purpose of the *in duplum* rule, which limits interest to the amount of the capital sum owed, is to protect the borrower from the lender and forms part of our law. It is based on public policy intended to protect debtors from exploitation by creditors. The rule is not limited to money lending transactions but applies to all contracts or transaction under which a ^H

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^A debt is subject to interest at a fixed rate. In terms of s 11A of the General Laws Amendment Act [*Chapter 8:07*], the *in duplum* rule does not apply to fiscal debts. Even without that provision, the position under the common law is clear; the rule does not apply to any other relationship which is not that of a borrower or lender, or which is not one of a commercial nature. Such a relationship may occur where the State is a ^B party; but the rule does not apply to debts owed by the taxpayer to the *fiscus*. The relationship between a taxpayer and the *fiscus* is a statutory one and does not fall under the contracts or transactions as perceived in the decided cases. The whole purpose of the relationship between the taxpayer and the *fiscus* is to enable the State to raise, by way of tax, public ^C revenue. The non-remittance of tax and the application of the rule to tax debts would interrupt the flow of revenue to the *fiscus* with adverse impact on good governance. Public policy upon which the *in duplum* rule is based, would dictate that a taxpayer who has defaulted in paying tax and interest thereon, should not benefit from the rule. The purpose of the common law is the preservation of the *fiscus* for the good of the nation.

Cases cited ^D

Air Zimbabwe Corp & Ors v ZRA 2003 (2) ZLR 11 (H)

CBZ Ltd v MM Builders and Suppliers (Pvt) Ltd & Ors 1996 (2) ZLR 420 (H)
Commr, SA Revenue Svc v Woulidge 2000 (1) SA 600 (C)
Commr, SA Revenue Svc v Woulidge 2002 (1) SA 68 (SCA)
CoT v CW 1989 (3) ZLR 361 (S)
CoT v First Merchant Bank Ltd 1997 (1) ZLR 350 (S)
Conforce (Pvt) Ltd v City of Harare 2000 (1) ZLR 445 (H)
CW v CoT 1988 (2) ZLR 27 (H)
Ehlers v Standard Chartered Bank Zimbabwe Ltd 2000 (1) ZLR 136 (H)
Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd 1998 (2) ZLR 488 (S)
Hotel Assn of Southern Rhodesia & Anor v Liquor Licensing Bd & Anor 1957 R & N 916; 1958 (1) SA 426 (SR)
Law Soc of Zimbabwe & Ors v Min of Finance 1999 (2) ZLR 231 (S)
Loewenstein v CoT 1956 (4) SA 766 (FC)
Union Govt v Jordaan's Exor 1916 TPD 411
Verulam Medicentre (Pty) Ltd v Ethekezwini Municipality 2002 (1) SA 68 (SCA)
Verulam Medicentre (Pty) Ltd v Ethekezwini Municipality 2005 (2) SA 451 (D)
Zimbabwe Teachers Association & Ors v Minister of Education and Culture 1990 (2) ZLR 48 (H)

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Legislation considered ^A

General Laws Amendment Act [*Chapter 8:07*], s 11A

Income Tax Act [*Chapter 23:06*], s 71(2)

Case information

L Mazonde, for the applicant

R Matsikidze, for the respondent ^B

Judgment

CHATUKUTA J: The applicant sought an order in the following terms:

- "1. That the respondent be and is hereby directed to refund the applicant within seven days of the date of this order the sum recovered from the applicant's Value Added Tax refund on 20 December 2005 (*sic*) of \$5 450 939 769.71. ^C
2. The respondent shall pay interest to the applicant on the sum recovered from the Value Added Refund (*sic*) on 20 December 2005 (*sic*) in the sum of \$5 450 939 769.71 at the prescribed rate of interest from 20 December 2005 to the date of payment in full.
3. The respondent shall pay costs of this application."

The background to the matter is that, in the exercise of its statutory duty, the ^D respondent reviewed the tax affairs of Trojan Nickel Mine and Bindura Smelting Corporation for the period 2003 and 2005. Both companies are subsidiaries of the applicant. At the conclusion of the review exercise, the two companies were assessed to pay additional corporate and withholding tax amounts due as according to the annual payment dates. The respondent ^E imposed a penalty and interest on the due amounts in terms of ss 46 and 71(2) of the Income Tax Act [*Chapter 23:06*] respectively. The applicant objected to the payment of interest beyond the capital debt. On 6 July 2005, the applicant instructed the respondent to hold back an amount of \$8 000 000 000 from its Value Added Tax refunds account with the respondent, as a deposit pending the finalisation of the investigations on the two subsidiaries' corporate tax. ^F The interest due in relation to the applicant's two subsidiaries was deducted from this amount. The applicant was of the opinion that the amount

deducted and withheld by the respondent in the sum of \$5 450 939 769 was interest in excess of the *in duplum* rule. The applicant then filed this application to recover that amount.

The respondent raised a point *in limine* that the applicant did not have the *locus standi* to institute these proceedings. It was submitted, for the respondent, that the additional corporate and withholding tax was due, not from the applicant, but from Trojan Nickel Mine and Bindura Smelting Corporation. Although the two companies were applicant's subsidiaries, they were separate

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are legal personalities. The companies should have brought the action in their individual names as they were not incapacitated in any manner.

The applicant submitted that it had a direct pecuniary interest in the affairs of its subsidiaries and therefore had *locus standi*. The respondent had throughout the review of the affairs of the two subsidiaries communicated with the applicant. The court was referred to various communications between the applicant and the respondent in connection with the matter at hand. In particular, the applicant referred the court to the letter dated 6 July 2005. That letter authorised the respondent to hold back as deposit an amount of \$8.8 billion being VAT returns submitted to ZIMRA. ZIMRA held back that amount and deducted the interest due by the two subsidiaries from that amount.

It is trite that for a party to be able to sue it must have an interest in the subject matter of the suit and that such interest must be a direct one. There is a plethora of authority in this regard. ¹ The Supreme Court in *Law Society of Zimbabwe & Ors v Minister of Finance (Attorney-General Intervening)* *supra* cited with approval the meaning ascribed to "direct and substantial interest" in *Zimbabwe Teachers Association & Ors v Ministry of Education* *supra* by Ebrahim J (as he then was). At 52E, it was observed that a party needs to show that it has an interest in the right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation.

It is my view that the applicant's financial interest in the current matter is not indirect as in the other cases cited above. In this case, the interest is direct by the very nature of the relationship of the applicant *vis-à-vis* the two companies whose financial affairs were reviewed. It is not in issue that the applicant wholly owns the subsidiary companies. The applicant's position is reinforced by the fact that the respondent did engage the applicant in its review of the affairs of the subsidiaries. It accepted the applicant's authority to hold back as deposit an amount of \$8.8 billion being VAT returns due to the applicant in order to off-set what was due from the subsidiaries. The respondent did not object to this direct communication between the holding company and itself. In fact, it is the balance of this amount that the applicant sought to be refunded. Although the respondent submitted that all the correspondence emanating from its office was directed at the two subsidiaries, it is conceded in the heads

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of argument that it had held a number of meetings with the applicant over the two subsidiaries. One such meeting was held on 17 January 2006. It concedes that it is the applicant who instructed the holding over of its VAT Refund, to settle the two subsidiaries' indebtedness to the respondent. It is further conceded that the applicant and the respondent held a meeting on 17 January 2006. It is my view that after all this engagement with the applicant in connection with the tax affairs of the subsidiaries, the respondent cannot turn round at this late hour and dispute the applicant's direct interest in the matter and therefore its *locus standi*.

Coming back to the merits of the application, it appears to me that there are two issues for determination. The first issue as identified by the applicants was whether the Commissioner is entitled to charge interest on unpaid withholding taxes from the dates from which they should have been paid or from the date of notification. The applicant submitted that interest is payable in terms of s 71(2) only after the taxable capital amount has been determined by the respondent and the applicant has been notified of the amount. Interest will then become due on to the remaining capital unpaid by the taxpayer. In this regard, the applicant relied on *Air Zimbabwe Corporation & Ors v Zimbabwe Revenue Authority* 2003 (2) ZLR 11 (H). It was the respondent's contention that interest accrued at the time when the taxes became due and the interest continued to accrue on the outstanding debt.

Section 71(2) provides:

"If tax is not paid on or before such days and at such places as are fixed ^ε or prescribed by or under this Act or, where no such time or place is so fixed or prescribed, as are notified by the Commissioner in terms of subs (1), interest, calculated at a rate to be fixed by the Minister, by statutory instrument, shall be payable on so much of the tax or an instalment of the tax, as the case may be, as from time to time remains unpaid by the ^δ taxpayer during the period beginning on the date specified by the Commissioner in the notification as the date on which the tax or the instalment of the tax shall be paid and ending on the date the tax or the instalment of the tax is paid in full:

Provided that in special circumstances the Commissioner may extend the time for payment of the tax without charging interest" (my emphasis).

It appears to me that the applicant's reliance on *Air Zimbabwe Corporation ^γ & Ors v Zimbabwe Revenue Authority* is misplaced. The applicant relied on a section that had been amended. *Air Zimbabwe Corporation & Ors v Zimbabwe Revenue Authority* was decided on s 71(2) before it was amended by the Finance Act 2003, Act 10 of 2003. Prior to the amendment, the provision did not refer to time fixed or prescribed by the Act. It is therefore, my view, that

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Chatukuta J

As 71(2) is now clear that interest is not payable from the date of notification but from the date when the tax was due in terms of the Act.

The second issue for determination is whether or not the *in duplum* rule applies to the fiscus. The rule states that interest runs only until the sum of the interest unpaid is equal to the sum of the capital. The applicant submitted that the rule was intended to protect borrowers from the exploitation of lenders ^β and it was entitled to the protection afforded by the rule. In this regard, the applicant relied on a number of cases. ² The applicant further submitted that at the time when interest was charged, the common law rule applied to the fiscus. This has however changed with the amendment of the General Laws Amendment Act [Chapter 8:07] by the Finance Act (No. 2), Act 8 of 2005. The ^γ General Laws Amendment Act was amended by the insertion of s 11A which provides that the rule does not apply to the fiscus. It was submitted that the amendment, however, did not have any retrospective effect and was therefore not applicable to the applicant.

The respondent submitted that the applicant and respondent's relationship was not that of a borrower and a lender. It was submitted that the *in duplum* ^δ rule applies to the real world of commerce and not to public fiscus matters. The applicant relied on *Southern African Revenue Service v Wouldge* 2002 (1) SA 68 (SCA) and *Verulam Medicentre Pty v Ethekweni Municipality* 2005 (2) SA 451.

Indeed, the purpose of the *in duplum* rule is the protection of the borrower ^ε from the lender and forms part of our law. This is clearly presented in the cited cases. The question is whether or not the rule applies to the fiscus. The question is better answered from an examination of s 11A of the General Laws Amendment Act. Section 11A provides -

"11A Exclusion of *in duplum* rule in certain cases

^ε (1) ...

(2) For the avoidance of doubt it is declared that the rule of the common law known as the *in duplum* rule that prohibits the payment of outstanding interest in excess of the amount representing the capital or principal sum of a debt does not apply to fiscal debts, that is, to debts by way of outstanding taxes or duties or penalties in respect of the non-payment thereof that are owed to the Authority by a person liable to pay such taxes, ^γ duties or penalties under the Scheduled Acts."

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Chatukuta J

It appears to me that the import of that section is that under common law, the ^α *in duplum* rule does not and has never applied to debts due to the state. The applicant contended that, prior to the introduction of the section in our legislation, the *in duplum* rule applied to the fiscus as it did to any other entity. The respondent submitted that s 11A was a restatement of the common law position.

It is, my view, that the wording of s 71(2) of the Income Tax Act is clear that ^β the *in duplum* rule does not apply to the fiscus. Section 11A of the General Laws Amendment Act would therefore be a restatement of the common law position on the rule. A strict approach is adopted in the

interpretation of fiscal legislation. ³ Where the statute is expressed in clear, precise and unambiguous words, the court can only expound those words in their ordinary and natural c sense and nothing more. ⁴

The relevant part of s 71(2) provides that –

“... interest, calculated at a rate to be fixed by the Minister, by statutory instrument, shall be payable on so much of the tax or an instalment of the tax, as the case may be, *as from time to time remains unpaid* by the taxpayer during the period beginning on the date specified by the Commissioner in the notification as the date on which the tax or the instalment of the tax shall be paid and *ending on the date the tax or the instalment of the tax is paid in full*”(my emphasis).

It is my view, that where tax due remains unpaid, interest is chargeable at the rate fixed by the relevant Minister. Interest ceases to be charged on the date e the tax or any instalment thereof is paid in full. Therefore, whether or not interest exceeds the capital the Commissioner is entitled to charge interest on any tax that remains unpaid. It is my view that the provision is not ambiguous and therefore need not be interpreted in favour of the applicant.

It is my view that the confusion has arisen as a result of s 11A of the General Laws Amendment Act, where it begins with: f

“For the avoidance of doubt it is declared that the rule of the common law known as the *in duplum* rule ...”

The impression created is that there may have been an ambiguity in the legislation as to whether or not the *in duplum* rule applied to the fiscus. g

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Chatukuta J

A However, I cannot find any clearer language used by the legislature as in this provision. It does not raise any ambiguity. I am of the view, therefore, that there is no need to interpret it in favour of the applicant.

Assuming that I am wrong in my interpretation of s 71(2), it is my view that the cases cited by the applicant do not in fact support its contention that before the introduction of section 11A, the common law rule applied to the fiscus. In B *CBZ Ltd v MM Builders & Supplies (Pvt) Ltd & Ors* 1996 (2) ZLR 420 (H) at 441D-F Gillespie J states, after an investigation into the history of the rule, that:

“In conclusion, the result of this investigation is such as to persuade me that it is a principle firmly entrenched in our law that interest, whether it accrues as simple or as compound interest, ceases to accumulate upon c any amount of capital owing, *whether the debt arises as a result of a financial loan or out of any contract whereby a capital sum is payable together with interest thereon at a determined rate*, once the accrued interest attains the amount of capital outstanding. Upon judgment being given, interest on the full amount of the judgment debt commences to run afresh but will once again cease to accrue when it waxes to the amount of the judgment debt, being the capital and interest thereon for which d cause action was instituted” (my emphasis).

Citing the decision in *Union Government v Jordaan’s Executor* 1916 TPD 411with approval Gillespie J stated at 433C-D:

“The decision in *Union Government v Jordaan’s Executor* is of great persuasive authority, bearing in mind the identity of the Bench from which e it comes. *It is also one of interest, not only as an example of the application of the rule to debts other than loans (recovery of survey fees due and unpaid)*, but more importantly because it affirms the proposition that the duplum rule does not simply render interest irrecoverable but operates so as to prevent it from accruing at all” (my emphasis).

The nature of transactions to which the rule is applied is again referred to in F *Commissioner for SA Revenue Service v Woulidge* 2000 (1) SA 600 (C). Davis J at 611F-G states:

“The effect of the *in duplum* rule is that interest stops running when the unpaid interest equals the outstanding capital. When the debtor repays a part of the interest the quantum of the outstanding interest reduces below the amount of outstanding capital. Interest again runs until it equals g the capital amount. *The rule applies not only to money-lending transactions but to any transaction which involves the payment of interest on an amount due in terms of the transaction*” (my emphasis).

It is my view that, by necessary implication, *in duplum* rule does not apply to h any other relationship which is not that of a borrower or lender, or which is

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Chatukuta J

not that of a commercial nature. The relationship between the applicant and ^A the respondent is a statutory relationship where the interest charged is intended to be compensatory for failure to pay tax on the due date. It appears to me that the relationship is in fact more than that. It is a relationship between the state and a subject, where it is in the domain of the state to tax its subjects. It surely cannot be said to be a contractual relationship where the *in duplum* ^B rule would apply. It is my view, therefore, that the relationship is not a transaction envisaged in *CBZ Ltd v MM Builders & Supplies (Pvt) Ltd & Ors* and the cases cited therein and, further, the other cases that have been decided on the rule. As stated earlier, in *CBZ Ltd v MM Builders & Supplies (Pvt) Ltd & Ors* the court cited with approval the decision in *Union Government v Jordaan's Executor supra* where it was held that the *in duplum* rule applied ^C to the fiscus. In that case the Union Government had paid survey fees of the farm belonging to the plaintiff. The amount so paid out carried interest at a fixed rate. When the plaintiff sought transfer of the property, he realized that he had not paid the capital amount and the interest. The interest claimed by the Union Government included interest beyond that permitted under the *in duplum* rule. de Villiers JP ruled in that case that no interest runs after the amount is ^D equivalent to the capital sum.

It appears to me that case is distinguishable from the present. In *Union Government v Jordaan's Executor*, the relationship between the plaintiff and the Government was a relationship where the state had expended money in paying surveyor fees on behalf of Jordaan's Executor. The relationship ^E created was therefore that of a debtor and a creditor, even though the creditor was now the state. It is my view that the Union Government had placed itself under the common law rule. Secondly, the amount expended in the payment of the surveyor fees started earning interest with effect from the time it was expended. In the case of tax, interest is not charged on tax during the period of the tax review. Tax is only charged when the amount becomes due and has ^F not been paid.

It is my view that what is also important is the basis of the rule. The rule is based on public policy intended to protect debtors from exploitation by creditors by forcing them to pay unregulated charges, and enforce sound fiscal discipline on creditors. See *Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd supra* ^G at 495D. The rationale for the rule is broadened in *Conforce (Pvt) Ltd v City of Harare* 2000 (1) ZLR 445 (H) where Chinhengo J observed as follows at 457G-458A-D:

"The rationale for the *in duplum* rule and its origins are fully examined by Gillespie J in *M M Builders' case supra*. I am much persuaded by his ^H

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Chatukuta J

A Lordship's reasoning and understanding of the rationale and origins of the rule. I do not need to traverse the same ground. If I understand the reasoning of Gillespie J correctly, then I venture to say that the public interest served by the *in duplum* rule is not to be identified with sympathy for the debtor, so as to say that the rule is design to protect him. I view the public interest involved as encompassing a wider spectrum of ^B interests, from the protection of the debtor, to securing fiscal discipline on the part of lenders, to considerations of justification for charging interest in the first place i.e. to compensate the creditor for deprivation of use of the money due until payment (*Mawere v Mukuna* 1997 (2) ZLR 360 (H) at 364G) and to the interests of commerce generally and to perhaps many more interests. Thus the public interest cannot be restricted to one or two considerations i.e. the protection of the debtor and the dictates of ^C modern commerce. But even if it were to be so restricted, I cannot see anything incompatible with the rule serving those interests if it were to be applied in the manner advocated for in *M M Builders* case. The creditor's claim for interest would be limited to an amount that does not exceed the capital."

The issue that arises from the rationale for the rule is best stated in *Verulam* ^D *Medicentre Pty v Ethekhwini Municipality supra* at 454I-455B where Galgut AJP says:

"It would appear from this that where on a proper construction the interest at issue serves a purpose other than the ordinary function that interest fulfils, the *in duplum* rule will not apply.

It may well be that the test is not as strict as that, however, because Bliden J went on to refer (at 655E-F) to single capital annuities and similar investments, and pointed out that concerns doing business of those kinds do not require protection and that public policy would not require that the investors concerned be limited by the rule, and in *Commissioner, South African Revenue Service v Wouldge* 2002 (1) SA 68 (SCA), ^F which admittedly turned on entirely different facts, Froneman AJA said (at 75B-C) that the *in duplum* rule can be applied only where it serves considerations of public policy in the protection of borrowers against exploitation by lenders.

It appears therefore that the test might simply be whether in the particular case public policy requires the debtor to be protected against exploitation ^G by the creditor."

The import of the above observations by Galgut AJP is, firstly, whether public policy dictates that the rule should apply to tax debts and, secondly, whether the applicant required protection. It has been accepted in our jurisdiction that the rule is not limited to money lending transactions but

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Chatukuta J

applies to all contracts or transactions under which a debt is subject to interest ^a at a fixed rate. As alluded to earlier, it is my view that the relationship between the applicant and the respondent is a statutory one and does not fall under the contracts or transactions as perceived in the decided cases. The whole purpose of the relationship between the applicant and the respondent is to enable the respondent to raise, by way of tax, public revenue. As stated in ^b *Revenue Law Principles and Practice*, ⁵ tax is a compulsory levy imposed by the government or local authority. The money so raised is intended for public purpose i.e. for government expenditure. Would it be in the public interest that the *in duplum* rule should apply to a person who has a statutory obligation to pay tax when it is due but fails to meet the obligations? What would be the consequences of the application of the rule? ^c

I do not believe that public policy would dictate that a taxpayer, who has defaulted in paying tax and interest thereon can benefit from the *in duplum* rule. The tax is raised for the good of the public. Judicial note is taken of the fact that tax payable in any given year forms part of the national budget. It is inconceivable to imagine what would happen to the fiscus if taxpayers were to be given the comfort that they can hold onto their money until interest due ^d on overdue tax is equal to the capital amount and they can proceed holding onto their money thereafter until the Commissioner sues for what is due. In *Commissioner of Taxes v First Merchant Bank Ltd* 1997 (1) ZLR 350 (S), Gubbay CJ discussed the common law on the raising of set-off against taxes due to the fiscus. He observed at 353B-E that: ^e

“At common law, set-off or compensation is a method by which mutual debts, being liquidated and due, may be extinguished. It takes place *ipso jure*. If the debts are equal, both are extinguished; if unequal, the smaller is discharged and the larger is proportionally reduced. There are, however, two important exceptions to the operation of the rule. A debt owed by one department of the State cannot be set off against a debt owed to another ^f department. And set-off cannot be raised against taxes due to the fiscus or where goods are sold for the benefit of the State. See *Schierhout v Union Government* 1926 AD 286 at 291; *Pentecost & Co v Cape Meat Supply Co* 1933 CPD 472 at 479; Voet *Commentarius ad Pandectas* 16.2.16 (Gane’s translation, Vol 3 at 166); van Leeuwen *Censura Forensis* 1.4.36.11 and 13 (Barber and Macfayden’s translation); Wessels *The Law g of Contract in South Africa* 2 ed vol II at paras 2567 and 2568; *Wille’s Principles of South African Law* 8 ed at 483. Both these exceptions are grounded in public policy and utility. The first is designed to avoid confusion in State accounts; the second to ensure the uninterrupted flow

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Chatukuta J

^a of tax revenues to the Treasury in the interests of good governance. In each instance, it is for the State to decide whether or not set-off should apply even though the debts co-exist.”

The above rationale against set-off would surely apply to the non application of the *in duplum* rule to tax debts. The non-remittance of tax and the application of the rule to tax debts would interrupt the flow of revenue to the fiscus with ^b adverse impact on good governance. The purpose of the common law, on set-off *vis-à-vis* tax debt, is the preservation of the fiscus for the good of the nation. Under such circumstances, it is my view, that the applicant cannot be said to require any protection against the respondent.

It appears to me that the very nature of the relationship of the parties also has ^c a bearing on the purpose of the interest charged by the respondent. In the cases of a borrower and a lender, interest starts accruing on the capital amount from the date the amount is advanced. In the present case, interest is payable from the date fixed under the Income Tax Act or date as notified by the Commissioner. The tax is not computed throughout the tax year. It is my view, therefore, that the underlining purpose of the interest charged by the respondent ^d is clearly different from interest charged in a commercial transaction.

In the result, I find that the *in duplum* rule does not apply to tax debts. I have found it not necessary, because of my conclusion above, to deal with the question raised by the applicant that it was entitled to interest on the refund that it sought.

£ Accordingly, I make the following order:

£ The application is dismissed with costs.

1 See *Hotel Assn of Southern Rhodesia & Anor v Liquor Licensing Bd & Anor* 1957 R & N 916; 1958 (1) SA 426 (SR); *Law Society of Zimbabwe & Ors v Min of Finance* 1999 (2) ZLR 231 (S); *Zimbabwe Teachers Assn & Ors v Min of Education* 1990 (2) ZLR 48 (H)

2 *CBZ Ltd v MM Builders & Supplies (Pvt) Ltd & Ors* 1996 (2) ZLR 420 (H), *Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S), *Ehlers v Standard Chartered Bank Zimbabwe Ltd* 2000 (1) ZLR 136 (H) and *Conforce (Pvt) Ltd v City of Harare* 2000 (1) ZLR 445 (H)

3 See Richard Jooste *Revenue Law* (1995) at 124; A S *Silke South African Income Tax* 8 ed (1975) at 898

4 *Commissioner of Taxes v C W (Pvt) Ltd* 1989 (3) ZLR 361 (S) at 372C-D; *C W v Commissioner of Taxes* 1988 (2) ZLR 27 (H) at 35 and *Loewenstein v Commissioner of Taxes* 1956 (4) SA 766 (FC) at 772A-F

5 C Whitehouse and Elizabeth Stuart-Buttle, at p 2-4

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NYAMAPFENI v CONSTITUENCY REGISTRAR, MBERENGWA EAST & ORS 2008 (1) ZLR 164 (H)

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Citation	2008 (1) ZLR 164 (H)
Case No	Judgment No. HH-27-08
Court	Electoral Court, Harare
Judge	Uchena J
Heard	22 February 2008
Judgment	22 February 2008
Counsel	<i>T R Mugabe</i> , for the appellant <i>Miss V Mabizha</i> , for the first and third respondents <i>G C Chikumbirike</i> , for the second respondent
Case Type	Electoral appeal
Annotations	Link to case annotations

Flynote

Elections — appeal — against rejection of appellant's nomination as c parliamentary candidate — when appeal must be lodged — period of four days within which to lodge appeal — includes weekends and public holidays

Headnote

In terms of s 46(19)(b) of the Electoral Act [*Chapter 2:13*] ("the Act"), an **D** appeal to the Electoral Court against a decision of a nomination officer to reject the nomination papers of an aspiring

parliamentary candidate must be lodged within four days of receipt of notice of the nomination officer's decision. Until rules of court for the Electoral Court are made in terms of s 165 of the Act, the rules of the High Court apply to the Electoral Court. Under r 4A of the High Court Rules, where anything is required to be done within a particular number of days or hours, a Saturday, Sunday or public holiday is not reckoned as part of such period. However, the Rules do not apply to the meaning of "days" in the Act, which must be interpreted in the light of s 33 of the Interpretation Act [Chapter 1:01]. In terms of that section, the reckoning of the four day period starts on the following day (that is, the day after receiving notice of the nomination officer's decision) and ends on the fourth day, if the fourth day falls on a day other than a Saturday, a Sunday or a public holiday. If the fourth day falls on a Saturday, a Sunday or a public holiday, the period then expires on the following day which is not a Saturday, a Sunday or a public holiday.

Cases cited

Ellis & Anor v Maceys Stores Ltd 1983 (2) ZLR 17 (S)

Kombayi v Berkhout 1988 (1) ZLR 53 (S)

Makuwaza v National Railways of Zimbabwe 1997 (2) ZLR 453 (S) ^H

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Uchena J

Legislation considered ^A

Electoral Act [Chapter 2:13], s 49(19)(b)

High Court Rules 1971 (RGN 1047 of 1971), r 4A

Interpretation Act [Chapter 1:01], ss 2, 3 & 33

Zimbabwe Electoral Commission Act [Chapter 2:12], s 18

Case information

^B T R Mugabe, for the appellant

Miss V Mabizha, for the first and third respondents

G C Chikumbirike, for the second respondent

Judgment

UCHENA J: The appellant and the fourth and fifth respondents are aspiring ^C parliamentary candidates. The appellant's nomination papers were rejected, while those of the fourth and fifth respondents were accepted by the first respondent. The second respondent is the Electoral Commission responsible for conducting elections in Zimbabwe. The third respondent is the Minister responsible for the administration of the Electoral Act [Chapter 2:13] and the Zimbabwe Electoral Commission Act [Chapter 2:12] (hereinafter referred to ^D as "the Electoral Act" and "the Zimbabwe Electoral Commission Act").

The brief facts leading to this appeal are that the appellant lodged his nomination papers with the first respondent who rejected them, because seven of the appellant's nominators' names could not be found on the voters roll. He is aggrieved because his nominators were registered voters who had, according to certificates of registration attached to the appeal, registered ^E between 15 November 2007 and 13 February 2008. The dates of their registration explains why their names are not on the voters roll. This however does not disentitle a nominator from nominating a candidate, as the proviso to s 46(1)(a) of the Electoral Act entitles the aspiring candidate to prove his nominator's eligibility by producing the relevant voters registration certificate. The ^F appellant, believing his nomination to have been unfairly rejected appealed to this court on 20 February 2008. The nomination court had rejected his papers on 15 February 2008.

Mr Chikumbirike, for the second respondent, raised two points *in limine*:

- (a) that the second respondent was incorrectly cited; and
- (b) that the appellant's appeal was noted out of time.

g In respect of the first point *in limine*, Mr *Chikumbirike* submitted that the correct citation of the second respondent should be "The Chairman Zimbabwe Electoral Commission" as provided in s 18 of the Zimbabwe Electoral Commission Act. The first respondent's counsel conceded this point but sought to argue that the incorrect citation is not a fatal irregularity to warrant h the dismissal of the appeal. In respect of the second point *in limine*,

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Uchena J

Mr *Chikumbirike* submitted that an appeal in terms of s 46 (19)(b) of the A Electoral Act must be lodged with the Electoral Court within four days of the rejection of the appellant's nomination. He said that in this case the appeal should have been lodged by 19 February 2008. He based his interpretation of s 46(19)(c) of the Electoral Act on s 33(2), (3) and (4) of the Interpretation Act [Chapter 1:01] (hereinafter referred to as "the Interpretation Act"). B

In his response, Mr *Mugabe* submitted that the appeal was lodged in time, as Saturdays and Sundays should not be included in the reckoning of time. He referred the court to Order 1 r 4A of the High Court Rules. In the alternative, he submitted that the ordinary meaning of a day c excludes Saturdays, Sundays and public holidays.

Mr *Chikumbirike*, in response, submitted that the ordinary meaning of a day includes Saturdays, Sundays and public holidays, as a day means a day and cannot exclude other days. I agree with Mr *Chikumbirike's* construction, as it accords with the literal meaning of the word "day". That is why the name of each day of the week ends with the suffix "day". That construction is supported by case law. In *Ellis & Anor v Maceys Stores Ltd* 1983 (2) ZLR 17 (S) at 18G, Gubbay JA (as he then was) said: D

"Rule 30(a) lays down that where leave to appeal is not necessary, as in this case, an appeal is properly entered by serving notice of appeal 'within twenty-one days of the day of the judgment appealed against'. Does the period include 'non-business' days? There is no doubt that it does. First, the ordinary meaning of the word 'days' embraces both business and E none-business days. If it were intended to exclude non-business days, it would have been a simple matter to have used the expression 'twenty-one business days'."

In *Kombayi v Berkhout* 1988 (1) ZLR 53 (S) at 56B, Korsah JA, referring with approval to the *Ellis* case *supra*, said:

"This court has repeated *ad nauseam* that the calculation of time for F lodging of appeals was based on ordinary days and not court days."

Words in a statute should be interpreted in accordance with the definition usually found in the definition or interpretation section of that statute. In the absence of a definition for the words to be interpreted, one has to look to the Interpretation Act for assistance in interpreting words in a statute. In relying G on the aforementioned, one can also invoke the general rules of interpretation, provided it would not be inconsistent with the definition provided in the Act or the Interpretation Act. Section 2 of the Interpretation Act provides as follows: H

2008 (1) ZLR p167

Uchena J

" A (1) The provisions of this Act shall extend and apply to every enactment as defined in this Act, including this Act which was in force in Zimbabwe immediately before the 1st November 1962, or thereafter comes into force in Zimbabwe, except in so far as any such provisions –

- (a) are inconsistent with the intention or object of such enactment; or
- (b) would give to any word, expression or provision of such an enactment B an interpretation inconsistent with the context; or
- (c) are in such enactment declared not applicable thereto.

(2) Nothing in this Act shall exclude the application to any enactment of any rule of construction applicable thereto and not inconsistent with this Act."

c The word "enactment" is defined in s 3 of the Interpretation Act and means:

- "(a) any Act;
- (b) any statute included in the revised edition of the laws of Zimbabwe prepared under an Act."

There is no doubt that the Electoral Act falls under this definition and should D therefore be construed according to the provisions of the Interpretation Act, as the words "day" and "days" are

not defined in the Electoral Act. ^A

Mr *Mugabe's* submission that the time should be reckoned in terms of the High Court Rules could have been premised on the provisions of s 165(4) of the Electoral Act which provides as follows:

"Until rules of court for the Electoral Court are made in terms of this section, ^E the rules of the High Court shall apply, with such modifications as appear to the Electoral Court to be necessary, with respect to election petitions and other matters over which the Electoral Court has jurisdiction."

It is true that this court can rely on High Court Rules, but the issue to be determined is whether or not the provisions of r 4A extend to time limits ^F prescribed in an Act of Parliament. Rule 4A provides as follows:

"Unless a contrary intention appears, where anything is required by these rules or in any ^G order of the court to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be reckoned as part of such period."

The key words in r 4A are "where anything is required by these rules or in any order of the court to be done within a particular number of days". This means the rule applies to anything required to be done by any rule in the High Court Rules or an order of the court. It does not extend to situations not provided for by the rules or court orders. It therefore does not assist in the construction of s 46(19)(c) of the Electoral Act, which is not a provision of the High Court ^H Rules, but a provision of the Electoral Act.

2008 (1) ZLR p168

Uchena J

In this case, the words "day" and "days" are not defined in the Electoral Act. They are, however, provided for in s 33 of the Interpretation Act, which provides as follows:

"(2) Where in an enactment a period of time is expressed to begin on, or to be reckoned from, a particular day, that day shall not be included in the period.

(3) Where in an enactment a period of time is expressed to end on, or to ^B be reckoned to, a particular day, that day shall be included in the period.

(4) Where the time limited by an enactment for the doing of any thing expires or falls upon a Saturday, a Sunday or a public holiday, the time so limited shall extend to and the thing may be done on, the first following day that is not a Saturday, a Sunday or a public holiday." ^C

The clear meaning of s 33(2) to (4) of the Interpretation Act is as follows. Subsection (2) excludes the day on which the event triggering the reckoning of time occurred, meaning the reckoning of time starts from the next day. Subsection (3) includes the last day of the stated period in the reckoning of time. Subsection (4) extends the period if the last day falls on a Saturday, a Sunday or a public holiday, to the next day which is not a Saturday, a Sunday ^D or a public holiday. The inclusion of subsection (4) and its providing for an extension if the period expires on a Saturday, a Sunday or a public holiday means that Saturdays, Sundays and public holidays are included in the reckoning of time. This interpretation was confirmed in *Makuwaza v National Railways of Zimbabwe* 1997 (2) ZLR 453 (S) at 456E-F where McNally JA ^E said:

"It was conceded on the understanding that the period from 10 May to 26 May was less than fourteen days if one excludes Saturdays, Sundays and public holidays.

That may be so, but on what basis does one exclude those days? The Interpretation Act [*Chapter 1:01*] does not allow it. The Labour Relations ^F (Settlement of Disputes) Regulations (SI 30 of 1993) do not authorize it. It is only permitted in matters before the High Court and Supreme Court because the rules of those courts specifically say so (rr 4A and 1 respectively)."

See also the case of *Ellis, supra* at pp 18-19.

When the provisions of s 46(19)(c) of the Electoral Act are construed in terms ^G of s 33 of the Interpretation Act, it becomes clear that the day on which the appellant was advised of the rejection of his nomination papers is not included. The reckoning of the four day period starts on the following day and ends on the fourth day, if the fourth day falls on a day other than a Saturday, a Sunday or a public holiday. If the fourth day falls on a Saturday, a Sunday ^H

2008 (1) ZLR p169

Uchena J

^A or a public holiday, the period then expires on the following day which is not a Saturday, a Sunday or a public holiday. The ordinary meaning of a "day" includes all days. If the Legislature had

intended the period to only include business days, they would have said so. The provisions of s 33 of the Interpretation Act are consistent with the provisions of s 46(19)(c) of the Electoral Act. The interpretation in terms of s 33 is also consistent with the contextual meaning of s 46 (19)(c) of the Electoral Act which provides as follows:

“If no appeal in terms of paragraph (b) is lodged within four days after the receipt of notice of the decision of the nomination officer, the right of appeal of the candidate shall lapse and the decision of the nomination officer shall be final.”

c Section 46(19)(b) of the Electoral Act provides that the decision of a judge of the Electoral Court is final and it shall not be the subject of an appeal. The Nomination Court sits to nominate candidates for an election on a date already announced. In this case, the elections will be held on 29 March 2008. The noting of an appeal and its hearing are therefore set within the urgency dictated by the count down towards the election date. Ballot papers must be prepared after the determination of the appeal, as the appellant's name must appear on the ballot papers if his appeal is upheld. That, in my view, explains why the reckoning of time should include Saturdays, Sundays and public holidays.

In this case, the four day period excludes 15 February 2008 when the appellant e was advised of the rejection of his nomination. It starts on Saturday 16 February and ends on Tuesday 19 February 2008. As the last day is a business day, there is no room for extension. It must also be stated that the Electoral Court is a creature of statute. Its jurisdiction is restricted to what is provided in the Electoral Act, which does not provide for condonation. It therefore cannot condone the appellant's failure to comply with the provisions of f s 46(19)(c) of the Electoral Act.

Electoral cases under the amended Electoral Act call for careful reading on the part of legal practitioners handling these cases. The appellant and his lawyers could have genuinely believed that the period excluded week-ends. There will therefore be no order of costs against the appellant.

g In the result, the appellant's appeal is dismissed with no order as to costs.

Zimbabwe Lawyers for Human Rights, appellant's legal practitioners

Civil Division, Attorney-General's, first and second respondent's legal practitioners

h *Chikumbirike & Associates*, second respondent's legal practitioners

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JAMU v CITY OF HARARE 2008 (1) ZLR 170 (S)

2008 (1) ZLR p170

Citation	2008 (1) ZLR 170 (S)
Case No	Judgment No. S-53-07
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Cheda JA & Malaba JA
Heard	10 July 2007
Judgment	4 March 2008
Counsel	No appearance for the appellant <i>D Kanokanga</i> , for the respondent

Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Appeal — *set-down* — *notice of* — *appellant not receiving notice* — *c appropriate course for court to take*

Headnote

The appellant had noted an appeal against a decision of the Administrative Court. Heads of argument were filed on her behalf. The appeal was set down for hearing, but on the hearing date there was no appearance for the appellant. It emerged that the appellant was not served with the notice ^D of set down and had no knowledge of the date of the hearing of the appeal.

Held, that in terms of r 36(4) of the Supreme Court Rules, where there is no appearance for the appellant and the appellant has had notice of set-down, the court has a discretion, depending on the circumstances of each case, to hear the appeal or strike it off the roll or to postpone the hearing. Where, as here, the appellant had not had notice of set-down, ^E the sub-rule does not apply. The court is not in a position to hear the appeal and the best course to take is to strike off the appeal from the roll with no order as to costs.

Cases cited

R v Mokwena 1954 (1) SA 256 (A) ^F

Legislation considered

Supreme Court Rules 1964 (RGN 380 of 1964), r 36(4)

Case information

No appearance for the appellant

D Kanokanga, for the respondent ^G

Judgment

MALABA JA: On 5 October 2006, the appellant noted an appeal against the judgment of the Administrative Court dismissing an appeal from a decision of the respondent by which it rejected an application for a permit to establish ^H

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Malaba JA

^A a residential clinic on the premises where the appellant was operating a private surgery. The appeal was set down for a hearing on 10 July 2007. The appellant did not appear at the hearing in person or by counsel. She had, however, filed heads of argument.

Mr *Kanokanga* produced a document containing a notice of set down which ^B showed that it had been uplifted from the Registrar's Office by a person who purported to be acting on behalf of the appellant. Mr *Kanokanga* argued that in the circumstances the appellant was in wilful default of appearance. He said that he was entitled to present the respondent's case on the merits. The court canvassed with counsel the question whether the best course was not to have the appeal struck off the roll in case the appellant was not aware of the date ^C of the hearing. Mr *Kanokanga's* position was that, in the light of the evidence of the document made available to it, the court was to proceed on the basis that the appellant was aware of the date of the hearing of the appeal. The court allowed Mr *Kanokanga* to make submissions on the merits of the appeal, at the conclusion of which it reserved judgment.

On 11 July 2007, a letter was written to the Registrar by the appellant's legal ^D practitioners alleging that the appellant had not been served with the notice of set down of the appeal for the hearing on

10 July. The letter reads in part:

"Further to our letter of 10 July wherein we sought your clarification regarding the service of the notice of set down of the above appeal which was enrolled for yesterday (10 July 2007) and the appellant was in default, we discovered from your offices that the endorsement on the notice of set down was to the effect that the notice had been uplifted from your offices by NYASHA MAKWANISE on 14 June 2007. We do not have anyone in our employ by the name NYASHA MAKWANISE and neither our offices nor Advocate Matinenga were aware of the set down. We record as well that NYASHA MAKWANISE appears to be an employee of the respondent's legal practitioners."

The letter was copied to Mr *Kanokanga*. There has been no denial of the allegation that the person who uplifted the notice of set down of the appeal was an employee of the respondent's firm of legal practitioners. It must be accepted as a fact that the appellant was not served with the notice of set down and had no knowledge of the date of the hearing of the appeal.

Rule 36(4) of the Supreme Court Rules provides that:

"Where, at the time of the hearing of an appeal, there is no appearance for the appellant and *no written arguments have been filed by him*, the court may dismiss the appeal and make such order as to costs as it may think fit.

2008 (1) ZLR p172

Malaba JA

Provided that an appeal dismissed in terms of this subrule may thereafter on application by the appellant be reinstated" (my own emphasis).

The question arises as to what course the court has to take in a case in which the appellant has filed heads of argument and there is sufficient proof that he or she had notice of the date of the hearing of the appeal but does not appear at the hearing. Upon a proper construction of r 36(4), the court in the circumstances does not have to dismiss the appeal without a hearing. It may proceed to hear the appeal and make a determination taking into account the written representations made by the appellant in the heads of argument. A discretion manifestly rests in the court in a matter of this kind. In *R v Mokwena* 1954 (1) SA 256 (A), the appellant, who had been duly served with a notice of set down, did not appear at the hearing of the appeal. Considering the course the court could take, Centlivres CJ said at p 257B:

"In my view, the court has a discretion, depending on the circumstances of each case, to hear the appeal or strike it off the roll or to postpone the hearing."

The court in that particular case dealt with the facts and dismissed the appeal. It is clear that r 36(4) confers a discretion on the court whether to dismiss the appeal, with the prospects of an application for an order of reinstatement being made later where the circumstances mentioned thereunder are present, that is to say, the appellant was aware of the date of the hearing of the appeal and had not filed heads of argument.

Whilst the appellant filed heads of argument in this case, she had no knowledge of the fact the appeal had been set down for a hearing on 10 July 2007. The subrule does not apply. The court is not in a position to hear the appeal either. The best course to take is to strike off the appeal from the roll with no order as to costs.

The appeal is struck off the roll with no order as to costs.

CHIDYAUSIKU CJ and CHEDA JA concurred.

Kanokanga & Partners, respondent's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 1/TOYOTA ZIMBAWE v POSI 2008 (1) ZLR 173 (S)

TOYOTA ZIMBAWE v POSI 2008 (1) ZLR 173 (S)**2008 (1) ZLR p173**

Citation	2008 (1) ZLR 173 (S)
Case No	Judgment No. S-55-07
Court	Supreme Court, Harare
Judge	Malaba JA, Cheda JA & Gwaunza JA
Heard	2 October 2007
Judgment	4 March 2008
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 — code of conduct — disciplinary proceedings under — penalty which may be imposed — code providing different penalties for a first offence and for subsequent offences — serious offence committed — employer not limited to penalties for first offence

Headnote

- The respondent was dismissed from his employment following disciplinary proceedings for an act of gross negligence regarding the handling of funds. This act had caused considerable financial loss to the employer. The code of conduct under which he was charged provided that, "depending on the severity of the offence committed", the following penalties were provided for an offence which fell into the category of *e* serious breaches of the code: for a first offence, a final written warning valid for 12 months and/or demotion and suspension without pay for up to 30 days; and for a second offence, dismissal. The respondent argued that since this was a first offence the disciplinary committee was bound to impose the lighter penalty and that dismissal was not a competent penalty.
- *Held*, that, if the construction of the words proposed by the respondent was adopted, the result would be that an employee who committed an act of misconduct which went to the root of the relationship between employer and employee could not be dismissed as long as it was his first breach of the rule against that conduct. This construction would drastically alter the common law. The position at common law is that a high degree of *g* negligence, such as gross negligence in the performance of work, justifies an employer dismissing the employee. It is also the position at common law that the commission by an employee of conduct inconsistent with the fulfilment of express or implied conditions of the contract of *h* employment entitles the employer to dismiss him if the circumstances of

2008 (1) ZLR p174

Malaba JA

the commission of the offence show that the continuance of a normal *a* employer and employee relationship has in effect been terminated. The Labour Act contains no provision which either expressly or impliedly purports to alter the common law principle that an employer has a right to dismiss an employee following conviction for a misconduct of a material nature going to the root of the employer and employee *b* relationship. A code of conduct cannot alter or abrogate a principle of the common law. It does not matter that the code of conduct is a product of an

agreement. What the code meant *in casu* was that the intention of the parties was to have the penalties provided imposed by employers unless there was evidence in the circumstances of the commission of the offence which so aggravated the conduct of the employee as to take it out of the ordinary degree of seriousness of the breach. In that case the employer was entitled to impose the penalty of dismissal on a first offender, which accords with the common law principle mentioned.

Cases cited

Standard Chartered Bank Zimbabwe v Chapuka 2005 (1) ZLR 52 (S) ^D

Wallace v Rand Daily Mail Ltd 1917 AD 479

Case information

H Zhou, for the appellant

The respondent in person

Judgment

MALABA JA: This is an appeal from a judgment of the Labour Court dated ^E 17 November 2006 setting aside the decision of the appellant to dismiss the respondent from employment following a conviction under a code of conduct of gross negligence in the performance of work. The Labour Court ordered that the case be remitted to the appellant for a penalty other than dismissal to be imposed. ^F

The respondent was employed by the appellant as an assistant credit controller. His duties included the supervision of work done by cashiers and accounting assistants. Cashiers had to submit to him the cash which they would have received from the appellant's customers after counting it, together with the banking sheets in which they would have entered the amounts. They were also supposed to prepare and submit to the respondent bank deposit ^G slips relating to the amount of money to be banked. It was the respondent's duty to count the money and check the banking sheets and deposit slips prepared by his subordinates to satisfy himself that there was no money missing. He had to sign the banking sheet and deposit slip to certify that the money was as recorded therein before it was taken to the bank. On 18 December ^H

2008 (1) ZLR p175

Malaba JA

^A 2002, one of the cashiers received a total amount of \$6 552 582.03. The banking sheets showed that this money had been received. The respondent signed the banking sheet to certify that, indeed, that amount of money had been received and receipted. On 31 December, the accounts department discovered upon examination of the deposit slips for 19 December when the money was supposed to have been banked that it had been under-banked by an amount ^B of \$218 652.13.

On 7 January 2003, the respondent appeared before the Disciplinary Committee charged with the misconduct of negligence in the performance of work as defined in the code of conduct ("the Code"). He admitted that when the money and the documents were brought to him he did not count it, nor did he go ^C through the banking sheets and deposit slips to satisfy himself that the amount of money recorded therein agreed with the cash. He had simply signed the banking sheets and deposit slip without paying attention to the probable consequences of failure to strictly comply with the procedures for proper performance of his work. The respondent further admitted that as a result of his negligence, the appellant had suffered a serious financial loss. Having ^D found the respondent guilty of the misconduct charged, the Disciplinary Committee was of the view that the facts showed that the degree of negligence committed was high, deserving the penalty of dismissal as a punishment. The respondent was accordingly dismissed from employment.

In deciding to impose the penalty of dismissal for what it considered to be ^E gross negligence on the part of the respondent who had committed a first breach, the Disciplinary Committee took into consideration the provisions of ^s 2 of the Code. I set out here only those provisions of the sections that are relevant in the determination of the appeal. Section 2 provides:

"CLASSIFICATION OF OFFENCES

Depending on the severity of the offence committed, the following are ^F provided:

2.1 MINOR BREACHES

1ST BREACH	2ND BREACH	3RD BREACH	4TH BREACH
Recorded G Verbal H Warning	First written warning valid for 3 months	Second written warning valid for 6 months	Final written warning valid for 12 months

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Malaba JA

2.2 MODERATE BREACHES A

1ST BREACH	2ND BREACH	3RD BREACH
First written warning valid for 6 months	Final written warning valid for 12 months B	Dismissal

2.3 SERIOUS BREACHES

1ST BREACH	2ND BREACH
Final written warning valid for 12 months and/or demotion and suspension without pay for up to 30 days	Dismissal C

The offences that fell in a particular class of offences were listed below the relevant box. Negligence in the performance of work is listed as falling in the class of serious breaches. On the basis of the classification of the various acts D of misconduct and the corresponding penalties, the respondent, on appeal to the Managing Director against the decision of the Disciplinary Committee to dismiss him from employment, contended that the Disciplinary Committee was bound to impose the penalty of a final written warning valid for 12 months and/or demotion and/or suspension without pay for up to 30 days, as his was a first breach. The argument was that whether or not dismissal was, in the E circumstances, an appropriate punishment for gross negligence in the performance of work, the Disciplinary Committee had no discretion in the matter of what penalty to impose.

The appeal was heard by the Financial Manager as the Managing Director had recused himself. The Financial Manager dismissed the argument by the respondent and upheld the decision of the Disciplinary Committee. He said: F

"It is my view, that the appellant's conduct attracts the stiffest penalty available. In this regard, I now have the discretion to award dismissal as the penalty, as did the designated official. It is my view, that regard being had to the opening words at p 12 of the Code that I have the discretion depending on the severity of the offence to award what I consider to be G a just penalty. To accept the appellant's submissions that there is no discretion that is afforded to the designated official would lead to the ridiculous conclusion that this company has no authority to dismiss any of its employees on a first breach no matter how fundamental the offence which would have been committed. By way of example, that would mean that an employee can kill or rape another employee in full view of everyone H

2008 (1) ZLR p177

Malaba JA

A and admit to the offence and he cannot be dismissed. Similarly it would mean that an employee can commit any of the serious offences in terms of the Code of Conduct and accept his wrongful conduct and cannot be dismissed. It is my view, therefore, that discretion on the penalty is available to the designated official depending on the severity of the offence, although a general guideline for penalties is provided.

^b The general penalty for negligence is that an employee can be given a final written warning valid for twelve months and/or demotion and/or suspension without pay for up to thirty days. Regard being had to this particular case, the negligence exhibited by the appellant was gross and therefore severe, which justifies a deviation from the ordinary penalties that would have been available to me. In these circumstances I agree with ^c the designated official that the appellant be dismissed."

The respondent appealed to the Labour Court, where his contention that the Disciplinary Committee was bound by the classification of the offences and the penalties provided under s 2 of the Code to impose the penalty specified thereunder for a first breach, regardless of the degree of seriousness of the commission of the offence, was accepted by the learned President. The ^d learned President was of the opinion that the words "depending on the severity of the offence committed, the following are provided" were explanatory of the basis on which the different penalties were provided in each class of offences according to whether the breach is a first breach or not. The effect of the reasoning adopted by the learned President was that the Disciplinary Committee was bound to impose the penalty indicated for a first breach ^e regardless of the degree of seriousness of the offence revealed by the circumstances of its commission.

He said:

"The wording in the Code 'depending on the severity of the offence' does not change the prescribed penalties under clause 2.3. The latter clearly ^f provides that a serious offence warrants dismissal on second breach. The wording relied on comes as a preface to all offences, that is minor, moderate and serious. In other words, read in that context, the words meant that the penalties depended on the severity or classification of the offence as minor, moderate or severe. The words do not give the respondent authority to impose a penalty more severe than the prescribed ^g penalty."

It appears to me that the learned President proceeded on the basis that s 2 was couched in clear and unambiguous language, the meaning of which the court was bound to give effect to, regardless of the consequences. To the contrary, s 2 of the Code is unhappily couched in vague and ambiguous language, ^h giving rise to a problem in ascertaining the intention of the parties to the Code.

2008 (1) ZLR p178

Malaba JA

It is not usual to talk in terms of the "severity" of an offence. It is common to ^a refer to the "severity" of a penalty to describe the intensity of the suffering the penalty is likely to bring on the person on whom it is imposed. I notice that the learned President used the words "serious" and "severe" interchangeably to describe the offences in the third class of the offences.

Where the words used are susceptible to more than one meaning, as is the case ^b with the language of s 2, it is the rule of construction that a court should avoid adopting the meaning which would lead to absurdity. Maxwell *Interpretation of Statutes* 12 ed states at p 105:

"Before adopting any proposed construction of a passage susceptible of more than one meaning, it is important to consider the effects or consequences which would result from it, for they often point out the real ^c meaning of the words. There are certain objects which the legislature is presumed not to intend, and a construction which would lead to any of them is therefore to be avoided."

Before adopting the construction of the words "depending on the severity of the offence committed, the following are provided", proposed by the respondent, I look at the consequences which would result from it. In the class ^d of offences described as serious breaches are found the following offences I have selected at random:

1. Unauthorised statements to the Press, or unauthorised public communication to other employees including posters, placards, or pamphlets. ^e
2. Any act, conduct or omission inconsistent with fulfilment of the expressed or implied conditions of contract or carrying out private work without authority.
13. Wilful disobedience to lawful orders.
33. Fraud. ^f
34. Theft.

If the construction of the words used in s 2 of the Code proposed by the respondent was adopted, the result would be that an employee who goes to the Press and deliberately makes an unauthorised statement denigrating and defaming his employer would not be dismissed from employment upon ^g conviction for the misconduct as long as it was his first breach of the rule against that conduct. That would be the case regardless of the fact that the misconduct goes to the root of the relationship

between employer and employee. The employer would be forced to keep the employee in his employment provided he imposes on him a final written warning valid for 12 ^h

2008 (1) ZLR p179

Malaba JA

A months and/or demotion and/or suspension without pay for up to 30 days and wait patiently for the day the employee would commit a second breach to dismiss him.

It would mean that an employee who commits a well planned and premeditated fraud or theft involving large sums of money against his employer would not upon being found guilty of the misconduct be dismissed because he is a first ^b offender.

It is known that the true extent of the gravity of certain offences is not known until the full facts and circumstances of their commission have been investigated. Although the offence included in the class of serious breaches is described as negligence in the performance of work it is known that there ^c are degrees of negligence which can only be established upon examination of the circumstances of the commission of the offence. That would mean that an employee who is a first offender and is guilty of gross negligence in the performance of his work would not be dismissed just the same as an employee who has been found guilty of negligence of a minor degree.

The view of s 2 of the Code adopted by the learned President would drastically ^d alter the common law. The position at common law is that a high degree of negligence, such as gross negligence in the performance of work, justifies an employer dismissing the employee: *Wallace v Rand Daily Mail Ltd* 1917 AD 479 at 482. It is a common law position that commission by an employee of conduct inconsistent with the fulfilment of express or implied conditions of ^e the contract of employment entitles the employer to dismiss him if the circumstances of the commission of the offence show that the continuance of a normal employer and employee relationship has in effect been terminated. See *Standard Chartered Bank Zimbabwe v Chapuka* 2005 (1) ZLR 52 (S).

We are bound by the rule of construction to the effect that we must presume that there is no intention to alter the common law. As Mr *Zhou* put it, the Labour Act contains no ^f provision which either expressly or by implication purports to alter the common law principle that an employer has a right to dismiss an employee following conviction for a misconduct of a material nature going to the root of the employer and employee relationship. A code of conduct cannot alter or abrogate a principle of the common law. It does not matter that the code ^g of conduct is a product of an agreement.

It appears to me that the construction of the words of s 2 proposed by the appellant is the more plausible. In the first place, the words "depending on the severity of the offence committed" seem to qualify the words "the following are provided". What that means is that the intention of the parties was to have ^h the penalties provided imposed by employers unless there was evidence in

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the circumstances of the commission of the offence which aggravated the ^a conduct of the employee so as to take it out of the ordinary degree of seriousness of the breach. In that case, the employer was entitled to impose the penalty of dismissal on a first offender. That position accords with the common law principle that an employer is entitled upon conviction of an employee of misconduct which goes to the root of their relationship to dismiss ^b him. In any case, the fact that the two penalties, that is to say, the final written warning valid for 12 months and/or demotion and/or suspension without pay for up to 30 days and dismissal, are penalties provided for serious breaches, means that any of them can be lawfully imposed as a punishment for the offences in that class of cases.

The appeal is allowed with costs. The decision of the court *a quo* is set aside ^c and substituted with the following order:

"The appeal is dismissed with costs."

CHEDA JA and GWAUNZA JA concurred. ^d

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

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 1/ZIMBABWE STOCK EXCHANGE v ZIMBABWE REVENUE AUTHORITY 2008 (1) ZLR 181 (S)

ZIMBABWE STOCK EXCHANGE v ZIMBABWE REVENUE AUTHORITY 2008 (1) ZLR 181 (S)
2008 (1) ZLR p181

Citation	2008 (1) ZLR 181 (S)
Case No	Judgment No. S-56-07
Court	Supreme Court, Harare
Judge	Malaba JA, Gwaunza JA & Garwe JA
Heard	17 September 2007
Judgment	4 March 2008
Counsel	<i>L T Biti</i> , for the appellant <i>M Sinyoro</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

c Practice and procedure — parties — locus standi — principles — need to have legal interest in subject-matter of action — Zimbabwe Stock Exchange — bringing action on behalf of stockbrokers — Stock Exchange having no legal interest at stake — Stock Exchange having no locus standi

Headnote

- The appellant, the Zimbabwe Stock Exchange, was established as a corporate body in terms of s 3 of the Zimbabwe Stock Exchange Act [*Chapter 24:14*]. Its affairs are managed and controlled by a Committee, the duties of which are set out in s 15 of the Act. Stockbrokers are members of the Exchange. A stockbroker is defined in the Act as a person who “carries on the business of purchasing and selling, or purchasing or selling listed securities on behalf of other persons”. In the discharge of the duties of managing and controlling the affairs of the appellant the Committee is enjoined to ensure that there is fair and efficient dealing in the securities listed and that the competence and conduct of stockbrokers is sufficiently high for the protection of the public.
- A dispute arose as to the liability of registered stockbrokers to pay value added tax (VAT) on the services provided by them, the respondent claiming that they were liable. The appellant sought a declaration that stockbrokers were exempt from paying VAT on the grounds that the service of purchasing and selling of listed securities they rendered to their clients was a financial service. The court *a quo* considered *in limine* whether the appellant had *locus standi* to bring the application. The appellant argued that since it was set up to manage a fair and efficient manner of dealing in listed securities, it had an interest in the impasse between the respondent and the stockbrokers and thus had a standing

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in terms of the common law on the basis that it had a direct and substantial ^A interest in the impasse. The court held that the appellant had no *locus standi*. On appeal:

Held, that the common law on *locus standi* of a party instituting legal proceedings is that to justify participation in the action the party must show that he has a direct and substantial interest in the right which is the ^B subject matter of the proceedings and the relief sought and not merely a financial interest which is only an indirect interest in the litigation. The exception to this rule where the question for determination involves the liberty of an individual who, because of mental illness or detention, is unable to institute the proceedings himself. The appellant was not involved in the purchasing and selling of listed securities. As such, it ^C would not have a direct interest in the result of the determination of the question whether or not such a service by a stockbroker was a "financial service" entitling its provider to an exemption from the liability for payment of VAT.

Cases referred to ^D

Ahmadiyya Anjuman Ashaati-Islam Lahore (SA) v Muslim Judicial Council (Cape) & Ors 1983 (4) SA 855 (C)

S A Optometric Assn v Frames Distributors (Pty) Ltd 1985 (3) SA 100 (O)

United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972 (4) SA 409 (C)

Zimbabwe Teachers Association & Ors v Minister of Education and Culture 1990 (2) ZLR 48 (H) ^E

Legislation considered

Stock Exchange Act [*Chapter 24:18*], s 15(1)

Case information

L T Biti, for the appellant ^F

M Sinyoro, for the respondent

Judgment

MALABA JA: This is an appeal from a judgment of the High Court dated 8 November 2006 ^{*} dismissing with costs an application by the appellant for an order declaring that stockbrokers are in terms of s 11(1)(a) of the Value Added Tax Act [*Chapter 23:15*] ("the VAT Act") exempted from the liability for the ^G payment of the tax chargeable in terms of s 3(1) on the value of services supplied to clients by registered operators in the course or furtherance of trade carried on by them. The ground on which the application was dismissed was ^A

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that the applicant had no *locus standi in judicio* to institute the proceedings and seek the relief on behalf of stockbrokers.

The appellant is a body corporate established in terms of s 3 of the Stock Exchange Act [*Chapter 24:18*] ("the Act") with the capacity to sue and be sued in its corporate name. Its affairs are managed and controlled by a Committee known as the Committee of the Zimbabwe Stock Exchange, ^B established in terms of s 4 of the Act. The duties of the Committee as set out under s 15(1) of the Act are:

- "(a) to manage and control the affairs of the Exchange; and
- (b) to regulate the transaction of business on the Exchange; and
- (c) to manage and invest the funds of the Exchange; and
- (d) to raise or borrow moneys for the purposes of the Exchange in sums not exceeding in aggregate twenty five thousand dollars in any financial year unless authorized at an Exchange meeting."

Stockbrokers are members of the Exchange. A stockbroker is defined in s 2 of the Act as a person who "carries on the business of purchasing and selling, ^D or purchasing or selling listed securities on behalf of other persons". In the discharge of the duties of managing and controlling the affairs of

the appellant, the committee is enjoined by s 15(1)(f) to ensure that there is fair and efficient dealing in the securities listed and that the competence and conduct of stockbrokers is sufficiently high for the protection of the public.

Section 6(1) of the VAT Act provided for a tax to be charged, levied and ^εcollected for the benefit of the Consolidated Revenue Fund at such rate as may be fixed on the value of services supplied by a registered operator in the course or furtherance of any trade carried on by him. The tax had to be paid by the registered operator. Section 11(1)(a) provided exemptions from the liability for the payment of the tax to suppliers of "financial services". Under s 2(1) of the ^εVAT Act "financial services" is defined to mean:

- "(a) any service provided by a banking institution registered or required to be registered in terms of the Banking Act [*Chapter 24:20*], or
- (b) any service provided by a building society registered or required to be registered in terms of the Building Societies Act [*Chapter 24:02*]; or ^g
- (c) the exchange of bank notes or other currency of any country, except where they are to be used as collectors items; or
- (d) the provisions of any deposit, loan or credit, including the provisions of any guarantee, indemnity, security or bond in respect of the ^η performance of obligations related to a deposit, loan or credit; or

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- (e) the issue or transfer of ownership of any share in a company or ^α interest in a private business corporation; or
- (f) services rendered by an insurer registered in terms of the Insurance ^{Act} [*Chapter 24:07*]; or
- (g) the services of an actuary, insurance agent or insurance broker, as defined in the Insurance Act [*Chapter 24:07*] to the extent that those ^β services are rendered to or on behalf of an insurer registered in terms of the Insurance Act [*Chapter 24:07*] or to or on behalf of a pension fund registered in terms of the Pension and Provident Funds Act [*Chapter 24:09*]."

Believing that stockbrokers are liable for the payment of the tax in terms of s 5 of the VAT Act but had not paid the amount of tax, the Commissioner General ^κ ("the Commissioner"), in the exercise of the powers conferred on him under s 31(3) of the VAT Act, made assessments of amounts of tax payable by stockbrokers and gave each of them written notice of the assessment, at the same time inviting him/her to lodge objections to the assessment in writing within thirty days after the date of the notice if dissatisfied with the assessment.

Notices of the assessments were given to stockbrokers on 19 May 2006. On ^δ 22 May, they stopped trading on the Stock Exchange as a way of expressing dissatisfaction with the assessments by the Commissioner. They resumed trading on 30 May, following an agreement with the respondent that they would collect the tax pending determination by courts of law of the question of their liability for the payment of the tax. The moneys collected were to be ^εremitted to the Commissioner should the courts rule that the stockbrokers were liable for the payment of the tax.

On 15 June 2006, stockbrokers submitted written objections to the assessments to the Commissioner in terms of s 31(1) of the VAT Act. They contended that, on the basis of s 11(1)(e) of the VAT Act, the service of purchasing and selling of listed securities they rendered to their clients is a financial service. They ^ε argued that, as suppliers of a financial service defined in s 2(1)(e), they were exempted from liability for the payment of the tax on the value of the service.

On the day stockbrokers lodged objections to the assessments with the Commissioner, the appellant made an application to the High Court for an order declaring that stockbrokers were exempted from liability for payment of Value ^g Added Tax. The appellant based the application on the same ground relied upon by the stockbrokers in the written objections to the assessments.

