

Document 1 of 49**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2

Volume 2

M B Ziko (Pvt) Ltd & Anor v Cestaron Investments (Pvt) Ltd & Anor	2008 (2) ZLR 1 (S)
Chivore v Mudavanhu & Anor	2008 (2) ZLR 16 (H)
Mazibuko NO & Anor v Ndebele & Ors	2008 (2) ZLR 26 (H)
Sikanyika v Garadi	2008 (2) ZLR 30 (H)
Shiriyekutanga Bus Services (Pvt) Ltd v Total Zimbabwe	2008 (2) ZLR 37 (H)
Estate Wakapila v Matongo & Ors	2008 (2) ZLR 43 (H)
Kaungwa v Nguni	2008 (2) ZLR 50 (E)
S v Chera & Anor	2008 (2) ZLR 58 (H)
Shumba & Anor v ZEC & Anor	2008 (2) ZLR 65 (S)
S v Mukome	2008 (2) ZLR 83 (H)
Garati v Mudzingwa (Mau Mau) & Ors	2008 (2) ZLR 88 (S)
Kadzima v Chimbete	2008 (2) ZLR 96 (E)
Mutsinya v Dande Holdings (Pvt) Ltd & Ors	2008 (2) ZLR 102 (H)
Gambiza v Taziva	2008 (2) ZLR 107 (H)
Mpofu v Commissioner of Police & Anor	2008 (2) ZLR 117 (S)
HEM Granite Industries (Pvt) Ltd v Keeley Granite (Pvt) Ltd	2008 (2) ZLR 123 (S)
Fantaisie Farm (Pvt) Ltd & Ors v Manyeruke & Ors	2008 (2) ZLR 132 (S)
Mawere v Minister of Justice	2008 (2) ZLR 140 (S)
Dobrock Holdings (Pvt) Ltd v Turner & Sons (Pvt) Ltd & Anor	2008 (2) ZLR 153 (S)
S v Gaviyaya	2008 (2) ZLR 159 (H)
Taylor v Taylor	2008 (2) ZLR 165 (S)

Kung v Kung	2008 (2) ZLR 170 (S)
National Merchant Bank (Pvt) Ltd v The Cold Chain (Pvt) Ltd	2008 (2) ZLR 177 (H)
Mudima v Commissioner General, Zimbabwe Revenue Authority	2008 (2) ZLR 189 (H)
Mega Pak Zimbabwe (Pvt) Ltd v Global Technologies Central Africa (Pvt) Ltd	2008 (2) ZLR 195 (H)
Zimnat Life Assurance Ltd v Dikunye	2008 (2) ZLR 200 (S)
Khumalo v Mandeya & Anor	2008 (2) ZLR 203 (S)
Rix Upholstery (Pvt) Ltd v Biddulphs (Pvt) Ltd	2008 (2) ZLR 210 (H)
Nyandoro & Anor v Nyandoro & Ors	2008 (2) ZLR 219 (H)
Samudzimu v Ngwenya	2008 (2) ZLR 228 (H)
Africa First Renaissance Corporation Ltd v ACM Investments (Pvt) Ltd & Ors	2008 (2) ZLR 237 (H)
Anchor Ranching (Pvt) Ltd v Beneficial Enterprises (Pvt) Ltd & Anor	2008 (2) ZLR 246 (H)
Timbe v Registrar-General	2008 (2) ZLR 250 (S)
Metro International (Pvt) Ltd v Old Mutual Property Investment Corp (Pvt) Ltd	2008 (2) ZLR 257 (S)
Mufundisi v Rusere	2008 (2) ZLR 264 (H)
Chiramba v Minister Home Affairs & Ors	2008 (2) ZLR 269 (H)
S v Gwande & Anor	2008 (2) ZLR 281 (H)
Communication & Allied Industries Pensioners' Association v Communication & Allied Industries Pension Fund	2008 (2) ZLR 288 (S)
Hiltunen v Hiltunen	2008 (2) ZLR 296 (H)
P Rosati & Sons (Pvt) Ltd v P & C Panel Beaters & Spray Painters (Pvt) Ltd	2008 (2) ZLR 304 (H)
Mujuru NO & Ors v The Master & Anor	2008 (2) ZLR 308 (H)
Maloya v Nyamupfukudza NO & Anor	2008 (2) ZLR 314 (H)
Makamure v Deven Engineering (Pvt) Ltd	2008 (2) ZLR 319 (H)
Murada v Murada	2008 (2) ZLR 326 (H)

Moyo v Ncube & Ors	2008 (2) ZLR 333 (H)
S v Moyo & Ors	2008 (2) ZLR 338 (H)
Mike Campbell (Pvt) Ltd & Ors v Republic of Zimbabwe	2008 (2) ZLR 343 (SADC T)
Shumba v Chairman, Zimbabwe Electoral Commission & Anor	2008 (2) ZLR 370 (H)

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Document 2 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/M B ZIKO (PVT) LTD & ANOR v CESTARON INVESTMENTS (PVT) LTD & ANOR 2008 (2) ZLR 1 (S)

M B ZIKO (PVT) LTD & ANOR v CESTARON INVESTMENTS (PVT) LTD & ANOR 2008 (2) ZLR 1 (S)

2008 (2) ZLR p1

Citation	2008 (2) ZLR 1 (S)
Case No	Judgment No. S-68-07
Court	Supreme Court, Harare
Judge	Malaba JA, Gwaunza JA & Garwe JA
Heard	14 February 2007
Judgment	9 July 2008
Counsel	<i>H Zhou</i> , for the appellants <i>E T Matinenga</i> , for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Evidence – *credibility* – *demeanour* – *extent to which it may be relied on* – *all circumstances of case must be considered*

Evidence – *document* – *date of execution* – *presumption that document D executed on date stated in document*

Evidence – *document* – *receipt of document* – *parties having agreed on method of delivery* – *all requirements complied with* – *presumption that letter delivered*

Headnote

An appellate court may still disagree with the finding of the trial court on the **E** credibility of a witness if, on examination of the evidence and considering all the circumstances (such as inferences from unquestioned facts and probabilities) of the case, it comes to the conclusion that

the trial court's findings on the credibility of the witness cannot be supported. Whilst demeanour is an important factor to be taken into account in the assessment of a witness's credibility, the weight to be placed on it in determining ^F the question whether the evidence given is reliable and probative of the facts in issue must depend on all the circumstances of the case.

Where a specific method of communication has been chosen by the parties and all the necessary requirements for its use, such as proper addressing and posting, have been complied with as directed, a presumption arises of the fact that the letter was delivered or received unless there is proof ^G to the contrary. The bare denial of receipt of the letters was not sufficient to discharge the onus on the first respondent to rebut the presumption that the letters were delivered at the address to which they were posted.

There is also a presumption that a document was executed on the day of the date it bears. In other words, unless the contrary is proved the date on ^H a document must be taken as its true date.

2008 (2) ZLR p2

Malaba JA

Cases referred to ^A

Blaustein v Maltz, Mitchell & Co [1937] 1 All ER 497 (CA)

Dougan v Estment 1910 TPD 998

Mthimkhulu v Nkiwane & Anor S-136-01 (not reported)

van der Merwe v Colonial Govt (1904) 21 SC 520 ^B

Case information

H Zhou, for the appellants

E T Matinenga, for the respondents

Judgment

MALABA JA: This is an appeal from a judgment of the High Court dated 11 February 2004 by which the first appellant was ordered to transfer to the ^C first respondent, within 14 days of the order, a certain piece of land situate in the District of Salisbury known as Amsterdam Portion of Odar, against payment of the balance of the purchase price, whilst the second appellant was ordered to render to the second respondent within 30 days of the order a statement of account in respect of all moneys received by it on behalf of the second respondent, a debatement of such account and payment of all ^D monies due to the second respondent in terms of the account. The appellants were ordered to pay the costs of suit jointly and severally one paying the other to be absolved.

On 11 April 1996 the first appellant, represented by one of its directors, M B Ziko, and Amsterdam Farm (1987) (Pvt) Ltd, represented by M J Smith, ^E entered into an agreement of sale in terms of which the latter sold and the former purchased a piece of land situate in the District of Salisbury known as Amsterdam Portion of Odar ("the property") measuring 102.3821 hectares held under Deed of Transfer No. 15/88 for \$700 000. It was a term of the agreement of sale that the purchaser had to secure from Founders Building Society an offer of a loan for the full purchase price payable against transfer ^F of the property within 60 days of the agreement. Transfer, which had to be done by the seller's legal practitioners Atherstone & Cook, had to be tendered within 14 days of the offer of the loan to the purchaser by Founders Building Society.

On 1 July 1998 M J Smith executed, on behalf of Amsterdam Farm (1987) ^G (Pvt) Ltd, a power of attorney in terms of which the second appellant was given the power to transfer the property to the first appellant. It is clear from the power of attorney that the full purchase price had been paid to the seller. Transfer of the property into the first appellant's name was effected on 12 February 1999.

On 7 May 1998 the first appellant, represented by M B Ziko, and the first ^H

2008 (2) ZLR p3

Malaba JA

A respondent, represented by one of its directors, G Dzubinsky, entered into an agreement of sale in terms of which the former sold and the latter purchased the property for \$7 000 000. In the preamble to the agreement of sale, the first appellant is referred to as "the owner of a piece of land Amsterdam Portion of Odar".

Under clause 2 of the agreement of sale the parties provided that the purchase ^B price was payable as follows:

- "(a) The Purchaser shall pay \$1 051 181 upon signing of the agreement which amount will be forwarded to FOUNDERS BUILDING SOCIETY in order to obtain the Title Deed of the above Amsterdam Portion of Odar.
- (b) \$2 500 000 to be paid after we obtain the original Title Deed from Founders Building Society and the balance to be paid in six (6) monthly instalments."

^C Clause 3 authorised the purchaser to take occupation of the property immediately in order to develop the land. Under clause 9 of the agreement of sale, transfer of the property had to be effected by the second appellant upon payment by the first respondent of the purchase price or production of a guarantee from a building society or bank of payment of the same upon ^D registration of transfer.

On the day of signing of the agreement of sale, the sum of \$1 051 181 was given to the second appellant who forwarded it to Founders Building Society. The second appellant had been appointed on behalf of the first respondent as its agent with authority to forward the deposit to Founders Building Society. ^E It had also been authorised to receive the original title deed for the property on behalf of the first respondent.

The first respondent ceded the right to develop the land to the second respondent. Mr and Mrs Dzubinsky were the directors of the respondent companies. On 22 July 1998 the second respondent, represented by G Dzubinsky, entered into an ^F agreement of agency with the second appellant represented by W T Manase.

The second appellant was authorised to sell on behalf of the second respondent 475 residential and 100 industrial stands making up the property and deposit the proceeds into an account which had to be opened with Barclays Bank Branch along Nelson Mandela Avenue in Harare. The money had to be transferred to the second respondent's bank account within seven days of ^G its receipt by the second appellant. The second appellant was to be paid ten per cent commission on the purchase price of each stand sold.

On 3 July 1998 W T Manase, a senior partner in the second appellant, wrote a letter to the directors of the first respondent inviting them to pay transfer fees in the sum of \$522 852.50 on behalf of the first respondent. When the ^H money was not paid he wrote another letter on 15 July 1998 saying:

2008 (2) ZLR p4

Malaba JA

"Dear Sir ^A

TRANSFER: MB ZIKO (PVT) LTD TO CESTARON (PVT) LTD – AMSTERDAM FARM REMAINING PORTION OF ODAR

We write to confirm that title deeds are now with us for the above property to be transferred to Cestaron (Pvt) Ltd. ... We confirm that there are no incumbrances, liens, mortgages, or litigation over the property."

On 20 July Mr Manase wrote to the first respondent's directors again. He said: ^B

"Dear Sir

M B ZIKO (PVT LTD

We write upon instructions of the above who ask that you deposit with us \$2 500 000 in terms of clause 2(b) of the agreement of sale between the parties. Once payment is made this will enable us to proceed to transfer the property ^C to yourselves. Mr Ziko is adamant that this be done first and urgently as he has other commitments to meet hence his decision to sell the property to yourselves."

It appears that the first respondent's directors wanted transfer to take place before payment of the purchase price. The letter makes it clear that the obligation to pay the sum of \$2 500 000 had become due. The first respondent's directors responded to the letter of 20 July by paying to the second appellant ^D \$1 million, part of which they asked that it be for transfer fees. Mr Manase wrote to the first respondent's directors on 28 July 1998 saying:

"Dear Sirs

M B ZIKO (PVT) LTD

We acknowledge receipt of your cheque in the sum of \$1 million which we E accepted and deposited without prejudice. It seems we are unable to utilize part of that sum for the transfer of the farm to yourselves until the \$2 500 000 is paid to Mr Ziko of the above. In this regard we shall disburse the \$1 million to Mr Ziko as part payment of the \$2 500 000 you owe him in terms of clause 2(b) of the agreement of sale. Mr Ziko has also directed as such. In fact it is the only way we can handle the matter as we are unable to transfer the property to you at this stage. To do so will prejudice our professional position. F

Please therefore do pay the balance of \$1 500 000 to enable transfer to take place."

The letter of 28 July makes it clear once again that the payment of the amount \$2 500 000 had become due in terms of clause 2(b) of the agreement of sale. The fact that the first respondent was under the duty to pay the outstanding balance of \$2 500 000 was discussed at meetings held between Mr Manase G and Mr & Mrs Dzubinsky. The letter of 10 August 1998 makes reference to these discussions. It reads:

"Dear Sirs

M B ZIKO (PVT) LTD

We refer to our previous letter of the 28 July 1998 in which we implored you to make payment to us the sum of \$2 500 000 in terms of the agreement. We H

2008 (2) ZLR p5

Malaba JA

A appreciate what Mr Dzubinsky told us that you are waiting for payment from Magamba Echimurenga Housing Co-operative but Mr Ziko is putting us under extreme pressure over the matter. As discussed at the luncheon at Monomatapa Hotel between the writer and yourselves, we will give to you all the assistance you require but we are unable to transfer the property prior to the payment as this will bring us into conflict with Mr Ziko."

B On 13 August Mr Manase wrote a letter to the first respondent on behalf of the first appellant demanding the payment of \$1 500 000 within thirty days from the date of the letter and threatening cancellation of the agreement of sale should the money not be paid within the time limit. The letter of demand reads:

"Dear Sirs

C M B ZIKO (PVT) LTD

We refer to previous correspondence in this matter. We have not received any response to our letter of the 10 August 1998 and any letter before it. Mr Ziko of the above company has requested us to give you notice to the effect that if no payment is forthcoming within a period of 30 days from the date of this letter they will proceed to cancel the agreement of sale entered between yourselves. M B D Ziko (Pvt) Ltd is demanding that you settle with them in the sum of \$1.5million in terms of the agreement for transfer to be effected. Please therefore take note that if no payment is received by us within the 30 days period as counted from the date of this letter client will thereafter proceed to cancel the said agreement."

When no payment of \$1 500 000 was made in terms of the letter of demand E a letter of cancellation of the agreement of sale was written on behalf of the first appellant on 30 September. It reads:

"Dear Sirs

THE AGREEMENT OF SALE: M.B. ZIKO (PVT) LTD AND YOURSELVES

We write in connection with the above agreement of sale wherein you purchased a piece of land Amsterdam Portion of Odar in the District of Salisbury. It was F a term of the agreement that you were to pay the seller M B ZIKO (PVT) LTD \$7 million as follows:

- \$1 051 181 upon signing of the agreement, which was done;
- \$2 500 000 upon obtaining title deeds from Founders Building Society. Only \$1 million of this amount has been paid;
- The balance was to be paid in 6 monthly instalments. Nothing has been G paid so far.

The seller has concluded that a breach of fundamental part of the agreement has been occasioned by yourselves. In this regard they are cancelling the agreement of sale forthwith unless payment is effected immediately of the full balance of the purchase price including interest at 34%. M B Ziko (Pvt) Ltd is calling upon you to vacate the farm and hand over all items you currently hold relating to the H farm."

2008 (2) ZLR p6

Malaba JA

On 8 October 1998 a cheque for \$2 000 000 was drawn in favour of the ^A second appellant. The cheque was dishonoured on two separate occasions upon presentation to the bank. It had been intended that, of the sum of \$2 million, \$1 500 000 would be part of the purchase price whilst \$500 000 would be used to pay transfer fees.

On 14 September 1998 the second respondent had requested the second ^B appellant to provide it with a list of stands sold, names and addresses of the purchasers and the prices at which the stands were sold. On 16 November the second appellant wrote to the second respondent advising that they were holding a sum of \$1 946 987.36 from the sale of stands. Mr Manase expressed reluctance in releasing the monies to the first respondent when the agreement of sale had been cancelled. ^C

On 12 February 1999 the respondents made an application to the High Court for an interdict restraining the appellants from selling, offering for sale or dealing with the property in any manner prejudicial to their rights pending determination of an action to be instituted by them. They also applied for an order directing the second appellant to deliver to their legal practitioners a ^D schedule showing all stands sold and forming part of the property, the purchase price of each stand, monies received in payment and interest accrued. The second appellant was to transfer into a joint interest bearing account in a financial institution to be agreed upon by the parties' legal practitioners all the monies received as well as the interest therein reflected in the schedule. The parties' legal practitioners were to be joint signatories to the account. ^E

The ground on which the application for the interdict was made was that the cancellation of the agreement of sale by the first appellant was unlawful because the first appellant had not exhibited to the first respondent the original title deed in its name as the owner of the property in terms of clause 2(b) of the agreement of sale. Although the application was opposed, the High ^F Court nonetheless granted it. The respondents were ordered to commence action on or before 22 March 1999.

Summons commencing action was issued in case HC 4209/99 on 22 March. The cause of action pleaded in paras 6 and 7 of the declaration was that the first respondent had not obtained the original title deed to the property in ^G terms of clause 2(b) at the time the agreement of sale was cancelled.

At the trial of the action ^G Dzubinsky gave evidence for the respondents. The material aspect of it was to this effect. ^H W T Manase was authorised, as the senior partner in the second appellant, to forward the payment of \$1 051 181 to Founders Building Society. He was to receive the original title deed for the property on behalf of the first respondent. After the payment of ^H

2008 (2) ZLR p7

Malaba JA

^A the deposit he visited the second appellant's offices, asking for the original title deed. He was told by the employees in the conveyancing department that the title deed was in a locked safe. Mr Manase could not be contacted as he was said to be out of the country.

In August 1998 he got a copy of the title deed from a land surveyor. He discovered that the property was still registered under Amsterdam Farm ^B (1987) (Pvt) Ltd. He had been made to believe that the original title deed was in the name of M B Ziko (Pvt) Ltd. W T Manase admitted that he knew that the property was registered under Amsterdam Farm (1987) (Pvt) Ltd. He also spoke to M J Smith who assured him that the registration of the property under Amsterdam Farm (1987) Pvt Ltd would not affect transfer to the first ^C respondent. The letters dated 10 and 13 August 1998, demanding payment of the balance of \$2 500 000 by the first respondent in terms of clause 2(b) of the agreement of sale, were not received by the first respondent. The court *a quo* found ^G Dzubinsky a credible witness. It said it believed all that he said in evidence.

Wilson Tatenda Manase gave evidence to this effect. He drew up the agreement ^D of sale. Mr and Mrs Dzubinsky and Mr and Mrs Ziko, representing their respective companies, came to his office on 5 May 1998. They asked him to draw up an agreement of sale relating to the property. The title deed was not produced at the time. From the information the parties gave him on what they had agreed upon, he drew up the agreement of sale. The parties signed ^E the agreement of sale on 7 May 1998. On that day he was given the sum of \$1 051 181 on behalf of the first respondent. The money was forwarded to Founders Building Society in terms of clause 2(a) of the agreement of sale.

At the end of May 1998 the original title deed on the property was brought to the office. He said he looked at the title deed and realised that the property ^F was still registered under Amsterdam (1987) (Pvt) Ltd. Mr and Mrs Dzubinsky were called to the office where he showed them the title deed. He explained to them that the fact that the property was still registered under Amsterdam Farm (Pvt) Ltd would not affect transfer to the first respondent. There would be a double transfer of the property from Amsterdam Farm (1987) (Pvt) Ltd to M B Ziko (Pvt) Ltd and then to the first respondent.

^G Mr Dzubinsky asked him to investigate further whether there could be any other encumbrances on the property. Having carried out the investigations, he wrote to the first respondent's directors on 15 July 1998 telling them that there were no encumbrances, liens, mortgages or litigation on the property.

The first respondent's directors asked him to transfer the property to the first ^H respondent before payment of the balance of the purchase price. He wrote

2008 (2) ZLR p8

Malaba JA

the letters on 20 and 28 July and held meetings with them to make clear ^A the fact that the first respondent was under the obligation to pay the sum of \$2 500 000 before transfer of the property could be effected. He explained to them that performance of the obligation to pay the money under clause 2(b) of the agreement of sale had become due. It was in response to the letter of 20 July, in which payment of \$2 500 000 was demanded on the basis that ^B performance of the obligation under clause 2(b) of the agreement of sale to pay had become due, that the sum of \$1 million was paid on behalf of the first respondent.

When payment of \$1 500 000 was not forthcoming he wrote to the first respondent on behalf of the first appellant on 13 August 1998. He put the first respondent *in mora* by telling it that if the money was not paid within 30 ^C days from the date of the letter the first appellant would cancel the agreement.

No payment was made in terms of the letter of demand. The agreement of sale was cancelled by letter of 30 September. In response to the cancellation the directors of the first respondent gave him a cheque of \$2 000 000. Of this amount \$1 500 000 was for the payment of the balance of \$2 500 000 whilst ^D \$500 000 was for the payment of transfer fees. On two separate occasions the cheque was dishonoured upon presentation to the bank for payment. On the order for an account, the matter was dealt with in terms of the order of 22 February. Considering that the agreement of sale had been cancelled, he paid back all the money received for the stands sold to the purchasers. At the time of commencement of the action there was no money in the custody ^E of the second appellant.

The learned judge was impressed by the witness's respectful demeanour. She, however, said he lacked knowledge of details of some of the matters in dispute. The learned judge said that, where the evidence of Mr Manase differed from that given by Mr Dzubinsky, she preferred the evidence of the ^F latter. She accepted the evidence that the first respondent's directors were not shown the original title deed and that the letter of 10 and 13 August 1998 were not received by the first respondent.

M B Ziko gave evidence for the first appellant to this effect. In 1996 the first appellant purchased stand No 194 in Chitungwiza with a loan from Founders ^G Building Society. A mortgage bond was raised over stand 194 in favour of Founders Building Society. A few days later someone at Founders Building Society asked him whether he was interested in purchasing Amsterdam Portions of Odar which was on sale. He was interested in purchasing the property.

A loan was advanced by Founders Building Society. The first appellant ^H

2008 (2) ZLR p9

Malaba JA

^A purchased Amsterdam Portion of Odar from Amsterdam Farm (1987) (Pvt) Ltd. The title deed for the property was with Atherstone & Cook. Instead of a separate mortgage bond being registered over the property in favour of Founders Building Society, one mortgage bond relating to stand 194 was used to secure the total amount advanced to the first appellant.

During the negotiations with Mr and Mrs Dzubinsky on behalf of their ^B respective companies on the sale and purchase of Amsterdam Portion of Odar, he told them that there was money owed to Founders Building Society that had to be paid for the original title deed to be released. On the day the agreement of sale was drawn up by Mr Manase, he went to Founders Building Society and ascertained the amount still owed by the first appellant. ^C The figure given was the outstanding balance of the total indebtedness of the first appellant to Founders Building society in respect of stand 194 and the property. As one mortgage bond was used to secure the total amount of money advanced to the first appellant to purchase the two properties the outstanding amount had to be paid for the title deed for Amsterdam Portion of Odar to be released.

^D The sum of \$1 051 181 was paid on behalf of the first respondent and forwarded by the second appellant. He said the original title deed to the property was released into the custody of the second appellant. As the property was still registered under Amsterdam Farm (1987) (Pvt) Ltd the first appellant was referred to in the preamble to the agreement of sale as the owner of the ^E property. The reason was that it had purchased the property from Amsterdam Farm (1987) (Pvt) Ltd. He had told Mr and Mrs Dzubinsky that the property was still registered under the previous seller's name.

The learned judge was not impressed by the witness's demeanour when he gave evidence. She noted that he kept his eyes directed at the ceiling.

On the basis of the assessment of the credibility of the witnesses the learned ^F judge made the following finding of facts on which the judgment appealed against was based. She said:

"On a balance of probabilities I find that the first plaintiff's directors were not shown the deed after they had paid the deposit. It is probable that the defendants did not want the first plaintiff to discover that it had been tricked into paying the deposit meant for Founders Building Society to release the deed. It is common ^G cause that the deed was with Messrs Atherstone & Cook and not with Founders Building Society. It is further common cause that the payment that was made to Founders Building Society was for the first defendant's other indebtedness to that institution and had nothing to do with the piece of land sold to the first plaintiff ... It is not clear from the testimony of both defendants when the deed was obtained from Messrs Atherstone & Cook. Thus it cannot be stated with any ^H certainty as to when the obligation by the first plaintiff to perform under clause

2008 (2) ZLR p10

Malaba JA

2(b) of the agreement became due. The time for performance was not set nor was ^A it clear. In such circumstances it was incumbent upon the first defendant to place the first plaintiff *in mora*. The defendants have argued that the first plaintiff was placed *in mora* by letters from the second defendant dated 28 July, 10 August and 13 August 1998. George Dzubinsky on behalf of the first plaintiff testified that the last two letters were never received. I believe him and agree with the submission by Mr Matinenga that these two letters were an obvious creation on ^B the part of the defendants to meet the case that the first plaintiff was making. ... In the absence of a proper demand having been made upon the first plaintiff the purported cancellation of the sale agreement is of no force and effect."

On the claim against the second appellant, the learned judge did not consider the evidence that the order made on 22 February 1999 covered the same subject matter of the imposition of the duty on the second appellant to ^C render to the second respondent an account of the stands sold, the names and addresses of the purchasers and the monies received on its behalf. She held that the second appellant was bound to account to the second respondent in terms of the order sought.

The question on appeal is whether the findings of fact made by the court ^D *quo* are correct. The determination of that question necessitates an inquiry into the question whether considering all the circumstances of the case the learned judge's assessment of the credibility of the witnesses can be supported.

In *Mthimkhulu v Nkiwane & Anor* S-136-01 at p 3-4 of the judgment it is stated that:

"The principles that govern the approach by an appellate court to the question of ^E the correctness of the trial court's finding of fact is that as a general rule the trial court's finding on the credibility of witnesses should not be lightly disturbed because that court would have seen the witnesses give evidence and from that position was better placed to comment accurately on their demeanour. An appeal is, however, a re-trial on recorded evidence. An appellate court may still disagree with the finding of the trial court if on examination of the evidence and ^F considering all the circumstances (such as inferences from unquestioned facts and probabilities) of the case, it comes to the conclusion that the trial court's findings on the credibility of witnesses cannot be supported. See *Forbes v Golach & Cohen* 1917 AD 559 at 560-561;

Lewis v Elske 1921 AD 36 at 38-42, *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199.” ^G

With every respect to the learned judge, I have come to an entirely different conclusion on the credibility of the witnesses. I reached this conclusion after a careful examination of the recorded evidence of the witnesses and consideration of the documentary evidence. I bore in mind the fact that the learned judge was better placed to comment accurately on the demeanour of the witnesses. I was nonetheless mindful of the fact that, whilst demeanour is ^H

2008 (2) ZLR p11

Malaba JA

^A an important factor to be taken into account in the assessment of a witness’s credibility, the weight to be placed on it in determining the question whether the evidence given is reliable and probative of the facts in issue must depend on all the circumstances of the case.