Apart from denying that purchasing and selling or purchasing or selling of listed securities by stockbrokers on behalf of other persons was a financial service as defined under s 2(1)(e) of the VAT Act, the respondent raised as ^η

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^α a point *in limine* the *locus standi in judicio* of the appellant to institute the proceedings and claim the particular relief on behalf of stockbrokers.

The court *a quo* held that the appellant had no direct and substantial interest in the right which formed the subject matter of the application and the relief applied for and dismissed the application for lack of *locus standi* on the part ^B of the appellant. The learned Judge President said:

"It is common cause that the applicant itself is not a stockbroker and is not liable to the respondent for VAT. The applicant brings this application on behalf of stockbrokers. From a reading of the applicant's papers, it is quite apparent that the applicant greatly sympathizes with the stockbrokers' case and has adopted their stance as if it was its own. It firmly believes that stockbrokers are exempt from paying VAT and has argued so in its ^C application. Noticeably, in its draft order, it does not pray for an order compelling the parties to the dispute to speedily resolve the issue that has disrupted trading on the bourse but specifically prays that the dispute be resolved in favour of the stockbrokers."

The common law on *locus standi in judicio* of a party instituting proceedings ^D in a court of law is that to justify participation in the action the party must show that he or she has a direct and substantial interest in the right which is the subject matter of the proceedings and the relief sought and not merely a financial interest which is only an indirect interest in the litigation. The exception to the rule is of a case in which the question raised for determination by a court involves the liberty of an individual who, because of mental illness ^E or detention, is unable to institute the proceedings himself. The common law is applicable in the determination of the question of *locus standi* of persons seeking to enforce statutory rights unless the particular statute prescribes specific requirements for *locus standi*: *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C); *AAIL (SA) v Muslim Judicial Council (Cape) & Ors* 1983 (4) SA 855 (C); *SA Optometric Association F v Frames Distributors (Pty) Ltd* 1985 (3) SA 100 (O); *Zimbabwe Teachers Association & Ors v Minister of Education* 1990 (2) ZLR 48 (H).

The question raised for determination by the court *a quo* was whether or not stockbrokers had a right under s 11(1)(a) of the VAT Act not be charged tax in terms of s 6(1) on the value of the services they supplied to their clients in ^G the course or furtherance of the trade they carried on. To determine the question, the court *a quo* had to decide the question whether or not purchasing and selling or purchasing or selling of listed securities on the Stock Exchange which stockbrokers conducted on behalf of their clients was a financial service as defined in s 2(1) of the VAT Act. In other words, was it the ^H intention of Parliament that the service of purchasing and selling listed

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securities on the Stock Exchange which stockbrokers rendered to their clients ^A be included in the meaning of "financial service" under s 2(1)(e) as "the issue or transfer of ownership of any share in a company or interest in a private business corporation"?

It is clear from the nature of the questions the court *a quo* was expected to determine that stockbrokers had a direct and substantial interest in the right ^B which was the subject matter of the application made by the appellant. The appellant was not involved in the purchasing and selling of listed securities. As such, it would not have a direct interest in the result of the determination of the question whether or not such a service was a "financial service" entitling its provider to an exemption from the liability for payment of value added tax under s 11(1)(a) of the VAT Act. ^C

In seeking to take up the cudgels and put on the garb of litigation on behalf of stockbrokers in the representative action, the appellant put itself in the position of those persons to whom the common law in *locus standi* is intended to deny the right of action. In a spirited attempt to salvage a hopeless case of lack of *locus standi in judicio*, Mr *Biti* argued that stockbrokers are the Stock ^D Exchange and the appellant was established to protect their interests. The contention was that the institution of proceedings for the determination of the question of the liability of stockbrokers for the payment of Value Added Tax was part of the affairs of the appellant. It must be said, however, that the appellant was established in terms of s 3 of the Act as a body corporate whose affairs do not include the protection of the financial interests of its members. ^E

An examination of the nature of the affairs of the appellant as a body corporate which would determine the kind of direct and substantial interests it would have a right of action to protect shows that they related to the management of the trading in the stock market. They included, for example, ensuring that only listed securities were dealt in, that there was fairness and efficiency in ^F the trading, sufficiently high standards of conduct were observed by stockbrokers and that transactions were generally regulated. None of these affairs would justify the institution of the

proceedings to vindicate the right of a stockbroker to an exemption from liability to pay tax on the value of services he would have rendered to his client. ^g

The appeal is dismissed with costs.

GWAUNZA JA and GARWE JA concurred.

Honey & Blanckenberg, appellant's legal practitioners ^h

Sinyoro & Co, respondent's legal practitioners

* See *ZES v ZRA* 2006 (2) 269 (H) a judgment of Makarau JP – *Editor*.

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Source:

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ATTORNEY-GENERAL v SIBANDA 2008 (1) ZLR 187 (S)

2008 (1) ZLR p187

Citation	2008 (1) ZLR 187 (S)
Case No	Judgment No. S-04-08
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA & Gwaunza JA
Heard	19 February 2008
Judgment	10 March 2008
Counsel	<i>C Mutangadura</i> , for the appellant <i>L Mazonde</i> , for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

c Criminal procedure — sentence — passing of — by whom must be passed — trial in High Court — murder trial — original judge not having decided issue of extenuation — original judge then becoming unavailable to complete the case — permissible for another judge to pass sentence

Headnote

The respondent was convicted in the High Court of murder. The proceedings ^d were postponed at the respondent's request to allow him to lead evidence on extenuation. Before the case resumed, the presiding judge retired. Shortly after his retirement, he was arrested on allegations of attempting to defeat the course of justice and placed on remand. He advised the Registrar that he would not

be available to complete his part-heard matters until he was cleared of the allegations against him. Some ^Εnine months later, the charges against the judge were withdrawn before plea. The judge then left the country and declined to return unless the charges were withdrawn after plea. Further communication with him proved fruitless. It was common cause that the judge became unavailable to continue after verdict but before extenuation and sentence. The ^Φquestion was whether another judge could take over the proceedings at this stage and thereafter determine the matter. Garwe JP ruled (see *S v Sibanda* 2005 (2) ZLR 117 (H)) that the proceedings had become a nullity and that another judge could not take over the proceedings and conclude them. He held that a murder trial only ends with the judge and assessors making findings on the existence or otherwise of extenuating ^Γcircumstances following a conviction for murder. On appeal by the Attorney-General:

Held, while it was correct to say that a trial in a murder case concludes when the court determines the issue of extenuation, that was not the issue. The ^Ηissue was when it becomes permissible for a judge to take over a trial

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Chidyausiku CJ

started by another judge. There is nothing in the language of ss 333 and ^Α337 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] to suggest that a judge can only take over a murder case commenced before another judge at the conclusion of the trial or after the determination of extenuation. If the words of ss 333 and 337 are given their primary meaning, the inescapable conclusion is that the legislature authorises ^Βthe take-over of a murder trial after the verdict of guilty has been reached. Section 333(2) provides that if sentence is not passed "forthwith", that is, immediately after conviction, any judge may pass sentence upon the convicted person. There is no reference therein to completion of the trial, which in turn would mean, in a murder trial, at the conclusion of proceedings relating to extenuation. Determining the issue of extenuation ^ϸis a process in relation to sentencing and not conviction.

Cases cited

R v Taylor 1949 (4) SA 702 (A)

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

S v Sparks & Anor 1972 (3) SA 395 (A) ^Δ

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 180(6), 331, 333 & 337

Criminal Procedure Act 56 of 1955 (South Africa), ss 109(3) & 329(1) ^Ε

High Court Act [*Chapter 7:06*], s 7

Case information

C Mutangadura, for the appellant

L Mazonde, for the respondent

Judgment

CHIDYAUSIKU CJ: This is an appeal against the judgment of Garwe JP (as ^Φhe then was) that there be a trial *de novo* in this matter. The facts of the matter were very ably summarised by the court *a quo*, to be the following. The respondent was, on 16 July 2002, convicted of murder with actual intent following a trial. The proceedings were thereafter adjourned at the instance of the respondent to enable him to submit evidence on the question of extenuation. On 18 July 2002, however, Blackie J retired from the High Court ^ΓBench before the issue of extenuation had been determined. The matter has to date not been finalised owing to developments that occurred not long after the trial judge retired.

In September 2002, Blackie J was arrested on allegations that he had attempted to defeat the course of justice in a matter involving one Tara White. ^Η

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^A He was thereafter placed on remand. In response to a query by the Registrar of the High Court as to when he would be available to complete six part-heard criminal and civil matters, the judge advised the Registrar in November 2002 that since he was facing criminal charges, he would not be coming back to finalise these matters until he was cleared of those charges.

In June 2003, the charges against Blackie J were withdrawn before plea. In ^B response to a further minute from the Registrar, the judge advised, in a letter dated 20 January 2004, that although the charges against him had been withdrawn before plea, he would not be returning to deal with any matter since the State had refused to withdraw the charges after plea and had reserved to itself the right to proceed against him in future. Further attempts by the ^C Registrar to communicate with the judge proved fruitless. The Registrar would deliver mail at a local address but the judge would post his response from South Africa, without giving his contact address or telephone numbers. In February 2005, the Director of Public Prosecutions advised by letter that "prosecution had been declined". A letter to this effect was sent to Blackie J using his local address. In the letter, the Registrar also requested the judge ^D to indicate when he would be available to finalise his part-heard matters since the State had now indicated it was no longer proceeding with the prosecution. The letter was returned to the Registrar with the inscription "Based in South Africa".

The current situation, therefore, is that there is no realistic chance that the ^E Registrar can communicate with the judge or that the judge will be coming back to determine his part-heard matters. Some of the judgments have been pending since the year 2000. Even at the time the judge retired, there had been undue delays in the handing down of some judgments but this only came to light after his retirement.

It is, therefore, common cause that the trial judge became unavailable upon ^F delivery of the verdict but before extenuation and sentence. The issue that fell for determination was set out by the learned Judge President in the following terms at p 120:

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

The learned Judge President concluded that the proceedings before Blackie J had become a nullity, and that another judge could not take over the ^H proceedings and conclude them. The learned Judge President cited a

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number of authorities in support of his conclusion. I shall revert to those ^A authorities later in my judgment.

The State submitted that, once the juridical verdict of murder had been entered, the second inquiry as to whether or not extenuating circumstance exist is a sentencing issue, which issue another judge can deal with in terms of s 337 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (hereinafter referred to as "the Act"). The court *a quo* rejected this submission. The appellant advanced the same submissions before us.

The reasoning of the learned Judge President in rejecting the contention of the State is set out at pp 121C-123B of the judgment. He reasoned thus:

"In terms of s 3(b) of the High Court Act [*Chapter 7:06*] the High Court shall be duly constituted, for the purposes of hearing a criminal trial, if it ^C consists of one judge of the High Court and two assessors. In terms of s 10(2) of the Act, any question of fact arising at a criminal trial in the High Court shall be decided by the majority of the court. In terms of subs (3) of that section, at any criminal trial in the High Court, the judge shall have the sole responsibility for fixing of the sentence, but he may consult the assessors if he thinks fit. From the above provisions, it is clear that whilst ^D the question of sentence is to be determined by the judge, issues of fact arising during the trial are to be decided by the judge and the two assessors. As stated by Gardiner and Lansdown *South African Criminal Law and Procedure* 6 ed vol 1 at p 348:

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

As to what constitutes 'a trial', the learned authors state on the same page:

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

On a careful analysis of the law, it is clear that although the judge and the assessors are required, after convicting an accused person of murder, to consider the question of extenuation, in reality there is but one composite verdict of guilty, with or without extenuating circumstances.

In *R v Taylor* 1949 (4) SA 702 at 717 (A), Schreiner JA stated:

'It is clear that in arriving at a conclusion as to whether to express the ^G opinion that extenuating circumstances are or are not present a jury, or court of judge and assessors, has not only to find facts relevant to the subject of extenuation but has also, after considering those facts and the extent of their probable influence on the accused's conduct, to form what is essentially a moral judgment as to whether the circumstances ought ^H

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Chidyausiku CJ

A to be characterised as extenuating ... the expressed opinion by the triers of fact that extenuating circumstances are or are not present is not part of the sentence or part of the judge's reasons for sentence; it is a distinct procedural step in relation to the power to sentence a convicted murderer ...'

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

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

The learned Judge of Appeal went on to stress the need for the trial court:

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

In *S v Sparks & Anor* 1972 (3) SA 395 (A) at 404C-G, Holmes JA had the following to say:

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

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

Attention is also drawn to du Toit *et al Commentary on the Criminal Procedure Act* (1993) ed at 21-5.

The conclusion must inevitably be reached that a murder trial ends with ^G the judge and assessors making findings on the existence or otherwise of extenuating circumstances following a conviction for murder. Until that stage is reached, the trial is not complete. Nor can the presiding judge proceed on his own to determine the question of extenuation without consulting the assessors in order to assess an appropriate sentence in a ^H given case."

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Chidyausiku CJ

I agree with the learned Judge President's conclusion that a murder trial ^A ends with the judge and the assessors making a finding on extenuating circumstances. But that is not the issue in this case. The issue in this case is not when does a trial conclude. The issue in this case is, when does it become permissible in terms of the relevant statute for a judge to take over a trial started by another judge? The learned Judge President accepted that the ^B circumstances under which one judge can take over a case commenced by another judge were governed by ss 333 and 337 of the Act. He further concluded that, in terms of the above sections, this can only happen at the conclusion of the trial and, in the case of a murder trial, the end of the trial means after a determination on extenuation. I have no problem in accepting that the end of a trial in a murder case includes a determination on extenuation. Put ^C differently, I accept that a trial in a murder case concludes when the court determines the issue of extenuation. I, however, do not accept that ss 333 and 337 of the Act provide that a judge can only take over a case commenced by another judge at the conclusion of the trial, or in the case of a murder trial, after the determination on extenuation. I say so for a number of reasons.

The word "trial" does not appear anywhere in ss 333 and 337 of the Act. If the ^d Legislature had used words to the effect that a judge can take over a case commenced by another judge at the end of the trial, I would have no difficulty in agreeing with the conclusion of the court *a quo*, as it would then be abundantly clear that the intention of the Legislature is that another judge can only take over a case at the conclusion of the trial. Section 180(6) of the Act ^e clearly indicates that the Legislature never intended to limit the take-over of a trial by another judge to the conclusion of a trial. That section provides as follows:

"(6) Any person who has been called upon to plead to any indictment, summons or charge shall, except as is otherwise provided in this Act or in any other enactment, be entitled to demand that he be either acquitted ^f or found guilty by the judge or magistrate before whom he pleaded:

Provided that –

- (i) where a plea of not guilty has been recorded, whether in terms of section *two hundred and seventy-two* or otherwise, the trial may be continued before another judge or magistrate if no evidence has been adduced; ^g
- (ii) where a plea of guilty has been recorded, the trial may be continued before another judge or magistrate if no evidence has been adduced or no explanation has been given or inquiry made in terms of paragraph (b) of subsection (2) of section *two hundred and seventy-one*." ^h

2008 (1) ZLR p193

Chidyausiku CJ

^a The above section makes it permissible for one judge to take over a trial commenced by another judge long before completion. The only proviso in terms of the above section is that no evidence or explanation of the plea should have been led for another judge to be able take over the trial. The respondent was found guilty by the judge before whom he pleaded. Thus, there was full compliance with s 180(6) of the Act. Having been found guilty, can another ^b judge take over and hear extenuation and sentence the respondent? That situation is provided for in ss 333 and 337 of the Act, which provide as follows:

"333 Sentence in High Court

(1) If an application for arrest of judgment is not made or is dismissed, the High Court may either pass sentence upon the convicted person ^c forthwith or may discharge him on his recognizance, as provided in Part XVIII, on condition that he shall appear and receive judgment at some future session of the court or when called upon.

(2) If sentence is not passed forthwith, any judge may pass sentence upon the convicted person ...

337 Sentence of death for murder

^d **Subject** to section *three hundred and thirty-eight*, the High Court –

- (a) shall pass sentence of death upon an offender convicted by it of murder:

Provided that, if the High Court is of the opinion that there are extenuating circumstances or if the offender is a woman convicted of ^e the murder of her newly-born child, the court may impose –

- (i) a sentence of imprisonment for life; or
- (ii) any sentence other than the death sentence or imprisonment for life, if the court considers such a sentence appropriate in all the circumstances of the case."

I see nothing in the language of the above sections that suggests that a judge ^f can only take over a murder case commenced before another judge at the conclusion of the trial or after the determination of extenuation. If the words of ss 333 and 337 are given their primary meaning, the inescapable conclusion is that the Legislature authorises the take-over of a murder trial after the verdict of guilty has been reached.

^g Section 331 of the Act, which precedes s 333, clearly suggests that the point in time at which another judge can take over a case is upon postponement after pronouncement of the verdict of guilty. The section provides as follows:

"331 Arrest of judgment

(1) A person convicted of an offence by the High Court, whether on his ^h plea of guilty or otherwise, may at any time before sentence apply to that

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Chidyausiku CJ

court that judgment be arrested on the ground that the indictment does ^a not disclose an offence.

(2) Upon the hearing of the application, the court may allow any such amendment to the indictment as it might have allowed before the verdict.

(3) The court may either hear and determine the application forthwith or may reserve the question of law for the consideration of the Supreme Court and may nevertheless pass sentence forthwith."

In terms of the above section, a person convicted of an offence by the High Court, whether on his plea of guilty or otherwise, may at any time before sentence apply to that court that judgment be arrested on the ground that the indictment does not disclose an offence. It is quite clear from the language of this section that the point in time being referred to therein is immediately after ^a a verdict of guilty is pronounced. Upon the pronouncement of that verdict, a convicted person is entitled to make the application. The section further provides that upon hearing such an application, the court may allow the application or any such amendment to the indictment as it might have allowed before the verdict. The section further provides that the court may either hear and determine the application forthwith, or may reserve the question of law ^b for consideration by the Supreme Court, and may nevertheless pass sentence forthwith. Where a court has not passed sentence forthwith, ^s 333 is activated. It authorises another judge to take over the proceedings and pass sentence. Section 332 of the Act deals with the reservation of judgment and does not really assist in determining the true meaning to be ascribed to ^s 333.

It is also interesting to note that ^s 333 is specifically headed "Sentence in the ^e High Court" and provides in subs (1), that if an application for the arrest of judgment is not made, or is dismissed, the High Court may either pass sentence upon a convicted person forthwith or may grant him bail. The word "forthwith" can only refer to immediately after conviction. I see nothing that suggests that "forthwith", in the case of a murder trial, means after determination of the issue ^f of extenuation. Subsection (2) of ^s 333 provides that if sentence is not passed forthwith, any judge may pass sentence upon the convicted person. There is no reference therein to completion of the trial, which in turn would mean in a murder trial at the conclusion of extenuation. The critical issue is whether sentence has been passed "forthwith" after conviction. If sentence is not passed forthwith after conviction, ^s 333(2) authorises any other judge to pass ^g sentence upon the convicted person later on.

As I have already stated, ^s 333 specifically refers to sentence in the High Court. The Legislature must have known that sentencing in the High Court in murder cases involves the consideration of the existence or otherwise of extenuating ^h

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Chidyausiku CJ

^a circumstances. If it had been the intention of the Legislature that another judge be barred from taking over proceedings until after the determination of extenuation, one would have expected the Legislature to have used more explicit language to express that intention. To read into the language of ^s 333 the intention to bar a judge from taking over a trial until after extenuation has been completed would be to stretch the ordinary meaning of the language ^b used in that section to an extent that, in my view, would not be permissible. The authorities cited by the learned Judge President in his reasons for judgment are indeed authorities on what constitutes a trial and when it is that a trial comes to an end. Sections 333 and 337 of the Act are not about what constitutes a trial but are about at what point a judge can take over a case from ^c another judge. It is quite clear from the cited authorities that they are referring to a trial in the context of the function of assessors and when that function comes to an end, namely at the conclusion of the trial, that is, upon verdict or conviction and, in the case of murder, after a finding on extenuation.

The authorities cited by the learned Judge President relate to a South African statutory provision, whose wording bears no resemblance to ^s 333 of ^b the Act. The authorities relate to ss 109(3) and 329(1) of the South African Criminal Procedure Act, 56 of 1955. The relevant portions of the above sections provide as follows:

"109(3) Before the trial the said judge shall administer an oath to the person or persons whom he has so called to his assistance that he or they will give a true verdict, according to the evidence upon the issues to be tried, and ^e thereupon he or they shall be a member or members of the court subject to the following provisions:

- (a) any matter of law arising for decision at such trial, and any question arising thereat as to whether a matter for decision is a matter of fact or a matter of law, shall be decided by the presiding judge and no ^f assessor shall have a voice in any such decision; ...

329(1) Sentence of death by hanging shall be passed by a superior court upon a person convicted before or by it of murder, and sentence of death by hanging may be passed by a superior court upon a person convicted before or by it of treason or rape:

Provided that where a woman is convicted of the murder of her newly ^g born child, or where a person under sixteen years of age is convicted of murder or where the jury, in convicting the accused of murder, expresses, in terms of subsection (2) of section *one hundred and forty-one*, the opinion that there are extenuating circumstances, or in the case of a trial without a jury, where the court is of opinion that there are extenuating ^h circumstances, the court may impose any sentence other than the death

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Chidyausiku CJ

sentence.” ^a

It is quite clear from the above provisions that the passage from Gardiner and Lansdown *South African Criminal Law and Procedure* 6 ed vol 1 at p 348, cited by the learned Judge President in support of what constitutes a trial, paraphrases the provisions of s 109(3), as read with s 329(1), of the South African Act. A similar provision to s 109(3) of the South African Act is to be ^b found in our law in s 7 of the High Court Act [*Chapter 7:06*], which provides as follows:

“Swearing in of assessor in criminal trial

Before the commencement of a criminal trial in the High Court the judge shall administer an oath to the assessors that they will give a true verdict according to the evidence upon the issues to be tried and thereupon they ^c shall, subject to this Part, be members of the court.”

It is quite apparent from the above that the authorities cited and referred to by the learned Judge President are relevant to sections of the South African Act which deal with what constitutes a trial in the context of the function of assessors. The South African provisions bear no resemblance to ss 333 and ^d 337 of the Act. Indeed, the cited authorities would be very persuasive if the issue *in casu* were the interpretation of the provisions of s 7 of the High Court Act, whose wording is very similar to the South African provisions. The said authorities cannot be persuasive in interpreting ss 333 and 337 of the Act, whose wording bears no resemblance whatsoever to the cited South African provisions. ^e

Further, as stated by Schreiner JA in *Taylor’s* case *supra*:

“The expressed opinion by the triers of fact that extenuating circumstances are or are not present is not part of the sentence or part of the judge’s reasons for sentence; it is a distinct procedural *step in relation to the power to sentence a convicted murderer ...*” (the emphasis is mine).

I agree with the learned Judge of Appeal that determining the issue of ^f extenuation is a process in relation to sentencing and not conviction. I have no doubt that the language used by the legislature in ss 333 and 337 is sufficiently clear. It authorises another judge to participate in the sentencing process after the verdict of guilty has been returned by the trial court. I accordingly will allow the appeal. ^g

Before concluding, I wish to refer to the point *in limine* which was raised by the respondent. The respondent submitted that the appellant has not complied with the Supreme Court Rules. In particular, the respondent contends that the appeal was noted out of time and no condonation has been granted for the ^h

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Chidyausiku CJ

^a late noting of the appeal.

In my view, there is substance in the submission of the respondent. The Attorney-General has broken every requirement of the Rules of this court in bringing this matter before this court. However, in my view, a very important legal point is involved in this case and its determination is imperative. This matter has been outstanding for a very long time and dismissal of this matter ^b for non-compliance with the Rules of this court would lead to a serious miscarriage of justice. It would mean that the judgment of Garwe JP stands and a trial *de novo* takes place when in fact there should be no such trial. There is also the possibility that such trial will be set aside in the event of an appeal against the judgment in the trial *de novo*. In my view, this is a proper case for ^c this court to depart from the rules in the interests of justice.

In the result, the appeal is allowed and the matter is remitted to the High Court for it to be completed before another judge.

SANDURA JA & GWAUNZA JA concurred.

▷ *Attorney-General's Office*, appellant's legal practitioners
Gill, Godlonton & Gerrans, respondent's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 1/LONGMAN ZIMBABWE (PVT) LTD v MIDZI & ORS 2008 (1) ZLR 198 (S)

LONGMAN ZIMBABWE (PVT) LTD v MIDZI & ORS 2008 (1) ZLR 198 (S)

2008 (1) ZLR p198

Citation	2008 (1) ZLR 198 (S)
Case No	Judgment No. S-54-07
Court	Supreme Court, Harare
Judge	Sandura JA, Gwaunza JA and Garwe JA
Heard	7 May 2007
Judgment	11 March 2008
Counsel	<i>L T Biti</i> , for the appellant <i>P C Paul</i> , for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Appeal — *noting of — effect — court or tribunal other than court of inherent c jurisdiction — such court or tribunal has no power to order stay of execution — noting of appeal does not suspend operation of decision appealed against*

Practice and procedure — *courts — issues raised by parties — not proper for court to decide only one of issues so raised unless such issue can ▷ determine the whole dispute between the parties*

Practice and procedure — *plea — lis pendens — separate appeals noted to Administrative Court and Supreme Court concerning same issues — refusal of Supreme Court to consider such issues*

Headnote

The respondents were, in terms of the Rent Regulations¹⁹⁸², statutory ε tenants of dwellings owned by the appellant. The appellant sought their ejectment on the grounds that it required the dwellings for renovation, followed by occupation by its own employees. The Rent Board granted an application for the ejectment of the respondents and later issued a certificate permitting their ejectment. The respondents appealed against ϕ the Rent Board's decision to the Administrative Court, raising several points of law regarding the validity of the appellant's notice to quite and of the Board's certificate and order. In the mean time, the appellant applied to the High Court for an order of ejectment. The respondents opposed the application, raising the same grounds as in their appeal to the Administrative Court. The High Court upheld one of the grounds ϑ raised by the

respondents, made no decision on the rest, and dismissed the application for ejectment on the grounds that the effect of the noting of the appeal by the respondents against the certificate of ejectment was to suspend the decision of the Rent Board. The appellant appealed against the High Court's decision. Apart from arguing that the High

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Garwe JA

^A Court's decision was correct, the respondents again raised the points being raised before the Administrative Court.

Held, that it is not proper for a court to make a decision on only one of the issues raised unless the issue so determined can put the whole matter to rest.

Held, further, that the power of a court to order execution of its own judgment ^B despite the noting of an appeal is founded in the common law doctrine of inherent jurisdiction. It is trite that only the superior courts enjoy inherent jurisdiction. In Zimbabwe, these are the High Court and the Supreme Court. Courts created by statute do not have inherent jurisdiction and consequently do not have power to order execution of their judgment ^C unless such jurisdiction is conferred on them by statute (*dicta per* Chidyausiku CJ in *Associated Newspapers of Zimbabwe v Minister of State for Information and Publicity & Ors* 2005 (1) ZLR 222 (S) followed).

Held, further, that unless empowered by law to do so, an inferior court, tribunal or other authority has no power to order the suspension of its own orders or judgments and that the noting of an appeal against the ^D judgment or order of such a court, tribunal or other authority, in the absence of statutory provision to that effect, does not have the effect of suspending the operation of the judgment or order that is sought to be appealed against.

Held, further, that while the appeal before the Administrative Court remained pending, the issues raised before the High Court, and subsequently the ^E Supreme Court, were *lis pendens*. They were matters for the Administrative to consider in due course and thereafter to determine. It would be premature for the Supreme Court to consider and determine them.

Cases cited

Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity & Ors 2005 (1) ZLR 222 (S)

^F *PTC v Mahachi* 1997 (2) ZLR 71 (H)

South Cape Corp (Pty) Ltd v Engineering Mgmt Svcs (Pty) Ltd 1977 (3) SA 534 (A)

Vengesai & Ors v Zimbabwe Glass Industries Ltd 1998 (2) ZLR 593 (H)

Legislation considered ^G

Rent Regulations 1982 (SI 626 of 1982), ss 30(2), (3) and (4), 32, 35 and 37

Case information

^L *T Biti*, for the appellant

^H *P C Paul*, for the respondents

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Garwe JA

Judgment

GARWE JA: The facts of this case are to a large extent common cause. The ^A appellant is the registered owner of the immovable property known as Paternoster Court situate at 157 Josiah Chinamano Avenue, Harare. The respondents are statutory tenants at the property. On 27 May 2003, the appellant gave two months notice to the respondents to vacate the property on the basis that certain internal and external structural renovations were to ^B be effected on the property. Thereafter, on 20 August 2003, the appellant further advised the respondents that it wished to repossess the premises for use by its own members of staff and further that the occupation by its members was to be preceded by structural renovations. In that notice, the appellant also gave the

respondents two calendar months to vacate the premises. In the meantime an application had been lodged with the Rent Board for the ejection of the respondents. The application was heard by the Board in June 2004. The Rent Board, satisfied that the appellant wanted the premises for use by its own employees and, further, that due notice had been given to the respondents, granted the application on 18 June 2004. On 21 June 2004, the Board further issued a certificate permitting the ejection of the respondents. The respondents did not move. Instead they appealed against the decision of the Board to the Administrative Court. The appellant then instituted an action in the High Court seeking the ejection of the respondents as well as holding over damages. The action in the High Court was predicated on the notice given by the appellant to the respondents on 20 August 2003 as well as the individual certificates of ejection issued by the Rent Board on 21 June 2004. The respondents opposed the relief sought on four bases. These were, firstly, that the letters purporting to give two months notice were not proper notices in terms of the Rent Regulations; secondly, that the appellant did not require the flats for use by its own employees; thirdly, that a company cannot give a valid notice in terms of s 32(c) of the Rent Regulations; and fourthly, that the certificates of ejection were not issued in terms of s 30 of the Regulations.

At the hearing of the matter before the High Court, the trial judge found that the notice given by the appellant to the respondents was defective in that it did not specify for whose personal occupation the premises were required. However, he also came to the conclusion that the effect of the noting of the appeal by the respondents against the certificate of ejection was to suspend the decision of the Rent Board. On that basis, he dismissed the appellant's claim with costs.

It is against the decision of the High Court dismissing its claim that the appellant has appealed to this court. In its heads of argument, the appellant

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Garwe JA

A submits that the main issue is whether or not the court *a quo* was correct in finding that the notice of appeal had the effect of suspending the ejection order. The appellant has urged this court to find that, except where a court enjoys original jurisdiction, the noting of an appeal against the decision of that court does not have the effect of suspending the judgment of the court.

The respondents accept that this was one of the issues for determination before the court *a quo*. They urge this court to find that an appeal in these circumstances does have the effect of suspending the order. The respondents submit, however, that it is not necessary to decide this point. They argue that the notice to vacate was defective in a number of respects; it did not specify the name of the person for whose personal occupation the dwelling was required; it did not specify the nature of the reconstruction as required by s 30(3)(b) of the Regulations; it further did not specify that the premises were required for the personal occupation of the appellant's employees but instead stated that the premises were required for the use of its employees; and lastly that, contrary to s 30(4) of the Rent Regulations, no certificate had been issued by the Board to the effect that the requirement that the lessee vacate the dwelling is fair and reasonable and the date specified in the certificate for the vacation of the dwelling had passed.

The relevant provisions of the Rent Regulations are to be found under s 30 of the Rent Regulations SI 626 of 1982. Subsections (2), (3) and (4) in particular provide as follows:

“(2) Subject to the provisions of this section, no order for the recovery of possession of a dwelling or for the ejection of a lessee therefrom, which is based on the fact of the lease having expired, either by effluxion of time or in consequence of notice duly given by the lessor, shall be made by any court so long as the lessee continues to pay the rent due within seven days of due date and performs the other conditions of the lease, unless, in addition –

- (a) the lessee has done, or is doing, material damage to the dwelling; or
- (b) the lessee has been guilty of conduct likely to cause material damage to the dwelling or material or substantial inconvenience to occupiers of neighbouring or adjoining property or to the lessor; or
- (c) the lessor has given the lessee not less than two months' written notice to vacate the dwelling on the ground that the dwelling is required –
 - (i) by the owner; or

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Garwe JA

- (ii) where the lessee is a sublessee, by the person letting the dwelling to the sublessee;

for his personal residential occupation or the personal occupation of his parent, child or employee; or

- (d) the lessor has given the lessee not less than two months' written notice to vacate the dwelling on the ground that the dwelling is ^b required for the purpose of a reconstruction or rebuilding scheme, and the nature of such reconstruction or rebuilding would preclude human habitation; or
- (e) ...
- (3) No notice to vacate a dwelling given by a lessor for the purpose of –
 - (a) paragraph (c) of subsection (2) shall be of any force or effect – ^c
 - (i) if it does not specify the person for whose personal occupation the dwelling is required; and
 - (ii) if it is given by a person who is not the owner or lessee who sublets the dwelling, unless the person giving such notice has previously been furnished with a request, in writing, to give such notice by the owner or lessee who sublets, ^d as the case may be;
 - (b) paragraph (d) of subs (2) shall not be of any force or effect unless it specifies the nature of the reconstruction or rebuilding scheme, the date by which it is proposed to commence the scheme and the date by which it is proposed to complete the scheme.
- (4) No order for the ejectment of a lessee from a dwelling shall be made ^e on the grounds referred to in paragraph (c) or (d) of subsection (2) unless the appropriate board has, on the application of the lessor, issued a certificate to the effect that the requirement that the lessee vacate the dwelling is fair and reasonable, and the date specified in the certificate for the vacation of the dwelling has passed.” ^f

Section 32 of the Regulations makes provision for the procedure to be followed in applying for a certificate required in terms of either subs (2) or (4) of s 30. After hearing the application, the Board may grant or dismiss the application.

Section 35 of the Regulations makes provision for the noting of appeals by any lessor or lessee who is aggrieved by a decision of the board to the Administrative Court. In terms of s 37, the Administrative Court may *inter alia* ^g confirm, vary, or reverse the decision of the Board and a decision of the Administrative Court under this section shall, for all purposes, be deemed to be the decision of the Board against whose decision the appeal was lodged.

It is clear from a perusal of s 30 of the Regulations that the order of ejectment, must, at the end of the day, be made by a court of law. For a court to make that ^h

2008 (1) ZLR p203

Garwe JA

^a order, however, any one of the situations stipulated in paras (a) to (e) of subs (2) must be shown to have existed. The use of the word “or” in those paragraphs is disjunctive and the clear intention was to provide a separate cause of action in respect of each of those paragraphs. The matter however does not end there. Where a lessor has given two months' written notice for the lessee to vacate the dwelling house in terms of subs (2), such notice shall ^b not be of any force or effect unless it specifies the person for whose personal occupation the dwelling is required. Further, where the cause of action is based on para (c) or (d) of subs (2) (i.e., where two month's notice has been given to vacate on the basis either that the lessor requires the dwelling for his personal residential occupation or personal occupation of his parent, child or ^c employee or that the dwelling is required for the purpose of a reconstruction or rebuilding scheme), a court is not empowered to grant an order of ejectment unless a certificate has been issued by the Board to the effect that the request that the lessee vacate the dwelling is fair and reasonable and the date specified for the vacation has passed.

A number of difficulties arise owing to the manner in which this matter was ^d handled by the court *a quo*. The difficulties illustrate the need in a case such as this one for a determination to be made on all the issues raised. In my view, it is not proper for a court to make a decision on only one of the issues raised and say nothing about other equally important issues raised, unless the issue so determined can put the whole matter to rest.

^e In the present matter, the trial judge accepted that the notice did not specify the persons for whose personal occupation the premises were required and that it was therefore defective. In other words, the court *a quo* accepted that the certificate that was issued pursuant to the notice was not valid. The trial court did not, as it should have, proceed to determine the matter on this basis. Nor did the trial court deal with the other issues raised in the pleadings and ^f agreed to at the pre-trial conference. The issues were left hanging. The effect on the plaintiff's claim on the trial court's finding that the notice given was invalid was not commented upon.

There is a further difficulty. The respondents appealed against the certificate and order of ejectment issued by the Rent Board to the Administrative Court. In their notice of appeal the respondents raised virtually the same points of law which they raised before the High Court. The trial court was aware of this state of affairs. No finding was made on whether the respondents could properly raise before the High Court the very same issues forming the subject of their appeal to the Administrative Court. It is common cause that the appeal before the Administrative Court is still pending.

2008 (1) ZLR p204

Garwe JA

On the facts, it seems to me that whilst the appeal before the Administrative Court remains pending, the issues raised before the High Court and thereafter before this court are *lis pendens*. The Administrative Court will need to address its mind to the issues raised in the appeal and thereafter make a determination. It would therefore be premature for me to consider and determine the points of law raised in argument by the respondents.

I am inclined to agree with Mr *Biti* that it appears the High Court decided not to make a determination on the correctness or otherwise of the certificate that was issued by the Rent Board but instead confined its enquiry to the effect that the appeal noted by the respondents had on the order made by the Rent Board. The High Court accepted that there was such an appeal before the Administrative Court. The High Court, however, appears to have adopted the attitude that the validity or otherwise of the certificate issued by the Rent Board was a matter to be determined by the Administrative Court at the conclusion of the appeal. The High Court did not, however, say so in clear terms.

In the circumstance, therefore, I agree that the issue that falls for determination in this appeal is the effect the noting of an appeal has on the order of the Rent Board.

The common law position was aptly captured by Corbett JA (as he then was) in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544 H-545A, when the learned Judge of Appeal remarked: ^E

"Whatever the true position may have been in the Dutch courts, and more particularly the Court of Holland ... it is today the accepted common law rule of practice in our courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment ..."

The application of this common law rule of practice has in the past not been uniform and a divergence of opinion has arisen amongst judges in this jurisdiction, resulting in uncertainty.

In *Vengesai & Ors v Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H), ^G Gillespie J, after considering a number of earlier decisions on the matter, remarked at p 598 E-F:

"In stating the common law, Corbett JA referred to the automatic stay of execution upon the noting of (an) appeal, as a rule of practice. That is not a firm rule of law, but a long established practice regarded as generally ^H

2008 (1) ZLR p205

Garwe JA

A binding subject to the court's discretion. The concept of a rule of practice is peculiarly appropriate only to superior courts of inherent jurisdiction. Any other court, tribunal or authority is a creature of statute and bound by the four corners of its enabling legislation ..."

The learned judge continued at p 599A-D:

"... the grant or withholding of a stay of execution is, at common law, a matter of discretion reserved to a court in which such a discretion is imposed. It follows that, in the absence of any statute specifically conferring such a discretion on an inferior tribunal or authority, or otherwise regulating the question of enforcement of judgments pending an appeal from that authority, no such discretion can exist. Such a court or authority can exercise only the powers conferred by statute. It cannot order the suspension of its own judgment pending an appeal. It has no discretion to enforce its own judgment, notwithstanding an appeal. The only basis upon which its judgment or order can be supposed to be stayed is where its enabling statute provides for the situation.

... the grant, whether automatic or not, of a stay of execution of a judgment pending appeal is an inseparable part of an exercise of discretion by the court from which the appeal lies, to order the enforcement of its judgment notwithstanding the appeal or any temporary stay. It follows that the

question of enforcement pending appeal of judgments from an inferior court or authority cannot possibly be regulated according to a rule of practice, derived from the common law, and applicable in superior courts of inherent jurisdiction."

¶ In the more recent Supreme Court decision in *Associated Newspapers of Zimbabwe v Min of State for Information and Publicity & Ors* 2005 (1) ZLR 222 (S), Chidyausiku CJ remarked at p 254D-E of the judgment:

"It is quite clear from the above authorities that the power of a court to order execution of its own judgment despite the noting of an appeal is founded in the common law doctrine of inherent jurisdiction. It is trite that only the superior courts enjoy inherent jurisdiction. In this country, these are the High Court and the Supreme Court. Courts created by statute do not have inherent jurisdiction and consequently do not have power to order execution of their judgment unless such jurisdiction is conferred on them by statute."

¶ Although the above remarks by the Chief Justice were made in the context of a matter that had been determined by the Administrative Court, it is clear that his remarks apply with equal force to judgments and orders made by all inferior courts and tribunals.

There is a presumption in our law that Parliament does not intend to alter the common law unless it does so expressly or by necessary implication. Silence

2008 (1) ZLR p206

Garwe JA

by the legislature should not be taken to mean that the legislature intends to alter the common law position. If the enabling legislation is silent, then the common law position must apply: *PTC v Mahachi* 1997 (2) ZLR 71 (H).

The position may now be accepted as settled in this jurisdiction that, unless empowered by law to do so, an inferior court, tribunal or other authority has no power to order the suspension of its own orders or judgments and, further, that the noting of an appeal against the judgment or order of such a court, tribunal or other authority, in the absence of a statutory provision to that effect, does not have the effect of suspending the operation of the judgment or order that is sought to be appealed against.

The court *a quo* was therefore wrong in concluding that:

"The Rent Regulations are silent on the effect of noting an appeal against the decision of the Rent Board. It does not automatically follow that in the absence of a provision, then the noting of an appeal does not suspend the decision of the Board."

By adopting such an approach, the trial court was in fact contradicting various decisions made over the years by both the High Court itself and the Supreme Court.

The decision of the court *a quo* cannot therefore stand. It is accordingly, ordered as follows.

1. The appeal is allowed with costs.
2. The order of the High Court made on 1 March 2006 is set aside and the following substituted:
"An order of ejectment of the defendants be and is hereby granted with costs."

SANDURA JA and GWAUNZA JA concurred. ¶

Honey & Blackenberg, appellant's legal practitioners

Wintertons, respondents' legal practitioners ¶

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 1/BEITBRIDGE-BULAWAYO RAILWAY (PVT) LTD v COMMERCIAL UNION INSURANCE CO OF ZIMBABWE LTD 2008 (1) ZLR 207 (S)

BEITBRIDGE-BULAWAYO RAILWAY (PVT) LTD v COMMERCIAL UNION INSURANCE CO OF ZIMBABWE LTD 2008 (1) ZLR 207 (S)

2008 (1) ZLR p207

Citation	2008 (1) ZLR 207 (S)
Case No	Judgment No. S-57-07
Court	Supreme Court, Harare
Judge	Cheda JA, Gwaunza JA & Garwe JA
Heard	25 June 2007
Judgment	11 March 2008
Counsel	<i>J C Andersen SC</i> , for the appellant <i>A P de Bourbon SC</i> , for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Contract — performance — impossibility — when extinguishes D obligations under contract — parties contemplating situation giving rise to impossibility — defendant not able to rely on impossibility to avoid obligations

Contract — performance — reciprocity — when party sued on contract entitled to rely on reciprocity by other party — principle of reciprocity may be excluded by contract itself

Headnote

The appellant acquired the sole right to the use of the Beitbridge-Bulawayo E railway line for, *inter alia*, the carriage of goods, including petrol, for the National Oil Company of Zimbabwe (NOCZIM). The respondent insured the appellant against any loss of gross profit resulting from any interruption of or interference with its business during a 12-month period. For part of this period, the appellant's business was interrupted F by a cyclone which rendered the railway line from South Africa to Beitbridge impassable and as a consequence goods could not be carried on the line. As a result the appellant suffered certain losses. All the losses were made good by the respondent, save for loss of gross profit in respect of NOCZIM traffic. It was agreed by the parties that the respondent would be liable to pay this amount unless, despite the appellant's G inability to convey petrol belonging to NOCZIM, NOCZIM was obliged to make payment for the minimum volume of traffic it was obliged to procure on the railway line in terms of an agreement between the appellant and NOCZIM.

The High Court found that, despite the cyclone, NOCZIM was liable, in terms H of the agreement between itself and the appellant, to pay the minimum

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Garwe JA

amount due in terms of the agreement and consequently the appellant A should have looked to NOCZIM for payment of the amount in question.

The appellant argued that that NOCZIM's obligation to make the payment for the minimum volume of petrol had been suspended by reason of the supervening impossibility and frustration that arose as a result of the closure of the railway line due to the cyclone. It was further argued that this was a case where the principle of reciprocity applies: where the one B party has not performed for whatever reason, the other cannot demand performance.

Held, that the general rule is that if, as a result of *vis major* or other supervening physical or legal act, performance of a contract has become impossible through no fault of the debtor, the obligations under the c contract are extinguished. There are, however, exceptions. If it is clear that the parties contemplated the situation which gave rise to the impossibility, then the general rule would not apply. Regard must therefore be had to the agreement between the parties, as it is from the provisions of the agreement that the court can determine whether or not supervening impossibility or frustration has the effect of extinguishing d obligations under that agreement. It was clear from the relevant provisions of the agreement that the parties were aware that intervening impossibility could prevent a party either wholly or in part from fulfilling its obligations under the contract. In the knowledge of the possibility of such an event, they had agreed that all obligations would be suspended for the duration of such an event except the obligation to make payment due under the agreement.

Held, further, that the principle of reciprocity recognizes the fact that in many contracts the common intention of the parties is that there should be an exchange of performances, and the exception gives effect to the recognition of this fact by serving as a defence for the defendant who is sued on the contract by a plaintiff who has not yet performed or f tendered to perform. Whether the contract is one to which the principle of reciprocity would apply is a question of interpretation. The presumption is that in any bilateral contract the common intention is that neither should be entitled to enforce the contract unless he has performed or is ready to perform his own obligations. However, general principles may be excluded by the contract itself. *In casu*, the parties had agreed that in g the event that either party was prevented from fulfilling its obligations, the agreement would be suspended for the duration of the event causing such impossibility, except the obligation to make payment due under the agreement. The defence that would otherwise have been available to the h appellant was by agreement expressly excluded.

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Cases referred to ^A

Acting Min of Industry & Anor v Tanaka Power (Pvt) Ltd 1990 (2) ZLR 208 (S)

Bekker NO v Duvenhage 1977 (3) SA 884 (E)

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

Field NO & Anor v Compuserve (Pvt) Ltd 1990 (2) ZLR 253 (H)

^B *Kok v Osborne & Anor* 1993 (4) SA 788 (SE)

Case information

J C Andersen SC, for the appellant

A P de Bourbon SC, for the respondent

Judgment

GARWE JA: This is an appeal against the decision of the High Court c dismissing with costs the appellant's claim against the respondent for payment of the sum of US\$1 765 652.

This matter was dealt with as a stated case before the High Court. The agreed facts were as follows. The appellant acquired the sole right to the use of the Beitbridge-Bulawayo railway line for, *inter alia*, the carriage of goods, d including petrol, for the National Oil Company of Zimbabwe (NOCZIM). In terms of a business interruption insurance agreement, the respondent insured the appellant against any loss of gross profit resulting from any interruption of or interference with its business during the period 1 June 1999 and 31 May 2000. Between 24 February and 20 April 2000, the appellant's business was interrupted by a cyclone. The cyclone rendered the railway line from South e Africa to Beitbridge impassable and as a consequence goods could not be carried on the railway line. As a result, the appellant suffered certain losses. Those losses have been made good by the respondent save for loss of gross profit in the sum of US\$1 765 652 in respect of NOCZIM traffic which is at the centre of this appeal. It was agreed by the parties that the respondent would f be liable to pay this amount unless, despite the appellant's inability to convey petrol belonging to

NOCZIM, NOCZIM was obliged to make payment for the minimum volume of traffic it was obliged to procure on the railway line in terms of an agreement between the appellant and NOCZIM.

The High Court found that, despite the cyclone, NOCZIM was liable to pay the minimum amount due in terms of the agreement and consequently, the ^g appellant should have looked to NOCZIM for payment of the amount in question. As a result, the High Court dismissed the plaintiff's claim with costs. It is against this finding that the appellant has now appealed to this court.

The issue that falls to be decided by this court is a narrow one. It is whether NOCZIM's obligation to pay the minimum amount was suspended following ^h the disruption to the railway line as a result of the cyclone.

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Garwe JA

In his submissions, Mr *Andersen* attacked the finding of the court *a quo* on ^a the broad basis that the court misdirected itself in finding that NOCZIM's obligation to make the payment for the minimum volume of petrol had not been suspended by reason of the supervening impossibility and frustration that arose as a result of the closure of the railway line due to the cyclone. In particular, he submitted that the court *a quo* erred in coming to the conclusion ^b that clause 9 of the agreement between NOCZIM and the appellant did not suspend NOCZIM's liability to make payment for the minimum volume. He further submitted that the words "payment due under this agreement" refers to payments other than those relating to the disruption of the agreement which had either fallen due or would fall due in the future. He also submitted that the court *a quo* erred in coming to the conclusion that payment could still be ^c claimed when the obligation giving rise to it had been suspended. He further argued that this is a case where the principle of reciprocity applies. Therefore, where the one party has not performed, for whatever reason, the other cannot demand performance. It was also his submission that the contention by the respondent that NOCZIM was obliged to make the minimum payment "come what may" is not correct and could not possibly have been contemplated. ^d Lastly, it was his submission that, even if the agreement as a whole did not fall away, liability would not arise for such obligations which constituted supervening impossibility.

Mr *de Bourbon*, for the respondent, submitted that the real issue in this matter is the interpretation to be given to the agreement and in particular to Clause ^e 9.3. He argued that, save where the law brought the agreement to an end, the obligation to make the minimum payment continued even if other obligations in terms of the agreement were suspended or even terminated. The cyclone was temporary and did not create a supervening impossibility of performance which discharged the contract as a whole. In other words, the effect of the cyclone was to suspend for a period the discharge of obligations under the ^f contract. The contract specifically made provision for what was to happen during the period of suspension. He argued, therefore, that this is not a matter that can be determined on the basis of supervening impossibility of performance. Rather, the matter has to be determined in terms of the contract, which contract provided that the minimum payment would have to be made irrespective of the ^g suspension of other obligations.

The general rule in our law is that, if, as a result of *vis major* or other supervening physical or legal act, performance of a contract has become impossible through no fault of the debtor, the obligations under the contract are extinguished. If authority is required for this proposition, attention is ^h

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Garwe JA

^a drawn to *Kok v Osborne & Anor* 1983 (4) SA 788 (SE) at 802; *Acting Minister of Industry & Anor v Tanaka Power (Pvt) Ltd* 1990 (2) ZLR 208 (S) at 214; *Field NO & Anor v Compuserve (Pvt) Ltd* 1990 (2) ZLR 253 (H) at 260.

The above proposition does not, however, cover the situation in which one party is temporarily disabled from fulfilling his obligation: *Field NO & Anor* ^d v *Compuserve (Pvt) Ltd supra* at 260F-G.

The position appears to be well settled in our law that, whilst, as a general rule, supervening impossibility can extinguish obligations under a contract, there are, however, exceptions. In *Kok v Osborne & Anor supra* at 803A-D, Jones J cited with approval remarks by Boshoff JP in *Bischofberger v van Eyk* 1981 (2) SA 607 (W) at 610H-611H that:

^c "This general rule is not so absolute as to override the terms or the implications of the contract ...

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

In *Bekker NO v Duvenhage* 1977 (3) SA 884 (E), Solomon J stated at p 888:

"That exceptions exist was stated by Solomon ACJ and it is clear that impossibility of performance will not always excuse non-performance of *e* a contract. If, by investigating the issues referred to by Stratford J, *supra*, it is clear that the parties contemplated the situation which gives rise to the impossibility, then clearly, the general rule would not apply ..."

The Law of Contract in South Africa 3 ed by R H Christie makes the same observations. At p 527, the learned author remarks:

g "There is nothing to prevent the parties making special provision in their contract for happenings that would otherwise discharge the contract and excuse non-performance. One could properly say that by mentioning the possibility they have taken foreseeability out of it and by making provision they have taken the unavoidability out of it, so it no longer falls *h* within the rule, or one could place the validity of such an argument on the

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simpler basis that it is a lawful agreement and must be enforced. Such an *a* agreement may also be made tacitly, where the nature of the contract and the surrounding circumstances lead to the conclusion that the parties accepted the risk of the event that has occurred ..."

I am satisfied that the remarks made in the authorities to which reference has just been made correctly reflect the law in this country. In short, regard must *b* be had to the agreement between the parties, as it is from the provisions of the agreement that a court can determine whether or not supervening impossibility or frustration has the effect of extinguishing obligations under that agreement. I would therefore agree with Mr *de Bourbon* that the real issue before this court is the interpretation to be given to the relevant portions of the agreement.

The relevant provisions which are at the centre of the dispute in this matter *c* are to be found in Article IX of the agreement between the parties. That article reads as follows:

"SUSPENSION OF OBLIGATIONS FOR CAUSES BEYOND CONTROL

- 1.1 Should either party be prevented wholly or in part from fulfilling its obligations under this agreement for causes beyond its control, its *d* obligations, *other than to make any payment due under this agreement*, shall be suspended to the extent and for so long as such obligations are affected by causes and the party claiming under this article shall immediately notify the other party to that effect and shall be entitled to such extension of time to fulfil its obligations as may be reasonably entitled by the effect of such causes.
- 1.2 Causes beyond the control of a party, within the meaning of this *e* Agreement, are those circumstances, the effects of which that party cannot reasonably avoid. Such circumstances include, but are not limited to the following and their direct after effects, namely civil unrest, strikes and lockouts, force *majeure*, act of God, breakdown of or accident to equipment or machines (provided such breakdown of, or accident to, equipment or machines is not due to wilfulness or *f* negligence as per article 8), disruption of public services or of utilities and an action or inaction of public authority.
- 1.3 *It is specifically recorded that the provisions of this clause shall not apply to any payment due under this Agreement"* (my emphasis).

It is clear from the above provision that the parties were aware that intervening *g* impossibility could prevent a party either wholly or in part from fulfilling its obligations under the contract. In the knowledge of the possibility of such an event, the parties agreed that all obligations would be suspended for the duration of such an event except the obligation to make payment due under the agreement. In other words, irrespective of whatever happened the obligation *h*

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Garwe JA

A to make payment due under the agreement would not be suspended by such an event. It is also clear from the wording of Article IX that it was not the intention of the parties that the contract should terminate on the occurrence of the events mentioned therein. Rather, the intention was that the agreement would be suspended for the duration of the events giving rise to such impossibility. It must be observed, however, that in terms of our common law B the contract could be extinguished if it became impossible for the one party to discharge its obligations under the contract permanently.

The issue that arises is the meaning to be given to the phrase "any payment due under this agreement".

The payments that NOCZIM is obliged to make are provided for in Article IV C of the agreement and in particular in Articles 4.2 and 4.3. Article 4.2 provides that NOCZIM is obliged to pay in respect of each calendar year an amount which is the greater of the tariff to be paid in respect of the minimum number of tonnes warranted to be transported per year or the amount actually payable in respect of products actually transported on the railway line that year. Clause 4.3 makes a similar provision but in respect of a calendar quarter and D further provides that any payment for any shortfall should be made within twenty-five days of the end of the quarter in question. Article 4.5 further provides that the compensation payable by NOCZIM in terms of Articles 4.2 and 4.3. shall be payable within the period referred to without deduction and/or set-off and further that *no event shall excuse its non-payment*.

E It was Mr *Andersen's* submission that the words "payment due under this agreement" refer to payments other than those relating to the disruption of the agreement which had either fallen due or would fall due in future.

On a proper reading of Clause 9.3 of the agreement, I am persuaded that the payment referred to in that clause is the payment envisaged in clause 4.2 as submitted by Mr *de Bourbon*. Indeed, there is no other payment that the F appellant is obliged to make in terms of the agreement. For this reason, I am unable to accept

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Garwe JA

the submission that the payment referred to was in respect of payments other than those relating to A the disruption of the agreement which had either fallen due or would fall due in the future. Article 9.3 is clear and allows of no ambiguity. The obligation to make payments due under the agreement G remains in the event of supervening impossibility whilst the other obligations are merely suspended. The payment due under the agreement is the payment due under Clause 4.2 of the agreement.

As Mr *de Bourbon* correctly observed, there is no other payment due other than the payment of the minimum amount under Article IV as the payments H and obligations are suspended by Clause 9.1 and 9.2. I do not, therefore, accept the submission that there were "other payments other than those relating to the disruption of the agreement which had either fallen due or would fall due in the future". Mr *Andersen* does not say which other payments these are, if these are not part of the payments envisaged in Clause 4.2.

I am satisfied that the above interpretation of Clause 9.3 is correct and that such interpretation does not result in an absurdity. The position is now well B established that, in interpreting words in a contract, it is the grammatical and ordinary sense of the words that is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the contract: Christie *op cit* p 228. I would agree that clause 9.3 was inserted to ensure that a minimum amount was payable notwithstanding any suspension of obligations in terms of the agreement due to unforeseen circumstances. I C should hasten to add, however, that in terms of the common law the obligation to pay would be discharged if it were to be shown that the impossibility is permanent.

I now proceed to consider the further argument raised by the appellant that it is not liable to pay the amount in question as there was no reciprocity.

The principle of reciprocity recognizes the fact that in many contracts the common intention of the parties, expressed or unexpressed, is that there should be an exchange of performances, and the exception gives effect to the recognition of this fact by serving as a defence for the defendant who is sued on the contract by a plaintiff who has not yet performed or F tendered to perform: Christie *op cit* p 467. E

In order to decide whether a defendant can raise such a defence in any given case, it is necessary to decide whether the contract is one to which the principle of reciprocity would apply. This is a question of interpretation. The presumption is that in any bilateral contract the common intention is that neither should be entitled to enforce the contract unless he has performed or is ready to perform ^F his own obligations.

It was Mr *Andersen's* submission that the principle of reciprocity applies in this case. It was NOCZIM's duty to provide the petrol and the appellant's duty to transport it. NOCZIM had the petrol available but the appellant was not able, due to the cyclone, to transport it. He argued that the appellant could not therefore, have claimed payment when it had not carried out its obligations ^G towards NOCZIM to transport the fuel.

It is important to remember that, as with many principles of the law of contract, principles may be excluded by contract. In other words, it is the contract itself to which regard should be had. ^H

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Garwe JA

^A Aware of the appellant's obligations to transport the fuel, the parties agreed that in the event that either party was prevented from fulfilling its obligations, the agreement would be suspended for the duration of the event causing such impossibility, except the obligation to make payment due under the agreement. I have already found that the payment envisaged was the minimum payment under Clause 4.2 of the agreement. In other words, the defence that would ^B otherwise have been available to the appellant was by agreement expressly excluded. That being the case, therefore, the defence is not available to the appellant. The performance by NOCZIM was not conditional upon performance by the appellant. The suggestion by Mr *de Bourbon* that, because of infrastructural arrangements that the appellant was required to make, the ^C parties must have intended that the minimum payment be made, irrespective of the quantity of fuel that was transported, is not far-fetched. Indeed, Clause 4.6 of the agreement emphasizes that no event shall excuse the non-payment of the amounts referred to in Clauses 4.2 and 4.3.

In the result, therefore, I am satisfied that the decision of the court *a quo* was correct.

The appeal is accordingly dismissed with costs.

CHEDA JA and GWAUNZA JA concurred.

Coghlan, Welsh & Guest, appellant's legal practitioners

^E *Honey & Blackenberg*, respondent's legal practitioners

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GMB v MUCHERO 2008 (1) ZLR 216 (S)

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Citation	2008 (1) ZLR 216 (S)
Case No	Judgment No. S-59-07
Court	Supreme Court, Harare
Judge	Garwe JA, Cheda JA & Gwaunza JA
Heard	17 June 2007

Judgment	11 March 2008
Counsel	<i>H Zhou</i> , for the applicant <i>Mrs J B Wood</i> , for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Practice and procedure — *bar* — *upliftment of* — *application* — *desirability of application being made in writing* — *court's duty when application made* — *not entitled to decide matter on merits without dealing with application for upliftment*

Headnote

The respondent, the appellant's Chief Executive Officer, was suspended ^D from his employment on disciplinary grounds. The respondent thereafter filed an application in the High Court challenging his suspension. That application was dismissed on the basis that the same matter was pending before the Labour Court. The respondent then appealed to the Supreme Court, which remitted the matter to the High Court, giving the appellant leave to file its opposing papers within the fourteen days of the date of ^E the order. The appellant failed to file its opposing papers within the stipulated time. The matter was then set down again before the High Court. Both parties were legally represented. Having failed to file its opposing papers within fourteen days stipulated, the appellant was automatically barred. An oral application to uplift the bar was made. The High Court, however, proceeded to deal with the matter on the merits and ^F concluded that the suspension was a nullity. It also found that no application to uplift the bar had been made. The appellant appealed against this decision, submitting that an oral application had been made, on which the court should have adjudicated first. It argued that it was improper for the High Court to deal with the case on the merits without ^G adjudicating on the application to uplift the bar. In any event, it argued, the court erred in dealing with the merits of the application in a situation where a default judgment was to be granted. The appellant prayed for the matter to be remitted so that the court could make a decision on the application for the upliftment of the bar. ^H

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Garwe JA

^A *Held*, that it is clear from rr 83, 84, 233 and 239 of the High Court Rules 1971 that, once a party is barred, the matter is treated as unopposed unless the party so barred makes an application before that court for the upliftment of the bar. It is also clear that, in making the application to uplift the bar, the party that has been barred can either file a chamber (not a court) application to uplift the bar or, where this has not been done, make ^B an oral application at the hearing.

Held, further, that the practice in the High Court is that only in very few instances have oral applications to uplift the bar been entertained. This is because in such a case the applicant must explain the reason for the delay, and thereafter convince the court that he has a *bona fide* defence on the merits. The general view is that this cannot properly be done by ^C oral application, as the other party would not have been afforded the proper opportunity to prepare and possibly contest the application. In practice, where such an application is made, the court will direct that a written application be filed. In that event the court will postpone any decision on the merits pending the determination of the application to ^D uplift the bar. The court may also give a time limit within which any such application is to be made as well as order the payment of the wasted costs by the party seeking the postponement.

Held, further, that once the application to uplift the bar had been made, the court became seized with the matter and was required to make a determination on that application. It did not do so; instead it proceeded ^E on the basis that there was no such application, before the court. If the

court was of the view that the appellant should have filed a written application then it should have said so and proceeded to grant a postponement for such application to be filed. Once there was a failure to determine the application to uplift the bar, then the decision on the *F* merits was incompetent and could not stand.

Case cited

Abramacos v Roman Gardens (Pvt) Ltd 1960 R & N 1 (SR)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 83, 84, 233 and 239

Case information

H Zhou, for the applicant

H Mrs J B Wood, for the respondent

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Garwe JA

Judgment

GARWE JA: The background giving rise to this appeal is, in the main, common *A* cause. The respondent, who was the Chief Executive Officer of the respondent, was suspended from his employment following allegations of misconduct levelled against him. Owing to the position he occupied with the appellant, difficulties arose as to which disciplinary proceedings were applicable to him. The respondent thereafter filed an application in the High Court challenging *B* his suspension. That application was dismissed on the basis that the same matter was pending before the Labour Court. The respondent then appealed to this court and, after due consideration, this court remitted the matter to the High Court but further gave the appellant leave to file its opposing papers within fourteen days of the date of the order. The appellant, as it so happened, failed to file its opposing papers within the stipulated time. The matter was then *C* set down again before the High Court. Both parties were legally represented. It was common cause that, having failed to file its opposing papers within fourteen days as stipulated by this court, the appellant was automatically barred. The High Court, however, proceeded to deal with the matter on the merits and concluded that the suspension was a nullity. The court also found that no application to uplift the bar had been made. For those two reasons, the *D* court *a quo* declared the suspension a nullity.

The appellant has now appealed to this court against this decision. In particular the appellant submits that an oral application was made before the court *a quo*. The court *a quo* should therefore, have adjudicated on that application first. The appellant further submits that it was improper for the *E* court *a quo* to deal with the case on the merits without adjudicating on the application to uplift the bar. In any event, so the appellant further argues, the court *a quo* erred in dealing with the merits of the application in a situation where a default judgment was to be granted. The appellant's prayer is for the matter to be remitted so that the court *a quo* can make a decision on the application for the upliftment of the bar. The respondent, on the other hand, *F* submits that the court *a quo* heard argument on the merits from both parties. The court then made a decision on the merits. Whether or not the appellant made an application to uplift the bar is immaterial. The court was satisfied that the appellant did not have a defence on the merits and was not prepared to lift the bar. The respondent further argues that the appellant, in his grounds of appeal, is not challenging the decision on the merits. *G*

What happened at the hearing is not entirely clear from a perusal of the record. It is apparent, however, that the opposing papers had indeed been filed, but out of time. The appellant was therefore barred. The appellant's legal practitioner has submitted in his heads of argument that an oral application to uplift the *H*

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Garwe JA

A bar was made before the court. It was in that context, that the legal practitioner told the court *a quo* that the delay in the filing of the papers had been occasioned by ill-health on his part. The

judgment of the court *a quo* confirms that the legal practitioner made this submission. This contention does not seem to be disputed by the respondent. In his heads of argument, the respondent states as follows: ^B

- "9. Whether or not the procedure adopted by the appellant amounted to an application to uplift the bar is immaterial. The learned judge was not satisfied with that procedure and was not prepared to uplift the bar on the basis thereof. The appellant had ample time within which to make a written application and, having chosen not to do so, must live with the consequences."

^CIt is apparent in the circumstances that an oral application to uplift the bar was made before the court *a quo*. The court did not determine that application immediately, but instead proceeded to hear argument from both parties on the merits. The court then made a decision on the merits and also concluded that no proper application to uplift the bar had been made. The trial judge has ^D remarked in his judgment that the lawyer told the court "that the delay was due to him being taken ill". I accept therefore that an oral application was made by the appellant before the court *a quo*.