The first question for the determination of which the credibility of the witnesses became a decisive factor was whether or not the first respondent ^B became aware of the fact that the original title deed for the property had been obtained as a result of the forwarding of \$1 051 181 to Founders Building Society. The first respondent’s directors appointed the second appellant as its agent and authorized W T Manase to obtain the original title deed on its behalf. Mr Manase gave evidence to the effect that the original title deed came into his possession at the end of May 1998. It is highly unlikely that ^C the letter of 3 July would have been written to the first respondent’s directors calling upon them to pay transfer fees on its behalf if the title deed was not in the second appellant’s possession. The letter of 15 July put the fact that the original title deed was in the possession of the second appellant by that date beyond any doubt. The learned judge accepted as a fact that the title ^D deed was in the possession of the second appellant. She held that the first respondent did not “obtain” the original title deed because it was withheld from its directors by the second appellant’s witness.

The learned judge overlooked the fact that the first respondent’s directors appointed the second appellant as its agent for the purposes of obtaining the original title deed in terms of clause 2(b) of the agreement of sale. Knowledge ^E of the second appellant’s witness that the title deed had been obtained and was in the agent’s custody as disclosed in the letter of 15 July 1998 was imputable to the first respondent as the principal for the purposes of the fulfilment of the condition precedent to the performance of the obligation to pay the sum of \$2 500 000 in terms of clause 2(b) of the agreement of sale.

^F Mr Manase’s evidence that after the title deed came into the possession of the second appellant at the end of May 1998 he called the first respondent’s directors and showed them the document is supported by probabilities. His conduct would be consistent with the fulfilment of the mandate in terms of which the second appellant was required to obtain the title deed on behalf of the first respondent.

^G The power of attorney signed by Mr Smith on behalf of Amsterdam Farm (1987) (Pvt) Ltd on 1 July 1998, appointing the second appellant as the conveyancers to transfer the property to the first appellant, was overlooked by the court *a quo*. The power of attorney states that as of 1 July 1998 the full purchase price at which the property had been sold to the first appellant had ^H been paid. It is common cause that all the indebtedness of the first appellant

2008 (2) ZLR p12

Malaba JA

to Founders Building Society in respect of the property had been discharged ^A upon payment of \$1 051 181. The first respondent undertook to pay this money as part of the purchase price. That the money was used to discharge the indebtedness of the first appellant to Founders Building Society in respect of stand 194 and the property was of no consequence to the interests of the first respondent, provided the payment had the effect of having the original ^B title deed to the property released into the custody of the second appellant.

There was no question of the first respondent being tricked into doing what it had voluntarily undertaken to do in pursuance of its interest to purchase the property. Mr Manase said that after the directors of the first respondent had sight of the original title deed and noted the fact that the property was still registered under Amsterdam Farm (1987) (Pvt) Ltd, they asked him to ^C carry out further investigations and ascertain whether there were any further encumbrances on the property.

The letter of 15 July 1998 is in substance a report to the first respondent's directors that the investigations carried out as directed revealed that there was no encumbrance, lien, mortgage bond or litigation on the property. The first respondent's directors did not deny that they received the letter. They also did not deny the evidence that after receipt ^D of the letter of 15 July 1998 they sought to have the property transferred into the first respondent's name before payment of the sum of \$2 500 000 in terms of clause 2(b) of the agreement of sale. How could they have the property transferred into the first respondent's name without the knowledge that the original title deed was available? ^E

The learned judge's finding – that it was not clear from the evidence of the appellants when the performance of the obligation to pay the sum of \$2 500 000 became due – was a clear misdirection. It was in the contemplation of the parties that the performance by the first respondent in terms of clause 2(b) would become due immediately following the obtaining of the original title deed. Mr Manase said the original title deed came into the possession of ^F the second appellant as the first respondent's agent at the end of May 1998.

There is no doubt at least that upon receipt of the letter of 15 July the first respondent's directors became aware of the fact that the condition precedent to the due performance of the obligation to pay the money had materialised. The letter of 20 July 1998 was an unequivocal demand for the payment of ^G \$2 500 000 in terms of clause 2(b) of the agreement of sale. At least, as of that date, the first respondent's directors were made aware of the fact that performance by the first respondent of the obligation to pay the money had become due. Payment of \$1 million made in response to the demand made in the letter of 20 July was an acknowledgement of the fact that the performance of the obligation under clause 2(b) of the agreement of sale had become due. ^H

2008 (2) ZLR p13

Malaba JA

^A Had sufficient weight been placed on the evidence of the letters, the court *a quo* would have arrived at a different conclusion in its assessment of the credibility of the witnesses.

The second question the determination of which was based on the assessment by the court *a quo* of the credibility of witnesses was whether or not the first respondent was put *in mora* before the agreement of sale was cancelled. It is ^B important to bear in mind the fact that the parties entered into an agreement of sale of land, in terms of which the purchase price was payable in two or more instalments. The first appellant was obliged by the provisions of s 8 of the Contractual Penalties Act [Chapter 8:04] ("the Act") to give the first respondent not less than 30 days within which to pay the balance of the ^C purchase price which was due before cancellation of the agreement of sale.

It is clear that the letter of 13 August 1998 would have had the effect of putting the first respondent *in mora* for the purposes of s 8 of the Act if the evidence that it was received was accepted. Mr Dzubinsky said the letters of 10 and 13 August were not received on behalf of the first respondent. He did not say the letters were not written on the dates they bear.

^D Mr Matinenga suggested to Mr Manase during cross-examination that the letters were written after the commencement of the action to meet the case being made by the first respondent. The basis for this proposition was that the photocopies of the two letters were of dark shading. It was also said that, when further particulars of the letters of demand the first appellant ^E had alleged in its plea to have sent to the first respondent were ordered as requested on behalf of the first respondent, for purposes of replication, the letters were referred to as annexure A, B, C, D and E whilst the letter of 13 August appeared as annexure E1. It was suggested that annexure E1 was inserted to meet the case the first respondent intended to make against the first ^F appellant at the trial. The contention was that the two letters were fabricated and given the dates they bear to create the impression that they were written on 10 and 13 August 1998. Mr Manase denied the accusation. The learned judge accepted the proposition put to the witness by Mr Matinenga.

The learned judge failed to appreciate the fact that there had to be reasonable grounds before so serious allegations of deliberate fabrication of documentary ^G evidence for purposes of meeting a case for the opposing party is made against a legal practitioner who is an officer of court. In this case there was no basis for the accusation leveled against the legal practitioner.

When Mr Manase explained in evidence in answer to the suggestion by Mr Matinenga that the letters of 10 and 13 August 1998 were referred to ^H as annexures E and E1 when further particulars were provided in terms of

Malaba JA

the order of 9 March 2000 the explanation ought to have been accepted. ^A The reason is that there was no evidence with which the veracity of the explanation could be challenged. In the replication it was not alleged that the letters were not written on the dates they bear. It was not even suggested that they were not received. The allegation made was that the letters did not constitute demand at law. Apart from the speculative cross-examination of ^B Mr Manase there was no basis in the evidence for the first respondent for the finding by the learned judge that the letters of 10 and 13 August 1998 were fabricated to meet the case the first respondent intended to make at the trial.

The question for determination is whether Mr Dzubinsky told the truth when he said that the two letters were not received by the first respondent. For the letter of 13 August to constitute demand for purposes of putting the first ^C respondent *in mora* as required by s8 of the Act, it had to be received by the first respondent. The two letters were addressed to the first respondent's directors and posted to the same post office address to which all the other letters that were received by the first respondent's directors were sent.

The other letters had not been replied to and no acknowledgement of their ^D receipt had been communicated to the appellants. The two letters were also not returned by the post office as not having been claimed. It is also important to note that the postal address was given by the first respondent's directors in the agreement of sale as the reliable address to which correspondence between the parties on matters arising from their contractual relationship should be sent. ^E

The post was chosen by the first respondent's directors as the reliable method of communication between the parties. Where a specific method of communication has been chosen by the parties and all the necessary requirements for its use such as proper addressing and posting have been complied with as directed, a presumption arises of the fact that the letter was delivered or received unless there is proof to the contrary: *van der Merwe v Colonial Government* (1904) 21 SC 520; *Dougan v Estment* 1910 TPD 998. ^F

There is also a presumption that a document was executed on the day of the date it bears. In other words, unless the contrary is proved, the date on a document must be taken as its true date: *Phipson on Evidence* 13 ed para 35-03.

The first respondent's witness merely denied having received the letters ^G of 10 and 13 August 1998 on behalf of the first respondent. There was no suggestion that the letters were not sent at all by post or that they were sent to a wrong address. The bare denial of receipt of the letters was not sufficient to discharge ^H

2008 (2) ZLR p15

Malaba JA

^A the onus on the first respondent to rebut the presumption that the letters were delivered at the address to which they were posted. There was also no basis on which the first respondent could be said to have discharged the onus to rebut the presumption that the two letters were written on the dates they bear. The court *a quo* ought to have found that the first respondent's directors received the letters of 10 and 13 August 1998. The first respondent was put *in mora*.

On the relief sought against the second appellant by the second respondent, it is clear that the former was authorised to sell the stands to members of the ^B public and receive the proceeds thereof on behalf of the second respondent. The second appellant was under the duty, as an agent, to account to the second respondent for the stands sold, the names and addresses of the purchasers and the proceeds received on its behalf. The second appellant could not defeat the claim for a statement of account by raising the rights of third parties, ^C such as the purchasers. In *Blaustein v Maltz, Mitchell & Co* [1937] 1 All ER 497 (CA) at 502 Slesser LJ said:

"Where an agent would otherwise be bound to account to his principal in respect of moneys paid to him, he cannot resist the claim of his principal by alleging some claims made to it by some other person."

^D Scott LJ at said p 505:

"The law is perfectly clear that an agent receiving money rightfully for his principal is not liable in respect of that money to the owner of the money even where the principal, upon receiving it, would be bound to pay it over to the owner."

At the time the second appellant sold the stands and received the proceeds thereof, the second appellant did so on behalf of the second respondent. It ^E was under the duty to account to the second respondent for the number of stands sold and the proceeds received, even if the monies had been refunded to the purchasers.

The point raised on behalf of the second appellant – which was not dealt with by the court *a quo* – was that the obligation to account to the second ^F respondent was enforceable under the order to account made against it on 22 February 1999. It appears to me that whilst the order which dealt with the same subject matter had not been abandoned, the second respondent was debarred from instituting an action claiming an order to account against the second appellant. It should have enforced the order of 22 February 1999.

^G As a result the appeal succeeds with costs. The order of the court *a quo* is set aside and substituted with the following:

“The action is dismissed with costs.”

GWAUNZA JA and GARWE JA concurred.

Manase & Manase, appellants’ legal practitioners

^H *Musunga & Associates*, respondents’ legal practitioners

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Document 3 of 49

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CHIVORE v MUDAVANHU & ANOR 2008 (2) ZLR 16 (H)

2008 (2) ZLR p16

Citation	2008 (2) ZLR 16 (H)
Case No	Judgment No. HH-61-08
Court	Electoral Court of Zimbabwe
Judge	Chitakunye J
Heard	17 July 2008
Judgment	17 July 2008
Counsel	<i>C Mukome</i> , for the petitioner <i>D C Kufaruwenga</i> , for the first respondent No appearance for the second respondent
Case Type	Election petition
Annotations	No case annotations to date

Flynote

Elections – election petition – service of notice of petition on respondent – c where such notice must be served – must be at respondent’s “usual or last known” dwelling or place of business – meaning

Headnote

Section 169 of the Electoral Act [*Chapter 2:13*] provides that notice of the presentation of an election petition shall “be served by the petitioner ^D on the respondent either personally or by leaving the same at his or her usual or last known dwelling or place of business.” This means that service must be either personally or by leaving the papers at the respondent’s *usual or last known dwelling or place of business*. It is not enough to serve the notice at the respondent’s party’s offices. The legislature intended that the respondent should get to know about the ^E petition personally as soon as possible. The addresses for service are such that the respondent frequents them as his usual dwelling or place of business. The term “usual” in this instance means “ordinarily used”, “frequently used” or “that is in ordinary use”. The dwelling place or place of business thus has to be where the respondent is ordinarily found or frequents or is expected to be available on a day to a day basis; it is not just any dwelling place or place of business for the respondent. It is for the petitioner to show that the respondent frequents or is ordinarily found ^F at the place at which service was effected. To merely say that a party headquarters is the respondent’s place of business is not good enough. Even if, for instance, the respondent was employed by the party, ^G the party’s headquarters would still not suffice if that is not where the respondent is based. Election petitions are for the personal attention of the particular respondent. It is the respondent’s, not the party’s, election which is being challenged. It is the respondent, not his party, on whom the responsibility to act promptly is imposed and on whom the dire consequences of failure to act promptly fall. ^H

2008 (2) ZLR p17

Chitakunye J

Cases cited ^A

Chabvamuperu & Ors v Jacob & Ors 2008 (1) ZLR 354 (H)

Chitungo v Munyoro & Anor 1990 (1) ZLR 52 (H)

Hove v Gumbo (Mberengwa West Election Petition Appeal) 2005 (2) ZLR 85 (S)

Muzenda v Kombayi & Anor 2008 (1) ZLR 366 (H)

Mwonzora v Kadzima EP-19-05

^B *Nair v Teik* [1967] 3 All ER 34 (PC)

Nath v Singh & Ors [1954] SCR 892

Pio v Smith 1986 (3) SA 145 (ZH)

Legislation considered

^C Electoral Act [*Chapter 2: 13*], ss 168(2), 168(3), 169 & 188(2)(b)

Case information

C Mukome, for the petitioner

D C Kufaruwenga, for the first respondent

No appearance for the second respondent

Judgment

^D **CHITAKUNYE J:** The petitioner was the ZANU (PF) Parliamentary candidate for the Zaka North House of Assembly Constituency in the harmonized general elections held on 29 March 2008. The first respondent was the MDC candidate in the aforesaid elections. He resides at No. 7453 Tsvoritsvoto Street, Chesvingo, Masvingo. The second respondent is a constitutional ^E body responsible for the running of the elections.

As is expected in any contest there had to be a winner and a loser. Unfortunately in this case the petitioner was the loser and the first respondent was declared the winner. The petitioner felt aggrieved by the election of the first respondent and petitioned this court for the election of the first respondent to be set aside ^F and for him to be declared the winner of the House of Assembly seat for Zaka North House of Assembly Constituency; alternatively, for the second respondent to be

ordered to set down a date for the re-run of the election for the said constituency. The petition was filed with this court on 14 April 2008. The petition was purportedly served on the first respondent on 6 May 2008 through Muzuva, a security officer at Harvest House, Nelson Mandela Avenue, Harare. This is the headquarters of the MDC party.

The respondents naturally opposed the application. The respondents raised points *in limine* that they felt were fatal to the petition.

The first respondent raised the following points *in limine*;

1. That the petition was not served on the first respondent within the time limit specified in s169 of the Electoral Act [Chapter 2:13].

2008 (2) ZLR p18

Chitakunye J

2. The petition was not served in the manner provided for in s 169 of the Electoral Act and.
3. The second respondent was improperly joined in the proceedings.

The second respondent objected to being joined as respondent to the petition contending that in terms of Part XXIII of the Electoral Act, the second respondent is not supposed to be joined as respondent.

At the hearing, Mr Mukome for the petitioner withdrew the case against the second respondent. Thus the issue of whether or not the second defendant was properly joined was resolved. The other two issues pertaining to the period of service and manner of service on the first respondent remained outstanding.

It is trite law that for a petition to be properly before the court the petitioner must comply with the provisions of the Electoral Act [Chapter 2: 13].

The papers filed of record show that after the declaration of the election results the petitioner filed his petition with the Registrar of this court on 14 April 2008. That petition was served on 6 May at Harvest House, Harare on one Muzuva, a security officer thereat. See Return of Service filed of record.

Section 168 subsections (2) and (3) of the Electoral Act states that:

“(2) An election petition shall be presented within fourteen days after the day on which the result of the election has been notified in terms of this Act.

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, at any time within thirty days after the day of such payment or other act.

(3) Not later than seven days after the presentation of the election petition, security of an amount fixed by the Registrar of the Electoral Court, being not less than the amount prescribed by the Commission after consultation with the Chief Justice, for the payment of all costs, charges and expenses that may become payable by the petitioner ... shall be given by or on behalf of the petitioner.”

Section 169 which deals with service of the petition states that:

“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 election period for parliamentary elections is defined as “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 4. It was common cause that the last result was declared at the end of March 2008.

2008 (2) ZLR p19

Chitakunye J

The papers filed of record show that the petition was filed on 14 April 2008.

The parties were agreed that the petition was filed in time. In terms of s 169 the petition was supposed to be served within 10 days thereof. Computing the period of service in terms of the Interpretation Act [Chapter 1:01], the period within which the petitioner ought to have served the

petition expired on 24 April 2008. *In casu*, service was only effected on 6 May 2008, some 12 days outside the time frame provided for in the Act. Mr *Kufaruwenga* argued that failure to serve within that time limit was fatal to the petition and uncondonable at law. The petition was thus ill-suited and not properly before the court. In this regard, he referred to case authorities wherein strict interpretation of similar provisions was taken. One such case is *Pio v Smith* 1986 (3) SA 145 (ZH). In that case, the court had occasion to deal with the interpretation of similar provisions of the Electoral Act in similar circumstances. Mfalila J, after considering a number of cases, concluded at pp 165-6 that:

"The part of s 141 dealing with the limitation of time is peremptory and must be complied with either exactly or so substantially that the act could stand on its own, as would be the case, for instance, in a situation where the notice was served within 10 days but without the list of proposed sureties; in other words defects in the notice would not invalidate it ..."

Other cases such as *Nair v Teik* [1967] 3 All ER 34 (PC), *Chitungo v Munyoro & Anor* 1990 (1) ZLR 52 (H), *Mwonzora v Kadzima* EP 19/05 tend to confirm this approach to time limits and that the Electoral Court as a creature of statute had no authority to grant condonation for failure to adhere to the time limits. It has also been held in other cases in respect of the same general elections that the Electoral Court has no authority to condone non-compliance with the Act. In *Muzenda v Kombayi & Anor* 2008 (1) ZLR 366 (H), Kudya J held that "in the light of decisions such as *Nyamapfeni's case supra* and *Chitungo v Munyoro & Anor* 1990 (1) ZLR 52 (H) and 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". In *Hove v Gumbo* 2005 (2) ZLR 85 (S), Malaba JA underscored this point when he said at p 92 that "A petition is not a common law cause of action. It is a special procedure created by statute. The law governing the manner and grounds on which an election may be set aside must be found in the statute and nowhere else". He proceeded to quote with approval the words of Mahajan CJ, Malaysia, in *Nath v Singh & Ors* [1954] SCR 892 at 895 wherein the Chief Justice said that:

"The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law

2008 (2) ZLR p20

Chitakunye J

and that the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law."

Clearly from the above, the petitioner is required to show exact or substantial compliance with the law. Where substantial compliance is being argued the petitioner must show that which he did in an effort to comply with the statute exactly. He must have done all that he is required to do to comply with the law within the stipulated time save for minor defects that would not invalidate the notice. A dilatory attitude or lack of diligence would not in my view, assist his cause.

As regards the petitioner's contention that they could not serve in time because the Registrar had not set the security required, Mr *Kufaruwenga* argued that that was without merit. Firstly, he said, the security was set on 23 April 2008 which was within the time limit the petitioner could have served the petition in compliance with the Act. The period for service was only expiring on 24 April 2008. He also argued that on the basis of *Pio v Smith supra* the petitioner could have served the notice of the petition and the petition without the security and that could have been substantial compliance. But in this case even though the security was set on or about 23 April 2008 the petitioner only served the notice of the petition and the petition on 6 May 2008, some 12 days after the last date when service should have been effected.

Mr *Mukome* for the petitioner conceded that service of the petition was indeed done outside the 10 day period. He however argued that service and manner of service must be viewed in the circumstances surrounding the filing and setting of security. Whilst admitting that the Electoral Act did not give room for condonation he urged for judicial activism in order to achieve the intention of the legislature. Such activism would entail condoning the petitioner's failure to serve the petition within 10 days and instead serving the same after 22 days from the date of filing. Mr *Mukome's* plea was not an easy one. It has already been conceded that the Registrar set the security on 23 April 2008. If the petitioner was genuinely ready to serve the petition but for the security, he would

surely have served before the expiry of 24 April 2008 which was the last day. Instead of serving soon after 23 April 2008, service was only effected 12 days after the last date. In any case, as stated in *Pio v Smith supra*, the notice and petition could have been served without the list of proposed sureties. Equally, he could have offered security in terms of s 28 of the Electoral Regulations 2005 (SI 21 of 2005) with a rider to increase it should the Registrar set a higher figure. The section states ^H

2008 (2) ZLR p21

Chitakunye J

A that "The security to be given by or on behalf of a petitioner to an election petition under s 168(3) for the payment of all costs, charges and expenses that may become payable by the petitioner shall be an amount which is not less than ten million dollars payable in cash or by bank certified cheque." This could have all weighed in favor of substantial compliance.

The authorities cited show that a stricter adherence to the time limits is ^B in tandem with the intention of the legislature. The need to adhere to the stipulated time limits is made even more imperative by the limited period within which election petitions must be determined. There is no provision for the Electoral Court to extend the periods to cater for parties who may not have diligently adhered to the time limits for whatever reason. Makarau ^C JP put it more succinctly in *Chabvamuperu & Ors v Jacob & Ors* 2008 (1) ZLR 354 (H) when she said that:

"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 disrupting the ^D 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 to provide the period within which petitions have to be determined both at the first instance and on appeal."

The judicial activism suggested by Mr *Mukome* would defeat the clear ^E intention of legislature that such petitions be urgently resolved. If for some good reason one were to consider judicial activism there would still be need to consider the reasons for the delay. In the instant case the petitioner's reasons appeared contradictory. In paras 2 to 4 of the heads of argument, the petitioner gave the reason for failure to serve within the 10 day period as that the Registrar had not set the security hence they were waiting for the ^F security to be set. The full reasons were couched as follows:

- "(2) Section 169 of the Act however makes it mandatory that the petitioner serves respondent the petition together with the names and addresses of the proposed sureties;
- (3) The Registrar of the Electoral Court is obliged to fix an amount as recognizance for security not less than an amount prescribed by the Zimbabwe ^G Electoral Commission in consultation with the Chief Justice. The Registrar could not fix such an amount making it impossible for the petitioner to serve the petition with the recognizance for security.
- (4) It is respectfully submitted that the petitioner should not suffer the consequences not of his own making. The omission lies squarely on the shoulder of the Registrar of the Electoral Court and accordingly the petitioner ^H should not suffer any prejudice."

2008 (2) ZLR p22

Chitakunye J

In as far as the petitioner was concerned, the fault was with the Registrar. ^A Nowhere in the written arguments did the petitioner state when the security was set. The impression created was that as soon as the security was set petitioner diligently served the petition. Unfortunately, security was set on or about 23 April 2008, a date within the 10 day period, but service was not effected soon thereafter. In the written heads of argument, the petitioner ^B did not state what caused the delay after the security was set. It was only in his oral submissions that Mr *Mukome* attempted to explain this delay. His explanation was to the effect that the delay in serving the petition was due to the fact that the petitioner did not know the first respondent's residential or business address. The delay was thus caused by the search for the first respondent's address. This was clearly an after-thought which was not worth ^C the effort. Had it been the reason it would have been stated in the petitioner's founding affidavit or at least in the heads of argument. In any case, s 188(2)(b) of the Act states that:

"Save as is otherwise specially provided in this Act and without derogation from s 40 of the Interpretation Act [*Chapter 1:01*], when any notice or other document is required to be served on any person under this

Act, it may be served ...by **d** leaving it at his or her last known place of residence or any place of residence stated on a voters roll as his or her place of residence;”

If truly the petitioner did not know the first respondent’s address he could easily have checked in the voters roll and served on the address indicated therein as the respondent’s place of residence. That search would not have taken **€**22 days. It is clear to me that the petitioner just did not seriously endeavour to comply with the Electoral Act. He took a lackadaisical approach and it is such an attitude that the time limits, *inter alia*, are intended to discourage.

The issue of compliance with service within the time limits, either exactly or substantially, is for the petitioner to prove. In this case, the petitioner **€**lamentably failed to show that he complied with the time limits either exactly or substantially. Indeed, in para 7 of his written submissions Mr *Mukome* admitted as much when he said that:

“In fixing the number of days, the legislature meant to give directions and time frames for the fulfillment of certain requirements so that a petition is expeditiously disposed of. In view of the above, it is submitted that though there was no **€** substantive compliance (in the strict sense) with the said section, there was indeed substantive fulfillment of the intention of the legislature.”

What is required is compliance with the intention of the legislature as espoused in the enactment and not substantive fulfillment of the perceived intention at a party’s own lackadaisical pace. Consequently, the petitioner must be visited by the consequences of non-compliance with the time limits. **h**

2008 (2) ZLR p23

Chitakunye J

a The other issue pertains to the manner and place of service. Section 169 of the Electoral Act provides, in pertinent part, that a petition shall “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”. Clearly, service was to be either *personally* or by *leaving* the papers at the respondent’s *usual or last known dwelling or place of business*.

b *In casu*, the petition and notice thereof was served on “Muzuva a security officer at Harvest House Nelson Mandela Avenue, Harare”. It was not disputed that the first respondent is resident at No. 7543 Tsvoritsvoto Street, Chesvingo in Masvingo. For such service to comply with the Act, the petitioner had to show either personal service or that the place at which the petition was left was *the usual or last known dwelling or place of business* for the first **c** respondent. In a bid to prove this, the petitioner argued in paras 8 to 11 of his heads of argument that:

- “8. On the issue of service on the respondent’s party headquarters, does it amount to service upon the respondent as envisaged by **s** 169 of the Act? It is hereby argued that the respondent’s party headquarters is a place of business in terms of the definition in the said section. **d**
9. In terms of **s** 169 of the Act, the term place of business assumes a special meaning. Since an election relates to political business a political party headquarters is where the respondent transacts his political business. Therefore, service of a petition on the respondent’s political party headquarters constitutes proper service on the respondent’s business address under **s** 169. See *Pio v Smith* 1986 (3) SA 145 (ZHC). **€**
10. It is submitted that the purpose of service is to notify the respondent of legal action against him and allow him to defend such action or application. Once the respondent has presented himself in court, he cannot rely on improper service to render a petition void. It would therefore be futile to argue that he was improperly served when the purpose has been achieved.
11. It is submitted that it would lead to an absurdity if the legislature on the one **€** hand would render valid, service at the respondent’s last known address which may be six or more months old or may have long been abandoned and on the other hand render null and void service at the respondent’s political party headquarters.”

The above reasoning is faulty for a number of reasons. It is clear that the **€** legislature intended that the respondent should get to know about the petition personally as soon as possible. The addresses for service are such that the respondent frequents them as his usual dwelling or place of business. The term *usual* in this instance means “ordinarily used”, “frequently used”, “that is in ordinary use”. The dwelling place or place of business had to be where the respondent is ordinarily found or frequents or is expected to **h** be available on a day to a day basis. Thus, the place of service is not just

2008 (2) ZLR p24

Chitakunye J

any dwelling place or place of business for the respondent; it has to be his ^A usual dwelling or place of business. It is for the petitioner to show that the respondent frequents or is ordinarily found at the place at which service was effected. As the place at which service was effected is the headquarters of the respondent's political party it was for the petitioner to show that the respondent who resided in Masvingo, a distance close to 300km from Harare, ^B frequented that place and so was bound to see the petition as soon as it was left there. To merely say that a party headquarters is the respondent's place of business is not good enough. Even if for instance, the respondent was employed by the party, the party's headquarters would still not suffice if it is not where the respondent is based. This is so because it is not a place where the respondent frequents or is ordinarily found on a day to day basis. That is to say, it is not a place where the respondent conducts business on a day to day basis. ^C Petitions are for the personal attention of the particular respondent. It is the individual and not the party whose election is being challenged and on whom the responsibility to act promptly and without delay is imposed. Such is not imposed on the respondent's party or other party functionaries. The dire consequences of failure to act promptly fall on the ^D respondent and not his party.

One would thus confidently say that the legislature did not intend that a political party headquarters could be a usual place of business for a party member who does not work for the party at that headquarters, and more so, as in this case, who resides far away from the party headquarters. The provision ^E of service at the respondent's last known address is meant for situations where a petitioner is unable to effect personal service and is unaware of the respondent's current usual dwelling or place of business. The last known address must still have been the respondent's usual dwelling or place of business. The contention that such an address could have been abandoned ^F six months ago does not arise as the petition is required to be filed within 14 days (or 30 days depending on the circumstances) from the end of the election period. In any case, such could be the address in the voters roll in terms of s 188(2)(b) of the Act.

As crisply stated by Makarau JP in *Chabvamuperu & Ors v Jacob & Ors supra*: ^G

"Service out of time is fatal to the validity of the petition. Service out of time at a place not designated by the statute 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 statute, actually compounds the non-compliance."

In the circumstances of this case, there was clearly no compliance with s 169 ^H

2008 (2) ZLR p25

Chitakunye J

^A of the Electoral Act either exactly or substantially in respect of both period of service and place of service.

Accordingly, the petition is dismissed with costs.

Muvingi, Mugadza & Mukome, petitioner's legal practitioners

^B *Dzimba Jaravaza & Associates*, first respondent's legal practitioners

Chikumbirike and Associates, second respondent's legal practitioners

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Document 4 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/MAZIBUKO NO & ANOR v NDEBELE & ORS 2008 (2) ZLR 26 (H)

MAZIBUKO NO & ANOR v NDEBELE & ORS 2008 (2) ZLR 26 (H)

2008 (2) ZLR p26

Citation	2008 (2) ZLR 26 (H)
Case No	Judgment No. HB-68-08
Court	High Court, Bulawayo
Judge	Kamocha J
Heard	25 June 2008
Judgment	17 July 2008
Counsel	<i>N Mazibuko</i> , for the applicants <i>J Mudenda</i> , for the first respondent No appearance for the second, third and fourth respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure – action – dismissal of – application by defendant for dismissal of action on grounds that it is frivolous and vexatious – application may not be made before a plea is filed

Practice and procedure – plea – special pleas, exceptions and applications to strike out – in absence of consent between the parties, applicant must plead over to the merits – need to comply with r 138(c) before matter can be set down

Headnote

In terms of r 75(1) of the High Court Rules 1971, a defendant must file his reply in his plea to the allegations raised by the plaintiff in his declaration, ^ε before he makes an application for the dismissal of the plaintiff's action on the basis that it is frivolous and vexatious. This is not possible if there is no reply from the defendant. In his plea, the defendant is required to deal specifically with every allegation in the plaintiff's declaration before making an application in terms of r 75(1).

In the absence of consent between the parties to an action, r 138(c) of the ^ε Rules prohibits an applicant from setting down a special plea, exception or application to strike out where the applicant has not pleaded over to the merits. Failure to adhere to the Rules in this regard means that the applicant is not properly before the court.

Legislation considered ^G

High Court Rules, 1971 (RGN 1047 of 1971), rr 75(1) & 138(c)

Case information

N Mazibuko, for the applicants

J Mudenda, for the first respondent

No appearance for the second, third and fourth respondents ^H

2008 (2) ZLR p27

Kamocha J

Judgment

^A **KAMOCHA J:** The applicants filed this application in terms of Order 11 r 75 for the dismissal of the plaintiff's claim in case number HC 2024/02 with costs on the legal practitioner and client scale and

sought for judgment to be entered in their favour. Costs were to be borne by the first respondent with his legal practitioners being liable for the same, jointly and severally, the one paying, the other to be absolved *de bonis propriis* on an attorney ^b and client scale.

The provisions of Order 11 r 75, in terms of which this application has been brought, recite as follows:

"75. Application for dismissal of action

- (1) Where a defendant has filed his plea, he may make a court application for the dismissal of the action on the ground that it is frivolous or vexatious. ^c
- (2) A court application in terms of subrule (1) shall be supported by affidavit made by the defendant or a person who can swear positively to the facts or averments set out therein, stating that in his belief the action is frivolous or vexatious and setting out the grounds for his belief.
- (3) A deponent may attach to his affidavit filed in terms of subrule (2) documents which verify his belief that the action is frivolous or vexatious."

^d The applicants, in an affidavit sworn to by the first applicant, averred that the plaintiff's matter was *res judicata*. Their belief was premised on case number HC 2288/02 wherein a default judgment was granted dismissing second respondent's action in case number HC 3340/01 and entering judgment in favour of one Josiah Bruce Gwizi. They contended that since the matter ^e was *res judicata* it was therefore frivolous or vexatious.

Apart from the first respondent the other three respondents filed no opposing papers. The first respondent raised two points *in limine*. They contended that the applicants were not properly before the court.

Firstly, they contended that the applicants, who were defendants in the main ^f matter, should have pleaded to the merits before applying to the court for the dismissal of the action on the ground that it was frivolous or vexatious. The applicants, on the one hand, suggested that a special plea was the same as a plea, which is an answer to the plaintiff's declaration. The first respondent, on the other hand, contended that a plea sets forth concisely the nature of the defendant's defence. In his plea a defendant must address each and every ^g point raised by a plaintiff. Every allegation not denied is taken as being admitted. There is merit in the respondent's contention.

In terms of r 75(1), a defendant must file his reply to the allegation raised by the plaintiff before he makes an application to the court for dismissal of the plaintiff's action on the basis that it is frivolous or vexatious. He may ^h not do so before filing his reply. The reason is simple. He can only convince

2008 (2) ZLR p28

Kamocha J

the court by his plea that the plaintiff's action is frivolous or vexatious, but ^a that is not possible if there is no reply from the defendant.

The first respondent concluded that the applicants had failed to show that his claim was frivolous or vexatious. They should have filed their plea on the merits to show that the plaintiff's claim was a hopeless one without any legal basis. He did not understand why the applicants were scared of filing ^b their plea on the merit if they believed they had a case in their favour.

There is merit in the first respondent's submissions. The applicants seemed to labour under the mistaken belief that their affidavit in terms of r 75(1), wherein they swore positively to the facts stating that in their belief the action was frivolous or vexatious and setting out grounds for their belief, takes the place of the plea on merits. That in my view, cannot be correct. What is ^c expected of a defendant who intends to proceed in terms of the provisions of r 75(1) is that he should specifically deal with every allegation in the plaintiff's declaration prior to making such an application and not before.

In casu, for instance, the plaintiff claimed that on 29 September 1999 he entered into an agreement of sale with one Petty Gwizi who was at that ^d time married to Josiah Bruce Gwizi. Petty Gwizi sold all her rights, title and interest in stand number 2290 Nketa Township of lot 400A Umganin District of Bulawayo, together with the immovable improvements, fixtures and fittings thereon to plaintiff for \$170 000 which he duly paid in full. Unfortunately Petty Gwizi died before effecting transfer of the stand to plaintiff's name. ^e

Josiah Bruce Gwizi, as the surviving spouse, was appointed executor of the estate of Petty Gwizi. When Josiah Bruce Gwizi was called upon to cede and transfer all the rights and title in the said property, he refused.

Instead of specifically pleading to the above claim the applicant launched this application. In my view the first respondent was entirely correct in concluding that the applicants were not properly before this court. ^f

Further, first respondent raised the point that the applicants had also failed to comply with the procedure on filing of special pleas as provided in Order 21 r 138. This in fact is common cause. In terms of r 138(c), since there was no consent between the parties, the application should have not have been set down before trial. ^g

Rule 138 provides as follows:

- "138 Procedure on the filing of special plea, exception or application to strike out
When a special plea, exception, application or application to strike out has been filed –
(a) the parties may consent within ten days of the filing to such special plea, ^h

2008 (2) ZLR p29

Kamocha J

- A exception or application being set down for hearing in accordance with subrule (2) of rule 223;
(b) failing consent either party may within a further period of four days set the matter down for hearing in accordance with subrule (2) of rule 223;
(c) failing such consent and such application, the party pleading specially, excepting or applying, *shall* within a further period of four days plead over ^b to the merits if he has not already done so and the special plea, exception or application *shall not be set down for hearing before trial.*" My emphasis.

The applicants *in casu* did not plead over to the merits when it is mandatory that they should do so. As if that was not bad enough, the applicants went on to set down the matter for argument before the trial. The rules prohibit that. On that basis also, the applicants are not properly before this court.

^c Both parties sought for costs on a higher scale when there is no basis for such a request. The applicants had even gone so far as asking for costs against the counsel for the respondent *bonis propriis* as they felt that the respondent's case could not succeed. But it has turned out that the applicant's counsel, in fact, was guilty of flouting the rules of this court, ie rules 75 and 138.

^d The order of this court is that the application be and is hereby dismissed with costs.

Calderwood, Bryce Hendrie & Partners, applicants' legal practitioners

T Hara & Partners, respondent's legal practitioners

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Document 5 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/SIKANYIKA v GARADI 2008 (2) ZLR 30 (H)

SIKANYIKA v GARADI 2008 (2) ZLR 30 (H)

2008 (2) ZLR p30

Citation	2008 (2) ZLR 30 (H)
Case No	Judgment No. HH-65-08
Court	Electoral Court, Harare
Judge	Uchena J

Heard	3 July 2008
Judgment	28 July 2008
Counsel	Mr <i>Nyahu</i> , for the petitioner T <i>Chibwana</i> , for the respondent
Case Type	Election petition
Annotations	No case annotations to date

Flynote

Elections – *election petitions – time limits – failure to comply with – fatal to the petition*

Headnote

The statutory periods laid down for election petitions must be strictly complied with. Any failure to comply is fatal to the petition. If the ^D legislature's intention was to authorise the courts to grant an extension of time limits, it would have made provision for such extension. The fact that no authority was granted to extend the time limits means that the legislature's intention was that failure to comply should lead to nullity. The legislature had in mind the timeous resolution of election petitions. ^E A petition must be determined within six months of its presentation. It must also be borne in mind that a pending election petition undermines the authority of the legislature and the executive, as holders of office in the challenged constituencies, will be participating in governing the nation while their election is under challenge. The legitimacy of the system of government is undermined. ^F

Cases cited

Chabvamuperu & Ors v Jacob & Ors 2008 (1) ZLR 354 (H)
Chitungo v Munjoro & Anor 1990 (1) ZLR 52 (H)
Ellis & Anor v Maceys Stores Ltd 1983 (2) ZLR 17 (S) ^G
Kombayi v Berkhout 1988 (1) ZLR 53 (S)
Kutama v Town Clerk for the Municipality of Kwekwe 1993 (2) ZLR 137 (S)
MDC & Anor v Mudede & Ors 2000 (2) ZLR 152 (S)
Muzenda v Kombayi 2008 (1) ZLR 366 (H)
Nyamapfeni v Constituency Registrar, Mberengwa East & Ors 2008 (1) ZLR 164 (H) ^H

2008 (2) ZLR p31

Uchena J

^A *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)

Legislation considered

^B Electoral Act [*Chapter 2:13*], ss 169 & 182

Case information

Mr *Nyahu*, for the petitioner

T *Chibwana*, for the respondent

Judgment

UCHENA J: The petitioner contested for, and lost, the Chinhoyi House of Assembly constituency in the 29 March harmonised elections. He was ZANU (PF)'s candidate for that constituency,. He contested against the respondent, an MDC Tsvangirai candidate, who won the right to represent that constituency. The petitioner presented this petition to the Registrar of the Electoral Court on 14 April 2008. He sought an order of this court setting aside the respondent's election and declaring the seat for the Chinhoyi House of Assembly constituency vacant, plus other procedural orders which would lead to a by-election being held in that constituency.

The respondent raised two points *in limine*, namely;

1. That the petition was not served on the respondent within the ten days prescribed in s 169 of the Electoral Act [*Chapter 12:13*] (hereinafter called "the Electoral Act").
2. That the petition was not properly served on the respondent, it having been served at his party's headquarters instead of on him personally or by leaving the same for him at his usual or last known dwelling or place of business.

Mr *Nyahu* conceded that the petition was served on the respondent on 14 April 2008. He submitted that service on that date was within ten days of the presentation of the petition, as Saturdays, Sundays and public holidays are, in terms of r 4A of the High Court Rules, not included in the computation of time. He argued, in the alternative, that the delay was caused by the Registrar of the Electoral Court's failure to fix the amount of security for the respondent's costs timeously. He submitted that, in terms of s 169 of the Act, the petition and the security for costs are supposed to be served on the respondent at the same time. He further submitted that service was through the Deputy Sheriff. He also conceded that the petition was served at the respondent's party's headquarters, but argued that such service is within the intention of the Legislature, as the party's headquarters is the place where

2008 (2) ZLR p32

Uchena J

the party's business is conducted. Mr *Nyahu*, however, later conceded that a service at the respondent's party's headquarters was not proper service.

Mr *Nyahu's* submission that the reckoning of time should exclude Saturdays and Sundays, if accepted, would bring service on 29 April 2008 within the ten day period, as the tenth day would have fallen on 29 April 2008. This issue was determined by this court in *Nyamapfeni v Constituency Registrar v Mberengwa East & Ors* 2008 (1) ZLR 164 (H), where I, when interpreting s 33 of the Interpretation Act [*Chapter 1:01*] and s46(19)(c) of the Electoral Act, said;

"The clear meaning of s 33 (1) to (4) is as follows. Subsection (1) spells out that s 33 defines any reference to time in any enactment in Zimbabwe. 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 or a public holiday. The inclusion of subs (4) providing for extension to the following day if the period expires on a Saturday, a Sunday or a public holiday means Saturdays, Sundays and public holidays are included in the reckoning of time. This interpretation is confirmed in the case of *Makuwaza v National Railways of Zimbabwe* 1997 (2) ZLR 453 (S) at 456E-F where McNALLY JA 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 (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)."

The same interpretation was given in *Ellis & Anor v Maceys Stores Ltd* 1983 (2) ZLR 17 (S) at 18G where Gubbay AJA (as he then was) said, Mr

"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 non-business days. If it were intended to exclude non-

business days it would have been a simple matter to G 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 *Ellis supra*, said,

"This court has repeated ad nauseum that the calculation of time for lodging of appeals was based on ordinary days and not court days:"

Mr Nyahu's reliance on r 4A was also dealt with in *Nyamapfeni supra* where H

2008 (2) ZLR p33

Uchena J

A I said;

"It is true that this court can rely on the High Court Rules, but the issue to be determined is whether or not the provisions of r 4A extend the time limits 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 order of the court to be done within a particular number of B 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 C s 46(19)(c) of the Electoral Act, which is not a provision of the High Court rules, but a provision of the Electoral Act."

On the issue of compliance with s 169 of the Electoral Act, that is service of notice of the presentation of the petition and how and where it should be served, the court should closely examine its provisions. It provides as follows;

D "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"

A literal interpretation of s 169 of the Electoral Act establishes the following; E

1. The petitioner is required to give to the respondent notice that he has presented to the Electoral Court a petition challenging his election as a member of Parliament.
2. The notice should be accompanied by a copy of the petition and the names and addresses of the proposed sureties. F
3. The notice should be served on the respondent within ten days after the presentation of the petition.
4. It should be served on the respondent either personally or by leaving the same at his or her usual or last known dwelling or place of business.

The points *in limine* raised by the respondent arise from 2, 3 and 4 above. G Mr Nyahu submitted that the petitioner was not able to serve the petition on the respondent within ten days because the Registrar of this Court had not yet fixed the amount for security of costs in terms of s 168(3) of the Electoral Act. That, in my view, is not a valid excuse, as security for costs was fixed by the Registrar on 23 of April 2008, two days before the expiry of the ten day period. A diligent legal practitioner, conscious of the need H to comply with peremptory provisions of the law, should have prepared

2008 (2) ZLR p34

Uchena J

all his papers and awaited the fixing of the security for costs so that all he A had to do, on becoming aware of the amount, was to communicate it to the sureties and endorse it on the papers for immediate service on the respondent. Alternatively, the petitioner could have served the petition accompanied by a letter promising to provide security as soon as it is fixed by the Registrar. That, in my view, would have amounted to substantial compliance. Failure to B serve the petition within the stipulated period, just because security for costs was still to be fixed, was commented on by Makarau JP in *Chabvamuperu & Ors v Jacob & Ors* 2008 (1) ZLR 354 (H), where she said:

"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 c 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 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." d

As already said, security was fixed two days before 25 April 2008. It was therefore possible for the petitioner to serve the respondent within the ten day period.

The issue of failure to serve a petition on the respondent within ten days of its presentation and service at the respondent's party headquarters have e already been determined by this court in *Muzenda v Kombayi & Anor* 2008 (1) ZLR 366 (H), where Kudya J said;

"I hold that the service of 6 May 2008 was a nullity for two reasons. Firstly, it was in contravention of the ten day period and secondly, at the wrong place, in violation of the provisions of section 169 of the Act." f

I respectfully agree with Kudya J's decision on failure to serve within the ten day period resulting in the petition being a nullity, and serving at the respondent's party headquarters not being in accordance with the law. Makarau JP also arrived at the same conclusions in *Chabvamuperu & Ors v Jacob & Ors*, supra where she said;

"I am therefore unable to find that service of the election petition twenty eight days g 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 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."

I respectfully agree with the Judge President's decision which considered h

2008 (2) ZLR p35

Uchena J

a the issue of substantial compliance and found that there was no substantial compliance.

The facts of the present case are on all fours with the *Muzenda* and *Chabvamuperu* cases supra, except for the difference in the period by which the ten day period was exceeded. However, the critical issue is that the statutory period should be strictly complied with, and any failure to b comply is fatal to the petition. In *Administrative Law* at page 197 Marinus Wiechers, commenting on the effect of statutes which confer privileges, rights or exemptions subject to certain formalities says:

"where the statute confers a privilege, right or exemption, subject to certain formalities, that right, privilege or exemption cannot be validly obtained unless c the formalities have been complied with. The presence of time clauses, where the courts are not authorized to grant extension, is an indication in favour of nullity."

A reading of s 169 of the Electoral Act clearly establishes that it gives the petitioner a right and privilege to challenge the election of the respondents subject to compliance with the time limit stipulated therein. If the Legislature's d intention was to authorise the courts to grant an extension of time limits, it would have made provision for such extension in s 169. The fact that no authority to extend the time limits was granted means the Legislature's intention was that failure to comply would lead to nullity.

The learned author, at p 199, went on to say;

e "The question is simply whether the organ has the power to dispense with the rule in question. In order to answer the question of the possible existence of a dispensing power, the rule itself must be examined. If the rule is peremptory, that is if absolute compliance is required, there can be no dispensing power, but if the rule is directory, there will be such a power."

In this case the wording of s 169 of the Electoral Act is peremptory in the f sense that the language used is not directory. It requires that the petition be served within ten days of its presentation. I am aware that the force of the command is not the criteria, but the intention of the Legislature. (See the cases of *Quinnell v Minister of Lands & Ors* 2004 (2) ZLR 293 (S); *MDC & Anor v Mudede & Ors* 2000 (2) ZLR 152 (S); *Sterling Products International Ltd g 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), *Pio v Smith* 1986 (3) SA 145 (ZH) and the *Chabvamuperu* case supra. In this case the Legislature, from a reading of the Part within which the section is found, had in mind

the timeous resolution of election petitions. In terms of s 182 of the Electoral Act, a petition must be determined within six months of its presentation. It must also be borne in mind that a pending election petition

2008 (2) ZLR p36

Uchena J

undermines the authority of the Legislature and the Executive, as holders of a office in the challenged constituencies will be participating in governing the nation while their election is under challenge. Commenting on the court's dispensing powers, the learned author, at pp 200 to 201, said;

"If it can be shown that non-compliance with the rule has led to real or potential prejudice, there is no dispensing power and the rule must be observed. To b determine whether non-compliance with formal or procedural requirements has resulted or may result in prejudice, the content and objectives of the rule must be analysed. If the administrative organ is mistaken about the possibility of prejudice and grants dispensation when such danger in fact exists, the court may review the defective exercise of the organ's discretionary power and declare the granting of the dispensation invalid. *In this regard it is of importance to mention that the obligatory nature of formal and procedural requirements often c arises in electoral issues. Although the courts are inclined to overlook minor formal defects, the general approach is nevertheless to regard the rules relating to the registration of voters, nomination, the drawing up of voters rolls and so on as peremptory. Such an approach is perfectly correct, elections are the foundation upon which a democratic system is built and although irregularities in elections cannot always be judged by the criterion of individual prejudice, the prejudice consists in the fact that the legitimacy of the system of government d is undermined*" (emphasis added).

In my view, a challenge to the propriety of the election of a member of Parliament falls under the class of electoral cases which should be regarded as peremptory. Such a challenge is more serious than a challenge to the nomination of a candidate, as the former challenges the authority of an officer e of government who is already, or is about to start, exercising the authority granted him by the challenged election. The weight of older authorities such as *Chitungo v Munyoro* and *Pio v Smith supra*, and the more recent cases referred in this judgment are a confirmation of the correct approach followed by the courts in this country. I am therefore satisfied that the petitioners failure to serve the petition within ten days of its presentation results in the f nullity of the petitioner's petition.

In the result, the petition is dismissed with costs.

Mandizha & Company, petitioner's legal practitioners.

Chibwana & Associates, respondent's legal practitioners g

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Document 6 of 49

Source:

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SHIRIYEKUTANGA BUS SERVICES (PVT) LTD v TOTAL ZIMBABWE 2008 (2) ZLR 37 (H)

2008 (2) ZLR p37

Citation	2008 (2) ZLR 37 (H)
Case No	Judgment HH-64-08
Court	High Court, Harare
Judge	Makarau JP
Heard	3 July 2008

Judgment	30 July 2008
Counsel	<i>T Magwaliba</i> , for the applicant <i>R Y Phillips</i> , for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Property and real rights – *spoliation* – *spoliation order* – *requirements for obtaining such order* – *applicant not required to show some reasonable or plausible claim to the property* – *court will not inquire into the judicial c nature of the possession claimed*

Headnote

In order to obtain a spoliation order, an applicant has to set up and prove that he was in peaceful and undisturbed possession of the property and that the respondent deprived him of such possession (*Botha & Anor v Barrett* 1996 (2) ZLR 73 (S) followed). The applicant does not have to show some reasonable or plausible claim to the property despoiled, nor will the court inquire into the juridical nature of the possession claimed.

Cases cited

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

Nino Bonino v de Lange 1906 TS 120

Kramer v Trustees, Christian Coloured Vigilance Council, Grassy Park 1948 (1) SA 748 (C)

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

Parker v Mobil Oil of South Africa 1979 (4) SA 250 (NC)

£ *Coetzee v Coetzee* 1982 (1) SA 933 (C)

Judelman v Colonial Govt (1909) 19 CTR 442

Case information

T Magwaliba, for the applicant

R Y Phillips, for the respondent

2008 (2) ZLR p38

Makarau JP

Judgment

MAKARAU JP: On 16 November 2007, the applicant approached this court ^A on a certificate of urgency and obtained a provisional order compelling the respondent to return to it six fuel pumps and other accessories that it had dismantled and removed on 10 November 2007. The provisional order also restrained the first respondent from removing any further equipment from its business premises pending its confirmation or discharge. ^B

In obtaining the provisional order, the applicant alleged in its founding affidavit that it had a dealership agreement with the respondent's predecessor in terms of which it borrowed a certain sum of money to upgrade its service station equipment and accessories on certain terms and conditions. One of the terms was that the applicant would only sell the fuel and oil products of the respondent. In time, the respondent was failing to meet the demands of the ^C applicant in terms of supplying fuel and oil products. In view of the erratic supply of products, the applicant proposed to purchase the equipment that the respondent had installed at applicant's premises and thereby

terminate the agreement between the parties. At a meeting held between the parties, the offer to purchase the equipment was repeated. No conclusion was reached on the issue. ^D

In September 2007, the applicant wrote to the respondent citing the inability of the respondent to keep the applicant supplied with products for resale and advising the respondent that it was paying up the balance of the loan and terminating the dealership agreement. The amount of the balance of the loan was transferred electronically into the account of the respondent. ^EIn response, the respondent declined to accept the tender of the balance of the loan and threatened to take legal action against the applicant. Without taking any such action and without any prior notice, it visited the premises of the applicant and, without notice, removed six pumps and other equipment accessory to the pumps, prompting the applicant to approach this court on the certificate of urgency as detailed above. ^F

The respondent opposed the confirmation of the provisional order and filed an opposing affidavit.

In the opposing affidavit, the respondent denied that it had advanced a loan to the applicant for the purposes of procuring pumps and other associated equipment and averred that in terms of the agreements between the parties, ^G the pumps and allied equipment would remain the property of the respondent. The respondent further averred that the pumps and equipment were the subject of a separate agreement in terms of which the respondent reserved unto itself the right to remove its equipment at any time that it deemed fit and this would effectively terminate the dealership agreement. The respondent also alleged that by allowing third party products into the respondent's ^H

2008 (2) ZLR p39

Makarau JP

A tanks without consent, the applicant was breaching the agreement between the parties. Further and more compelling in my view, the respondent made the point that the applicant terminated the dealership agreement, thereby triggering the return of the equipment to the respondent. It was clearly understood between the parties that the respondent would be entitled to return the equipment once the dealership agreement had been terminated. ^B In this instance, the dealership agreement was terminated by the applicant itself, leaving the applicant with no basis for retaining the equipment, so the arguments proceeds.

It is common cause that the application brought by the applicant was for relief under the *mandament van spolie*. That the respondent was in peaceful ^C possession of the pumps and accessories is not in dispute. Further, that the respondent, acting under the dealership agreement, took possession of the pumps and equipment without first obtaining a court order is also not in dispute.

On the authority of *Botha & Anor v Barrett* 1996 (2) ZLR 73 (S), the applicant argued that the respondent had no defence to defeat the possessory remedy that it was seeking.

^D In *Botha & Anor v Barrett supra*, Gubbay CJ set out the two requirements that an applicant for a spoliation order has to set up and prove. These are that he was in peaceful and undisturbed possession of the property and that the respondent deprived him of such possession. In this regard, the learned Chief Justice was relying on the decisions in *Nino Bonino v de Lange* 1906 ^E T s 120; *Kramer v Trustees Christian Coloured Vigilance Council, Grassy Park* 1948 (1) SA 748 C and *Davis v Davis* 1990 (2) ZLR 136 (H).