The main issue for determination by this court is whether the trial court erred, as contended by the appellant, in failing to adjudicate on the application to uplift the bar. Other subsidiary issues that have been raised in the heads of ^E argument are whether the court *a quo* erred when it dealt with the matter on the merits and whether the appeal should be dismissed on the basis that the appellant has not challenged the finding of the court *a quo* on the merits.

Rule 233(3) of the High Court Rules provides:

"Notice of opposition and opposing affidavits ^F

(1) ...

(2) ...

(3) A respondent who has failed to file a notice of opposition and opposing affidavit in terms of subrule (1) shall be barred."

Rule 239 provides:

^G "Hearing of application

At the hearing of an application –

(a) ...

(b) ...

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Garwe JA

Provided that if one of the parties has been barred the court shall ^A deal with this application as though it were unopposed unless the bar is lifted."

Rules 83 and 84 provide:

"Effect of bar

Whilst a bar is in operation – ^B

- (a) the registrar shall not accept for filing any pleading or other document from the party barred; and
- (b) the party barred shall not be permitted to appear personally or by legal practitioner in any subsequent proceedings in the action or suit;

except for the purpose of applying for the removal of the bar: ^C

Removal of bar

(1) a party who has been barred may –

- (a) make a chamber application to remove the bar; or
- (b) make an oral application at the hearing, if any, of the action or suit concerned; and the judge or court may allow the application on such terms as to costs and otherwise as he or it, as the case may ^D be, thinks fit."

It is clear from the above provisions that, once a party is barred, the matter is treated as unopposed unless the party so barred makes an application before that court for the upliftment of the bar. It is also clear that, in making the application to uplift the bar, the party that has been barred can either file a ^E chamber (not court) application to uplift the bar or, where that has not been done, the party can make an oral application at the hearing. The practice in the High Court, so far as I am aware, is that only in very few instances have oral applications to uplift the bar been entertained by the court. This is because, in such a case, the applicant must explain the reason for

the delay, and thereafter convince the court that he has a *bona fide* defence on the merits. ^F Most judges of the High Court believe this cannot properly be done by oral application, as the other party would not have been afforded the proper opportunity to respond and possibly contest the application. In practice, where such an application is made, the court will direct that a written application be filed. In that event, the court will postpone any decision on the merits pending the determination of the application to uplift the bar. The court ^G may also give a time limit within which any such application is to be made, as well as order the payment of the wasted costs by the party seeking the postponement. As stated by Hathorn J (as he then was) in *Abramacos v Roman Gardens (Pvt) Ltd* 1960 R & N 1 (SR) at 2: ^H

2008 (1) ZLR p221

Garwe JA

A "... a defendant ought not to be deprived of the opportunity of having an application for condonation disposed of before default judgment is given against him where, as here, there appears to be an adequate explanation why that application is not properly before the court ..."

The learned judge continued at 3:

"... in those cases in which the defendant's counsel has asked for a ^B postponement in order to enable a proper application for removal of the bar to be made and has given a satisfactory explanation why such an application was not then before the court, I have treated the appearance as the first step in an application for the removal of the bar, and granted the postponement ..."

I am satisfied that the court *a quo* erred when it failed to deal with the ^C application to uplift the bar. If the court was of the view that the appellant should have filed a written application, then it should have said so and proceeded to grant a postponement for such application to be filed. As already noted, the court could have allowed the postponement on such conditions as it deemed necessary. Once the application to uplift the bar had been made, ^D the court became seized with the matter. The court was enjoined to make a determination on that application. It did not do so. Instead, it proceeded on the basis that there was no such application before the court. In this regard, the court erred. I am satisfied that the trial judge erred in disregarding the oral application and proceeding as if none had been made.

The High Court Rules permit a court to deal with a matter on the merits where ^E the respondent has been barred for failure to file heads of argument on time. See r 238(2)(b). The Rules, however, do not make provision for a matter to be dealt with on the merits where the respondent has been barred for failure to file opposing papers. Rule 236(1) specifically provides that where the respondent has been barred for failure to file opposing papers, the applicant may, without ^F notice to the respondent, set the matter down on the unopposed roll in terms of r 223(1)(e). Given these specific provisions, I agree with the appellant that it was irregular for the trial court to hear argument on the merits of the case from both parties. At best, the matter should have been treated as unopposed until and unless an application to uplift the bar had been made and granted. As the matter was unopposed, the trial court should have granted a default judgment ^G in the event that it dismissed the application to uplift the bar. The respondent has submitted that there is no appeal against the decision of the court *a quo* on the merits. That is indeed correct. It is clear, however, that the appellant seeks an order setting aside the decision of the trial court and remitting the ^H matter to that same court for a determination of the application to uplift the bar.

2008 (1) ZLR p222

Garwe JA

Once it is accepted that there was a failure to determine the application to uplift ^A the bar, then the decision on the merits would be incompetent and cannot stand.

The appeal must therefore succeed. I therefore make the following order:

1. The appeal is allowed with costs.
2. The order of the court *a quo* is set aside. ^B
3. The matter is remitted to the court *a quo* for the determination of the application for the upliftment of the bar.

CHEDA JA and GWAUNZA JA concurred.

Muzangaza, Mandaza & Tomane, appellant's legal practitioner ^C

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 1/KUDINGA v DHLIWAYO & ANOR 2008 (1) ZLR 223 (H)

KUDINGA v DHLIWAYO & ANOR 2008 (1) ZLR 223 (H)**2008 (1) ZLR p223**

Citation	2008 (1) ZLR 223 (H)
Case No	Judgment No. HH-22-08
Court	High Court, Harare
Judge	Makarau JP
Heard	11 March 2008
Judgment	12 March 2008
Counsel	<i>F Katsande</i> , for the applicant <i>Mrs E Bvumbi</i> , for the first respondent
Case Type	Chamber application
Annotations	Link to case annotations

Flynote

c Landlord and tenant — lessee — ejectment — certificate of ejectment issued by rent board — status of such certificate — not an order for ejectment — need to obtain certificate before getting order from court for ejectment

Headnote

The applicant had obtained a certificate from the second respondent, the chairman of the rent board, for the ejectment of the first respondent from the premises he was renting from the applicant. The first respondent noted an appeal with the Administrative Court against the ejectment certificate. The applicant, believing that the noting of the appeal suspended the operation of the ejectment certificate, applied to the High Court for an order for the execution of the certificate pending the appeal.

Held, there is a ruling of the Supreme Court to the effect that the operation of *any* judgment is suspended by the noting of an appeal.

Held, further, however, that the issuance of a certificate of ejectment by a rent board is not a judgment as envisaged by the rule of practice in the superior courts. Such a certificate is issued in terms of s 32 of the Rent Regulations 2007 (SI 32 of 2007). In granting the certificate, the board is *enjoined* to specify in the certificate the date on or before which the tenant is to vacate the dwelling. The regulations do not proceed to specify that in the event that the tenant does not vacate the dwelling on the specified date, a writ for his ejectment may be issued by the board or any other competent authority. The issuance of a certificate by the rent board is merely a

preliminary step before the obtaining of a court order ^g for the ejectment of the tenant. It is not the ejectment order itself. It is not a judgment, nor can it be used for the purposes of issuing a writ of ejectment from any court.

Held, further, that the noting of an appeal against the decision of the rent board to issue a certificate is thus not an instance where the High Court ^h can use its inherent jurisdiction to order that the tenant be evicted from

2008 (1) ZLR p224

Makarau JP

the dwelling pending the determination of the appeal. The landlord still ^a has to obtain an eviction order on the back of the certificate from a court of competent jurisdiction.

Held, further, that the fact that the chairman of the rent board was a magistrate did not make the decision a ruling of the magistrates court. It was inappropriate to use the terms "judgment", "order" or "ruling" when describing the decision of a rent board. The correct nomenclature is "a ^b certificate of ejectment".

Cases cited

Chibanda v Musumhiri & Anor 1999 (2) ZLR 50 (H)

Fletcher v Three Edmunds (Pvt) Ltd 1998 (1) ZLR 257 (S) ^c

Founders Building Society v Mazuka 2000 (1) ZLR 528 (H)

Jackson v Unity Insurance Co Ltd 1999 (1) ZLR 381 (S)

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

PTC v Mahachi HH-183-98

Vengesai & Ors v Zimbabwe Glass Industries Ltd 1998 (2) ZLR 593 (H) ^d

Legislation considered

Rent Regulations 2007 (SI 32 of 2007), ss 30(2)(e), 32

Case information

F Katsande, for the applicant

Mrs E Bvumbi, for the first respondent ^e

Judgment

MAKARAU JP: The applicant approached this court on a certificate of urgency, seeking leave to execute on the "ruling" of the second respondent dated 12 February 2008 in which he was granted a certificate for the ejectment of the first respondent from certain premises in Hatfield, Harare.

BACKGROUND FACTS ^f

I summarise the facts giving rise to the application as follows:

In August 2003, the applicant and the first respondent entered into a lease agreement in respect of the premises in Hatfield. The lease was to obtain for a period of 12 months with an option for renewal.

In February 2008, the applicant approached the second respondent for a ^g certificate ejecting the first respondent from the premises. The application was granted and a certificate was duly issued in terms of s 30 of the Rent Regulations 2007. In terms of the certificate, the first respondent was to be evicted from the premises on 1 March 2008. The certificate was issued on 12 ^h February 2008.

2008 (1) ZLR p225

Makarau JP

^a On 18 February 2008, the first respondent noted an appeal against the decision of the second respondent granting the certificate. The appeal was noted to the Administrative Court.

Believing that the certificate issued by the second respondent was now incapable of enforcement, having been suspended by the noting of the appeal and that the second respondent had no jurisdiction to order the execution of ^B its "ruling" pending appeal, the applicant approached this court, requesting it to exercise its inherent jurisdiction under s 13 of the High Court Act [*Chapter 7:06*].

In his certificate of urgency, the applicant's legal practitioner was of the view that the matter was urgent as the first respondent is operating lodges at the ^C leased premises without licence and the premises were being used for immoral purposes.

The application was opposed.

In his opposing affidavit, the first respondent denied all the allegations by the applicant, raised the issue of the *locus standi* of the applicant's agent to swear ^D to the founding affidavit and further argued that the matter was pending before this court under case No. HC 5887/07 which has been set down for hearing on 25 March 2008.

THE LEGAL ISSUES

At the commencement of the hearing, I requested the parties to address me ^E specifically on whether the noting of the appeal against the decision to grant the certificate of ejectment suspended the certificate. Both counsel were of the view that it did and that I could entertain the application on the test laid down for the granting of leave to execute pending appeal.

I am unable to agree.

^F It appears to me to be the settled approach of this court that the common law principle to the effect that the noting of an appeal suspends the decision appealed against only applies to judgments of the superior courts. See *PTC v Mahachi & Ors* HH-183-98; *Vengesai & Ors v Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H) and *Founders Building Society v Mazuka* 2000 (1) ZLR 528 (H). The views of this court are clearly expressed by Gillespie J in ^G *Vengesai & Ors* at 599C as follows:

"... the grant, whether automatic or not, of a stay of execution of a judgment pending appeal is an inseparable part of an exercise of discretion by the court from which the appeal lies, to order the enforcement of its judgment notwithstanding the appeal noted or any temporary stay. It follows that ^H the question of enforcement pending appeal of judgments from an inferior

2008 (1) ZLR p226

Makarau JP

court or authority cannot possibly be regulated according to a rule of ^A practice, derived from common law, applicable in superior courts of inherent jurisdiction."

The above debate, including the extensive discourse that Gillespie J goes into on the subject, arose from the uncertainty on the issue created by an earlier and binding decision by the Supreme Court in *Phiri & Ors v Industrial Steel and Pipe (Pvt) Ltd* 1996 (1) ZLR 45 (S). In that matter, Korsah JA held at 48C ^B that:

"By Roman Dutch Law the execution of all judgments is suspended upon the noting of an appeal",

when dealing with an appeal from the Minister to the Labour Relations Tribunal in terms of the Labour Relations Act, 1985. ¹ ^C

The decisions of this court ever since the judgment have sought ways of avoiding following the *ratio decidendi* in the matter, with Gillespie J submitting to be bound by the decision but respectfully calling upon the Supreme Court to revisit its decision on the issue.

I add my voice to those of the eminent judges before me who query the ^D correctness of the statement of law enunciated in the *Phiri* case and who, with the appropriate deference and the greatest of respect, call upon the Supreme Court to revisit its decision for the sake of clarity and certainty in the law.

Accepting to be bound by the *ratio decidendi* in the *Phiri* case, to the effect that the execution of all judgments is suspended upon the noting of an appeal, it is my view that the issuance of a certificate of ejectment by a Rent Board is ^E not a judgment as envisaged by the rule of practice in the superior courts.

A certificate of ejectment is issued in terms of s 32 of the Rent Regulations, 2007. In granting the certificate, the Board is enjoined to specify in the certificate the date on or before which the tenant

is to vacate the dwelling. ² The statute does not proceed to specify that in the event that the tenant does ^F not vacate the dwelling on the specified date, a writ for his ejectment may be issued by the Board or any other competent authority.

The purpose of the certificate appears to me to be explained in the provisions of s 30 of the regulations. Section 30(2)(e) of the regulations provides that:

"(2) No order for the recovery of possession of a dwelling or for the ^G ejectment of a lessee therefrom, which is based on the fact of the lease

2008 (1) ZLR p227

Makarau JP

A having expired, either by effluxion of time or in consequence of notice duly given by the lessor, shall be made by any court so long as the lessee continues to pay the rent due within seven days of the due date and performs the other conditions of the lease, unless in addition –

- (e) the appropriate board has issued a certificate to the effect that the requirement that the lessee vacate the dwelling is fair and reasonable ^B on some other ground stated therein and the date specified in the certificate for the vacation of the dwelling has passed."

It thus appears to me that the issuance of a certificate by the rent board is merely a preliminary step before the obtaining of a court order for the ejectment of the tenant. It is not the ejectment order itself. It is not a judgment nor can ^C it be used for the purposes of issuing a writ of ejectment from any court.

In my view, the same point appears to have been made obliquely by Gubbay CJ in *Fletcher v Three Edmunds (Pvt) Ltd* 1998 (1) ZLR 257 (S), where at 263C he held that the respondents before him had no cause of action when they approached the lower court for an order evicting the appellants as they did not have the requisite certificate from the appropriate rent board at the time ^D summons was issued. On the basis that they had not obtained the certificate prior to the issuance of the summons for eviction, he held that the default judgment of the lower court evicting the appellants in the absence of the certificate was void.

In *Jackson v Unity Insurance Co Ltd* 1999 (1) ZLR 381 (S), Gubbay CJ had occasion to rule on the purpose of a certificate issued in terms of s 30 of the ^E Rent Regulations. ³ In that matter, the landlord had written to the tenant declaring that the lease was to terminate on some future date on account of an alleged breach of the lease by the tenant. The future date came and went by. The tenant remained in occupation. The appellant approached the High Court for an order evicting the tenant without first approaching the appropriate ^F rent board for a certificate. The order was granted hence the appeal to the Supreme Court. In allowing the appeal, the learned Chief Justice had this to say at 383G:

"It necessarily follows that having elected to give notice of termination of the contract of lease from some future date and not to exercise its right to resile therefrom immediately, the respondent was caught by s 30(2) of the ^G Regulations. It was debarred from obtaining relief from the High Court. For it had not obtained, in accordance with para (e) to s 30(2), a certificate that the requirement that the appellant vacate the premises on the ground that

2008 (1) ZLR p228

Makarau JP

he had unlawfully operated a scooter hire business thereon is 'fair and ^A reasonable', and that the date specified for vacation had passed."

In my view, the purpose of a certificate of ejectment and its legal complexion were aptly put by Mubako J in *Chibanda v Musumhiri & Anor* 1999 (2) ZLR 50 (H). Following the decision in *Fletcher v Three Edmunds (Pvt) Ltd supra*, the learned judge took a swipe at the Rent Regulations for interfering with the ^B judiciary's role in matters relating to the fixing of rentals and the eviction of errant tenants from dwellings and for reducing such to a clerical role. At p 56C-E he said:

"... s 30(4) ... continues to fetter the court's hands relative to issuing an order of ejectment of a lessee. The court can take no such action even where justice would otherwise require it to act except along the path ^C allowed by the regulations.

Subsection (4) requires that the lessor must first apply to a rent board and obtain a certificate which says it is *fair and reasonable* to require the lessee to vacate the dwelling. In respect of the case at hand, Mr *Sinyoro* submitted that the obtaining of the certificate must precede the court order for eviction. He was perfectly correct. That is the natural construction ^D which must be put on s 30(4), ..."

It thus presents itself clearly to me that the noting of an appeal against the decision of the rent board to issue a certificate in terms of s 30 of the Regulations is not an instance where this court can use its inherent jurisdiction to order that the tenant be evicted from the dwelling pending the determination of the appeal. The landlord still has to obtain an eviction order on the back of ^E the certificate from a court of competent jurisdiction.

It may be necessary at this stage to remark in passing that, while the second respondent was chaired by a magistrate, he sat in his capacity as such and not as a magistrates court. Thus, whatever decision the second respondent made, such was made under the Regulations and is not a decision of the magistrates ^F court.

It may also be worth mentioning, again in passing, that magistrates who preside over or chair rent board proceedings in terms of s 32 of the Rent Regulations 2007, may assist the situation by avoiding issuing "orders" and "judgments" as if they are presiding over court proceedings. The use of such ^G terms, which are terms ordinarily associated with court proceedings, may have the unfortunate effect of confusing lay persons and some legal practitioners into equating certificates of ejectment with orders of ejectment. The appropriate nomenclature to use for rent board proceedings and decisions is to be found in the Regulations and should be used at all times. In terms of s 32, rent boards issue certificates of ejectment and not ejectment orders. They do not hand ^H

2008 (1) ZLR p229

Makarau JP

^A down judgments, orders or rulings. They can only either issue a certificate of ejectment or decline to issue such a certificate. Their decisions cannot be executed upon as they are merely preliminary steps before a landlord can obtain a court order evicting the tenant from the premises in dispute.

DISPOSITION

^B In view of the order that I make in the matter, it is in my view not necessary that I deal with the other issues of adjectival law raised by the first respondent in his opposing affidavit. These relate to the capacity of the deponent to the applicant's affidavit to file an affidavit in the absence of an affidavit by the applicant himself and to the allegation that the matter is pending before this court under case No. HC 5887/07.

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

1. the application is dismissed.
2. The applicant shall bear the costs of the application.

F M Katsande & Partners, applicant's legal practitioners

^D *Mkuhlani Chiperesa*, first respondent's legal practitioners

- 1 The Labour Relations Act 1985 was repealed and replaced by the Labour Act [*Chapter 28:01*].
- 2 See s 32(5) of SI 32 of 2007.
- 3 While the 1982 Regulations have been amended by the 2007 regulations, s 30 of the old regulations has been transported unaltered into the new regulations

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 1/MAKONE & ANOR v CHAIRPERSON, ZIMBABWE ELECTORAL COMMISSION & ANOR 2008 (1) ZLR 230 (H)

MAKONE & ANOR v CHAIRPERSON, ZIMBABWE ELECTORAL COMMISSION & ANOR 2008 (1) ZLR 230 (H)

Citation	2008 (1) ZLR 230 (H)
Case No	Judgment No. HH-38-08
Court	Electoral Court, Harare
Judge	Uchena J
Heard	10 March 2008; 11 March 2008
Judgment	13 March 2008
Counsel	<i>B W Elliot</i> , for the applicants <i>G C Chikumbirike</i> , for the respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Elections — Electoral Court — jurisdiction — subject matter of petition or c application not specifically allocated to Electoral Court — court having no jurisdiction to hear matters not specifically provided for in Electoral Act — court's power to make orders allowing for matters to be done which are otherwise contrary to the provisions of the Act D

Elections — Electoral Act [Chapter 2:13] — s 161(1) — "in terms of this Act" — meaning of — Electoral Court — jurisdiction of — power of court to order production of copies of the voters roll — application of *expressio unius est exclusio alterius* rule — no power in terms of Act to make such an order

Interpretation of statutes — *expressio unius est exclusio alterius* — application E of rule — need to apply rule with caution

Words and phrases — "in terms of this Act" — meaning of — means as stipulated, limited or prescribed by the Act

Headnote

For the purpose of the election of 29 March 2008, the applicants sought an F order compelling the respondents to provide them with electronic copies of the voters roll in a format acceptable to them. The respondents, however, took the point that the Electoral Court, which was seized of the application, had no jurisdiction to consider it. In considering the extent of the jurisdiction conferred on the court by the Electoral Act [Chapter G 2:13], the applicants relied upon s 161(1) thereof, which established the court "... for the purpose of hearing and determining election petitions and other matters in terms of (the) Act". It was the appellants' submission that the order sought was one of the "other matters" in respect of which the court did have jurisdiction. It was submitted, however, upon the H

Uchena J

A respondent's behalf that the maxim of interpretation "*expressio unius est exclusio alterius*" militated against the appellants' case. The Act specified instances where jurisdiction was conferred upon the court and where it was not specifically conferred, the legislature must be presumed not to have intended to confer jurisdiction. It was the respondents' case that the order sought was not one of those "matters" specifically conferred B on the court and that the applicants should have sought relief from the High Court.

Held, that as a creature of statute, the Electoral Court could only exercise the jurisdiction conferred upon it by the Act which created it. Its powers are confined within the provisions of that Act. Such jurisdiction can be C conferred expressly or by necessary implication. The clear meaning of s 157 of the Act is that the Electoral Court may, during the hearing of an electoral petition, or

when an application is made to it in terms of s 157 (2) thereof, make an order allowing an otherwise illegal practice an exception to the provisions of the Act.

Held, further, that whether the Electoral Court had jurisdiction could be ^D determined by ascertaining the expressed or implied intention of the legislature from the construction of the sections which conferred jurisdiction on the court and a careful study and construction of the scheme of the Act. This called for an analysis of the sections conferring jurisdiction on the Electoral Court and other courts. An examination of the sections conferring jurisdiction showed that in some instances, the ^E magistrates court had jurisdiction; in others, the Electoral Court; and in others, the High Court. This clearly demonstrated the legislature's deliberate intention as to which court it intended to deal with which situation. Consequently, where the legislature intended to confer jurisdiction on the Electoral Court it did so by conferring it through a specific provision in the Act. There was clearly no room for the conferring ^F of jurisdiction by implication. The express mention of the instances where the court had jurisdiction was a clear indication that where no jurisdiction was specifically conferred the legislature did not intend to confer jurisdiction on the court. The maxim *expressio unius est exclusio alterius* was one of limited application to be applied with great caution because a conclusion based on it is a product of a logical deduction inferred from the specific mention of the other thing being an implied exclusion of that which was not mentioned. However, this was a case where the maxim did apply.

Held, further, that the meaning of "and other matters in terms of this Act" ^H could be discovered by assigning an ordinary, literal or grammatical

2008 (1) ZLR p232

Uchena J

meaning to every word in the phrase. In this case the key word was ^A "terms", the dominant meaning of which clearly has something to do with limiting, conditioning, bounding and directing whatever is to be done. In this context, it meant that the jurisdiction of the court was as is limited, conditioned, bound and directed by the Act.

Held, further, that *in casu*, upon a careful reading of the sections of the Act ^B conferring jurisdiction on the Electoral Court and other courts, together with s 161 thereof, whose interpretation restricts the search for jurisdiction within the Act, the express mention of the instances where the court has jurisdiction is a clear indication that where no jurisdiction is specifically conferred, the legislature did not intend to confer jurisdiction on the ^C court.

Cases cited

Chrmn, PSC & Ors v Zimbabwe Teachers Assn & Ors 1996 (1) ZLR 637 (S)

Chegutu Municipality v Manyora 1996 (1) ZLR 262 (S)

Chivinge v Mushayakarara & Anor 1998 (2) ZLR 500 (S)

CoT v F Kristiansten (Pvt) Ltd 1994 (1) ZLR 412 (S) ^D

Davies & Ors v Min of Lands 1996 (1) ZLR 681 (S)

Eagle Insurance Co Ltd v Grant 1989 (3) ZLR 278 (S)

Endeavour Foundation & Anor v CoT 1995 (1) ZLR 339 (S)

Expedite Haulage (Pvt) Ltd v Scotfin Ltd 2000 (2) ZLR 113 (H)

Gwalazimba v PG Merchandising Ltd & Anor 1993 (2) ZLR 215 (S) ^E

Harare, City of v TA Properties (Pvt) Ltd 1994 (2) ZLR 82 (S)

Keyter v Min of Agriculture 1908 NLR 522

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

PTC v Mahachi 1997 (2) ZLR 71 (H)

R v Bishop of Oxford (1879) 4 QBD 245

Vengesai & Ors v Zimbabwe Glass Industries Ltd 1998 (2) ZLR 593 (H) ^F

Legislation considered

Electoral Act [*Chapter 2:13*], ss 157 and 161(1)

Interpretation Act [*Chapter 1:01*], s 15(2)

Case information

B W Elliot, for the applicants ^G

G C Chikumbirike, for the respondents

Judgment

UCHENA J: The first applicant is a nominated parliamentary candidate for the Movement For Democratic Change (the MDC). He will stand for the Goromonzi West House of Assembly constituency seat in Mashonaland East Province. ^H

2008 (1) ZLR p233

Uchena J

^A The second applicant is the Movement for Democratic Change a political party which fielded candidates for the presidential, parliamentary, senatorial and local council elections.

The first respondent is the Chairman of the Zimbabwe Electoral Commission, which is responsible for the conducting of elections in Zimbabwe. The second respondent is the Registrar-General of Voters, responsible for the registration ^B of voters, though he does so, under the control and supervision of the first respondent. The brief facts leading to this application are as follows.

The applicants, exercising their right under s 21(4) of the Electoral Act [*Chapter 2:13*], which I will refer to as the Electoral Act in this judgment, requested the respondents to supply them with electronic copies of the voters roll. They supplied the respondents with compact discs onto which the voters ^C roll was to be copied. The applicants have since been given fifty compact discs, with voters rolls copied onto them but in a format not acceptable to the applicants. They were advised that other discs could not presently be copied because of the break down of the respondents' computers. The applicants, being spurred by the approaching election day on 29 March 2008, urgently ^D want the voters roll, hence the filing of an urgent application. They seek an order compelling the respondents to give them electronic copies of the voters roll in a format they have specified.

Mr *Chikumbirike*, for the respondents, raised a point *in limine*. He submitted that this court, being a creature of statute, does not have jurisdiction to determine issues arising from the provisions of s 21 of the Electoral Act as that ^E section does not confer jurisdiction on the Electoral Court. He submitted that this court can only exercise jurisdiction in cases where the Electoral Act specifically confers jurisdiction on it. He further submitted that the Act specifies instances when the court has jurisdiction meaning in instances where jurisdiction is not specifically conferred the legislature did not intend to confer jurisdiction. He relied on the *expressio unius est exclusio alterius* ^F rule of interpretation. Mr *Elliot* in response submitted that this court was created to deal with electoral matters and therefore has jurisdiction to hear and determine matters arising from failure to comply with any provisions of the Electoral Act. He submitted that the use of the words "and other matters in terms of this Act" confers jurisdiction on this court in instances where the ^G legislature did not specifically do so. He summed up by saying the Electoral Court was created to hear and determine electoral cases. He pointed out various provisions in which various officials are required to act in one way or the other and asked what would happen if they did not comply. He submitted that this court should intervene and order the officials to comply as should ^H be done in this case.

2008 (1) ZLR p234

Uchena J

Mr *Chikumbirike* for the respondents in reply submitted that the applicants ^A are not left without remedy as they can apply to the High Court which has inherent jurisdiction and can hear and determine matters for which the Electoral Court has no jurisdiction

CREATURE OF STATUTE

This court was created in terms of s 161(1) of the Electoral Act. There is no ^B doubt that it is a creature of statute. As a creature of statute it can only exercise the jurisdiction conferred on it by

the statute which created it. Its powers are confined within the provisions of the creating Act. In *Vengesai & Ors v Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H) at 598F Gillespie J said:

"The concept of the rule of practice is peculiarly appropriate only to superior courts of inherent jurisdiction. Any other court, tribunal or authority is a creature of statute and bound by the four corners of its enabling legislation."

See also *Chairman, Public Service Commission & Ors v Zimbabwe Teachers Association & Ors* 1996 (1) ZLR 637 (S) at 656D and 661G, *Harare City v TA Properties (Pvt) Ltd* 1994 (2) ZLR 82 (S) at 84E, and *Gwalazimba v PG Merchandising Ltd & Anor* 1993 (2) ZLR 215 (S) at 216C-D where McNally JA said:

"This submission is undoubtedly correct. The Tribunal is a creature of statute and can only hear appeals as provided in the Labour Relations Act 16 of 1985."

In *PTC v Mahachi* 1997 (2) ZLR 71 (H) at 73E, Chatikobo J, commenting on the powers of a court created by statute, said:

"The Tribunal was established by s 83(1) of the Labour Relations Act [Chapter 28:01] ("the Act"). Being a creature of statute, the Tribunal has no powers other than those conferred upon it by the legislature either expressly or by necessary implication."

The important observation made by Chatikobo J, which I respectfully agree with, is that the Act which confers jurisdiction on the creature of statute can do so expressly or by necessary implication. This means the enabling Act must be analysed to determine whether or not the implied jurisdiction, which in this case, Mr Elliot seems to rely, on was conferred. The implied jurisdiction must be discovered from the provisions of the Electoral Act. ^g

THE PROVISION IN DISPUTE

Section 161(1) of the Electoral Act, provides as follows:

"(1) There is hereby established a court to be known as the Electoral court, for the purpose of hearing and determining election petitions and other matters in terms of this Act." ^h

2008 (1) ZLR p235

Uchena J

^a There is no dispute on the meaning of the part of s 161(1) which establishes the Electoral Court. It is common cause that this court has jurisdiction to hear and determine election petitions.

The dispute arises from the interpretation of the later part of s 161(1), namely the words "and other matters in terms of this Act". Most of the words in that phrase present no difficulties as their meanings are obvious. They are not ^b ambiguous as they admit of no other meanings besides their ordinary grammatical meanings. It is the word "terms" which the parties rely on in arriving at their respective constructions of the phrase in question.

CONSTRUCTION OF THE PHRASE

The meaning of the phrase "and other matters in terms of this Act" can be ^c discovered by assigning an ordinary, literal or grammatical meaning to every word in the phrase. In *Keyter v Minister of Agriculture* 1908 NLR 522 at p 523-524, Bale CJ said:

"It is the duty of the court to give effect to every word which is used in a statute unless necessity or absolute intractability of the language employed ^d compels the court to treat the words as not written (*Salmon v Duncombe & Ors* 7 NLR 182).

Another cardinal rule in ascertaining the meaning of a statute is that in construing the words used we are to ascertain the meaning from the words themselves, and not from what we imagine to have been the intention of the legislature."

^e In *The Queen v Bishop of Oxford* (1879) 4 QBD 245 at 261, it was said that a statute:

"should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant."

In *Chegutu Municipality v Manyora* 1996 (1) ZLR 262 (S) at 264, McNally ^f JA said:

"There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as Lord Wensleydale said in *Grey v Pearson* (1857) 10 ER 1216 at 1234,

'unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further'."

In this case, the word "and" in the phrase is a conjunction, joining the other matters which this court can hear and determine, to petitions which are agreed ^H can be heard and be determined by this court. The word "other" simply means

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other than the petitions already referred to. The word "matters" means other ^A cases which can be heard and determined along with the petitions which it is common cause can be heard by this court. The word "in" directs the inquirer to the source from which he or she can look for the "other matters" which can be heard and determined by this court. The word "terms" refers to what qualifies a matter to be heard and determined by this court. It is the word whose ^B true meaning has to be construed to determine whether or not this court has jurisdiction to hear this case. I will consider its construction later in this judgment. The remaining words, "of this Act", directs the inquirer to look within the Electoral Act for the other cases or matters which can be heard and determined by the Electoral Court.

In this case, the key word is "terms". Its interpretation should be based on its ^C ordinary, literal, grammatical meaning. In *Expedite Haulage (Pvt) Ltd v Scotfin Ltd* 2000 (2) ZLR 113 (H) at 115 H to 116A, Chatikobo J said:

"On the face of it, the contention advanced by Mr *de Bourbon* seems to be closer to the wording of the statute than that advanced by Mr *Colegrave*, and of course the cardinal rule of construction is that the words of a statute must be given their ordinary, literal, grammatical meaning, unless to do so ^D would lead to a glaring absurdity."

The same principles were expressed by the Supreme Court in *Endeavour Foundation & Anor v Commissioner of Taxes* 1995 (1) ZLR 339 (S) at p 356F-G to 357A, where Gubbay CJ said:

"The general principle of interpretation is that the ordinary, plain, literal ^E meaning of the word or expression, that is as popularly understood, is to be adopted, unless that meaning is at variance with the intention of the legislature as shown by the context, or such other *indicia* as the court is justified in taking into account, or creates an anomaly or otherwise produces an irrational result. See *Stellenbosch Farmers' Winery Ltd v Distillers' Corp (SA) Ltd & Anor* 1962 (1) SA 458 (A) at 476E-F. The same ^F notion was expressed in another way by Margo J in *Loryan (Pvt) Ltd v Solarsh Tea & Coffee (Pvt) Ltd* 1984 (3) SA 834 (W) at 846G-H:

'Dictionary definitions of a particular word are very often of fundamental importance in the judicial interpretation of that word in a statute or in a contract or in a will. Nevertheless, the task of interpretation is not always fulfilled by recourse to a dictionary definition, for what must be ascertained ^G is the meaning of that word in its particular context, in the enactment or contract or other document'."

The inquiry according to these cases must encompass the following rules of interpretation: ^H

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- (a) The literal rule, to establish the ordinary, literal, grammatical or dictionary meaning of the word; and the
- (b) Intention of the legislature, to determine the contextual meaning of the word as guided by the clear intention of the legislature; and
- (c) Other *indicia* or rules of interpretation, to confirm the presence or absence ^B of anomalies and absurdity in the resultant meaning established through the use of the above mentioned.

THE LITERAL INTERPRETATION

It is trite that a court can rely on a dictionary meaning in the construction of statutes. See *Endeavour Foundation supra* and *Chegutu Municipality, c supra*.

The ordinary grammatical meaning of the word "terms" according to the *Shorter Oxford English Dictionary* means:

"(i)(a) a limit in space, duration, etc, that which limits the extent of anything; a limit, extremity, boundary, bound; (b) Utmost or extreme limit; end (c) That to which movement or action is directed or tends, as its

object, ^D end or goal;

(ii) A limit in time; a space of time.

(iii) Limiting conditions ^{pl}. Conditions or stipulations limiting what is proposed to be granted or done."

The dominant meaning of the word "term" clearly has something to do with ^E limiting conditioning, bounding, and directing whatever is to be done. In the context of this case, this means the jurisdiction of this court, is as is limited, conditioned, bound and directed by the Electoral Act. In simple language, the jurisdiction of the Electoral court, is as is provided by the Electoral Act.

The word "term" has acquired a well known judicial meaning. In the law of ^F contract, when one refers to the terms of a contract, the clear meaning is the conditions on which the contract is premised. In a will, it means as is provided by the testator in the will. Similarly in an enactment it means as is provided by the provisions of the enactment.

In the result, the literal, ordinary, plain and technical meaning of the word "terms" as used in s 161, and in the context of the Electoral Act means as ^G stipulated, limited or provided by the Electoral Act.

THE INTENTION OF THE LEGISLATURE

Mr *Elliot* took this court through the various sections of the Electoral Act for which no court is vested with jurisdiction to enforce compliance in the event ^H that the officer who is required to act does not do so. He argued that in such

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situations the Electoral Court has jurisdiction. He obviously had in mind the ^A implied intention of the legislature referred to in the *PTC* case *supra*, or the assumed or imagined intention of the legislature, referred to in the *Keyter* case *supra*. Mr *Chikumbirike* argued that in such circumstances the aggrieved party should apply to the High Court which has inherent jurisdiction. He referred to s 13 of the High Court Act [*Chapter 7:06*]. It is correct that the High ^B Court has inherent jurisdiction and can hear such cases, but the issue is, does the Electoral Court have jurisdiction to hear such cases as submitted by Mr *Elliot*? This can be determined by ascertaining the expressed or implied intention of the Legislature from the construction of the sections which confer jurisdiction on the Electoral Court and a careful study and construction of the scheme of the Electoral Act. This calls for an analysis of the sections ^C conferring jurisdiction on this court and other courts.

In Part V of the Act, aggrieved parties are in terms of s 25(6) referred to a designated magistrate for the province in which the affected constituency is situated, for redress in the case of a dispute over claims for transfer of registration.

In Part VI, ss 27(3)(a) and (b), 28(3)(b) and 29 of the Electoral Act confers ^D jurisdiction on a designated magistrate to hear appeals against objections by the constituency registrar or a voter. Section 30(1) to (4) provides for the submission of a stated case by the designated magistrate to a judge of the High Court for his opinion.

In Part X, s 44(7) confers jurisdiction on the Electoral Court to hear and ^E determine petitions against the decision of the presiding officer over the election of the Council of Chiefs and of President and Deputy President of the Council of Chiefs and other Senator Chiefs.

In Part XI, s 46(19)(b) and (c) confers jurisdiction on the Electoral Court to hear and determine appeals from the nomination court. ^F

In Part XIII, s 66(2) provides for the presence of an Electoral Court judge at the drawing of lots to determine the winning candidate. Section 66(4) confers jurisdiction on the Electoral Court to hear and determine a petition against the decision of the Chief Elections Officer. Section 70(3)(b), (4), (5), and (8) confers jurisdiction on the Electoral Court to determine issues and make orders in relation to the destruction or preservation of electoral documents. ^G

In Part XIV, s 81 confers jurisdiction on the High Court, on convicting a person for inducing any person to obtain a ballot paper and influencing him or her to vote in favour of a particular candidate, to declare the convicted person disqualified from voting in any election for a period not exceeding five years. ^H

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^aIn Part XVII, s 111 confers jurisdiction on the Electoral Court, to hear and determine petitions on an undue return or an undue election of a person to the office of President, while s 112A, as read with the fifth schedule, confers jurisdiction on the Chief Justice to preside over the Electoral College, for the election of a President.

In Part XVIII(A), ss 133E and 138 confers jurisdiction on the High Court to ^bimpose additional punishment, of a civil nature, on a person it will have or convicted for intimidatory practices. The same jurisdiction is conferred on the High Court in terms of s 150. Identical jurisdiction is conferred on the Electoral Court by s 155, but after the hearing of a petition after the election. It is clear the legislature conferred jurisdiction on two different courts on this aspect. ^cThe High Court deals with intimidatory and illegal practices before the elections, while the Electoral Court deals with the same situations and can impose the same additional penalties after the elections.

In Part XXI, ss 155 to s 158 confer jurisdiction on the Electoral Court to hear and determine petitions and applications and make appropriate orders specified in the various sections.

^dIn Part XXII, s 161 establishes the Electoral Court and in subs (1) and (2) specifies what it can or cannot do.

In Part XXIII, s 167 provides for the presentation of election petitions to the Electoral Court. Section 170(1) confers jurisdiction on the Electoral Court to hear and determine objections on the sufficiency of the security provided by ^ean applicant to an election petition. Section 171(1) confers jurisdiction on the Electoral Court to hear and determine election petitions. Sections 177, 179, 180, and 181 provide for the other powers the Electoral Court may exercise in the hearing of petitions.

In Part XXIV, s 183 confers jurisdiction on the Electoral Court to hear and ^fdetermine applications by persons convicted on perjured or false evidence, for the removal of the incapacity imposed at the time of conviction.

An examination of the sections conferring jurisdiction on the various courts clearly demonstrates the legislature's deliberate intention as to which court it intended to deal with which situation. There is no doubt in my mind that where the legislature intended to confer jurisdiction on this court, it did so by ^gconferring it through a specific provision in the Act. There is clearly no room for the conferring of jurisdiction by implication. The legislature's specific mention of the instances where this court has jurisdiction means where it did not confer jurisdiction it intended not to confer jurisdiction. This would ^hsupport Mr *Chikumbirike's* submission that the application of the *expressio*

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unius est exclusio alterius rule to the specific conferring of jurisdiction in ^asome instances means this court has no jurisdiction where it is not specifically conferred. In *Nkomo & Anor v Attorney-General & Ors* 1993 (2) ZLR 422 (S) at 434D-E, Gubbay CJ said:

"To ascribe a sensible meaning to subs (5) and to avoid superfluity necessitates the legitimate recourse of construing the general words 'any ^bsentence' in subs (6) as excluding the specific reference to 'a sentence of death' in subs (5). This is no more than an application of the rule embodied in the maxim '*expressio unius exclusio alterius*'. It draws attention to the fairly obvious linguistic point that in many contexts the mention of some matters warrants an inference that other cognate matters were intentionally excluded. See Maxwell *Interpretation of Statutes* 12 ed at p 293."

In *Eagle Insurance Co Ltd v Grant* 1989 (3) ZLR 278 (S) at 280F, Korsah JA, ^ccommenting on the operation of the maxim, said:

"A rule which is variably resorted to in the interpretation of statutes the *expressio unius* rule – is that the mention of one or more things of a particular class may be regarded as silently excluding all other members of the class." ^d

The use of the words "may be regarded as silently excluding" leaves room for the inapplicability of the rule in some cases. This is confirmed in *Chivinge v Mushayakarara & Anor* 1998 (2) ZLR 500 (S) at p 506E-F, where Gubbay CJ said:

"The same result is arrived at, so it seems to me, by a cautious application ^eof the maxim *expressio unius est exclusio alterus*. See *Taylor v Prime Minister & Anor* 1954 SR 94 at 165; 1954 (3) SA 956 (SR) at 965B-D; *R v Ndhlovu* (1) 1980 ZLR 96 (G) at 100A-D; *Hewlett v Minister of Finance &*

Anor 1981 ZLR 571 (S) at 596C-E; *National Automobile & Allied Workers Union v Borg-Warner* 1994 (3) SA 15 (A) at 26H-I. The specific mention of the instances of permissible discharge, of termination on notice by a permanent employee, to my mind leads to the unavoidable inference that it was not the intention of the parties to the contract to allow termination on notice of a permanent employee."

The need to exercise caution before relying on the *expressio unius* rule is because a conclusion based on it is a product of a logical deduction inferred from the specific mention of the other thing being an implied exclusion of that which was not mentioned. In *Commissioner of Taxes v F Kristiansten (Pvt) Ltd* 1994 (1) ZLR 412 (S) at 419H, the Supreme Court commenting on the nature of the rule said:

"It may be that one cannot rely on that uncertain principle of interpretation known as the '*expressio unius exclusio alterius*' in this situation." H

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A The uncertainty of the *expressio unius est exclusio alterius* rule was again commented on by the Supreme Court in *Davies & Ors v Minister of Lands, Agriculture & Water Development* 1996 (1) ZLR 681 (S) at 687G where Gubbay CJ said:

"Mr Andersen's counter to this argument was that the principle *expressio unius est exclusio alterius* was one of limited application to be applied B with great caution. This is of course true but whereas here something which is not on the face of it acquisition is specifically stated so to be, there is a strong indication that acquisition is to otherwise be given its ordinary meaning."

In the present case, a careful reading of the sections of the Electoral Act conferring jurisdiction on this court and other courts, together with s 161 of C the Act, whose interpretation restricts the search for jurisdiction within the Act, the express mention of the instances where this court has jurisdiction is a clear indication that where no jurisdiction was specifically conferred the legislature did not intend to confer jurisdiction on this court. In the context of the whole Act, the words "and other matters in terms of this Act" means other D matters in which jurisdiction has been conferred by provisions of this Act.

OTHER INDICIA

Mr Elliot for the applicants referred this court to s 157 of the Electoral Act and submitted that reference in it to "petitions and applications" when no specific jurisdiction in terms of the Act is conferred on this court to hear and determine E petitions means applications such as the applicant's are the "other matters" which can be heard and be determined by this court. This tends, to suggest, that the literal meaning as established above should include applications as provided in s 157. The *expressio unius est exclusio alterius* rule would not be applicable as the mentioning of applications without providing for them in any specific sections of the Act would leave this court with jurisdiction in F circumstances mentioned by Mr Elliot. That would not be consistent with the plain meaning of the phrase "and other matters in terms of this Act". It would entitle this court to depart from the plain, literal and grammatical meaning to avoid the inconsistency or the absurdity. See *Chegutu Municipality supra*.

Mr Chikumbirike for the first respondent submitted that the word "application" G means petition. He therefore, argued that its being mentioned in s 157 is of no significance. He relied on s 15(2) of the Interpretation Act [Chapter 1:01], which provides as follows:

"Any reference in an enactment to a petition to a court shall be construed H as a reference to an application to the court or to a judge, magistrate or

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other judicial officer of the court, made in accordance with rules of the A court."

Mr Chikumbirike's submission is persuasive but does not explain why the legislature would convey the same concept using two different words of the same meaning in succession. This would suggest that one of the words is superfluous. If the use of both words was made out of caution, then why would B the legislature use the word "or" between them, suggesting that it should be one or the other? A careful reading of s 157 is called for. It provides:

“(1) When it appears to the Electoral Court, either on application or upon an election petition, that –

- (a) any act or omission of a candidate at an election or of his or her chief election agent or of another agent or person, which but for c this section would be an illegal practice, has been done or made in good faith through inadvertence or accidental miscalculation or some other reasonable cause of a like nature; and
- (b) by reason of the circumstances it would be just that the candidate or his or her chief election agent or other agent or person, or any of them, should not be subject to any of the consequences under d this Act of the said act or omission;

the Electoral Court may make an order allowing the act or omission to be an exception from the provisions of this Act which would otherwise make the act or omission an illegal practice, and thereupon the candidate, agent or person shall not be subject to any of the consequences under this Act of the said act or omission. e

(2) Where application, is made for relief in terms of subsection (1), the Electoral Court, before hearing the application, shall be satisfied that reasonable notice of the application has been given in the constituency or area in which the election was held.”

The clear meaning of s 157 is that the Electoral Court may during the hearing f of a petition or when an application is made to it in terms of subs (2), make an order allowing an otherwise illegal practice to be an exception to the provisions of the Act. The provisions of s 15 of the Interpretation Act are therefore not applicable in this case. Subsection (2) specifically provides for the making of an application to the Electoral Court, and confers jurisdiction on it to hear and determine such applications. I, with respect, do not agree with either Mr g Elliot’s or Mr Chikumbirike’s respective interpretations of s 157 of the Electoral Act. Therefore the interpretation of the words “and other matters in terms of this Act”, as discussed above, remains unaffected by the provisions of s 157. Even if subs (2) of s 157 had not clarified the issue, there are other sections of the Electoral Act, which confer jurisdiction on this court to hear h

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a and determine applications. Section 179(2) provides for an application for substitution of a petitioner. Section 183 provides for an application to the Electoral Court for the removal of any incapacity imposed upon conviction based on perjured or false evidence.

It is therefore beyond doubt that the instances in which this court has jurisdiction to hear and determine applications are specifically provided for b in the Act. As already indicated that means all the instances in which the legislature intended to confer jurisdiction on this court are specified, leaving no room for this court to assume jurisdiction in circumstances referred to by Mr Elliot.

Mr Chikumbirike sought costs on the legal practitioner and client scale c against the applicants on the basis that his clients were unnecessarily dragged to a court which does not have jurisdiction to hear the application. It is true that, with careful reading of the Electoral Act, the applicants should have known that they were suing the respondent in a court which did not have jurisdiction. It is, however, apparent from Mr Chikumbirike’s own failure to appreciate that the Act confers jurisdiction on this court to hear applications d that the Electoral Act as recently amended is still to be fully understood by legal practitioners especially those who infrequently appear before this court. There is need for guidance through the judgments of this court. I therefore cannot grant punitive costs in circumstances which clearly call for the guidance of this court.

e In the result, the applicant’s application is dismissed with costs.

Coghlan Welsh & Guest, applicants’ legal practitioners

c Chikumbirike & Associates, respondents’ legal practitioners

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Source:

AGRIBANK v MACHINGAIFA & ANOR 2008 (1) ZLR 244 (S)**2008 (1) ZLR p244**

Citation	2008 (1) ZLR 244 (S)
Case No	Judgment No. S-61-07
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Garwe JA
Heard	15 October 2007
Judgment	17 March 2008
Counsel	<i>J Dondo</i> , for the appellant <i>M S Gwaunza</i> , for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote**Contract** — *mistake* — *unilateral mistake by offeror* — *when will entitle offeror to escape liability***Contract** — *waiver* — *delay in enforcing rights* — *when may be construed as waiver of right***Employment** — *Labour Court* — *jurisdiction* — *labour matters* — *declaratory order* — *no exclusive jurisdiction to grant declaratory order* — *High Court retaining jurisdiction***Headnote**

The respondents were employed in managerial positions by the respondent bank. In 2000, they signed revised contracts of employment. Among the provisions of the contract was one relating to the use of motor vehicles. ^ε This provided that the employees could purchase a car under the bank's scheme and claim for the use of it when on duty. They were also entitled to a fixed monthly allowance based on 4000 km a month. The following year the bank wrote to the affected employees and told them that the car scheme had been changed. The benefits were substantially less. The respondents almost immediately raised the question of the monthly [£] allowance and were told that the bank could not afford it. After more correspondence, the bank told the respondents that the allowance had been included by mistake. Following this statement, the respondents sought a *declaratur* that they were entitled to the allowance. The High Court granted the application. On appeal, the bank raised 4 issues: (1) that the inclusion of the allowance in question was the result of a mistake; (2) that the respondents had waived their rights by not bringing up the matter to court timeously; (3) that in terms of the contract of employment agreed to by the respondents, the appellant could change its policies and procedures; and (4) that the court *a quo* had no jurisdiction to determine ^η

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^A what was essentially a labour dispute contrary to the provisions of s 89(6) of the Labour Act [*Chapter 29:01*].

Held, that the High Court's inherent jurisdiction to grant declaratory orders in labour matters had not been ousted. The only issue for determination was whether the case was a proper one for the

exercise of discretion under s 14 of the High Court Act. The fact that the dispute could well have been ^B determined in the Labour Court was not the determining factor.

Held, further, that there is a presumption, even in some cases a strong one, against waiver. This means not only that the onus is upon the party asserting waiver to prove it, but that although, as in all civil cases, the onus may be discharged on a balance of probability, it is not easily discharged. *In casu*, the correspondence showed that the respondents ^C immediately complained and even threatened to take legal action. In any event, delay in enforcing a contractual right is not necessarily a waiver of the right. Delay, of itself and without more, can never deprive a party of a contractual right except by prescription.

Held, further, that a party to a contract relying on an error of judgment, who ^D can go further and show that at the time of the contract he was labouring under some misapprehension, may escape liability under a contract. The onus however is not easy to discharge. Unless the mistaken party can prove that the other party knew of his mistake, or that as a reasonable man he ought to have known of it, or that he caused it, the onus of showing that the mistake was a reasonable one justifying release from ^E the contractual bond will not be easy to discharge. However material the mistake, the mistaken party will not be able to escape from the contract if his mistake was due to his own fault. This principle will apply whether or not his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract and in fact in any circumstances in which the mistake is due to his own carelessness ^F or inattention, for he cannot claim that his *error* is *iustus*. In this case, when the appellant made provision for this allowance in the contract of employment, there was no question of mistake at that stage. That allowance was what the appellant was prepared to offer the respondents. Later, however, the appellant had a change of heart because it considered the allowances as too high and unsustainable. An offeror cannot escape liability by establishing that he has made a wrong offer which was accepted.

Held, further, that although the respondents undertook to subscribe to the bank's policies and procedures currently in use and as revised and ^H amended from time to time, this did not mean that the bank was empowered

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to remove, without reference to the respondents, such a fundamental ^A right as the entitlement to payment of a monthly mileage allowance. If the appellant's argument were to be taken to its logical conclusion, even the respondents' salaries could have been reduced. The bank, in amending its policies and procedures, was not empowered to alter clearly defined contractual rights to payment of a salary and allowances. ^B

Cases cited

Chidziva & Ors v ZISCO 1997 (2) ZLR 386 (S)

Johnsen v Agricultural Finance Corp 1995 (1) ZLR 65 (S)

Sibanda & Anor v Chinemhute & Anor HH-131-04

University of Zimbabwe v Gudza 1996 (1) ZLR 249 (S) ^C

Legislation considered

High Court Act [Chapter 7:06] s 14

Labour Act [Chapter 29:01] s 89(6)

Case information

J Dondo, for the appellant ^D

M S Gwaunza, for the respondents

Judgment

GARWE JA: This is an appeal against the judgment of the High Court, Harare handed down on 13 July 2005 in which the High Court granted with costs an application by the respondents declaring,

inter alia, that they were entitled to payment of a mileage allowance of 4 000 km per month calculated at the ^ε Automobile Association of Zimbabwe (AAZ) rates.

The facts of this case are these. The respondents were employed by the appellant as Assistant Director, Credit Risk and Assistant Director, Debt Recovery, respectively. Both respondents signed revised contracts of employment in the year 2000 which stipulated their conditions of employment. ^ε The contract of employment provided in paragraph 3 as follows:

“3. Motor Vehicle Use

You are entitled to the use of an Agribank company car under the prevailing terms and conditions. You are required to familiarize yourself with the existing rules and regulations for the use and disposal of the ^ε motor vehicle.

or

You are entitled to purchase a motor vehicle under the prevailing motor vehicle scheme. You will use the car for business and claim in accordance with the existing rules as amended from time to time. *You are also entitled* ^ε

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A to a mileage allowance based on a mileage of 4 000 km per month at the applicable standard AAZ rates” (my own emphasis).

The italicised portion of para 3 is at the centre of the dispute in this matter.

By letter dated 30 August 2001, the appellant’s Human Resources Manager wrote to the respondents advising them that following the restructuring of ^ε management grades the appellant’s board had approved the conversion of the company car scheme to a personal car scheme under the managers and field staff motor vehicle scheme with effect from 1 September 2001. The conversion to a personal car scheme was done without reference to the respondents. The conversion meant that the use of a company car was being done away with and the respondents would no longer access fuel and other facilities previously ^ε offered by the bank in this regard. The respondents were offered a loan equivalent to the purchase price of their existing company vehicles and a monthly allowance of \$30 300 to assist in “the cost of running the motor vehicle”.

It appears the respondents were not happy with the conversion to the new scheme and on 3 September 2001 wrote a letter to management raising various ^ε issues on the matter and threatening legal action because of what they perceived as a breach of contract. One of the issues raised was their entitlement to an allowance based on a monthly mileage of 4 000 km.

The response by the managing director of the appellant was that such an allowance “would ultimately be too expensive for the bank to sustain” and that ^ε the change had been “influenced by the magnitude of the vehicle allowance cost and its sustainability”.

Thereafter, the parties engaged in considerable exchange of correspondence on the matter. The respondents continued to insist that they were entitled to the allowance. The appellant maintained that it could not justify payment of such a huge allowance. The appellant eventually stated by letter dated 14 April ^ε 2004 that the allowance had been included by mistake and that the intention had been to allow the respondents to use their personal vehicle and submit claims for such use under the bank’s prevailing terms and conditions.

In June 2004, the respondents then filed a court application seeking, *inter alia*, a *declarator* that they were entitled to payment of the allowance. After hearing ^ε both parties, the High Court granted the application with costs. It is against that decision that the appellant has appealed to this court.

The decision of the court *a quo* is attacked on four bases. These are, firstly, that the court *a quo* erred in finding that the inclusion of the allowance in ^ε question was not the result of a mistake; secondly, that the court *a quo* erred in

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dismissing the appellant’s defence of waiver; thirdly, that the court *a quo* ^ε erred in failing to take into account the fact that in terms of the contract of employment agreed to by the respondents, the appellant could change its policies and procedures; and fourthly that the court *a quo* erred in coming to the conclusion that it had jurisdiction to determine what was essentially a labour dispute contrary

to the provisions of s 89(6) of the Labour Act [*Chapter B 29:01*]. I proceed to deal with each of the four grounds raised.

WHETHER THE HIGH COURT HAD JURISDICTION TO DETERMINE THE APPLICATION

It is the appellant's contention that what was before the court *a quo* was essentially a labour dispute and in the light of the provisions of s 89(6) of the c Labour Act [*Chapter 28:01*], only the Labour Court has the jurisdiction in the first instance to hear and determine such a matter. In support of its argument, the appellant has cited the case of *Sibanda & Anor v Chinemhute & Anor* HH-131-04. In that case, Makarau J (as she was then) made the following remarks at p 7:

"Consequent upon my finding above, that this court is only barred from D exercising its inherent jurisdiction in labour matters where the Labour Court has jurisdiction, it appears to me that this court retains its jurisdiction to grant declaratory orders in terms of s 14 of the High Court Act in labour disputes ..."

The learned judge continued at p 8 of the judgment:

"Similarly, I hold that in the absence of the specific power on the part of E the Labour Court to issue a declaratory order as competent relief to parties appearing before it, the jurisdiction of this court to do so in the first instance has not been ousted."

The above case does not in fact support the appellant's contention that the High Court has no jurisdiction to hear the application. To the contrary the case F is authority for the proposition that the High Court retains its original jurisdiction to grant declaratory orders, even in labour disputes. The appellant has not sought to argue that that case was wrongly decided.

In *Johnsen v Agricultural Finance Corp* 1995 (1) ZLR 65 (S), Gubbay CJ had occasion to consider when a *declarator* can be granted. The learned Chief Justice remarked at 72E-F: G

"The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an 'interested person', in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future H

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A or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties interested is not a prerequisite to the exercise of jurisdiction ..."

It was not in contention before the court *a quo* that the respondents were interested persons. The only issue for determination was whether the case B was a proper one for the exercise of discretion under s 14 of the High Court Act. The trial court reached the conclusion that it was. The fact that the dispute could well have been determined in the Labour Court is not the determining factor. In *Johnsen v Agricultural Finance Corp supra*, Gubbay CJ remarked at 77B:

"Nor does it seem to me that the availability, in the same court, of a remedy by way of interdict was of itself reason to refuse declaratory relief. C Standing alone, it will seldom be sufficient to induce a court to decline jurisdiction. It is but one factor to be taken into account by the court in the exercise of its discretion whether or not to make a declaration of rights ..."

See also Herbststein & van Winsen *The Civil Practice of the Supreme Court D of South Africa* 4 ed p 1058.

I am of the view that the court *a quo* was correct in coming to the conclusion that it had the jurisdiction to deal with the matter. Paragraph 1 of the order granted by the court *a quo* was clearly declaratory.

This ground of appeal must therefore fail.

E THE QUESTION OF WAIVER

The appellant has argued that the court *a quo* should have dismissed the application on the ground that the respondents had by their conduct waived whatever rights they might otherwise have had.

In terms of the common law, there is a presumption against waiver. R H Christie F *Law of Contract in South Africa* 3 ed (1996) states at 488:

"Having gone to all the trouble to acquire contractual rights people are, in general, unlikely to give them up. There is therefore a presumption, even in some cases a strong one, against waiver. That means not only that the onus is upon the party asserting waiver to prove it, but that although, as in all civil cases, the onus may be discharged on a balance of probability, ^g it is not easily discharged ...

To this, it is only necessary to add that it has repeatedly been held that clear proof is required, especially of a tacit as opposed to an express waiver ..."

Attention is also drawn to the judgment of this court in *Chidziva & Ors v H Zimbabwe Iron & Steel Company* 1997 (2) ZLR 368 (S).

2008 (1) ZLR p250

Garwe JA

In dealing with this argument, the trial judge stated at p 4 of the judgment: ^a

"The respondent further submitted that the applicants must be held to have waived their rights by not bringing up the matter to court timeously. The submission is clearly devoid of any merit when regard is had to correspondence filed of record in which the respondent admits that the applicant never manifested any signs of abandoning their rights. On 25 September 2001, the managing director acknowledged that the applicants' ^b memorandum raised the issue of 'Legal action insinuated because of perceived contractual agreement violation'. On 5 June 2003, the Human Resources Manager, in response to another communication from the second applicant, also acknowledged that the matter was first raised in 2001 and as far as the bank was concerned it had been deliberated upon to its finality then. The above statement was clearly misleading. The bank ^c never said it had made a mistake at that stage. The issue was therefore very much alive.

Finally the bank, in the final memorandum of 14 April, acknowledged that the matter had been brought up a couple of times since 2001. In such circumstances, it cannot be said that the applicants abandoned their rights when the requirements of a waiver were not met at all." ^d

I agree with the trial judge in this respect. At no stage did the respondents suggest that they were abandoning their entitlement to the allowance. They immediately wrote to management on 3 September 2001, voicing their concern at what they considered was a breach of their contract of employment and even threatened legal action. Although it appears that they did request for the ^e extension of the period within which to repay their loans, at no time did they waive their entitlement to the allowance. It is also not correct, as suggested by the appellant, that the respondents did not assert their rights for more than twenty months. The correspondence on file shows that the respondents immediately complained and, as already noted, even threatened to take legal action. ^f

Even if it were to be accepted for a moment that there was such a delay our law is clear that:

"Delay in enforcing a contractual right is not necessarily a waiver of the right. One can go further and say that delay, of itself and without more, can never deprive a party of a contractual right except by prescription ...":

Christie *op cit* p 491. ^g

This ground of appeal must also fail.

THE DEFENCE OF MISTAKE

It is the appellant's contention that the allowance was never intended and that it was inserted by mistake. If, so the appellant argues, the allowance were to ^h

2008 (1) ZLR p251

Garwe JA

^a be paid this would result in the respondents being paid twice in the sense that they would be entitled to motor vehicle loans to purchase motor vehicles and at the same time receive allowances for the use of the same vehicles based on a monthly mileage of 4 000 km at standard AAZ rates.

A party to a contract relying on an error of judgment who can go further and show that at the time of the contract he was labouring under some ^b misapprehension may escape liability under a contract. The onus, however, is not easy to discharge. As stated by Christie *op cit* p 353:

"Unless the mistaken party can prove that the other party knew of his mistake, or that as a reasonable man he ought to have known of it, or that he caused it, the onus of showing that the mistake was a reasonable one ^c justifying release from the contractual bond will not be easy to discharge."

The learned author continues at p 354:

"However material the mistake, the mistaken party will not be able to escape from the contract if his mistake was due to his own fault. This principle will apply whether his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract ... and D in fact in any circumstances in which the mistake is due to his own carelessness or inattention, for he cannot claim that his *error is iustus*."

In responding to concerns by the respondents that the appellant had breached the contract of employment, the Managing Director of the appellant made it clear that the appellant had made a mistake as it could not justify these E allowances or sustain them. He went on to state that the allowance was almost equivalent to the respondents' monthly salary and was by implication too high.

The trial court observed that during a period of two years and eight months the appellant had not at any stage, alluded to the possibility of such an allowance having been included by mistake. He noted that the appellant made F this assertion for the first time on 14 April 2004. The trial judge remarked as follows on pp 3-4 of the judgment:

"As can be seen from the above memorandum the respondent was then being categorical that it had made a mistake, a thing it failed to do during the couple of times the matter had been brought up since 3 September 2001. The matter would not have dragged this far if the respondent had G stated, the first time the matter was raised, that the inclusion of the allowances was a mistake. The suggestion, in the memorandum, that the allowances whose payment the applicants sought were not intended and the bank did not regard them as part of the applicants' contract is simply untenable. If the respondent did not intend the allowances to be part of H the contract, it would have removed them from the contract document at

2008 (1) ZLR p252

Garwe JA

the time it amended the contract by removing the first option which related A to the use of company vehicles.

Further, when one examines the contract document filed of record it reveals that 4 000 km was hand written while about 99 per cent of the document was type written. There are also some figures that were hand written such as the salary, annual bonus, clothing allowance, the vacation and occasional leave etc. There can be no doubt that these were inserted B into the blank spaces after careful thought. It seems to me that the same applies to the 4 000 km. The suggestion, therefore, that the inclusion of the entitlement of a mileage allowance based on mileage of 4 000 km per month at the applicable standard AAZ rates, was inserted by mistake is equally untenable.

If at all it had been a mistake the respondent would have immediately C realized it and would have said so when the applicants first raised the issue on 3 September 2001, failing which respondent would have realized and said so at any other subsequent occasion the applicant raised it, in 2001 or early 2002 or even 2003. It therefore seems to me that if at all the respondent had made a mistake then such mistake was grossly D unreasonable."

I am inclined to agree with the above observations.

It is apparent in this case that when the appellant made provision for this allowance in the contract of employment, there was no question of mistake at that stage. That allowance was what the appellant was prepared to offer the respondents. Later, however, the appellant had a change of heart because of E the amounts involved, which were calculated using AAZ rates. It considered G the allowances as too high and unsustainable.

The position is now settled that an offeror cannot escape liability by establishing that he has made a wrong offer which was accepted: *University of Zimbabwe v Gudza* 1996 (1) ZLR 249 (S) at 253D-E. The offeror will not be permitted to rely on the absence of the consensus if the mistake was due to his own F carelessness: *University of Zimbabwe v Gudza supra* at 254B-C.