Applying the principles emanating from these authorities, the learned judge found that the respondents before him had failed to prove that the dispossession was without his consent and on that basis, discharged the provisional order that had restored possession to him.

^F In response, Mr Phillips for the respondent placed much reliance on the decision in *Parker v Mobil Oil of SA* 1979 (4) SA 250 (NC), where it was held that the rule that goods dispossessed against the will of the possessor must be restored forthwith, is not an absolute one.

The facts in the *Parker v Mobil Oil of South Africa supra* are in my view ^G not very dissimilar to the facts of the application before me. They may be summarized as follows:

The applicant and the respondents entered into two agreements in terms of which the applicant was the aviation agent of the respondent at two airfields. The two agreements were both cancelled by the respondent. After the ^H cancellation, the respondent took possession of the equipment used to refuel

Makarau JP

aeroplanes at both aerodromes. A month later, the applicant approached court ^A for a spoliation order against the respondent to return all the equipment to the aerodromes and for an order compelling the respondent to sell applicant's aviation fuel at the two aerodromes in terms of the cancelled agreements.

After examining the reason behind the possessory remedy, van den Heever J had this to say, at p 255: ^B

"The reason for the rule is, according to the authorities, certainly not because the fact of possession is elevated to a right stronger than *plenum dominium*, but to discourage breaches of the peace by self-help in the case of dispute. Despite generalizations that even the thief or robber is entitled to be restored to possession, I know of no instance where our courts, which disapprove of metaphorical grubby hands, have come to the assistance of an applicant who ^C admits that he has no right vis-à-vis the respondent to the possession he seeks to have restored to him.

(Cf *Judelman v Colonial Government* 3 BAC 446 (19 CTR 442 at 444).)".

In dismissing the application, the learned judge was of the view that the concession that possession of the equipment would be of no use whatever to Parker (and, being deprived of possession, at least inconvenient for Mobil) ^D and the termination of the agreements between the parties militated against the grant of a spoliation order, where the spoliation order was sought not to regain possession of the equipment, but merely as necessarily inherent in seeking specific performance of the contracts. The court was quite clear that the return of the pumps to Parker would have had the effect of granting ^E specific performance of the cancelled contracts.

The finding in *Parker's* case *supra* to the effect that the rule that goods dispossessed against the will of the possessor must be restored forthwith, is not an absolute one was recently followed in *Coetzee v Coetzee* 1982 (1) SA 933 (C). (This is the only case that I have come across where the decision in *Parker* was referred to. It is also worth noting that the two cases were both ^F decided by the same judge.)

Coetzee v Coetzee supra was a matrimonial dispute involving a motor vehicle registered in the name of the husband but in the possession of his "irresponsible" and estranged wife who was accumulating parking tickets in his name and had reported to him that the vehicle had been stolen after ^G she had left it in parking garage. He found the car and took it away, offering to have it registered in her name pending the determination of the divorce proceedings he had commenced earlier. The offer was rejected, with the wife insisting on her right to restoration of possession *ante omnia*. At p 935 van den Heever again had this to say:

"There are limits to the scope of the remedy (*Parker v Mobil Oil of Southern* ^H

Makarau JP

^A *Africa (Pty) Ltd* 1979 (4) SA 250 (NC)). The cases seem to suggest that, despite lip service to the sweeping statement by Voet 41.2.16 that even the despoiled robber will be assisted, possession will not be restored if the applicant has no vestige of a 'reasonable or plausible claim' (*Price Possessory Remedies* at 107), and the respondent conclusive proof of his ownership of the article in question. On the other hand the cases also indicate that, once the applicant satisfies the court that he was in possession, and was dispossessed by respondent without ^B recourse to law nor by consent of respondent, the applicant is entitled to have possession restored to him if he merely alleges some such 'reasonable or plausible claim'.

The court does not at this stage 'look too closely into the juridical nature of the possession claimed'. (*Price ubi cit*)."

It is quite clear that the learned judge who decided both cases is of the firm ^C belief that the possessory remedy of *mandament van spolie* is not there for the taking and that the rule that even a thief can be despoiled finds no favour with her. In her view, the applicant seeking to have possession restored to him must allege and prove some reasonable or plausible claim to the property.

With respect, the weight of authority appears to be against the learned judge. ^D It has not been established as part of our law in any other decided case that an applicant for spoliation order has to show some reasonable or plausible claim to the property despoiled.

The learned judge seems to suggest that the court, determining an application for a spoliation order, will look into but not closely, the juridical nature of ^ε the possession of the applicant. (See *Coetzee v Coetzee supra*.) I hold a different opinion and do so with the greatest of respect and due deference to the learned judge. The decided cases referred to by Gubbay CJ in *Botha & Anor v Barrett supra* are quite clear that the court does not at all look into the juridical nature of the possession claimed.

The doctrine of stare *decisis* binds me to follow the decision in *Botha and Another v Bennet supra* and not to follow *Mobil v Parker supra* and *Coetzee v Coetzee supra*.

On the basis of the foregoing, I am compelled to confirm the provisional order.

Regarding costs, I note that after obtaining the provisional order in its favour, the applicant took no steps to set the matter down. It was the respondent ^g who had the matter enrolled by filing its heads of argument. Further in view of the confusion in the law that may have been created by the decision in *Parker's* case, I do not view the opposition by the respondents to have been unreasonable in the circumstances. While the argument advanced by the respondent does not succeed, I do not perceive it as being frivolous.

^h Accordingly, I make the following order:

2008 (2) ZLR p42

Makarau JP

1. The respondent is hereby restrained from removing from the applicant's ^a premises at Lot 3 Block HH Ardbennie, Harare any equipment including the following:
 - 1.1. one compressor
 - 1.2. one underground blend tank (25 000 litres);
 - 1.3. one underground diesel tank (25 000 litres); ^b
 - 1.4. one underground IP tank (15 000 litres);
 - 1.5. two dual wayne pumps /IP
 - 1.6. one dual pump off canopy (diesel)
 - 1.7. one commercial pump by skid tank ^c
 - 1.8. one canopy
 - 1.9. one total monolith
 - 1.10. two direction arrows.
2. Each party shall bear its own costs. ^d

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

Magwaliba and Kwirira, respondent's legal practitioners.

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Document 7 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/ESTATE WAKAPILA v MATONGO & ORS 2008 (2) ZLR 43 (H)

ESTATE WAKAPILA v MATONGO & ORS 2008 (2) ZLR 43 (H)

2008 (2) ZLR p43

Citation	2008 (2) ZLR 43 (H)
Case No	Judgment No. HH-71-08
Court	High Court, Harare
Judge	Kudya J

Heard	4 July 2008
Judgment	31 July 2008
Counsel	<i>D Matimba</i> , for the applicant <i>H Mucheche</i> , for the first respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Succession – will – validity – disposition affecting property rights of surviving spouse – which rights are affected – only those existing at time will is executed may not be eroded

Headnote

▫ The provisions of s 5(3)(a) of the Wills Act [*Chapter 6:06*] prevent a testator from eroding the property rights vested in his spouse by law in either his or their joint estate. These rights are those that the spouse has at the time the will is executed, as opposed to future or contingent rights that arise on the death of the testator. This is because the variation or prejudice does ^E not arise on the demise of the testator but at the time the will is written, notwithstanding that the will only commences to operate on his demise.

It is fallacious to argue that at the time of death the surviving spouse is vested with rights in a deceased estate in which a testamentary disposition has been made. The first reason is that the divested property, subject ^F to acceptance by the beneficiary, no longer belongs to the testator. The second reason is that to give such a meaning to the provision in issue would result in a radical alteration of the common law power of a spouse to dispose of his property to whomsoever he wishes. If the lawmaker intended such a radical departure from the common law, it would have said so in clear language. It would be absurd to allow the spouse to dispose of his property during his or her lifetime but take away that power from him to ^G dispose of it by will. The third reason is that a wife married under customary law can only inherit from her husband's estate if he dies intestate. Where he has disposed of his estate by a will, she does not inherit and thus has no rights in any property belonging to his estate.

2008 (2) ZLR p44

Kudya J

Cases referred to ^A

Cattle Breeders Farm (Pvt) Ltd v Feldman (2) 1973 (2) RLR 261 (A)

Muganga v Sapukwanya 1996 (1) ZLR 217 (S)

Muswere v Makanza HH-16-05

Muzanenhamo & Anor v Katanga & Ors 1991 (1) ZLR 182 (S) ^B

Legislation considered

Wills Act [*Chapter 6:06*], s 5(3)(a) & 8(5)

Case information

D Matimba, for the applicant

H Mucheche, for the first respondent ^C

Judgment

KUDYA J: The late Pension Wakapila died on 28 May 1999. He was survived *inter alios* by his wife Bridget to whom he was married in terms of the Customary Marriages Act [Chapter 5:07] on 5 August 1973. Bridget died on 6 September 2002. Their union was not blessed with children. Before they ^b contracted the union, Pension had children by another woman, while Bridget also had a son by another man. This son, Remigio Tawanda Chagonda, was appointed the executor dative of Bridget's estate by the Assistant Master at Harare magistrates court on 6 March 2007, while the other woman in Pension's life was appointed the executrix dative by the Master on 1 October 1999. She was appointed in the face of a will executed by Pension on 24 December ^e 1998 in which he appointed Tafadzwa Wakapila as executor testamentary. The will was deposited with the Master on 11 January 1999.

Again, on 30 November 1999, the Assistant Master, sitting at Harare, appointed Bridget the executrix dative of the estate of the late Pension.

The untidy situation that prevailed was that two executrices were appointed ^f for the same estate at different fora and dates by the Master in the face of an existing will which had already been deposited with the Master. The provisions of ss 23, 24 and 25 of the Administration of Estates Act give preference to the appointment as executor by the Master of the person nominated in the testator's will. It is only where the nominated person has predeceased the testator, declined the appointment or has the appointment challenged that ^g the Master is precluded from issuing him with letters of administration. It is not clear from the Master's report or the pleadings why the testamentary executor was not issued with letters of administration and why the Master appointed an executrix dative on 1 October when the will had been lodged with him on 11 January 1999. The Master's appointment of 1 October 1999 was not impugned by the testamentary executor or any interested party. In ^h

2008 (2) ZLR p45

Kudya J

^a my view, it remains valid until set aside by a competent court. While the appointment of Bridget was invalid, that of the first respondent was valid as it was the first in time. The first respondent was properly sued as the appointed executor.

The present application was launched by the executor in Bridget Wakapila's estate against the executrix in Pension Wakapila's estate for the control of ^b an immovable property commonly known as stand 22 Muridzamhara Road, Mufakose, Harare.

The applicant contends that, though the rights in the immovable property were registered in Pension's name, they were as a matter of law jointly held in equal and undivided shares by both Pension and Bridget. He bases his ^c contention on the fact that Pension acquired those rights through his marriage to Bridget. He further contends that the purported disposal of the jointly held rights in the property by will by Pension ran foul of the provisions of s 5(3)(a) of the Wills Act [Chapter 6:06]. He opines that the violation invalidates the will. He further averred that the invalidation of the will would result in the devolution of the house to Bridget and thus to her estate, and perhaps to ^d him as her only surviving beneficiary.

The first respondent opposed the application. The first basis of opposition was that the cession in the property was held by Pension and not by both Pension and Bridget. The second was that the registration of Pension's estate by Bridget was void because it came after the registration of the same estate ^e by the first respondent. She further averred that the will was valid and used its validity as a sword to attack the registration by Bridget of the estate in the magistrates' court. In her view, which was supported by the Master in his report of 30 July 2007, all testamentary estates by law are registered with the Master and not with the Assistant Master.

In her heads of argument, she raised the preliminary point that the applicant ^f had no *locus standi* to bring the application as he was neither the wife of Pension nor a beneficiary in his estate. Mr *Mucheche*, for first respondent, conceded that this point was misplaced as the applicant is the executor of Bridget's estate. The son is not the applicant. He is not suing in his personal capacity. The preliminary point therefore falls away.

^g I proceed to deal with the contentions advanced by the applicant, *seriatim*.

Whether Bridget was a joint holder of rights with Pension in the immovable property

The letter of 5 February 2007 from the second respondent, on which the applicant relies for the averment that his mother was a joint holder of rights, ^H does not disclose that she was a joint holder of rights in the property in

2008 (2) ZLR p46

Kudya J

question. It simply states that “the deceased Pension Wakapila was married ^A to Bridget Wakapila on African Custom Certificate Number Z74/73 Zvimba on 05 August 1973.” It does not establish, as was averred by the applicant in his founding affidavit, that she was a joint registered holder of rights in the property in question.

The rights, title and interest in the immovable property in question were ^B acquired by Pension from the City of Harare. He registered six children, that is, Chanceless, Berita, Godfrey, Lazarus, Jane and Tafadzwa and his wife Bridget with the City of Harare as his dependents. The registration of the wife and children did not confer any transferable rights, interest and title in the immovable property to them. Ownership in the property remained vested in the City of Harare. Pension was a cessionary while the City of Harare ^C was the cedant and owner of the rights, interest and title in the property. A wife who is not registered as a cessionary in her own right or jointly with her husband does not become a holder of any rights in the property such as the present merely because she is the wife.

The argument advanced by the applicant implicitly accepts that the rights ^D were registered in Pension’s name only at the time of his death. At the hearing Mr *Matimba* conceded that, as the rights in the property were registered in Pension’s name, he was the sole holder of those rights.

I hold that she was not in fact and in law a joint holder of rights in the immovable property. See *Muswere v Makanza* HH-16-05, *Cattle Breeders E Farm (Pvt) Ltd v Veldman (2)* 1973 (2) RLR 261 (A), *Muzanenhama & Anor v Katanga & Ors* 1991 (1) ZLR 182 (S) and *Muganga v Sakupwanyanya* 1996 (1) ZLR 217 (S).

Whether the will was invalidated by s 5(3)(a) of the Wills Act

Section 5(3)(a) of the Wills Act, on which the applicant relied, reads as follows: ^F

“(3) No provision, disposition or direction made by a testator in his will shall operate so as to vary or prejudice the rights of —

(a) any person to whom the deceased was married to a share in the deceased’s estate or in the spouses’ joint estate in terms of any law governing the property rights of married persons; or ^G

(b) ...

(c) ...

except in so far as such variation or prejudice is brought about with the consent of the person or creditor concerned or through the exercise by him of a right of election.

The applicant submitted that the intention of the legislature in enacting this ^H

2008 (2) ZLR p47

Kudya J

A provision was to prevent the erosion of the rights of the surviving spouse by the deceased through a will.

The first respondent contended that the testator exercised his testamentary freedom to dispose of his rights to whomsoever he wished without any legal or factual disabilities. She therefore submitted that the validity of the will could not be impugned. Mr *Mucheche* further contended that the provision ^B relied on by the applicant protects only those rights that the surviving spouse possesses at the time that the will is executed. He gave two examples of such rights. The first concerns an immovable property that is registered in the surviving spouse’s name, wherein the parties are married out of community of property, while the second involves jointly held property for those married ^C in community of property. In these two instances, the deceased spouse could not bequeath in a will the surviving spouse’s rights. Mr *Matimba* did not make any submissions to the contrary. He in fact abandoned the initial submission in his heads that Bridget held joint rights in the immovable property with her late husband.

The provisions of s 5(3)(a) of the Wills Act prevent the testator from eroding ^D the property rights vested in his spouse by law in either his or their joint estate. These rights, in my view, are those

that the spouse has at the time the will is executed as opposed to future or contingent rights that arise on the death of the testator. After all, the variation or prejudice does not arise on the demise of the testator but at the time the will is written, notwithstanding ^ε that the will only commences to operate on his demise.

The argument advanced by Mr *Matimba* that the surviving spouse is vested with rights in a deceased estate, in which a testamentary disposition has been made, at the time of death is fallacious for three reasons. The first is that the divested property, subject to acceptance by the beneficiary, no longer belongs to the testator. The second is that giving such a meaning to the provision ^ϕ in issue would result in a radical alteration of the common law, power of a spouse to dispose of his or her property to whomsoever he or she wishes. If the lawmaker intended such a radical departure from the common law it would have said so in clear language. It would be absurd to allow the spouse to dispose of his or her property during his or her lifetime but take away that power from him or her to dispose of it by will. The third is that a wife ^ϑ married under customary law can only inherit from her husband's estate if he dies intestate. Where he has disposed of his estate by a will, she does not inherit and thus has no rights in any property belonging to his estate.

In casu, at the time the testator wrote the will, Bridget did not have any legal rights in the immovable property. He did not therefore deprive her of any ^η rights when he bequeathed them to another in a will. At his death, Pension

2008 (2) ZLR p48

Kudya J

no longer held the rights in the immovable property for they were vested in ^α another. Disposal by will is an exercise of control over the property which is similar to disposal by sale. Both have the same effect of divesting dominion over the property from the testator. They are not prohibited by any legal regime that governs matrimonial property rights.

I am not persuaded that the divesture of the immovable property from the ^β deceased's dominion contravened s 5(3)(a) of the Wills Act.

At the hearing Mr *Matimba* attacked the validity of the will on the basis that it did not comply with the formalities set out in s 8(1)(b) of the Wills Act, which mandates that every page of the will be signed by the testator and his attesting witnesses. It reads as follows:

"8 Formalities for making wills, other than soldiers wills, wills ^γ made during epidemics and oral wills

(1) Subject to subsections (3) and (5), a will shall not be valid unless—

(a) ...

(b) the testator, or some other person in his presence and at his direction, signs each page of the will as closely as may be to the end of the writing ^δ on the page concerned ..."

The will under consideration has three pages. The first two pages deal with the appointment of the executor testamentary, the beneficiaries and the bequests. They are both signed by the testator and two witnesses as closely as may be to the end of the writing on each page. ^ε

The third page is set out as follows:

This is the Last Will and Testament

of (signature of testator is appended)

of (address of testator is provided)

Dated 24/12/98

Executor (nothing is written) ^ϕ

Mr *Mucheche* contended that, notwithstanding the failure by the testator and his two witnesses to append their signatures close to the last writing on that page, the will was valid because the Master had accepted it as such.

I am not persuaded by Mr *Matimba*'s argument that the failure to append signatures on p 3 would invalidate the will. This page does not deal with the ^ϑ substantive contents of the will but seems to me to identify whose will it is. In any event the information on page three is fully covered on pp 1 and 2, both of which were correctly executed.

It is also noteworthy that the formalities that are set out in subs (1) are made subject to subs (5) of s 8 of the Wills Act. The latter reads:

“(5) Where the Master is satisfied that a document or an amendment of a will

2008 (2) ZLR p49

Kudya J

A document which was drafted or executed by a person who has since died was intended to be his will or an amendment of his will, the Master may accept that document, or that document as amended, as a will for the purposes of the Administration of Estates Act [Chapter 6:01] even though it does not comply with all the formalities for –

(a) the execution of wills referred to in subsection (1) or (2);”

¶ In his report the Master indicated that he accepted the validity of the will. It seems to me that he exercised his discretion properly. The procedure for setting aside a will is provided for in s 15A of the Wills Act. *In casu*, it was not followed. The validity of the will stands.

The applicant has therefore failed to impugn the validity of the will. It follows that as the deceased did not die either wholly or partially intestate, c the provisions of s 3A of the Deceased Estates Succession Act [Chapter 6:02] that were cited by the applicant do not apply in the present case.

Accordingly, the application is dismissed with costs.

Matimba & Muchengeti, applicant’s legal practitioners

¶ *Donsa-Nkomo Legal Practice*, first respondent’s legal practitioners

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Document 8 of 49

Source:

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KAUNGWA v NGUNI 2008 (2) ZLR 50 (E)

2008 (2) ZLR p50

Citation	2008 (2) ZLR 50 (E)
Case No	Judgment No. HH-72-08
Court	Electoral Court, Harare
Judge	Uchena J
Heard	30 June 2008
Judgment	30 July 2008
Counsel	<i>L Uriri</i> , for the petitioner <i>G Mandizha</i> , for the respondent
Case Type	Election petition
Annotations	No case annotations to date

Flynote

Headnote

Irrespective of the attitude of the parties, jurisdiction is conferred by statute ^D and not by the parties. The authority to dispense with statutory time limits is not a wide discretion based on expediency, but a circumscribed discretion which is fully subject to judicial review. A reading of s 169 of the Electoral Act [*Chapter 2:13*] clearly establishes that it gives the petitioner a right and privilege to challenge the election of the respondent, subject to compliance with the time limit stipulated therein. If the ^E legislature's intention was to authorise the courts to grant extension of time limits, it would have made provision for such extension in the section. The fact that no authority was granted to extend the time limits means the legislature's intention was that failure to comply should lead to nullity. If it can be shown that non-compliance with the rule has led ^F to real or potential prejudice, there is no dispensing power and the rule must be observed. To determine whether non-compliance with formal or procedural requirements has resulted or may result in prejudice, the content and objectives of the rule must be analysed. If the administrative organ is mistaken about the possibility of prejudice and grants dispensation when such danger in fact exists, the court may review the defective ^G exercise of the organ's discretionary power and declare the granting of the dispensation invalid. In this regard it is of importance to mention that the obligatory nature of formal and procedural requirements often arises in electoral issues. Although the courts are inclined to overlook minor formal defects, the general approach is nevertheless to regard the rules relating to the registration of voters, nomination, the drawing up ^H

2008 (2) ZLR p51

Uchena J

^A of voters rolls and so on as peremptory. Such an approach is perfectly correct, elections are the foundation upon which a democratic system is built and although irregularities in elections cannot always be judged by the criterion of individual prejudice, the prejudice consists in the fact that the legitimacy of the system of government is undermined. The weight of authority in this country and elsewhere is to the effect that the time ^B requirements are peremptory and cannot be dispensed with.

Cases cited

Absalom v Gillet [1995] 2 WLR 128 (DC)

Ahmed v Kennedy & Anor; Ullah & Ors v Pagel & Anor [2002] 4 All ^C ER 764 (QBD)

Ahmed v Kennedy; Ullah & Ors v Pagel & Anor [2003] 2 All ER 440 (CA)

Chabvamuperu & Ors v Jacob & Ors 2008 (1) ZLR 354 (H)

Chitungo v Munyoro & Anor 1990 (1) ZLR 52 (H)

Ghani v Saidi High Court of Malaysia (1981)

Kutama v Town Clerk for the Municipality of Kwekwe 1993 (2) ZLR 137 (S)

^D *MDC & Anor v Mudede NO & Ors* 2000 (2) ZLR 152 (S)

Mwonzora v Kadzima EP-19-05

Muzenda v Kombayi 2008 (1) ZLR 366 (H)

Nair v Teik [1967] 3 All ER 34 (PC)

Nanayakkara v Kiriella & Ors Ceylon Election Appeal 6/64

^E *Pio v Smith* 1986 (2) ZLR 120 (S)

Quinnell v Minister of Lands & Ors 2004 (2) ZLR 293 (S)

Sterling Products International Ltd v Zulu 1988 (2) ZLR 293 (S)

Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd 1998 (2) ZLR 249 (S)

Williams v Mayor of Tenby (1879) 5 CP 135

Legislation considered ^F

Electoral Act [*Chapter 2:13*], ss 168(4) & 169

Case information

L Uriri, for the petitioner

G Mandizha, for the respondent

Judgment

^G **UCHENA J:** The petitioner contested for and lost the Mhondoro-Mubaira constituency. He represented the Movement for Democratic Change (Tsvangirai faction), in the 29 March 2008 harmonised elections. He contested against the respondent who represented ZANU (PF). The respondent won ^H the election. The petitioner filed a petition challenging the respondent's

2008 (2) ZLR p52

Uchena J

election. He presented it on 14 April 2008, but served it at the respondent's ^A party headquarters on 9 May 2008.

The respondent opposes the petition and raised points *in limine* on the service of the petition. In particular, he alleges that the petition was served after the expiry of the 10 day period stipulated in s 169 of the Electoral Act [*Chapter 2:13*] hereinafter called the Electoral Act. He further alleged that ^B service at his party's headquarters is not valid service in terms of s 169 of the Electoral Act.

Section 169 of the Electoral Act provides as follows:

"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 ^C 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."

An interpretation of s 169 establishes the following:

1. The petitioner is required to give to the respondent notice that he has presented to the Electoral Court a petition challenging his election as a ^D Member of Parliament.
2. The notice should be accompanied by a copy of the petition and the names and addresses of the proposed sureties.
3. The notice should be served on the respondent within ten days after the presentation of the petition. ^E
4. It should be served on the respondent either personally or by leaving the same at his or her usual or last known dwelling or place of business.

Mr *Uriri* for the petitioner submitted that the petitioner's failure to serve a notice of the petition and the petition on the respondent within 10 days of its presentation is not fatal as this court has authority to dispense with that ^F requirement. He in his submissions agreed with the decision of Makarau JP in the case of *Chabvamuperu & G Ors v Jacob & Ors* 2008 (1) ZLR 354 (H), but submitted that that decision is not correct where it says this court has no authority to dispense with the 10 day period. The issue of failure to comply with the provisions of s 169 of the Electoral Act and its predecessors has been the subject of this court's decisions in the following cases, *Chabvamuperu & Ors v Jacob & Ors supra*, *Muzenda v Kombayi* 2008 (1) ZLR 366 (H), *Pio v Smith* 1986 (2) ZLR 120 (S), *Chitungo v Munyoro & Anor* 1990 (1) ZLR 52, and *Mwonzora v Kadzima* EP19/05. In all these cases, it was held that failure to serve the respondent within the stipulated time was fatal and leads to the nullity of the petition. The same position has been taken by courts in other jurisdictions in cases like *Ahmed v Kennedy & Anor*; *Ullah & Ors v H*

2008 (2) ZLR p53

Uchena J

^A *Pagel & Anor* [2002] 4 All ER 764 (QBD), *Ahmed v Kennedy*; *Ullah & Ors v Pagel & Anor* [2003] 2 All ER 440 (CA) at 451d-e, *Nair v Teik* [1967] 3 All ER 34 (PC), *Absolom v Gillet* [1995] 2 WLR 128 (Divisional Court). and *Williams v Mayor of Tenby* (1879) 5 CP 135, while interpreting provisions similar to s 169 of the Electoral Act.

^B A similar provision was interpreted by the High Court of Malaysia in the case of *Sabdin Ghani v Mahomed Saidi*, where Seah J said:

“the petitioner’s failure to observe the time for service therein prescribed rendered the election petition a nullity.”

The same reasoning was followed by Colin-Thome JA in the case of *Nanayakkara v Kiriella (Deceased) & Ors*, Supreme Court of Ceylon, ^C Election Appeal No. 6/84, where he said:

“I hold that the governing words ‘within 10 days of the presentation of the petition’ in r 15(1) apply to all and every mode of service set out in r 15. It is mandatory for all modes of service. The petitioner is given a choice of several modes of service so as to ensure service within a specified time limit. Under r 15(1)(b) where the notices are tendered to the Registrar for service, both the delivery ^D and the service must be effected within 10 days. I hold that the failure to serve notices on first, third and eighth respondents, within the mandatory 10 days is a fatal defect.”

In view of the catena of authorities agreeing with Makarau JP’s decision in the *Chabvamuperu* case *supra*, I am not going to determine the issues determined in that case and the many other cases referred to above. I will ^E concentrate on the reason why Mr *Uriri* says that case was wrongly decided. Mr *Uriri* argued that this court has dispensing powers to extend the 10 day period or condone failure to comply with it. He relied on Marinus Wiecher *Administrative Law* at p 199 where the learned author says:

“The question that now arises is not whether the formal or procedural provision ^F in question is peremptory or directory– because it must simply be accepted that the rule, being a rule of positive law, is indeed peremptory – but whether the administrative organ that failed to comply with the rule was authorised not to comply with it or to condone the subject’s non-compliance with it. The question is simply whether the organ has the power to dispense with the rule in question. In order to answer the question of the possible existence of a dispensing power, the rule itself must be examined.”

^G Mr *Uriri* submitted that the power to grant a dispensation need not be expressly granted, but can be implied by the statute itself. He again referred the court to Wiecher *op cit* at p 199 where the learned author says:

“The authority to permit dispensation with a formal or procedural statutory rule in a particular case, is an implied discretionary power conferred on the ^H administrative organ by the statute. Like all discretionary powers, the power to

2008 (2) ZLR p54

Uchena J

dispense with formal and procedural requirements is a legal power. This means ^A that the law lays down certain conditions and requirements for its exercise.”

He stopped the quotation just before the determinant part of that paragraph, which states:

“It is not a wide discretion based on expediency, but a circumscribed discretion which is fully subject to judicial review.” ^B

Mr *Uriri* further submitted that the petitioner’s failure to serve the notice and the petition was a result of this court’s Registrar’s failure to fix security for costs timeously. It is common cause that the Registrar fixed security for costs on 23 April 2008. Mr *Uriri* therefore contended that the petitioner could not have presented his petition before the fixing of security for costs, and that service on 9 May 2008 was in substantial compliance with section 169 of ^C the Electoral Act. He further contended that the petitioner became aware of the fixed security for costs on 2 May 2008. In further submissions, he said there will be no prejudice if the court dispenses with the 10 day requirement.

Mr *Mandizha* for the respondent agreed with Mr *Uriri*’s submissions. I am therefore compelled to closely examine ^S 169 Of the Electoral Act, to ^D determine whether or not I have the dispensing power both parties say I have. The issue before me is a jurisdictional factor. I am therefore, at liberty to disagree with counsel for both parties as jurisdiction is conferred by statute and not by the parties.

In the petitioner’s heads of argument prepared by Mr *Chibwana* and adhered ^E to and added to by Mr *Uriri*, it is stated that security for costs were paid into court and that in view of that fact there was no need for names and addresses of sureties to accompany the notice of the presentation of the petition or the petition itself. That is a correct exposition of the law. If the petitioner knew that he was going to pay security in cash to the Registrar as he did, there was no need for him to await the fixing of security before serving the ^F respondent with the notice of presentation of a petition and the

petition. In such circumstances, the need to provide the names and addresses of sureties falls away, there was therefore no need for the notice of the presentation of the petition to be accompanied by the names and addresses of sureties. Section 168 (4), makes the use of sureties for the provision of security optional. It provides as follows: ^g

“Security given in terms of subsection (3) shall be by recognizance entered into by the petitioner and sureties not exceeding four in number in a form approved by the Registrar of the Electoral Court, which recognizance shall be signed in the presence of the Registrar of the Electoral Court or a magistrate” (my own emphasis).

There was therefore, no reason for the petitioner to await the fixing of security ^h

2008 (2) ZLR p55

Uchena J

A for costs before serving the respondent. He should have served the notice of presentation of the petition and the petition within 10 days and advised the respondent that he was going to deposit security for costs in cash with the Registrar as soon as it was fixed, and serve proof on the respondent. That, in my view, would have been substantial compliance with the provisions of s 169 of the Electoral Act, as service of the notice and security for costs ^b are not intrinsically linked. In *Chabvamuperu supra*, Makarau JP, dealing with this issue said:

“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 ^c 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 effected in the absence of the other.”

I must now consider whether or not I have authority to dispense with the ^d requirement that notice of the presentation of the petition should be served on the respondent within 10 days after the presentation of the petition. I have already noted that the authority to dispense “is not a wide discretion based on expediency, but a circumscribed discretion which is fully subject to judicial review”. A close examination of Wiecher’s book on the court or ^e organ’s dispensing power is necessary.

At p 197, commenting on the effect of statutes which confer privileges, rights or exemptions subject to certain formalities, he says:

“where the statute confers a privilege, right or exemption, subject to certain formalities, that right, privilege or exemption cannot be validly obtained unless the formalities have been complied with; the presence of time clauses, where ^f the courts are not authorized to grant extension, is an indication in favour of nullity.”

A reading of s 169 clearly establishes that it gives the petitioner a right and privilege to challenge the election of the respondent subject to compliance with the time limit stipulated therein. If the legislature’s intention was to authorise the courts to grant extension of time limits, it would have made ^g provision for such extension in s 169. The fact that no authority to extend the time limits was granted means the legislature’s intention was that failure to comply should lead to nullity.

The learned author at p 199 went on to say:

“The question is simply whether the organ has the power to dispense with the ^h rule in question. In order to answer the question of the possible existence of a

2008 (2) ZLR p56

Uchena J

dispensing power, the rule itself must be examined. If the rule is peremptory, ^a that is if absolute compliance is required, there can be no dispensing power, but if the rule is directory, there will be such a power.”

In this case, the wording of s 169 is peremptory in the sense that the language used is not directory. It requires that the petition be served within 10 days of the presentation of the petition. I am aware that the force of the command ^b is not the criterion, but the intention of the Legislature. See *Quinnell v Minister of Lands & Ors* 2004 (2) ZLR 28 (S); *MDC & Anor v Mudede & NO & Anor* 2000 (2) ZLR 152 (S); *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), *Pio v Smith* 1986 (3) SA 145 (ZH) and *Chabvamuperu v Jacob & Ors supra*. In this case, the Legislature, from a reading of the part within which the section is found, had in mind the timeous resolution of election petitions. In terms of s 182 a petition must be determined within six months of its presentation. It must also be born in mind that a pending election petition undermines the authority of the legislature and the executive, as holders of office in the challenged constituencies will be participating in governing the nation while their election will be under challenge. Commenting on the court's dispensing powers and prejudice, the learned author at pp 200-201 said:

"If it can be shown that non-compliance with the rule has led to real or potential prejudice, there is no dispensing power and the rule must be observed. To determine whether non-compliance with formal or procedural requirements has resulted or may result in prejudice, the content and objectives of the rule must be analysed. If the administrative organ is mistaken about the possibility of prejudice and grants dispensation when such danger in fact exists, the court may review the defective exercise of the organ's discretionary power and declare the granting of the dispensation invalid. *In this regard it is of importance to mention that the obligatory nature of formal and procedural requirements often arises in electoral issues. Although the courts are inclined to overlook minor formal defects, the general approach is nevertheless to regard the rules relating to the registration of voters, nomination, the drawing up of voters rolls and so on as peremptory. Such an approach is perfectly correct, elections are the foundation upon which a democratic system is built and although irregularities in elections cannot always be judged by the criterion of individual prejudice, the prejudice consists in the fact that the legitimacy of the system of government is undermined*" (my own emphasis).

In my view, a challenge to the propriety of the election of a member of parliament falls under the class of electoral cases which should be regarded as peremptory. Such a challenge is more serious than a challenge to the nomination of a candidate, as the former challenges the election of a member of Parliament who is already, or is about to start exercising the authority

2008 (2) ZLR p57

Uchena J

A granted him by the challenged election. The weight of older authorities such as *Chitungo v Munyoro* and *Pio v Smith supra* and the more recent cases already referred to in this judgment are confirmation of the correct approach followed by the courts in this country. As already indicated this is the approach followed by courts in other jurisdictions whose judgments have been referred to above.

B I am therefore, satisfied that I do not have authority to dispense with the requirement that the petitioner should serve notice of the presentation of the petition and the petition within 10 days of its presentation. The petitioner's failure to serve the petition within 10 days of its presentation is therefore fatal and results in the petition being a nullity. It must as a result, be dismissed. The petitioner has not applied for condonation, therefore, even C if I had authority to dispense with the provisions of s 169 of the Electoral Act such authority can not be exercised in the absence of an application for condonation. In *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S) at 251C-D, Sandura JA, commenting on the need to first apply for condonation, said:

D " If he does not make the application within that period but wants to make it after the period has expired, he must first of all make an application for the condonation of the late filing of the application."

This, in my view, applies to the petitioner's failure to apply for condonation of his failure to serve notice of the presentation of the petition on the respondent within the time stipulated in s 169 of the Electoral Act.

E The petitioner's petition is therefore dismissed with costs.

Mbidzo, Muchadehama & Makoni, petitioner's legal practitioners

Mandizha & Co, respondent's legal practitioners

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Document 9 of 49**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/S v
CHERA & ANOR 2008 (2) ZLR 58 (H)

S v CHERA & ANOR 2008 (2) ZLR 58 (H)**2008 (2) ZLR p58**

Citation	2008 (2) ZLR 58 (H)
Case No	Judgment No. HB-84-08
Court	High Court, Bulawayo
Judge	Ndou J
Heard	31 July 2008
Judgment	31 July 2008
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – general principles – sentence – multiple counts – unlawful entry and theft – correct approach to sentence – imposition of globular sentence or sentence for each count taken individually

Criminal procedure (sentence) – general principles – theories of purpose of punishment – reformation, rather than retribution, the preferable approach – multiple counts – sentence for each count treated individually – need to ensure sentence on each count as well as the overall sentence is not excessive – need for magistrates to have regard to sentences imposed or recommended by the High Court in similar cases

Criminal procedure (sentence) – offences under Criminal Code – crimes of dishonesty unaccompanied by violence – outer limits of sentences for such offences

Headnote

The position is now fairly well settled that in cases involving multiple counts, the correct approach to sentence is either to take all counts as one for the purpose of sentence and then impose a globular sentence which the court consider appropriate in the circumstances, or alternatively to determine an appropriate sentence for each count taken singly so that the seriousness of an offence is properly reflected. The court would then determine a realistic total which it considers appropriate in circumstances and, where necessary, the severity of the aggregate sentence on all counts taken together may be palliated by ordering some counts to run concurrently with others (*dicta per* Garwe J in *s v Chirwa* HH-79-94 followed).

The two accused persons, both youthful offenders, had been convicted of multiple counts of unlawful entry into premises and theft. For the purpose of sentence, the provincial magistrate had dealt with the offences separately. Each accused had been sentenced, in total, to 56 years, 10 years of which had been suspended on appropriate conditions. On

2008 (2) ZLR p59

Ndou J

A automatic review by the High Court, it was:

Held, that where multiple counts are involved, it is necessary where the counts are not treated all together for sentence to ensure that the sentences on each count as well as the overall sentence is not excessive.

Held, further, that the most popular theory today is that the proper aim of criminal procedure is to reform the criminal so that he may become ^a adjusted to the social order. A mixture of sentimental and utilitarian motives gives this view its great vogue. With the spread of humane feelings and the waning of faith in the old concept of the necessity for inflicting pain in the treatment of children and those suffering from mental disease, there has come revulsion at the hard-heartedness of the ^c old retributive theory. The growing belief in education and in the healing powers of medicine encourages people to suppose that the delinquent may be re-educated to become a useful member of society. It is better to save such youthful offenders for a life of usefulness rather than punish them by lengthy imprisonment, which generally makes them worse after they leave than before they entered. An enlightened judicial officer will ^d recognise the futility of severely punishing unavoidable retrogression in human dignity. While it is accepted that one of the functions of the criminal law is to give expression to the collective feeling of revulsion towards offences committed by the accused persons, such disapproval need not be cruel or take extreme forms. Magistrates need to be guided by the principle of consistency in sentencing, and therefore, regard must ^e be had to sentences imposed or recommended in similar cases by the superior courts.

Held, further, *in casu*, the sentences both taken individually or collectively were manifestly excessive. An effective period of imprisonment of 46 years is beyond the outer limits which our courts would impose. ^f Indeed, a term of imprisonment, of 20 years for crimes of dishonesty, unaccompanied by violence would be approaching the outer limit of what the High Court would impose for such crimes.

Cases cited

S v Chirwa HH-79-94

^g *S v Gerber* [2006] 4 All SA 423 (SCA)

S v Hassim 1976 (2) PH H58 (N)

S v Nyathi HB-60-03

S v Shadaya 1977 (2) RLR 22 (A); 1977 (4) SA 108 (RA)

S v Sherman S-117-84

^h *S v Sifuya* HH-77-02

2008 (2) ZLR p60

Ndou J

S v van der Merwe 1974 (4) SA 523 (N) ^a

S v Young 1977 (1) SA 602 (A)

Judgment

NDOU J: The accused persons were convicted by a Gweru provincial magistrate of ten (10) counts of unlawful entry into premises as defined in s 131(1) of the Criminal Law (Codification and Reform) Act [Chapter 9:23] ^b and a further ten (10) counts of theft as defined in s 113(1) of the same Act. Each accused person was sentenced as follows:

"Counts 1 and 2 as one for the purpose of sentence	- 4 years' imprisonment
Counts 3 and 4 as one	- 4 years' imprisonment
Counts 5 and 6 as one	- 5 years' imprisonment
Counts 7 and 8 as one	- 3 years' imprisonment ^c

Counts 9 and 10 as one	- 4 years' imprisonment
Counts 11 and 12 as one	- 5 years' imprisonment
Counts 13 and 14 as one	- 5 years' imprisonment
Counts 15 and 16 as one	- 4 years' imprisonment
Counts 17 and 18 as one	- 5 years' imprisonment
Counts 19 and 20 as one	- 1 year imprisonment

Total 56 years' imprisonment of which 10 years is suspended for 5 years on condition accused does not within that period commit any offence of which dishonesty is an element and upon conviction accused is sentenced to imprisonment without the option of a fine. Effective 46 years' imprisonment."

The salient facts of the case are the following. The accused persons are youthful offenders aged 18 and 19 years respectively. The first accused, ^E although the younger of the two, has relevant previous convictions of dishonesty. In February 2003, he was convicted of housebreaking with intent to steal and theft and was sentenced to a caution and discharged. In March 2003 he was convicted of theft of a cycle and sentenced to corporal punishment. In April 2003 he was convicted of housebreaking with intent to steal and theft and he ^F was given a prison sentence. This type of recidivism on his part is disturbing and aggravating. The second accused is a first offender. The accused persons committed these twenty offences in Gweru District suburbs. In counts 1 and 2 they gained unlawful entry and stole property valued at \$48 405 000 of which \$6 000 000 worth of property was recovered. In counts 3 and 4 they unlawfully gained entry and stole property valued at \$850 000 and ^G property recovered was worth \$500 000. In counts 7 and 8 they unlawfully gained entry into the complainant's premises and stole property valued at \$1 000 000. Property valued at \$500 000 was recovered. In counts 9 and 10 they broke into the complainant's premises. They stole property valued at \$870 000 and nothing was recovered. In counts 11 and 12 they broke into the complainant's premises and stole goods valued at \$300 000 all of which was ^H

2008 (2) ZLR p61

Ndou J

^A recovered. In counts 13 and 14 they broke into the complainant's premises and stole property valued at \$1,5million. Property valued at \$1,4million was recovered. In counts 15 and 16 they broke into the complainant's premises and stole property valued at \$21 415 000. Property worth \$10 000 000 was ^B recovered. In counts 17 and 18 they broke into complainant's premises and stole property valued at \$3 000 000. property valued at \$700 000 was recovered. In counts 19 and 20 they broke into the complainant's premises and stole property valued at \$500 000 and half of that was recovered. The total value stolen in all the counts is \$81 680 000 and property valued at \$23 310 000 was recovered. These values are as per the period February to April 2007. These offences were committed in residential suburbs and most ^C of stolen property comprise of household property. With the first accused's previous convictions, it was wrong to regard his moral blameworthiness to be similar to that of the second accused. There was a need for the first accused to be dealt with more severely than the second accused. It is trite that in cases of co-offenders, uniformity in sentence can obviously be attained if their moral guilt is equal: *s v Shadaya* 1997 (2) RLR 22 (A), 1977 (4) SA 108 (RA). ^D The moral guilt of the accused persons is not equal *in casu*. Further the individual sentences imposed in each count are excessive, and, their cumulative effect is so excessive as to call for interference: *s v Hassim* 1976 (2) PH H58 (N) and *s v Nyathi* HB-60-03. Where multiple counts are closely connected or similar in point of time, nature, seriousness or otherwise counted as one, it is a useful way of ensuring that the punishment imposed ^E is not unnecessarily duplicated or its cumulative effect not too harsh on the accused. Nevertheless the practice is undesirable and should only be adopted by lower courts in exceptional cases: *s v Young* 1977 (1) SA 602 (A); *s v Van der Merwe* 1974 (4) SA 523 (N). In other words magistrates should adopt this approach sparingly and only in exceptional instances in the interests of ^F the accused. Once this approach is, however, adopted, then the principles set out in *s v Chirwa* HH-79-

94 and *s v Sifuya* HH-77-02 must be followed. In *s v Chirwa, supra*, Garwe J (as he then was) stated at p 3 of the judgment:

"The position is now fairly well settled that in cases involving multiple counts, the correct approach to sentence is either to take all counts as one for the purposes of sentence and then impose a globular sentence which court considers appropriate ^g in the circumstances, or, alternatively to determine an appropriate sentence for each count taken singly so that the seriousness of offence is properly reflected. The court would then determine a realistic total which is considers appropriate in the circumstances and where necessary the severity of the aggregate sentence on all the counts taken together may be palliated by ordering some counts to run concurrently with others."

^h *In casu*, the trial magistrate erred by failing to palliate the aggregate sentence

2008 (2) ZLR p62

Ndou J

in order to come up with a realistic total. The sentence of 56 years, with ^a effective of 46 years' imprisonment, is manifestly excessive and, is in any event, in excess of the outer limit our courts would ordinarily impose: *s v Sherman* S-117-84. In that case McNally JA stated:

"How does one begin to measure the outer limits of a sentence in a case of this magnitude? One may say that even murder with actual intent often attracts a ^b sentence of 16 – 18 years. One may ask – what sentence would be appropriate where a quarter of a million dollars is stolen and nothing is recovered? What sentence would be appropriate where two or six million dollars is involved? These considerations and suggestions suggest to me that a twenty year sentence for a crime of dishonesty unaccompanied by violence must be approaching the out limit of what any court in this jurisdiction would impose for such crimes" – *s v Sawyer* HH-231-99 and *s v Sibiya* 1973 (2) SA 51 (A). ^c

In *s v Sifuya, supra*, Guvava J rightly stated:

"In *s v Chikanga* S-123-93 the Supreme Court commented that it knew of no reported in South or Zimbabwe, whether for only one offence or more where a man has been sentenced to more than 25 years' imprisonment. The court took the view that life imprisonment rarely exceeds 16 years in Zimbabwe and by statute more than one term of life imprisonment is served concurrently. The sentence ^d imposed in this case was in excess of the outer limit generally accepted by the courts in this jurisdiction."

The sentence here is well in excess of the general accepted outer limit. As alluded to above, both accused persons are youthful offenders aged 18 and 19 years. To imprison such young men for 46 years raises an ethical question of ^e whether there was justice in this punishment. The magistrate seems to have adopted the old form of *lex talionis*, an eye for an eye or tooth for a tooth. The most popular theory today is that the proper aim of criminal procedure is to reform the criminal so that he may become adjusted to the social order.

A mixture of sentimental and utilitarian motives gives this view its great ^f vogue. With the spread of humane feeling and the waning of faith in the old conception of the necessity for inflicting pain in the treatment of children and those suffering from mental disease, there has come a revulsion at the hard-heartedness of the old retributive theory. The growing belief in education and in the healing powers of medicine encourages people to suppose that the delinquent may be re-educated to become a useful member of society. Is it ^g not better to save such youthful offenders for a life of usefulness rather than punish them by lengthy imprisonment, which generally makes them worse after they leave than before they entered? – *Reason and Law* by M R Cohen at 54-5. An enlightened judicial officer will recognise the futility of severely punishing unavoidable retrogression in human dignity. It is accepted that it is one of the functions of the criminal law to give expression to the collective ^h

2008 (2) ZLR p63

Ndou J

^a A feeling of revulsion towards offences committed by the accused persons. But, such disapproval need not be cruel or take extreme forms. Magistrates need to be guided by principle of consistency in sentencing, therefore, regard must be had to sentences imposed or recommended in similar cases by the superior courts as highlighted above – *s v Gerber* [2006] 4 ALL SA 423 (SCA). The principles set out in above cases on the acceptable outer limit ^b should be followed.

Accordingly, I confirm the convictions in all the twenty counts. I, however, set aside the sentences imposed by the trial magistrate and the following are substituted:

Accused 1: Chrispen Chera

c Count 1	-	6 months' imprisonment
Count 2	-	6 months' imprisonment
Count 3	-	6 months' imprisonment
Count 4	-	6 months' imprisonment
Count 5	-	6 months' imprisonment
d Count 6	-	6 months' imprisonment
Count 7	-	6 months' imprisonment
Count 8	-	6 months' imprisonment
Count 9	-	6 months' imprisonment
Count 10	-	6 months' imprisonment
e Count 11	-	6 months' imprisonment
Count 12	-	6 months' imprisonment
Count 13	-	6 months' imprisonment
Count 14	-	6 months' imprisonment
Count 15	-	6 months' imprisonment
f Count 16	-	6 months' imprisonment
Count 17	-	6 months' imprisonment
Count 18	-	6 months' imprisonment
Count 19	-	6 months' imprisonment
Count 20	-	6 months' imprisonment

^g Total 120 months' imprisonment of which 30 months' imprisonment is suspended for 5 years on condition the accused in that period does not commit any offence involving theft or dishonesty and for which he is convicted and sentenced to imprisonment without the option of a fine.

Accused 2: Solomon Ndlovu

^h All 20 counts treated as one for purposes of sentence: 6 years' imprisonment

2008 (2) ZLR p64

Ndou J

of which 2 years is suspended for 5 years on condition the accused in that ^a period does not commit any offence involving theft or dishonesty and for which he is convicted and sentenced to imprisonment without the option of a fine.

CHEDA J concurred. ^b

Document 10 of 49**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/SHUMBA & ANOR v ZEC & ANOR 2008 (2) ZLR 65 (S)

SHUMBA & ANOR v ZEC & ANOR 2008 (2) ZLR 65 (S)**2008 (2) ZLR p65**

Citation	2008 (2) ZLR 65 (S)
Case No	Judgment No. S-11-08
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA, Ziyambi JA, Malaba JA & Garwe JA
Heard	22 May 2008
Judgment	1 August 2008
Counsel	<i>R M Fitches</i> , for the applicants <i>G C Chikumbirike</i> , for the respondents
Case Type	Constitutional application
Annotations	Link to case annotations

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(1) – application to Supreme Court – when may be brought – proceedings commenced in lower court – lower court declining jurisdiction – no proceedings before that court – applicant entitled to bring application under s 24(1)*

Elections – *election petition – time limits – failure to comply with – High Court has no power to condone such failure*

Election – *nomination – rejection of nomination papers – papers rejected on the grounds that they were submitted after nomination had closed – remedies open to candidate disputing nomination officer's decision*

Practice and procedure – *parties – citation – Zimbabwe Electoral Commission – requirement to cite chairperson, not Commission itself – citation of Commission – whether fatal to proceedings*

Headnote

¶ The applicants wished to stand as candidates in the Presidential election in March 2008. At 1545 hours on nomination day they were both in the nomination court to present their papers. Their papers were rejected by the second respondent, the nomination officer, on the grounds that the nomination court had closed. They brought an application in the High Court to compel the second respondent to accept their nominations and ¶ declare them to be candidates for the election. The High Court declined jurisdiction, holding that only the Electoral Court had jurisdiction, by virtue of s 46(19) of the Electoral Act [Chapter 2:13]. An application was then brought before the Electoral Court, which held that the matter had prescribed in terms of s 46(19)(c) of the Electoral Act. After the ¶ election had been held, the applicants brought an application under s 24(1)

2008 (2) ZLR p66

Chidyausiku CJ

of the Constitution, alleging that their right to freedom of association, ¶ guaranteed by ss 21(1) and 21(2) of the Constitution, and their right to protection of the law, guaranteed by s 18(1) of the Constitution, were violated by the second respondent, an employee of the first respondent.

It was argued by the respondents that the remedy available to the applicants upon the rejection of their nomination papers was an appeal to a judge of ^B the Electoral Court in terms of s 46(19) of that Act. When the applicants failed to do so timeously, the decision of the nomination officer became final, in terms of s 46(19)(c). The application to the Supreme Court was, they argued, a disguised appeal against the nomination officer's decision and not permissible. The second point raised was that the application should be dismissed, on the basis that the matter arose from proceedings ^C in both the High Court and the Electoral Court and therefore could only find its way to the Supreme Court by referral in terms of s 24(2) of the Constitution. The applicants had no right to approach the court directly in terms of s 24(1) of the Electoral Act. The third point raised was that the first respondent, the Zimbabwe Electoral Commission, was wrongly ^D cited, having regard to the provisions of s 18 of the Zimbabwe Electoral Commission Act [*Chapter 2:12*]. The chairman of the Commission should have been cited.

Held, that the applicants' contention that their nomination papers were not rejected in terms of s 46(10) of the Act was correct. The application of subs (10) is conditional upon the fulfilment of the requirements of subss ^E (8) and (9), which envisage that nomination papers are submitted to the nomination officer, who in turn accepts and examines the nomination papers. It is only after a nomination officer has accepted and examined the nomination papers that he can act or do any of the things provided for in terms of subs (10). *In casu*, the respondents' nomination papers ^F were rejected by the nomination officer for failure to comply with s 46(7) of the Act, which provides that nomination papers have to be submitted by four o'clock in the afternoon of the nomination day. The rejection of the papers was contrary to the explicit provisions of s 46(7) of the Act, the applicants being within the court by four o'clock. The Act does not provide a remedy for such a candidate – an apparent oversight by the ^G draftsman. Where no specific remedy is provided for in the Act, the High Court can exercise its inherent jurisdiction of review. The approach to the High Court in the first instance was therefore correct.

Held, further, that once proceedings are commenced in the High Court or any subordinate court and a constitutional point arises from the pleadings or circumstances of the case, the constitutional point has arisen from ^H

2008 (2) ZLR p67

Chidyausiku CJ

^A proceedings in that court. *In casu*, the High Court and the Electoral Court both declined jurisdiction. Where a court has declined jurisdiction there cannot be proceedings before it thereafter. While it was open to the applicants to apply to the High Court or the Electoral Court to refer the case to the Supreme Court, the mere existence of an opportunity to apply for a referral did not create an obligation on the applicants to ^B comply with s 24(2) of the Constitution or bar them from approaching the Supreme Court in terms of s 24(1). One of the objects of ss 24(2) and 24(3) is to prevent parallel proceedings in two courts and the possibility of two conflicting outcomes. Where the one court has concluded that it has no jurisdiction that possibility is eliminated. It is also incongruous ^C to hold that a matter arises from proceedings in another court when that other court has declined jurisdiction.