I accordingly reject the appellant's argument that the court *a quo* erred in rejecting its claim that the allowance had been inserted by mistake.

WHETHER THE APPELLANT COULD ALTER THE RESPONDENTS' CONDITIONS OF SERVICE G

The appellant has argued that, in terms of para 11 of the contract of employment, the respondents undertook to subscribe to the bank's policies and procedures currently in use and as revised and amended from time to time. Pursuant to this clause, so it is argued, a revised motor vehicle scheme came into existence with effect from 1 September 2001. H

Garwe JA

A I do not accept that, on the basis of para 11 of the contract of employment, the appellant was empowered to remove, without reference to the respondents, such a fundamental right as the entitlement to payment of a monthly mileage allowance. If the appellant's argument were to be taken to its logical conclusion, on the basis of that paragraph, even the respondents' salaries could have been reduced. I do not accept that the bank, in amending its policies and procedures, B was empowered to alter clearly defined contractual rights to payment of a salary and allowances. Clause 3 of the contract of employment clearly states that the respondents were:

"... entitled to a mileage allowance based on a mileage of 4 000 kilometres per month at the applicable standard AAZ rates."

c Such an entitlement could not be changed, altered or amended at whim on the basis that the appellant was entitled to change its policies and procedures from time to time. A party to a contract cannot unilaterally alter the terms and conditions of the contract in these circumstances.

This submission must also fail.

d In the result, I find that this appeal has no merit.

The appeal is dismissed with costs.

SANDURA JA and ZIYAMBI JA concurred.

Chinamasa, Mudimu, Chinogwenya & Dondo, appellant's legal practitioners

Ⓔ *Kantor & Immerman*, respondents' legal practitioners

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Source:

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G v G 2008 (1) ZLR 254 (H)

2008 (1) ZLR p254

Citation	2008 (1) ZLR 254 (H)
Case No	Judgment No. HH-31-08
Court	High Court, Harare
Judge	Makarau JP
Heard	17 March 2008; 18 March 2008
Judgment	2 April 2008
Counsel	<i>G H Muzondo</i> , for the plaintiff Defendant in person
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Family law — husband and wife — divorce — irretrievable breakdown of c marriage — when can be said to have occurred — one party having expressed intention to end marriage and not having changed his mind — need for other party to show that there are prospects of reconciliation

Headnote

The plaintiff husband sought a decree of divorce to issue on the grounds that ^d his relationship with the defendant had broken down to such an extent that there was no possibility of reconciliation. In the main, he lamented the fact that he had been denied conjugal rights by the defendant for a period in excess of three years. The defendant however did not agree that the marriage had broken down to such an extent that reconciliation was impossible. She averred that with proper counselling, the parties could ^e resume a normal married life.

Held, that s 5 of the Matrimonial Causes Act [Chapter 5.13] vests wide discretion in the court seized with a divorce matter, either to grant the divorce or to postpone the hearing of the matter to give the marriage another chance where the court is of the view that this is the appropriate approach to take. Courts will not grant divorces lightly. Divorces change ^f one's status at law and socially. Where the parties have children, a divorce has the effect of separating the children from one of their parents save for regulated periods of access by the non-custodian parent. Generally, a divorce has the effect of impoverishing the couple, as it parcels out jointly held assets into two separate estates, each estate ^g obviously becoming less in worth than the jointly held estate. Thus, where there is evidence that a marriage can be salvaged, or where the justice of the case demands, the court will exercise its discretion against granting a decree of divorce. However, once one party to the marriage has expressed an intention to end the marriage and remains of that view ^h

2008 (1) ZLR p255

Makarau JP

^a at the time of the hearing, in the absence of any evidence to show that he or she may have changed his or her mind between the issuance of summons and the hearing of the matter, the court will be hard pressed to order the parties to reconsider their positions. It takes two to tango. A defendant who argues that the marriage has not broken down irretrievably has the duty to place before the court evidence tending to show that there ^b are prospects of reconciliation and that the plaintiff has been responding well to overtures of reconciliation. The court cannot act on the mere belief of one of the parties that the marriage will someday blossom into its former vibrancy and passion. *In casu*, in the light of the evidence, it was idle for the court to believe that what the parties required was more time to reconsider their respective positions.

^c *Held*, therefore, that a decree of divorce would be granted.

Cases referred to

Chiviya v Chiviya 1995 (1) ZLR 210 (H)

Kangai v Kangai HH-52-07

^d *Mashonganyika v Mashonganyika* HH-10-08

Case information

G H Muzondo, for the plaintiff

Defendant in person

Judgment

MAKARAU JP: The plaintiff and the defendant were married at Harare on 5 ^e September 1998. Two daughters were born of the marriage. These were born in 2001 and 2004 respectively.

On 31 January 2007, the plaintiff issued summons praying for a decree of divorce to issue on the grounds that his relationship with the defendant had broken down to such an extent that there is no

possibility of reconciliation. In the main, the plaintiff lamented the fact that he had been denied conjugal ^F rights by the defendant for a period in excess of three years.

The action was defended and after the pleadings in the matter had closed, the parties appeared before a judge in chambers for a pre-trial conference on more than one occasion. During the discussions under the guidance of the judge at the pre-trial conference, the parties managed to agree that it was in the best ^G interests of the minor children that their custody be awarded to the mother upon divorce, with the plaintiff enjoying reasonable rights of access to the children. The parties also agreed in the main as to how to apportion the movable assets they jointly acquired during the subsistence of the marriage. They also agreed that the immovable property in Ruwa, being a vacant stand, ^H be registered in the names of the minor children. The defendant, however, did

2008 (1) ZLR p256

Makarau JP

not agree that her marriage to the plaintiff had broken down to such an extent ^A that reconciliation is impossible. She averred that, with proper counselling, the parties could resume a normal married life. It was this sole issue that the judge presiding over the pre- trial conference referred to trial.

At the trial of the matter, the plaintiff testified as to the frustrations he has endured during the subsistence of the marriage in exercising conjugal rights ^B with the defendant. The record is replete with the minute details of how each attempt at intercourse was not satisfactory for him and left him frustrated. He further testified as to how in an effort to enhance their intimacy, he procured an adult DVD on one occasion and, on another, he purchased for the defendant a lubricant to ease things for her. All this came to naught.

Realizing that they had a real problem in their marriage, the parties were ^C counselled by a married couple who arranged counselling sessions for them. This appears to have been professional counselling. The problem persisted. Relatives tried to talk to them and still the plaintiff felt frustrated by what he perceived as the defendant's failure to perform her side of the bargain in the marriage. He then resolved to terminate the marriage and caused summons to ^D be issued in the matter.

Under cross examination, the plaintiff explained how the two daughters they have were born in the marriage which he had described as unfulfilling. The record again carries the minute details of how, according to the plaintiff, the second daughter was conceived. It is not necessary for the purpose of this judgment that I repeat the graphic evidence that was led in this regard. ^E

In my view, the plaintiff gave his evidence well. His frustrations were almost palpable as he testified. He is an articulate young man who impressed me as being honest and fair.

The defendant is equally articulate and very earnest. She testified in defence of her marriage to the plaintiff. It is clear that she values her marriage and is ^F still affectionate towards the plaintiff. She is a devout Christian who believes in the sanctity of marriage.

Her evidence was to the effect that the marriage has not broken down irretrievably, as she still loves the plaintiff. She denied the allegation that she had denied the plaintiff conjugal rights and was of the view that the problems ^G they are facing are capable of solution. She further testified as to how the plaintiff walked out of some of the counselling sessions they were undergoing and failed to turn up for others.

In my view, the facts of this matter are largely common cause. The parties have had some problems in their marriage. The problems are not freshly occurring ^H

2008 (1) ZLR p257

Makarau JP

^A or transient. The parties have debated the issue before between themselves and in the company of others. Some of the questions that the defendant put to the plaintiff in cross-examination were put to him previously and in other *fora*. They have sought counselling on the issue and this has not yielded the desired result. She at one time sought medical treatment and again it did not assist the parties in enhancing their intimacy. It may be well true, as she says, ^B that the problem on her part is psychological and will require psychological intervention.

The issue that falls for my determination is whether in light of the evidence before me I am satisfied that the marriage between the parties has broken down irretrievably and that a decree of divorce should issue. In determining this c matter, I have sought guidance from the provisions of s 5 of the Matrimonial Causes Act [Chapter 5:13] which provides that:

“(1) An appropriate court may grant a decree of divorce on the grounds of irretrievable break-down of the marriage if it is satisfied that the marriage relationship between the parties has broken down to such an extent that there is no reasonable prospect of the restoration of a normal marriage d relationship between them.”

It is the settled position at law, as recognized by this court, that this section vests wide discretion in the appropriate court seized with a divorce matter to either grant the divorce or postpone the hearing of the matter to give the marriage another chance, where the court is of the view that this is the appropriate e approach to take. See *Chiviya v Chiviya* 1995 (1) ZLR 210 (H), *Kangai v Kangai* HH-52-07 and *Mashonganyika v Mashonganyika* HH-10-08.

The introduction of the concept of irretrievable breakdown of marriage in 1985 was to move away from the fault or matrimonial offence principle to an objective assessment of the state of the marriage by the appropriate court. It is my considered view that, once one party to the marriage has expressed an f intention to end the marriage and remains of that view at the time of the hearing of the matter, in the absence of any evidence to show that he or she may have changed their mind between the issuance of summons and the hearing of the matter, the court will be hard pressed to order the parties to reconsider their positions. It takes two to tango.

g *In casu*, as stated elsewhere above, the parties have genuine problems that have persisted for at least three years. Counselling to date has not assisted in resolving their problems. It is therefore idle, in my view, for the court to postpone the matter to enable the parties to seek further counseling in the h matter.

2008 (1) ZLR p258

Makarau JP

The parties separated in July 2007. He has not been back. Since he departed a from the matrimonial home, there is no evidence that the parties attempted to resolve their problem or that they took any active steps in coming together again as husband and wife. It is, in my view, again idle for the court to believe that what the parties in this matter require is more time to reconsider their respective positions. The facts of this matter are in my view, to be contrasted b with the facts in *Mashonganyika v Mashonganyika supra*, where the parties were sharing board and bed, including affording each other conjugal rights well up to a fortnight before the date of the hearing. Rather than showing incompatibility, the parties in that case showed that they could continue as husband and wife were for some time and the plaintiff only changed their daily routines because the matter had been set down for hearing. If the matter had c taken long before being set down, it is easy to imagine that normal marriage relations would have continued between the parties. It is not cynical in the least to suggest that normal marriage relations between the two were interrupted by the set down of the matter.

The courts will not grant divorces lightly. Divorces change one's status at law and socially. Where the parties have children, a divorce has the effect of d separating the children from one of their parents save for regulated periods of access by the non-custodian parent. Generally, a divorce has the effect of impoverishing the divorcing couple as it parcels out jointly held assets into two separate estates, each estate obviously becoming less in worth than the jointly held estate. Thus, where there is evidence that a marriage can be e salvaged, or where the justice of the case demands, the court will exercise its discretion against granting a decree of divorce. Neither of these two aspects appears to me to characterize the matter before me.

Equally important, in my view, is to note that, while courts will not lightly grant a decree of divorce, defendants who argue that their marriages to plaintiffs have not broken down irretrievably have the duty to place before the court f evidence tending to show that there are prospects of reconciliation and that the plaintiff has been responding well to overtures of reconciliation. The court cannot act on the mere belief of one of the parties that the marriage will someday blossom into its former vibrancy and passion.

The parties agreed on how to share their assets in the event of a divorce. I shall g give effect to this agreement in the divorce order that I issue. Regarding the immovable property, the parties agreed that it be registered in the joint names of the parties two children as their property, but that in the

interim and for the purposes of securing funds to develop the vacant stand, that it be registered in the name of the defendant. ^H

2008 (1) ZLR p259

Makarau JP

^A The defendant prayed for maintenance for herself and the minor children. She is a Bachelor of Science graduate who is gainfully employed. In praying for maintenance for herself, the defendant argued that since the plaintiff is the one who has decided to terminate the relationship, he should be compelled by law to maintain her and the minor children at a standard of living higher than they ^B were used to during the subsistence of the marriage.

"A woman who has been divorced is no longer entitled as of right to be maintained by her former husband until her remarriage or death. Where the woman is young and had worked before the marriage, and is thus in a position to support herself, where there are no minor children, she will not be awarded maintenance. If she had given up her job to look after the family she will be awarded maintenance for a short time to allow her time ^C to get back on her feet. Where the divorced woman is middle aged she will be given maintenance for a period long enough to allow her to be trained or retrained. On the other hand, elderly women who cannot be trained or remarried are entitled to permanent maintenance. See *Chiomba v Chiomba* 1992 (2) ZLR 197."

The above are the remarks of Gowora J in *Kangai v Kangai supra*. I associate ^D myself with the remarks as representing the approach of this court to the issue of maintenance for the divorced wife.

On the basis of the above, the defendant, being gainfully employed, is not entitled to maintenance from the plaintiff.

Regarding the maintenance of the minor children, the parties have agreed as ^E between them that the contribution of the plaintiff be in kind and that he provides at least 60 percent of the monthly needs of the children. I will not make an order to this effect as such an order will not be difficult in policing but in enforcing as well. I will leave it open to the defendant to approach an appropriate maintenance court should she find the arrangement unworkable ^F in future.

In the result, I make the following order:

1. A decree of divorce is hereby issued.
2. Custody of the two minor children is hereby awarded to the defendant with the plaintiff enjoying reasonable rights of access. ^G
3. The plaintiff shall be awarded as his sole and absolute property the following:
 - 3.1.1. 1 x refrigerator
 - 3.1.2. 1 x DVD player ^H
 - 3.1.3. 1 x satellite dish and decoder

2008 (1) ZLR p260

Makarau JP

- 3.1.4. 1 x two plate stove ^A
 - 3.1.5. 1 x bed and mattress
 - 3.1.6. 1 x 21 inch LG color television set.
4. The defendant is hereby awarded as her sole and absolute property the following: ^B
 - 4.1. 1 x 4 plate cooker
 - 4.2. 1 x deep freezer
 - 4.3. 1 x lounge suite
 - 4.4. 1 x 21 inch Phillips television set
 - 4.5. 1 x radio cassette player ^C
 - 4.6. 1 x carpet.
2. The immovable property known as stand No. 27 Ruwa is hereby awarded in equal and undivided shares to Vongai (born 21 March 2001) and Vimbai (born 22 July 2004).
3. Until the younger child attains majority, the immovable property shall be ^D registered in the name of the defendant, who shall hold the property in trust and, to the extent that she is

capable, shall develop the property for the benefit of the minor children.

4. Each party shall bear its own costs.

Madzivanzira, Gama and Associates, plaintiff's legal practitioners ^ε

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PISSAS v PISSAS 2008 (1) ZLR 261 (H)

2008 (1) ZLR p261

Citation	2008 (1) ZLR 261 (H)
Case No	Judgment No. HH-35-08
Court	High Court, Harare
Judge	Gowora J
Heard	26 March 2008; 28 March 2008
Judgment	9 April 2008
Counsel	<i>S G J Bull</i> , for the applicant <i>Miss N Tiyago</i> , for the respondent
Case Type	Urgent chamber application
Annotations	Link to case annotations

Flynote

Appeal — *noting of — effect — interlocutory order issued by High Court — c when leave to appeal against such order not required — matter relating to custody of children — includes matter relating to access by non-custodian parent*

Family law — *child — custody — issues relating to — include access by non-custodian parent*

Headnote

▷ After her divorce from the applicant, the respondent had been awarded custody of the children, while he had access to them. She subsequently obtained an order from the High Court permitting her to take the children out of Zimbabwe and relocate with them in the United Kingdom. The applicant had opposed the granting of the order but was unsuccessful. ^εThe applicant noted an appeal against the order. Learning that it was her intention to take the children out of the country in spite of the noting of the appeal, he applied for an urgent interdict restraining her from taking the children out of the country and requiring her to deliver their passports to the Registrar of the High Court. His attitude was that, whilst he did not object in principle to the children relocating to England, such relocation ^εshould be in circumstances where it is in their best interests to do so. He did not want them removed until the details on their livelihood had been established in a satisfactory manner.

The respondent contended that the appeal had not been properly filed in the absence of leave from the court because the appeal was against an ^G interlocutory order. The applicant contended that the order, although issued as a provisional order, was final in effect due to the nature of the relief granted.

In terms of s 43(2) of the High Court Act [*Chapter 7:06*], no appeal from the High Court shall lie to the Supreme Court from an interlocutory order or ^H interlocutory judgment, without the leave of either the judge concerned

2008 (1) ZLR p262

Gowora J

or a judge of the Supreme Court, except, *inter alia*, where the custody ^A of minors is concerned or where an interdict is granted or refused. The applicant argued that the matter concerned custody and an interdict had been granted; the respondent argued that the matter was concerned with access, not custody.

Held, that access is an incidence of custody and the two go hand-in-hand ^B where there are rights of more than one parent at stake. It cannot have been the intention of the legislature to give to parents who are engaged in issues relating to custody an automatic right of appeal to the Supreme Court, whilst not granting the right to parents wishing to enforce rights of access. Were access to be excluded in the exception to the section it would lead to an absurdity such as would not have been the intention ^C of the legislature.

Held, further, that even if this approach was incorrect, part of the order from the judgment appealed against was an interdict and on that basis the appeal would qualify under the exceptions referred to in s 43(2).

Held, further, that the noting of the judgment by the applicant had the effect of suspending the order issued by the High Court until the conclusion ^D of the appeal and the respondent was not entitled, without having obtained leave to execute the judgment, to remove the children from the jurisdiction of the court.

Cases cited

PTC v Mahachi 1997 (2) ZLR 71 (H) ^E

South Cape Corp (Pty) Ltd v Engineering Mgmt Svcs (Pty) Ltd 1977 (3) SA 534 (S)

Vengesai & Ors v Zimbabwe Glass Industries Ltd 1998 (2) ZLR 593 (H)

Legislation considered

High Court Act [*Chapter 7:06*], s 43 ^F

Case information

S G J Bull, for the applicant

Miss *N Tiyago*, for the respondent

Judgment

GOWORA J: The parties herein were formerly husband and wife. Two minor children were born from the union, namely Anthony Christie Pissas (born 8 ^G March 1994) and Dean Alexander Pissas (born 13 October 1995). On 2 November 2006, this court granted a decree of divorce in favour of the respondent herein. The respondent was awarded custody of the minor children. Prior to the decree of divorce being granted, the parties had entered into a consent paper in terms of which other ancillary relief was provided for. ^H

2008 (1) ZLR p263

Gowora J

^A The terms of the consent paper defined the right of access to the minor children by the applicant (described in the consent paper as “the defendant”) as follows:

“The defendant shall be entitled to exercise access to the minor children on alternate weekends, including alternate public holidays and school exeat weekends, and alternate school holiday periods.

Ⓑ The parties will alternate Easter holiday periods and Christmas/New Year periods (where the Christmas/New Year period will be from the morning of 24 December to the afternoon of 2 January.

On those occasions, when it is the defendant's weekend for access, he will collect the children every Thursday on termination of school activities Ⓒ and shall have them with him until he returns them to school the following Monday morning.

The parties agree that access periods will necessarily need to be flexible depending upon the personal and business commitments from time to time of each of the parties."

On 18 March 2008, Guvava J granted an order in favour of the respondent. Ⓓ The order is not before me but is common cause that the respondent had applied to this court for an order permitting her to take the children out of this country on an urgent basis and relocate with them in the United Kingdom. The applicant had opposed the granting of the order but was unsuccessful. The applicant has noted an appeal against the order of the 18 March 2008. Subsequent to the appeal being noted, the applicant sought an assurance that Ⓔ the respondent would not depart with the children before the appeal was determined. Notwithstanding the noting of the appeal, the respondent did not feel compelled to provide the undertaking sought by the applicant. He has learnt that it was her intention to take the children out of the country on 26 March 2008. The applicant wishes to have the appeal heard and has filed an Ⓕ urgent application for relief which is in the following terms:

TERMS OF ORDER MADE

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

1. That pending the appeal instituted by the applicant in case No. SC/08 (Refer HC 1476/08) or the earlier written consent of the applicant, the Ⓖ respondent be and is hereby interdicted from removing the minor children Anthony Christie Pissas and Dean Alexander Pissas from Zimbabwe. Ⓗ
2. That the respondent shall bear the costs of this application.

2008 (1) ZLR p264

Gowora J

INTERIM RELIEF GRANTED Ⓐ

1. The respondent is hereby directed to forthwith deliver up all the passports of each of the minor children Anthony Christie Pissas (born 8 March 1994) and Dean Alexander Pissas (born 13 October 1995) to the Registrar of this Honourable Court who shall retain the said passports pending the outcome of the applicant's appeal in SC/08 (Refer HC 1476/08) or the earlier receipt of applicant's written Ⓑ consent to the release of the passports to respondent.
2. The applicant's legal practitioners, Atherstone & Cook, be and are hereby authorized to serve this order on the Department of Immigration Offices in Linquenda House and on an immigration officer at Harare International Airport or any other point of entry to/exit from Zimbabwe and to serve the order on the respondent at the offices of her legal Ⓒ practitioners, Scanlen & Holderness.
3. This order shall take effect upon the respondent immediately upon issue without the need for service on her.

In his founding affidavit in support of the application, the applicant has averred that he had filed a notice of appeal to the order granted on 18 March Ⓓ 2008. The notice of appeal is filed with his papers. He goes on further to state that, whilst he does not object in principle to the children relocating to England, such relocation should be in circumstances where it is in their best interests to do so. He says further that there should be a proper infrastructure for the children's day-to-day care, supervision and stability, all living costs, education and medical treatment and proper arrangements for paternal access. Ⓔ He goes further to state that he had learnt that the respondent was due to depart this country with the minor children on 26 March 2008 and was then desirous of having her interdicted from taking the children away until the details on their livelihood had been established in a satisfactory manner.

In seeking to oppose the grant of this provisional order, apart from raising Ⓕ issues on the merits which I believe were dealt with by my sister Guvava on which aspect I will advert to later, the respondent contended that the appeal had not been properly filed in the absence of leave from this court, because the appeal was against an interlocutory order. *Per contra*, the applicant contends that the order, although issued as a provisional order, is final in effect due to the nature of the relief granted. The question as to whether the applicant Ⓖ required leave to appeal can be resolved in another way without the need for me to inquire into the nature of the order issued, be it interlocutory or final.

Although both parties went to some detail to justify their respective stances, it is my view that these are issues that were before the judge who granted the respondent the authority to depart from Zimbabwe with the children. For me ^h

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Gowora J

^a to rehash them would be akin to reviewing those proceedings. I will not do so. In my view, the only issues for determination by me are whether or not the applicant required the leave of this court to note the appeal and whether, having noted such appeal, the order of this court is as a result suspended. In addition, the applicant has sought a temporary interdict pending the appeal. The temporary interdict is being sought as part of the final order and, although ^b it is not before me, I would still have to determine whether or not I should, on the facts, issue a provisional order incorporating as part of the final order a temporary interdict against the respondent.

In terms of s 43 of the High Court Act [*Chapter 7:06*], appeals from the court are provided for as follows:

- ^c " (1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction.
- (2) No appeal shall lie –
- (a) ... (not applicable) ^d
 - (b) ... (not applicable)
 - (c) ... (not applicable)
 - (d) from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court, except in the following cases – ^e
 - (i) where the liberty of the subject or the custody of minors is concerned;
 - (ii) where an interdict is granted or refused;"

According to Mr *Bull*, the applicant is entitled, by virtue of the provisions of the section, to launch an appeal directly to the Supreme Court without the need ^f for leave, because not only did Guvava J issue an interdict, but the issue then before her Ladyship was concerned with the question of the custody of the minor children of the parties. Miss *Tiyago's* view is that what the applicant is seeking to ensure is that his access rights to the children are secured. She argues that access is not custody and, as a result, the exception provided in the section does not apply in this particular instance.

^g Access is an incidence of custody and, in my view, the two go hand-in-hand where there are rights of more than one parent at stake. It cannot have been the intention of the legislature to accommodate parents who are engaged in issues relating to custody specifically to the exclusion of anyone and to grant such parents an automatic right of appeal to the Supreme Court whilst not ^h granting the right to parents wishing to enforce rights of access. Were access

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Gowora J

to be excluded in the exception to the section it would, in my view, lead to an ^a absurdity such as would not have been the intention of the legislature. In any event, as pointed out by Mr *Bull*, the provisional order issued on 18 March 2008 was, in its final terms, to the effect that the respondent should retain custody of the minor children of the parties. It is obvious, therefore, that the appeal is properly taken as the court had been dealing with the custody of the minor children of the parties. The fact that what the applicant wishes to enforce ^b is access and not custody would not, on my reading of the section, preclude him from being able to launch his appeal. My reading of the exception is that it would be. No mention is made of the access rights of the applicant and it is to that extent that the applicant wishes to have the order appealed against.

In terms of the interim relief granted, apart from an authorization to remove the ^c children from the jurisdiction, the respondent was granted an interdict in terms of which the applicant was restrained from preventing the respondent from removing the children from this jurisdiction. So, assuming I am incorrect in finding that ^g access is an incidence of custody and that on that basis the applicant would not have required leave to file the appeal, part of the order from the judgment appealed against was an interdict. On that basis, the appeal ^d would qualify under the exceptions referred to

in s 43(2)(d) of the Act. I find, therefore, that there was no need for leave to appeal and that therefore there is an appeal pending before the Supreme Court.

The next issue of my inquiry is whether or not the appeal filed on 25 March 2008 would have the effect of suspending the order of Guvava J. The noting of an appeal has the effect of suspending the order or judgment which is the ^ε subject matter of the appeal. The authority for that principle is the *dictum* by Corbett JA (as he then was) in *South Cape Corp (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (S). What the learned Judge of Appeal had to say at 544H-545A was to the following effect:

"Whatever the true position may have been in the Dutch Courts, and more particularly the Court of Holland (as to which see *Ruby's Cash Store (Pty) F Ltd v Estate Marks & Anor* 1961 (2) SA 118 (T) at pp120-3), it is today the accepted common law rule of practice in our courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. To obtain such leave, the party ^g in whose favour the judgment was given must make special application."

These remarks were quoted with approval by Chatikobo J in *PTC v Mahachi* 1997 (2) ZLR 71 (H) and by Gillespie J in *Vengesai & Ors v Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H). I humbly associate myself with the views of Chatikobo J to this effect: ^h

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Gowora J

^a "To me, this statement is no more than an expose of the time honoured rule that the court has an inherent jurisdiction to control the operation of its own judgments" See *PTC v Mahachi* at p 73.

The High Court is a superior court with inherent jurisdiction. Thus, it has the right to regulate its proceedings and judgments. This inherent jurisdiction includes the power to grant leave to have its judgments executed pending ^b appeal. As submitted by Mr *Bull*, it is trite that the noting of an appeal against a judgment or order of a superior court has the effect of suspending the judgment. The purpose of the rule is to prevent irreparable harm to an appellant either by the issue of a writ of execution or by the execution of the judgment in any manner pending the appeal. In my view, the noting of the appeal by the applicant had the effect of suspending the order issued by Guvava J until the ^c conclusion of the appeal and the respondent is not entitled, without having obtained leave to execute the judgment, to remove the children from the jurisdiction of this court.

The applicant has, however, sought that the passports of the minor children be delivered to the Registrar of this court pending the hearing of the appeal ^d or written permission by the applicant for the removal of the children by the respondent. The removal of the passports from the respondent to the custody of the Registrar has the effect of interdicting the applicant from removing the children from Zimbabwe until the appeal has been determined. As the question of an interdict is part of the relief being sought in the final order of this application, it is not necessary in my view, that I come to a firm view as to ^e whether or not there exist factors entitling the applicant to such relief. My *prima facie* view of the matter is that the applicant was awarded access rights which may be prejudiced by the removal of the children in the absence of a variation of those rights to accommodate their intended place of abode.

The respondent did not really raise a defence to the application before me as ^f she sought to rely on issues of a technical nature. I am, therefore, inclined to grant relief as sought in the provisional order. In the premises, there will be an order in terms of the provisional order.

Atherstone & Cook, applicant's legal practitioners

^g *Scanlen & Holderness*, respondent's legal practitioners

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Source:

MOYO & ANOR v INTERMARKET DISCOUNT HOUSE LTD 2008 (1) ZLR 268 (S)**2008 (1) ZLR p268**

Citation	2008 (1) ZLR 268 (S)
Case No	Judgment No. S-60-07
Court	Supreme Court, Harare
Judge	Cheda JA, Ziyambi JA & Garwe JA
Heard	19 November 2007; CAV
Judgment	9 April 2008
Counsel	<i>E T Matinenga</i> , for the appellants <i>J C Andersen SC</i> , for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote**Contract** — *compromise* — *what is* — *effect of compromise on original cause of action***Practice and procedure** — *pleadings* — *what must be pleaded* — *parties entitled to plead only the facts and not the law or evidence* — *suit based on one ground but another one raised at trial* — *facts necessary to support other ground established* — *court entitled to base decision on that ground***Headnote**

The respondent sued the appellants for a sum of money, based on an acknowledgment of debt. The respondent had lent the appellants a sum of money which had not been repaid. The amount owing had increased due to interest. After negotiations, the appellants signed the acknowledgment of debt, but when the respondent sued, the appellants paid the original sum owed, plus interest up to the double, but claimed that the balance due under the acknowledgment of debt was illegal interest, as it offended against the *in duplum* rule. In its replication, the respondent claimed that the principal debt had been novated. At the trial, counsel for the respondent advised the court that he would be relying not on the principle of novation but on that of compromise, it being the respondent's stance that the principal debt had been compromised and was therefore recoverable. The trial judge found on the facts that indeed a compromise had been arrived at and accordingly gave judgment in favour of the respondent. The appellants argued on appeal that the trial court should not have found that the respondent's claim against the appellants was based on a compromise, because, in the summons and particulars of claim, the respondent had based its claim on the basis of an alleged novation.

2008 (1) ZLR p269

Ziyambi JA

^A *Held*, that the rules relating to pleadings require that a party must plead the facts on which his case is based and not the law applicable or the evidence by which he intends to establish those facts. Parties will be bound by their pleadings where any departure would be prejudicial to the other party or prevent a full enquiry. However, the courts have a wide discretion, and where there has been full investigation of a matter and ^B there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised. Here, the court

a quo had before it all the facts which were necessary to determine the real issue which arose before it, which was whether the agreement amounted to a compromise or a novation.

c Held, further, that compromise is the settlement by agreement of disputed obligations, or of a lawsuit the issue of which is uncertain. The parties agree to regulate their intention in a particular way, each receding from his previous position and conceding something either diminishing his claim or increasing his liability. A party sued on a compromise is not *d* entitled to raise defences to the original cause of action. On the facts, the trial court's conclusion – that there had been a compromise – was correct.

Cases referred to

Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A)

Commercial Bank of Zimbabwe Ltd v M M Builders & Suppliers (Pvt) Ltd & Ors 1996 (2) ZLR 420 (H); 1997 (2) SA 285 (ZH)

Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd 1998 (2) ZLR 488 (S)

Medispa (Pty) Ltd v Kroebel Tools & Products (Pty) Ltd 1988 (4) SA 415 (W)

Middleton v Carr 1949 (2) SA 374 (A)

Robinson v Randfontein Ests GM Co Ltd 1925 AD 173

Case information

E T Matinenga, for the appellants

J C Andersen SC, for the respondent

Judgment

g ZIYAMBI JA: The respondent instituted proceedings in the High Court for payment of the sum of \$18 382 120 596.74 with interest at the rate of 210 per cent *per annum* from 2 March 2004 to the date of payment and costs of suit on an attorney and client scale. The basis of the claim was an acknowledgement *h* of debt which came about in the following manner.

2008 (1) ZLR p270

Ziyambi JA

On 26 August 2003, the respondent lent and advanced to the second appellant *a* the sum of Z\$4 billion to facilitate the acquisition of a controlling interest in a public company called Trans Zimbabwe Industries Ltd (TZI). The shares were held by the respondent as security for the loan. In addition, the first appellant signed as surety for the due payment of the loan.

On the maturity date, the appellants were unable to pay the amount due and *b* the debt was rolled over to 29 February 2004 but the respondent indicated to the appellants that it would not roll the debt over again. Payment was not made and the amount due increased to in excess of Z\$32 billion. Demand by the respondent produced no result, causing the respondent to request further security from the appellants. In addition, the shares were to be placed on the market and, in the absence of satisfactory arrangements for payment, the *c* respondent was to institute proceedings for the recovery of the debt and liquidate the second appellant.

Negotiations then took place between the appellants and the respondent through its curator, regarding the settlement of the debt. After a number of meetings and discussions, the respondent agreed to a reduction of the amount *d* claimed. A figure of Z\$24 billion was suggested by the curator but this was rejected and the parties finally agreed on the figure of Z\$18 billion. So, it was that on 2 March 2004 the second appellant, represented by the first appellant, signed an acknowledgement of debt for "the due and proper payment, being capital plus interest, in the sum of \$18 382 120 596.74 ("the principal debt") by reason of a loan made and advanced to the company and any interest thereon *e* specified below ..." and, on 16 March 2004, the first appellant signed a personal guarantee for the payment to the respondent of all amounts owed to the respondent by the second appellant.

The appellants, at the pre-trial conference, admitted liability for the capital debt of Z\$4 billion, as well as interest up to the double and an order was given by *f* consent in favour of the respondent for the sum of Z\$8 billion. As to the balance of the claim in the sum of \$10 382 120 596.74, the

appellants pleaded that this was illegal interest in excess of the double which offended against the *in duplum* rule ¹ and which was accordingly not recoverable. The respondent in turn replicated that the parties had entered into a new loan agreement in terms of which the principal debt was novated on terms and conditions ⁶ particularised in the acknowledgement of debt annexed to the declaration.

2008 (1) ZLR p271

Ziyambi JA

^A At the trial, counsel for the respondent advised the court that he would be relying not on the principle of novation but on that of compromise, it being the respondent's stance that the principal debt had been compromised and was therefore recoverable. The learned judge found, upon an examination of the facts, that indeed a compromise had been arrived at. He accordingly, gave judgment in favour of the respondent.

^B The appellants appealed to this court on the following grounds:

- "1. The court *a quo* erred in finding that the respondent's claim against the appellants' was based on a compromise when in fact in the summons and particulars of claim, the respondent has not based its claim on a compromise but on the contrary, had based its claim on the ^C basis of an alleged novation.
2. The court *a quo* erred in proceeding to determine that there existed a compromise when in fact the respondent had not amended its claim so as to plead a compromise and therefore enable the court to determine that there was a compromise."

Mr *Matinenga*, for the appellants, did not take issue with the fact that a ^D compromise had in fact been arrived at. His contention was that the court *a quo* ought not to have based its decision on an issue which was not pleaded.

The learned judge in the court *a quo* approached the matter as follows:

"As a general and tried proposition, pleadings are restricted to averments of factual matters and do not afford the opportunity to a party to expound ^E on the law or legal principles.

Counsel for the defendant, with some justification, complained about the apparent shift in stance resorted to by the plaintiff's legal practitioners [namely] between the stance taken in their pleadings and the position at the trial. This court will endeavour to consider all the factual evidence with a view to arriving at a just and proper decision on this matter by regard ^F to the relevant legal principles applicable."

In my view, the approach of the learned judge was correct. To begin with, the rules relating to pleadings require that a party pleads the facts on which his case is based and not the law applicable or the evidence by which he intends to establish those facts. *Beck's Theory and Principles of Pleading in Civil* ^G *Actions* put it this way:

"Pleadings should state facts and facts only, that is to say, they should not contain a statement of either law or the evidence required to establish the facts."

2008 (1) ZLR p272

Ziyambi JA

It is true, as Mr *Matinenga* submitted, that the object of pleadings is to define ^A the issues. In this regard, the courts have held that parties will be bound by their pleadings where any departure would be prejudicial to the other party or prevent a full enquiry. However, as Innes CJ remarked in *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at p 198:

"... within those limits the court has a wide discretion, for pleadings are ^B made for the court, not the court for the pleadings, and where a party has had every facility to place all the facts before the trial court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been."

See also *Medispa (Pty) Ltd v Kroebel Tools & Products (Pty) Ltd* 1988 (4) SA 415 (W) at 421-2; ^C and *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 433, where Centlivres JA remarked:

"This was not the contract relied on by the defendant in his pleadings, and the position should have been regularised by an appropriate amendment. But in this case, where the contractual relationship between the parties ^D arose partly through the interchange of letters and partly through their conduct, all the material letters (excepting one in respect of which secondary evidence, which was rightly accepted by the magistrate, was led) were produced in evidence and the conduct of the parties was examined in *viva voce* evidence. This court, therefore, has before it all the materials on which it is able to form an opinion, and

this being the position ^Ε it would be idle for it not to determine the real issue which emerged during the course of the trial ...”

In a similar vein, it was said in *Middleton v Carr* 1949 (2) SA 374 (A) at 385-6:

“... as has often been pointed out, where there has been full investigation of a matter, that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the ^Γ court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised. But unless the court is satisfied that the investigation has been full, in the above sense, injustice may easily be done if the issue is treated as being before the court.”

As Mr *Andersen* submitted, it was clear on the record that there were no further facts requiring investigation and that the issue of the legality or otherwise of ^Θ the acknowledgement of debt was fully canvassed in the court *a quo*. Indeed, there was no suggestion by the appellants that there were any further facts which required investigation. Thus the court *a quo* had before it all the facts which were necessary to determine the real issue which arose before it, which was, whether the agreement amounted to a compromise or a novation. See also ^Η

2008 (1) ZLR p273

Ziyambi JA

A the following passage in R H Christie *The Law of Contract in South Africa* 3 ed at p 505 where the learned author says:

“Compromise, or *transactio*, is the settlement by agreement of disputed obligations, whether contractual or otherwise. If there is no such dispute there can be no compromise. It is a form of novation differing from ordinary novation in that the obligations novated by the compromise must ^Β previously have been disputed or uncertain, the essence of compromise being the final settlement of the dispute or uncertainty. The fact that a claim compromised subsequently turns out to have been invalid does not affect the validity of the compromise, but an illegal claim or a claim unenforceable on grounds of public policy cannot be validly compromised any more than it can be validly novated. However the contract may be ^Δ described by the parties, the court will look at the substance rather than the form in order to decide whether a particular obligation or dispute has been compromised” (my own emphasis).

As I indicated above, Mr *Matinenga* did not dispute the finding of the learned judge that on the facts there was a compromise reached by the parties. In view of that finding, which is supported by the evidence, the *in duplum* rule was ^Δ of no assistance to the appellants as any cause of action which they may have had before the new agreement of compromise was extinguished by that agreement. They are bound by the acknowledgement of debt. See *Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S) at 496D-H where Gubbay CJ said:

^Ε “Compromise, or *transactio*, is the settlement by agreement of disputed obligations, or of a lawsuit the issue of which is uncertain. The parties agree to regulate their intention in a particular way, each receding from his previous position and conceding something either diminishing his claim or increasing his liability. See *Cachalia v Harberer & Co* 1905 TS 457 at 462 *in fine*; *Tauber v von Abo* 1984 (4) SA 482 (E) at 485G-I; *Karson v Minister of Public Works* 1996 (1) SA 887 (E) at 893F-G. The purpose of ^Γ compromise is to end doubt and to avoid the inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect is the same as *res judicata* on a judgment given by consent. It extinguishes *ipso jure* any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved. See *Nagar v Nagar* 1982 (2) SA 263 (ZH) at 268E-H. As it brings legal proceedings already ^Θ instituted to an end, a party sued on a compromise is not entitled to raise defences to the original cause of action. See *Hamilton v van Zyl* 1983 (4) SA 379 (E) at 383H. But a compromise induced by fraud, duress, *justus error*, misrepresentation, or some other ground for rescission, is voidable at the instance of the aggrieved party, even if made an order of court. See ^Η *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co*

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Ziyambi JA

Ltd & Ors 1978 (1) SA 914 (A) at 922H. Unlike novation, a compromise is ^Α binding on the parties even though the original contract was invalid or even illegal. See *Hamilton v van Zyl supra* at 383D-E; *Syfrets Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd* 1991 (3) SA 276 (SEC) at 288E-F.”

Accordingly, it is my view, that the judgment of the court *a quo* is unassailable ^Β and the appeal is dismissed with costs.

CHEDA JA and GARWE JA concurred.

Atherstone & Cook, appellants’ legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners c

- 1 *Commercial Bank of Zimbabwe Ltd v MM Builders and Suppliers (Pvt) Ltd & Ors* 1996 (2) ZLR 420 (H); 1997 (2) SA 285 (ZH)
- 2 5 ed by I Isaacs at p 35

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 1/MOVEMENT FOR DEMOCRATIC CHANGE & ANOR v CHAIRPERSON, ZIMBABWE ELECTORAL COMMISSION 2008 (1) ZLR 275 (H)

MOVEMENT FOR DEMOCRATIC CHANGE & ANOR v CHAIRPERSON, ZIMBABWE ELECTORAL COMMISSION 2008 (1) ZLR 275 (H)

2008 (1) ZLR p275

Citation	2008 (1) ZLR 275 (H)
Case No	Judgment No. HH-37-08
Court	High Court, Harare
Judge	Uchena J
Heard	5 April 2008; 6 April 2008; 7 April 2008; 8 April 2008; 9 April 2008
Judgment	14 April 2008
Counsel	<i>A Muchadehama</i> , for the applicants <i>G Chikumbirike</i> , for the respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Election — *presidential election — results — announcement — need for result to proceed with urgency — delay in announcing results — when delay permissible — recount of poll — when may be ordered by D Commission — may justify delay in announcing results*

Election — *Zimbabwe Electoral Commission — proceedings against — need to cite chairperson — jurisdiction — jurisdiction of court to hear matter against Commission — court having jurisdiction to ensure Commission operating within law*

Ⓔ **Election** — *Zimbabwe Electoral Commission — standard required to be observed by — functions to be performed efficiently in accordance with the law*

Words and phrases — *"efficiently" — Constitution of Zimbabwe 1980 — s 61(4)(a) — means Zimbabwe Electoral Commission must act accurately and timeously in the discharge of its duties*

Headnote

Following the harmonized elections held on 29 March 2008, the results of the polls for the elections to Parliament and local authorities were announced within a few days thereof. To comply with the legal requirements, the results were announced at constituency levels by the respective constituency election officers and, subsequently, also announced by the second respondent, the chief elections officer of the Zimbabwe Election Commission. Notwithstanding this, the respondent had failed to announce the result of the poll for the office of President. The applicants, who were the main opposition party and its president, sought an urgent order compelling them to do so. They contended that the

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Uchena J

respondents were employing delaying tactics by announcing the results of already declared results for the House of Assembly and the Senate and that the results of the presidential poll should have been declared already.

It was argued on behalf of the respondents, firstly, that in view of the wording of s 61(5) of the Constitution, the court did not have jurisdiction to hear the application. Secondly, it was argued that, having regard to s 67A of the Electoral Act, the result of the Presidential polls could not be declared until the possibility of a recount of the presidential poll had been clarified. This, the first respondent alleged, was being considered as he had received several complaints relating to the poll. The respondents submitted that the Commission may, on its own initiative, order a recount and should it choose to do so, the decision and the extent of the recount should not be the subject of an appeal. The respondents argued that the first respondent, the Chairman of the ZEC, should not have been joined as he plays no role in the processing and announcement of presidential results.

Held, that the clear intention of the legislature in s 61(5) of the Constitution was to ensure the independence of the Zimbabwe Electoral Commission, provided that it operated within the law. It had to exercise its functions as provided by s 61(4) thereof, for it to enjoy immunity from direction and control. It could not conduct elections unfairly, outside the law and, on being sued, insist that the courts had no jurisdiction over it. In the circumstances, the court had jurisdiction to hear the application.

Held, further, that the first respondent was correctly cited in his nominal capacity as the Chairman of ZEC. Section 18 of the Zimbabwe Electoral Commission Act [Chapter 2:12] provides for his being cited in the event of legal proceedings against the ZEC.

Held, further, that it was not necessary to decide whether the ZEC was an "administrative authority" in terms of the Administrative Justice Act [Chapter 10:28]. Its conduct should be determined by whether it had complied with s 61(4)(a) of the Constitution, which required it to conduct elections "efficiently, freely, fairly, transparently and in accordance with the law". The use of the word "efficiently", when construed in conformity with the urgency provided for in the Electoral Act, meant the ZEC must act accurately and timeously. In the absence of an explanation, the delay in announcing the results seemed to be unjustified and pointed to a lack of efficiency. The period between the holding of the elections and the date of application was six days; three other elections involving greater

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Uchena J

A numbers of candidates had been processed and finalized at their levels within two days of the date of the elections.

Held, further, however, that the explanation proffered by the respondents for their failure timeously to announce the results of the presidential poll was legally valid. The Commission was considering the possibility of a recount, as it was entitled to do in terms of s 67A(4) of the Electoral Act [Chapter 2:13]. In terms of s 67A(7), any decision to order a recount and the extent thereof is not subject to an appeal, which means that the court could not inquire into that decision. In these circumstances, the application had to be dismissed with costs.

Legislation considered

Administrative Justice Act [Chapter 10:28], ss 2 and 3(1)(b)

Constitution of Zimbabwe 1980, ss 61(1), (4) and (5)

Electoral Act [*Chapter 2:13*], ss 64(2), 65 and 67A(1), (4) and (7), 110(3) and 112; 2nd Schedule paras (1) and 1(2), 2(1), (2), (3) and 3(1)

High Court Rules 1971 (RGN 1047 of 1971), rr 4C, 227(4), 229(c) and 262(2)

▫ Zimbabwe Electoral Commission Act [*Chapter 2:12*], ss 11 and 18

Case information

A Muchadehama, for the applicants

G Chikumbirike, for the respondents

Judgment

UCHENA J: The first applicant, the Movement for Democratic Change, is a ^ε political party, commonly known as the “MDC”. It will be referred to as the first applicant. The second applicant, Mr Morgan Tsvangirai, is its president. He was the first applicant’s presidential candidate in the just ended harmonized elections held on 29 March 2008. He will be referred to as the second applicant.

The first respondent is the Chairman of the Zimbabwe Electoral Commission, ^ϕ a Commission established in terms of s 61(1) of the Constitution of Zimbabwe. He was appointed in terms of s 61(1)(a) of the Constitution. He will be referred to as the first respondent. The Commission is commonly known as “ZEC”, in reference to the abbreviation of its name. It will be referred to as ZEC in this judgment. The second respondent is ZEC’s Chief Elections Officer appointed in terms of s 11 of the Zimbabwe Electoral Commission Act [*Chapter 12:12*], ^ϑ hereinafter called the Zimbabwe Electoral Commission Act. He will be referred to as the second respondent.

THE FACTS

The first respondent, through ZEC, conducted harmonised elections which ^η were held on 29 March 2008. The elections were contested by candidates

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aspiring for the following positions, councilors of local authorities, members ^α of the House of Assembly and the Senate, and President of the Republic of Zimbabwe. It is common cause that the contestants of the first three positions now know the results of their elections. The results were announced at the ward constituency, House of Assembly and Senatorial constituency levels. The winners were declared by the respective ward and constituency elections ^β officers. House of Assembly and Senatorial results have also been announced by the National Collation Centre presided over by the second respondent. It is conceded by the respondents that this was merely for the benefit of the general public as the legal requirements had been satisfied at constituency level.

The applicants who have an interest in presidential election results, filed an ^ϰ urgent application seeking this court’s provisional order, compelling the respondents to announce the results.

The respondents, while conceding that presidential results have not yet been announced, contended that they will announce them when they are ready. They contended, *in limine*, that they are not subject to the jurisdiction of this court. [▫]

After the court’s ruling on the issue of jurisdiction, Mr *Muchadehama* for the applicants submitted that the application was urgent and outlined the facts establishing the urgency. In response, Mr *Chikumbirike*, for the respondents, submitted that the application is not urgent, and should have been brought by way of ordinary application. ^ε

JURISDICTION

On 6 April 2008, before this case could be heard on the merits, Mr *Chikumbirike* for the respondents submitted that this court did not have jurisdiction to hear the applicant’s application. He relied on the provisions of s 61(5) of the Constitution which provides as follows: ^ϕ

“(5) The Zimbabwe Electoral Commission shall not, in the exercise of its functions in terms of subs (4), be subject to the direction or control of any person or authority.”

The provisions of subs (4) which are relevant to this application are found in subs (4)(1)(a). They provide as follows: ^g

“(4) The Zimbabwe Electoral Commission shall have the following functions:

- (a) to prepare for, conduct and supervise –
 - (i) elections to the office of President and to Parliament; and ^h

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- (ii) elections to the governing bodies of local authorities; and
 - (iii) referendums; and
- to ensure that those elections and referendums are conducted efficiently, freely, fairly, transparently and in accordance with the law.”

^b Mr *Chikumbirike* submitted that this court has no jurisdiction to hear the applicant’s complaint, and should therefore dismiss the application with costs.

Mr *Muchadehama* for the applicants submitted that the respondents are subject to the jurisdiction of this court and that is why s 18 of the Zimbabwe Electoral Commission Act provides for the citing of the first respondent as a ^c nominal citee. He further submitted that the court has jurisdiction to inquire into any complaint against the Zimbabwe Electoral Commission provided that it observes ZEC’s independence if it is complying with the provisions of the law. He further submitted that this court can intervene if the respondents stray from the provisions of the law. I agree with Mr *Muchadehama*’s submissions as it could never have been intended by the legislature that ZEC could conduct ^d itself outside the provisions of the law including the provisions of s 61(4) of the Constitution itself, and still remain outside the jurisdiction of this court.

The clear intention of the legislature in s 61(5) of the Constitution was to ensure ZEC’s independence, provided it was operating within the law. It has to exercise its functions as provided by subs (4) for it to enjoy that immunity. It ^e cannot, for example, conduct elections unfairly, outside the law, and which are not free and fair, but on being sued insist that the courts have no jurisdiction over it. The court would in such circumstances have jurisdiction to hear and determine complaints against ZEC.

It was for these reasons that I ruled that this court has jurisdiction to hear the applicant’s application.

^f **URGENCY**

After the ruling on the issue of jurisdiction, Mr *Muchadehama* made submissions on the urgency of the application. He submitted that s 110(3) of the Electoral Act [*Chapter 12:13*], hereinafter called the Electoral Act, ^g provides for a re-run within 21 days after the previous election in the event of no candidate obtaining a clear majority in the election. This, he submitted, means a delay in announcing the election results which will deprive candidates of sufficient time to prepare for the re-run. He also submitted that the ^h respondents would not have enough time to prepare for the re-run.

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Mr *Chikumbirike* for the applicants submitted that there was no urgency in ^a the applicants’ application because their cause of action was based on the announcement of the results of the presidential poll. He argued that those results were not due, as the provisions of the second schedule had not yet been complied with. He therefore reasoned that the cause of action would arise when the provisions of the second schedule of the Electoral Act would have ^b been complied with. He summed up by submitting that the applicant’s cause of action as stated in Mr Biti’s founding affidavit had not yet arisen; hence the absence of urgency in the application.

Mr *Muchadehama* in response disputed Mr *Chikumbirike*’s submission that the cause of action had not yet arisen. He submitted that Mr Biti’s affidavit complains of delays and the respondent’s wasting time on already declared ^c election results instead of doing what they are mandated to do, that is the collation and verification of presidential results and their announcement.

A reading of Mr Biti’s founding affidavit confirms that though he, in some paragraphs, emphasised the announcement of results he clearly brought out a case against the general delay. That was in

fact the theme of the applicants' complaint in paras 5, 11, 12, 13, 14, 16, 17, 24, 26 and 27. I am, therefore, satisfied ^o that the applicants' application is premised on delays and the respondents' wasting time doing everything else other than what they should have been doing. Therefore the cause of action has arisen, though the wording of the provisional draft order seeks the announcement of results within four hours of the service of it on the respondents. This can be corrected by a variation ^e in terms of r 246(2) of the High Court Rules 1971 which provides as follows:

"(2) Where in an application for a provisional order, the judge is satisfied that the papers establish a *prima facie* case he shall grant a provisional order either in terms of the draft filed or as varied."

This means that an application for a provisional order which has been *prima facie* proved cannot be dismissed because of a poorly drafted order. The court ^f can vary it and grant a correctly formulated provisional order consistent with the *prima facie* case proved. In fact, on being granted, the order becomes the court's order. The court must therefore be satisfied by its formulation before granting it.

It was for these reasons that I found the application was urgent and proceeded ^g to hear it on the merits.

PROCEDURAL ISSUES

In response to Mr *Muchadehama's* submissions on the merits, Mr *Chikumbirike* for the respondents raised several procedural issues which he ^h

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A should have raised as preliminary issues. He, in his first procedural issue, contended that the applicant's application was not made in the correct form. He submitted that it should have been in form 29 with appropriate modifications. Mr *Muchadehama* for the applicants in reply submitted that the applicants' application was made in the correct form and that even if it was not in the correct form, r 229C provides that such failure shall not, in itself, be a ground for ^b dismissing the application. The court can, however; dismiss such an application, if it has caused prejudice to the other party which cannot be cured by directions for service of the application on the other party with or without an order of costs. An examination of the applicant's application reveals that it is in form 29B when it should be in form 29 with relevant modifications, as ^c provided by the proviso to r 241(2). The respondents have, however, not suffered any prejudice. They were served with the application and they took no issue until during their counsel's response on the merits. Even though the issue was raised, no prejudice was alleged. I am satisfied that nothing turns on this as either r 229C or r 4C could be resorted to, to condone the application's failure to strictly comply with the proviso to r 241(2).

^o In his second procedural issue Mr *Chikumbirike* raised the issue of the applicants not having filed an answering affidavit. He submitted that this means the applicants have accepted the respondent's averments in the opposing affidavit. Mr *Muchadehama's* response was that most of the issues had already been put in contention by the applicant's founding affidavit deposed to by Mr Biti. That may be so in respect of the delay and aspects ^e related to it. It is however not correct in respect of the reason for the delay averred to in Chiweshe J's opposing affidavit. Chiweshe J said the delay is due to ZEC having received complaints about miscounting and is considering the evidence for it to decide whether or not to order a recount of the presidential votes before announcing the results. The failure to file an answering affidavit ^f disputing that fact means the fact that complaints have been received is not in dispute. However, the legality of the recount can still be challenged as it is a matter of law.

Mr *Chikumbirike*, in his third procedural issue, raised the issue of the second applicant not having filed any affidavit. He submitted that he should have filed a founding affidavit or at least a supporting affidavit verifying the averments ^g made on his behalf by the first applicant's deponent. Mr *Muchadehama*, in response, submitted that the averment by Mr Biti that he was authorized to depose to the founding affidavit by the second applicant, is sufficient. He relied on r 227(4)(a) which provides as follows:

^h "(4) An affidavit filed with a written application –

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- (a) shall be made by the applicant or respondent, as the case may ^a be, or by a person who can swear to the facts or averments set out in therein."

There is no dispute that Mr Biti is the Secretary General of the first applicant and can swear positively to issues involving the first and second applicants as regards events which took place in connection with the announcement of ^b presidential results. The issues in this case are purely party matters and the second applicant, being the first applicant's presidential candidate, is merely joined, not because he has issues for which he has separate and distinct information which the first applicant's Secretary General is not privy to. I would therefore find that nothing turns on this issue.

The affidavit filed by

Mr Biti satisfies the requirements of r 227(4). ^c

Mr *Chikumbirike's* fourth procedural issue was on para (1) of the draft provisional order seeking the same relief, as is sought in para (1) of the final order. Mr *Muchadehama* conceded the error and sought a variation of the provisional order so that it grants a relief different from that sought in the final order. This issue has already been dealt with in my ruling on the issue of urgency. ^d

Mr *Chikumbirike's* final procedural issue was on what he alleged was an improper joinder of the first and second respondents. He submitted that the first respondent plays no role in the processing and announcement of presidential results, and should therefore not have been joined with the second respondent in these proceedings. ^e

Mr *Muchadehama* in his response correctly submitted that the first respondent was correctly cited in his nominal capacity as the Chairman of ZEC. Section 18 of the Zimbabwe Electoral Commission Act provides for his being a nominal citee, just as the Minister of Home Affairs would be cited together with a constable who had committed a delict during the course of his duties. I find ^f no merit in Mr *Chikumbirike's* submission on this issue, especially in view of Chiweshe J's concession that there was no issue on the citation of the parties. The respondents, in their opposing affidavit, said the Commission received complaints about miscounting of the presidential votes which it is considering with a view to ordering a recount before those results are announced. This clearly confirms the importance of citing the first respondent ^g as a party as it is the Commission which is considering the complaints. The second respondent cannot deal with that issue, and cannot process and announce presidential results until that issue is resolved. The first respondent has, therefore, been correctly cited as a party in these proceedings. ^h

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A THE MERITS

On the merits, the applicants contended, through Mr Biti's founding affidavit dated 3 April 2008, that there has been an unreasonable delay in the processing and announcement of presidential results. They submitted that the harmonised elections having been held on 29 March 2008, the results for the presidential ^b poll should have been announced. They accused the respondents of employing delaying tactics by announcing the already declared results for the House of Assembly and the Senate. They submitted that the respondents were thereby avoiding their primary responsibility. They explained the procedure laid down in ss 64 and 65, and the second schedule of the Electoral Act which should have been followed and said it should not have taken long to collate, verify ^c and announce the results. They submitted that the procedure to be followed signifies the legislature's intention that the results of the poll must be processed and be announced without any undue delays.

On the issue of delays, Mr *Chikumbirike* for the respondents submitted that the respondents had not strayed from what the electoral laws require them to do. They cannot therefore be compelled to release the results when they were ^d operating within the law. He submitted that there was no provision in the Electoral Act requiring the respondents to collate, verify and announce the results in a specified period. He therefore argued that the respondents were entitled to act at their own discretion, but in terms of the electoral laws.

PROVISIONS OF THE ELECTORAL LAWS AND THEIR ^e INTERPRETATION

The question of whether or not the respondents are operating within the law can only be determined after an analysis of provisions of the Electoral Act which deal with the transmission of presidential

results from polling stations through constituency centres to the Chief Elections Officer.

¶ Section 64(2) of the Electoral Act provides for the transmission of polling station returns as follows:

"(2) Immediately after affixing a polling station return on the outside of the polling station in terms of subsection (1)(e), the presiding officer shall personally transmit to the constituency elections officer for the constituency to which the polling station belongs – g

(a) ...

(b) the polling-station return certified by himself or herself to be correct:

Provided that if, by reason of death, injury or illness, the presiding h officer is unable personally to transmit the ballot box, packets, statement

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and polling station return under this subsection, a polling officer who was A on duty at the polling station shall personally transmit these ..."

It is clear from the provisions of this section that polling station returns and other election results material must be urgently, and under the personal care of the presiding officer, be sent to the constituency elections officer. Even the death, injury or illness of the presiding officer is not allowed to delay the B transmission of the polling station returns and other election result material to the constituency elections officer. In the event of death, injury or illness a polling officer must take over and deliver them with the same urgency the presiding officer should have done. The presidential polling station return is part of the material to be urgently transmitted.

The second schedule to the Electoral Act in para 1(1) and (2) provides for the C further handling and transmission of presidential results. It provides:

"(1) After the number of votes received by each candidate as shown in each polling-station return has been added together in terms of subparagraph (1) of subsection (3) of section 65 and the resulting figure added to the number of postal votes received by each candidate, the constituency elections officer shall forthwith – D

(a) record on the constituency return the votes obtained by each candidate and the number of rejected ballot papers in such a manner that the results of the count for each polling station are shown on the return;

(b) display the completed constituency return to those present and E afford each candidate or his or her election agent the opportunity to subscribe their signature thereto; and

(c) transmit to the Chief Elections Officer by hand through a messenger the constituency return or a copy thereof certified by the constituency elections officer to be correct.

(2) Immediately after arranging for the constituency return to be F transmitted in terms of paragraph (c) of subparagraph (1), the constituency elections officer shall affix a copy of the constituency return on the outside of the constituency centre so that it is visible to the public."

The provisions of para 1 of the second schedule clearly express the urgency with which the constituency return has to be transmitted to the ("second respondent") the Chief Elections Officer. A reading of subpara (1)(c) and G subpara (2) reveals the urgency through the use of the word "immediately" and the fact that the affixing of the constituency return outside the constituency centre can only be attended to after the Constituency Elections Officer has arranged for the transmission of the constituency return to the Chief Elections H

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A Officer.

The question that has to be answered is why should these returns be urgently transmitted from polling stations and constituency centres, if the legislature did not expect the Chief Elections Officer to equally attend to them without delay? The inquiry must be taken to the next and subsequent stages of the B process.

Paragraph 2(1) of the second schedule provides:

"(1) The Chief Elections Officer shall give reasonable notice in writing to each candidate or his or her chief election agent of the time and place where the Chief Elections Officer will verify and collate all the constituency returns."

c Mr *Chikumbirike* seems to rely on this paragraph for the absolute discretion he claims for the respondents. It is true that no time within which the notice shall be given is specified, but does it mean the second respondent was intended to take whatever time he deemed necessary before inviting the candidates for the collation and verification of the constituency returns? An analysis of para 2(1) seems to reveal that the apparent relaxation of the d urgency previously insisted on in the preceding sections and paragraphs could be for the benefit of the invitees. The Chief Elections Officer must await their arrival before the collation and verification starts. Even if that was the intention of the legislature, the Chief Elections officer, should have been required to invite them forthwith or immediately after receiving returns from e the constituencies. It must be noted that these returns will be transmitted by hand from all constituencies scattered throughout the country. The distance between each constituency centre and the National Collation Centre determines the arrival of each return. The legislature could, in those circumstances, have provided for urgency soon after the receipt of the last return. The fact that it did not leaves its intention unclear. However, in the construction of statutes f the intention of the legislature can be ascertained from the context within which the provision in question is found. This part of the second schedule should therefore be construed in conformity with the whole schedule and other provisions of the Electoral Act. The inquiry must therefore, move on to the remaining provisions under para 2.

g Paragraph 2(2) provides as follows:

"(2) At the time and place notified for the verification and collation of the constituency returns referred to in subparagraph (1) and in the presence of such candidates, their chief elections agents and observers as are present, the Chief Elections Officer shall display each constituency return h to those present and shall, on request, allow a candidate or chief election

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agent of a candidate to make notes of the contents of each constituency a return."

This paragraph establishes that at the time notified the collation and verification should start and continue irrespective of the absence of other candidates. The words "as are present" are instructive. The urgency which seems to have been abandoned in subpara (1) seems to have been resumed. In para 2(3), the b legislature provided:

"(3) When the Chief Elections Officer has completed the verification of the constituency returns under subparagraph (2) the Chief Elections Officer shall, in the presence of such persons referred to in subparagraph (2) as are present, add together the number of votes received by each candidate as shown in each constituency return." c

This means once the invitees referred to in subpara (1) arrive, verification and collation shall continue in their presence. We move on to para 3(1) which provides:

"3(1) Subject to subparagraph (2), after the number of votes received by each candidate as shown in each constituency return has been added together in terms of subparagraph (3) of paragraph 2, the Chief Elections d Officer shall forthwith declare the candidate who has received [the qualifying votes in terms of (a) and (b)] to be duly elected as President of the Republic of Zimbabwe with effect from the day of that declaration."

This means that, once the verification and collation starts, it continues until the winning candidate is forthwith declared the president of Zimbabwe if the e result produces a winner with a majority of the votes cast. This clearly proves urgency is presumed from the time the invitees come till the declaration of the winner. This means that from the transmission of the polling and constituency returns, the legislature intended that officials must urgently forward returns to the Chief Elections Officer who must after the arrival of invited candidates or their agents urgently collate and verify and declare the result of the f presidential poll.

Mr *Muchadehama* submitted that s 110(3) of the Electoral Act must be factored in, in ascertaining the legislature's intention on whether or not the respondents were intended to act with urgency. The section provides as follows:

"Where two or more candidates for President are nominated, and after a poll g taken in terms of subsection (2) no candidate receives a majority of the total votes cast, a second election shall be held within twenty-one days after the previous election in accordance with this Act." h

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A He further submitted that the possibility of a second election within twenty-one days is consistent with the urgency expressed in the sections and paragraphs already discussed above. He said the time for the second election is fast approaching and, according to his calculation, the second election must be held on 19 April 2008. He submitted that the legislature, being aware of the possibility of a re-run, could not have intended para 2(1) of the second B schedule to give the second respondent a wide discretion as to when he should collate and verify constituency returns. The limited period between the first and second election suggests that the first election's results must be processed with urgency to avoid prejudicing candidates who will be contesting the second election. The processing of presidential results must, in my view, be given priority when compared to the announcement by the National C Collation Centre of other elections which have no possibility of a re-run. I am, therefore, satisfied that the legislature intended that presidential election results should be processed without any undue delay.