Held, further, that it is clear from s 18 of the Zimbabwe Electoral Commission Act that the Chairperson of the Zimbabwe Electoral Commission is to be cited whenever the Commission is being sued. Failure to cite the Chairperson of the Commission, or the citing of the Commission itself ^D instead of the Chairperson, constitutes a failure to comply with s 18 of the Zimbabwe Electoral Commission Act. Sections 2 and 3 of the State Liabilities Act [*Chapter 8:14*], which are incorporated by s 18 of the Zimbabwe Electoral Commission Act, provide that a plaintiff or applicant must cite, as the defendant or the respondent, the Minister ^E to whom the headship of the Ministry or department concerned has been assigned. To interpret the sections as conferring on a plaintiff or applicant an unfettered discretion to cite the Minister or any other person of their choice would lead to an obvious absurdity that could not have been intended by the legislature. The correct interpretation to be ascribed to s 18 of the Zimbabwe Electoral Commission Act, as ^F read with the State Liabilities Act, is that whenever an employee of the Commission is being sued and a plaintiff or applicant wishes to join the Commission, the Chairperson of the Commission, not the Commission itself, has to be cited. However, the use in s 3 of the State Liabilities Act of the word "may", rather than "shall", meant that the provision was directory rather than peremptory. The consequences of failure to comply ^G with the provisions of s 18 of the Zimbabwe Electoral Commission Act are not explicitly spelt out. In those statutory provisions, where the

legislature has not specifically provided for the consequences of failure to comply, it has to be assumed that the legislature has left it to the courts to determine what the consequences of failure to comply should be. One of guiding principles for the determination of whether failure

2008 (2) ZLR p68

Chidyausiku CJ

to comply with a statutory provision is fatal or a mere irregularity is a the possible consequences of a particular interpretation. If interpreting non-compliance with a statutory provision leads to consequences totally disproportionate to the mischief intended to be remedied, the presumption is that Parliament did not intend such a consequence and therefore the provision is directory. The purpose of s 18 of the Zimbabwe Electoral Commission Act is to ensure that the Chairperson of the Commission, as an interested party, is not sidelined in litigation against the Commission. *In casu*, he had not been sidelined. He was aware of the proceedings and had filed an affidavit. To hold that the proceedings were a nullity for failure to comply with s 18 of the Zimbabwe Electoral Commission Act c would result in a consequence totally disproportionate to the mischief intended to be remedied. No prejudice was caused in this case.

Cases cited

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

Min of Lands & Agriculture v CFU S-111-01

Nhidza v Unifreight Ltd S-27-99

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

Legislation considered e

Constitution of Zimbabwe 1980, s 24(1), (2) & (3)

Electoral Act [Chapter 2:13], s 46(7), (10), (16) & (19)

State Liabilities Act [Chapter 8:14], ss 2 & 3

Zimbabwe Electoral Commission Act [Chapter 2:12], s 18 f

Case information

R M Fitches, for the applicants

G C Chikumbirike, for the respondents

Judgment

CHIDYAUSIKU CJ: The applicants allege that their right to freedom of g association, guaranteed by ss 21(1) and 21(2) of the Constitution of Zimbabwe ("the Constitution"), and their right to protection of the law, guaranteed by s 18(1) of the Constitution, were violated by the second respondent, an employee of the first respondent. The alleged violation of the applicants' rights occurred in the course of the second respondent's employment with the first respondent. h

2008 (2) ZLR p69

Chidyausiku CJ

A THE FACTS

The applicants are the leaders of two different political parties. Both applicants wished to contest the Presidential Election conducted on 29 March 2008. The election which the respondents wanted to contest is complete and the outcome has been announced. The applicants are seeking a declaratory order that their rights were violated. Mr *Fitches* submitted that the outcome of this b application has no bearing on the already completed election. He contends, however, that this application for a declaratory order is more than a mere academic exercise. He contends that a determination by this court will provide a useful guideline for the future conduct of election officials. Put differently, the completed electoral process will not be affected by the outcome of this c case. 15 February 2008 was the nomination day for the Presidential Election conducted on 29 March 2008. All aspiring

candidates wishing to contest the 29 March 2008 Presidential Election were required to file their nomination papers by four o'clock on the afternoon of 15 February 2008. The first applicant avers that on 15 February 2008 he arrived at, and entered, the nomination court at or about 15.45 hours. This was fifteen minutes before the official closing time for nominations. He submitted his nomination papers to the second respondent, who advised him to wait until the official had finished attending to the second applicant. The second applicant at that time was filling in some forms. He sat in the nomination court awaiting his turn to be attended to and to file his own nomination papers. When the second applicant finished filling in his papers, he presented them to the second respondent, only to be told that the nomination court had closed and his nomination papers would not be accepted. When the second applicant was told that his nomination papers could not be accepted, the first applicant moved forward to submit his own nomination papers, as he had been advised to wait until the nomination officer had finished attending to the second applicant. The first applicant contends that upon presenting his nomination papers, he too was told that his nomination papers could not be accepted as the nomination court had closed. He protested at this turn of events to no avail.

What transpired thereafter is not entirely clear from the affidavits filed by the parties. The first applicant sets out his version of what transpired in para 11 of the founding affidavit, while the first respondent sets out its version of what transpired in para 6 of the opposing affidavit. The two versions do not present a clear chronology of the events which occurred thereafter. Mr *Chikumbirike*, who appeared for the respondents in both the High Court and the Electoral Court proceedings, made certain submissions, which were accepted by the applicants as correct. These submissions, to some extent, clarified what transpired after the rejection of the applicants' nomination

2008 (2) ZLR p70

Chidyausiku CJ

papers. The following appears to have happened. After the rejection of their nomination papers, the applicants launched a chamber application in the High Court. The chamber application is attached to this application. In terms of the draft order, the applicants sought the following relief from the High Court:

1. The second respondent is ordered to accept the applicants' papers.
2. The second respondent is ordered to declare the applicants duly nominated for the March 2008 Presidential Elections.
3. The respondents pay costs of suit.

According to Mr *Chikumbirike*, the matter was argued before Guvava J, sitting as a High Court judge. She dismissed the chamber application on the basis that the High Court had no jurisdiction to entertain the application and that it was the Electoral Court that had jurisdiction to deal with the matter in terms of s 46(19) of the Electoral Act [*Chapter 2:13*] hereinafter referred to as "the Act". Thereafter, the application found its way to the Electoral Court in terms of s 46(19) of the Act. According to Mr *Chikumbirike*, the application was heard by Uchena J, sitting as a judge of the Electoral Court. The application was dismissed on the ground that the matter had prescribed. In terms of s 46(19)(b) of the Act, a candidate has a right of appeal against a decision of the nomination officer to a judge of the Electoral Court. In terms of s 46(19)(c) of the Act, the right of appeal lapses after four days and the decision of the nomination officer becomes final. After the dismissal of the appeal by the Electoral Court, nothing happened until 15 April 2008, when the present application was launched in this court. This application is made in terms of s 24(1) of the Constitution. As already stated, the applicants are asking for a *declarator* that does not seek to change the outcome of the already completed election.

THE ISSUES

The averments of the applicants as to what transpired at the nomination court have not been put in issue by the respondents. In particular, the second respondent has not filed an affidavit disputing the allegations made against him relating to his conduct during the nomination court proceedings. Given this situation, this court has to accept, as a fact, that the applicants arrived at the nomination court at least fifteen minutes before the closing time on the nomination day. In terms of s 46(7) of the Act, a candidate who is within the nomination court at close of business is entitled to have his nomination papers accepted by the nomination court. The proposition that what is not denied in

affidavits must be taken as admitted is not disputed by the respondents and is supported by authorities. See *Fawcett Security Operations (Pvt) Ltd v Director of Customs and Excise & Ors* 1993 (2) ZLR 121 (S) at 127F; ^h

2008 (2) ZLR p71

Chidyausiku CJ

^a *Nhidza v Unifreight Ltd* S-27-99; and *Min of Lands & Agriculture v CFU* S-111-2001 at 60.

Mr *Chikumbirike* has raised three defences. Firstly, he argues that the remedy available to the applicants upon the rejection of their nomination papers was an appeal to a judge of the Electoral Court in terms of s 46(19) of the Act. When the applicants failed to do so timeously, the decision of the nomination officer became final in terms of s 46(19)(c) ^b of the Act. An application to this court in terms of s 24(1), so he submitted, is a disguised appeal against the decision of the Electoral Court or the nomination officer. He argues that this is not permissible. The decision of the nomination officer, if not appealed against in terms of s 46(19)(b) of the Act, becomes final in ^c terms of s 46(19)(c). The applicants, as I understand his argument, failed to avail themselves of the protection of the law by failing to comply with the procedure laid down in s 46 of the Act.

Secondly, Mr *Chikumbirike* submitted that this application should be dismissed on the basis that this matter arose from proceedings in both the ^d High Court and the Electoral Court and therefore can only find its way to the Supreme Court by referral in terms of s 24(2) of the Constitution. He further argued that s 24(3) of the Constitution specifically prohibits the making of an application to this court in terms of s 24(1) of the Constitution in respect of matters arising from proceedings in the High Court or any subordinate adjudicating authority. In response, Mr *Fitches* argued that s 46(19) of the ^e Act did not apply to the applicants because their papers were not rejected by the second respondent in terms of subs (10) or (16) of s 46 of the Act. The remedy of an appeal to an electoral judge provided for in s 46 (19) of the Act is limited to litigants whose nomination papers are rejected in terms of subs (10) or subs (16) of s 46 of the Act. Mr *Fitches* also submitted that the present application did not arise from proceedings in the High Court or ^f in the Electoral Court and, accordingly, the applicants are not barred from approaching this court by s 24(3) of the Constitution.

Mr *Chikumbirike* also raised the issue of citation and submitted that the first respondent was wrongly cited having regard to the provisions of s 18 of the Zimbabwe Electoral Commission Act [Chapter 2:12]. This was disputed ^g by Mr *Fitches*.

On the basis of the foregoing, three issues emerge on the papers -

1. Whether or not the first respondent was correctly cited;
2. Whether or not the applicants' nomination papers were rejected in terms of subs (10) or subs (16) of s 46 of the Act, in which case the applicants ^h should have followed the procedures provided in s 46(19) of the Act;

2008 (2) ZLR p72

Chidyausiku CJ

and ^a

3. Whether the alleged violation of the applicants' rights in the present application is a question that arose in proceedings in the High Court and/or the Electoral Court.

I will deal with the second issue first:

Does section 46 of the Act apply to the applicants? ^b

The second issue raises the question of the correct interpretation of subss (8), (9), (10) and (19) of s 46 of the Act. These subsections provide as follows:

"(8)The nomination officer shall examine every nomination paper lodged with him or her which has not been previously examined by him or her in order to ascertain whether it is in order and shall give any candidate or his or her chief ^c election agent an opportunity to rectify any defect not previously rectified and may adjourn the sitting of the court for that purpose from time to time:

Provided that the sitting shall not be adjourned to any other day that is not a nomination day.

(9) If, on examining a nomination paper which specifies that the candidate concerned is to stand for or be sponsored by a political party, the nomination ^d officer is doubtful that such fact is true, the nomination officer may require the candidate or his or her chief election agent to produce proof as to such fact, and may adjourn the sitting of the court for that purpose from time to time:

Provided that the court shall not be adjourned to any other day that is not a nomination day.

(10) Subject to subsections (8) and (9), the nomination officer in open court shall reject any nomination paper lodged with him or her at any time –

- (a) if he or she considers that any symbol or abbreviation specified therein in terms of paragraph (b) or (c) of subsection (1) –
 - (i) is indecent or obscene; or
 - (ii) is too complex or elaborate to be reproduced on a ballot paper; or
 - (iii) so closely resembles –
 - A. the symbol of any other candidate contesting the election in the constituency concerned; or
 - B. the recognised symbol or abbreviation of any political party, other than the political party, if any, for which the candidate concerned is standing or which is sponsoring him or her;
- as to be likely to cause confusion; or
- or
- (b) if any symbol specified therein in terms of paragraph (b) of subsection (1) is a prohibited symbol; or
- (c) if the nomination paper states that the candidate concerned is to stand for or be sponsored by a political party and the nomination officer has reason to believe that that fact is not true; or

2008 (2) ZLR p73

Chidyausiku CJ A

- (d) if in his or her opinion the nomination paper is for any other reason not in order; and subsection (19) shall apply. ...
- (19) If a nomination paper has been rejected in terms of subsection (10) or been regarded as void by virtue of subsection (16) –
 - (a) the nomination officer shall forthwith notify the candidate or his or her chief election agent, giving reasons for his or her decision; and
 - (b) the candidate shall have the right of appeal from such decision to a judge of the Electoral Court in chambers and such judge may confirm, vary or reverse the decision of the nomination officer and there shall be no appeal from the decision of that judge; and
 - (c) 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; and
 - (d) if an appeal in terms of paragraph (b) is lodged, the judge concerned may–
 - (i) direct that any further proceedings under this section in relation to that election shall be suspended, if necessary, pending determination of the appeal; and
 - (ii) specify a day or days on which any poll in terms of this Part and Part XIII shall be held; and if he or she does so, the Chief Elections Officer shall cause notice thereof to be published in the *Gazette*.”

A proper reading of the above subsections reveals that the applicants’ contention that the nomination papers of the applicants were not rejected in terms of subs (10) of s 46 of the Act, cannot but be correct. I, however, come to this conclusion for reasons different from those advanced by the applicants. The applicants contend that s 46 of the Act does not apply to Presidential Elections. It does, by reason of the provisions of s 104(3) of the Act. In my view, if the applicants’ nomination papers were rejected other than in terms of subss (10) or (16) of s 46 of the Act, then the remedy provided for in subs (19) thereof was not available to them. Subsection(10) of s 46 clearly states that it is subject to subss (8) and (9). Put differently, the application of subs (10) is conditional upon the fulfilment of the requirements of subss (8) and (9). Subsections (8) and (9) envisage that nomination papers are submitted to the nomination officer, who in turn accepts and examines the nomination papers. It is only after a nomination officer has accepted and examined the nomination papers that he can act, or do any of the things provided for, in terms of subs (10). The facts of this case clearly show that the nomination papers of the first applicant were never accepted by the nomination officer.

2008 (2) ZLR p74

Chidyausiku CJ

The second applicant's nomination papers were rejected on re-submission. ^A I will proceed on the basis that the second applicant's nomination papers were also rejected. Without first accepting and examining the nomination papers, a nomination officer cannot comply with subss (8) and (9) and consequently act in terms of subs (10). It is quite clear, on the papers, that the nomination papers were rejected for failure to comply with subs 46(7) ^B of the Act, which provides that nomination papers have to be submitted by four o'clock in the afternoon of the nomination day. The second respondent has not filed an affidavit in this case. The inescapable inference from the accepted facts, as deposed to by the applicants, is that the nomination officer rejected the nomination papers because, in his view, the nomination papers were submitted after 4 o'clock on the nomination day. Indeed, that is what ^C the applicants were told by the second respondent.

The applicants, however, contend that they were inside the nomination court by close of nominations and that, in terms of the proviso to s 46(7) of the Act, their nomination papers should have been accepted and examined by the second respondent. Section 46(7) of the Act provides: ^D

"(7) No nomination paper shall be received by the nomination officer in terms of subsection (6) after four o'clock in the afternoon of nomination day or, where there is more than one nomination day for the election concerned, the last such nomination day:

Provided that, if at that time a candidate or his or her chief election agent is present in the court and ready to submit a nomination paper in respect of the ^E candidate, the nomination officer shall give him or her an opportunity to do so."

It is quite clear to me that the applicants' nomination papers were rejected by the second respondent for non-compliance with s 46(7) of the Act, contrary to the explicit provisions of the proviso to that subsection. On a proper reading of s 46(7) of the Act, a candidate whose nomination papers have been wrongfully rejected for non-compliance with that subsection cannot appeal ^F to a judge of the Electoral Court in terms of s 46(19) of the Act. Indeed the Act does not provide a remedy for such a candidate. This appears to be an oversight by the draftsman. Where no specific remedy is provided for in the Act, the High Court can exercise its inherent jurisdiction of review. It would appear to me, therefore, that the approach to the High Court in the ^G first instance was correct and, had the cause of action been properly pleaded, the probabilities are that the High Court would have exercised its review jurisdiction and determined the matter. As things stand, the High Court declined to determine the matter on the ground that it had no jurisdiction.

I am satisfied that subss (10), (16) and (19) of s 46 of the Act do not apply to the applicants and their contention in this regard succeeds. ^H

2008 (2) ZLR p75

Chidyausiku CJ

^A Are the allegations of violations of the applicants' rights in the present application questions that arose in proceedings in the High Court and/or the Electoral Court? If so, are the applicants barred from direct approach to this court?

It is common cause that, before launching the present application to this court, the applicants approached the High Court and the Electoral Court. Both courts ^B declined to hear the matter on the ground that they had no jurisdiction. In the case of the High Court, the court erroneously ruled that it lacked jurisdiction because this was a matter for determination by the Electoral Court in terms of s 46(19) of the Act. The Electoral Court declined jurisdiction because the matter had prescribed in terms of the Act. Mr *Chikumbirike's* contention, as ^C I understand it, is that the basis of the applicants' complaint in both the High Court and the Electoral Court was the conduct of the second respondent during nomination proceedings. The same conduct of the second respondent is the basis of the present application. The only difference, he submitted, is that in the High Court and the Electoral Court ^D the applicants categorised the second respondent's conduct as unlawful, while in the present application, the applicants categorise the second respondent's conduct as violating the applicants' rights. On this basis, he further argued, the present application is a matter that arose during proceedings in the High Court and the Electoral Court.

The applicants' right to approach this court in terms of s 24(1) of the Constitution had they not first approached the High Court and/or the Electoral ^E Court cannot be disputed. The issue for determination is: Does the applicants' approach to the High Court and the Electoral Court make this application a matter arising from the proceedings in the High Court or the Electoral Court within the meaning of s 24(2) of the Constitution, thus barring the applicants from directly approaching this court in terms of s 24(1) of the Constitution? In *Tsvangirai v Mugabe & Anor* 2006 (1) ZLR 148 (S)

this court ^F had occasion to consider what constitutes a matter arising from proceedings in the High Court in terms of s 24(2) of the Constitution. The facts of that case were as follows. The applicant was the petitioner in an election petition brought following the Presidential Election held in March 2002. Amongst the grounds on which the petition was based was the allegation that s 158 ^G of the Act and certain statutory instruments enacted thereunder, in terms of which the election was conducted, were constitutionally invalid. Several months after the petition was lodged, and after urging from the applicant, a pre-trial conference was held, at which the parties agreed that the trial of the election petition would deal first with submissions and argument on the constitutional validity of s 158 and the statutory instruments and orders made ^H under its authority. The trial finally commenced about a year later, after the

2008 (2) ZLR p76

Chidyausiku CJ

applicant had obtained a writ of mandamus compelling the Registrar of the ^A High Court to set the matter down for trial. The judge heard submissions and argument on the constitutional issues and reserved judgment on these issues. Seven months after judgment was reserved, the judge issued an order, in terms of which the contentions advanced on behalf of the applicant were dismissed. No reasons were given, in spite of a promise to do so within two ^B weeks. There was no appeal noted by the applicant against the order within fifteen days of the date it was given, as required by r 30 of the Rules of the Supreme Court. A month later, the resumed trial was set down for a date in September 2004. In August 2004 the applicant asked for a postponement of the trial because it was necessary to examine ballot papers and other election material, the production of which had been ordered by the court. ^C In the meantime, the applicant continued to seek the judge's reasons for his decision, although it was not until February 2005 that it was made clear that he was seeking the judge's reasons in order to decide whether or not to appeal. No reasons having been forthcoming by July 2005, the applicant approached the Supreme Court for redress in terms of s 24(1) of the Constitution, alleging that the rights to protection of the law and to a fair ^D hearing within a reasonable time, guaranteed to him and protected against infringement under subs (1) (9) of s 18 of the Constitution respectively, had been contravened by the High Court. He sought an order setting aside the judge's order and putting the matter before the Supreme Court for decision. It was argued, on behalf of the first respondent, that the matter was not ^E properly before the Supreme Court because the constitutional question arose in the proceedings in the High Court and as such the applicant was obliged to comply with the procedure prescribed in s 24(2) of the Constitution. The applicant argued that there were no proceedings in the High Court, the only proceedings being the hearing on the constitutional argument, and thus he was not obliged to request the judge to refer the constitutional issue to the ^F Supreme Court in terms of s 24(2). In addition, as the judge was accused of being the principal cause of the delay, by reason of his continued failure in the hearing and determination of the election petition by failing to give reasons, he would have become a judge in his own cause in breach of the rules of natural justice. ^G

This court held:

- “(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 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 ^H

2008 (2) ZLR p77

Chidyausiku CJ

^A of the action or application. There was no need to limit the very general words of s 24(2) by saying that the question as to the contravention of the Declaration 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 pleadings or from the ^B 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 procedure prescribed in s 24(2) is mandatory. If the judge had, out of selfish interest ^C 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 discharged his duty to comply with the procedure prescribed in s 24(2)."¹

▫ Thus, it would appear from *Tsvangirai's* case *supra* that once proceedings are commenced in the High Court or any subordinate court and a constitutional point arises from the pleadings or circumstances of the case, the constitutional point has arisen from proceedings in that court. *In casu*, there is no doubt that an application was made to the High Court and the Electoral Court. The High Court heard submissions from counsel but did not adjudicate on the merits ^ε of the matter because it concluded that it had no jurisdiction. Similarly, the matter was commenced in the Electoral Court. The Electoral Court did not adjudicate on the merits of the application because the application or appeal was out of time. On these facts, can it be contended that the constitutional point arose from proceedings in the High Court or the Electoral Court within the meaning of s 24(2) of the Constitution?

⊞ The present case is distinguishable from *Tsvangirai's* case *supra* in two significant respects. Firstly, both the High Court and the Electoral Court declined to entertain the matter on the merits on the basis that they had no jurisdiction. Can it be said that there are proceedings in a court that has declined jurisdiction? The court dealing with *Tsvangirai's* case had [⊞] jurisdiction. Secondly, in *Tsvangirai's* case, the High Court proceedings had not concluded. In the present case, the proceedings of both the High Court and the Electoral Court were concluded, in the sense that both courts had

2008 (2) ZLR p78

Chidyausiku CJ

made a final determination that they had no jurisdiction. Given the facts set [⊞] out above, can it be said that the application before this court arose from proceedings in the High Court or the Electoral Court within the meaning of s 24(2) of the Constitution? There is no doubt that it was open to the applicants to apply to the High Court or the Electoral Court to refer this case to the Supreme Court. I, however, do not think that the mere existence [⊞] of an opportunity to apply for a referral creates an obligation on the applicants to comply with s 24(2) of the Constitution and bars them from approaching this court in terms of s 24(1) of the Constitution. Common sense dictates that, where a court has declined jurisdiction, there cannot be proceedings before it thereafter. It seems to me that one of the objects of subss (2) and (3) of s 24 of the Constitution is to prevent parallel proceedings in two courts and the [⊞] possibility of two conflicting outcomes. Where the one court has concluded that it has no jurisdiction, that possibility is eliminated. It also appears to me incongruous to hold that a matter arises from a proceeding in another court when that other court has declined jurisdiction. In *Tsvangirai's* case *supra*, the court had yet to determine the matter on the merits. In the present case, both the High Court and the Electoral Court had made a final determination [⊞] that they had no jurisdiction. I also find nothing in the language of s 24, and in particular in subs (3), which suggests that the legislature intended to bar a litigant whose matter cannot be determined on the merits by the High Court or other adjudicating authority because of lack of jurisdiction, from approaching this court directly in terms of s 24(1) of the Constitution. ^ε

On the facts of this case, I am satisfied that the applicants can approach this court in terms of s 24(1) of the Constitution. In the result, Mr *Chikumbirike's* contention that the applicants are barred from approaching this court in terms of s 24(3) of the Constitution fails.

Was the first respondent wrongly cited? [⊞]

Turning to the final point raised, namely that the first respondent was wrongly cited. A perusal of the relevant provisions of the Zimbabwe Electoral Commission Act [*Chapter 2:12*] and the State Liabilities Act [*Chapter 8:14*] clearly shows that Mr *Chikumbirike* is correct and the Chairperson of the first respondent should have been cited instead of the first respondent. The relevant provisions provide as follows. Section 18 of the Zimbabwe Electoral [⊞] Commission Act provides as follows:

"Legal proceedings against Commission

The State Liabilities Act [*Chapter 8:14*] applies with necessary changes to legal proceedings against the Commission, including the substitution of references therein to a Minister by references to the Chairperson of the Commission." [⊞]

2008 (2) ZLR p79

Chidyausiku CJ

A The above provision is fairly explicit. It states quite clearly that whenever there is a reference to a Minister in the State Liabilities Act, the litigant substitutes "Minister" with "Chairperson of the Commission". The Zimbabwe Electoral Commission Act provides that the Chairperson of the Electoral Commission (hereinafter called "the Commission") is to be cited whenever the Commission is being sued. Failure to cite the Chairperson of the Commission, or the citing B of the Commission itself instead of the Chairperson, constitutes a failure to comply with s 18 of the Zimbabwe Electoral Commission Act. The applicants in this case therefore did not comply with s 18 of the Zimbabwe Electoral Commission Act. That being the case, the issue that falls for determination is what are the legal consequences that flow from the applicants' non- compliance C with s 18 of the Zimbabwe Electoral Commission Act. I shall revert to this issue shortly. The relevant provisions of the State Liabilities Act that are incorporated by s 18 of the Zimbabwe Electoral Commission Act provide as follows:

"2 Claims against the State cognizable in any competent court

Any claim against the State which would, if that claim had arisen against a private D person, be the ground of an action in any competent court, shall be cognizable by any such court, whether the claim arises or has arisen out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any officer or employee of the State acting in his capacity and within the scope of his authority as such officer or employee, as the case may be.

3 Proceedings to be taken against Minister of department E concerned

In any action or other proceedings which are instituted by virtue of section two, the plaintiff, the applicant or the petitioner, as the case may be, *may make the Minister* to whom the headship of the Ministry or department concerned has been assigned *nominal defendant or respondent*:

Provided that, where the headship of the Ministry or department concerned F has been assigned to a Vice-President, he may be made nominal defendant or respondent" (the emphasis is mine).

On a proper interpretation of the above sections, the words "may make the Minister" the defendant or the respondent have to be interpreted as directing the plaintiff or the applicant to cite the Minister as the defendant or the respondent. G To interpret the above words as conferring on the plaintiff or the applicant unfettered discretion to cite the Minister or any other person of their choice would lead to an obvious absurdity that could not have been intended by the legislature. In the same vein, s 18 of the Zimbabwe Electoral Commission Act directs the applicant to cite the Chairperson of the Commission as the defendant or the respondent. In my view, the correct interpretation to be H ascribed to s 18 of the Electoral Commission Act, as read with the State

2008 (2) ZLR p80

Chidyausiku CJ

Liabilities Act, is that whenever an employee of the Commission is being A sued and the plaintiff or the applicant wishes to join the Commission, the Chairperson of the Commission, and not the Commission itself, has to be cited. The same would apply when the Commission alone is being sued for the misconduct of its employees or its own misconduct – the Chairperson is to be cited as representing the Commission. I therefore do not accept the B contention of the applicants that the use of the word "may" in the above provision entitled the applicants to cite whomever they wished in place of the Chairperson of the Commission.

Mr *Chikumbirike* further argued that the applicants' failure to comply with s 18 of the Zimbabwe Electoral Commission Act, as read with ss 2 and 3 of the State Liabilities Act, rendered these proceedings a nullity. In other C words, Mr *Chikumbirike's* submission is that s 18 of the Zimbabwe Electoral Commission Act is peremptory and failure to comply with the section renders the proceedings a nullity. I do not accept the contention that s 18 of the Zimbabwe Electoral Commission Act, as read with the State Liabilities Act, is peremptory for a number of reasons. In s 18 of the Zimbabwe Electoral D Commission Act, as read with the State Liabilities Act, the word "may", as opposed to the word "shall", is used. This is indicative of a directory and not a peremptory intent of the legislature.

It is a generally accepted rule of interpretation that the use of peremptory words such as "shall" as opposed to "may" is indicative of the legislature's intention to make the provision peremptory. The use of the word "may", as E opposed to "shall", is construed as indicative of the legislature's intention to make a provision directory. In some instances the legislature explicitly provides that failure to comply with a statutory provision is fatal. In other instances, the legislature specifically provides that failure to comply is not fatal. In both of the above instances no difficulty arises. The difficulty usually arises where the legislature has made no specific indication as to whether F failure

to comply is fatal or not. In the present case, the consequences of failure to comply with the provisions of s 18 of the Zimbabwe Electoral Commission Act are not explicitly spelt out. In those statutory provisions where the legislature has not specifically provided for the consequences of failure to comply, it has to be assumed that the legislature has left it to the ⁶ courts to determine what the consequences of failure to comply should be.

Francis Bennion *Statutory Interpretation* submits that the courts have to determine the intention of the legislature using certain principles of interpretation as guidelines. He had this to say at pp 21-22:

"Where a duty arises under a statute, the court charged with the task of enforcing the statute needs to decide what consequence Parliament intended should follow ⁸

2008 (2) ZLR p81

Chidyausiku CJ

^A from breach of the duty.

This is an area where legislative drafting has been markedly deficient. Draftsmen find it easy to use the language of command. They say that a thing 'shall' be done. Too often they fail to consider the consequence when it is not done. What is not thought of by the draftsman is not expressed in the statute. Yet the courts are forced to reach a decision.

^B It would be draconian to hold that in every case failure to comply with the relevant duty invalidates the thing done. So the courts' answer has been to devise a distinction between mandatory and directory duties. Terms used instead of 'mandatory' include 'absolute', 'obligatory', 'imperative' and 'strict'. In place of 'directory', the term 'permissive' is sometimes used. Use of the term 'directory' in the sense of permissive has been justly criticised. (See Craies *Statute Law* 7 ed 1971 p 61 n 74.) However it is now firmly rooted.

^C Where the relevant duty is mandatory, failure to comply with it invalidates the thing done. Where it is merely directory the thing done will be unaffected (though there may be some sanction for disobedience imposed on the person bound). (As to sanctions for breach of statutory duty see s 13 of this Code (criminal sanctions) and s 14 (civil sanctions).)"

Thereafter the learned author sets out some guiding principles for the ^D determination of whether failure to comply with a statutory provision is fatal or a mere irregularity. One of those guiding principles is the possible consequences of a particular interpretation. If interpreting non-compliance with a statutory provision leads to consequences totally disproportionate to the mischief intended to be remedied, the presumption is that Parliament did ^E not intend such a consequence and therefore the provision is directory. The purpose of s 18 of the Zimbabwe Electoral Commission Act is to ensure that the Chairperson of the Commission, as an interested party, is not sidelined in litigation against the Commission. He has not been sidelined as he is aware of the proceedings in this matter. He has filed an affidavit. On the facts of this case, to hold that the proceedings are a nullity for failure to comply with s 18 ^F of the Zimbabwe Electoral Commission Act would result in a consequence totally disproportionate to the mischief intended to be remedied. In the result I hold the view that s 18 of the Zimbabwe Electoral Commission Act is directory and not peremptory. This is not to say that, in a proper case, the court will not dismiss an application or mulct an offending litigant in costs ^G for failure to comply with s 18 of the Zimbabwe Electoral Commission Act. Legal practitioners should stand forewarned that in a proper case the court may dismiss an application for failure to comply with s 18 of the Zimbabwe Electoral Commission Act. On the facts of this case, I am satisfied that no prejudice has been caused to any party by the failure to comply with s 18 of the Zimbabwe Electoral Commission Act and that in the interests of ^H bringing speedy finality to litigation the court should exercise its discretion

2008 (2) ZLR p82

Chidyausiku CJ

and condone the applicants' irregularity in this regard. This approach will ^A facilitate a speedy resolution of the substantive issues in this case.

CONCLUSION

In conclusion, on the version of events as stated by the applicants, it is quite clear that the refusal to accept their nomination papers was not in accordance with the law, in particular s 46(7) of the Act. The second respondent's refusal ^B to accept the applicants' nomination papers was therefore null and void. As I have already said, the election in question is complete, having taken place on 29 March 2008, and the applicants do not seek an order that affects that election. To that extent, this

exercise is somewhat academic. However, the application succeeds and an order is made in terms of the draft. c

SANDURA JA, ZIYAMBI JA, MALABA JA, GARWE JA concurred

Chinyama & Associates, applicants' legal practitioners

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

1 The words quoted are not the exact words of the judgment but are taken from a summary prepared by the Legal Resources Foundation and published on the Foundation's website. – *Editor*

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Document 11 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/S v MUKOME 2008 (2) ZLR 83 (H)

S v MUKOME 2008 (2) ZLR 83 (H)

2008 (2) ZLR p83

Citation	2008 (2) ZLR 83 (H)
Case No	Judgment No. HH-68-08
Court	High Court, Harare
Judge	Makarau JP & Hungwe J
Heard	25 June 2008
Judgment	6 August 2008
Counsel	<i>C Mukome</i> , for the appellant <i>R Chikosha</i> , for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – general principles – factors to consider – need to balance interests of society and of the accused – prudent way of approaching sentence – sentencing court should identify and articulate the two conflicting interests

Criminal procedure (sentence) – statutory offences — Precious Stones Act [Chapter 21:06] – s 3(1) – possession of diamonds – failure to have adequate regard to personal circumstances of accused when considering sentence – effective sentence of 2 years' imprisonment excessive – failure to consider sentencing options other than imprisonment amounting to a misdirection – fine and wholly suspended term of imprisonment appropriate

Headnote

In sentencing an accused person a number of competing interests come into play and have to be delicately balanced. On the one hand is the need ^F to punish and on the other hand are the interests of the accused being punished. Reaching the correct balance is always a taxing exercise and one that must be approached humanely and rationally. The same punishment does not weigh the same with all people. A sentence that is heavily weighed in favour of the needs of society without paying adequate ^G attention to the interests of the offender is invariably harsh and appears draconian, while a sentence that underplays the interests of society while over-emphasizing the interests of the offender is invariably lenient and ineffectual in curbing crime. While it is not practical that in each case a sentencing court should identify and articulate these two competing interests that it seeks to balance, it is a prudent way of approaching the ^H sentencing exercise.

2008 (2) ZLR p84

Makarau JP

The accused had been correctly convicted of contravening s 3(1) ^A of the Precious Stones Act [Chapter 21:6]. While she had ministerial possession to possess diamonds inside the mining area, she had been found in possession of 157 diamonds, outside that area, valued at \$1 669 760 (old money). Notwithstanding that she was a first offender and had pleaded guilty to the charge, she was sentenced in the magistrates court to three ^B years' imprisonment of which one year was suspended on conditions. The magistrate had taken the view that the gravity of the offences, as reflected in s 3(1) of the Act and the effects of the offence on the economy and inflation, justified such a sentence.

Held, that the magistrate had over-emphasized the interests of society in assessing sentence, while at the same time paying scant regard to the ^C accused's personal circumstances. In doing so, he had misdirected himself in failing to consider other sentencing options.

Held, further, that, in all the circumstances, a fine of double the value of the diamonds, coupled with a wholly suspended term of imprisonment, would meet the justice of the case. ^D

Legislation considered

Precious Stones Act [Chapter 21:06], s 3

Case information

C Mukome, for the appellant

R Chikosha, for the respondent ^E

Judgment

MAKARAU JP: On 15 December 2006, the appellant appeared before the magistrates' court at Mutare facing one count of contravening s 3 of the Precious Stones Act [Chapter 21:06]. She was found in possession of 157 diamonds, valued at \$1 669 760. She pleaded guilty to the charge and ^F was duly convicted and sentenced to three years' imprisonment with 1 year suspended on conditions. The diamonds were forfeited to the State.

The appellant noted an appeal to this court against both conviction and the sentence. At the hearing of the appeal Mr *Mukome*, for the appellant, abandoned the appeal against conviction. We believe that his concession ^G that the appellant was correctly convicted is proper.

Against the conviction, the appellant had sought to argue that she had the authority of the minister in charge of mines to mine and possess the precious stones. In this regard, reliance was placed on the evidence that she led on special reasons, to the effect that while she did not have authority to mine and possess the diamonds, the Minister of Transport and Communication ^H

2008 (2) ZLR p85

Makarau JP

^A had given her, and the other miners, permission to dig for the diamonds in the Chiadzwa diamond field, but had told them not to take the diamonds out of the area as the Minerals Marketing of Zimbabwe Officials would come onto the diamond field and buy the diamonds.

It is not in dispute that the permission that the appellant allegedly had from ^B the minister was to mine and possess the diamonds within the confines of the diamond fields. She did not have the government official's permission to possess the diamonds outside the mine fields. The appellant was arrested outside the diamond field and, at the time and place she was arrested, she did not have the alleged protection of the official. In my view, the claim of right that the argument seeks to raise may have been proper had the appellant ^C been found in possession of the diamonds within Chiadzwa.

It is on the basis of the above that we were satisfied that the trial court had not erred in finding the ^D appellant guilty as charged and that, in turn, the concession by Mr *Mukome* was properly made.

Regarding sentence, it has been argued that the sentence imposed upon the appellant is severe and induces a sense of shock. In sentencing the appellant thus, the trial court viewed the offence as very serious in that it goes to the economy of the nation. Due to what he believed were the effects of the offence on the economy and on inflation, the trial magistrate was of the view that even though the appellant is a first offender, the gravity of the offence was ^E such that she had to be sentenced to a term of imprisonment.

It has been accepted over the years that assessing sentence is one of the most difficult tasks that faces a judicial officer convicting an accused person. Except where the law has laid out a minimum mandatory sentence, the judicial officer convicting an accused person is called upon to exercise their ^F discretion and punish the accused on behalf of society. As with most judicial functions, a number of competing interests come into play and have to be delicately balanced. On one hand is the need to punish and, on the other, are the interests of the accused being punished. Reaching the correct balance is always a taxing exercise and one that must be approached humanely and rationally. The same punishment does not weigh the same with all people. ^G A sentence that is heavily weighed in favour of the needs of society, without paying adequate attention to the interests of the offender, is invariably harsh and appears draconian; while a sentence that underplays the interests of society, while overemphasizing the interests of the offender, is invariably lenient and ineffectual in curbing crime.

^H *In casu*, the statute creating the offence did not set out a minimum mandatory

2008 (2) ZLR p86

Makarau JP

sentence for the offence at the time the offence was committed.¹ It provided ^A in s 3(2) as follows:

"Any person who contravenes subsection (1) shall be guilty of an offence and liable to—

- (a) a fine not exceeding level thirteen or double the value of the precious stones that are the subject-matter of the offence, whichever is the greater; or ^B
 - (b) imprisonment for a period not exceeding five years;
- or to both such fine and such imprisonment."

Thus, the sentencing court had to assess a sentence guided not only by the statutory provision but by the need to balance the interests of society with the interests of the accused person. While it is not practical that in each case ^C a sentencing court should identify and articulate the two competing interests that it seeks to balance, in my view this is a prudent way of approaching the exercise. If this is done, it will assist the sentencing court to view whether it has overplayed any of the interests at the expense of the other. It will also assist any superior court that will be reviewing the sentence to see whether the competing interests have each been fairly considered. ^D

In my view, the trial magistrate overemphasized the interests of society in assessing sentence in this matter. The under-performing economy of Zimbabwe and the runaway inflation were uppermost in his mind when he sentenced the appellant. It is quite clear from his reasoning that he not only wanted to punish the appellant but through her, to send a warning to other ^E like minded citizens that the courts would impose harsh sentences on all those convicted of illegally possessing precious stones.

On the other side of the balance, the trial magistrate paid scant regard to the appellant's personal circumstances and the need to fit the punishment to her person. He recorded, in the opening paragraph of his reasons for judgment, that the appellant is a first-time female offender who pleaded guilty to the ^F charges. He, however, does not appear to have brought these factors to bear on the sentence that he imposed. In the result, he imposed a sentence that was not in line with the

statutory provision and overlooked the need to consider community service as a viable option for sentencing the appellant.

Trial magistrates must not pay lip service to the plea of guilty and to the ^g mitigation that is submitted by accused persons. The sentences they impose after receiving submissions in mitigation must reflect that the mitigatory features of the case have been taken into account.

As indicated above, the trial magistrate misdirected himself by failing to

2008 (2) ZLR p87

Makarau JP

A consider other sentencing options in the matter. He overemphasized the gravity of the offence and its impact on the economy of the nation. In this regard, he erred and we are at large to assess a sentence in this matter. Again above, I have indicated the approach that a sentencing court should take in seeking to strike a balance between the interests of society and the personal circumstances of the accused. In my view, the gravity of the offence weighs ^b equally heavy with the mitigatory features in this matter. The appellant was a first offender who pleaded guilty to the charges. She was in possession of the diamonds which she had mined in a field where a government official had authorised their activities. She committed the offence when she took the diamonds out of the field.

^c Section 3(2) of the Act prescribes the penalty for this offence. At the time of the commission of the offence, the level thirteen fine was pegged at \$20 000. The precious stones found in the possession of the appellant were valued at \$1 669 760.

In my view, a fine of double the value of the stones coupled with a wholly suspended prison term would meet the justice of this case.

^d In the result we make the following order:

1. the appeal against sentence is allowed.
2. the sentence imposed by the magistrates court is set aside and is substituted by the following:
 - ^e a. a fine of \$ 3 399 520 (old value) or 4 days' imprisonment in default of payment.
 - b. In addition, six months' imprisonment, suspended for 3 years on condition the appellant is not during that period convicted of contravening section 3 of the Precious Stones Act [*Chapter 21:06*] and upon conviction is sentenced to a term of imprisonment without ^f the option of a fine.
 - c. The precious stones are forfeited to the State.

HUNGWE J concurred.

^g *Mugadza Mazengero & Dhliwayo*, appellants' legal practitioners.

Office of the Attorney-General, respondent's legal practitioners.

- 1 The minimum mandatory sentence was introduced by Act 10 of 2007.

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Document 12 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/GARATI v MUDZINGWA (MAU MAU) & ORS 2008 (2) ZLR 88 (S)

GARATI v MUDZINGWA (MAU MAU) & ORS 2008 (2) ZLR 88 (S)

2008 (2) ZLR p88

Citation

2008 (2) ZLR 88 (S)

Case No	Judgment No. S-19-08
Court	Supreme Court, Harare
Judge	Sandura JA, Malaba JA & Garwe JA
Heard	26 February 2008
Judgment	15 August 2008
Counsel	<i>O C Gutu</i> , for the appellant <i>Z M Kamusasa</i> , for the first respondent No appearance for the second, third and fourth respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Practice and procedure – condonation – application – when application must be made – failure to comply timeously with applicable rule – no need to apply for condonation when no rule breached ^o

Practice and procedure – execution – sale – setting aside of – common law right to have sale set aside on good cause shown

Headnote

The appellant's property had been sold to the first respondent in a sale in execution at the instance of the second respondent, a building society. The sale took place in November 2001. In January 2002 the appellant ^e wrote to the third respondent, the sheriff, protesting that the sale price was unreasonably low. In April 2002 the sheriff confirmed the sale in terms of r 359(7) of the High Court Rules 1971. The first respondent, however, did not pay the purchase price immediately. Six months later, the building society expressed its concern about the delay. In January ^f 2003, the price still being unpaid, the appellant wrote to the building society asking it to cancel the sale. The building society in turn asked the sheriff to cancel the sale. On 31 January 2003 the purchase price was finally paid.

On 18 February, the appellant made application for an order setting aside the sale on the ground that there had been an inordinate delay in the ^g payment of the purchase money by the first respondent. He said that because of the hyper-inflationary conditions obtaining in the country, he would lose considerably if the sale in favour of the first respondent were allowed to go through. He also alleged that by failing to take steps to cancel the sale on the ground that the first respondent had failed to pay the purchase price within a reasonable time, the sheriff aided and ^h

2008 (2) ZLR p89

Malaba JA

^a abetted the first respondent in delaying the payment.

The first respondent averred that the application was made in terms of r 359(8) and so had to have been made within one month after the appellant was notified of the decision of the sheriff. He contended that the application was not properly before the court as it was made outside the time limit. No condonation of non-compliance with r 359(8) had been applied for ^b and granted. The appellant at first disputed that there was any need to apply for condonation, then accepted that he should apply for condonation. His application for condonation was rejected by the High Court.

Held, that an application for condonation is made when there has been failure to comply properly or timeously with a rule under which a party is bound to act in seeking relief from the court. The judge *a quo* proceeded on the ^c basis that a question of condonation of non-compliance by the appellant

with r 359(8) had arisen for determination. In fact, the appellant did not apply to have the sheriff's decision confirming the sale set aside. The main application was for an order setting aside the sale on the ground that the purchase money was paid by the first respondent after an unreasonably long period of time. The ground on which the relief was sought arose after the decision of the third respondent in terms of r 359(7) and was a consequence of the conduct of the first respondent. There was therefore no question of non-compliance for the purposes of founding an application for condonation with a rule the appellant was not bound to comply with in seeking the relief from the court.

¶ *Held*, further, that under the common law an owner of property which has been sold in execution but not yet transferred may seek an order of *restitutio in integrum* setting aside the sale on good cause shown. When he applied to have the sale in execution of his property set aside on the ground that the purchase money had been raised and paid by the first respondent after an unreasonably long time, the appellant was exercising this common law right. The judge *a quo* should have heard and determined the main application.

Cases referred to

Mapedzamombe v Commercial Bank of Zimbabwe & Anor 1996 (1) ZLR 257 (S)

¶ *Morfopoulos v Zimbank & Ors* 1996 (1) ZLR 626 (H)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 359

Case information

¶ *O C Gutu*, for the appellant

2008 (2) ZLR p90

Malaba JA

Z M Kamusasa, for the first respondent A

No appearance for the second, third and fourth respondents

Judgment

MALABA JA: This is an appeal from a judgment of the High Court dated 30 July 2003 dismissing with costs an application in case HC 2596/03 for condonation of an alleged late filing of the court application in case B HC 1488/03.

The court application under HC 1488/03 was made on 18 February 2003. It was for an order to set aside the sale by public auction of stand no. 2580 Highfield ("the property") belonging to the appellant. The sale was in execution of a judgment in favour of the second respondent. At the public c auction held on 30 November 2001, the first respondent was the highest bidder. He was declared the purchaser of the property by the third respondent on 12 December for a price of \$2 050 000.

On 14 January 2002 the appellant lodged a written request with the third respondent in terms of r 359(1) of the High Court Rules ("the Rules") to set aside the sale on the ground that the property was sold for an unreasonably D low price. After hearing submissions by the parties on the request, the third respondent confirmed the sale on 15 April 2002.

Rule 361 of the Rules provides that, immediately after the sale has been confirmed and the conditions of sale complied with, the Sheriff shall proceed to give transfer of the property to the purchaser against payment E of the purchase money. The first respondent was under an obligation to pay the purchase price for the property immediately after he was notified of the decision to confirm the sale. He did not do so. On 22 October 2002, the second respondent wrote a letter to the third respondent through its legal practitioners, expressing concern at the delay by the first respondent in the payment of the purchase money. On 23 October, the third respondent wrote F to the first respondent demanding payment of the money. On 27 November, the second respondent wrote again to the third respondent expressing its concern at the continued failure by the first respondent to pay the money. On 3 January 2003, the appellant, who believed that the second respondent had power to cancel the sale, wrote to it complaining of the delay by the G first respondent in paying the purchase money and asking that the sale be cancelled. He copied the letter to the third respondent.

On 20 January 2003, the second respondent's legal practitioner wrote to the third respondent a letter in the following terms:

"We have now received a letter from the judgment debtor requesting that we cancel the sale. It is not up to us to cancel the sale. The sale was confirmed and

2008 (2) ZLR p91

Malaba JA

It is within your discretion to cancel the same in the event that there are delays in the payment of the purchase price by the purchaser. The purchaser has delayed in making payment and from the look of things it does not appear he still wants to proceed with the sale."

On 3 February the appellant wrote to the third respondent saying:

"It would appear ... that Mr Mau Mau bid for the property at the auction knowing fully (*sic*) well that he did not have the money with which to purchase the property but had seen an opportunity to make money for himself since he is now looking for a buyer to the tune of \$15 million without himself having wasted a cent towards the property. I view all this to be unfair and I am now seeking for a redress with your office. I would regard it as fair if you could cancel his sale and re-auction the house or allow me to look for a buyer."

The first respondent had in fact paid the purchase money on 31 January 2003. The payment was made fourteen months after the sale and nine months after confirmation.

On 18 February, the appellant made the application in case no. HC 1488/03 for an order setting aside the sale on the ground that there had been an inordinate delay in the payment of the purchase money by the first respondent. In para 9 of the founding affidavit he said:

"The main reason (for the application) is basically the fact that it has taken the first respondent an unreasonably and unduly long time to raise the purchase price in the sum of \$2 050 000. ... By reason of delay in raising and paying the purchase price, the first respondent had caused me and other interested parties considerable financial prejudice. On my part, I did everything within my power and means to ensure that the transfer was properly executed in favour of the first respondent soon after my objection was dismissed by the third respondent. Throughout this transaction the first respondent was adopting a very casual attitude which can only be interpreted to mean that he was not in a hurry to pay the purchase price and thus, he was effectively in breach of the contract of sale executed at the public auction on 30 November 2001."

The appellant also made the allegation that, by failing to take steps to cancel the sale on the ground that the first respondent had failed to pay the purchase price within a reasonable time, the third respondent aided and abetted the first respondent in delaying the payment. In para 10 of the founding affidavit he said:

"What I find very curious is the fact that the third respondent was literally going out of his way to assist and also to protect the interests of the first respondent at the expense of everyone else. He seemed not to have done anything to expedite the payment of the purchase price by the first respondent. This is clearly proved by the fact that it took the first respondent almost fourteen months to raise and pay the purchase price from the date of the sale. Even if one had to consider the time that the first respondent took to consider and to subsequently reject my objection to the sale, it is still apparent that the first respondent took an

2008 (2) ZLR p92

Malaba JA

unreasonably long time to raise and to pay the purchase price. It is a notorious fact that because of the hyper-inflationary conditions presently obtaining in the country, I am going to considerably lose out if the sale in favour of the first respondent is allowed to go through. ...

The fact of the matter is that the first respondent did not play ball and he therefore cannot and should not be allowed by this Honourable Court to literally have his cake and eat it. I humbly submit that there are very good grounds for this Honourable Court to exercise its discretion by setting aside the public sale that was conducted on 30 November 2001."

He made it clear that what caused him to make the court application was the fact of the inordinate delay by the first respondent in paying the purchase money. In para 11 of the founding affidavit he said:

"Had the first respondent promptly paid the purchase price to the third respondent, then I would not have even contemplated filing the present court application."

The first respondent did not deny in the opposing affidavit the allegation that the purchase money was paid after an unreasonably long period of time calculated from the date of the sale or its confirmation. He averred that the application was in terms of r 359(8) which provides that: ^o

"Any person who is aggrieved by the Sheriff's decision in terms of subrule (7) may, within one month after he was notified of it, apply to the court by way of a court application to have the decision set aside."

The appellant made arrangements with the second respondent in terms of which he paid the judgment debt. The second respondent released the title ^e deed to the property into his custody. The third respondent filed a report dated 4 March 2003. He did not deny the allegation that the first respondent took an unreasonably long time to raise and pay the purchase money. He said he would abide by the decision of the court in the application.

The decision made by the third respondent in terms of subr (7) of r 359 is the decision confirming the sale. The first respondent averred in the opposing ^f affidavit that the court application was in term of r 359(8) and as such had to have been made within one month after the appellant was notified of the decision of the Sheriff. He contended that the application was not properly before the court as it was made outside the time limit. No condonation of non-compliance with r 359(8) had been applied for and granted. ^g

The appellant denied in the answering affidavit that the court application was subject to any time limit. He later changed his mind and accepted that the application had to comply with the time limit prescribed under r 359(8). It is then that he made the application for condonation in case no. HC 2596/03. In dismissing the application the learned judge said:

"In terms of the provisions of r 359(8) of the High Court Rules, the applicant ^h

2008 (2) ZLR p93

Malaba JA

^a was supposed to lodge a court application to have the sale in execution of the immovable property set aside within one month of the notification by the Sheriff of the rejection of his objection. The applicant became aware of the Sheriff's decision before 14 May 2002. Despite that knowledge the applicant applied to this Court only on 18 February 2003 to have the Sheriff's decision set aside. He was more than nine months out of time and did not first seek condonation ^b Regarding condonation, the applicant had been advised, albeit wrongly, by his legal practitioner that there was no need to seek condonation first. The first respondent specifically raised the issue of condonation in his opposing affidavit. However, the applicant in his answering affidavit roundly rejected the advice on condonation as being false, maintaining there was no time limit for bringing the application and proceeded to file his heads of argument and to request a set down date. Only after being served with the first respondent's heads of argument ^c did the applicant file the present application, now seeking condonation.

The above series of delays and reckless disregard of the rules of this court constitute enough grounds to move the court to express its displeasure by declining condonation even though committed by the applicant's chosen legal practitioners and not directly by the applicant himself. See *Saloojee & Anor NNO v Minister of Community Development* 1965 (2) SA 135 (A), *Kodzwa v Secretary ^d for Health & Anor* 1999 (1) ZLR 313 (S). However, the matter is put beyond any pale of doubt when the applicant's prospects of success are examined. On the merits the applicant states that the delay by the first respondent in effecting payment constitutes good ground for the setting aside of the sale. This is the one and only basis upon which the applicant seeks to have the sale in execution set aside. However, in my considered view, failure to pay the purchase price timeously or at all is a matter pertaining to the performance of the contract of ^e sale and not its conclusion or terms, and thus falls outside the ambit of r 359(1). Where the purchaser fails to carry out obligations in a sale in execution, the Sheriff may be moved to cause the sale to be cancelled in terms of r 357. In this case the payment has already been made. Therefore the applicant's remedy lies in establishing and pursuing a cause of action relating to the late payment of the purchase price."

^f An application for condonation is made to a court when there has been failure to comply properly or timeously with a rule under which a party is bound to act in seeking the relief from the court. The learned judge proceeded on the basis that a question of condonation of non-compliance by the appellant with r 359(8) at the time he made the main application to have the sale set aside had arisen for his determination. The assumption was that in seeking ^g the particular relief from the court the appellant was bound to act in terms of that rule.

The appellant did not apply to court to have the decision of the third respondent confirming the sale in terms of subr (7) of r 359 set aside. The main application was for an order setting aside the sale on the ground that the purchase money ^h was paid by the first respondent after an unreasonably long period of time.

Malaba JA

The ground on which the relief was sought arose after the decision of the ^A third respondent in terms of subr (7) and was a consequence of the conduct of the first respondent. The appellant could not make the application for the relief he sought from the court in terms of r 359(8) which is directed at any person who is aggrieved by the Sheriff's decision in terms of subr (7). There was therefore no question of non-compliance for the purposes of founding ^B an application for condonation with a rule the appellant was not bound to comply with in seeking the relief from the court.