It is, however, not in dispute that the legislature did not specify the period within which presidential results should be collated, verified and announced. D Mr *Muchadehama* said it must be within a reasonable time and relied on the provisions of s 3(1)(b) of the Administrative Justice Act [Chapter 10:28] (hereinafter called the Administrative Justice Act). It provides as follows:

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

- (a) act lawfully, reasonably and in a fair manner; and
- (b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned."

Mr *Chikumbirike* for the respondents contended that the Administrative F Justice Act does not apply to the respondents as the Commission is not an administrative authority. Mr *Muchadehama* contended that it is and relied on its being created in terms of s 3 of the Zimbabwe Electoral Commission Act. Mr *Chikumbirike* submitted that s 3 of the Zimbabwe Electoral Commission Act has since been repealed and substituted. He is correct. The provision which created the Commission in the Zimbabwe Electoral Commission Act G was repealed and substituted by one which provides for the procedure it shall follow and how it shall perform its functions. The Commission as it now stands was established in terms of s 61(1) of the Constitution. Mr *Muchadehama* countered that, in any event, the second respondent remains within the H meaning of "an administrative authority" as defined by s 2 of the Administrative

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Justice Act, as he is authorized by "an enactment to exercise or perform any A administrative power or duty". I agree with Mr *Muchadehama's* submission because the Chief Elections Officer is employed by ZEC in terms of s 11 of the Zimbabwe Electoral Commission Act, and his duties and functions are specified in that section. The remaining issue on that aspect is whether the establishment of ZEC by the Constitution excludes it from the definition of an "administrative authority". B

Mr *Muchadehama* further submitted that ZEC remains an "administrative authority" by virtue of the provisions of Parts I and II of the schedule to the Administrative Justice Act. Mr *Chikumbirike* submitted that that is not the correct way of determining whether or not ZEC is an administrative authority. Mr *Muchadehama's* submission is premised on the fact that ZEC is not C mentioned among the administrative authorities for which the application of the Administrative Justice Act is limited or excluded. It is true that ZEC is not mentioned in Parts I and II of the Schedule, but the limitation and exclusion must only apply to those who fall under the definition of "administrative authority". B Those who do not fall within the definition need no limitation or exclusion from the application of the Act as they are already not affected by D its application. I would therefore agree with Mr *Chikumbirike* that the fact that ZEC was not mentioned in Parts I and II does not assist in the determination of whether or not it is an "administrative authority".

Mr *Muchadehama* sought to establish the validity of the applicant's claim that ZEC had acted outside the law by proving that it, as an "administrative E authority", had not announced the presidential results within a reasonable time. In my view, the conduct of ZEC should be measured against s 61(4)(a) of the Constitution, which provides as follows:

"The Zimbabwe Electoral Commission shall have the following functions –

- (a) to prepare for, conduct and supervise:

- (i) elections to the office of President and to Parliament; ^F
- (ii) elections to the governing bodies of local authorities;
- (iii) referendums; and

to ensure that those elections and referendums are conducted efficiently, freely, fairly, transparently and in accordance with the law.”

The standard set by the legislature in the Constitution is for ZEC to perform ^G any function required of it by the legislature through the Constitution, the Electoral Act or the Zimbabwe Electoral Commission Act, efficiently, freely, fairly, transparently and in accordance with the law. The use of the word “efficiently”, when construed in conformity with the urgency provided for in the Electoral Act, means ZEC must act accurately and timeously. ^H

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^A In this case, the question to be answered is, did the respondents act efficiently, fairly, transparently and in accordance with the law in regard to the collation, verification and announcement of presidential results? If they did, that should be the end of the inquiry. If they did not, the failure must be identified before this court can intervene and order compliance.

When the above criteria are applied to the facts of this case and the law as ^B provided in the Electoral Act, the applicants’ allegations that there was delay seems to be justified by the legislature’s intention that the election results must be processed without undue delay. This intention is revealed through the provisions which provide for the urgent transmission of polling station returns and constituency returns to the Chief Elections Officer, and how he ^C should conduct the collation, verification and the declaration of the winning candidate. In the absence of an explanation, the delay between 29 March 2008 and 4 April 2008 seems to be unjustified and points to a lack of efficiency. The period between the holding of the elections and the date of application is six days. Three other elections involving greater numbers of candidates were processed and finalized at their levels within two days of the date of the ^D elections. The work to be done by the Chief Elections Officer is made simpler by the counting and collation done at polling stations and constituency levels. All he has to do is to verify and display the constituency returns and add the figures thereon to identify the winning candidate whom he should forthwith declare to be the President of Zimbabwe. This task should, all things being equal, not have taken the second respondent up to 4 April 2008 to ^E announce the presidential results.

THE EXPLANATION

The respondents explained the delay through Chiweshe J’s opposing affidavit. In para 18 of his opposing affidavit, he said:

^F “In response to the letter of 2 April 2008 Annexure ‘B’ I had prior to receiving the application, which was served on me last night, prepared a press statement, which I intended to release, not only to inform the applicants of the Commission’s position on these issues, but to the country and world at large. I attach a copy of the statement and request this honourable court to incorporate it as part of this affidavit. The statement relates extensively and accurately to the correct legal position. ^G This statement is annexed as Annexure ‘C’.”

At pp 2 to3 of Annexure “C” he explained that ZEC had received several complaints in terms of ^s 67A of the Electoral Act.

^H At p 2 of Annexure “C” he said “In this process, sight must not be lost of the

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provisions of ^s 67A(1) of the Electoral Act (Electoral Laws Amendment Act ^A No. 17 of 2007),” which provides as follows:

“(1) Within 48 hours after a constituency elections officer has declared a candidate to be duly elected in terms of section 66(1), any political party or candidate that contested the election in the ward or constituency concerned may request the Commission to conduct a recount of votes in ^B one or more of the polling stations in the ward or constituency.”

This is a right accorded to a candidate or a political party, who/which contested an election for either House of Parliament. The same is also applicable to a presidential candidate, by virtue of the provisions of Part XVIII in s 112, which imports Part XIII of the Electoral Act (where s 67A is found). For the avoidance of doubt, I refer to this section below: c

"Subject to this Part, the provisions of Parts XIII (other than sections 66, 67, and 68, for which the provisions of the second schedule are substituted), XIV, and XV, shall apply, with any changes that may be necessary, to an election to the office of President."

After explaining the effect of a miscounting, even by one vote, could have on a presidential election, Chiweshe J concluded at pp 3-4 by saying:

"The Commission, it must be put on record, has received several complaints in terms of s 67A.

The Commission is in the process of considering the evidence submitted, to determine whether a recount should or should not be done. The question as to whether to order a recount, or not, is entirely in the E discretion of the Commission. This is provided in s 67A(7) which provides –

'The Commission's decision on whether or not to order a recount and, if it orders one, the extent of the recount shall not be subject to appeal'."

INTERPRETATION OF THE LAW APPLICABLE TO THE EXPLANATION F

The prospect of a recount generated spirited legal arguments for and against it. Mr *Muchadehama* submitted that s 67A, being part of s 67, was excluded from the sections which were imported into Part XVII by s 112. He further argued that s 67A does not apply to presidential elections, because it is not found in Part XVII where presidential elections are provided for.

Mr *Chikumbirike* for the respondents argued that s 67A is a section of the G Electoral Act in its own right and was imported into Part XVII by virtue of its not having been mentioned among the sections excluded by s 112.

I agree with Mr *Chikumbirike*, because a section in a statute has its own separate existence even if it shares a section number with another section. It H

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A is distinguished from the preceding section by the letter added to the section number it shares with the preceding section. A section in a statute is constituted by the provisions after its section number up to the last subsection under it. In this case, s 67 ends with subs (3), and the next section which is s 67A follows. Section 67A was not in the original Electoral Act. It was introduced by s 48 of Act 17 of 2007. If the legislature intended to make it part of s 67 it B would have introduced it into the Act as a subs of s 67. A new section is usually placed in the part of the statute where it fits into the scheme of the Act. In this case, it was placed between s 67 which provides for the notification of the result of an election, and s 68, which provides for the publication of the names of elected candidates in the *Gazette*, because that is where a recount C conveniently fits into the scheme of the Electoral Act. It determines the winning candidate whose name should be published. I am therefore satisfied that s 67A enjoys a separate existence from s 67. Therefore, its exclusion from the sections of Part XIII, excluded by s 112 from importation into Part XVII, means it was imported into Part XVII.

Mr *Muchadehama* for the applicants summed up by submitting that even if D s 67A is held to be part of Part XVII, it does not apply to presidential elections because they have not yet been announced. For that argument, he relied on s 67A(1)'s provision that the complaint by a party or candidate must be made within forty-eight hours after a candidate for that election has been declared duly elected. Mr *Chikumbirike* for the respondents submitted that the forty-eight hours within which the complaint must be raised after the winning E candidate has been declared does not apply to presidential elections because s 112 provides for "necessary changes" in the importation of Parts XIII, XIV and XV into Part XVII.

Section 67A, as already found, is part of Part XVII, by virtue of its importation thereto by s 112. It therefore applies to presidential election results with the F necessary changes referred to by s 112. I however do not agree with Mr *Chikumbirike* that the necessary changes extend to the substantive provisions of s 67A. Where in a statute a provision from one Part of a Statute is imported into another part of the same statute, to "apply, with any changes that may be necessary" the court interpreting that statute is not allowed to re-enact the relevant provision. It can only make necessary changes to make the provisions G fit into the importing Part. That power is limited to

changing things like, the names of officers who should act as provided by the importing Part, the sections empowering them to act and the places where they are authorized to act etc. The substantive provisions cannot be changed. They are in fact the reason for the importation. They are intended to influence the provisions of

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A the importing Part.

In this case s 67A(1), will after the necessary changes have been made read as follows:

“(1) Within forty-eight hours after the Chief Elections Officer has declared a candidate to be duly elected in terms of section 110(6), as read with the provisions of the second schedule, any political party or candidate that B contested the election for the office of President, may request the Commission to conduct a recount of votes in one or more of the polling stations.”

In its changed form, s 67A(1) means a recount can only be requested within forty-eight hours after the declaration of the results of the presidential election. A recount before the announcement of the results, is in terms of C s 67A(1) as imported into Part XVII, not provided for. If the request for a recount in terms of s 67A(1) is the reason for the delay in announcing the presidential results, the delay is based on an incorrect interpretation of s 67A(1). It would thus be an invalid reason for delaying the announcement of the presidential election results.

Mr *Chikumbirike* for the respondents further submitted that even if the forty-eight D hours apply, ZEC can, on its own initiative, order a recount in terms of s 67A(4) which provides as follows:

“The Commission may on its own initiative order a recount of votes in any polling stations if it considers there are reasonable grounds for believing that the votes were miscounted and that, if they were, the miscount would E have affected the result of the election.”

Mr *Muchadehama* for the applicants, submitted that s 67A(4) should not be read in isolation, but together with s 67A(1). He submitted that, if read in the context of the whole section, it means any recount contemplated by it can only be done after the announcement of the results.

An analysis of s 67A(4) reveals that ZEC can act on its own initiative to order F a recount. It does not state when it can do so as is specified in respect of subs (1). The information on which it may act can come from any source including a complaint as provided in subs (1). It simply should have reasonable grounds for believing that votes were miscounted. If the legislature intended to restrict the first respondent to considering a recount after the announcement, G it could have made reference to subs (1) as is done in subs (3). The wide discretion given to the first respondent on this aspect is confirmed by the provisions of subs (7) of s 67A. It provides as follows:

“(7) The Commission’s decision on whether or not to order a recount and, if it orders one, the extent of the recount shall not be subject to appeal.” H

2008 (1) ZLR p293

Uchena J

A The fact that ZEC’s decision to recount and the extent thereof is not subject to an appeal means that it was intended to act independently and that its decision would be final. The provision barring an appeal simply means ZEC has been given a very wide discretion as to whether or not to order a recount. The provision that ZEC’s decision shall not be subjected to an appeal also means this court can not inquire into that decision. This should, therefore, be B the end of the inquiry, as ZEC’s conduct can only be open to the jurisdiction of this court when it strays from the law.

I should, therefore, find that the reason proffered by the respondents for their failure to timeously announce the presidential results is legally valid. It can, therefore, justify the delay. The respondents have not strayed from the law. C This court is therefore not entitled to intervene and order the respondents to announce the results on the basis of failure to comply with the law.

Mr *Chikumbirike* sought costs against the applicants’ and their legal practitioners, on the higher scale. He submitted that the applicants’ application was not necessary as the applicants could have sought for information from the respondents. He also relied on the fact that there are no time limits within D which the respondents are required to act, a fact which the applicants should have known. Mr *Muchadehama* in response to the issue of costs said if any costs are to be ordered they should be on the ordinary scale. He disputed that the application could have been avoided as their letter of 2 April 2008 was not responded to. The issue of costs is in the court’s discretion. That discretion E

must be exercised in a manner that does not discourage litigants from approaching the courts. Electoral matters are very important to candidates, political parties and the nation. In this case the whole nation is waiting for results. The applicants were anxious at the time they made their application. Their legal practitioners wrote a letter expressing anxiety and demanding the results but did not get a reply till they resorted to this application. They should not be penalized by costs on the higher scale for making an application in circumstances where delay is conceded but has now been explained because of their application.

I would, in the result, dismiss the application with costs on the ordinary scale.

¶ *Mbidzo Muchadehama & Makoni*, applicants' legal practitioners

Chikumbirike & Associates, respondents' legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 1/DZVOVA v DZVOVA 2008 (1) ZLR 294 (H)

DZVOVA v DZVOVA 2008 (1) ZLR 294 (H)

2008 (1) ZLR p294

Citation	2008 (1) ZLR 294 (H)
Case No	Judgment No. HH-39-08
Court	High Court, Harare
Judge	Makarau JP
Heard	25 March 2008
Judgment	7 May 2008
Counsel	Mrs J V Pratt, for the plaintiff R Y Phillips, for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Family — husband and wife — divorce — division of property following c divorce — principles to be applied — "clean break" principle — not part of our law

Headnote

The "clean break" principle, as its name implies, envisages a situation where, after divorce, there are no strings, financial or social, tying the parties one to the other. The parties are given their due from the failed marriage and left to pick up their lives and move on. This, on the face of it, appears to be the desire of most plaintiffs and some defendants in divorce actions. On the other hand, s 7(3) of the Matrimonial Causes Act [*Chapter 5:13*] introduces a duty on the court divorcing the parties to maintain, as far as is reasonable and practicable, the *status quo* of the

lifestyle that the spouses had during the subsistence of the marriage. Upholding one obviously frustrates the other. The Act does not specifically embrace and provide for the clean break principle. On the contrary, it provides for the continuance of the marriage as far as is reasonable and practicable after divorce. It is on this basis that the High Court has made orders for custodian parents to remain in occupation of the matrimonial residence after divorce and until the youngest child attains majority. It is on this basis that the court has ordered the procurement of new residences or motor vehicles for divorced spouses to achieve the objectives of the Act. It could thus be appropriate, where division of the matrimonial home is ordered, to take into account one party's need to remain in the property, ⁶ if that outweighs the other's need to realize her one half share of the property immediately and achieve a clean break from the first party, and allow the first party to remain in possession of the home. ⁸

2008 (1) ZLR p295

Makarau JP

Cases cited ^A

Nyatawa v Nene 1990 (1) ZLR 97 (H)

Takafuma v Takafuma 1994 (2) ZLR 103 (S)

Legislation considered

Matrimonial Causes Act [*Chapter 5:13*] s 7(3)

Case information

^B Mrs J V Pratt, for the plaintiff

R Y Phillips, for the defendant

Judgment

MAKARAU JP: The plaintiff and the defendant were married in Harare in February 1982. There are no children to the marriage. The parties have realised ^c that they no longer have love and affection for each other and that their relationship has broken down and cannot be retrieved. They came to this joint conclusion at a pre-trial conference that was held after the plaintiff had issued summons for divorce in January 2006. At the same pre-trial conference, the parties also agreed on how to share the movable assets of their joint estate in the event that the court agreed with them that their marriage cannot be ^d salvaged and granted a divorce in the matter. The sole issue that remained for determination was how to distribute the immovable property of the marriage, namely, stand No. 493 Houghton Park Township. It was the plaintiff's contention that she be awarded 50 per cent of the net proceeds from the sale of the property. On the other hand, the defendant argued that the immovable ^e property was his sole property and that it should be declared as such. He further argued that in the event that the court awarded a share to the plaintiff, the property should only be sold upon his death as to do so prior would be to render him homeless.

The facts of this matter regarding the acquisition of the immovable property are to a large extent common cause. When the parties married, they were in ^f rented accommodation; they then secured a vacant stand in or about 1985. At that time, he was the one in gainful employment. She would then use her time to attend to all those tasks that required someone who had more time on their hands. The property was registered in their joint names. The parties developed the stand to its current state from the proceeds of a loan secured by a bond ^g over the property which loan he repaid from his earnings.

In 1997, she became gainfully employed and had the kitchen and the bathrooms tiled. She also had cupboards installed in the kitchen. This was from her earnings.

It is further common cause that the parties assisted his family to put up a ^h residence at a farm that he considers as his family home. Her parents owned

2008 (1) ZLR p296

Makarau JP

a property in Dube, Soweto, South Africa and upon their untimely demise, ^a either the property passed on to her, (which fact she denies) or she has the right to reside in the property.

The plaintiff is in her mid-fifties while he turns sixty-seven next September. He is on pension from a company that he worked for, for thirty four years. He is currently a contract worker with the same employer. ^b

During the trial of the matter, both gave evidence. As indicated above, their evidence is largely common cause. She admitted that whilst the property is registered in their joint names, he developed the stand virtually on his own save for the tiling of the kitchen and of the bathrooms that she saw to after she obtained employment in 1997. He admitted that since the property was acquired during the subsistence of the marriage, she is entitled to a share but ^c that she should only be able to realize that share upon his demise. He further testified that the plaintiff is South African by origin and after divorce, she will return to South Africa where her family is. She has a son from a previous marriage who at one stage lived at the family home in Soweto which has been left by her parents.

Although I found both to be generally good witnesses, it is, in my view, ^d pertinent that at this stage I mention that I have accepted the defendant's contention as more probable, that the plaintiff is unlikely to remain in Zimbabwe after the divorce. I did not believe her averments that she will stay in the country as she has developed a clientele for a catering service. With the economic downturn that the country is experiencing resulting in the shortage ^e of basic commodities, her line of business is not the most lucrative and would hardly entice her to stay where she has an option to leave. I have also based my finding on the admitted fact that she has already taken to that country some of her clothes. She argues that these are now a wee bit loose as she has lost weight. I do not believe her in that regard. She has accommodation in South Africa even if she may not own that property. She has not sought to find and ^f establish another home in Zimbabwe for herself even after filing for divorce. She has sold some of the movable assets that the parties agreed could be retained by her as her sole and absolute property.

Two issues fall for determination in this matter. Firstly, I have to determine whether from her 50 per cent share in the property, I may deduct any percentage to award to the defendant in exercising the discretion vested in me ^g by s 7 of the Matrimonial Causes Act [*Chapter 5:13*] (the Act). Having made that determination, I will have to go further and establish whether there is any basis upon which I can make any consequential or supplementary provisions to give effect to the award that I would have determined under the first issue.

I return to the first issue. ^h

2008 (1) ZLR p297

Makarau JP

^a It is common cause that the property in issue is registered in the parties' joint names. As has been held in the much cited case of *Takafuma v Takafuma* 1994 (2) ZLR 103 (S), the plaintiff is a half owner in the immovable property. Such ownership is not derived from her status as a wife nor does it arise from the direct contributions that she made towards the acquisition of the property. She is an owner by virtue of the registration of her name against the Deed of ^b Transfer in respect of the property. Her title to the property in this regard holds against the world at large and, to an extent, against her husband, unless he can show recognizing her right in the property will not achieve the objectives set out in the Act, namely of placing the spouses in the position they would have been in had a normal marriage relationship continued, as far as this is ^c reasonable and practicable.

In the result, I will award 50 per cent of the net value of the property to the plaintiff.

The second issue that falls for determination in this matter has exercised my mind. The plaintiff has argued that upon the granting of the divorce, the property in dispute must be sold and the proceeds shared in terms of the ^d respective awards. He in turn has pleaded that he is a pensioner. He has no means to purchase the plaintiff's one-half share in the property so as to save the property from being sold immediately upon the granting of the divorce. He is still employed as a contract worker and cannot therefore relocate to the farm which he considers his rural home. He is too old to start his hand at ^e farming. In this regard, he has further pleaded that I put a condition that the property can only be sold upon his demise.

The parties' positions above in my view bring into focus the contrast between the "clean break" concept in divorces and the objectives of s 7 of the Act that imposes a duty upon the court to view

the distribution of the matrimonial assets as if a marriage between the parties continues. The plaintiff's stance ^F is clearly a manifestation of the clean break concept. She would want to break cleanly from him and realize her share of the immovable property upon the granting of the divorce and move on with the remainder of her life. His is the exact opposite. He would not want the divorce to unsettle his life save as for that which cannot be avoided. In this regard he would want to remain in the ^G property until his death notwithstanding the granting of the divorce.

In *Nyatawa v Nene* 1990 (1) ZLR 97 (H), Ebrahim J (as he then was) had occasion to remark on the place of the clean break concept in our divorce law in the context of the provisions of the Matrimonial Causes Act. He was of the ^H view that the statutory objective as set by s 7(3) of the Act is foreign to our

2008 (1) ZLR p298

Makarau JP

legislation and militates against the clean break theory or principle towards ^A which the entire statute is geared.

The learned judge proceeded to note that our own legislation, the Matrimonial Causes Act, was promulgated very shortly after the repeal from the English equivalent of a similar provision, and our legislature did not take the opportunity to include the clean break principle in the legislation. ^B

As stated by the learned judge in the judgment, the clean break principle, as its name implies, envisages a situation where, after the divorce, there are no strings, financial or social, tying the parties one ^D to the other. Each party is given their due from the failed marriage and is left to pick up their lives and move on. This, on the face of it, appears to be the desires of most plaintiffs and some defendants in divorce actions. ^C

On the other hand, s 7(3) of the Act introduces a duty on the court divorcing the parties to maintain as far as is reasonable and practicable, the *status quo* of the lifestyle that the spouses had during the subsistence of the marriage. Upholding one obviously frustrates the other.

While our Act was framed on the basis of the South African equivalent, which ^D in turn was framed after the fashion of the English one, the Matrimonial Causes Act does not specifically embrace and provide for the clean break principle. On the contrary, it provides for the continuance of the marriage as far as is reasonable and practicable after divorce. It is on this basis that this court has made orders for custodian parents to remain in occupation of the matrimonial residence ^F after divorce and until the youngest child attains majority. It is on ^E the basis of this that this court has ordered the procurement of new residences or motor vehicles for divorced spouses to achieve the objectives of the Act.

On the basis of the foregoing, while the plaintiff is entitled to 50 per cent of the net proceeds from the sale of the property of the marriage, she is not as of right entitled to enjoy that award upon the granting of the divorce. She ^F would only be so entitled if the clean break principle was a part of our divorce law. It clearly is not.

As indicated above, I have found on a balance of probabilities that the plaintiff will return to South Africa upon the granting of the divorce. I have taken this into account in weighing the equities of the matter before me.

I have also taken into account on the other hand that he is still employed ^G although on a contract basis. He is advanced in age and is unlikely to raise funds that will enable him to pay off the plaintiff to retain full ownership of the property. From his one-half share he is unlikely to pay for rented accommodation for any appreciable period. His circumstances are, in my view, such that his ^H

2008 (1) ZLR p299

Makarau JP

^A need to remain in the property outweighs her need to realize her one half share of the property immediately and achieve a clean break from the defendant.

I have taken into account that it may take the plaintiff quite some time before she can realize her one-half share of the property. This I have weighed against her minimal cash outlay towards the acquisition and development of the ^B property during the subsistence of the marriage. In my view, the two balance each other evenly. Thus, where she has gained by contributing less than him in

monetary terms, he will gain by her wait on the terms I shall spell out in the order. In making this award, I am guided by the objective of s 7 of the Act of trying as far as is reasonable and practicable to maintain the *status quo stante matrimonii* where both were equal owners of the property. I have attempted c to achieve that equality after divorce.

In the result, I make the following order:

- 1 A decree of divorce is hereby granted.
- 2 Each party shall retain as their sole and exclusive property the movable assets in their possession. d
- 3 Each party is awarded 50 per cent of the net value of stand No. 493 Ardbennie Township 3 of Subdivision A of Ardbennie.
- 4 The defendant is hereby granted the right to remain in occupation of the property until he dies or lives with another person after the manner of husband and wife whichever occurs sooner. e
- 5 Each party shall bear its own costs.

Mushonga & Associates, plaintiff's legal practitioners

e *Coghlan Welsh & Guest*, defendant's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 1/MANDAVA v CHASWEKA 2008 (1) ZLR 300 (H)

MANDAVA v CHASWEKA 2008 (1) ZLR 300 (H)

2008 (1) ZLR p300

Citation	2008 (1) ZLR 300 (H)
Case No	Judgment No. HH-42-08
Court	High Court, Harare
Judge	Makarau JP & Hlatshwayo J
Heard	6 May 2008
Judgment	8 May 2008
Counsel	Appellant in person Respondent in person
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Court — *magistrates court* — *proceedings before* — *requirement to follow c correct rules of procedure* — *not permissible for court to proceed on informal basis even with unrepresented parties*

Customary law — *marriage* — *unregistered customary law union* — *division of property following break-up of union* — *matter heard before magistrates court* — *need for parties to choose between customary and d general law* — *effect*

Headnote

All magistrates courts are formal courts whose proceedings are governed by a set of rules and established procedures. The setting of rules of procedure is the widely acceptable manner of avoiding arbitrariness and ensuring fairness in the airing of disputes by litigants. Rules of court are ^E framed for a purpose and any procedure done outside the rules is susceptible of being set aside. Such informality as hearing the parties in the absence of pleadings filed of record and before a pre-trial conference has been held is unacceptable. It destroys the integrity of magistrates' courts as courts of law and reduces proceedings before the court to the ^F same level as that before the traditional leaders and at village level.

Unregistered customary unions are not marriages for the purposes of the Matrimonial Causes Act [Chapter 5.13]. Parties to such unions cannot be divorced by the courts and their joint estate cannot be distributed in terms of the divorce law of this country. This does not mean that parties in such a union cannot approach the court for relief. They can. However, ^G when they do so, the law requires that they must choose which law – customary or general – they want to apply to the resolution of their dispute. If they choose general law, they must plead a cause of action recognizable at law as their "marriage" is not recognized as such. The matter must also fall within the monetary jurisdiction of the trial magistrate. ^H

2008 (1) ZLR p301

Makarau JP

Cases referred to ^A

Feremba v Matika 2007 (1) ZLR 337 (H)

Takafuma v Takafuma 1994 (2) ZLR 103 (S)

Case information

Appellant in person

Respondent in person

Judgment

^B **MAKARAU JP:** On 23 May 2005, the respondent issued summons out of Marondera magistrates court. Her claim against the defendant, as it appears on the face of the summons, is recorded as "sharing property". An affidavit was attached to the summons, curiously titled, in my view, as "Applicant's ^C supporting affidavit (Property Sharing)". In the affidavit, the respondent alleged that she was in an unregistered customary union with the appellant and that during the subsistence of the union, the parties had acquired certain household goods and effects. She gave the estimate value of each item that she alleged the parties acquired. She further alleged that due to the violent conduct that the appellant exhibited towards her, the union between them had ^D broken down irretrievably. She ended the affidavit by praying that the court confirms the distribution of the assets as suggested by her in the affidavit.

It is not clear on the record how the matter was set down for trial. I shall return to this point in detail later. The record, however, indicates that, on the day of the trial, the appellant was in attendance and verbally indicated that he was opposed to the proposals made by the respondent. Prior to the set down date, ^E he had not filed any pleadings or other papers in the matter.

The matter proceeded to trial with the parties giving evidence. For the purposes of this appeal, it is, in my view, not necessary that I go into the details of the evidence that each party led. After hearing the parties, the trial court made an award that dissatisfied the appellant, prompting him to note an appeal ^F to this court. In his notice of appeal, the appellant challenged the distribution that was made in the lower court and prayed that it be set aside.

The parties were not legally represented at any stage of the legal battle between them. We thus could not engage them at all regarding the legal issues that arise in this appeal. The legal points made in this judgment are, therefore, ^G our opinions without the aid of argument by counsel.

The two issues that arise are, in my view, so important that a copy of this judgment will be dispatched to the Chief Magistrate for his attention and for the benefit of other trial magistrates who may be falling into the same pitfalls ^H

that the trial magistrate in this matter fell. I shall make the necessary order for

2008 (1) ZLR p302

Makarau JP

this to be effected by the Registrar. ^A

Firstly, all magistrates courts in this country are formal courts whose proceedings are governed by a set of rules and established procedures. It is trite that the pre-setting of rules of procedure is to date the widely acceptable manner of avoiding arbitrariness and ensuring fairness in the airing of disputes by litigants. Rules of court are framed for a purpose and any ^B procedure done outside the rules is susceptible of being set aside as being unprocedural.

In the lower court, the respondent commenced her suit by issuing summons against the appellant. She then filed an affidavit to support her claim. This was a most unusual mixture of procedures and one that the rules of the lower court do not provide for. In accordance with the rules, having issued summons in ^C the matter, the respondent had to file her particulars of claim, to be answered by the respondent by the filing of a plea or other answer.

Affidavits, on the other hand, such as the one filed by the respondent together with her summons, are a part of the application procedure.

The two procedures, *viz.*, one commenced by the issuance of summons and ^D the other by the filing of an application, while overlapping and sometimes exchangeable in terms of utility, are quite distinct one from the other. They cannot be employed at the same time to resolve the same dispute.

I have indicated above that the parties were not legally represented before the lower court. I thus do not hold it against her that she filed incompetent papers ^E before the lower court. In my view, the fault lies squarely with the clerk of the lower court who accepted a summons to which an affidavit was attached.

Even assuming that the incompetent procedure detailed above escaped the attention of the clerk, the trial magistrate should not have proceeded to trial on a matter that had not reached *litis contestatio*. After the issuance of summons, no further pleadings were filed in the matter. No pre-trial conference ^F was held. The matter was thus not at issue and should therefore not have been referred to trial.

In my view, the informality allowed in this matter by the trial court, of hearing the parties in the absence of pleadings filed of record and before a pre-trial conference was held in the matter, is unacceptable and cannot be allowed to ^G stand. It destroys the integrity of magistrates courts as courts of law. It reduces proceedings before the court to the same level as that before the traditional leaders and at village level.

Even if we assume that the procedure before the court was application procedure, the appellant, as respondent in the lower court, had to file his notice ^H

2008 (1) ZLR p303

Makarau JP

^A of opposition and opposing affidavit before the matter could be referred to a magistrate for hearing. Application procedure is ordinarily determined on the basis of the papers filed and, in the absence of papers from the respondent, a hearing of oral evidence was improper.

The magistrate should have returned the matter to the clerk as not being ready for a hearing in the absence of such observance to the rules as I have ^B highlighted above. His lapse in this regard in my view cannot be condoned and is unacceptable. It is hereby brought to the attention of the Chief Magistrate for corrective action to be immediately taken, lest the procedures in the magistrates court and the integrity of such court fall into disrepute.

The second issue that arises in this appeal is one that escaped a number of ^C trial magistrates from the nature of the appeals that are reaching this court. The issue is one of a socio-legal nature and requires intervention from Parliament to correct the anomaly that exists between registered and unregistered customary unions.

It is still part of our law that unregistered customary unions are not marriages for the purposes of the Matrimonial Causes Act [*Chapter 5:13*]. Consequently, [Ⓓ] parties to such unions cannot be divorced by the courts and their joint estate cannot be distributed in terms of the divorce of this country. Trial magistrates who deal with the estates of parties to an unregistered customary union tend to fall into three errors. Firstly, they tend to proceed to deal with unregistered unions as if they are registered. Secondly, they fail to advert to the choice of [Ⓔ] law provisions of our law; and, finally, they tend to forget their monetary jurisdictional limit when distributing joint estates at general law.

The trial magistrate *in casu* fell into all three traps. In his award, he was attempting to effect a just and equitable distribution of the joint estate as if he was dealing with a marriage recognized as such at law. He applied the law of equity as provided for in s 7 of the Matrimonial Causes Act and attempted [Ⓕ] to sort the estate into three lots marked "his", "hers" and "theirs" following the guidelines given to divorce courts by the Supreme Court in *Takafuma v Takafuma* 1994 (2) ZLR 103 (S).

The above is not to say that parties in an unregistered customary union cannot approach the court for relief. They can. However, when they do so, it is a [Ⓖ] requirement of our law that they chose which law they want to apply to the resolution of their dispute as between customary and general law and if they chose general law, they must plead a cause of action recognizable at law as their "marriage" is not recognized as such.

[Ⓗ] *In casu*, no choice of law inquiry was gone into and it is clear that he was not

2008 (1) ZLR p304

Makarau JP

applying customary law. However, since no cause of action at general law had [Ⓐ] been pleaded, it is difficult to establish how he came up with the order that he made and which principles of law he applied.

Finally, the magistrates court is a creature of statute with set jurisdictional limits in civil matters. Assuming that a choice of law had been properly made and that choice was general law, that a valid cause of action had been pleaded [Ⓑ] and that the matter had properly proceeded to trial in terms of the rules, the value of the estate that the trial court set to distribute far exceeded its monetary jurisdiction and the trial magistrate did not even advert to this issue.

The issues that I have highlighted above are not new to this appeal court. I have had occasion to discuss the same issues in *Feremba v Matika* 2007 (1) ZLR 337 (H). I will take the risk of repeating myself again in this judgment and [Ⓒ] exhort all trial magistrates approached to distribute the joint estates of persons in an unregistered customary union to ensure that the parties before have made the appropriate choice of law between customary and general law. Once a choice of law has been appropriately made, two further issues arise but only if general law is chosen. These are the cause of action and the monetary [Ⓓ] jurisdiction of the trial magistrate.

In view of the fact that the trial magistrate failed to observe any of the above, his decision cannot stand.

In the result, I make the following order:

1. The appeal is allowed. [Ⓔ]
2. The matter is hereby remitted to the magistrate's court for a trial *de novo*.
3. The parties are to file pleadings in accordance with the provisions of the rules and a pre-trial conference has to be held in the matter before the trial.
4. Each party shall bear its own costs.
5. The Registrar of this court is directed to bring this judgment to the [Ⓕ] attention of the Chief Magistrate.

HLATSHWAYO J concurred. [Ⓖ]

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Document 34 of 47**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 1/SIBANDA v PRESIDENT OF ZIMBABWE 2008 (1) ZLR 305 (H)

SIBANDA v PRESIDENT OF ZIMBABWE 2008 (1) ZLR 305 (H)**2008 (1) ZLR p305**

Citation	2008 (1) ZLR 305 (H)
Case No	Judgment No.HB-46-08
Court	Electoral Court, Bulawayo
Judge	Ndou J
Heard	7 May 2008
Judgment	9 May 2008
Counsel	<i>K Ncube</i> and <i>C P Moyo</i> , for the applicant <i>Ms V Mabhiza</i> and <i>Mrs M Cheda</i> , for the respondent
Case Type	Details not supplied
Annotations	Link to case annotations

Flynote

Elections — candidate — death of before election — requirement to hold fresh election — declaration by Chief Elections Officer that proceedings are void — nature of such declaration — no obligation on Chief Elections Officer to notify President of his declaration — President required within 14 days to order new election

Headnote

Where a candidate for a parliamentary election dies before the poll, the Chief Elections Officer must, in terms of s 50 of the Electoral Act [*Chapter 2:13*], declare all the proceedings void and all proceedings relating to that election must be commenced afresh in the same manner as if a vacancy had occurred. No formal declaration is prescribed. The stopping of the election by the Chief Elections Officer, whether by word of mouth or in writing, constitutes such a declaration. There is no requirement under s 39 of the Act for the Chief Elections Officer to notify the President of his declaration made in terms of s 50 of the Act. However, within 14 days of such a declaration, the President is obliged to publish a notice in the *Gazette* ordering a new election to fill the vacancy.

Cases cited

Feinberg v Pietermaritzburg Liquor Bd 1953 (4) SA 415 (N)
Maharaj v Rampersad 1946 (4) SA 638 (A)
Messenger of the Magistrate's Court, Durban v Pillay 1952 (3) SA 678 (A)
R v Busa 1959 (3) SA 385 (A)
Simpson v Attorney-General [1955] NZLR 271

Legislation considered ^G

Electoral Act [*Chapter 2:13*], ss 38, 39 & 50

Case information

K Ncube and *C P Moyo*, for the applicant

vs *Ms V Mabhiza* and *Mrs M Cheda*, for the respondent

2008 (1) ZLR p306

Ndou J

Judgment

NDOU J: The applicant seeks an order that the respondent be ordered to ^A comply with the Electoral Act [*Chapter 2:13*] (hereinafter referred to as "the Act") and publish in the *Government Gazette* the sitting of the Nomination Court, in order to accept further nominations, if any, for the Pelandaba-Mpopoma Parliamentary Constituency. In short, the applicant seeks that the respondent complies with the provisions of s 39(2), as read with s 50, of the ^B Act. The brief facts of this matter are the as follows. In February 2008, following the setting of the nomination day for Parliamentary candidates by the respondent, the applicant was duly nominated as one of the candidates to contest the elections set for 29 March 2008. The applicant was to contest as an independent candidate for the Pelandaba-Mpopoma constituency in Bulawayo. The applicant was one of the eight prospective candidates in the ^C constituency. The applicant's symbol for the elections is a white dove in flight clutching a white rose in its beak. Surrounding the dove, are the words "Love Peace Success", with the last word appearing below the dove. After the nomination court sitting in February 2008 and during the campaign period, the applicant travelled the length and breadth of the constituency, canvassing for support. He addressed numerous meetings and gatherings. The applicant ^D avers that his support was growing with each meeting that he addressed. He distributed thousands of fliers in an effort to sell himself to the electorate. A song was composed in his honour and a play was written and staged. Unfortunately, a few weeks before the elections, fate intervened when one of the candidates in the constituency, one Milton Gwetu, passed away. As a result of this death, the parliamentary elections were not held in this ^E constituency. This is presumably in terms of the section 50 of the Act. What is beyond dispute is that the House of Assembly elections did not take place in the Pelandaba-Mpopoma constituency.

The respondent raised three issues, the first one being a point *in limine*. I propose to deal with the point *in limine* first. If the point is ruled in favour of ^F the respondent, then there will be no need to deal with the other issues on the merits.

DID THE CHIEF ELECTIONS OFFICER DECLARE THE DEATH IN TERMS OF S 50 OF THE ACT?

While conceding that the election in question did not take place after the death ^G of Milton Gwetu, the respondent's case is that there was no form of declaration made by the Chief Elections Officer that he is aware of. In other words, the Chief Elections Officer did not formally make a declaration in terms of s 50(1)(b) of the Act. I think there is need to understand the declaration required by s 50(1)(b) of the Act in order to resolve this issue. ^H

2008 (1) ZLR p307

Ndou J

^A Section 50 provides:

"Death of candidate

(1) If –

- (a) the Chief Elections Officer is satisfied that a duly nominated candidate for election for a constituency died before the poll commenced or if the poll has commenced, before the close thereof; or
- (b) the proceedings relating to an election for a constituency have been stopped in terms of subsection (2);

the Chief Elections Officer shall, so far as concerns that constituency, declare that all ^C proceedings relating to that election are void and all proceedings relating to that election shall be commenced afresh in the same manner as if a vacancy had occurred:

Provided that no fresh nomination shall be necessary in the case of a candidate who was duly nominated at the time when the proceedings were declared void, if such candidate or his or her chief

election agent notifies the Constituency Elections Officer in writing of his or her intention to remain a candidate.

(2) If a nomination officer is satisfied that a duly nominated candidate for election in that constituency died before the close of the poll in that constituency, he or she shall stop all proceedings relating to that election and forthwith notify the Chief Elections Officer" (emphasis is mine).

The provision does not say that the declaration has to be in writing. In fact, ^εthe nature of the declaration is not prescribed. In my view, the stopping of the Pelandaba-Mpopoma Constituency elections by the Chief Elections Officer, whether by word of mouth or in writing, constitutes such a declaration. This is the interpretation submitted to the Chief Elections Officer and the Zimbabwe Electoral Commission by their legal practitioner, which resulted in the ^εapplication against them being dismissed on account of misjoinder in case No. HB-17-08. The applicant conceded that there was a misjoinder of the Chief Elections Officer and the Zimbabwe Electoral Commission and withdrew against them purely on that understanding. Although the Chief Elections Officer was not forthcoming on the exact date that the declaration was made, it is beyond dispute that it was before 30 March 2008. This is so because the ^εdeclaration stopped the election on that date. The reckoning of the fourteen day period can commence on that date for the purposes of s 39(2) of the Act.

Another issue to be determined is whether the Chief Elections Officer has an obligation to notify the respondent of this declaration.

^ε Section 39 of the Act provides:

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Ndou J

"Vacancies and by-elections" ^A

(1) A vacancy in the membership of Parliament which exists otherwise than by reason of a dissolution of Parliament shall, subject to this section, *be notified to the President and the Commission in writing* by the President of the Senate or the Speaker of the House of Assembly, as the case may be, as soon as possible after the President of Senate or the Speaker of the House of Assemble becomes aware of the vacancy. ^B

(2) The President shall, within a period of fourteen days after –

- (a) he or she *has been notified* in terms of this section of a vacancy in the membership of Parliament; or ^C
- (b) a declaration is made *by the Chief Elections Officer in terms of section fifty*; or
- (c) a nomination day or the last nomination day, as the case may be, where no person has been duly nominated for election.;

publish a notice in the *Gazette* ordering a new election to fill the vacancy in the same manner, with any changes that may be necessary, as provided in section *thirty-eight* in regard to a general election and the provisions of this Act shall apply accordingly ..." (emphasis is mine). ^D

From these provisions, it is clear that there is no duty placed on the Chief Elections Officer (as is the case with the President of the Senate and Speaker of the House of Assembly when there is a vacancy in the membership of Parliament – s 39(1) and 39(2)(b) of the Act) to notify the President in writing of his or her declaration made in terms of s 50 of the Act. In the circumstances, the Chief Elections Officer did all that was expected of him or her in terms of ^εss 39(2)(b) and s 50 of the Act. It is now up to the respondent to act in terms of s 39(2) of the Act. Even without knowing the exact date that the declaration was made by the Chief Elections Officer, at least the reckoning of the fourteen day period can commence running from 30 March 2008. In the circumstances, the point *in limine* raised by the respondent must fail. ^F

15. IS S 39(2) OF THE ACT PEREMPTORY OR DIRECTORY?

The wording used is "The President *shall*, within fourteen days ..." (emphasis is mine).

It is trite that language of a predominantly imperative nature is taken to be indicate of peremptoriness. The verb "shall" is one such word – *Messenger* ^G of the *Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A) at 683; *Feinberg v Pietermaritzburg Liquor Board* 1953 (4) SA 415 (N) at 419; *R v Busa* 1959 (3) SA 385 (A) at 390 and *Maharaj v Rampersad* 1964 (4) SA 638 (A) at 644. In this case, there is nothing in the Act that suggests otherwise and accordingly s 39(2) is peremptory and the respondent is required to act in terms ^H

2008 (1) ZLR p309

Ndou J

A of s 39(2) within fourteen days. Such fourteen days from 30 March 2008 have already lapsed. Ms *Mabhiza* raised an issue of an exception to this general rule. She cited a New Zealand authority, *Simpson v Attorney-General* [1955] NZLR 271 discussed *de Smith's Judicial Review of Administrative Action* 4 ed by J M Evans at p 144. In the *Simpson* case, the court held that procedural requirements should not be construed as mandatory if serious public inconvenience would result. Before I decide whether this legal principle is applicable in this jurisdiction, I feel that I am to determine whether the respondent has established that serious public inconvenience would result. If I decide that there is nothing showing a serious public inconvenience, it will not be necessary for me to determine this legal issue.

c THE ISSUE OF THE ZIMBABWE ELECTORAL AUTHORITIES NOT HAVING FUNDS TO RUN THIS PARTICULAR ELECTION

Ms *Mabhiza*, submitted from the bar, that the respondent is of the view that the electoral authorities do not have sufficient funds to conduct this election "properly and efficiently". She further submitted that the Zimbabwe Electoral Commission is not ready to hold the elections in the time frame proposed by the applicant on account of lack of funds. As alluded to above, this information is from the bar. There is no affidavit by the respondent or his agent to that effect. This being an urgent application I will not use this against the respondent. The main problem is that the Zimbabwe Electoral Commission was initially a party of these proceedings. They sought to be excluded from these proceedings instead of pleading such lack of funds. Once they succeeded in their misjoinder application, they cannot be heard through the agency of the respondent raising such issues. There is nothing in this case that shows that the Zimbabwe Electoral Commission mandated the respondent to act on its behalf. In the absence of such mandate, the Zimbabwe Electoral Commission is autonomous of the respondent as enshrined in s 61(5) of the Constitution of Zimbabwe. In the circumstances, the respondent cannot use this argument of lack of resources to ward off the order sought in this application. It is really up to the Zimbabwe Electoral Commission to fight its battles, so to speak. In the circumstances, this argument of lack of funds must fail. In any event, s 38 of the Act gives the Zimbabwe Electoral Commission some time to raise funds for the elections.

g The parties have agreed that I grant a final order instead of an interim one as I have already heard argument from both sides. I propose to do so.

It is ordered that:

1. The respondent be and is hereby ordered and directed to take steps to h publish in the *Government Gazette* in the shortest possible time, but not

2008 (1) ZLR p310

Ndou J

more than fourteen days of this order, the sitting of the nomination court a in order to accept nominations for the Pelandaba-Mpopoma Parliamentary Constituency.

2. The respondent take all such steps as are necessary in accordance to s 39(2) of the Act to have a by-election conducted in the Pelandaba-Mpopoma Constituency. b
3. The respondent shall bear the costs of this application.

Kossam Ncube & Partners and Moyo and Nyoni, applicant's legal practitioners

Civil Division, Attorney-General's Office, respondent's legal practitioners c

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 1/NATIONAL EMPLOYMENT COUNCIL FOR THE CATERING INDUSTRY v CATERING AND HOSPITALITY INDUSTRY WORKERS UNION OF ZIMBABWE 2008 (1) ZLR 311 (S)

NATIONAL EMPLOYMENT COUNCIL FOR THE CATERING INDUSTRY v CATERING AND HOSPITALITY INDUSTRY WORKERS UNION OF ZIMBABWE 2008 (1) ZLR 311 (S)

2008 (1) ZLR p311

Citation	2008 (1) ZLR 311 (S)
Case No	Judgment No. S-08-08
Court	Supreme Court, Harare
Judge	Cheda JA, Ziyambi JA and Malaba JA
Heard	12 February 2008
Judgment	13 May 2008
Counsel	<i>E T Matinenga</i> , for the appellant <i>M Kamudefewere</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Associations — *voluntary association — absolute discretion as to membership thereof — admission to membership — principles of natural justice inapplicable*

Ⓓ **Employment** — *employment councils — voluntary employment councils — membership — entitlement to — admission to membership in discretion of council — no trade union entitled to membership as of right*

Interpretation of statutes — *common law — alteration of — legislature presumed to be aware of the common law*

Headnote

Ⓔ The appellant was a voluntary employment council formed in terms of s 56 of the Labour Act [Chapter 28:01]. The Act provides for two types of employment councils, voluntary and statutory. Voluntary employment councils differ from their statutory counterpart in the manner of formation. With regard to the former, the parties may come together by choice to Ⓕ form a council, whereas in respect of the latter, the parties to the council are chosen by the Minister in the manner prescribed in s 57 of the Act.

As required by s 58(g) of the Act, the appellant's constitution made for the provision of new members to the council. The constitution stated that "... any ... trade union registered in terms of s 36 of the Act, in respect of persons engaged or employed in the industry, may be admitted to Ⓖ membership of the Council". The respondent trade union sought membership of the council but its application was refused. It then approached the Registrar of Labour, who ordered that the respondent be admitted to membership and allocated two seats on the council. An Ⓗ appeal by the appellant to the Labour Court failed.

2008 (1) ZLR p312

Ziyambi JA

On appeal to the Supreme Court, the appellant argued that by virtue of its Ⓐ being a voluntary employment council, admission to its membership was not as of right but dependent on the discretion of the council. The use of the words "may be admitted" in clause 5:3 of the constitution clearly showed that admission was not as of right. Since the issue of membership was within the discretion of the council, a court could only interfere with Ⓑ the exercise of that discretion if it was exercised irrationally. The second contention was that s 21 of the Constitution guarantees the right of the appellant to freedom of association and there was nothing in the Act which entitles the respondent to membership of the appellant as of right or obliges the appellant to admit the

respondent to its membership. The respondent argued that the word “may” was to be construed as being c mandatory in this case, since it was mandatory in terms of s 58 of the Act that any constitution of an employment council should contain provisions for admission to that council. This meant, it argued, that the legislature was making it mandatory for the appellant to admit whoever applied, subject only to the applicant possessing the qualifications set out in clause 5(3) of its constitution. d

Held, that normally a voluntary association has an absolute discretion as to whether or not it admits a person to membership. It follows that, in the matter of admission to membership, no question of *mala fides* or non-compliance with principles of natural justice can arise.

Held, further, that the use of the word “may” in s 58 of the Labour Act [*Chapter 28:01*] did not disclose an intention by Parliament to alter the e common law, of which it is presumed to be aware, relating to voluntary associations. Section 58 did not, therefore, impose mandatory membership upon an appellant voluntary employment council formed in terms of s 56 of the Act. The membership thereof is governed by its constitution.

Cases cited f

George Wimpey Co Ltd v British Overseas Airways Corporation [1955] AC 169

Pinner v Everett [1969] 3 All ER 257 (HL)

Legislation considered

Labour Act [*Chapter 28:01*], ss 29(4)(f), 56, 57 and 58 g

Case information

E T Matinenga, for the appellant

M Kamudefewere, for the respondent

Judgment

ZIYAMBI JA: The appellant, to which I shall refer as “NEC”, is a voluntary employment council formed in terms of s 56 of the Labour Act [*Chapter 28:01*] h

2008 (1) ZLR p313

Ziyambi JA

A (“the Act”) which provides as follows:

“56. Voluntary Employment Councils

Any –

(a) employer, registered employers organization or federation of such organizations; and b

(b) registered trade union or federation of such trade unions;

may, at any time, form an employment council by signing a constitution agreed to by them for the governance of the council, and by applying for its registration in terms of section *fifty-nine*.”

Clause 5:3 of the appellant’s constitution makes provision, as indeed it is enjoined to do by s 58 ¹ of the Act, for the admission of new parties to the c employment council. It reads:

“Any employer in the industry and any Employer’s Organisation or Trade Union registered in terms of s 36 of the Act, in respect of persons engaged or employed in the industry may be admitted to membership of the Council.”

d Following its registration as a trade union on 29December 2000, the respondent sought to be admitted to membership of the appellant. The application having been refused, the respondent sought assistance from the Registrar of Labour. The latter found that:

“... the NEC does not have valid reasons for not accepting CHIWUZ (the respondent) therefore should consider accommodating them.”

e and concluded:

“Having taken cognizance of all issue(s) raised as well as examining CHIWUZ’s register of 4 590 members, it was decided to give the applicants two seats in the council on the Labour side. It is up to the union to

decide who is to represent them in the council. It was also decided that the NEC's constitution should be amended to include CHIWUZ."

¶ Aggrieved by the Registrar's decision, the appellant appealed, without success, to the Labour Court which also refused an application for leave to appeal to the Supreme Court. The matter comes before us on appeal with leave of a judge of the Supreme Court in terms of s 92F(3) of the Act.

The main contention advanced on behalf of the appellant by Mr *Matinenga* G is that by virtue of its being a voluntary employment council, admission to its membership is not as of right but dependent on the discretion of the council. The use of the words "may be admitted" in clause 5:3 of the constitution, he said, clearly showed that admission was not as of right. Since the issue of

2008 (1) ZLR p314

Ziyambi JA

membership was within the discretion of the council, a court can only interfere A with the exercise of that discretion if it was exercised irrationally. The second contention was that s 21 of the Constitution of Zimbabwe guarantees the right of the appellant to freedom of association and there was nothing in the Act which entitles the respondent to membership of the appellant as of right or obliges the appellant to admit the respondent to its membership. B

The respondent's stance was that the constitution of the appellant does not preclude membership of the respondent and that the word "may" was to be construed as being mandatory in this case, since it was mandatory in terms of s 58 of the Act that any constitution of an employment council should contain provisions for admission to that council. It was submitted that it was irrelevant that the appellant was a voluntary employment council since the C appellant's constitution could not be superior to the Labour Act.

The Act provides for two types of employment councils namely, voluntary and statutory. Voluntary employment councils differ from their statutory counterpart in the manner of formation. With regard to the former, the parties, that is, any employer or employers' organization and any registered trade D union or federation of trade unions may come together by choice to form a council, whereas in respect of the latter, the parties to the council are chosen by the Minister in the manner prescribed in s 57 of the Act. Section 57 of the Act provides as follows:

"57 Statutory employment councils

(1) The Minister may, whenever the national interest so demands, E request –

- (a) any registered employers organization or federation of such organizations; and
- (b) any registered trade union or federation of such trade unions;

to form an employment council and to apply for its registration in terms F of section *fifty-nine*.

(2) If within three months of a direction being given in terms of subsection (1), the parties concerned have failed to apply for the registration of an employment council, the Minister may appoint such number of persons as he considers will represent the employers and employees concerned, and such persons shall, within such period as may G be specified by the Minister, form an employment council by signing a constitution agreed to by them for the governance of the council and by obtaining registration of the council in terms of section *fifty-nine*."

The Act sets out in s 58 the provisions which must be included in the constitution of every employment council. There is no statutory duty imposed H

2008 (1) ZLR p315

Ziyambi JA

A on voluntary councils to admit new members; the only requirement being that provision must be made in the constitution for the admission of new members. 2 Section 58 provides:

"The constitution of every council formed in terms of this part shall provide for –

- (a) ... B
- (g) the admission of new parties to the employment council; ..."

The constitution of the appellant, in keeping with this requirement, provides that a certain category of persons may be admitted to its membership. The appellant's position is that persons or bodies falling within this category may apply, not necessarily successfully, for admission to membership. The C success of the application depends on the discretion of the Council. The respondent however contends, and his contention was accepted by the court *a quo*, that the word "any" in the appellant's

constitution is indicative of the fact that once an applicant falls within the category mentioned in clause 5(3), admission to membership by the appellant is compulsory. The use of the word “may”, so it was submitted, is not intended to be discretionary but mandatory ^o and must be construed to mean “shall”. He submits, further, that by requiring the employment council to make provision in its constitution for admission of new members to membership of its council, the legislature was making it mandatory for the appellant to admit whosoever applied subject only to their possession of the qualifications set out in clause 5(3) of its constitution.

ε At common law, the position relating to voluntary associations is as follows:

“Normally, an association has an absolute discretion as to whether or not it admits a person to membership ... It follows that in the matter of admission to membership no question of *mala fides* or non-compliance with principles of natural justice can arise.” ³

The legislature is presumed to be aware of the common law and any intention ^ε to depart therefrom must be clearly and unambiguously stated in the statute concerned. The following passage from *Maxwell on the Interpretation of Statutes*⁴ ed by P St J Langan at p 116 is instructive:

“It is presumed that the legislature does not intend to make any change in the existing law beyond that which is expressly stated in, or follows by ^g necessary implication from, the language of the statute in question. It is thought to be in the highest degree improbable that Parliament would

2008 (1) ZLR p316

Ziyambi JA

depart from the general system of law without expressing its intention with ^a irresistible clearness, and to give any such effect to general words merely because this would be their widest, usual, natural or literal meaning would be to place on them a construction other than that which Parliament must be supposed to have intended. If the arguments on a question of interpretation are fairly evenly balanced, that interpretation should be chosen which involves the least alteration of the existing law.” ⁴ ^B

The use of the word “may” in s 58 does not, in my view, disclose an intention by Parliament to alter the common law relating to voluntary associations. Not only that, but the provision in s 56 for voluntary councils, in the absence of an express statement to the contrary, lends weight to the conclusion that Parliament intended these to be voluntary associations to which the common law is applicable. This view is strengthened by the further provision, in s 57 ^c for statutory employment councils. A trade union wishing to be part of an employment council may form one with any willing employer organization. Alternatively, recourse may be had to the Minister who may exercise his powers in terms of s 57 to direct certain groups to form employment councils where he deems such to be in the national interest. ^o

I conclude, therefore, that s 58 does not impose mandatory membership on the appellant formed, as it was, in terms of s 56, and that membership of the appellant is governed by its constitution.

In its ordinary meaning, the word “may” is discretionary. The starting point in the interpretation of statutes is that words are to be given their ordinary ^ε meaning. In the words of Lord Reid in *Pinner v Everett* [1969] 3 All ER 257 (HL) at 258:

“The first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some ^f other possible meaning of the word or phrase.”

Although in the instant case the word sought to be interpreted is not contained in a statute, the same principle is applicable. When given its ordinary meaning the word “may” as it is used in clause 5:3 of the appellant’s constitution does not, in my view, conflict with the intention of Parliament as expressed in the provisions of the Act under mention. The provision in ^g s 29(4)(f) of the Act that “a registered trade union ... shall be entitled to form or be represented on any employment council” does not detract from that view.

2008 (1) ZLR p317

Ziyambi JA

^a The legislature, in providing for the two different categories of employment councils, ensured that all unions and employers organizations could be represented on an employment council. There is no disharmony between s 29(4)(f) and s 56 by virtue of which a trade union may, in association with an employers’ organization, form an employment council. Reading the two sections together, I do not discern, as urged on behalf of the respondent, an ^b intention by Parliament to depart from the

common law by imposing, as it is suggested it does, any trade union or employer organization as a member of a voluntary employment council.

It was, therefore, unlawful for the Registrar to impose the respondent as a member of the appellant and the appeal must succeed on this ground. This conclusion renders it unnecessary to determine the other grounds of appeal.

Accordingly, it is ordered as follows:

The appeal is allowed with costs.

The judgment of the court *a quo* is set aside and substituted with the following order:

▷ "The appeal is allowed with costs."

CHEDA JA & MALABA JA concurred.

Gill, Godlonton & Gerrans, appellant's legal practitioners

ε *Musunga & Associates*, respondent's legal practitioners

- 1 See para (g).
- 2 See s 58(g) *supra*
- 3 Bamford *The Law of Partnership and Voluntary Association in South Africa* 3 ed at p 139.
- 4 See *George Wimpey Co Ltd v British Overseas Airways Corporation* [1955] AC 169, per LORD REID at p 191

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 1/TRUST INSURANCE BROKERS v MINISTER OF FINANCE & ANOR 2008 (1) ZLR 318 (S)

TRUST INSURANCE BROKERS v MINISTER OF FINANCE & ANOR 2008 (1) ZLR 318 (S)

2008 (1) ZLR p318

Citation	2008 (1) ZLR 318 (S)
Case No	Judgment No. S-06-08
Court	Supreme Court, Harare
Judge	Garwe JA, Malaba JA & Ziyambi JA
Heard	15 January 2008
Judgment	13 May 2008
Counsel	<i>D M Campbell</i> , for the appellant No appearance for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Insurance — insurance brokers — registration — requirements for — c Insurance Regulations imposing requirements additional to those in Act and compelling brokers to re-register even if already registered — Regulations *ultra vires*

Interpretation of statutes — regulations — validity — regulations effectively altering provisions of parent Act — approach of courts to alteration of d statutes by subordinate bodies

Headnote

The Minister of Finance enacted regulations in terms of s 89 of the Insurance Act [Chapter 24:07]. The enabling section of the Act allowed the Minister to make regulations "prescribing anything which under this Act e is to be prescribed or which, in his opinion, is necessary or convenient to be prescribed, for carrying out or giving effect to this Act". The effect of two sections of the Regulations was: (a) to impose additional requirements for registration on insurance brokers already registered; and (b) to oblige every registered insurance broker to apply for re-registration in terms of the Regulations. The penalty for failure to re-register f was automatic de-registration. The appellant argued that the enabling section of the Act did not give the Minister the power to prescribe alterations to the qualifications and requirements laid down by Parliament in the Act for the registration of insurance brokers, nor did it confer on the Minister the power to de-register insurance brokers who were duly registered in compliance with the provisions of the Act. g Despite the general nature of its terms the power given to the Minister in the section was not unlimited in its application; it was limited to "anything which under this Act is to be prescribed" and to regulating only those things which in the Minister's opinion are "necessary or convenient to be prescribed for carrying out or giving effect to" the Act. h

2008 (1) ZLR p319

Ziyambi JA

a Re-registration was not in any way "necessary or convenient ... for carrying out or giving effect to" the Act. The Minister's argument was that he had, in effect, been given unfettered powers to prescribe *anything* "which in his opinion is necessary to be prescribed".

Held, that the approach of the courts in such matters is that power will only be given to a subordinate law-making body to alter an enactment of b Parliament in extraordinary circumstances. The courts lean against implying an alteration or repeal of one statute by another and, for obvious reasons, lean even more heavily against implying that Parliament has conferred power on a subordinate law-making body to alter or repeal an Act of Parliament. No express power was conferred on the Minister to c alter the provisions of the Act relating to the qualifications for registration of insurance brokers or for their de-registration. In s 35 of the Act, Parliament set the requirements for the registration of insurance brokers. Once an applicant meets those requirements then, unless the Commissioner is of the opinion that it would not be in the public interest to approve his application, the Commissioner is obliged to register him. d Similarly, in s 38, Parliament prescribed the procedure for cancellation of the registration of insurance brokers. Not only was there no express grant of power to alter those requirements but, from a reading of s 89 together with ss 35 and 38, there was no indication of an intention on the part of Parliament to grant to the Minister the power to amend the Act, in particular, the power to alter the requirements for registration or the e procedure for de-registration of insurance brokers.

Judgment of Kamocha J in *Trust Insurance Brokers (Pvt) Ltd v Min of Finance & Anor* HB-13-07 overruled.

Cases cited

Seward v The Owner of the "Vera Cruz" (1884) 10 AC 59

f *van Heerden NO & Ors v Queens Hotel (Pvt) Ltd & Ors* 1972 (2) RLR 472 (A)

Legislation considered

Insurance Act [Chapter 24:07], ss 35(2), 38 & 89(1)

Insurance Amendment (No 6) Regulations, 2005 (SI 59 of 2005), ss 4 & 14

Case information

D M Campbell, for the appellant
No appearance for the respondents

Judgment

ZIYAMBI JA: On 28 September 2005, the High Court sitting at Bulawayo ^h issued (in favour of the appellant) a provisional order in the following terms:

2008 (1) ZLR p320

Ziyambi JA

"TERMS OF FINAL ORDER SOUGHT ^A

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

1. That section 14 of the Insurance (Amendment) (No. 6) Regulations 2005 (SI 59 of 2005) be and is hereby declared to be null and void and of no force and effect.
2. That the respondents are to pay the costs of this application jointly ^b and severally the one paying the other to be absolved.

INTERIM RELIEF GRANTED

Pending determination of this matter the applicant is granted the following relief:

1. That the applicant is absolved from any obligation to register as an ^c insurance broker under the provisions of section 14 of the Insurance (Amendment) (No. 6) Regulations, 2005 (SI 59 of 2005).
2. That the second respondent is hereby interdicted from removing the name of the applicant from the Register of Insurance Brokers as a consequence of any failure on the part of applicant to register itself as an insurance broker on or before 1 October 2005 or from in any way ^d treating the applicant as though it were no longer registered as a consequence of any such failure."

Thereafter, on 23 January 2007, the matter came before that court for confirmation of the provisional order. This is an appeal against the order of the High Court discharging the provisional order. ^e

The sole issue for determination by this court is whether, in enacting s 14 of the Insurance (Amendment) (No. 6) Regulations, 2005 (SI 59 of 2005) ("the Regulations"), the first respondent ("the Minister") exceeded the authority given to him by statute, namely, s 89 of the Insurance Act [Chapter 24:07] ("the Act"). In other words, did the Act empower the Minister to enact s 14 of the Regulations? ^f

Section 89(1) of the Act provides as follows:

"Regulations

(1) The Minister may make regulations prescribing anything which under this Act is to be prescribed or which, in his opinion, is necessary or convenient to be prescribed, for carrying out or giving effect to this ^g Act."

The Regulations were enacted by the Minister acting in terms of s 89(1) of the Act. Sections 4 and 14 of the Regulations are set out below.

"4. An insurer or insurance broker, or applicant for registration as an ^h

2008 (1) ZLR p321

Ziyambi JA

A insurer or insurance broker, shall comply with the following additional requirements for registration with respect to its equity capital –

- (a) every insurer or insurance broker must have at least three shareholders;
- (b) no individual or individual and his or her close relatives may own or control, directly or indirectly, more than forty *per centum* of ^b the voting shares of the insurer, insurance broker or applicant;
- (c) no part of –
 - (i) the minimum paid-up equity capital of the insurer or applicant insurer shall consist of borrowed funds;
 - (ii) the paid-up equity capital of the insurance broker or ^c applicant insurance broker that is used to determine whether he or she qualifies for registration in terms of section 3(2)(iv) or (v) shall consist of borrowed funds.

14. Every registered insurer, mutual society and insurance broker shall, no later than 1 October 2005, apply to be registered under the principal regulations as amended by these Regulations, and every such insurer, ^D mutual society and insurance broker as fails to do so shall, with effect from that date, be deemed not to be registered."

It will be seen that s 4 imposes additional requirements for registration on insurance brokers already registered, while s 14 obliges every registered insurance broker to apply for re-registration in terms of the Regulations. The penalty for failure to comply with s 14 is automatic de-registration. Mr *Campbell* ^E contended that s 89(1) of the Act does not give the Minister the power to prescribe alterations to the qualifications and requirements laid down by Parliament in the Act for the registration of insurance brokers, nor does it confer on the Minister the power to de-register insurance brokers who are duly registered in compliance with the provisions of the Act. There was no ^F appearance on behalf of the respondents, but the Minister's response, as expressed in his affidavit filed in the High Court as well as in the heads of argument prepared on his behalf and filed of record, is that the Minister has, in effect, been given unfettered powers to prescribe **anything** "which in his opinion is necessary to be prescribed" and that accordingly, the Minister acted within his powers when he enacted ss 4 and 14 of the Regulations. The ^G learned judge in the court *a quo* was of the same view. He said at p 5 of the judgment:

"In my view, the provisions of s 89 enjoins (*sic*) the Minister with very wide powers. He may make regulations prescribing anything which needs to be prescribed under the Act or which, in his opinion, is necessary or ^H convenient to be prescribed for carrying out or giving effect to the Act.

2008 (1) ZLR p322

Ziyambi JA

Although what the Minister did was not one of the things listed in s 89(2), ^A I do not believe that that list is exhaustive, otherwise the Legislature would not have reposed in him the power to prescribe anything which in his opinion was necessary to prescribe ... since the Minister is enjoined (*sic*) with wide powers and discretion to prescribe anything which in his opinion is necessary or convenient to be prescribed it was within his powers, in my view, to act as he did." ^B

Mr *Campbell*, however, submitted that despite the general nature of its terms, the power given to the Minister in s 89(1) is not unlimited in its application. Firstly, it was limited to "anything which under this Act is to be prescribed" and nothing in the Act requires the Minister to prescribe anything more pertaining to the registration of insurance brokers than the forms and ^C documents described in s 35(2). Accordingly, the power in s 89(1) to "prescribe anything which under this Act is to be prescribed" does not empower the Minister to require insurance brokers who are already registered in terms of s 35 to possess additional qualifications and to register again. Secondly, he submitted, that the power was limited to regulating only those things which, in the Minister's opinion, are "necessary or convenient to be prescribed for ^D carrying out or giving effect to" the Act. Re-registration, he submitted, is not in any way "necessary or convenient ... for carrying out or giving effect to" the Act.

In response to the Minister's averment in his affidavit that "it became necessary to require all to come and re-register" to enable him to monitor their solvency and ensure the correct maintenance of principles and practices in ^E the industry and that "re-registration was the only avenue of taking stock", he submitted that the Minister already has those powers in ss 89(2) and (3) of the Act. If the Minister did exceed the powers granted to him by Parliament in s 89 (1), then the Regulations would be void to the extent of such excess. I turn to examine the power conferred on the Minister by Parliament in s 89(1) ^F of the Act, namely:

"... anything which under this Act is to be prescribed or which, in his opinion, is necessary or convenient to be prescribed, for carrying out or giving effect to this Act ..."

The power thereby conferred must be construed in the light of the approach of the courts in such matters, which is that power will only be given to a ^G subordinate law-making body to alter an enactment of Parliament in extraordinary circumstances. Thus, in *van Heerden NO & Ors v Queens Hotel (Pvt) Ltd & Ors* 1972 (2) RLR 472 (A) at 496D-H, MacDonald JP (as he then was) had this to say: ^H

2008 (1) ZLR p323

Ziyambi JA

^A "[The] power of a subordinate law-making body to alter the enactments of Parliament is so far-reaching in its implications that it will be readily understood that it is a power but rarely granted and usually only for

the most compelling reasons, for example, in times of dire emergency when the Parliamentary safeguards inherent in the ordinary legislative process must perform give way to the need for swift and decisive action in the interests of the safety and security of the State."

The subordinate power must be construed strictly. The following words by Lord Selborne in *Seward v The Owner of the "Vera Cruz"* (1884) 10 AC 59 at 68 were quoted with approval in *van Heerden supra*:

"Now if anything be certain it is this: that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed altered or derogated from merely by force of such general words without any indication of a particular intention to do so."

Thus, as it was put in *van Heerden supra* at 497A, courts of law lean against implying an alteration or repeal of one statute by another and for obvious reasons lean even more heavily against implying that Parliament has conferred power on a subordinate law-making body to alter or repeal an Act of Parliament. In the instant case, there is no express power conferred on the Minister to alter the provisions of s 35 of the Act relating to the qualifications for registration of insurance brokers or for their de-registration. In the absence of an express power to so alter the Act, the court must ascertain from the language of the enabling statute whether, notwithstanding the absence of an express provision, the clear intention of Parliament, as expressed in the Act, was to grant the power to alter the Act.

Section 35(2) of the Act provides:

"(2) An application for registration as an insurance broker shall be made to the Commissioner in the prescribed form and shall be accompanied by such documents as may be prescribed.

(3) If the Commissioner is satisfied that an applicant in terms of this section –

- (a) is not seeking to register under a name identical with the name of a person registered in terms of this Act, or so nearly resembling the name of such person as to be mistaken for it; or
- (b) has not, under any law of any country –
 - (i) been adjudged or otherwise declared insolvent or bankrupt and has not been rehabilitated or discharged; or

2008 (1) ZLR p324

Ziyambi JA

- (ii) made an assignment to or arrangement or composition with his creditors which has not been rescinded or set aside; or
- (c) has not been convicted by any court wheresoever situate of any offence involving dishonesty, or of an offence in terms of this Act for which he was imprisoned without the option of a fine; or
- (d) has not entered into an agreement relating to the preferential offer of insurance business with any person carrying on insurance business so as to impair his impartiality in placing insurance business; or
- (e) is authorised, if he negotiates insurance business, other than life insurance business, to act as correspondent of brokers who are authorised by insurers in any country to place business with any such insurers;

the Commissioner shall register the applicant as an insurance broker and shall issue him a certificate of registration.

(4) Notwithstanding anything contained in subsection (3), if the Commissioner is of the opinion that it would not be in the public interest to approve an application for registration as an insurance broker, he shall reject the application and notify the applicant in writing accordingly."

In this section, Parliament set the requirements for the registration of insurance brokers. Once an applicant meets those requirements then, unless the Commissioner is of the opinion that it would not be in the public interest to approve his application, the Commissioner is obliged to register him.

Similarly, cancellation of registration is provided for in s 38 of the Act. It provides:

"Cancellation of registration of insurance brokers

(1) The Commissioner shall notify a registered broker in writing that he proposes to cancel his registration as an insurance broker and of his reasons for so doing if at any time he is satisfied that if the registered insurance broker were an applicant for registration in terms of section *thirty-five* he would not be qualified for being so registered.

(2) If a registered insurance broker who has been so notified of the Commissioner's proposal to cancel his registration as an insurance broker fails to lodge with the Commissioner a request to submit his case for review ^g by the Minister as is provided in subsection (1) of section *seventy-one* within the period mentioned in that subsection or, having lodged such request within that period, withdraws the request before the Minister gives his decision in the case, the Commissioner shall cancel his registration and notify the insurance broker in writing accordingly. ^h

2008 (1) ZLR p325

Ziyambi JA

^a (3) The Commissioner may, at the request of a registered insurance broker or his liquidator, trustee or judicial manager, cancel his registration as an insurance broker:

Provided that before cancelling such registration the Commissioner shall satisfy himself that all the liabilities of the insurance broker in respect of his business have been met or other provision has been made for them ^b by means acceptable to the Commissioner."

Here, also, Parliament prescribed the procedure for cancellation of the registration of insurance brokers. The Minister is given the power to review the Commissioner's decision, at the request of the broker who has been notified of the Commissioner's intention to cancel his registration. The provisions of ss 35 and 38 of the Act clearly evince the intention of Parliament ^c regarding the registration and de-registration of brokers.

Not only is there no express grant of power to alter those requirements but, from a reading of s 89, together with ss 35 and 38, of the Act set out above, I can find no indication of an intention on the part of Parliament to grant to the Minister the power to amend the Act. It must, therefore, be taken that, in ^d enacting s 89, Parliament was alive to the provisions of ss 35 and 38 and did not intend to grant power to the Minister to alter the requirements for registration or the procedure for de-registration of insurance brokers. Clearly, the power granted in s 89 to the Minister is to enact regulations necessary for the administration of the Act as it stands, not to amend the Act. By setting additional qualifications for registration as well as requiring registered brokers ^e to re-register on pain of de-registration, the Minister exceeded the power granted to him in s 89.

I therefore, hold that s 14 of the Regulations is *ultra vires* s 89 of the Act and is, accordingly, void and of no force or effect. We were not asked for a declaration of nullity in respect of s 4 of the Regulations which prescribes the ^f additional requirements set by the Minister for the registration of insurance brokers. Suffice it to say that had this relief been requested we would no doubt, for the same reasons, have granted it.

Accordingly, the appeal is allowed with costs. The order of the High Court is set aside and substituted as follows:

^g "The Provisional Order is confirmed."

MALABA JA and GARWE JA concurred.

^h *Calderwood, Bryce Hendrie & Partners*, appellant's legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 1/DUBE v DUBE 2008 (1) ZLR 326 (H)

DUBE v DUBE 2008 (1) ZLR 326 (H)

2008 (1) ZLR p326

Citation	2008 (1) ZLR 326 (H)
Case No	Judgment No. HB-39-08
Court	High Court, Bulawayo

Judge	Ndou J
Heard	13 September 2006
Judgment	22 May 2008
Counsel	<i>N Mazibuko</i> , for the plaintiff <i>N Ndlovu</i> , for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Practice and procedure — *absolution from the instance* — *when may be granted* — *principles* — *application made in respect of ancillary matter* — *not permissible to grant piece-meal applications*

Headnote

An application for absolution from the instance stands on much the same footing as an application for discharge of an accused at the close of the ^D evidence for the prosecution, but it would indeed be curious if in civil cases the courts were to apply a more stringent rule of practice than in criminal cases. As in a criminal case the onus of proof is always higher than in a civil case, evidence which, in a criminal case, would be insufficient to justify refusing an application for the discharge of an ^E accused might well in a civil case be sufficient to justify refusing an application for absolution from the instance. A defendant who might be afraid to go into the witness box should not be permitted to shelter behind the procedure of absolution from the instance. The rules of procedure are made to ensure that justice is done between the parties and, so far as possible, the courts should not allow rules of procedure to be used to ^F cause an injustice.

Piecemeal applications for absolution are not permissible: an application, if successful, must have the effect of terminating the case completely. The procedure is not intended for the court to determine issues piecemeal in one trial. ^G

Cases cited

A-G v Mzizi 1991 (2) ZLR 321 (S)

Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA (A)

Gascoyne v Paul & Hunter 1917 TPD 170

Mangwendeza v Mangwendeza 2007 (1) ZLR 216 (H) ^H

2008 (1) ZLR p327

Ndou J

^A *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A)

Mazibuko v Santam Insurance Co Ltd & Anor 1982 (3) SA 125 (A)

Moyo v Knight Frank & Anor HB-87-05

Munhuwa v Mhukahuru Bus Services (Pvt) Ltd 1994 (2) ZLR 382 (H)

Ngwenya v Ndlovu HB-118-07

R v Dzingayi & Ors 1967 RLR 171 (G)

^B *Sibanda & Anor v Sibanda* 2005 (1) ZLR 97 (S)

Supreme Service Station(1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd 1971 (1) RLR 1 (A); 1971 (4) SA 90 (RA)

Case information

N Mazibuko, for the plaintiff

c N Ndlovu, for the defendant

Judgment

NDOU J: The plaintiff issued out summons against the defendant for divorce and ancillary relief.

When the trial commenced, the only issue left was one in the defendant's **D** counter claim. This issue is whether stand No. 61456, Pelandaba, Bulawayo, the two stands in Romney Park, Bulawayo and the two motor vehicles were matrimonial property and, if so, how such property should be distributed. In light of this, the duty to begin lay on the defendant. After the defendant testified, she closed her case. At that stage, Mr *Mazibuko*, for the plaintiff, applied for the court "to enter judgment in respect of issues agreed upon and **E** enter absolution from the instance in respect of the other issues without putting the plaintiff on his defence". This type of application is novel to me. I am not sure whether the Rules provide for such an application. In any event, Mr *Mazibuko* did not refer me to any authority for such a procedure. What can be gleaned from his submissions is that he is praying the court to apply **F** the Rules of procedure application at the close of the plaintiff's case, i.e. application for absolution from the instance – see *Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A); 1971 (4) SA 90 (RA); *Marine and Trade Insurance Co Ltd v van der Schyff* 1972 (1) SA 26 (A); *Gascoyne v Paul & Hunter* 1917 TPD 170 at 171; *Mazibuko v Santam Insurance Co Ltd* 1982 (3) SA 125 (A); *Munhuwa v Mhukahuru Bus* **G** *Services* 1994 (2) ZLR 382 (H); *Moyo v Knight Frank & Anor* HB-87-05 and *Ngwenya v Ndlovu* HB-118-07. What is clear from these cases is that a case should not be summarily terminated merely because the evidence adduced on behalf of the plaintiff [in reconvention *in casu*] contains contradictions. The *locus classicus* of the cases dealing with procedure of absolution from the **H** instance in this jurisdiction is the *Supreme Service Station* case, *supra*. At

2008 (1) ZLR p328

Ndou J

p 4C-E, Beadle CJ stated: **A**

"The *locus classicus* of the cases dealing with the procedure of absolution from the instance is the old Transvaal case of *Gascoyne v Paul & Hunter* 1917 TPD 170. In that case, it was pointed out that an application for absolution from the instance stands much on the same footing as an application for discharge of an accused at the close of the evidence for the prosecution, but it is stressed (see p 173 of the judgment) that it would **B** indeed be curious if in civil cases we were to apply a more stringent rule of practice than in criminal cases. It would seem to me that as in a criminal case the onus of proof is always higher than in a civil case, evidence which in a criminal case would be insufficient to justify refusing an application for the discharge of an accused, might well in a civil case be sufficient to justify refusing an application for absolution from the instance." **C**

See also *Manhuwa supra* at 383G.

The learned Chief Justice at p 5D concluded:

"The test, therefore, boils down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a **D** question of fact and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make: a definition which helps not at all."

The learned Chief Justice also stated that a defendant who might be afraid to go into the witness box should not be permitted to shelter behind the procedure of absolution from the instance. The rules of procedure are made **E** to ensure that justice is done between the parties and, so far as possible, courts should not allow rules of procedure to be used to cause an injustice. *In casu*, if I grant the application for absolution from the instance, the matrimonial case between the parties is not terminated completely. The main issue, the divorce, will not be terminated. The absolution only relates to an ancillary relief. As it is axiomatic that this application for absolution from the instance stands much **F** on the same footing as an application for the discharge of an accused at the close of the State case in a criminal case, the application must fail on this fact alone. The application, if successful, must have the effect of terminating the case completely. This procedure is not intended

for the court to determine issues piecemeal in one trial: *R v Dzingayi & Ors* 1965 RLR 171 (G) and *A-G v Mzizi* 1991 (2) ZLR 321 (S) at 323.

Further, the defendant alleged in her testimony that although the two motor vehicles are registered in the names of Galaxy Craft Services (Pvt) Ltd, these are business assets acquired by the parties. The same applies to the stand. She explained her contribution in this regard. The court should not at this stage ^H

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Ndou J

^A evaluate and reject her evidence as suggested by Mr *Mazibuko*. The court should be extremely chary of granting absolution at the close of the plaintiff's case: *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) and Herbstein and van Winsen *The Civil Practice of the Supreme Court of South Africa* 4ed at p 683.

^B Mr *Mazibuko* relied heavily on the separation between business assets and personal assets acquired by the parties. He overlooked the acceptable practice by our courts to regard as matrimonial assets the net worth of both the business assets and the personal assets acquired by the parties during the duration of the marriage: see *Sibanda & Anor v Sibanda* 2005 (1) ZLR (S) and *Mangwendeza v Mangwendeza* 2007 (1) ZLR 216 (H). *In casu*, the ^C defendant has testified why she regards the business assets as matrimonial property. The application is therefore misplaced and unnecessary.

Accordingly, the application for absolution from the instance is dismissed.

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

^D *Cheda & Partners*, defendant's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 1/ROGERS v ROGERS & ANOR 2008 (1) ZLR 330 (S)

ROGERS v ROGERS & ANOR 2008 (1) ZLR 330 (S)

2008 (1) ZLR p330

Citation	2008 (1) ZLR 330 (S)
Case No	Judgment No. S-64-07
Court	Supreme Court, Harare
Judge	Cheda JA, Malaba JA and Gwaunza JA
Heard	14 May 2007
Judgment	27 May 2008
Counsel	<i>E T Matinenga</i> , for the appellant <i>J C Andersen SC</i> , for the first respondent No appearance for the second respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Practice and procedure — application — dismissal of — summary dismissal of action — action "frivolous" — when action may be regarded as frivolous

Will — undue influence — allegation of undue influence on testator — declaration — need to set out therein all material facts necessary to sustain the averment of undue influence

Will — validity — undue influence on testator — what amounts to undue influence — need to show that undue influence actually influenced making of the will — revocation of earlier will by a later will — language of later will clear and unambiguous — revocation of earlier will effective

Headnote

Summary dismissal of an action in terms of r 79(2) of the High Court Rules, 1971 is an extraordinary remedy to be granted in clear and exceptional cases. The reason is that granting the remedy has the effect of interfering with the elementary right of free access to the Court. The object of the rule is to enable the court to stop an action which should not have been launched.

The word "frivolous" in its ordinary and natural meaning connotes an action characterized by lack of seriousness, as in the case of one which is manifestly insufficient. An action is in a legal sense "frivolous or vexatious" when it is obviously unsustainable, manifestly groundless or utterly hopeless and without foundation. A plaintiff who commences an action in a court of law when he has no reasonable grounds to do so has no cause of action. An action without a good cause is baseless and unsustainable.

The appellant's application to have her mother's will, from which she had been excluded, declared invalid on the grounds of undue influence, had been summarily dismissed in the High Court on the grounds that it was

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Malaba JA

A frivolous. Alternatively, she had sought an order that the will was applicable only to her mother's estate situated in Zimbabwe. Her mother had made two previous wills, one which dealt with her property in Britain and a later one dealing with her property in Zimbabwe. Although the appellant was asked for particulars of the alleged undue influence, such particulars were not provided. The first respondent, the appellant's brother, averred that the refusal by the appellant to plead the particulars of undue influence meant that there were no facts in the declaration which if proved at the trial, would entitle the appellant to the relief sought. On the alternative relief, he averred that the language of the will was so clear and unambiguous in expressing the intention of the testatrix to revoke all prior wills that the contention that she had no intention to revoke the previous will relating to the disposal of her estate in Britain was unsustainable. Accordingly he applied for, and was granted, absolution from the instance in terms of r 79 of the High Court Rules, the court finding that for the reason advanced by the first respondent, the appellant's case was frivolous.

Held, that when undue influence amount to coercion of the mind of the person who becomes the testator or testatrix, it may take many forms depending on the facts and circumstances of each case. It does not follow that because undue influence was applied on the testator or testatrix, it necessarily caused the execution of the will. That the undue influence caused the execution of the will must be established by the facts alleged. It must be shown to have been operative at the time of the execution of the will. A testator or testatrix may still make a will expressing his or her wishes, notwithstanding the application of undue influence to his or her mind.

Held, further, that averring, as she had, that the first respondent had exercised undue influence upon their mother, the testatrix, the appellant was required to allege in her declaration all the material facts to sustain her averment. This she had failed to do. She had no knowledge of the facts of what the first respondent did or said to the testatrix which, if proved at the trial, would amount to coercion of the testator's will.

Held, further, that in regard to the alternative relief sought by the appellant, ^g the first respondent's submission that the language of the will was completely clear and unambiguous was correct. That being so, and as the testatrix was of a sound mind, memory and understanding at the time she executed this, her latest will, it could not be argued that she did not intend ^h to revoke her earlier will dealing with her property in Britain.

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Malaba JA

Held, that the appellant's action was untenable and frivolous and that her ^a appeal must be dismissed with costs.

Cases cited

Corderoy v Union Government 1918 AD 512

Craig v Lamoureux [1920] AC 349

Dube v Banana 1998 (2) ZLR 92 (H) ^b

Finucane v Macdonald & Ors 1942 CPD 19

Fisheries Development Corporation v Jorgenson & Anor 1979 (3) SA 1331 (W)

Hodgson v Granger & Anor HH-133-91

Lawrance v Lord Norreys (1887) 39 ChD 213 ^c

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

Patel v Controller of Customs and Excise 1982 (2) ZLR 82 (H)

Peebles v Dairibord Zimbabwe (Pvt) Ltd 1999 (1) ZLR 41 (H)

S v Cooper & Ors 1977 (3) SA 475 (T)

In re Wayland 's Est [1951] 2 All ER 1041 (PDA)

Western Assurance Co v Caldwell's Trustee 1918 AD 262 ^d

Wood NO v Edwards 1968 (2) RLR 212 (G); 1966 (3) SA 443 (R)

Legislation considered

High Court Rules, 1971 (RGN 1047 of 1971), rr 75(1) & (2) and 79 (2)

Case information

E T Matinenga, for the appellant ^e

J C Andersen SC, for the first respondent

No appearance for the second respondent

Judgment

MALABA JA: This is an appeal from a judgment of the High Court dated 1 November 2006 dismissing with costs the action commenced by the appellant in case No. HC 2389/05 and entering judgment of absolution from the instance ^f in terms of Order 11 r 79(2) of the High Court Rules, 1971 on the ground that it was frivolous.

The appellant and the first respondent are the surviving children of Betty Rogers who died in Harare on 6 November 2004. The subject matter of the dispute between the two children is the validity or extent of the legal effect of the will executed by their late mother in Harare on 22 January 2004. The testatrix ^g had on 6 January 1995 executed a will in the United Kingdom, in terms of which she bequeathed her immovable property situated in that country to the two children in equal shares and named both as the executors of the will. There was a second will executed in Harare on 23 March 1999 regulating the disposition of her estate in Zimbabwe. ^h

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Malaba JA

A On 22 January 2004, the testatrix executed a third will. On the face of it the document is regular and complete. It was executed and attested in accordance with the due formalities for giving validity to a will, prescribed in s 8(1) of the Wills Act [Chapter 6:06] ("the Act"). It is a short and simple document beginning with a general revocatory clause. The will states as follows:

"I BETTY ROGERS of 30 Arundel School Road, Mount Pleasant, Harare, B Zimbabwe, HEREBY REVOKE all former WILLS AND Testamentary Dispositions made by me and Declare this to be my last will.

I appoint my son Eliot Grenville Kern Rogers of 30 Arundel School Road, Mount Pleasant, Harare, Zimbabwe to be sole executor of this my WILL. I GIVE DEVISE AND BEQUEATH unto my son Eliot Grenville Rogers my fifty percent share of the property 30 Arundel School Road, Mount C Pleasant, Harare, Zimbabwe and one hundred percent of the property 15 Carrington Road, Darlington, Mutare, Zimbabwe to my son Eliot Grenville Kern Rogers.

I GIVE DEVISE AND BEQUEATH all my estate both real and personal whatsoever after payment thereof of all my just debts and funeral and testamentary expenses to my son Eliot Grenville Kern Rogers.

D As 30 Arundel School Road, Mount Pleasant, Harare, Zimbabwe has been the home of my son Eliot Grenville Kern Rogers all artworks, furniture and equipment are his personal possessions. I am grateful to have had the use of these during my period in Harare.

My reasons for the above bequests are as follows:

E In 1993 at the time of the death of my late husband, Cyril Alfred Rogers, my daughter Traude Allison Rogers was offered a one third share of the property 30 Arundel School, Mount Pleasant Harare, Zimbabwe but rejected this offer. Additionally my daughter Traude was offered the use of the property at 15 Carrington Road, Darlington, Mutare for the duration of her stay there. However the property proved unsatisfactory for her F requirements. HAD it proved satisfactory I would have bequeathed it to her."

After execution, the will was placed in the custody of the first respondent who resided at the same house with the testatrix. The will remained in his custody until after the testatrix's death. The appellant had been passed over in the disposition of the deceased's estate under the will.

G She commenced action in the High Court on 24 May 2005, challenging its validity. The appellant alleged that the first respondent through undue influence had caused the testatrix to make the will. She claimed an order declaring the will invalid, alternatively an order that the will was applicable only to the testatrix's estate situated in Zimbabwe and had the effect of H revoking prior wills dealing with such property.

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Malaba JA

Paragraphs 6 and 7 of the declaration contained the basis of the main claim as A perceived by the appellant. It stated that:

- "6. The said will was executed under undue and improper pressure exerted on the testatrix by first defendant and as a consequence the testatrix was not at that time capable of executing a will of her own free will and exercising her own unfettered discretion.
7. The said will is invalid not having been executed by the testatrix of B her own free will and in the premises plaintiff seeks an order from this Honourable Court to that effect."

On 20 July 2005, the first respondent, through his legal practitioners, asked for further particulars as to when, where and in what manner it was alleged he had exerted undue influence on the testatrix to obtain the execution of a will C which did not express her own wishes. The reply to the request was in the following terms:

"Undue and improper pressure was exerted on the testatrix by first defendant at the testatrix's home, where first defendant also resided cumulatively over a long period of time. The undue pressure came in the form of physical, emotional and verbal harassment, *the particulars of D which are a matter of evidence which plaintiff is not obliged to plead at this stage*" (the emphasis is mine).

The appellant was not prepared to plead the particulars of the undue influence through which she alleged the first respondent had caused the testatrix to make the will. E

The alternative relief was claimed on the ground set out in para 10 of the declaration as follows:

- "10. In the alternative and if it be found by this Honourable Court that plaintiff is not entitled to the relief sought in paragraph 7 above then:
 - 1.1 The plaintiff avers that the testatrix intended her will dated 22 January 2004 to apply only to her estate situate in Zimbabwe; F

- 1.2 The testatrix did not intend by executing the will dated 22 January 2004 to revoke the will executed by her in 1995 governing her estate situate in the United Kingdom."

When asked by the first respondent through his legal practitioners for the facts on which she alleged that the testatrix intended the will dated 22 January 2004 to apply only to her estate situated in Zimbabwe and not to her estate in the United Kingdom, the appellant said:

"The testatrix's will of 22 January 2004 specifically refers to the testatrix's property in Zimbabwe and says nothing about the testatrix's estate in the United Kingdom which is governed by the testatrix's 1995 will."

H

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Malaba JA

A On 10 October 2005, the first respondent filed his plea. He denied the allegations contained in paras 6, 7 and 10 of the declaration. He alleged that the will of 6 January 1995 was revoked by the will of 22 January 2004.

On 15 December 2005, the first respondent made a court application to the High Court in terms of Order 11 r 75 of the High Court Rules 1971 ("the Rules") for the dismissal of the action on the ground that it was "frivolous or vexatious". B Rule 75 provides that:

"(1) Where a defendant has filed a plea, he may make a court application for the dismissal of the action on the ground that it is frivolous or vexatious."

Rule 79 provides that:

C "(1) Unless the court is satisfied, whether the plaintiff has given evidence or not that the action is frivolous or vexatious it shall dismiss the application and the action shall proceed as if no application had been made.

(2) If the court is satisfied that the action is frivolous or vexatious it may dismiss the action and enter judgment of absolution from the instance with costs."

In respect of the main relief, the first respondent averred that refusal by the appellant to plead the particulars of undue influence meant that there were no facts in the declaration which, if proved at the trial, would entitle the appellant to the relief sought. On the alternative relief, he averred that the language of the will was so clear and unambiguous in expressing the intention of the testatrix to revoke D all prior wills that the contention that the testatrix had no intention to revoke the will of 6 January 1995 was obviously unsustainable.

In the opposing affidavit, the appellant made reference to negative aspects of the first respondent's character and his relationship to the testatrix.

E She averred that the first respondent was a single man who abused drugs and alcohol, whilst remaining at all material times unemployed and dependent on his parents for financial support. She said that, when he was under the influence of drugs or alcohol, the first respondent became verbally and physically abusive to members of his family. Although the testatrix was ashamed of the first respondent's character and lifestyle, she lacked the F courage to stop the constant placation of him because she was frightened of what he would do to her.

She accused him of developing obsessive hostility towards her. She said he warned her not to visit the testatrix at her home and threatened her with H violence if she did. In para 9.3.10 of the opposing affidavit, the appellant said:

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"... the cumulative effect of the state of affairs which I have summarized A above and which will be elaborated upon by both me and the plaintiff's witnesses in the trial of the main action resulted in my late mother executing the will under the substantial and improper influence of the applicant to the effect that I should be disinherited and that consequently the will was not executed by her of her own free will."

The argument for the first respondent in support of the application was that B the action was frivolous or vexatious because the declaration, as amplified by the opposing affidavit, did not contain allegations of the facts which, if proved at the trial would constitute the elements of undue influence and entitle the appellant to the main relief. On the alternative relief, it was argued that the language of the will was so clear and unambiguous, in expressing the intention C of the testatrix to revoke all former wills made by her, that the contention that she had no intention of revoking the earlier will dealing with her property in the United Kingdom confirmed the frivolity or vexatiousness

of the action. The argument for the appellant was that she had set out sufficient facts which, if proved at the trial, would constitute the ground of undue influence on which she intended to rely. ^d

The learned judge found that it was not one of the facts alleged in the declaration, as amplified by the opposing affidavit, that the first respondent verbally or physically abused the testatrix. It was not the appellant's case that he demanded that she should dispose of the whole of her estate to him and disinherit the appellant. The fact alleged was that the first respondent did not ^e place the testatrix under immediate threat at the time she executed the will.

The learned judge held that in the absence of allegations of facts which, if proved at the trial, would amount to coercion of the testatrix's mind in order to cause the execution of the will, which she was unwilling to make, there was no good cause of action. On the alternative relief, the learned judge accepted the argument that the language used in the will was so clear and unambiguous ^f in expressing the intention of the testatrix to revoke all former wills that the contention that the testatrix had no intention to revoke the earlier will dealing with her property situated in the United Kingdom was clearly untenable. For that reason he also came to the conclusion that the action was frivolous. In the exercise of the discretion the court undoubtedly had, the learned judge dismissed the action and entered judgment of absolution from the instance ^g with costs. The court *a quo* was satisfied that it was a hopeless action and that there was no reasonable ground for prosecuting it.

The question for determination on appeal is whether the decision of the court *a quo* that the action was frivolous is correct. It is important to bear in mind that it is the action in respect of which the court must be satisfied that it is ^h

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A frivolous or vexatious. An action, in that sense, is the legal proceeding instituted by the appellant in the High Court to obtain redress of the wrong allegedly committed by the first respondent. It includes all the material facts the knowledge of which would have satisfied her that the first respondent had committed undue influence on the testatrix to obtain the execution of the will disposing of all her estate to him.

^b The state of the facts referred to was not only to be the reason for the action and the ground on which it was to be sustained, it was the state of facts to which the principle of undue influence sought to be enforced in determining the wrongful acts committed by the first respondent applied. In short, the answer to the question whether the appellant had reasonable grounds for charging the first respondent with undue influence on the testatrix's will is ^c fundamental to the determination of the question whether the action was correctly found to be frivolous by the court *a quo*.

Summary dismissal of an action in terms of r 79(2) of the Rules is an extraordinary remedy to be granted in clear and exceptional cases. The reason is that granting the remedy has the effect of interfering with the elementary ^d right of free access to the court. The object of the rule is to enable the court to stop an action which should not have been launched. In *Lawrance v Lord Norreys* (1887) 39 ChD 213, Bowen LJ at p 234 said:

"It is abuse of the process of the court to prosecute in it any action which is so groundless that no reasonable person can possibly expect to obtain relief."

^e In *S v Cooper & Ors* 1977 (3) SA 475 (T) at 476D, Boshoff J said that the word "frivolous" in its ordinary and natural meaning connotes an action characterized by lack of seriousness, as in the case of one which is manifestly insufficient. An action is in a legal sense "frivolous or vexatious" when it is obviously unsustainable, manifestly groundless or utterly hopeless and without ^f foundation. See also *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at p 271; *Corderoy v Union Government* 1918 AD 512 at p 517; *Wood NO v Edwards* 1968 (2) RLR 212 (G) at 213A-F; *Fisheries Development Corporation v Jorgensen & Anor* 1979 (3) SA 1331 (W) at 1339E-F; *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S).

It appears to me that a plaintiff who commences action in a court of law when ^g he has no reasonable grounds to do so has no cause of action. An action without a good cause is baseless and obviously unsustainable.

In *Peebles v Dairiboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 (H) at 54E-F, it was said that:

^h "A cause of action was defined by Lord Esher MR in *Read v Brown* (1888)

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22 QB 131 as every fact which it would be necessary for the plaintiff to A prove if traversed in order to support his right to the judgment of the court.

In the same case, Lord Fry at 132-133 said the phrase meant everything which if not proved gives the defendant an immediate right to judgment. In *Letang v Cooper* [1965] 1 QB 232 at 242-3, Diplock LJ (as he then was) said a cause of action is simply a factual situation the existence of which entitled one person to obtain from the court a remedy against another B person."

See also *Patel v Controller of Customs & Excise* 1982 (2) ZLR 82 (H); *Denton v Director of Customs & Excise* HH-216-89; *Hodgson v Granger & Anor* HH-133-91; *Dube v Banana* 1998 (2) ZLR 92 (H).

In this case, the appellant alleged specially undue influence as the ground on C which she intended to rely at the trial for invalidating the will. She was required to give the necessary particulars which, if proved at the trial, would constitute the wrong she accused the first respondent of having committed. She, however, seems to have had no knowledge of the material facts she was required to allege in the declaration, proof of which would constitute the essential elements of undue influence and entitle her to the judgment of the D court. The *onus* was on her who was making the allegation of wrongdoing to prove on a balance of probabilities that the first respondent, through undue influence on the testatrix's mind, caused her to execute the will she was unwilling at the time to make: *Craig v Lamoureux* [1920] AC 349; *Finucane v Macdonald & Ors* 1942 CPD 19 at p 26.

The appellant did not appreciate the fact that undue influence is a compendious E description of the facts which, if alleged in the declaration and proved at the trial, would constitute the wrong for the redress of which the action was commenced. Whether there has been undue influence or not is a question which must be decided by reference to the facts and circumstances peculiar to the case. As it is a question of fact, undue influence may take many different F forms. It may be in the form of coercion of the testator or testatrix's will so that he or she does what is against his or her own volition. When undue influence amounts to coercion of the mind of the person who becomes the testator or testatrix, it may also take an infinite number of forms, depending on the facts and circumstances of each case. It does not follow that, because undue influence was applied on the testator or testatrix, it necessarily caused the G execution of the will. That the undue influence caused the execution of the will must be established by the facts alleged. The undue influence must be shown to have been operative at the time of the execution of the will. A testator or testatrix may still make a will expressing his or her wishes, notwithstanding the application of undue influence to his or her mind. H

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A It must follow from the principle that to be undue influence there must be coercion of the will as a ground to be relied upon at the trial. For invalidating a will, undue influence must never be alleged unless the plaintiff has reasonable grounds on which to support it. That requires the plaintiff to allege in the declaration all the material facts he or she has to prove at the trial to succeed. In this case, the appellant had no knowledge of the facts of what the first B respondent did or said to the testatrix which, if proved at the trial, would amount to coercion of the testatrix's will.

In *Tristram & Cootes Probate Practice* 27 ed at p 1131, a precedent is given as Form No. 266 of the kind of allegations a party alleging undue influence as the ground for invalidating a will could make if those were the facts. The C importance of the precedent lies in the fact that it confirms the point that there cannot be a finding of undue influence without the facts of what the person charged is alleged to have done.

The precedent therefore supports the contention that sufficient allegations of the facts relating to the conduct complained of as undue influence must be made in the declaration or plea. The defendant whose plea of undue influence D is on Form No. 266 said:

"For a year prior to his death, the plaintiff had been living in the house of the deceased, being employed to look after him during such time as the defendant (his only son) was necessarily resident abroad. The plaintiff so took advantage of the extreme old age of the deceased and of his weak and emotional state as to assume complete domination over him and his E household; she frequently contrived to keep from the deceased the letters the defendant wrote to him; she encouraged the deceased falsely to believe the defendant had abandoned him, and she persuaded him that she was the only person to whom he owed any duty; she herself gave the instruction for the alleged will and was present when the deceased purported to execute it. The defendant will allege that the influence of the F plaintiff over the deceased was

such that he was not a free agent and that the said alleged will was not the product of his own volition but was procured by the importunity of the plaintiff.”

Conspicuous by their absence from the declaration in this case were allegations of facts on what the first respondent could have done or said to the testatrix causing her to execute the will under which he benefited. The cause of action *G* remained shadowy.

When she was asked to give the necessary particulars of the alleged undue influence, the appellant declined, saying they were matters of evidence. She did not deny the fact that they were not part of the declaration or statement *H* of claim. What she said in the opposing affidavit did not cure the defect. The

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clear impression one gets is that she had no knowledge of the necessary *A* particulars of the undue influence with which she charged the first respondent.

Even if the allegations she made about the character of the first respondent and his relationship to the testatrix were made out at the trial, they would not amount to undue influence entitling her to the judgment of the court. She needed to have made the allegation of the fact that the first respondent used *B* his condition and the placation of him to coerce the mind of the testatrix so that she executed the will which she was unwilling at the time to make. She did not make that allegation.

There was nothing in the declaration, as amplified by the opposing affidavit, to induce the court *a quo* to suppose that there was any foundation for the allegation of undue influence the appellant made against the first respondent *C* as the ground on which she intended to rely at the trial for invalidating the will. She commenced the action when she had no reasonable ground on which she intended to rely at the trial for invalidating the will. She commenced the action when she had no reasonable ground on which to support it. The action was baseless and obviously unsustainable. It was frivolous. The court *a quo* had *D* cause to be satisfied that the action was hopeless and that there was no reasonable ground for prosecuting it further.

I turn to determine the question whether the contention that the testatrix had no intention of revoking the earlier will dealing with her property in the United Kingdom is clearly untenable. The will begins with a general revocatory clause. The clause is in terms which show that it was the intention of the *E* testatrix to revoke “all former wills” made by her (my emphasis). The language by which the intention of the testatrix is expressed is clear and unambiguous. When we are faced with such unequivocal language, the question whether the will of 6 January 1995 dealing with the testatrix’s property in the United Kingdom was intended to be revoked hardly arises as a matter of construction of the will of 22 January 2004. *F*

The testatrix was of a sound mind, memory and understanding at the time she executed the will of 22 January 2004. She knew that she had made prior wills disposing of part of her whole estate in a manner inconsistent with the disposition she was about to make. To put the matter of her intention beyond doubt, the testatrix described the will of 22 January 2004 as her “last will”. She *G* further provided that she was bequeathing all her residual estate both real and personal to the first respondent.

The principle applied in the case of *In re Wayland’s Estate* [1951] 2 All ER 1041 (PDA) to the effect that if each will deals only with property in a different *H*

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A country, the later will does not revoke the earlier one even if it does contain a revocatory clause, is not applicable to the facts of this case. The reason is that the clear intention of the testatrix was to deal in the will of 22 January 2004 with *all* her property including the property situated in the United Kingdom which she had dealt with in the earlier will.

The testatrix was able to provide for the disposition of the whole of her residual *B* estate, both real and personal, in the manner she did under the will of 22 January 2004 because in her mind she considered that the earlier will, which dealt differently with the disposition of the property in the United Kingdom, had been destroyed by the revocation. The court must give full effect to the

revocatory clause as the will which regulated the disposition of the property c in the United Kingdom no longer exists.

In the circumstances, the contention that in executing the will of 22 January 2004, the testatrix had no intention of revoking the will of 6 January 1995 is clearly untenable. The action which was based on such a ground was obviously unsustainable. The learned judge had good cause to be satisfied that the action was frivolous; exercised his discretion and dismissed it.

▫ The appeal is accordingly dismissed with costs.

CHEDA JA and GWAUNZA JA concurred.

▫ *Gill, Godlonton & Gerrans*, appellant's legal practitioners

P Chiutsi Legal Practitioners, first respondent's legal practitioners

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SIMBARASHE v ZIMBABWE ELECTORAL COMMISSION & ANOR 2008 (1) ZLR 342 (H)

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Citation	2008 (1) ZLR 342 (H)
Case No	Judgment No. HH-45-08
Court	Electoral Court, Harare
Judge	Kudya J
Heard	5 June 2008; 6 June 2008
Judgment	9 June 2008
Counsel	<i>K Ncube</i> , for the petitioner <i>G C Chikumbirike</i> , for the first respondent <i>J S Mandizha</i> , for the second respondent
Case Type	Electoral petition
Annotations	No case annotations to date

Flynote

Elections — election petition — when must be presented — should be c presented within 14 days of the declaration of the result for the last constituency — security for costs — when must be furnished — effect of failure to do so timeously — Zimbabwe Electoral Commission — joinder of — not proper to join Commission as respondent in an election petition ▫

Headnote

In terms of s 168(2) of the Electoral Act [*Chapter 2:13*], an election petition must be presented within fourteen days after the end of the period of the election to which it relates, the "period of

the election" being, in the case of a general election for the purpose of electing members of Parliament, the period between the calling of the election and the declaration of the [£] result of the poll for the last constituency in terms of s 66(1). It is not the date on which the result for the particular constituency was announced.

In terms of s 168(3) of the Act, a petitioner must furnish security for costs (or enter into recognizances) within seven days after the presentation of the petition. The aim of providing for security of costs is to guarantee the [£] expenses that the respondent will incur in defending the petition. The petitioner is requested to guarantee payment of these costs in advance to demonstrate his seriousness in challenging the election result. The security also serves to discourage the petitioner from launching a vexatious and reckless petition. Failure to comply with the seven day period is fatal to the petition. The Electoral Court is not clothed with any [£] powers of condonation for a breach of any of the time frames that are set out in the Act.

The Zimbabwe Electoral Commission should not be joined as a respondent in an election petition. For a start, s 166 of the Act states that "respondent" *means* the President, a member of Parliament or councillor whose election [£]

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[£] or qualification for holding the office is complained of in an election petition. By application of the maxim *expression unius est exclusion alterius*, "respondent" cannot include the Commission. Apart from this, there were numerous other indications in the Act that the legislature did not intend that the Commission should be a party to an election petition. Once an electoral malpractice is found to have been committed with the [£] knowledge and consent or approval of the winner or of his agents and that malpractice materially affected the election it renders that election void and triggers the holding of a new election. The effect is that the Commission is obliged by operation of law to hold a new election. It does not necessarily require a citation in an election petition to carry out this [£] statutory mandate. No prejudice will arise to either candidate or to the Commission if it is not cited. There is therefore no logical reason for citing it.

Cases referred to

Blackburn v Flavelle (1881) 6 App Cas 628

▷ *Chitungo v Munyoro & Anor* 1990 (1) ZLR 52 (H)

Crest Entprs (Pty) Ltd & Anor v Barnett & Schlosberg NNO 1986 (4) SA 19 (C)

Dettman v Goldfain & Anor 1975 (3) SA 385 (A)

Ellis & Anor v Maceys Stores Ltd 1983 (2) ZLR 17 (S)

£ *Hove v Gumbo (Mberengwa West Election Petition Appeal)* 2005 (2) ZLR 85 (S)

Kombayi v Berkhout 1988 (1) ZLR 53 (S)

Lowe v Dorling & Son [1906] 2 KB 772

MDC & Anor v Mudede NO & Ors 2000 (2) ZLR 152 (S)

Nyamapfeni v Constituency Registrar, Mberengwa East & Ors 2008 (1) ZLR 164 (H)

£ *Pio v Smith* 1986 (3) SA 145 (ZH)

Savanhu v Postmaster-General 1992 (2) ZLR 455 (H)

Sibanda v Postmaster-General HH-263-90

Terblanche v SA Eagle Ins Co Ltd 1983 (2) SA 501 (N)

Tsvangirai v Mugabe & Anor 2005 (2) ZLR 398 (H)

Legislation considered [£]

Electoral Act [Chapter 2:13], ss 155, 156, 157, 158, 166, 168(2), (3) & (4), 170(1), 171(3), (4) & (7)

£ Interpretation Act [Chapter 1:01], s 33(4)

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Case information

K Ncube, for the petitioner ^A

G C Chikumbirike, for the first respondent

J S Mandizha, for the second respondent

Judgment

KUDYA J: At the management meeting that was held on 21 May 2008, three preliminary issues were referred to trial. They were framed as follows: ^B

1. Whether the petition is out of time and, if so, whether this is fatal to the petition;
2. Whether the failure to file security for costs timeously renders the petition void;
3. Whether the first respondent was properly joined as a party. ^C

THE FACTS

The brief facts in this matter are as follows. On 29 March 2008, the harmonized presidential, parliamentary and council elections were held in Zimbabwe. Hillary Simbarashe, the petitioner, stood as an independent candidate for the House of Assembly seat in the Mutoko North constituency. The elections ^D were run and conducted by the Zimbabwe Electoral Commission, the first respondent. Mabel Chinomona, the second respondent, of the Zimbabwe African National Union (Patriotic Front) (ZANU (PF)) was one of the candidates who battled it out with the petitioner. On 31 March 2008, she was declared the winner.

The petitioner was unhappy with the pre-election and post-election ^E environment as well as the manner in which the election was conducted. Accordingly, he lodged the present petition with the Registrar on 16 April 2008. The date of service was not disclosed, but the second respondent filed her opposing papers on 15 May 2008. She, amongst other things, raised the first two preliminary issues referred for trial. The first respondent opposed the ^F petition on the basis of misjoinder, hence the third issue.

When I set down the matter for hearing, I directed the parties to furnish me, at the hearing, with information from the Zimbabwe Electoral Commission indicating the date on which the result in the last constituency for election to the House of Assembly was announced by the constituency election officer for that constituency. This was not done. I however proceeded to hear the ^G matter on the understanding that I would deliver this judgment after that information had been availed. It was only provided by Mr *Chikumbirike*, for the first respondent, on the morning of 6 June 2008. He produced a document which has three columns. The first column indicates the province in which the House of Assembly seat is found, the second indicates the constituency and ^H

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A the last the date on which the V23 form was signed by the constituency elections officer. The signature is appended on the date on which the constituency elections officer declares the winning candidate. The last V23 form was signed on 4 April 2008 for the Kariba constituency.

The parties were therefore agreed that the declaration of the result in the last ^B constituency was made on 4 April 2008.

THE SUBMISSIONS

1. WHETHER THE PETITION IS OUT OF TIME AND, IF SO, WHETHER THIS IS FATAL TO THE PETITION

Mr *Mandizha*, for the second respondent, submitted that the petitioner is ^C non-suited for lodging the petition outside the 14 day period. He computed the period from 31 March 2008, the date on which the second respondent was declared the winner.

Mr *Ncube*, for the petitioner, on the other hand, contended that the petition was not filed out of time. He contended in his heads of argument that the second respondent had not shown that the result of the election had been ^D notified in terms of the Electoral Act [*Chapter 2:13*] (hereinafter referred to as "the Act"). He based this argument on the provisions of ss 67 and 68 of the Act.

In his view, the effect of these provisions is to establish the date on which the winner is officially declared as such in an election of this kind. This argument was made despite the petitioner's averment in his founding affidavit that the ^E second respondent was duly declared the winner on 31 March 2008. Clearly, on the basis of this averment, his line of argument was unsustainable.

The 14 day period for the presentation of a petition is set out in s 168(2) of the Act. It reads:

"(2) An election petition shall be presented within fourteen days after the end of the period of the election to which it relates:

^F Provided that, if the return or election is questioned upon an allegation of an illegal practice, the petition may be presented, if the election petition specifically alleges a payment of money or some other act to have been made or done since that day by the member or an agent of the member or with the privity of the member or his or her chief election agent in pursuance or in furtherance of the illegal practice alleged in the petition, ^G at any time within thirty days after the day of such payment or other act."

The phrase "period of the election" is defined in s 4, the interpretation section of the Act, as:

"'election period' or 'period of an election' means –

^H (a) in the case of a general election for the purpose of electing members

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of Parliament, the period between the calling of the election and the ^A declaration of the result of the poll for the last constituency in terms of s 66(1)."

I concentrate on the 14 day period in this judgment because the petitioner has not sought to rely on the proviso which allows the filing of an election petition within 30 days from the date on which an illegal practice, as defined in Part XX ^B of the Act, occurs. The illegal practice must have occurred after the declaration of the result in the last constituency to which that election relates. In his founding affidavit, in paras 36 and 37, the petitioner pleaded intimidatory practice rather than illegal practice.

The 14 day period commences to run on the day following the declaration of the result of the poll for the last constituency in terms of s 66(1) and not on ^C the date on which the result is notified, as submitted by Mr *Ncube* who relied on the wording of that section before it was amended by the Electoral Law Amendment Act No. 17 of 2007. While the notification of the results to the chief elections officer and the subsequent notification to the Clerk of Parliament and the gazetting of the winner are important processes, the overriding consideration for our purposes is the declaration made by the constituency ^D elections officer of the winning candidate in the last constituency for a House of Assembly seat.

It is that date which is synonymous with the declaration of the result for the last constituency of the election to which it relates. The election to which it relates, in my view, would be for the House of Assembly and not for the Senate, ^E even though both are elections for members of Parliament. The parties were agreed that the declaration of the result for the last constituency was made on 4 April 2008, for the Kariba constituency.

The 14 day period for the petitioner would expire on Friday, 18 April 2008. This was a public holiday. The two days that followed were a Saturday and a ^F Sunday. The date which followed these was Monday, 21 April 2008. In terms of s 33(4) of the Interpretation Act [*Chapter 1:01*], the 14 day period would expire on 21 April 2008. See *Nyamapfeni v Constituency Registrar Mberengwa East & Ors* 2008 (1) ZLR 164 (H); *Ellis & Anor v Maceys Stores Ltd* 1983 (2) ZLR 17 (S) and *Kombayi v Berkhout* 1988 (1) ZLR 53 (S).

The petitioner filed his petition on 16 April 2008. He therefore did so timeously. ^G

The effect of the information in the document that was produced by Mr *Chikumbirike* was to dispose of the first issue in favour of the petitioner and against the second respondent. ^H

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A 2. WHETHER THE FAILURE TO FILE SECURITY FOR COSTS TIMEOUSLY RENDERS THE PETITION VOID

The petitioner did not furnish security for costs within the period of seven days after the presentation of the election petition, as set out in s 168(3) of the Act. The security is set in an amount fixed by the Registrar in a sum not less than the amount prescribed by the Commission after consulting the Chief Justice. It is benchmarked against the expected outlay of all costs, charges and expenses that may be incurred by both the petitioner and the respondent in the petition.

Section 168(4) gives the petitioner the choice between paying the fixed amount set in subs (3) to the Registrar and entering into recognizance with, at most, four sureties in the presence of the Registrar or a magistrate. It seems to me that once the petitioner has paid the security for costs he or she is not obliged to execute a recognizance. A recognizance is, after all, a bond entered into between the petitioner and the sureties, which is made for the benefit of the respondent. This is one of the reasons why, in my view, it has to be served with the petition. The other is that it affords the respondent the opportunity to object not only to the names of the proposed subscribers but also to the format and contents of the recognizance.

The second respondent objected in his opposing papers, filed on 15 May 2008, to the failure to furnish security. The petitioner produced at the hearing, from the bar, proof that the security in the amount set by the Registrar was paid on 20 May 2008. Payment was thus made after the second respondent had raised it in his opposing papers.

Mr *Mandizha* submitted that the failure to provide security rendered the petition void. He contended that as s 168(3) was framed in peremptory language, the petitioner had to strictly comply with its provisions. The late payment that he made fell outside the time limits allowed by the section under consideration. He was, therefore, non-suited.

Mr *Ncube*, on the other hand, contended that the petition was deemed to be at issue because the second respondent did not object to the security within the period set out in s 170(1). He therefore submitted that the petitioner could not be non-suited.

Section 170(1) deals with the method and grounds of objection. It also sets out the period within which to object. That period would have to depend on the directions given by the Electoral Court, as there are no prescribed rules of court at the moment. It is clear from the wording of the subsection that the creation of the recognizance precedes the objection. I fail to comprehend how the petitioner expected the second respondent to object, at the time of service, to a non-existent bond.

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The first contention of Mr *Ncube* in this regard must fail. ^a

Mr *Ncube* further contended that, as costs could only be paid at the conclusion of the petition, failure to strictly comply with the seven day period was not fatal to the petition, as long as security was furnished before the hearing. He argued that the late payment was in substantial compliance with s 168(3).

The aim of providing for security of costs is to guarantee the expenses that ^b the respondent will incur in defending the petition. The petitioner is requested to guarantee payment of these costs in advance to demonstrate his seriousness in challenging the election result. The security also serves to discourage the petitioner from launching a vexatious and reckless petition. See the sentiments of Berman J in *Crest Enterprises v Barnet and Schlosberg* 1986 (4) SA 19 ^c (C) at 20D.

In *MDC & Anor v Mudede NO & Ors* 2000 (2) ZLR 152 (S) at 158C-G, the Supreme Court accepted that peremptory language in statutes did not necessarily require strict compliance, but could, in the absence of prejudice, require substantial compliance. At 154B-C, McNally JA introduced the four step approach to statutory interpretation which he used at p 159A. He ^d enjoined the judicial officer to consider the relevant legislation; what actually happened; whether the provisions of the relevant legislation were substantially complied with; and whether there was any prejudice as a result of non-compliance.

I apply these criteria to the provision under scrutiny. ^e
Consideration of the relevant legislation

The subsection requires the petitioner to give security to the Registrar within seven days of the presentation of the petition.

What actually happened?

What actually happened was that the petitioner did not provide such security for costs within seven days after the presentation of the petition. The seven days expired on 23 April 2008. He served the petition on the second respondent who filed her opposition on 15 May 2008 and indicated that the seven day period for furnishing security had been breached. Thereafter, the petitioner paid the security to the Registrar on 20 May 2008. He was out of time by 27 days. ^h

Did the petitioner substantially comply with the subsection?

Substantial compliance entails some positive action on the petitioner's part to provide security for costs within the stipulated period. It does not entail the absence of any action on the petitioner's part. The petitioner took no action whatsoever to provide for security in the set period. He did not attempt to ^h

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^A follow the precepts of the subsection. He simply did not comply with the provisions of the subsection.

Whether there was any prejudice as a result of the non-compliance

In the absence of a finding of substantial compliance, it is unnecessary to make a finding on the existence of prejudice. It suffices to note that his disdain of ^B the requirements of the subsection undermined the objective of the section to have petitions dealt with seriously and speedily. He gave the impression to the second respondent that he did not wish to pursue his grievance in a lawful manner and led her to incur costs in bringing this preliminary challenge resulting in prejudice to its speedy resolution.

It seems to me that failure to comply with the seven day period is fatal to the ^C petition. After all, the Electoral Court is not clothed with the powers of condonation for a breach of any of the time frames that are set out in the Act. See *Chitungo v Munyoro* 1990 (1) ZLR 52 (H) at 58H and *Nyamapfeni's case supra*.

I therefore hold that the failure to furnish security timeously renders the ^D petition void.

3. WHETHER THE FIRST RESPONDENT WAS PROPERLY JOINED AS A PARTY

Mr *Chikumbirike* objected to the citation of first respondent in the petition. He relied on the definition of respondent found in Part XXIII in s 166 of the ^E Act. The section reads as follows:

"166. Interpretation in Part XXIII

In this Part —

'respondent' means the President, a member of Parliament or councillor whose election or qualification for holding the office is complained of in ^F an election petition."

He invoked the maxim *expressio unius est exclusio alterius* in aid of his objection. According to Francis Bennion *Statutory Interpretation* (Butterworths 1988) at p 844 the expression means "to express one thing is to exclude another." In full, Bennion states thus:

"The maxim *expressio unius est exclusio alterius* (to express one thing is ^G to exclude another) is an aspect of the principle *expressum facit cessare tacitum*, known in short as the *expressio unius* principle. It is applied where a statutory proposition might have covered a number of matters but in fact mentions only some of them. Unless these are mentioned merely as examples or *ex abundante cautela* or for some other sufficient reason, ^H the rest are taken to be excluded from the proposition.

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The *expressio unius* principle is also applied where a formula, which itself ^A may or may not include a certain class, is accompanied by words of extension naming only some members of that class. The remaining members of that class are then taken to be excluded.

Again, the principle may apply where an item is mentioned in relation to one matter but not in relation to another matter equally eligible."

Mr *Chikumbirike* submitted that the legislature deliberately defined a “respondent” in the Act so as to exclude the first respondent in circumstances where it should automatically have been included by virtue of its overarching role in running and conducting elections. It did not desire that the first respondent be made a party in electoral petitions. He advanced six reasons upon which he based his contention that the exclusion was deliberate. c

Mr *Ncube*, on the other hand, submitted that first respondent was properly cited because it is an interested party which bears the responsibility to give effect to the order of the court. He based his submission on the common law principle of joinder and relied on *Tsvangirai v Mugabe & Anor* 2005 (2) ZLR 398 (H). Mr *Ncube* referred to *Lowe v Dorling & Son* [1906] 2 KB 772 at 784; *Blackburn v Flavelle* (1881) 6 App Cas 628; *Dettman v Goldfain & Anor* 1975 (3) SA 385 (A) d and *Terblanche v SA Eagle Insurance Company Ltd* 1983 (2) SA 501 (N) and cautioned the court against the application of the principle in a manner that would result in grave injustice.

In his oral submissions, Mr *Ncube* indicated that the grave miscarriage of justice that would occur would be the failure by first respondent to obey any e court order arising from the petition if it was not cited and, secondly, that the petition would be hamstrung and compromised by a failure to call the evidence from any of the officials of the first respondent who are implicated in electoral malpractice.

I agree with Mr *Chikumbirike* that the six reasons he advanced demonstrate f the full force of the *expressio unius* principle at play in the present matter. With the full knowledge of first respondent’s mandate in election matters, the legislature firstly, in s 166, did not include it as a respondent, obviously in a bid to guarantee its neutrality in the conduct of elections. Secondly, the first respondent is excluded from the protective ambit of s 168(3). Thirdly, in s 171(3)(b)(ii), it mandated the Electoral Court to certify its determination to, g amongst others, the first respondent, which in itself would be an anomalous method of alerting a respondent who is before it of its decision. In fact, the other persons who are notified are not respondents but public officials. Fourthly, in s 171(7)(a) and (b), the first respondent may be made to pay costs or a portion thereof for the culpable conduct of its officials, an obvious fate h

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a that befalls any losing or maligned respondent. Fifthly, in s 158 as read with s 171(4)(b), any person alleged to have committed an electoral malpractice may be called to vindicate his name before such a finding is made against him. These legislative provisions were put in place to emphasize the fact that the first respondent could not be a party to proceedings that relate to petitions in terms of Part XXIII of the Act.

b In any event, “means” is the operative word in s 166 of the Act. It carries a different import from such words as “includes”. It is peremptory in nature. Again, one resorts to the formulation in *MDC v Mudede supra*. The parties who can be cited as respondents are indicated. The legislature was aware that the first respondent was in charge of elections. The aim and object of defining c “respondent” in this limited fashion appears from the very nature of an election petition. It is a challenge against the actions of the winning candidate before, during and after an election. In other words, at the center of an election petition is the winning candidate. It is designed to impugn or vindicate the winner’s acts of commission and omission against the benchmarks set out in s 3 of the Act. Section 167 of the Act outlines the causes of action in an election d petition. These are the absence of qualification, disqualification, electoral malpractice, irregularity or any other cause whatsoever. The first two grounds arise directly from the candidate. Electoral malpractice and irregularity may arise from the actions or omissions of the candidate, his chief election agent, his election agent or of any other person.

e Part XXI, in ss 155, 156 and 157, of the Act deals with how the Electoral Court may determine petitions. It makes the winner liable for his own actions; for the actions of his chief election agent; for the actions of his agent; or for the actions of any person done with his knowledge and consent or approval or the approval and consent of his agents. Once an electoral malpractice is found to have been committed with the knowledge and consent or approval of the f winner or of his agents and that malpractice materially affected the election, it renders that election void and triggers the holding of a new election. The effect is that the first respondent is obliged to hold a new election. This is by operation of law. The first respondent does not necessarily require a citation in an election petition to carry out this statutory mandate.

In addition, s 158 gives the Electoral Court the power to call a person who is ^g implicated in electoral malpractice to testify in a bid to vindicate his name. Officials of first respondent and those seconded from the Public Service are not exempt from such a summons.

What emerges from this Part of the Act is that an election is set aside for the ^h electoral malpractice committed by the candidate whether personally or

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through his agents or by any other person with his knowledge and consent ^a or approval. The first respondent is not a candidate in such an election. All it has to do, is to await the order of the court declaring an election valid or void. There is no reason for it to be joined in as a party. No prejudice will arise to either candidate or to the first respondent if it is not cited. There is therefore no logical reason for citing it.

My finding is in consonance with that of Mfalila J in *Pio v Smith* 1986 (3) SA 145 (Z) at 166E-H, which I quote in full for its clarity. He stated: ^b

"Issue 2: *Whether the petitioner must be non-suited for failing to join the presiding officer, the returning officer and the Registrar-General as parties in these proceedings.*

I will not dwell at length on this issue because I agree with counsel for the ^c petitioner that the point raised therein has no merit. The petitioner cannot be non-suited for failing to do that which is not provided for or required by the statute. The question of the State officials or the State being condemned unheard does not arise, because, first, if one of the allegations is irregularities committed by State officials, these can always be called as witnesses; secondly, when it comes to the question of costs, the ^d statute provides machinery for the State to be heard. There was therefore no duty on the petitioner to join any of the election officials; indeed had he done so and cited them a successful application to have them struck out could have been made, for even under s 164 of the Act, the Chief Justice has made no rules which could have provided for this.

For these reasons, I answer the second issue in the negative and say that ^e the petitioner cannot be non-suited for failing to join the presiding officer, the returning officer and the Registrar-General as parties in these proceedings."

While the nature of the application was different to the present one on the facts, Mfalila J underscored the point that an institution in the shoes of the first respondent could not be cited in an election petition. ^f

I was referred to *Tsvangirai v Mugabe & Anor supra* as authority for the proposition that the first respondent was properly cited. Hlatshwayo J at p 404 based his decision for approving the citation of the predecessor to the first respondent in that case on the common law rule of the presence of a direct and substantial interest and rr 85, 86 and 87 of the High Court rules. The only ^g difficult I have with reference to the common law is that an election petition is unknown to common law (*per* Malaba JA in *Hove v Gumbo* 2005 (2) ZLR 85 (S) at 92). Further, it does not appear to me that the rules of the High Court would supercede the definition of "respondent" set out in s 166 of the Act. In any event, as was submitted by Mr *Chikumbirike*, as his sixth reason, the ^h

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^a *Tsvangirai* case is distinguishable from the present matter, in that it concerned a presidential election petition, while the present involves a parliamentary election petition. The Electoral Act [Chapter 2:01], under consideration in that case, did not in s 102 define the "respondent" for presidential petitions. Under that old Act, petitions were referred to the High Court and not, as at present, to the Electoral Court, a special court created under the Electoral Act ^b No. 25 of 2004.

Citing first respondent or, more correctly, its Chairman, is not permitted by the Act in election petitions. I fail to see how citing the first respondent can be said to be in substantial compliance with the Act when the Act excludes it. The citation of the first respondent in name is contrary to the provisions of s 18 ^c of the Zimbabwe Electoral Commission Act, which incorporates the *modus operandi* set out in s 3 of the State Liabilities Act [Chapter 8:14] for citing government ministries and departments. It directs that the Chairman of the first respondent be cited. The aim of the section is to bring the suit to the attention of the first respondent through its head so that it can respond appropriately. It is, in reality, the direct opposite of what transpired in *Savanhu v Postmaster-General* ^d 1992 (2) ZLR 455 (H) and *Sibanda v Postmaster-General* HH-263-90, where

the two employees cited the Postmaster-General, contrary to the stipulations of the Post and Telecommunications Act which established the Post and Telecommunications Corporation as the corporate body that was capable of suing and being sued. Lacking common law powers, I fail to see how the error can be corrected other than by withdrawing the matter and ^Fcommencing proceedings afresh.

Thus, even if the first respondent were properly joined in the petition, I would still dismiss it on the basis that the wrong party was cited. I however hold that the Zimbabwe Electoral Commission was improperly joined as a party in this petition.

^F **DISPOSITION**

The petition is dismissed with costs for failure by the petitioner to furnish security for costs within the time frame stipulated in subs (3) of 168 of the Electoral Act [*Chapter 2:13*].

It is declared that the Zimbabwe Electoral Commission was wrongly cited and ^Gis hereby removed as a party to this petition. The petitioner shall bear its costs.

Gill, Godlonton & Gerrans, petitioner's legal practitioners

Chikumbirike & Associates, first respondent's legal practitioners

^H *Mandizha & Co*, second respondent's legal practitioners

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CHABVAMUPERU & ORS v JACOBS & ORS 2008 (1) ZLR 354 (H)

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Citation	2008 (1) ZLR 354 (H)
Case No	Judgment No. HH-46-08
Court	High Court, Harare
Judge	Makarau JP
Heard	5 June 2008
Judgment	10 June 2008
Counsel	<i>LUriri</i> , for the petitioners <i>J Mandizha</i> , for the respondents
Case Type	Election petition
Annotations	Link to case annotations

Flynote

Elections — election petition — notice to respondent — when must be c presented — effect of failure to present within stipulated time — whether substantial compliance with provisions of Act sufficient — Electoral Court — has no power to condone non-compliance with Act — service at respondent's party offices — not service as required by the Act

Headnote

In terms of s 169 of the Electoral Act [Chapter 2:13], notice in writing of the ^d presentation of a petition and of the names and addresses of the proposed sureties, accompanied by a copy of the petition, must, within ten days after the presentation of the petition to court, be served by the petitioner on the respondent personally or by leaving the same at his or her usual or last known dwelling or place of business. ^e

The petitioners, all losing candidates in the March 2008 general election, presented election petitions. Having timeously presented the petitions to court, they purportedly gave notice to the respondents by handing a copy thereof to an official at the respondents' party's headquarters in Harare nearly a month later. The petition was served, together with a notice setting the matter down before a judge for a pre-trial conference ^f and a letter offering security for costs. The respondents contended that in view of the non-compliance with the provisions of the electoral law in respect of the time and place of service of the petition, the petitioners were non-suited and the petition should accordingly be dismissed. The petitioners argued that service outside the time limit and at the headquarters of respondents party was proper and in substantial ^g compliance with the provisions of the law. In particular, they argued that they delayed in serving the petition as they were waiting for the amount of security to be fixed by the Registrar, since the law requires them to serve the petition together with a list of their proposed sureties. ^h

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^a *Held*, that the language used in s 169 of the Act is peremptory. The question was whether what had been done by the petitioners could constitute substantial compliance with the peremptory provisions of the section. This required the court to establish, firstly, what had to be done in terms of s 169 of the Act and, secondly, the object of the section. In the third step, it had to be established what was actually done; and finally, the ^b court had to assess whether what was actually done could stand alone and be objectively viewed as amounting to substantial compliance with the requirements of the section. In the event that there was substantial compliance, the next question was whether there was any prejudice as a result of the non-compliance.

^c *Held*, further, that the section itself was plain in meaning and admitted of no ambiguity. The object was to contain the time frame within which election petitions presented to court may be determined. Election petitions require urgent resolution. The section should not be interpreted so as to intrinsically link the furnishing of security with the presentation of the petition, such that one cannot exist without the other. The presentation ^d of the petition, a thing in the exclusive domain of the petitioner, has no direct link to the furnishing of security for the costs of the respondent, the fixing of which is under the control of persons other than the petitioner, save that the law requires the two to be served together. The fact that the two are to be served at the same time does not make them so intrinsically linked, one to the other, that service of one could not be ^e effected in the absence of the other. In any event, the Registrar had fixed security nearly 3 weeks before the petitions were served, so there was no factual ground for arguing substantial compliance. In view of the failure by the petitioners to comply exactly or substantially with the provision, their petition was a nullity and the proceedings before the court were also rendered a nullity.

^f *Held*, further, that the Electoral Court, being a creature of statute, can only exercise those powers that are expressly granted to it by the enabling statute. Section 169 of the Act does not grant the court power on good cause, to extend the time within which petitions can be served. Rule 4C of the High Court Rules is of no application as the court was not dealing ^g with a time limit that has been set in terms of the rules of court. This was a time limit set by Parliament.

Held, further, that with regard to service at the party's offices, the section requires that service has to be personal or at the residence or place of business of the respondent. A "political" business place is not one of ^h the places where proper service of an election petition may be effected.

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Cases cited ^A

Chitungo v Munyoro & Anor 1990 (1) ZLR 52 (H)

Kutama v Town Clerk for the Municipality of Kwekwe 1993 (2) ZLR 137 (S)

MDC & Anor v Mudede & Ors 2000 (2) ZLR 152 (S)

Nair v Teik [1967] 2 All ER 34 (PC)

Pio v Smith 1986 (3) SA 145 (ZH)

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

Sterling Products International Ltd v Zulu 1988 (2) ZLR 293 (S) ^B

Legislation considered

Electoral Act [*Chapter 2:13*], ss 168(3) & 169

High Court Rules 1971 (RGN 1047 of 1971), r 4A ^C

Case information

LUriri, for the petitioners

J Mandizha, for the respondents

Judgment

MAKARAU JP: The hearing of argument on the preliminary points arising from this election petition was consolidated with hearings in seven other ^D cases, as the issues raised in all eight petitions were similar to a large extent and may very well call for the application of the same legal principle. In three of the petitions, however, the Zimbabwe Electoral Commission was cited as a respondent, prompting the Commission to raise an objection, alleging mis-joinder. I could have issued one judgment in all eight matters but have deemed ^E it administratively convenient to issue individual judgments in each of the election petitions.

BACKGROUND

The five petitioners in the above petition were candidates in the harmonized elections that were held on 29 March 2008. The first petitioner stood as a ^F candidate for the senatorial seat in Mutoko. The second petitioner stood as a candidate for the Mutoko South House of Assembly Constituency. The third petitioner stood for the Mutoko East House of Assembly Constituency while the fourth stood for the Mutoko North House of Assembly seat. The fifth petitioner stood as a candidate for Ward 10 for election to the Mutoko local authority. They all belong to one political party. Dissatisfied with the ^G outcome of the poll, the five presented a composite petition to this court, seeking to nullify the results on several grounds, the details of which appear in their respective affidavits filed with the petition.

The petition was duly presented to court on 14 April 2008. It was purportedly served on 12 May 2008 by handing a copy thereof to one Dzora, a personal ^H

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^A assistant to the ZANU-PF Secretary for Administration at the party's headquarters in Harare. The petition was served together with a notice setting the matter down before a judge for a pre-trial conference and a letter offering security for costs. The respondents filed a notice of opposition and opposing affidavits to the petition. In their respective opposing affidavits, they all took the points *in limine* that the petition had been served out of time and not at ^B a place provided for in the statute. On the basis of this preliminary objection, they alleged that the petitioners were non-suited for failing to comply with the provisions of the Electoral Act [*Chapter 2:13*] (hereinafter referred to as "the Act") in relation to the time within which to effect service and the place of service of the

petition. Directions were subsequently given to the parties at the pre-trial conference as to the filing of heads of argument, culminating in c the hearing of the points *in limine* as described above.

In the heads of argument filed on their behalf, the respondents contended that in view of the non-compliance with the provisions of the Act in respect of the time and place of service of the petition, the petitioners were non-suited and the petition should accordingly be dismissed. In opposition, the petitioners d argued that service outside the time limit and at the headquarters of the respondents' party was proper and in substantial compliance with the provision of the Act. In particular, it was argued that the petitioners delayed in serving the petition as they were waiting for the amount of security to be fixed by the Registrar, since the law requires them to serve the petition together with a list of their proposed sureties.

THE ISSUES

Argument in the matter and in the other petitions proceeded on the basis that regarding the issue of service of the petitions, there were two separate issues as follows: f

1. whether service of the election petitions outside the ten day period stipulated in s 169 of the Act is such non-compliance with the provision as to render the petitions invalid; and
2. whether service of the petition at the headquarters of the respondents' political party is such non-compliance with the provision as to render the petition invalid.

g In my view, the two issues, while made up of two distinct components, are essentially the two sides of the same issue. Service of petitions is provided for in one section of the Act and this requires that it be done within a certain specified period and at a certain specified place. It further appears to me that h one cannot assess whether there was substantial compliance with the

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provisions of the Act by taking piece-meal what the petitioners did and a establishing whether each separate act was in substantial compliance with the Act. A holistic approach is, in my view, what is called for. However, in view of the fact that argument was presented to me on the two issues as if they are separate, I shall deal with each in turn.

WHETHER SERVICE OF THE ELECTION PETITIONS OUTSIDE B THE TEN DAY PERIOD STIPULATED IN THE ACT IS FATAL TO THE VALIDITY OF THE PETITION.

It is pertinent in my view, that at this stage I set out in full the relevant provision of the Act that governs the service of election petitions and the interpretation of which gave rise to the points *in limine* raised by the respondents. c

Section 169 of the Act provides:

"Notice in writing of the presentation of a petition and of the names and addresses of the proposed sureties, accompanied by a copy of the petition, shall, within ten days after the presentation of the petition, be served by the petitioner on the respondent personally or by leaving the same at his or her usual or last known dwelling or place of business." d

It is common cause that the petition before me was not served within the ten days stipulated in s 169 of the Act. It ought to have been served on or before 24 April 2008, having been presented to court on 14 April 2008. The petition was only served on 12 May 2008, 28 days after presentation. The crisp and immediate issue that presents itself is whether service of the petition twenty eight days after presentation is fatal to its validity. e

Before I proceed to deal with the merits of the matter, there is one issue I feel constrained to comment on. The respondents were initially represented by Mr *Hussein* who filed detailed and most useful heads of argument supporting the contention that the petition was invalid as its service was not in compliance with the law. At the hearing of the matter, Mr *Mandizha* purported to appear f for the respondents. I use the word "purported" very deliberately as Mr *Mandizha* effectively abandoned the position adopted by the respondents in their opposing affidavits and advanced on their behalf in the heads filed by Mr *Hussein*. Instead, he argued the case for the petitioners that the petition was properly before the court. The issue that exercised my mind in this matter is whether in the circumstances I still had a dispute between the parties to g determine in view of the concessions made by Mr *Mandizha*.

I proceeded to determine the matter as I am of the firm view that the issue that falls for determination goes to the validity of the petition before the court and thus to the jurisdiction of this court. The issue I formulated for myself is ^h

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^a whether the electoral court has power to determine an election petition that has not been served in compliance with the electoral Act. I am fortified in this approach by the fact that Mr *Mandizha* did not formally withdraw the objection by the respondents but simply gave me his opinion on the interpretation of section 169 of the Act. Thus, the issue remained alive before me for me to consider whether the concession made by Mr *Mandizha* was ^b properly made. Furthermore, as indicted above, the hearing of this argument was part of the hearing of seven other arguments and thus the respondents were not prejudiced by the about-turn in stance displayed by Mr *Mandizha* on the day of the hearing. I have been able to rely on the submissions that were made by other counsel for similarly placed respondents.

^c I now turn back to the merits of the matter.

As indicated above, there was no argument advanced on behalf of the respondents in this matter as Mr *Mandizha* for the respondents argued that the provisions of s 169 of the Act could be interpreted in such a way that it becomes directory rather than peremptory. In this regard, he submitted that he was guided by the decision in *MDC & Anor v Mudede & Ors* 2000 (2) ZLR 152 (S) ^d where the approach of assessing whether there had been substantial compliance with the statutory provision was discussed and applied. He further argued that, in ascertaining the intention of the Legislature in enacting s 169 of the Act, reference had to be made to s 168(3), which deals with the issue of security. The mainstay of his argument was that the ^e petitioners could not serve their petition upon the respondents before the amount of security had been fixed by the Registrar of this court. He concluded by urging the court to use r 4C of the High Court Rules, 1971 to condone any departure from the strict compliance with the provisions of the law.

Before I comment on the submissions made by Mr *Mandizha*, I deem it desirable that I also summarise the argument by Mr *Uriri* for the petitioners, ^f seeing that the two were on the same side of the argument. Firstly, Mr *Uriri* referred me to the decision in *Pio v Smith* 1986 (3) SA 145 (ZH) where the learned judge, sitting as the High Court, had to interpret a similarly worded section in the then Electoral Act. In that case, the court held that the petitioner who served his election petition two days out of time was non-suited as the part of the provision dealing with the limitation of time within which service had ^g to be effected was peremptory and had to be complied with either exactly or so substantially that the act done could stand on its own and constitute service within ten days. Mr *Uriri* was of the view that *Pio's* case, *supra* was wrongly decided as the learned judge in that matter was relying on the old and ^h disfavoured jurisprudence of classifying statutory provisions as either

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peremptory or directory. Secondly, Mr *Uriri* argued that the degree of non-compliance ^a in the petition before me was such that it would not defeat the object of the provision to expeditiously determine the election petition. Finally, Mr *Uriri* argued that I enjoy wide discretionary powers to grant dispensations and extend the time within which the petition could have been served. ^b

From the submissions by both counsel in this matter, I discern three distinct propositions. The first one is that, in determining whether or not the non-compliance by the petitioners to serve the election petition in terms of the provision renders the election petition a nullity, I must be guided by the substantial compliance approach. That this is the current thinking in this jurisdiction in matters as the one before me is settled. The approach has been ^c adopted and applied in a number of decisions of the Supreme Court and of this court. See *Quinnell v Minister of Lands & Ors* 2004 (2) ZLR 293 (S); *MDC & Anor v Mudede & Ors supra*; *Sterling Products International Ltd v Zulu* 1988 (2) ZLR 293 (S); *Kutama v Town Clerk for the Municipality of Kwekwe* 1993 (2) ZLR 137 (S); *Chitungo v Munyoro & Anor* 1990 (1) ZLR 52 (H) and *Pio v Smith supra*. I ^d therefore agree fully with this submission from counsel.

It may be pertinent at this stage to deal specifically with the point made by Mr *Uriri* that *Pio's* case *supra* was wrongly decided as the learned judge in that matter relied on the old classification of

statutory provisions into “peremptory” or “directory”. I am unable to agree with this submission. In my view, it is clear that the learned judge first found that the wording of the ^ε statutory provision was peremptory. He then proceeded to determine whether there had been substantial compliance with the peremptorily worded section. In rejecting the contention that there had been substantial compliance in the circumstances of the matter, Mfalila J had this to say at p 165F:

“In the present case, Mr *de Bourbon* said that there was substantial compliance with the provisions of s 141 because the respondent was made ^ε aware of the petition within 10 days, the time prescribed by the section, when the petitioner personally telephoned him and through his wife.

Did this action or actions by the petitioner, the deputy sheriff or the office secretary amount to substantial compliance with s 141 in the sense in which I have stated, namely, were they enough to achieve the objectives of the provision? The object of the requirement that a written notice of the ^g presentation of a petition shall be served on the respondent within 10 days is to give notice to the respondent in the shortest possible time so that he can start preparing his defence papers in order to have the case finalized as soon as possible. Now, could the telephone messages to the respondent and to his wife achieve these objectives? I think not.” ^h

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^A I therefore do not accept that *Pio v Smith* was incorrectly decided for the reasons advanced by Mr *Uriri*. It is correct that the learned judge found that the language used in the section under construction was peremptory. He however did not stop there. He proceeded to establish whether what had been done by the petitioner before him could be regarded as substantially in compliance with the requirements of the section. The approach that he took ^B was subsequently taken by the Supreme Court in the *Sterling Products* case *supra*, where at p 301B, Gubbay JA (as he then was) had this to say:

“The categorization of an enactment as ‘peremptory’ or ‘directory’, with the consequent strict approach that if it be former it must be obeyed or fulfilled exactly, while if it be the latter substantial obedience or fulfillment will suffice, no longer finds favour. As was pertinently observed by van den Heever J ^C (as he then was) in *Lion Match Company Ltd v Wessels* 1946 OPD 376 at 380, the criterion is not the quality of the command but the intention of the legislator, which can only be derived from the words of the enactment, its general plan and objects. The same sentiment was expressed by Milne J in *J E M Motors Ltd v Boutle & Anor* 1961 (2) SA 320 (N) at 327 *in fine* -328B. This approach received imprimatur of the ^D South African Appellate Division in *Maharaj & Ors v Rampersad* 1964 (4) SA 638 (A) where, after concluding that the provision with which he was concerned was imperative, van Winsen AJA went on to inquire whether the failure in strict compliance therewith was fatal.”

The second distinct proposition that I discern from counsels’ submissions is the argument advanced mainly by Mr *Mandizha* in this petition and by ^E Mr *Gijima* in respect of other petitions in the consolidated hearing, which submissions I incorporate herein. It is that in the circumstances of this matter, there was such substantial compliance with the provisions of the Act that the validity of the petition is thus saved. Mr *Gijima* was quite clear, and correctly so in my view, that the language used in s 169 of the Act is peremptory and ^F that my task is to establish whether what had been done by the petitioners could constitute substantial compliance with the peremptory provisions of the section. He further submitted, and again correctly in my view, that the approach necessitates that I first establish what had to be done in terms of s 169 and secondly, the object of the section. In the third step, I have to establish what was actually done and finally, assess whether what was ^G actually done can stand alone and be objectively viewed as amounting to substantial compliance with the requirements of the section. In the event that I find substantial compliance, I then have to consider whether there was any prejudice as a result of the non-compliance. The above is the step-by-step approach that was taken by McNally JA in *MDC & Anor v Mudede & Ors* ^H *supra*.

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It was further submitted on behalf of the petitioners that if I follow the above ^A four steps, I would find that what the petitioners did was in substantial compliance with the object of the provision. With respect, I find myself unable to agree with this submission. If I take the above four steps I find myself stumbling and falling on the fourth step as I shall demonstrate.

I now take the first step. ^B

Section 169 of the Act is quite clear as it employs clear language that admits of no ambiguity. It requires all petitioners to serve written notice of the presentation of the petition and a list of proposed sureties upon the respondent, personally, or by leaving it at his residence or place of business, within ten days of the presentation of the petition. This is what all petitioners ought to have done or were required to do by the law. ^c

The second inquiry I must now embark on is to establish the intention of the legislature in enacting this provision. It is pertinent, in my view, to note that the provision is not new and has been part of our electoral law since at least 1985. It was part of the law that governed the second elections in this country post independence. It also pertinent, in my view, to note that, the provision ^d is not peculiar to our electoral law. With slight modifications, it is part of the electoral law of most countries that were once colonized by the British. In *Pio v Smith supra*, it was held that the object of the requirement that a written notice of the presentation of a petition shall be served on the respondent within ten days is to give notice to the respondent in the shortest possible time so that he can start preparing his defence papers in order to have the case ^e finalized as soon as possible. In *Nair v Teik* [1967] 2 All ER 34 (PC), it was stressed that it is in the public interest that election petitions be speedily resolved. In my view, it is beyond dispute that s 169 was enacted with the object of containing the time frame within which election petitions presented to court may be determined. It is my further view that it is beyond dispute that election petitions require urgent resolution, as they have the effect of ^f disrupting the composition and the working of two of the three pillars of State, the executive and the legislature. That this is the intention of the legislature is not only to be read from the section under construction but from the entire part of the Act dealing with election petitions, as it goes on to provide the period within which petitions have to be determined, both at the first instance ^g and on appeal.

The third part of the inquiry requires me to establish what was actually done. This is the easiest part. It is common cause that written notice of the petition was only served at the headquarters' of the respondents' political parties on the 28th day after presentation of the petition to court. Together with a copy ^h

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^a of the petition was served a letter giving the respondents security for costs. A copy of the letter was not attached to the papers and I therefore cannot comment on its nature and contents. It has been argued that service could not be effected within the ten days required by the Act as the amount of security had not been fixed. In the view of counsel, there was substantial compliance by the petitioners in serving the applications late as the issue of security had ^b not been settled in strict compliance with the provisions of the Act, and thus the petitioners could not serve the petitions without first securing the requisite security in the form of proposed sureties. Since the amount of security was not known, the argument proceeds, they could not procure sureties as all the proposed sureties could not stand as such until they knew the amount for which they stood good.

^c It appears to me that the petitioners have erroneously interpreted s 169 to intrinsically link the furnishing of security with the presentation of the petition such that one cannot exist without the other. It is clear that the presentation of the petition, a thing in the exclusive domain of the petitioner, has no direct link to the furnishing of security for the costs of the respondent, the fixing of ^d which is under the control of persons other than the petitioner, save that the law requires the two to be served together. The fact that the two are to be served at the same time does not make them so intrinsically linked, one to the other, that service of one could not be effected in the absence of the other. In my view, the situation is analogous to the example of a situation where a driver is ordered by his employer to proceed to the airport within the hour and ^e pick up the employer's wife. He is further ordered to purchase a bouquet of flowers to give to the employer's wife to reassure her of her husband's affection. The driver fails to find flowers at the correct price in good time. After securing the flowers, he delays for an unexplained reason while he is on his own business, and instead of driving to the airport, he decides to wait for his ^f employer's wife at the city offices of the airline, arguing that she will catch a bus from the airport or the airline will ferry her into town in due course, since it is in the transport business. Facing imminent dismissal by the employer, he strenuously argues that he could not go to the airport in time as he could not find flowers at the right price and in any event, the mistress would eventually arrive home anyway as he (the driver) had substantially carried out the order ^g given him by the employer. He is dismissed.

As the purchase of the flowers by the driver in the analogy could have clearly waited, in my view, the written notice of the petition and a copy of the petition could have, and should have, been served independent of the list of sureties pending the fixing of security. In any event, even after the Registrar had fixed ^H the amount of security on or about 23 April 2008, the petitioners still hung back

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and did not serve the petitions as required by law. The delay of nineteen days ^A after security had been fixed in my view belies the genuineness of the petitioner's excuse that they could not serve the petition before the amount of security had been fixed. The further delay remains unexplained, like the delay of the driver in the analogy after purchasing the flowers.

In my view, the petitioners simply did not make any reference to the Act in ^B serving the petition and when the point *in limine* was raised, the absence of security was latched onto as a convenient excuse to explain the fatal delays. I am, therefore, unable to find that the service of the election petition 28 days after presentation is such an act that can be construed as substantial compliance with the law. The provisions of s 169 of the Act are peremptory and require exact compliance or substantial compliance. In view of the failure ^C by the petitioners to comply exactly or substantially with the provision, their petition is a nullity and the proceedings before the court are rendered a nullity. As I have failed to pass the fourth step, I deem it unnecessary that I consider whether there was prejudice or not as a result of the non-compliance.

Although I have effectively found that the petition is a nullity, I will proceed ^D to deal with the rest of the submissions made by counsel. The third distinct submission that I discern from counsels' submissions is that I have inherent jurisdiction to condone departures from the provisions of the Act. Mr *Mandizha* has submitted that I should employ ^E r 4C of the High Court Rules to condone the late service of the petition. Mr *Uriri* has made reference to my inherent powers. It is, in my view, trite that this court, being a creature of ^F statute, can only exercise those powers that are expressly granted to it by the enabling statute. Section 169 of the Act does not grant this court power, on good cause, to extend the time within which petitions can be served. Rule 4C of the High Court Rules is of no application, as I am not dealing with a time limit that has been set in terms of the rules of court. This is a time limit set by the Legislature and the doctrine of separation of state powers commands that ^F I refrain from amending a statute from the bench as that is not my function. See *Chitungo v Munyoro & Anor supra*.

WHETHER LATE SERVICE OF THE PETITION AT THE HEADQUARTERS OF THE RESPONDENTS' POLITICAL PARTY IS SUCH NON-COMPLIANCE WITH THE PROVISION AS TO ^G RENDER THE PETITION INVALID

As stated above, the Act prescribes the proper manner of serving election petitions. Service has to be personal or at the residence or place of business of the respondent. That is what the law requires. In the petition before me, service was effected at the party headquarters of the respondents. It was ^H

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Makarau JP

^A argued for the petitioners that this was substantial compliance with the provisions of the Act, as the party headquarters can be regarded as the respondents' place of "political" business.

Firstly, I regard this issue as an integral part of the first issue. Thus, I am not determining the ^B effect of serving the petition at the party headquarters in isolation of the first issue. In my view, the correct position is to determine the effect of serving the petition at the party headquarters out of time. I have already expressed my views on the effect of failing to serve the petition on time. The same principles that I applied in arriving at the conclusion that the petition before me is a nullity for failing to comply with the provisions of the Act apply in respect of this issue with equal force. Service out of time is fatal to the validity ^C of the petition. Service out of time at a place not designated by the Act can hardly save the invalid petition. In my view, late service of the petition at the party headquarters of the respondents, far from being in substantial compliance with the Act, actually compounds the non-compliance. In any event, the inquiry becomes idle if one has regard to the fact that the Act has prescribed what constitutes proper service of a petition. "Political business"

place is not ^d one of the places where proper service of an election petition may be effected. Substituted service, again an aspect that is regulated by the inherent powers of the High Court, is not applicable in election petitions.

On the basis of the above, I would hold that there was no substantial compliance with the provisions of the Act and that such non-compliance ^e renders the petitioners non-suited before this court. In this regard, I find the concession made by Mr *Mandizha* on behalf of the respondents to have been ill-advised.

In the result, I make the following order:

1. The petition is dismissed ^f
2. The petitioners are to pay the respondents' costs.

Mbidzo Muchadehama & Makoni, petitioners's legal practitioners

^g *Hussein Ranchhod & Co*, respondents' legal practitioners

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MUZENDA v KOMBAYI & ANOR 2008 (1) ZLR 366 (H)

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Citation	2008 (1) ZLR 366 (H)
Case No	Judgment No. HH-47-08
Court	Electoral Court, Harare
Judge	Kudya J
Heard	6 June 2008
Judgment	10 June 2008
Counsel	<i>I E G Musimbe</i> , for the petitioner <i>D Kufaruwenga</i> , for the first respondent <i>GC C Chikumbirike</i> , for the second respondent
Case Type	Election petition
Annotations	Link to case annotations

Flynote

Election — *Electoral Act [Chapter 2:13] — s 167 — election petition — duty c to present petition cast on losing candidate — format and presentation of petition — duties of petitioner*

Election — *election petition — service upon the respondent effected out of time at the respondent's party offices — Electoral Act [Chapter 2:13] — s 169 — not proper compliance therewith — no room for argument based ^d upon substantial compliance*

Election — *election petition — security for costs — when must be provided — service late due to failure of public official — substantial compliance with requirement sufficient*

Headnote

The duty to present an election petition is cast on the losing candidate by s 167 of the Electoral Act (*Chapter 2: 13*). Its format and period of presentation are set out in s 168 of the Act. It has to be presented within 14 days after the date on which the declaration of the result in the last ^F constituency for senatorial elections is made. The duty is placed by the Act on the petitioner to establish this fact. It is this fact alone which triggers the petitioner's legal rights. Failure by the petitioner to establish it would be fatal to the case because the petitioner would have failed to bring himself or herself into the protective ambit of the Act.

Where a petitioner provided security for costs but did so a day late because ^G the Registrar had fixed no sum until then, a case for substantial compliance with the provisions of the Act had been made. The Registrar, a public functionary, was to blame for the failure to comply and there could be no prejudice to a respondent who could, on service of the petition, object to the amount set. ^H

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Kudya J

^A It is not proper to join the Zimbabwe Electoral Commission as a respondent in an electoral petition. Even if the commission could be joined, it would not be proper to cite the Commission itself; the chairmen should be cited.

In an election for the Senate conducted under the auspices of the second respondent, the Zimbabwe Electoral Commission, on 29 March 2008, the petitioner was unsuccessful. She only became aware, however, that she ^B had lost the election to the first respondent on 5 April 2008. Being dissatisfied, she filed her petition contesting the result thereof timeously on 15 April 2008. Notwithstanding s 169 of the Electoral Act [*Chapter 2:13*], which required such petitions to be served within 10 days of the date of filing, her petition was only served on the first respondent on 6 May 2008. It was therefore, argued on behalf of the first respondent that ^C the service of the petition was out of time. It was also argued that as the petition was served upon a party employee at the party headquarters of the first respondent, and was not personal service, the service itself was not in compliance with the section. Section 169 required that the service had to be made at his "...usual or last known dwelling or place of business." In argument before the Electoral Court, the question was ^D raised as to whether, in spite of such defects, the petitioner had substantially complied with s 169 of the Act.

Held, that there was no room for any argument based upon substantial compliance. The fixed time frame of 10 days set out in s 169 of the Act required strict compliance and was not adhered to. Further, service of the petition upon a party employee at Party headquarters was not in ^E accordance with the provisions of the section. The petitioner simply did not adhere to the provisions thereof and therefore the question of substantial compliance with s 169 of the Act did not arise.

Cases cited

^F *Chitungo v Munyoro & Anor* 1990 (1) ZLR 52 (H)

Hove v Gumbo (Mberengwa West Election Petition Appeal) 2005 (2) ZLR 85 (S)

MDC & Anor v Mudede NO & Ors 2000 (2) ZLR 152 (S)

Ex p Ndlovu 1981 ZLR 216 (G)

Nyamapfeni v Constituency Registrar, Mberengwa East, & Ors 2008 (1) ZLR 164 (H) ^G

Savanhu v Postmaster-General 1992 (2) ZLR 455 (H)

Smith v Pio 1986 (3) SA 145 (H); 1986 (2) ZLR 120 (S)

Sibanda v Postmaster-General HH-263-90

^H *Tsvangirai v Mugabe & Anor* HH-109-05

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Legislation considered ^A

Electoral Act [*Chapter 2:13*], ss 3, 58, 166, 167, 168(2), 168(3), 169, 171(3)(b) and 171(4)(b)

High Court Rules 1971 (RGN 1047 of 1971), rr 85, 86 and 87

Zimbabwe Electoral Commission Act [*Chapter 2:12*], s 18

Case information

I E G Musimbe, for the petitioner ^B

D Kufaruwenga, for the first respondent

GC C Chikumbirike, for the second respondent

Judgment

KUDYA J: At the management meeting held on 21 May 2005, four preliminary issues were referred to trial. These were whether or not the petition was served ^C on time; whether there was proper service on the second respondent; whether security for costs was provided and whether or not the second respondent was properly joined to the petition. At the hearing, on noticing that the petition had been lodged with the Registrar of this court on 15 April 2008, I raised the further issue of whether it was presented within the time limits set out in s 168(2) of the Electoral Act [*Chapter 2:13*], hereinafter called the Act. ^D

The brief facts were these. Tsitsi Veronica Muzenda, the petitioner, of the Zimbabwe African National Union (Patriotic Front) ZANU (PF Party), stood as a senatorial candidate for the Gweru-Chirumanzu senatorial constituency during the harmonized elections held in Zimbabwe on 29 March 2008. She competed for office with Patrick Kombayi, the first respondent, of the ^E Movement for Democratic Change – Tsvangirai’s Party, MDC-T. The election was run and conducted by the Zimbabwe Electoral Commission, the second respondent. The petitioner became aware that the first respondent had won the seat on 5 April 2008 and filed the petition on 15 April 2008.

It was served on 6 May 2008 by the Deputy Sheriff at Harvest House, the headquarters of the first respondent’s political party. The return of service ^F indicates that a court application was served on one Muzuva, a security officer who accepted service on behalf of the first respondent. Another copy was served on second respondent at its place of business on the same day. The petition did not show that security for costs had been furnished. The first respondent was not served with any recognizance. Mr *Musimbe*, for the ^G petitioner, was to advise the court from the bar in argument that the security for costs was paid in the sum set by the Registrar and, out of an abundance of caution, recognizance entered at the same time on 23 April 2008. The first respondent received the petition on 19 May 2008. ^H

2008 (1) ZLR p369

Kudya J

^A The petitioner provided minimal facts of the events that triggered the application. She did not provide the date on which the first respondent was declared the winner by the constituency election officer in terms of s 66(1) of the Act. She referred to a recount of votes but did not provide any details on the date it was held and its outcome. Some of the facts that appear in her heads of argument were not pleaded in her founding affidavit.

^B The duty to present an election petition is cast on the losing candidate by s 167 of Act. Its format and period of presentation are set out in s 168 of the Act. It has to be presented within 14 days after the date on which the declaration of the result in the last constituency for senatorial elections is made. The duty is placed by the Act on the petitioner to establish this fact. It is this fact alone ^C which triggers this legal right for her. Failure by her to establish it would be fatal to her case for the reason that she would have failed to bring herself into the protective ambit of the Act.

The facts alleged in the affidavit deal with corrupt practices which occurred before and during the election but not after the elections. It is only illegal practice as defined that occurred after the announcement by the constituency ^D elections officer in the last constituency that triggers the 30 day notice period from the date of the alleged illegal practice that ^E is provided in the proviso to s 168(2) of the Act. The petitioner could only bring her petition within the 14 day period.

I, however, requested that the information that is required to initiate the ^εpetition be provided by the second respondent. At the hearing, Mr *Chikumbirike*, for the second respondent, produced a document from second respondent which showed that the declaration of the last result in a House of Assembly constituency had been made on 4 April 2008 for the Kariba constituency. Mr *Kufaruwenga*, for the first respondent, correctly in my view, abandoned argument on whether or not the petition had been filed on time. ^ϕI accept his reasoning that if the result for the House of Assembly seat was announced in Kariba on 4 April 2008, it was unlikely that the result for the senatorial constituency which incorporated the Kariba constituency would have been declared earlier, given its size. The effect of 4 April was that in terms of s 33(4) of the Interpretation Act [*Chapter 1:01*] the petitioner had at least until 21 April 2008 to present her petition, as the 14 day period would have ^Ϸended on 18 April, a public holiday, which was followed by a Saturday and Sunday: see *Nyamapfeni v Constituency Registrar Mberengwa East & Ors* 2008 (1) ZLR 164 (H) and the cases cited therein.

In casu, the petition, having been filed on 15 April 2008, was presented on time. ^ηThe issue that I raised therefore falls away.

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Kudya J

I proceed to deal with the issues that were referred to trial *seriatim*. ^α

WHETHER THE PETITION WAS SERVED ON TIME AND WHETHER PROPER SERVICE WAS DONE

These two issues can be conveniently dealt with at the same time. They both arise from the provisions of s 169 of the Act. In essence, they seek to answer the question whether service, firstly, outside the 10 day period; and secondly, ^βon the political party headquarters of the first respondent was in compliance with s 169 of the Act.

The section reads:

"169 NOTICE OF ELECTION PETITION TO BE SERVED ON THE RESPONDENT ^c

Notice in writing of the presentation of a petition and of the names and addresses of the proposed sureties, accompanied by a copy of the petition, shall, within ten days after the presentation of the petition, be served by the petitioner on the respondent either personally or by leaving the same at his or her usual or last known dwelling or place of business."

The petitioner is mandated by the section to serve the petition on the ^δrespondent within 10 days. These are 10 ordinary days. The petition was filed on 15 April 2008. The 10 day period expired at the close of business on 25 April 2008. Service took place on 6 May 2006. It was therefore, done outside the time frame set out in s169. *Pio v Smith* 1986 (3) SA 145 (ZH) is authority for the proposition that strict compliance as opposed to substantial compliance is ^εcalled for in a provision, such as this, which is designed to serve the public interest of speedily determining the controversy between the petitioner and the winner.

The Supreme Court of Zimbabwe, in *Movement for Democratic Change & Anor v Mudede NO & Ors* 2000 (2) ZLR 152 (S), laid out the approach to be followed in interpreting statutory provisions which are couched in peremptory ^ϕlanguage such as the present one. McNally JA first surveyed the shift from the idea that a peremptory worded provision envisaged strict compliance while a directory one required substantial compliance, before adopting the position enunciated by Gubbay J, as he then was, in *Ex p Ndlovu* 1981 ZLR 216 (G) at 217F that "the test of whether a defect such as this (giving inadequate notice in an application for rehabilitation of an insolvent) is formal ^Ϸor substantive is not whether the statutory provision is directory or peremptory, but whether it aims at some definite object and whether having regard to the particular facts, non-compliance therewith will result in the defeat of that object". In the process, he set out a useful four step approach which enjoins a judicial officer to consider: ^η

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Kudya J ^α

1. the relevant legislation
2. what actually happened
3. whether the provisions of the relevant legislation were substantially complied with
4. whether there was any prejudice as a result of non-compliance.

¶ I find that the application of this approach is substantially similar to the one in *Pio's* case and that it produces the same result.

I have already set out the relevant legislation. Notice in writing of the presentation was given. A copy of the petition was served with the notice. The names and addresses of the proposed sureties were not given and were not served with the notice and the petition, even though these had been furnished to the Registrar on 23 April. The service was done 11 days after the due date. Service was, however, done at the political headquarters of the first respondent. It was not personal service. The party headquarters was not his usual or last known place of dwelling.

It was common cause that the first respondent resides in Gweru. He operates commercial businesses in Gweru. His usual place of residence, that is, where he normally lives on a day to day basis, is in Gweru. He does not live at his political party headquarters. He is not employed by his political party. He does not work at or from his political party headquarters on a day to day basis.

The first respondent's objections were to the period within which service was done and to the place where it was done. I fail to perceive how the petitioner could substantially comply with the 10 day period when she accepts that she acted outside that period. She was required to abide by that period. She did not do so. Mr *Musimbe* contended that the petitioner failed to meet the 10 day deadline because of the legal vacuum created by the inability of the Registrar to set the amount of security within the seven day period specified in s 168(3). ¶ I found this explanation incomprehensible, given that the security had been provided to the Registrar two days before the expiration of the 10 day period. The petitioner was therefore not affected by any perceived vacuum in the legislation. It is, in any event, difficult to apply the concept of substantial compliance to the realm of fixed time frames. Fixed time frames would appear to require strict compliance. *In casu*, the petitioner did not comply with the 10 day period. The question of substantial compliance and that of prejudice, therefore, falls away. If prejudice were required, as so ably noted by Mfalila J in the *Pio* case, it arises to the public interest which requires firstly, that the law be obeyed and, secondly, that electoral petitions be speedily determined.

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Kudya J

On the question of service at the party headquarters, the issue is not whether a service was done, but whether it was proper service. The petitioner and the first respondent competed for the Gweru-Chirumanzu senatorial seat in that constituency. The first respondent is domiciled and has commercial interests in that constituency. He does not operate from his party's political headquarters in Harare. The petitioner simply did not adhere to the provisions of the section. ¶ Again, the question of substantial compliance does not rise. Even if it did, the petitioner's acts were prejudicial to the first respondent. He saw the petition on the 9th court business day. Even if it was competent for the petitioner to give him 14 days within which to oppose, he did not have adequate time to prepare for his defence, a fact underscored by his inability to file any opposing papers by the time of the management meeting. c

In the light of decisions such as *Nyamapfeni's* case *supra* and *Chitungo v Munyoro & Anor* 1990 (1) ZLR 52 (H) it is axiomatic that an Electoral Court has no powers of condonation. Its powers are found only in the four corners of its constitutive statute. *Hove v Gumbo* S-143-04 underscores the fact that it has no inherent powers.

I determine the first two issues in favour of the first respondent. I hold that d the service of the 6 May 2008 was a nullity for two reasons. Firstly, it was served in contravention of the 10 day period and, secondly, at the wrong place, in violation of the provisions of s 169 of the Act.

I would accordingly, dismiss the petition with costs.

WHETHER SECURITY FOR COSTS WAS PROVIDED ¶

The third issue concerns the failure to furnish security for costs. The petitioner apparently paid the amount fixed by the Registrar and out of an abundance of caution entered into the required recognizance on 23 April 2008. He should have done so by 22 April, but could not because no sum had been set by the Registrar. He did provide security as soon as the Registrar set a figure. Where f a public functionary is to blame for failure to comply, even though the Supreme Court left the question open in *Pio v Smith* 1986 (2) ZLR 120 (S) at 132C-F, it has been held that a case for substantial compliance is made: see *Pio's* case at 163J. I would find the provision of security on the

23 April in substantial compliance with the provisions of the Act in line with the example set out by ^g Mfalila J in *Pio's* case at p 165I-J. I conceive of no prejudice to the first respondent who could on service of the petition object to the amount set. My view is that once the petitioner pays the amount fixed, it is not necessary for him to provide the respondent with the list and names of sureties. He only does so where he enters into a recognizance. ^h

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Kudya J

^a I would have found for the petitioner on the question of security for costs.

WHETHER THE SECOND RESPONDENT WAS PROPERLY JOINED AS A PARTY

Mr *Chikumbirike* objected to the citation of second respondent in the petition. He relied on the definition of "respondent" found in Part XX III in ^b s 166 of the Act. The section reads as follows:

"166 Interpretation in Part XXIII

In this Part:

'the respondent' means the President, a member of Parliament or councillor whose election or qualification for holding the office is complained of in ^c an election petition."

[Definition substituted by s 78 of Act 17 of 2007]

He invoked the maxim *expressio unius est exclusio alterius* in aid of his objection. According to Francis Bennion *Statutory Interpretation* (Butterworths 1988) at p 844, the expression means "to express one thing is to exclude another". Mr *Chikumbirike* submitted that the legislature ^d deliberately defined respondent in the Act so as to exclude the second respondent in circumstances where it would automatically have been included by virtue of its overarching role in running and conducting elections. He advanced six reasons upon which he based his submission that the exclusion was deliberate.

^e Mr *Musimbe*, for the petitioner, on the other hand submitted that the second respondent was properly cited because it is an interested party which is charged with the responsibility of giving effect to the order of court. He based his submission on the common law principle of joinder and relied on *Tsvangirai v Mugabe & Anor* HH-109-05. He contended that the second respondent would have no obligation to give effect to the determination the court arising ^f from proceedings in which it did not participate. He further argued that grave injustice would visit the petitioner if the second respondent's officials who are implicated in electoral malpractice are not called to testify. He seemed to believe that they could only testify if the second respondent was cited as a respondent.

^g I am persuaded by the six reasons that were advanced by Mr *Chikumbirike*. They clearly demonstrate that the legislature deliberately excluded the citation of the Zimbabwe Electoral Commission as a respondent in electoral petitions brought under Part XXXIII of the Act. With the full knowledge of the second respondent's mandate in election matters, the legislature, firstly, in s 166 did ^h not include it as a respondent, obviously in a bid to guarantee its neutrality

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Kudya J

in the conduct of elections. Secondly, the second respondent is excluded from ^a the protective ambit of s 168(3). Thirdly, in s 171(3)(b)(ii) it mandated the Electoral Court to certify its determination to, amongst others, the first respondent, which in itself would be an anomalous method of alerting a respondent who is before it of its decision. In fact, the other persons who are notified are not respondents but public officials. Fourthly, in s 171(a) and (b) the second respondent may be made to pay costs or a portion thereof for the ^b culpable conduct of its officials, an obvious fate that befalls any losing or maligned respondent. Fifthly, in s 158, as read with s 171(4)(b), any person alleged to have committed an electoral malpractice may be called to vindicate his or her name before such a finding is made against him or her.

In any event, "means" is the operative word in s 166 of the Act. It carries a ^c different import from such words as "includes". It is peremptory in nature. I find that the force of reasoning in the *Movement for Democratic Change v Mudede* case, *supra*, is such that in defining respondent in s 166 of the Act, the legislature intended to demonstrate beyond doubt the centrality of the winning candidate in election petitions. The challenge is to him or her. His conduct is impugned in terms of ^s

167 and measured against the principles set out in s 3 of the Act. Sections 155 to 157 make the winner liable for the acts of commission or omission that he or his agents or any other person commits with his or their knowledge and consent or approval. A finding that the election was tainted to such an extent as would materially affect its outcome triggers, by operation of law, the holding of a new election. The second respondent does not have the authority, luxury or inclination to decline to hold such an election in those circumstances.

I therefore discern of no conceivable reason in either law or logic why the second respondent should be cited as a respondent under Part XXXIII of the Act. Mfalila J was of the same view at p 166E-H in *Pio's* case. He held that the predecessor functionaries of the second respondent could not be cited as a respondent under the then prevailing Electoral Act.

The reliance placed by Mr *Musimbe* on *Tsvangirai v Mugabe Anor, supra* as authority for the proposition that the first respondent was properly cited was misplaced. Hlatshwayo J at p 6 based his decision for approving the joinder of the Electoral Supervisory Commission, the predecessor of the second respondent, on the common law principle of *locus standi* and rules 85, 86 and 87 of the High Court rules. The only difficulty I have with reference to the common law is that an election petition is unknown to common law: see *Hove v Gumbo* S-143-04 at p 19. Further, it does not appear to me that the rules of the High Court would supercede the definition of respondent set out in s 166 H

2008 (1) ZLR p375

Kudya J

A of the Act. In any event, as was submitted by Mr *Chikumbirike* as his sixth reason, the *Tsvangirai* case is distinguishable from the present matter in that it concerned a presidential election petition while the present involves a parliamentary election petition. The Electoral Act [Chapter 1:01], under consideration in that case, did not, in s 102, define "respondent" for presidential petitions. Under that old Act, petitions were referred to the High Court and B not, as at present, to the Electoral Court, a special court created under the Electoral Act No. 25 of 2004.

Citing the second respondent or, more correctly, its Chairman is not permitted by the Act in election petitions. I fail to see how citing the second respondent can be said to be in substantial compliance with the Act when the Act excludes C it. The citation of the second respondent by name is contrary to the provisions of s 18 of the Zimbabwe Electoral Commission Act which incorporates the *modus operandi* set out in s 3 of the State Liabilities Act [Chapter 8:14] for citing government ministries and departments. It directs that the Chairman of the second respondent be cited. The citation of the wrong party renders the petition as against the second respondent void: see *Savanhu v Postmaster-General* 1992 (2) ZLR 455 and *Sibanda v Postmaster-General* HH-263-90. Thus, even if the second respondent were properly joined in the petition, I would still dismiss it on the basis that the wrong party was cited.

I, however, hold that the Zimbabwe Electoral Commission was improperly joined as a party in this petition.

E I am satisfied that the petition is a nullity by reason of non-compliance with the provisions of s 169 of the Act.

It is accordingly dismissed with costs.

It is declared that the Zimbabwe Electoral Commission was wrongly cited and is hereby removed as a party to this petition. The petitioner shall bear its costs.

F *Mutumbwa Mugabe & Partners*, petitioner's legal practitioners

Dzimba, Jaravaza & Associates, first respondent's legal practitioners

Chikumbirike & Associates, second respondent's legal practitioners

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MAPENZAUSWA v MUSKWE & ORS 2008 (1) ZLR 376 (H)**2008 (1) ZLR p376**

Citation	2008 (1) ZLR 376 (H)
Case No	Judgment No. HH-48-08
Court	High Court, Harare
Judge	Kudya J
Heard	7 March 2008
Judgment	18 June 2008
Counsel	<i>J M Bhamu</i> , for the applicant <i>T D Muskwe</i> , for the first respondent <i>L Mazonde</i> , for the fourth respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Will — validity — marriage subsequent to execution of will — whether will c thereby invalidated — will made in contemplation of marriage — such will valid

Headnote

The deceased had executed a will in late 2000. In the will he referred to the applicant as his “wife” and in it he made several bequests to her. In fact ^d he was not married to her at the time, though they were living together. His previous wife had died some time beforehand. There was no evidence as to whether the applicant and the deceased had contracted a customary law marriage, but in April 2001 they were married by civil rites. After the deceased’s death, the first respondent, the executor, started to dispose of the estate in terms of the will. This included the property where the ^e applicant was living. The applicant sought an order declaring the will invalid.

Held, that it was not necessary to decide whether the civil marriage was a subsequent marriage for the purposes of s 16(1) of the Wills Act [Chapter 6:06]. This situation was governed by s 16(4) of the Act, which saves a will made in contemplation of an impending marriage. The facts showed ^f that this was such a will and, accordingly, its validity would be upheld.

Cases cited

In re Savanhu 1990 (2) ZLR 177 (H)

Logan v Morris NO & Ors 1990 (2) ZLR 65 (S) ^g

Savanhu v Heirs Estate Savanhu 1991 (2) ZLR 19 (S)

Legislation considered

Administration of Estates Act [Chapter 6:01] s 16

Customary Marriages Act [Chapter 5:07] s 3 (1)(a) ^h

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A Wills Act [*Chapter 6:06*] ss 5(3)(a), 16(1)&(4)

Case information

J M Bhamu, for the applicant

T D Muskwe, for the first respondent

L Mazonde, for the fourth respondent

Judgment

KUDYA J: This application was filed on 19 December 2006 by the widow of ^B the late Abisha Mapenzauswa. She is challenging the validity of the will and last testament of her late husband and its subsequent execution by the first respondent, the testamentary executor.

On 26 October 2000, the deceased executed a will and appointed the first respondent testamentary executor. He married the applicant by civil rites on ^C 21 April 2001 and died at the ripe age of 82 on 8 December 2004. His estate was registered with the Master in DR 171/2005 by the testamentary executor on 12 May 2005.

In clause 5 of the will, the deceased disposed of his immovable property in these terms:

"Upon my death, my immovable property commonly known as 56 ^D Mubvamaropa Road, Mufakose, Harare, shall be sold and ninety-five percent (95%) of the proceeds shall be shared equally among my surviving children namely –

- 1.1 PAUL MAPENZAUSWA (born 13 May 1956)
- 1.2 JONAH MAPENZAUSWA (born 7 January 1958) ^E
- 1.3 CHIPO MAPENZAUSWA (born 8 July 1957)
- 1.4 AND I bequeath five percent (5%) of the said proceeds to my surviving wife namely JANE MAPENZAUSWA (nee KAMBINI)."

The Master accepted the will as valid and after due inquiry granted authority to the executor to dispose of the property by private treaty. The executor duly ^F sold the rights of the deceased in the immovable property to the fourth respondent for cash on 31 August 2005. The applicant must have submitted her marriage certificate to the Master at a subsequent date, for he wrote to the executor on 12 December 2005 requesting him to withhold the sale opining that in terms of s 5(3)(a) of the Wills Act [*Chapter 6:06*] the will was invalid as it was executed prior to the contraction of the civil marriage. On 22 March 2006, ^G the executor wrote to the Master indicating that only 50 per cent of the immovable property was for distribution given that the other half had been dealt with in the estate of the deceased's first wife and that the beneficiaries agreed that the property be disposed of in terms of the will. On 19 June 2006, the Master authorised the advertisement of the First and Final Administration ^H and Distribution Account. The applicant objected to the account but her

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Kudya J

objections were dismissed by the Master on 7 November 2006. ^A

On 14 September 2006, the third respondent advised the applicant's legal practitioners of record that the property was still registered in the name of the Estate Late Abisha Mapenzauswa but he had no objection to the request from the executor testamentary to cede it to the fourth respondent. On 25 September 2006, acting in terms of the agreement of sale, the fourth respondent, by an ^B order of the Magistrates Court, duly evicted the applicant from the immovable property. Her subsequent attempts to reverse the eviction in the same forum failed.

This application was opposed on 6 February 2007 by the first respondent and on 11 July 2007 by fourth respondent (who was served with the application on 12 June 2007). The first respondent attached his response dated 22 March ^C 2006. Apparently to the Master's letter of 16 March 2006, the Master granted the consent to sale after receiving a copy of the agreement of sale to the fourth respondent. Correspondence was exchanged between the Master and the applicant's legal practitioners and the first respondent. On 7 November 2006, the Master overruled the applicant's objection to the sale of the immovable estate property in question. The fourth respondent averred

that he purchased ^D the property in good faith and that the applicant was lawfully evicted by a magistrates court order.

On 13 March 2007, the Master submitted his report on the present application. He stated that when he authorised the sale of the house he was not aware that the applicant, who was one of the beneficiaries in the will, had contracted a ^E civil marriage with the deceased subsequent to the execution of the will.

The main issue for determination is whether the civil marriage that the deceased contracted five months after the execution of the will invalidated that will.

Mr *Bhamu*, for the applicant, submitted that the subsequent civil marriage ^F between the testator and the applicant invalidated the will. He relied on the provisions of subs (1) of s 16 of the Wills Act [Chapter 6:06] and *In re Savanhu* 1990 (2) ZLR 177 (H).

Section 16(1) of the Wills Act states as follows:

16 Effect of testator's subsequent marriage on will ^G

(1) Subject to this section, a will shall become void upon the subsequent marriage of the testator.

The facts in the *Savanhu* case *supra*, were that the testator solemnized his customary law union on 17 May 1949. He executed a will on 7 October 1988 and contracted a civil marriage in church with the same wife of almost 40 years ^H

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Kudya J

^A on 26 February 1989. He died on 6 September 1989. The widow applied to the High Court to have the will declared null and void on the ground that he had entered into a subsequent marriage with her as contemplated by s 16 (1) of the Wills Act.

Chinengundu J dismissed the application on the basis that the civil marriage to the same woman with whom he had a registered customary union was not ^B a subsequent marriage as contemplated by s 16(1) of the Wills Act. At p 179B-C, he stated thus:

"In my view, a subsequent marriage contemplated by s 16(1) of the Wills Act 1987, is a marriage by one party to another person after the dissolution of an existing union either by divorce in court or by death. Such a marriage ^C can properly be regarded as a subsequent marriage for the purposes of the above-mentioned Act. What the parties did was to convert their potentially polygamous marriage into a monogamous one, but their proprietary rights are still governed by African law and custom."

His reasoning found approval with Gubbay CJ on appeal in *Savanhu v Heirs Estate Savanhu* 1991 (2) ZLR 19 (S) who at 23F held that:

^D "But the right given to Africans who have already contracted a registered customary union to contract a second marriage under the Marriages Act, without having the first dissolved, does not mean that their second marriage has the effect of rendering void any pre-existing will. For there has been no change in status of the testator from an unmarried to a married person, and it is the existence of that very change that the legislative ^E intendment is aimed at."

The learned Chief Justice set out the legislative basis for promulgating s 16(1) of the Wills Act at 23B-E in these terms:

"It is plain to me that by enacting the provision in question the lawmaker was minded to alter the common law in accordance with which a will is not ^F revoked by the subsequent marriage of the testator. See *Ludwig v Ludwig's Executors* (1848) 2 Menz 452; *Shearer v Shearer's Executors* 1911 CPD 813; *Braude NO v Perlmutter & Ors* 1969 (2) RLR 103 (A) at 109C; 1969 (4) SA 101 (RA) at 106. It was appreciated that the operation of such a principle would cause injustice and untold hardship. So in 1929 a change in the law was effected by the introduction of s 2 of the former Deceased Estates Act, presently superseded by s 16(1) of the Wills Act. ^G Its object is to afford some measure of protection to the new spouse of the testator who had been previously married, and to any issue whether born to the parties or adopted by them. The provision contemplates more than the mere conversion of an existing polygamous or potentially polygamous matrimonial union to one of monogamy. It envisages a ^H necessary change, brought about by the subsequent marriage, to the

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status of both the spouse and the testator to that of a married person – from a bachelor, divorcée or widower in the case of the man, and from a spinster, divorcée or widow in the case of the woman. *It is designed to avoid a situation in which the will of one or each of them, which pre-dates the subsequent marriage, makes no provision for the other's new spouse*" (my own emphasis).

In the present case, neither the applicant nor the respondents have averred that the testator had solemnized a customary law union with her which they converted into a civil marriage. Their marriage certificate showed that their status changed from widower and spinster, respectively, to married. Section 3 of the Customary Marriages Act [Chapter 5:07] makes it clear that an unregistered customary marriage is not a marriage in this country. It reads: c

"3 Marriages not to be valid unless solemnized

- (1) Subject to this section, no marriage contracted according to customary law, including the case where a man takes to wife the widow or widows of a deceased relative, shall be regarded as a valid marriage unless –
 - (a) such marriage is solemnized in terms of this Act."

The present case is not on all fours with the *Savanhu* case, *supra*. To the extent that the testator was a widower, he entered into a subsequent marriage with the applicant. He executed his will prior to the civil marriage. The validity of the will falls for determination under s 16 of the Wills Act.

Mr *Muskwe* contended on his own behalf that the will was executed at a time when the applicant was in a customary law union with the testator. He drafted the will for the deceased. He was not aware that at that time the deceased was not married to the applicant. He was aware that the deceased was once a widower as he had dealt with his deceased wife's estate. He averred that the testator disposed of his half share in the immovable property under his will. The other half belonged to his late wife and this went to her children.

I agree with Mr *Bhamu* that the introduction of the testator's deceased wife into the controversy is a red herring. The will sought to dispose of the whole house and not just a half share. The letter from the third respondent of 14 September 2006 indicated that the property was registered in the deceased's name. The question of the deceased wife holding a half share in the property does not arise. Mr. *Muskwe* failed to appreciate that after her death, as the property was registered in his name, the rights in the property remained vested in the testator. I agree with Mr *Bhamu* that the immovable property belonged to the testator.

Mr *Muskwe* contended that in terms of African custom, even though the applicant and the testator had not solemnized their customary law union under

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Kudya J

at the Customary Marriages Act or the Marriages Act [Chapter 5:11], they were regarded as husband and wife. In fact they also regarded each other as husband and wife. He therefore submitted that their union in the eyes of African custom created the same legal obligations as a registered one.

The pleaded facts did not disclose that by the time the testator executed the will, he had contracted a customary law union with the applicant. Had the facts established the existence of such a union, I would have been prepared to consider Mr *Muskwe*'s submission. I, however, leave the question open and decline to venture an opinion whether in those circumstances I would have reached the same conclusion as did Chinengundu J in the *Savanhu* case.

Mr *Muskwe* further submitted that the will was validated by the provisions of subs (4) of s 16 of the Wills Act. It reads:

- "(4) Where it appears from a will that when it was made the testator was expecting to be married and that he intended that –
 - (a) the will should not become void upon the expected marriage, the will shall not become void upon that marriage; d
 - (b) a particular disposition or provision in the will should not become void upon the marriage –
 - (i) that disposition or provision shall take effect notwithstanding the marriage; and
 - (ii) any other disposition or provision in the will shall take effect also, unless it appears that the testator intended the e disposition or provision to become void upon the marriage."

It seems to me that the intention of the testator can be discerned from the wording of the will. He referred to the applicant three times by name and called her "my surviving wife". The civil marriage

was contracted just less than 6 months after the will was executed. He made three bequests to her in the will. He therefore, provided for her. He called her his surviving wife even though ^F she was not yet, legally, his wife. At that time, in law, she was his girl friend. He obviously desired that she become his future wife. He was then 79 years old. He had children, grandchildren and great grand children from his previous marriage that he felt he owed a filial duty to provide for. He also wished his future wife to benefit from his only major asset together with his descendants ^G in the proportion which he believed did justice and fairness to them all. In my view, this demonstrates that he made the will in contemplation of his pending civil marriage to the applicant. He therefore did not intend that his will be invalidated by that marriage.

The civil marriage did not, in my view, invalidate his will. The will and the ^H subsequent acts of the testamentary executor cannot, therefore, be impugned.

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Kudya J

The resolution of this main issue makes it unnecessary for me to deal with the ^A other issues that were raised by the parties and Mr *Mazonde*, for the fourth respondent, save for the one which touches on the conduct of the Master's office. There is need for that office to be consistent in its operations. It does not assist litigants for officials in the Master's office to issue contradictory opinions in the same matter. In any event in *Logan v Morris NO & Ors* 1990 (2) ZLR 65 (S) at 71E, McNally JA stated: ^B

"The Master is not empowered to conduct judicial enquiries. Where matters of law arise he is enjoined to refer the matter to a Judge or to the Court. (See e.g. s 113)."

In terms of proviso (i) of s 16 of the Administration of Estates Act [*Chapter 6:01*] the determination of the validity of a will is the domain of the High Court. ^C The Master should have referred this issue to the High Court for determination when it arose rather than issue contradictory opinions.

I, however, hold that the will was valid. The application is therefore dismissed with costs.

Musarira Law Chambers, applicant's legal practitioners ^D

Muskwe & Associates, first respondent's legal practitioners

Chihambakwe, Mutizwa & Partners, fourth respondent's legal practitioners ^E

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BUBYE MINERALS (PVT) LTD v REGISTER OF THE HIGH COURT & ORS 2008 (1) ZLR 383 (H)

2008 (1) ZLR p383

Citation	2008 (1) ZLR 383 (H)
Case No	Judgment No. HH-49-08
Court	High Court, Harare
Judge	Chitakunye J
Heard	18 June 2008
Judgment	18 June 2008

Counsel	<i>W Trengove SC</i> , with him <i>H Zhou</i> , for the appellant <i>N G Maphosa</i> , for the first, second and third respondents <i>J B Colegrave</i> , for the fifth respondent E
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

c **Appeal** — record — inspection of by parties — procedure to be followed — party and Registrar not in agreement on what should be included or omitted — procedure to follow

Costs – *de bonis propriis* – legal practitioner — when may be granted

Legal practitioner — conduct and ethics — need to approach case with D objectivity and impartiality

Headnote

Part of the process of preparing the record for a civil appeal is that parties, or their legal representatives, should inspect the record in order to ensure that it complies with r 15(8a) of the Supreme Court Rules 1964 (RGN 380 of 1964). The word “inspect” may be defined as “to look at carefully; to E examine or review officially”. Where such examination has occurred it is then expected the examiner will certify so. A party examining the record must of necessity append a seal in the form of a signature confirming the examination. To merely examine without such a seal would be of no relevancy to the process. Equally, merely to append one’s seal by way F of signature without examining the record would not be in compliance with the rules. Without that certificate the registrar cannot comply with r 15(10), which requires that after completion of the record the registrar shall certify that it is correct. This certification by the registrar is only possible where the parties have inspected the record and certified so. Where there is a dispute arising from the preparation of the record – for G example, about what should or should not be included – the parties may, in terms of r 15(9), submit the dispute to a judge.

Rule 15(8b) provides that where the appellant has not inspected the record within the time given or extended, the registrar shall notify the registrar of the Supreme Court of that fact, and thereupon (meaning immediately H thereafter) the appellant shall be deemed to have abandoned his appeal.

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Chitakunye J

Where such has occurred, the appellant has to take steps to have the A appeal re-instated if he is still interested in the appeal.

Legal practitioners should approach their cases with a sense of objectivity, impartiality and disinterest, in order that they are not subsumed by their clients’ cases. They have a duty to uphold the dignity of the courts and the Registrar’s office in particular. Where a legal practitioner has lost all B sense of objectivity and shows a contemptuous attitude towards the Registrar’s office, costs on the higher scale may be awarded. Costs *de bonis propriis* against the legal practitioner should only be awarded in reasonably grave circumstances, such as dishonesty, *mala fides*, wilfulness or professional negligence of a high degree.

Cases referred to c

Matamisa v Mutare City Council 1998 (2) ZLR 439 (S)

Practice Note 2 of 1969 (Appellate Division) 1969 RLR 430 (A)

Techniquip (Pvt) Ltd v Allan Cameron Engineering (Pvt) Ltd 1994 (1) ZLR 246 (S)

Legislation considered D

Supreme Court Rules 1964 (RGN 380 of 1964), r 15

Case information

W Trengove SC, with him *H Zhou*, for the appellant

N G Maphosa, for the first, second and third respondents

J B Colegrave, for the fifth respondent ^ε

Judgment

CHITAKUNYE J: The applicant brought this application for a declaratory order purportedly in terms of ss 13 and 14 of the High Court Act [*Chapter 7:06*], alternatively in terms of s 4 of the Administrative Justice Act [*Chapter 10:28*]. ^ƒ

The facts are that a dispute arose between the applicant, Buby Minerals (Pvt) Ltd, and the fifth respondent, River Ranch Ltd, about the mineral rights under a special grant. The dispute led to an application to the High Court in case No. HC 278/06. On 6 December 2006, this court ruled in favour of River Ranch Ltd. The applicant, not being satisfied with the ruling, noted an appeal on the very next day. ^g

In terms of r 15 of the Rules of the Supreme Court 1964, as amended, the Registrar of the High Court is enjoined to prepare the record of appeal and thereafter invite the parties to inspect the record before forwarding it to the Supreme Court. On 7 February 2007, the Registrar of the High Court invited ^h

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Chitakunye J

^a the parties to inspect the record of appeal in terms of r 15(8a) of the Rules of the Supreme Court. He alerted the applicant that if it failed to do so in time, it would be deemed to have abandoned its appeal. On 9 February 2007, the applicant's legal practitioner, Mr Hussein, attended the Registrar's office and inspected the record. He opined that the record was incomplete. He recorded his objection in a letter to the Registrar later that same day. On 22 February ^b 2007, the Registrar re-invited the appellant to inspect the record. In his letter he stated, *inter alia*, "Please be advised that the judge's handwritten notes cannot form part of the record, hence I re-invite you to come and inspect the record within 48 hours failure which the appeal will be deemed to be dismissed/lapsed." In response to this re-invitation, Mr Hussein again attended the office of the Registrar on 26 February 2007. He noted that his earlier objection ^c had not been attended to and so he inscribed on the Registrar's certificate that:

"The record is not complete. I wrote a letter on 9 February 2007 complaining about this. Why are you not complying with this? Please do not suppress information. I therefore am not signing 26/02/07."

On 2 March 2007, the Registrar sent another letter to Mr Hussein informing ^d him, *inter alia*:

"I see no relevance to the said items to be included in the record, as they are not relevant to the appeal. Therefore, the appeal is deemed to have lapsed or abandoned."

On 5 March 2007, Mr Hussein addressed a letter of protest to the Registrar. ^e In his protest, he said, among other things, that:

"Your letter is therefore a complete nullity as you purported to confer upon yourself judicial and legal powers which you clearly do not have. We therefore do not accept nor recognize your letter as having any force at law, and as far as we are concerned, the appeal that was lodged still stands. Abandonment of the appeal can only come into effect if the appellant fails ^f to inspect the record. This, you will see was in fact done ..."

He went on to say that he expected the Registrar to confirm that his letter had been written in error and should be ignored. On the same day, Mr Hussein wrote another letter of complaint to the Judge President on the same issue. Meanwhile, on 7 March 2007 the Registrar responded to Mr Hussein explaining his office's position regarding the inclusion of the documents that Mr Hussein ^g was insisting on. He concluded his letter by saying:

"If you feel strongly about the inclusion of any other information you are at liberty to apply for its inclusion from the bar when the matter is set down in the Supreme Court; and that, you have not signed the record and I am ^h by copy of this letter advising the Supreme Court Registrar accordingly."

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Chitakunye J

On 9 March 2007, the Judge President also responded to Mr Hussein's letter ^a by inviting the parties to proceed in terms of r 15(9) of the Rules of the Supreme Court. The parties thereafter went before Gowora J. On 9 May, Gowora J dismissed the applicant's application, in effect ruling that the Registrar of the High Court was correct in his refusal to include the documents which the applicant was insistent on. ^b

On 2 May 2007, the Registrar issued another letter to the applicant's legal practitioners asserting that in view of the ruling by Gowora J, "the decision of this office communicated to you on 2 March 2007 still stands".

As a consequence of the above, the applicant applied to this court seeking a declaratory order that:

- "1. The letters written by the Registrar to the applicant's legal practitioners ^c dated 2 March 2007 and 24 May 2007, and copied to the parties and the Registrar of the Supreme Court, are null and void and accordingly set aside.
2. The Registrar is to prepare the record of appeal for case No. HC 278/06, appeal reference No. SC 350/2006, and transmit this record upon ^d compliance with the Rules, to the Supreme Court of Zimbabwe within 7 days of this order.
3. That Mr Nyatanga bear the costs of suit on an attorney and client scale in his personal capacity, jointly and severally, with any respondent that opposed this application."

The applicant alleged that the Registrar was wrong in saying that the applicant ^e had not inspected the record and thus its appeal was deemed abandoned or lapsed. They contended that the Registrar misconstrued the meaning of the rules in this regard.

The applicant was not clear in terms of which rule this application was being brought, save to say that they were bringing this application in terms of ss 13 and 14 of the High Court Act, alternatively, s 4 of the Administrative Justice ^f Act. However, these sections grant general jurisdiction. Section 13 is on the original jurisdiction of the High Court, whilst s 14 deals with the High Court's power to determine future or contingent rights. Section 4 of the Administrative Justice Act grants a person aggrieved by the failure of an administrative authority to comply with s 3 to apply to the High Court for relief and sets out ^g the nature of the relief the High Court may grant.

The first respondent, on the other hand, maintained that the decision in its letter of 2 March 2007 deeming that the appeal had lapsed was valid. He argued that the inspection which the applicant says it did was not in accordance with the rules. The first respondent contended that the applicant was required to ^h

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Chitakunye J

^a do an effective inspection, whereby he would sign the Registrar's certificate. Refusal to sign that certificate amounted to no inspection. The first respondent also argued that that the applicant has adopted a wrong procedure. If the applicant felt that the Registrar's decision or action was not correct, it should have brought that decision on review.

The fifth respondent also opposed the application. It contended that the ^b inspection required that the applicant to sign the Registrar's certificate. What was required was an efficacy inspection and this, the applicant did not do.

The major issues are:

1. The meaning of "inspection" in terms of the Rules; and
2. Whether the applicant complied with the rules for inspection or not.

^c The issues call for a closer examination of the rules in question.

Rule 15(8a) states that:

"A Registrar of the High Court responsible for preparing a record shall invite the appellant and the respondent or their legal representatives to inspect the record before it is bound in order to ensure that – ^d

- (a) all necessary documents are included in the record and are in the proper order; and
- (b) any unnecessary documents are omitted from the record; and
- (c) the record has been compiled in accordance with subrules (1) to (5); and ^e
- (d) the papers are all properly paginated; and
- (e) the record is legible."

That basically captures what is expected during the inspection. The importance of the inspection is made very clear by subrule (8b) which provides the consequences of failure to inspect. The subrule provides that:

“If the appellant or his legal representative does not inspect the record as provided in subrule (8a) within ten days after being invited to do so, or within any further time granted by the Registrar of the High Court, the Registrar of the High Court shall notify the Registrar of that fact, and thereupon –

- (a) the appellant shall be deemed to have abandoned his appeal; ^g
- (b) the notification in terms of this sub rule shall be treated as notice by the appellant in terms of rule 37 that he has abandoned his appeal.”

The word “inspect” maybe defined as “to look at carefully; to examine or review officially” (see Webster’s *Universal Dictionary & Thesaurus* 2003 ^h edition). The above provisions are quite clear on what is expected during that

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examination. Where such examination has occurred it is then expected the ^a examiner will certify so. Indeed, as stated by the then Chief Justice and Judge President in *Practice note No. 2 of 1969 (Appellate Division)* 1969 RLR 430 (A) on the requirement for inspection by State counsel in criminal appeals:

“In future, the following practice will be followed: Counsel who is appearing for the Crown in the matter will satisfy himself that the record contains ^b sufficient information to enable the court to adjudicate properly on all the points in issue. After he has done that, he will issue a certificate certifying that he has so satisfied himself and the Registrar of the General Division will not, in terms of subr (10) of r 15, certify that the record is complete and correct until he has been supplied with such a certificate.”

Though this practice note pertained to records in criminal appeals, I am of the ^c firm view that the important aspect is the importance of the certificate to the Registrar’s next course of action. Without that certificate the Registrar cannot comply with r 15(10). Rule 15(10) states that:

“After completion of the record a Registrar of the High Court shall certify that is correct.”

This certification by the Registrar is only possible were parties have inspected ^d the record and certified so. Where there are disputes, such would have been attended to by the parties in terms of r 15(9) and the parties would then have certified the record. The record cannot be complete without the certification. Where a party does not certify, it cannot be said that that party has complied with the rules. The certification in this case is by a party appending his ^e signature to the Registrar’s certificate as that is the only way the Registrar would have been enabled to certify the record as complete and forward it to the Supreme Court. An inspection in terms of the rules is thus a process which involves an examination of the record in terms of r 15(8a). A party examining the record must of necessity append a seal in the form of a signature confirming the examination. To merely examine without such a seal would, in my view, be ^f of no relevance to the process. Equally, to merely append one’s seal by way of signature without examining the record would not be in compliance with the rules. An inspection in terms of the rules would thus require a party to check that:

1. All documents necessary and relevant to the appeal are included in the record and are in their proper order; ^g
2. Documents that are not necessary for the appeal are removed from the record;
3. The record has been compiled in accordance with subrules (1) to (5); ^h

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4. The record of appeal is properly paginated;
5. The record of appeal is legible; and
6. A party has appended his signature to the record confirming that he has examined the record in terms of r 15(8a) and the Registrar can forward it to the Supreme Court.

^b It is only when all this has been done that it can be said the record is complete and the Registrar can act in terms of r 15(10). *In casu*, it cannot be said that what Mr Hussein did would have enabled the Registrar to certify the record as complete in terms of r 15(10).

It is not disputed that Mr Hussein attended the Registrar's office. In that office, he went through the record of appeal prepared by the Registrar. He opined that c certain documents should be included in order that he could be satisfied that the record was ready for transmission to the Supreme Court. That process of going through the record is, in my view, part of the inspection required. For the inspection to be of value, he had to come up with an opinion on the state of the record. This he did. The fact that he felt the need to include other d documents did not repudiate what he had done. To confirm that he had gone through the record and come up with an opinion, on 9 February 2007, he wrote a letter to the Registrar on his objections to the state of the record.

It is clear from that letter that the applicant's legal representative was not happy with the exclusion of certain documents, as pointed out in the letter. Upon assessing the objections, the Registrar re-invited the applicant's legal e practitioner and pointed out to him that the documents he wished to be included were not relevant. This, in my view, the Registrar did as part of his duty to ensure that only those documents and evidence necessary for the appeal are part of the record, excluding irrelevant documents. Indeed, r 15(8) of the Rules of the Supreme Court enjoins him to do so. At that stage, it ought f to have been clear to the applicant's legal practitioner that there was a dispute regarding the relevancy of the documents he was insisting on.

Rule 15(9) provides that:

"The preparation of a record under the provisions of rules 22 and 34 shall be subject to the supervision of a Registrar of the High Court. The parties may submit any matter in dispute arising from the preparation of such g record to a judge of the High Court who shall give such directions thereon as justice may require."

The Registrar in his supervisory role made it clear to the applicant's legal practitioner that the other documents and information counsel was insisting on were not relevant. Instead of accepting that the Registrar was only doing h his duty, the applicant's legal practitioner decided to instruct the Registrar to

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include that which he wanted. Indeed, in his letter of 9 February 2007 he wrote a that:

"If you look at our letter of 7 February 2006. *We instructed you* to include this record. The record in our view is deficient and *the following documents must be included ...*" (my emphasis).

On 26 February 2007, he inscribed on the Registrar's certificate, *inter alia*: b

"Why are you not complying with this? Please do not suppress information."

The confrontational stance adopted by counsel is difficult to understand, as surely he ought to have been aware of the provisions of r 15(9). This subrule required him to submit the dispute to a judge so that his objection or dissatisfaction with the record could be attended to and he would then certify the record. Had counsel reverted to subrule (9) he would have saved his client c the costs of this application and probably the appeal would have been heard by now.

Mr *Trengove*, who argued for the applicant, took a non-confrontational stance which, in my view, was commendable. He alluded to the fact that the dispute could easily have been resolved by reference to the procedure in the rules. d According to the rules, where there is a dispute or disagreement, such should be referred to a judge for directions. He argued that the penalty built in only comes into play if one fails to inspect. *In casu*, he acknowledged that the Registrar did invite the parties to inspect in terms of the rules. In response, thereto the applicant's legal practitioner went to the Registrar's office and inspected the record. The legal practitioner was not satisfied with the record, e hence his letter to the Registrar of 9 February 2007. There was then an event of which the legal practitioner was not aware. In his opposing affidavit, the first respondent said that his office had sought the advice of Kamocha J. The judge had confirmed that the notes and documents the applicant was insisting on to be included were not relevant. It would appear that, armed with this, the Registrar re-invited the applicant to inspect the record within 48 hours failing f of which the appeal would be deemed to have lapsed. In this re-invitation, the Registrar did not inform the applicant that a judge's view had been sought. To the applicant, therefore, it was as if no advice had been sought. In that vein, the applicant's legal practitioner in anger inscribed on the Registrar's certificate what has already been referred to. Mr *Trengove* further submitted that, without criticizing the Registrar for seeking guidance from Kamocha J, that g was nevertheless not an application under subrule 15(9). I find this stance apt. The first respondent, in any case, did not contend that the applicant's legal practitioner was advised that his query had been referred to a judge. It was upon

the applicant as a party to submit the dispute to a judge and not to hold the office of the Registrar to ransom. ^H

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^A Further, whilst it was within the applicant's rights to raise objections as it did, the language the legal practitioner chose to use was certainly unsavoury. The legal practitioner chose to vent his anger at the Registrar over his client's misfortune rather than revert to the rules for guidance.

It is my view that at that stage the applicant, faced with a possible penalty as ^B enunciated in the Registrar's letters, should have applied for directions from a judge in terms of r 15(9) instead of inscribing unsavoury remarks and accusations against the Registrar. Faced with such an attitude, where one party says "I won't sign till you do as I want", what should the Registrar have done? It is at that stage the Registrar chose to deem the appeal abandoned. In his opposing affidavit, the first respondent portrayed the final straw thus:

^C "The applicant's legal practitioner was invited and he made demands that were rightfully dismissed. When he came he only inscribed on annexure 'D' his insistence with the unreasonable demands. The appeal's office then sought directions from Kamocha J.

Upon being re-invited to inspect the record, the applicant's legal practitioner refused indicating that he will only do so if his demands were complied ^D with. This resulted in the appeal's office considering the appeal 'deemed abandoned or having lapsed' (see para. 11.2 and 11.3 of the first respondent's opposing affidavit). Clearly, the Registrar's action/'decision' was as a result of the applicant's refusal to fully comply with the rules of inspection."

All in all, I am of the view that the Registrar's letters were a concomitant result ^E of the applicant's legal practitioner's attitude. The legal practitioner chose a stance that was helpful neither to his client nor to the Registrar's task.

The Registrar having deemed the appeal abandoned, we note that when applying for directions before Gowora J the fate of the appeal was not put in issue. All that the applicant sought was the inclusion of certain documents. ^F Had the applicant's counsel objectively and impartially applied his mind to the reality of the Registrar's decision, he would have realized that even if his prayer had been granted the decision taken by the Registrar would not have automatically fallen away. I make these remarks to point out the need for legal practitioners to approach their cases with a sense of objectivity, impartiality and disinterest, in order that they are not subsumed by their client's case. As ^G was held in *Matamisa v Mutare City Council* 1998 (2) ZLR 439 (S) at 439:

"A legal practitioner has a duty towards court as well as to his client. His duty towards court requires that he adopts a disinterested attitude in a case and remain in a position to give impartial and objective advice to his ^H client."

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Chitakunye J

Had counsel heeded this he would not have fallen foul of r 15(8b). ^A

Rule 15(8b) provides that where the appellant has not inspected the record within the time given or extended, the Registrar of the High Court shall notify the Registrar of the Supreme Court of that fact, and *thereupon* (meaning immediately thereafter) the appellant shall be deemed to have abandoned his appeal. The Registrar said he complied with this in its letter to the applicant's ^B legal practitioner's dated 7 March 2007 wherein he wrote "But as of today you have not signed the record and I am by copy of this letter advising the Supreme Court Registrar accordingly".

The "deemed to be abandoned" is a consequence of a party's failure to inspect in terms of the Rules. Where such has occurred, a party has to take steps to have the appeal re-instated if he is still interested in the appeal. *In casu*, the ^C applicant sought a declaratory order to the effect that the letters by the Registrar are null and void, that they be set aside, and that the Registrar be ordered to prepare the record of appeal and forward it to the Supreme Court in terms of the Rules.

In the circumstances, as the applicant did not comply with the rules of ^D inspection it cannot be said that the applicant cannot be deemed to have abandoned its appeal. The Registrar purported to act in terms of the rules where a party has not complied with the rules of inspection. If the applicant felt that the Registrar had failed to properly act in terms of the Rules of the Supreme Court or that his decision was wrong, the applicant should have brought the case on review. ^E

COSTS

The respondents asked for costs on a higher scale. The first respondent in particular asked for costs *de bonis propriis* against Mr Hussein. The first respondent argued that Mr Hussein should have known better: that the Registrar having made a decision, such could only be taken on review as the Registrar had become *functus officio*. He argued that this application was induced by Mr Hussein's conduct which was not proper. The first respondent went on to say that a reading of the applicant's founding affidavit and correspondence leading to this application gives the impression that Mr Hussein seized upon the opportunity to reveal to this court his extreme dissatisfaction and displeasure at the judgment of Kamocha J. I tend to agree with the first respondent on this. The language in the founding affidavit and in correspondence from Mr Hussein show that he had lost all sense of objectivity as an officer of the court. There is much verbiage, with little or no relevance to the issues at hand. The letters to the Registrar exhibit a worryingly

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Chitakunye J

A contemptuous attitude towards the Registrar's office and a dangerous inclination to rubbish that office.

It is necessary to remind legal practitioners that, as officers of court, they have a duty to uphold the dignity of the courts and the Registrar's office in particular. Leveling unwarranted accusations against that office will not win a client's case. This is not to bar constructive criticism of that office. Such criticism should be based on facts and not on fanciful and misplaced understanding of that office's function. It is for the legal practitioners to ensure that their clients understand the role of that office. As is evident in this case, the Registrar's contention that the documents the applicant was insisting on were not relevant was adjudged to have been correct against the legal practitioner's avowed better judgment before his client.

Whilst accepting that costs be on a higher scale I am of the view that these may not be *de bonis propriis* against Mr Hussein. In *Matamisa supra*, costs were so awarded because the application was totally without merit and was frivolous and vexatious. The legal practitioner was adjudged to have abused the legal process and had acted with *mala fides* and in a highly reprehensible fashion in bringing the application. This was aptly in line with what the Supreme Court held in *Techniquip (Pvt) Ltd v Allan Cameron Engineering (Pvt) Ltd* 1994 (1) ZLR 246 (S) that:

"An order that a legal practitioner pay costs *de bonis propriis* is only granted against legal practitioners in reasonably grave circumstances. Dishonesty, *mala fides*, willfulness or professional negligence of a high degree, fall into this category. The critical factor to be determined before making such an order is whether justice demands that it be made ..."

In the present case, whilst accepting that Mr Hussein erred in his attitude/approach to the case, I am not convinced that justice demands that he be so penalized.

Accordingly, the application is dismissed, with the applicant to pay costs on an attorney and client scale.

Hussein Ranchhod & Co. applicant's legal practitioners

Civil Division of the Attorney General's Office, first, second and third respondents' legal practitioners

Dube Manikai & Hwacha, fourth respondent's legal practitioners

Costa & Madzonga, fifth respondent's legal practitioners

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ESTATE GARANDE v MASAITI & ORS 2008 (1) ZLR 394 (H)**2008 (1) ZLR p394**

Citation	2008 (1) ZLR 394 (H)
Case No	Judgment No. HH-51-08
Court	High Court, Harare
Judge	Kudya J
Heard	30 May 2008
Judgment	19 June 2008
Counsel	<i>N Mhlolo</i> , for the applicant <i>W Zhangazha</i> , for the first and second respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Administration of estates — *executor dative* — *appointment of* — *letters of administration* — *form of* — *exact compliance with statutory form not c required* — *equivalent compliance sufficient*

Headnote

The letters of administration appointing the executor dative to a deceased estate are valid if they are in substantial compliance with Form B, which is set out in the Second Schedule to the Administration of Estates Act ^o [Chapter 6:01], as long as it serves to inform the world at large that the Master has appointed the named individual on a given date as the executor of a deceased estate. Thus, even though peremptory language is used, equivalent as opposed to exact compliance with the provisions of s 23 suffices to fulfil the aim and objectives of the section, that is, the identification of the duly appointed executor in a given deceased estate. ^e

Cases cited

Karitawu v Karitawu & Ors 2007 (2) ZLR 64 (H)

Masuka v Chitungwiza Town Council 1998 (1) ZLR 15 (H)

MDC & Anor v Mudede NO & Ors 2000 (2) ZLR 152 (S) ^f

Musara v ZI NA THA 1992 (1) ZLR 9 (H)

Legislation considered

Administration of Estates Act [Chapter 6:01] ss 23, 68B & 177

High Court Act [Chapter 7:06] ss 14, 26 & 27 ^g

Case information

N Mhlolo, for the applicant

W Zhangazha, for the first and second respondents

Judgment

KUDYA J: On 6 February 2007, the applicant filed the present application. He prayed for an order that: ^h

Kudya J ^A

- (a) the appointment of the first respondent, executrix to the Estate, Attwell Garande be and is hereby set aside;
- (b) the agreement of sale and agreement of assignment of stand No. 6579 Budiro 5B, Harare done on 17 January 2007 be and is hereby set aside and the property reverts back to the Estate, Attwell Garande; ^B
- (c) the third respondent be and is hereby interdicted from ceding this property to any third parties without the order of this Honourable Court;
- (d) the first and second respondents pay the applicant's costs of suit;
- (e) the fourth respondent be and is hereby ordered to convene an edict meeting for the Estate Attwell Garande and proceed to have it administered according to the Garande family, and interested members' directions.

^C It was opposed by the first and second respondents. The first respondent raised two preliminary issues. The first was that the applicant lacked *locus standi* to represent the estate and secondly that the procedure used to bring it fell foul of r 259 of the High Court Rules. She prayed that the application be dismissed without recourse to the merits. I directed the parties to argue the ^D matter on both the preliminary issues and the merits.

THE PRELIMINARY ISSUES

Mr *Zhangazha*, for the first respondent, submitted that the purported authority relied upon by the applicant was a nullity because it did not adhere to the format set out in Form B in the Second Schedule by s 23 of the Administration ^E of Estates Act [*Chapter 6:01*]. He contended that, as s 23 of the Administration of Estates Act is worded in peremptory language, exact compliance with its provisions was required. He averred that the letters of administration issued to the first respondent met the criterion set out in s 23.

The authority relied on by the applicant is entitled "Letter of Appointment of ^F Executor dative/heir". It has a reference number for a deceased estate file issued by the Chitungwiza civil and customary law magistrates court. It has the provincial magistrate's date stamp of 8 May 2006 and signature. It appoints the applicant, following an edict meeting, as the executor dative in the estate in question.

The one relied on by the first respondent takes the format set out in Form B ^G by s 23 but adds the words "who died at" and "on the". It is also not in exact compliance with the provisions of s 23.

It seems to me that both these letters of administration are in substantial compliance with Form B. Each serves to inform the world at large that the ^H Master has appointed the named individual on a given date the executor of

Kudya J

a deceased estate. Thus, even though peremptory language is used, equivalent ^A as opposed to exact compliance with the provisions of s 23, it suffices to fulfill the aim and objectives of the section, that is, the identification of the duly appointed executor in a given deceased estate. See *Movement for Democratic Change & Anor v Mudede NO & Ors* 2000 (2) ZLR 152 (S) at 158C-H.

In any event, the submission by Mr *Zhangazha* loses its force in the face of ^B the averment by the Master that the letters of administration that were issued to the applicant were valid. The first preliminary issue is decided against the first respondent.

Mr *Zhangazha* further contended that the applicant seeks a review of the Master's decision through the medium of a *declaratur*. He submitted that the application should be dismissed for failing to abide by the requirements of ^C Order 33 r 257 and 259 of the Rules of Court. He relied on *Masuka v Chitungwiza Town Council* 1998 (1) ZLR 15 (H). Mr *Mhlolo*, for the applicant, on the other hand submitted that it was competent for the applicant to seek a declaration of nullity of the Master's decision and consequent relief other than by way of review. He relied on *Musara v ZINATHA* 1992 (1) ZLR 9 (H). ^D

In *Musara's* case *supra*, Robinson J held that it was in the interests of justice that an invalid act be declared a nullity by way of a *declaratur* even if this could be achieved through common law review

proceedings and in the alternative exercised his discretion in terms of s14 of the High Court Act [Chapter 7:06] to grant the order sought. In *Masuka's case supra*, Devittie J held that a litigant could not, by seeking a declaratory order based on recognizable review ^ε grounds, avoid the mandatory strictures for review proceedings that are set out in r 259.

It seems to me that Devittie J relied on s 26 and s 27 of the High Court Act [Chapter 7:06] in his bid to dismantle the reasoning in the *Musara* case. He did not pay particular attention to the provisions of s 14 of the High Court Act, ^ε which Robinson J adopted in the alternative. To the extent that s 26 and s 27 take second fiddle to s 14 of the High Court Act, it seems to me that Robinson J was correct to hold that a declaration of nullity other than by way of review was available to any interested party who was prepared to persuade the court to exercise its discretion under s 14 in his favour. In other words, I incline to the view that, notwithstanding that an application may contain recognizable ^ε review grounds it may be brought other than by way of common law review through a *declaratur*.

I would for that reason dismiss the second objection raised by the first respondent and find that the application is properly before me. ^η

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Kudya J

A THE FACTS

The deceased died single at Gweru on 27 February 2006. On 8 May 2006, Sharpstone Garande was appointed executor dative at Chitungwiza Magistrates Court.

The applicant averred that the deceased enjoyed an unsolemnised customary ^β union with the first respondent from mid-1996 to June 2000 which had been dissolved by the time of his death. He then stayed with one Mary Spondarge who passed away in December 2005.

He produced a letter from the first respondent's brother to the deceased as proof of the customary dissolution of the union. The letter, however, appears to show that the two were still in the union.

^α On 30 October 2006, the first respondent registered the estate with the Assistant Master at Harare magistrates court in DR 1512/06 and was appointed executrix dative. The immovable property in question was awarded to her as the surviving spouse and she was also granted the Master's consent to sell her rights and interest in the property on that day. The applicant saw an ^δ advertisement in the newspaper for the first and final administration and distribution account of the estate in *The Herald* newspaper on 12 December 2006. This drove him to write to the Master on 14 December objecting to the appointment of the first respondent as an executrix in the estate. In the meantime, on 17 January 2007, the first respondent had signed a deed of assignment of the property in favour of the second respondent at the third ^ε respondent's offices.

Armed with this document, the second respondent visited the property in February 2007 and this triggered the present application.

The applicant averred that as first respondent was improperly appointed an executrix, the sale was a nullity. He further averred that the Assistant Master ^ε connived with her to defraud the estate of its sole asset. He fortified his averment by showing that he took the word of the first respondent at face value and without any input from the deceased's relatives, that she was his customary law widow; and further that he ignored the averment in her affidavit of 12 September 2006 of the existence and location of the deceased's mother but proceeded to appoint her; he ignored the contradictory averments that the ^ε deceased had no relatives and that which indicated she was not in good books with the mother whose address was provided as the matrimonial home and, lastly, the first and final administration and distribution account was advertised in both the newspaper and *Government Gazette* of 12 December 2006 after it had been approved on 30 October 2006. In any event, the final administration ^η and distribution account was approved before it had been advertised.

2008 (1) ZLR p398

Kudya J

The fourth respondent, the Master, filed his report on 16 October 2007. He ^α stated that the registration of the estate by the first respondent was irregular as she was appointed executrix in the

face of a valid and existing appointment of the applicant to the same office. He further stated that her appointment was also prejudicial to the estate as she averred in her application that the deceased had no relatives. He recommended that her letters of administration be nullified ^b together with all the subsequent acts that flowed from her appointment.

The first respondent averred that she was the customary law union wife of the deceased and that that union subsisted at the time of his death. She attached the memorandum of agreement, entered into by the City of Harare on the one hand and the deceased and herself on the other, of 11 September 2000 in a bid to demonstrate that she was a joint holder of rights in the immovable property ^c in question. Mr *Mhlolo* attacked the authenticity of this document. In doing so he relied on four documents that were filed of record by the applicant. The first three, which consisted of an application for title deeds filed with the third respondent by the deceased on 19 September 2002, the rent card issued by the third respondent on 1 June 1998, the building inspectorate form of 5 October 2001, were all in the sole name of the deceased. The fourth document ^d was a purported prototype addendum to an agreement of sale which he alleged the third respondent used with the consent of a spouse to secure the interests of the other spouse in its property.

The dispute on the authenticity of the sale agreement can be resolved on the papers. That agreement is an official document of the third respondent. The ^e applicant failed to show on a balance of probabilities that it was forged. In fact, Mr *Mhlolo* abandoned his onslaught on the contents of the document after it became clear to him that he had misconstrued certain information thereon. The document provides a portion for the inclusion of more than one right holder. In those portions, the names of the deceased and the first respondent appear. Each of them, together with officials of the third respondent, initialled ^f each page of the seven page document and the first respondent also appended her signature as co-purchaser with the deceased. She also produced water bills which are in the joint names of the two.

It does not appear to me that the four documents that were relied on by Mr *Mhlolo* can be used to challenge the authenticity of the agreement of sale. ^g These documents were either drawn by or on the instructions of the deceased without any input from the first respondent. The fourth document protected the right of a spouse who was a joint holder of rights by virtue of marriage and could not be used, in my view, on a spouse who was a joint owner in her own right. ^h

2008 (1) ZLR p399

Kudya J

^A I find on the papers that the first respondent was a joint holder of rights in the immovable property together with the deceased.

The second respondent averred that he was an innocent purchaser who bought the property for value, through an estate agency, after due diligence. He counterclaimed for a declaration of validity of the sale and that the purchase price be held in trust pending the resolution of the dispute between the ^b applicant and the first respondent by the fourth respondent; and, in the alternative that the dispute between the applicant and the first respondent be adjudicated on by the fourth respondent and that the second respondent be declared a creditor of the estate with a claim to be considered by the fourth respondent with costs to be borne by the estate.

^c It seems to me that the fate of the second respondent is inextricably linked with that of first respondent. If I invalidate the first respondent's appointment, it must follow that all subsequent acts based on that appointment were void. In that event, the second respondent's counterclaim would fail. See *Karitawu v Karitawu & Ors* 2007 (2) ZLR 64 (H) at 69-70.

The applicant sought the declaration of nullity on the basis of procedural irregularities that arose in the appointment of the first respondent. He did not address his mind to the question whether the Master could issue a second letter of administration while the first one was still extant. Part IIIA in s 68 of the Act defines "executor". Section 68B outlines how an executor is appointed. In Part III, s 26 deals with the persons who are eligible for appointment to the ^e office of executor. The appointed person is issued with letters of administration which take the format laid out in Form B of the Second Schedule. Section 177, which is found in Part V of the Administration of Estates Act, deals with the removal of an executor from office. These sections all contemplate the appointment of one individual as an executor at any given time. Unless co-executors are appointed, it would be incompetent for the Master to appoint ^f a subsequent executor for a deceased estate without first seeking the removal of the one in office.

The first respondent was appointed an executrix at a time when the applicant was in office. I agree with the averment made by the Master that her appointment in those circumstances was void.

¶ I do not believe it is necessary that I deal with the points raised by the parties on the irregularities committed by the first respondent and the Assistant Master in any great detail for the reason that I hold that the first respondent's appointment was void. It suffices to observe that the failure by the Assistant Master to call the known surviving relatives of the deceased at the edict ^H meeting at which she appointed her to confirm whether or not she was the

2008 (1) ZLR p400

Kudya J

widow of the deceased, and his failure to deal with the objection of the ^A applicant of 14 December 2006, coupled with his approval of the distribution plan before it had been advertised, were gross irregularities which would have been fatal to her appointment.

CONCLUSION

The effect of my findings is that the applicant remains the duly appointed ^B executor of the estate of the late Attwell Garande. It is not possible in these circumstances to order the Master to convene an edict meeting for the estate for it to be administered in accordance with the wishes of interested parties as prayed for in para (e) of the applicant's draft order. It is, however, appropriate for me to grant the other prayers set out in that draft order. ^C

DISPOSITION

Accordingly, it is ordered that:

1. The appointment of the first respondent to the Estate Attwell Garande be and is hereby set aside
2. The agreement of sale and agreement of assignment of stand No. 6579 ^D Budiriro 5B, Harare done on 17 January 2007 be and is hereby set aside and the property reverts back to the Estate, Attwell Garande.
3. The third respondent be and is hereby interdicted from ceding this property to any third parties without the order of this Honourable Court.
4. The first and second respondents pay the applicant's costs of suit, jointly ^E and severally, the one paying the other to be absolved.
5. The second respondent's counterclaim be and is hereby dismissed with costs.

Mushonga and Associates, applicant's legal practitioners

Chinamasa, Mudimu, Chinogwenya & Dondo, first and second respondents' ^F legal practitioners ^G

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TSAMWA v HONDO & ORS 2008 (1) ZLR 401 (H)

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Citation 2008 (1) ZLR 401 (H)

Case No Judgment No. H-53-08

Court High Court, Harare

Judge	Mavangira J
Heard	7 May 2008; 8 May 2008; 9 May 2008; 14 May 2008; 15 May 2008; 19 May 2008; and 28 May 2008
Judgment	25 June 2008
Counsel	Miss <i>T Gonese</i> , for the plaintiff <i>C Chipere</i> , for the first and second defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

c Contract — *validity* — *contract made in breach of statutory prohibition* — *no objection by parties* — *contract nevertheless void ab initio*

Town and country planning — *subdivision of property* — *prohibition on agreement for change of ownership of portion of property without permit allowing for subdivision* — *effect* — *permit issued after agreement had been concluded* — *no effect on illegality of agreement* — *agreement void ab initio*

Headnote

The court is bound to refuse to enforce a contract which is illegal even though no objection to the legality of the contract is raised by the parties (*dicta per* Lewis ACJ in *York Estates Ltd v Wareham* 1949 SR 197; 1950 (1) SA 125 at p 128 followed). ^E

The preamble to an agreement for sale of an immoveable property reflected that, as at the time of the sale, a subdivision permit was not yet in place. The seller had applied to the City of Harare for the approval of the subdivision. He undertook that the subdivision permit would be ready in not more than six months from the date of the agreement. In seeking ^F to overcome the difficulty caused by s 39(1)(b)(i) of the Regional Town and Country Planning Act [*Chapter 29:12*], it was argued on behalf of the plaintiff that the prohibition against such sales only applied where no application for a permit had been made.

Held, dismissing the plaintiff's argument, that the submission for a subdivision ^G permit was no guarantee as to its success. The planning authority should not have its hands forced. The issuance of the permit after the agreement had already been entered into could not have any legal effect on the validity of the agreement in so far as compliance with the Act is concerned. It is the state of affairs prevailing at the time that the parties ^H entered into the agreement, in relation to the existence or otherwise of

2008 (1) ZLR p402

Mavangira J

a subdivision permit, that is relevant. ^A

Held, further, that the plaintiff's claim must be dismissed as at the time the parties entered into the agreement, there was no subdivision permit in existence. An agreement made in such circumstances is forbidden by s 39(1)(b)(i) of the Act. Any purported agreement for the change of ownership of a portion of a property is a nullity and no effect can be given ^B thereto.

Cases cited

In re *An Arbitration between Mahmoud & Ispahani* [1921] 2 KB 716

Bartleff v Vinor (1692) Carth 251

Brightman and Co Ltd v Tate [1919] 1 KB 463 ^C

Dube v Khumalo S-103-86

Langton v Hughes (1813) 1 M and S 593

Matsika v Jumvea Zimbabwe (Pvt) Ltd & Anor 2003 (1) ZLR 71 (H)

Nyamweda v Georgias 1988 (2) ZLR 422 (S) ^D

X-Trend-a-Home (Pvt) Ltd v Hoselaw Investments 2000 (2) ZLR 348 (S)

York Estates Ltd v Wareham 1949 SR 197; 1950 (1) SA 125 (SR)

Legislation considered

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

Case information

Miss *T Gonese*, for the plaintiff ^E

C Chipere, for the first and second defendants

Judgment

MAVANGIRA J: The plaintiff's claim, as amended, is for:

"Transfer of subdivision of Lot 1 of Lot 310 Block B Hatfield Estate upon payment to the defendants of the balance of the purchase price being the ^F sum of \$50 million.

Alternatively, damages in the sum of the purchase price of 2000 square meters of land in the same locality as Hatfield, as at the date of judgment."

The plaintiff's claim emanates from an agreement of sale that was executed on 14 May 2004. The agreement reflects that it was executed by and between ^G Ndoda Hondo and the plaintiff. It reflects that Ndoda Hondo sold to the plaintiff a certain piece of land, held by him under Deed of Transfer No. 3144/81, situate in the district of Salisbury called Lot 1 of Lot 310 Block B, Hatfield Estate measuring 5 379 square metres. ^H

2008 (1) ZLR p403

Mavangira J

^A The issues referred for determination at trial were listed as:

1. What were the terms of the agreement entered into between the plaintiff and second defendant?
2. Whether or not the plaintiff discharged his obligations in terms of the contract. ^B
3. Alternatively, whether the plaintiff breached the agreement.
4. Whether the plaintiff is entitled to the relief he seeks as amended.

In December 2005, when the plaintiff issued out summons, he cited one defendant, Ndoda Hondo. In April 2007, he then applied for the joinder of Thomas Kobo Munemo as the second defendant. He indicated in his ^C application that it had since emerged that, contrary to his earlier belief, the names Ndoda Hondo and Thomas Kobo Munemo referred to one and the same person, he had since ascertained that the names refer to two different people. The order of joinder was granted on 28 June 2007. When the plaintiff subsequently gave evidence before this court, he stated that the person with whom he entered into the agreement claimed that the name "Ndoda Hondo" ^D was his Chimurenga war name. In addition, that he used the name interchangeably with the name "Thomas Kobo Munemo".

The defendants, on the other hand, maintained that the two names relate to them as two different individuals and that the two of them are brothers. From the documentary exhibits produced before the court, it is also apparent that, ^E in an application for summary judgment filed by the defendants in the Magistrates Court in January 2006 in a related case, they sued as first and second applicants respectively. Furthermore, in proceedings before this court, two individuals, each answering to one of the two names, gave evidence as the two defendants. It was clear that the two names refer to two different people. Clearly, therefore, if not in 2006 during proceedings before the ^F magistrates court, then certainly in April 2007 when the plaintiff applied for the joinder of the second defendant in the instant proceedings, the plaintiff became aware and certain that the two names refer to the two different people now before this court as the defendants. Significantly too, according to the

plaintiff's founding affidavit in that application, the two "turned up at court on 26 February 2007", the date on which the matter had been set down. In her closing submissions, Miss *Gonese* for the plaintiff submitted that the plaintiff's contention was that the two names, insofar as the agreement in issue is concerned, refer to the same person. She urged the court to find in favour of the plaintiff on this aspect. In my view, such a finding would be untenable on the evidence before this court and in the circumstances related above.

2008 (1) ZLR p404

Mavangira J

The clear position emerging from the evidence placed before the court is that there are two defendants before the court. The property in question is registered in the name of the one defendant. The plaintiff entered into an agreement of sale in relation to the said property with the other defendant who is not the registered owner of the property. Whilst the agreement of sale purports to have been signed by the registered owner who is in fact the first defendant, the fact is that the signature was appended not by him but by the second defendant. The second defendant appended a signature falsely purporting to show the agreement as having been signed by the first defendant. He did not, as he could have done, sign in his own name on the basis of the power he would purportedly derive from the special power of attorney.

In his plea, the first defendant denied entering into an agreement with the plaintiff. He claimed to have no knowledge of the sale in question stating that, although the property was registered in his name, it belonged to the second defendant who was unable to have it registered in his name as he was not the holder of an identity document at the relevant time of the registration. He also claimed that he did not know whether the second defendant had sold the property. In his evidence before this court, he gave a different story, stating that he was aware of the sale and had signed a special power of attorney to enable the second defendant to do as he wished with his property.

The defendants have also contended that the plaintiff breached the agreement by failing to pay the agreed deposit of \$15 000 000 upon signing the agreement and also by failing to make all payments through Messrs Kwenda & Associates, Legal Practitioners. The plaintiff contended, on the other hand, that there was no time period stipulated or agreed upon for the payment of the deposit. Furthermore, that it was the defendant who in fact breached the agreement by failing to tender transfer within six months of the agreement.

The evidence led before this court shows that the agreement of sale was, as recorded therein, made by and between the plaintiff and the second defendant. The agreement was, however, in relation to a property registered in the name of the first defendant. The first defendant is not a party to the agreement of sale. The second defendant said that he was asked by one Mashonganyika to sign the agreement as "Ndoda Hondo" and he did so. The first defendant said that although it is registered in his name, the property actually belongs to the second defendant.

On 16 June 2000, the first defendant signed a special power of attorney in favour of the second defendant nominating and appointing him to act as his agent in all transactions concerning the property known as 50 Alexandra

2008 (1) ZLR p405

Mavangira J

A Drive, Hatfield, Harare. It also "declared" the second defendant the "sole signatory on all the papers concerning the sale of No. 52 Alexandra Drive, Hatfield, Harare" on his behalf. The two paragraphs of the "Special Power of Attorney" refer two to different properties as described above.

Despite the realisation of the true position as conceded by the plaintiff and the fact of the joinder of the second defendant about a year before the hearing of this matter, the plaintiff did not make any amendments to his pleadings. No cause of action is averred or established in his declaration in respect of the second defendant. Rather, the plaintiff kept insisting when giving evidence, that the second defendant had stated that he used the two names interchangeably. However, despite becoming alive to the reality of the two names representing two people by 26 February 2007, it appears the plaintiff did not thereafter reflect on the impact of the revealed position on his claim as framed. Miss *Gonese* submitted that whilst it would have been prudent for the plaintiff to amend his pleadings, particularly his declaration, the court should proceed to consider the matter on the basis of the evidence placed before it.

▷ A number of preliminary questions arise as to the validity of the agreement placed before the court. Is the agreement valid and binding despite the fact that it was not signed by the person it purports to have been signed by? What is the effect, if any, of the special power of attorney on the signature appended not by the first defendant but by the second defendant, on the agreement? ◻ If the agreement is binding, did any of the parties breach it and if so, to what effect?

It does also appear, however, that before any of the above questions are determined or considered, there is a more fundamental aspect that needs to be determined. The preamble to the agreement of sale reflects that as at the time of the sale a subdivision permit was not yet in place. The seller had applied ◻ to the City of Harare for the approval of the subdivision. He undertook that the subdivision permit would be ready in not more than six months from the date of agreement. Section 39 of the Regional, Town and Country Planning Act, [Chapter 29:12] provides as follows:

"39 No subdivision or consolidation without permit

- (1) Subject to subsection (2), no person shall –
- (a) ...
 - (b) enter into any agreement –
 - (i) for the change of ownership of any portion of a property; ◻ or

2008 (1) ZLR p406

Mavangira J

(ii) ...; A

except in accordance with a permit granted in terms of section *forty*."

When the court raised this issue with the parties after both had closed their cases, the defendants contended that the agreement does not fall foul of s 39 of the Regional, Town and Country Planning Act because its enforcement was sought after the issuance of a subdivision permit. Miss *Gonese* submitted that ◻ the section is applicable only when no application for a permit has been made. *In casu*, an application had been submitted to the local authority. The subdivision was thus not merely in the contemplation of the parties. She submitted that this distinguished the case from the *X-Trend-a-Home (Pvt) Ltd v Hoselaw Investments* 2000 (2) ZLR 348. She submitted that should the court find that the section is applicable in this matter she would urge the ◻ court to exercise its discretion and do justice between man and man. She further submitted that the passages highlighted to her by the court from McNally JA's judgment do not reflect the *ratio decidendi* of the judgment but are only *obita dictum*.

In *X-Trend-a-Home (Pvt) Ltd v Hoselaw Investments* McNally JA ◻ stated that:

"It is desirable to eliminate any uncertainty which may exist as to the state of the law in relation to transactions involving portions of land which are not yet subdivided."

and at 350B:

"It is necessary then , squarely to face the question: 'Does s 39 of the ◻ Regional, Town and Country Planning Act [Chapter 29:12] prohibit persons from entering into an agreement for the change of ownership of any portion of a property, even where the agreement is made, expressly or impliedly, conditional upon the obtaining of a permit for subdivision of that portion?'"

He then found, at 355B: ◻

"...the statute no longer speaks of 'a sale'. It uses the much wider expression 'agreement for the change of ownership'. The agreement with which we are concerned is clearly 'an agreement for the change of ownership' of the unsubdivided portion of a stand. What else could it be for? *Whether the change of ownership is to take place on signing, or later ◻ on an agreed date, or when a suspensive condition is fulfilled, is unimportant. It is the agreement itself which is prohibited*" (my emphasis).

Miss *Gonese* submitted that the *ratio decidendi* of the case is the following passage at 355C-D:

"The evil which the statute is designed to prevent is clear. Development ◻

2008 (1) ZLR p407

Mavangira J

A planning is the function and duty of planning authorities, and it is undesirable that such authorities should have their hands forced by developers who say 'but I have already entered into conditional agreements; major developments have taken place; large sums of money have been spent. You can't possibly now refuse to confirm my unofficial subdivision or development'. "

¶ I do not find persuasive Miss *Gonese's* submission that McNally JA's statements highlighted above at 349H, 350B and 355B are only *obiter dicta*. The learned Judge of Appeal was determining the very question that he had set out to decide. He was eliminating any uncertainty which may have existed as to the law in relation to transactions involving portions of land which are not yet subdivided. This is clearly indicated and reflected in the stated *c* passages amongst others. In any event, the language of the statute in s 39 is peremptory and admits of no relevant exception to its applicability. Even on an application of the passage at 355C-D, the fact of development planning being the function and duty of planning authorities remains pertinent. The submission of the application for a subdivision permit is no guarantee as to its success. The planning authority should not have its hands forced. The *o* issuance of the permit after the agreement had already been entered into cannot have any legal effect on the validity of the agreement insofar as compliance with the Act in question is concerned. It is the state of affairs prevailing at the time that the parties entered into the agreement, in relation to the existence or otherwise of a subdivision permit, that is relevant.

¶ On the evidence before this court, the fact is that at the time the parties entered into the agreement, there was no subdivision permit in existence. An agreement made in such circumstances is what the section in question prohibits. Any purported agreement for the change of ownership of a portion of a property is therefore null and void *ab initio* by virtue of the provision in s 39(1)(b)(i). It follows therefore, in my view, that the agreement in this matter is null and *o* void *ab initio*. In *In re An Arbitration Between Mahmoud and Ispahani* [1921] 2 KB 716 at 724, Bankes LJ stated:

"...The order is a clear and unequivocal declaration by the legislature in the public interest that this particular kind of contract shall not be entered into. The respondent had a licence; the appellant had no licence. The *g* respondent contends that, as he had a licence, the appellant cannot be heard to say that in the circumstances he had not a licence. I cannot assent to that proposition. I do not think there is any authority for it, and as the language of the order clearly prohibits the making of this contract, it is open to a party, however shabby it may appear to be, to say that the legislature has prohibited this contract, and therefore it is a case in *h* which the court will not lend its aid to the enforcement of the contract.

2008 (1) ZLR p408

Mavangira J

The decision of McCardie J in *Brightman & Co Ltd v Tate* [1919] 1 KB *a* 463 at 467 has been cited, where in the early part of his judgment he referred to statements of the law upon the point by very learned judges. He referred to the language of Holt CJ in *Bartlett v Vinor* (1692) Carth 251, 252; and also to the statement of Lord Ellenborough CJ in *Langton v Hughes* (1813) 1 M & S 593, 596 – namely, that:

'what is done in contravention of the provisions of an Act of Parliament, *c* cannot be made the subject matter of an action'" (my emphasis).

In *York Estates Ltd v Wareham*; 1949 SR 197; 1950 (1) SA 125 at 128, Lewis ACJ stated:

"The court has no equitable jurisdiction to grant relief to a plaintiff seeking to enforce a contract prohibited by law: see *Mathews v Rabinowitz* 1948 (2) SA 876 (W). In fact, the court is bound to refuse to enforce a contract which is illegal even though no objection to the legality of the contract is raised by the parties: see *Cape Dairy and General Livestock Auctioneers v Sim* 1924 AD 167. Furthermore the court will not enforce such a contract even though the plaintiff is innocent and the defendant is setting up his own illegality: see *R. Mahmoud and Ispahani* [1921] 2

KB 716... *o*

The fact that the Minister's approval to the subdivision was subsequently given before the plaintiff sought to enforce the contract is immaterial. It is not alleged that after obtaining the Minister's approval a new contract was entered into. In the *Cape Dairy v Sim* case which dealt with an illegal sale of cattle on a Sunday, it was sought to rely on ratification of the sale *e* made on the following Thursday. Innes CJ observed at p 170: there can be no ratification of a contract which is prohibited and made illegal by statute" (my emphasis).

Miss *Gonese* also submitted that should this court find that the agreement is illegal, it should exercise its discretion to do justice between man and man and enforce it. In support of such an approach, she cited the following cases: *f Matsika v Jumvea Zimbabwe (Pvt) Ltd & Anor* HH-9-03; and submitted that the court therein decided to enforce an illegal contract to do justice to the parties. She submitted that in *Nyamweda v Georgias* 1988 (2) ZLR 422 (S), the court enforced a contract that was *in pari delicto* in order to do justice. In *Nyamweda v Georgias*, McNally JA stated at 427C: "The reasoning in *Dube's* case must prevail." In *Dube v Khumalo* S-103-86, Gubbay JA stated *g* at p 7 of the judgment:

"I turn then to consider whether the plaintiff's claim for relief, based as it is upon an agreement which involved a conspiracy to defraud the Municipality, should be entertained." H

2008 (1) ZLR p409

Mavangira J

A He proceeded at p 9:

"In this case, so it seems to me, the plaintiff was not seeking to enforce an illegal agreement. That agreement had been performed. It had achieved its purpose – the Municipality was defrauded. In consequence of it, the defendant had acquired rights in respect of stand No. 70769 without incurring any corresponding disadvantage. She had given no value for them. The plaintiff paid for their acquisition and continues to do so. And it was the official recognition that those rights vested in him and not in the defendant that he sought from the court *a quo*; in other words, the recovery of those rights from the defendant.

In my view, the refusal to accord the plaintiff that relief allowed the defendant to be unjustly enriched at his expense: see *Padayachey v c Lebesse* 1942 TPD 11; *Albertyn v Kumalo & Ors* 1946 WLD 529; *Roots (Central Africa) (Pvt) Ltd v Mundawarara & Anor* 1973 (1) RLR 57 at 61A-B; *Osman v Reis* 1976 (3) SA 710 (C) at 712H" (my emphasis).

Unlike the situation in *Dube v Khumalo supra*, the plaintiff herein seeks to enforce an agreement specifically prohibited by law. The authorities already discussed above are clear on this. The courts cannot accede to such a request. D The case cited is, therefore, distinguishable. The court cannot lend its aid to the enforcement of the contract.

In view of the above, it therefore becomes unnecessary for this court to determine neither the issues that were referred to trial nor those that arose or emerged from the evidence placed before this court.

E The plaintiff's claim cannot therefore succeed in the circumstances. Costs will follow the cause. In the result it is ordered as follows:

The plaintiff's claim is dismissed with costs.

Kwenda & Associates, plaintiff's legal practitioners

F *Mtombeni, Mukwasha, Muzawazi & Associates*, defendants' legal practitioners

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Source:

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TAWONANHASI v TSHUMA & ORS 2008 (1) ZLR 410 (H)

2008 (1) ZLR p410

Citation	2008 (1) ZLR 410 (H)
Case No	Judgment No. HB-63-08
Court	High Court, Bulawayo
Judge	Kamocha J
Heard	11 June 2008
Judgment	26 June 2008
Counsel	<i>C Dube</i> , for the applicant <i>D Vundla</i> , for the respondents

Case Type	Civil application
Annotations	No case annotations to date

Flynote

Family law — *child — custody — to whom should be granted — child born c of unregistered customary union — natural parent available and willing to take custody — custody should be granted to such parent in absence of compelling reasons not to*

Headnote

The applicant was the father of a boy born during the brief subsistence of ^d an unregistered customary union. He was granted access to the boy and paid various sums to support the child, who was living with his mother. The mother left the country and left the boy with his grandmother, who in turn left him with his great-grandmother. The applicant sought custody of the child.

Held, that what had happened was clearly undesirable. When the mother left ^e to go and settle in South Africa the custody of the child should have been given to the natural parent – the father. He had paid *lobola* for the customary union. There was no need for the custody of the child to be given to a third party when one of the parents was available. A natural parent should not be deprived of his rights of custody unless he is found ^f to be unworthy to have custody. There should be very compelling reasons for doing so. *In casu* the evidence was that the father was a responsible person who had the means to support the child. There was no need to abandon the child to a fourth party when a willing and able father was available. ^g

Case information

C Dube, for the applicant

D Vundla, for the respondents

Judgment

KAMOCHA J: The applicant seeks an order granting him custody of his son Eddison Tawonanhasi junior born on 12 April 2006. ^h

2008 (1) ZLR p411

Kamocha J

^a The applicant and Nyenyedzi Mativenga, the third respondent, entered into an unregistered customary union in 2005 and started living together as husband and wife at No. 4 Gayland Court, Bulawayo. A baby boy was born to the union on 12 April 2006. He was named Eddison Tawonanhasi, junior.

The union was, however, short lived. It was terminated in March 2007 resulting in the third respondent going back to her parents with the infant. The parents ^b lived at block 25/849 Mpopoma, Bulawayo.

In July 2007, the maintenance court issued an order, by consent, to the effect that the applicant would be responsible for all the child's needs. He was to provide the basic needs in food stuff and health requirements. He also was responsible for 50 per cent of the salary of the maid hired to baby sit the child. ^c The applicant has been dutifully discharging his obligations in delivering the full groceries.

During that same month he applied for and was granted an order to have access to the child. Initially he exercised his right of access to the child without any problem. However, trouble started when the mother of the child left this country on 23 September 2007 to go and work and live in South Africa. She ^d left the infant with her mother, who is the second respondent herein.

Soon after the mother of the child had left to go and settle in South Africa, the grandmother went to work and live in Kwekwe. The grandmother left the infant in Bulawayo with its great grandmother, thereby giving custody to her. The great grandmother could not tolerate the father of the child. She complained *inter alia* that the food that he used to buy for the child was not good for the child's health as it was modern food. The old lady was clearly old fashioned and could not appreciate advantages of modern food.

What has been happening in this case is clearly undesirable. When the mother left to go and settle in South Africa the custody of the child should have been given to the natural parent – the father. He had paid *lobola* for the customary union. There was no need for the custody of the child to be given to a third party when one of the parents was available. A natural parent should not be deprived of his rights of custody unless he is found to be unworthy. There should be very compelling reasons for doing so.

In casu, there is no reason to do that. There is no evidence to suggest that the father is unfit to have the custody of his child. On the contrary, the papers filed of record show that he is a responsible person who has got the means to do so as a business man. He has employed a maid to look after the child. He loves his child.

2008 (1) ZLR p412

Kamocha J

The mother of the child has abandoned the child in the custody of the grandmother who in turn has abandoned him to her mother – the great grandmother. There is no need for this undesirable scenario when a willing and able father is available. The custody of the child is with a fourth party – a most undesirable situation in the circumstances.

This court as the upper guardian of all minors cannot sanction such a situation. It must be stopped. In the result I would issue the following order.

It is ordered that:

The custody of the minor child Eddison Tawonanhasi junior, born on 12 April 2006, be and is hereby granted to his father, the applicant.

Lazarus & Sarif, applicant's legal practitioners

Dube-Banda, Nzarayapenga & Partners, respondent's legal practitioners

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Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 1/CHURCH OF THE PROVINCE OF CENTRAL AFRICA v KUNONGA & ANOR 2008 (1) ZLR 413 (S)

CHURCH OF THE PROVINCE OF CENTRAL AFRICA v KUNONGA & ANOR 2008 (1) ZLR 413 (S)

2008 (1) ZLR p413

Citation	2008 (1) ZLR 413 (S)
Case No	Judgment No. S-7-08
Court	Supreme Court, Harare
Judge	Chidyausiku CJ (in chambers)
Heard	28 February 2008; 6 March 2008
Judgment	13 March 2008

Counsel	<i>M P Mahlangu</i> , for the applicant <i>V Chizodza</i> , for the respondents
Case Type	Application to strike out appeal
Annotations	No case annotations to date

Flynote

Appeal — *striking out* — *failure to comply with Supreme Court Rules* — *appeal noted out of time and no application made for condonation* — *judge in chambers not having jurisdiction to strike out appeal*

Headnote

▷ The applicant obtained an interdict from the High Court against the respondents, who filed a notice of appeal. The notice of appeal was not filed timeously in terms of r 30 of the Supreme Court Rules 1964. The applicant applied to a judge of the Supreme Court, in chambers, for the notice of appeal to be struck out. The issue for decision was whether a ⅇ judge in chambers had the jurisdiction to strike out an appeal for failure to comply with the Rules.

Held, that r 31 of the Supreme Court Rules specifically gives a judge who dismisses an application for extension of time jurisdiction to have the notice of appeal struck out after the refusal to grant the extension of time within which to note the appeal. Where, however, there is no application ⅈ for condonation, a judge who strikes a matter off the roll for non-compliance with the Rules pre-empts the discretion of the court to grant condonation or not and assumes that power. There is no provision in the Rules that authorises the dismissal of an appeal other than on the basis provided for in the Rules. Where an appeal does not comply with the Rules, it is up to the court, and not a judge in chambers, to order the striking off of the matter for failure to comply with the Rules or to grant the indulgence for failure to comply with the Rules. A distinction must be made between those matters where the notice of appeal is invalid by reason of failure to comply with the provisions of the statutes and a ⅈ situation where a notice of appeal is invalid by reason of failure to comply

2008 (1) ZLR p414

Chidyausiku CJ

with the Rules. Where the notice of appeal does not comply with the ⅈ provisions of an Act of Parliament, the court has no discretion in the matter and the defect is incurable. In a situation like that, it is open to the court, and indeed to a judge of the Supreme Court, to order that the appeal is a nullity and is incurably defective. However, where the notice of appeal does not comply with the Rules, it is not incurably defective ⅈ because the court has a discretion to overlook the defect. A judge in chambers should not preclude the court from considering whether the failure to comply with the Rules should be condoned or not.

Cases referred to

ZESA v Mangwengwende S-180-05 ⅈ

Legislation considered

Supreme Court Rules 1964 (RGN 380 of 1964), r 31

Case information

M P Mahlangu, for the applicant ▷

V Chizodza, for the respondents

Judgment

CHIDYAUSIKU CJ (in Chambers):

This is an urgent chamber application in which the applicant seeks the following relief set out in the draft order: ^E

“(1) The notice of appeal filed by the respondents in the matter SC 17/08 be and is hereby declared as being of no force and effect and is hereby struck out.

(2) The High Court’s provisional order in the matter HC 345/08 remains in effect.

(3) The first and second respondents jointly and severally the one ^F paying the other to be absolved are to pay the costs of this application at attorney and client scale.”

This application is voluminous, but only two issues emerge on the papers:

- (1) Is the judgment of Makarau JP in Case No. HC 345/08 final or provisional?
- (2) Does the applicant’s failure to note an appeal render the notice a ^G nullity entitling the applicant to have it struck out?

I also raised with counsel for the applicant whether I had jurisdiction in the event of my accepting his contention that the notice was a nullity, as that would mean there was no appeal pending in this court. Counsel asked for leave ^H

2008 (1) ZLR p415

Chidyausiku CJ

^A to make written submissions in that regard. Both counsel made written submissions in due course. In the light of the contents of the written submissions, I invited both counsel to further address me.

On the issue of jurisdiction, counsel referred me to some orders that were issued by this court. It was contended that the orders were issued in similar circumstances. I shall revert to this later on. No authority was cited and I was ^B not able to find any authority on all fours with the case before me.

After giving this issue careful consideration, I came to the conclusion that I had jurisdiction. I came to this conclusion on the basis that, once an appeal is noted to this court, this court is seized with the matter, otherwise how else can the issue of validity of the notice of appeal be determined? I accordingly ^C accept that I have jurisdiction to adjudicate in this matter as it relates to an appeal with which this court was seized.

I now turn to the applicant’s first ground of challenge, namely, that the judgment of Makarau JP is an interim judgment. Consequently the respondent required the leave of the court *a quo* to appeal. Such leave was neither sought nor granted. Accordingly, the appeal was a nullity for failure to comply with ^D s 43 of the High Court Act [Chapter 7:06]. Section 43 of the Act provides as follows:

“43 Right of appeal from High Court in civil cases

(1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the ^E exercise of its original or its appellate jurisdiction.

(2) No appeal shall lie –

- (a) from an order allowing an extension of time for appealing from a judgment;
- (b) from an order of a judge of the High Court in which he refuses ^F an application for summary judgment and gives unconditional leave to defend an action;
- (c) from –
 - (i) an order of the High Court or any judge thereof made with the consent of the parties; or
 - (ii) an order as to costs only which by law is left to the ^G discretion of the court, without the leave of the High Court or of the judge who made the order ^H or, if that has been refused, without the leave of a judge of the Supreme Court;
- (d) from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the

2008 (1) ZLR p416

Chidyausiku CJ

Supreme Court, except in the following cases ^A –

- (i) where the liberty of the subject or the custody of minors is concerned;
- (ii) where an interdict is granted or refused;
- (iii) in the case of an order on a special case stated under any law relating to arbitration. ^B

(3) An order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory order within the meaning of subsection (2)."

I do not accept that the judgment of Makarau JP is an interlocutory judgment. The application before Makarau JP reveals that a provisional order seeking interim relief pending the final order was sought. The learned Judge President invited both parties to a hearing and granted the final order sought in the provisional order. It is quite clear from the judgment that the learned Judge President did not intend to sit on the return day to grant another order. In any event, the judgment of the court *a quo* is covered by s 43(1)(d)(ii) of the High Court Act and leave to appeal is not required. I am therefore satisfied that the appeal is not invalid for lack of compliance with s 43 of the High Court Act.

The second ground of challenge relates to failure to note an appeal timeously.

It is common cause that the notice of appeal was filed out of time and therefore does not comply with the rules of this court, in particular r 30.

The issue that arises is whether a judge in chambers can strike out an appeal ^ε for failure to comply with the rules of this court. Where the rules provide that a judge can do that, I see no problem. Where, however, such jurisdiction is not conferred by statute or the Supreme Court Rules, I entertain serious doubt.

Rule 31 subrules (1) and (7) provide as follows:

"31 Application for leave to appeal and extension of time to appeal ^ε

(1) An application that leave to appeal be granted or for an extension of time in which to appeal shall be by notice of motion signed by the applicant or his legal representative and shall be accompanied by a copy of the judgment against which it is sought to appeal.

(7) A judge may make such order on the application as he thinks fit and ^g shall, if an extension of time be granted, deal also with any question of leave to appeal which may be involved."

It is quite clear from the above that a judge who dismisses an application for extension of time has jurisdiction to have the notice of appeal struck out after the refusal to grant the extension of time within which to note the appeal. The ^h

2008 (1) ZLR p417

Chidyausiku CJ

A case of *ZESA v Mangwengwende* S-180-05, cited by the applicant, is pertinent. The notice of appeal was struck out after refusal to grant leave to appeal and an extension of time. The application was not, as *in casu*, an application to strike out an appeal because it was noted out of time.

I have some doubt whether the same inherent jurisdiction is enjoyed by a judge ^b sitting alone in chambers. The difficulty that I have in accepting this proposition arises from the fact that where a judge strikes a matter off the roll for non-compliance with the rules, he pre-empts the discretion of the court to grant condonation or not and assumes that power.

I was referred to two orders of this court in this regard, namely, Cases Nos. SC 180/2005 and SC 345/2006.

^cIn regard to the first case, this was an application for leave to appeal and an extension of time within which to appeal. The learned judge in that matter, after reading documents filed of record and hearing counsel, ordered that: "The matter be and is hereby struck off the roll with costs". Rule 31 of the rules of this court specifically makes provision for an application for leave to appeal or for an extension of time within which to note a belated appeal. Subrule 31(7) ^d of the rules provides that:

"Subject to the provisions of subsection (3) of section 17 of the Act, a judge may make such order on the application as he thinks fit and shall, if an extension of time be granted, deal also with any question of leave to appeal which may be involved."

^εThus, the rules specifically empower a judge in Chambers to whom an application for leave or for an extension of time within which to note an appeal is made to strike out the appeal. In my view, the learned judge in this matter was acting within the rules of the Supreme Court.

However, the second matter, namely case No. SC 345/2006, was an application for the striking out of the notice of appeal. The learned judge issued the ^f following order:

"IT IS ORDERED THAT:

1. The respondent's notice of appeal in the matter SC 48/05 be and is hereby struck out.
2. The respondent pays the applicant's costs of suit."

g It is not clear from that order or from the record itself the basis upon which the appeal was struck off. However, the rules of the Supreme Court specifically provide instances where dismissal of an appeal is made without hearing the matter. The rules also provide for where an appeal shall be deemed to have h lapsed for failure to comply with the rules – see rr 36 and 44.

2008 (1) ZLR p418

Chidyausiku CJ

I am not aware of any provision in the rules of the Supreme Court that a authorizes the dismissal of an appeal other than on the basis provided for in the rules. Where an appeal does not comply with the rules of this court it is up to the court, and not a judge in chambers, to order the striking off of the matter for failure to comply with the rules or to grant the indulgence for failure to comply with the rules. b

In my view, a distinction has to be made between those matters where the notice of appeal is invalid by reason of failure to comply with the provisions of the statutes, such as s 43 of the High Court Act, and a situation where a notice of appeal is invalid by reason of failure to comply with the rules of the Supreme Court. Where the notice of appeal does not comply with the provisions of an Act of Parliament, the court has no discretion in the matter c and the defect is incurable. In a situation like that, it is open to the court, and indeed a judge of the Supreme Court, to order that the appeal is a nullity and is incurably defective. However, where the notice of appeal does not comply with the rules of the Supreme Court, it is not incurably defective because the court has a discretion to overlook the defect and a judge in chambers should not preclude the court from considering whether the failure to comply with the d rules should be condoned or not.

It is on this basis that I am unable to grant the draft order sought by the applicant. I have no problem in pronouncing that the notice of appeal filed by the respondent does not comply with the rules of this court. It is open to the court that will sit to adjudicate the appeal to determine whether the appeal e should be struck off for that reason or to grant the respondent the indulgence for failure to comply with the rules. There will be no order as to costs. Costs will be costs in the cause.

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

M V Chizodza-Chineunye, respondents' legal practitioners g

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