At common law any person interested in a sale in execution may apply to court to have it set aside on good cause shown although courts are reluctant to set aside a sale which has been confirmed and even more reluctant where transfer of the immovable property has been effected. The law was restated ^C by Gillespie J in *Morfopoulos v Zimbabwe Banking Corporation Ltd & Ors* 1996 (1) ZLR 626 (H) where at 628G-H the learned judge in the course of a review of the authorities said:

"By the common law an owner of property which has been sold in execution but not yet transferred may seek an order of *restitutio in integrum* setting aside the sale on *good cause shown*." ^D

See also *Mapedzamombe v Commercial Bank of Zimbabwe & Anor* 1996 (1) ZLR 257 (S) at 260 D-E.

The right a person interested has under r 359(8) to apply to the court to have the decision of the Sheriff in terms of subr (7) set aside is in addition to the ^E common law right to apply to the court to have the sale set aside before transfer of the property on good cause shown.

It appears to me that the appellant was exercising the common law right when he applied to the court to have the sale in execution of his property set aside on the ground that the purchase money had been raised and paid by the first respondent after an unreasonably long time. ^F

The court hearing the application has to decide, in the exercise of its discretion, whether or not the ground on which the application was made is a good cause for setting aside the sale. In arriving at that decision the court would take into account all the relevant circumstances of the case, including the failure by the third respondent to act in terms of r 357; the attitudes of the ^G second and third respondents to the application; and the fact that transfer of the property has not been effected.

It was a misdirection on the part of the court *a quo* to consider the prospects of success of the main application when no question of condonation of non-compliance with r 359(8) had in fact arisen, notwithstanding the application made to it. The learned judge should have heard and determined the main ^H

Malaba JA

^A application. He should now do so.

In the result, the appeal succeeds with costs. The judgment of the court *a quo* is set aside and substituted with the following order:

"The matter is struck off the roll with costs."

^B SANDURA JA and GARWE JA concurred.

Gutu & Associates, appellant's legal practitioners

Kamusasa & Company, first respondent's legal practitioners

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Document 13 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/KADZIMA v CHIMBETE 2008 (2) ZLR 96 (E)

KADZIMA v CHIMBETE 2008 (2) ZLR 96 (E)**2008 (2) ZLR p96**

Citation	2008 (2) ZLR 96 (E)
Case No	Judgment No. HH-75-08
Court	Electoral Court, Harare
Judge	Mtshiya J
Heard	20 August 2008
Judgment	20 August 2008
Counsel	<i>T Nyawo</i> , for the petitioner <i>D T Mwonzora</i> , for the respondent
Case Type	Election petition
Annotations	No case annotations to date

Flynote

Elections – *election petition – service of notice of petition on respondent – service of notice on respondent’s legal practitioner – whether such constitutes substantial compliance with Act*

Headnote

All the places of service indicated in the Electoral Act [*Chapter 2:13*] clearly demonstrate the need for *personal service* on the respondent. For the purposes of service of a petition and other documents, the legislature has spelled out the manner and places of service only through ss 169 and 188(2). A legal practitioner’s office is not one of the places provided for. If there is failure to effect service at the places mentioned in s 169, then in terms of s 188(2) service can be effected at the respondent’s address appearing in the voters’ roll. But even in a last resort situation, the office of a legal practitioner is not availed to the petitioner as a proper place of service. The doctrine of substantial compliance has found way in our jurisdiction. If there was evidence to show that the respondent had in fact instructed or advised the petitioner to serve the petition on his legal practitioners, that might constitute substantial compliance.

Cases cited

Chabvamuperu & Ors v Jacob & Ors 2008 (1) ZLR 354 (H)

Mwonzora v Kadzima EP-19-05 G

Mabika v Manyika HH-67-08

Tighy v Putter 1949 (1) SA 1087 (T)

Legislation considered

Electoral Act [*Chapter 2:13*], ss 169 & 188(2) H

2008 (2) ZLR p97

Mtshiya J

Case information

A *T Nyawo*, for the petitioner

D T Mwonzora, for the respondent

Judgment

MTSHIYA J: The issue for determination *in casu* is whether or not service of a petition on the respondent's legal practitioner is proper service in terms of the Electoral Act [*Chapter 2:13*] ("the Act"). I want to quickly state that ^aan affirmative answer to the issue raised depends on whether or not there is clear evidence that the respondent chose that course.

Section 169 of the Act provides as follows:

"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 ^crespondent either personally or by leaving the same at his or her usual or last known dwelling or place of business."

The petitioner *in casu*, was a candidate for the House of Assembly seat in the Nyanga South constituency in the harmonized Presidential, Parliamentary and Council elections held in Zimbabwe on 29 March 2008. He stood on ^dthe ticket of the Zimbabwe African National Union (Patriotic Front) (ZANU (PF)) party and lost to the respondent who represented the Movement for Democratic Change (Tsvangirai) (MDC (T)). The election result was announced on 2 April 2008 and on 14 April 2008 the petitioner filed a petition with the Registrar of the Electoral Court challenging the result of the election on certain grounds. The petition was served on the respondent's ^elegal practitioners within the stipulated time (i.e on 21 April 2008).

On 22 May 2008, both parties attended a pre-trial conference before Makarau JP, where it was agreed that the petition was served on time. The matter was then set for trial on 3 June 2008.

On 3 June 2008, the parties appeared before me in chambers represented by the ^fsame legal practitioners who had appeared before Makarau JP. Mr *Nyawo* for the petitioner indicated that the Zimbabwe Electoral Commission, which had been cited as a second respondent, had raised objection and the issue was yet to be resolved. He said it was necessary for the legal position to be spelt out. He therefore, asked for a postponement. The application for a postponement was not opposed. I then postponed the matter to 10 June 2008.

^gPrior to 10 June 2008 the petitioner had already withdrawn his application against the second respondent, the Zimbabwe Electoral Commission. A withdrawal notice was filed on 21 May 2008. An attempt was, however, made on 30 May 2008 to re-join the second respondent in the name of the Chairperson of the Electoral Commission of Zimbabwe. The said application ^hfor a re-jonder was, however, also withdrawn on 21 July 2008.

2008 (2) ZLR p98

Mtshiya J

On 10 June 2008, the parties met me in chambers and Mr *Mwonzora* indicated ^athat in view of Makarau JP's ruling in *Chabvamuperu & Ors* 2008 (1) ZLR 354 (H), a new preliminary issue had come to light. He said the effect of the ruling was that service at a respondent's party headquarters was no service at all in terms ^s169 of the Act. He said *in casu*, service had been effected on the respondent's legal practitioners. That being the case, he explained, the ^brespondent would now raise it as a preliminary issue. Mr *Nyawo* indicated that he had not yet seen the ruling.

On 21 July 2008, the parties agreed to present argument on the issue of service and indeed arguments were finally heard on 30 August 2008.

In para 4 of his heads of argument, Mr *Nyawo* had this to say:

"Whether the Honourable Court has powers to *mero motu* raise the issue of ^cnon-compliance with the provisions of the Electoral Act. In this regard, it is submitted that the Electoral Court is a creature of statute. Consequently, it can only do those acts that are expressly mentioned within the four corners of the statute establishing it. See *Chitungo v Munyoro supra* and *Nyamapfeni v The Constituency Registrar Mberengwa East & Ors* HH-26-08. The Electoral Court has held in *Chabvamuperu case supra* that it has no powers to condone ^dnon-compliance with the provisions of the Act. A *fortiori* the Electoral Court cannot *mero motu* raise the issue of non-compliance with the provisions of the Electoral Act since the enabling Act does not expressly grant it powers to do so."

In view of the above submission, I felt it was necessary to clear the issue raised in the above submission before I proceeded to hear full argument ^eon the issue of service and hence the

background of the case for the period 22 May 2008 to 21 July 2008. Consequently, upon explanation of the said background Mr *Nyawo* abandoned the issue.

I must, however, still point out that it is proper and procedural for the court to ascertain whether or not a petition before it is properly so placed. It is ^F this court's duty to ensure that the procedures required for a petition to be placed before it are properly followed. To that end, the court can *mero motu* raise legal issues.

I now return to submissions made on the issue of service on the respondent's legal practitioner.

Mr *Mwonzora*, relying on the ruling in *Chabvamuperu supra*, submitted that, ^G apart from the manner of service stipulated in ss 169 and 188(2) of the Act, there is no other address of service or manner of service given in the Act.

Section 188(2) of the Act provides as follows:

"1. ...

2. Save as is otherwise specially provided in this Act and without derogation ^H

2008 (2) ZLR p99

Mtshiya J

^A from s 40 of the Interpretation Act [*Chapter 1:01*], when any notice or other document is required to be served on any person under this Act, it may be served –

- (a) by delivering it to the person to whom it is addressed; or
- (b) by leaving it at his or her last known place of residence or any place of residence stated on a voters roll as his or her place of residence; or
- (c) by sending it to any place of residence referred to in para (b) through the ^B post by registered letter marked upon the outside 'electoral notice letter' and, unless the contrary is proved, the notice or other document shall be deemed to have been served at the time at which such registered letter would have been delivered in the ordinary course of post."

He said that was the only other section in the Act that dealt with the issue of service. He said in case of failure to effect service in terms of s 169 of ^C the Act, the legislature had, in terms of s 188(2), provided for service at the respondent's address as it appears in the voters' roll. That was the only other prescribed manner of service.

Dealing with the issue of the court's lack of power of condonation, Mr *Mwonzora* submitted that since the petitioner conceded that s 169 of the ^D Act is peremptory, the court could not proceed to allow a departure from strict compliance with the provisions of the law. He said such a move would amount to giving the parties the power of legislation. Relying on a number of authorities such as *Tighy v Putter* 1949 (1) SA 1087 (T); and *Mwonzora v Kadzima* EP 19/05, he submitted that as a creature of statute, the court could not assign to itself any power of condonation or waiver.

^E Mr *Mwonzora* further submitted that the legislature was fully aware of the existence and importance of legal practitioners but it had chosen not to include them for purposes of proper service. This, he said, was so because of the need for the legal practitioner to be given a mandate before proceeding with a matter. *In casu*, the petition had been "discovered" by the respondent's ^F legal practitioners and all the respondent had done was to ask his legal practitioners to ascertain its existence. There were no specific instructions to accept service on behalf of the respondent.

On the issue of substantial compliance, Mr *Mwonzora* said the issue should be looked at in terms of the strict legal requirements in the Act. He said the fact that, through diligence, the respondent had responded to the petition, ^G should not be used to circumvent the peremptory provisions of the law. All in all, he argued, the petitioner was ill-suited, for failure to effect service on the respondent in terms of s 169 of the Act.

Mr *Nyawo*, for the petitioner, submitted that s 188(2) of the Act referred to by the respondent did not cover service of a petition, but other public ^H documents, as was clear from the heading of the section. He said service

2008 (2) ZLR p100

Mtshiya J

of a petition was specifically provided for in s 169. Whilst conceding that ^A the court has no power to condone non-compliance, he submitted that the court should make its own inquiry as to whether or not there was substantial compliance. It was his view that under the concept of substantial

compliance the petition *in casu*, could be served. To support that view, he argued that with service having been effected at the respondent's legal practitioners, ^b there was indeed in turn a meaningful response made timeously. There was therefore, in his view, no prejudice.

I indicated from the outset that this issue depends on the availability of clear evidence to the effect that the respondent directed/instructed the petitioner to effect service at his legal practitioner's offices.

A perusal of the Act reveals that for the purposes of service of a petition and ^c other documents, the legislature spells out the manner and places of service only through ss 169 and 188(2) of the Act. A legal practitioner's office is not one of those places. It does appear to me that if there is failure to effect service at places mentioned in s 169, then service can be effected at the respondents' address appearing in the voters' roll. To that end, I would agree ^d with the respondent that s 188(2) of the Act would apply *in casu*. Clearly, even in a last resort situation, the office of a legal practitioner is not availed to the petitioner as a proper place of service.

The issue of mandate on the part of a legal practitioner is very important. In the main, a legal practitioner will only act upon being given instructions ^e to do so; and in some cases, he or she may act only upon being placed in funds. This may be an impediment to the realisation of personal service. There is nothing in the Act which demands of the respondent that he or she should respond through a legal practitioner. That becomes the respondent's election upon being personally served with the petition.

In the main, personal service, as envisaged by the Act, entails total personal ^f control of the petition process by both parties. It is only through that process that a petition, an issue of public interest, can be determined within the time frame spelt out in the Act.

All the places of service indicated in the statute clearly demonstrate the need for *personal service*. Accordingly, I would *in casu*, associate myself ^g with the recent decisions of this court in *Chabvamuperu supra* and *Mabika v Manyika* HH-67-08 in emphasizing the need to adhere to the manner of service prescribed in s 169 of the Act. Failure to strictly comply with the mandatory provisions of that section of the Act is fatal to a petition.

True, the doctrine of substantial compliance has found way in our jurisdiction. However, *in casu*, all we know is that the petition was "discovered" by ^h

2008 (2) ZLR p101

Mtshiya J

^a the respondent's legal practitioners. There is no evidence to show that the respondent had in fact instructed/advised the petitioner to serve the petition on his legal practitioners. No certificate of service was ever filed. In the absence of that evidence I cannot make an opinion on whether or not there was substantial compliance.

In view of the foregoing, my finding is that the petitioner is non-suited for ^b failure to effect personal service on the respondent as provided for s 169 of the Act. I therefore, make the following order.

The petition be and is hereby dismissed with costs.

Mandizha & Co, petitioner's legal practitioners

^c *Mwonzora & Associates*, respondent's legal practitioners

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Document 14 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/MUTSINYA v DANDE HOLDINGS (PVT) LTD & ORS 2008 (2) ZLR 102 (H)

MUTSINYA v DANDE HOLDINGS (PVT) LTD & ORS 2008 (2) ZLR 102 (H)

Citation	2008 (2) ZLR 102 (H)
Case No	Judgment No. HH-78-08
Court	High Court, Harare
Judge	Makarau JP
Heard	21 August 2008
Judgment	22 August 2008
Counsel	<i>L Mazonde</i> , for the applicant <i>O Takaindisa</i> , for the respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Computers and information technology – information stored on computer – such information being illicitly copied without consent of owner of computer – not possible under *mandament van spolie* to require person copying information to delete it from his computer D

Property and real rights – spoliation order – incorporeal property – information stored on computer – such information being illicitly copied without consent of owner of computer – not possible under *mandament van spolie* to require person copying information to delete it from his computer E

Headnote

The respondents unlawfully “cracked” the password on a computer belonging to the applicant, who was employed by the first respondent. They then copied a number of files and information onto their computers. The information that was transferred from the applicant’s computer was personal and confidential to the applicant. He sought an order under F the *mandament van spolie*, compelling the respondents to delete from their computers all the information that they had transferred from his computer in the interim, and as final relief, that the respondents be restrained from using the information that they had transferred from the applicant’s computer.

Held, that the *mandament van spolie* is a remedy for the restoration of G possession and is usually used to restore physical possession of movable or immovable property. It is a remedy of a very specific nature. Its sole purpose is to restore the parties to the status *quo ante* after one of them has been despoiled, against his will or without his consent, of possession of something by the other party’s violence, fraud, stealth or other illicit conduct. This is why the rights of the parties to the property do not H

Makarau JP

A enter into the picture and no attempt is made, or is indeed permissible, to determine the merits of the underlying dispute between the parties. It is settled law that the remedy now applies to incorporeal rights.

Held, further, that the applicant was in possession of all the information on his computer before the cracking of his password. He had exclusive control over access to that information. The conduct of the respondents B in gaining access to his files without his consent and in his absence was illicit. However, by gaining access to his information and transferring such information onto their own computers, the respondents did not deprive the applicant of “possession” of the information in such a manner that such possession could be restored by a spoliation order. The applicant

remained in possession of the information that was on c his computer. The respondents did not “take away” the information they had accessed. What they did was simply to obtain copies thereof, albeit illicitly. The remedy of *mandament van spolie* cannot be used to assert and vindicate any other right in the property that is not possession, so the applicant could not use the remedy to interdict the respondents from d accessing information that they were not entitled to, but which they now had, or to eradicate from their own computers information that they had illicitly obtained from his. His remedy would lie in some other branch of the law and not in the possessory remedy that he has invoked. What the applicant lost through the actions of the respondents was the right to have exclusive access to and knowledge and use of, the information e that was on his computer. Such a right, albeit incorporeal, is incapable of restoration once access has been had to the information. It is a right that is incapable of being possessed physically and it cannot be protected by the *mandament van spolie*.

Cases cited f

Nino Bonino v de Lange 1906 TS 120

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

Case information

L Mazonde, for the applicant

g O Takaindisa, for the respondents

Judgment

MAKARAU JP: The facts of this matter are very simple and yet they present a novel issue before this court. In their simplicity, the facts bring to the fore the challenges posed by advancement in information technology and the response of the law to such advancement.

h The applicant was employed by the first respondent as its managing director.

2008 (2) ZLR p104

Makarau JP

The second to fourth respondents were colleagues and fellow employees of a the first respondent, being the chief executive officer, production director and human resources director, respectively. On 23 July, 2008, certain allegations of a criminal nature were made against the applicant by his colleagues. The applicant was taken by the police and, whilst he was in custody, the respondents gained access to his computer and transferred therefrom a number b of files and information onto their computers. This they did after “cracking” the applicant’s password and rendering it dysfunctional in the process. The information that was transferred from the applicant’s computer was personal and confidential to the applicant and included an examination paper he had set for students at the University of Zimbabwe where he also lectures.

Upon discovering the intrusion and transfer, the applicant reported the matter c to the police. The papers filed of record do not disclose the response of the police to the report by the applicant.

In addition to reporting the matter to the police, the applicant filed this application on a certificate of urgency, seeking an order compelling the respondents to delete from their computers all the information that they d had transferred from his computer in the interim and, as final relief, that the respondents be restrained from using the information that they had transferred from the applicant’s computers. The application was opposed.

In moving the application on behalf of the applicant, Mr Mazonde was clear that what the applicant was seeking was relief under the *mandament van spolie*. e In this regard, he argued that the applicant was in peaceful and undisturbed possession of the information and that he was unlawfully dispossessed of such by the respondents, when they unlawfully broke the password to his computer and thereby gained access to the information thereon, which they then transferred to their own computers. In the opposing affidavits the respondents had sought to argue that the applicant had another remedy in the nature of f the criminal proceedings he had initiated by making the report to the police, in argument, Mr Takaindisa submitted that the applicant had approached the court for the incorrect relief, as the *mandament van spolie* could not be used to restore information stored on computers and allied devices.

It is trite that the *mandament van spolie* is a remedy for the restoration of ^g possession. The remedy is usually used to restore physical possession of movable or immovable property. See *Nino Bonino v de Lange* 1906 TS 120 at 122. It is a remedy of a very specific nature. Its sole purpose is to restore the parties to the *status quo ante* after one of them has been despoiled, against his will or without his consent of possession, of something by the other party's violence, fraud, stealth or other illicit conduct. This is why, ^h

2008 (2) ZLR p105

Makarau JP

^a In an application for a *mandament van spolie*, the rights of the parties to the property in question do not enter the fray and no attempt is made or is indeed permissible to determine the merits of the underlying dispute between the parties. In my view, we can now take it as settled law that the remedy applies to incorporeal rights. See *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA).

^b In my view, it cannot be disputed that the applicant was in possession of all the information on this computer prior to the cracking of his password. He had exclusive control over access to that information. It is further not in dispute that the conduct of the respondents, in gaining access to his files without his consent and in his absence, was illicit. In my view, the first ^c real issue that I have to deal with in this application is whether, by gaining access to his information and transferring such information onto their own computers, the respondents deprived the applicant of "possession" of the information in such a manner that such possession can be restored by an order *mandament van spolie*. I think not. The applicant remained in possession of the information that was originally on his computer. Due to the versatility ^d of the storage and transfer functions of information stored on computers, the respondents did not take away the information they had accessed. What they did was simply to obtain copies thereof, albeit illicitly.

I did not hear the applicant aver that, in tampering with his password, the respondents have barred him from accessing his files. If that was the case, ^e one could very well argue that he had thus been despoiled of control and access as one could equate the password to a key to a building, for instance, and hold that by breaking the key, the respondents had barred the applicant from accessing his information. By making copies of the information on his computers, the respondents did not interfere with the applicant's physical possession and /or access to the information. It is trite that the *mandament* ^f *van spolie* is employed as a remedy to prevent respondents from taking the law into their own hands and taking into their possession property that they believe they are entitled. Its aim is to restore the factual possession of which the *spoliatus* has been unlawfully deprived. It requires that the property despoiled be restored, without going into the merits of the dispute between the parties.

^g It has been generally accepted that a claim of right is not a defence to a *mandament van spolie*. In my view, equally, the remedy cannot be used to assert and vindicate any other right in the property that is not possession. In other words, the applicant cannot use the remedy to interdict the respondents from accessing information that they are not entitled to but which they now ^h have, or to eradicate from their own computers information that they illicitly

2008 (2) ZLR p106

Makarau JP

obtained from his. It would appear to me that his remedy lies in some other ^a branch of the law, and not in the possessory remedy that he has invoked in these proceedings. What the applicant has lost through the actions of the respondents is the right to have exclusive access, knowledge and use of the information that was on his computer. Such a right, albeit incorporeal, is in my view incapable of restoration, once access has been had to the information. ^b It is a right that is incapable of being possessed physically and, in my view, it cannot be protected by the *mandament van spolie*. In my further view, the situation can be likened to a *spoliatus* who is in possession of a bucket full of water which the respondent illicitly takes and uses the water for his own needs. In such circumstances, while possession by the applicant and an illicit dispossession by the respondent can both be proved, a *mandament* ^c *van spolie* cannot be used to fill the bucket with water and restore possession to the applicant.

It is on the basis of the above that I dismissed the application on the turn. I made no order as to costs, to show the court's disapproval of what the respondents did to access the applicant's information. ^d

Tondlanga & Associates, applicant's legal practitioners.

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Document 15 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/GAMBIZA v TAZIVA 2008 (2) ZLR 107 (H)

GAMBIZA v TAZIVA 2008 (2) ZLR 107 (H)

2008 (2) ZLR p107

Citation	2008 (2) ZLR 107 (H)
Case No	Judgment No. HH-109-08
Court	High Court, Harare
Judge	Gowora J
Heard	30 July 2007; 31 July 2007; 3 August 2007
Judgment	27 August 2008
Counsel	<i>T G Kasuso</i> , for the plaintiff <i>R K H Mapondera</i> , for the defendant
Case Type	Civil trial
Annotations	Link to case annotations

Flynote

Contract – *illegality – agreement to pay foreign currency for item purchased in Zimbabwe – breach of exchange control laws – par delictum rule – relaxation of – when appropriate*

Ⓓ **Exchange control** – *offences – Exchange Control Regulations 1996 (SI 109 of 1996) – s 4(1)(a)(ii) – exchanging foreign currency without approval – meaning – includes paying foreign currency to purchase item in Zimbabwe – prices quoted in foreign currency in agreement between parties – not illegal – manner of performance of agreement rendering agreement illegal*

Ⓔ **Words and phrases** – *"exchange" – Exchange Control Regulations 1996 (SI 109 of 1996) – s 4(1) – meaning – in context includes "to pay" and "to receive"*

Headnote

Section 4(1)(a)(ii) of the Exchange Control Regulations 1996 (SI 109 of 1996) does not proscribe the conclusion by parties of agreements where prices are quoted in foreign currency. In general terms, the Regulations do not forbid parties from transacting in foreign currency but they do, however, detail specific conduct, involving foreign currency, which is then prohibited.

Ⓖ The parties entered into an agreement whereby the plaintiff would supply a motor car to the defendant. The purchase price was stated in South African currency. An initial deposit of nearly a third of the full purchase was paid in rand, with the balance to be paid within a month. In the meantime, the plaintiff kept the registration book. The defendant failed to pay the balance in rand and tendered payment in Zimbabwean currency [Ⓗ] at the official exchange rate. The plaintiff refused the tender and sued

Gowora J

for the return of the vehicle or, alternatively, payment of the balance in A rand. On behalf of plaintiff, it was argued that the agreement was not unlawful, as s 4(1) of the Exchange Control Regulations 1996, which proscribed the buying, selling, borrowing, lending or exchange of any foreign currency without proper permission, did not make it an offence to receive foreign currency. The defendant argued that the agreement B was illegal and that the *in pari delicto* rule should apply. Accordingly, he argued, the loss should lie where it fell. The defendant counterclaimed for the delivery of the registration book against payment of the balance owing, in Zimbabwean currency.

Held, that although the Regulations did not forbid the parties from transacting in foreign currency, the question to be asked was whether they could C be said to have been "exchanging" foreign currency. In the context in which the word "exchange" is used in the Regulations, the meaning that can be ascribed thereto is "to pay" and "to receive." Because of this, the agreement was tainted with illegality and could not be enforced.

Held, further, that the agreement had only been partially performed by each D of the parties. Although the agreement itself was not illegal, the manner in which the parties performed part of the agreement had rendered it illegal and any order of the court that would lead to the performance of the remaining part of the agreement would have the effect of giving sanction to the actions of the parties in violating the regulations. This meant that the counterclaim could not be entertained. E

Held, further, that the usual way of treating illegal agreements, where the parties were equally to blame, is to let loss lie where it falls. However, the courts have a discretion, in suitable cases, to relax the *par delictum* rule in order to do justice between man and man and to prevent the injustice of one party being enriched at the expense of another. The plaintiff having parted with a valuable item against payment of an F amount which was less than half the purchase price, it would be just to order that the vehicle be returned to the plaintiff.

Cases cited

Dube v Khumalo 1986 (2) ZLR 103 (S)

Jajbhay v Cassim 1939 AD 537 G

Matsika v Jumvea Zimbabwe (Pvt) Ltd & Anor 2003 (1) ZLR 71 (H)

Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A)

Legislation considered

Exchange Control Regulations 1996 (SI 109 of 1996), s 4(1)(a) H

Gowora J

Case information

A T G Kasuso, for the plaintiff

R K H Mapondera, for the defendant

Judgment

GOWORA J: On 1 March 2007, the plaintiff issued summons out of this court for an order as follows: B

- (a) an order declaring the agreement annexure A to the particulars of the claim dated 18 December 2006, to have been validly cancelled and incapable of performance;
- (b) an order for the return to the plaintiff of motor vehicle Mitsubishi Chariot, Registration number AAN 8616; or alternatively C
- (c) payment of the sum of R17 000 being the balance of the purchase price due to the plaintiff;
- (d) costs of suit.

The facts which give rise to the dispute are these. The plaintiff and the defendant were not only friends, they were also business partners. On 18 December 2006, the parties entered into a written agreement of sale in respect of a **D** Mitsubishi Chariot owned by the plaintiff. It was agreed between the parties that the vehicle would be sold to the defendant for a price of ZAR25 000 or Z\$6 million. A deposit of R8 000 was recorded as having been paid with the balance of R17 000 being paid in two or more installments on or before 20 January 2007.

EIn his declaration, the plaintiff avers that the defendant has not paid any other amount aside from the initial R8 000. He therefore sues for the return of the vehicle or payment of the outstanding amount.

The defendant admits the existence of the agreement and the terms of the written agreement. He agrees that the balance had to be paid by 20 January **F** 2007, but denies that he had breached the agreement as claimed by the plaintiff. He avers that he tendered payment within the stipulated period, but that the plaintiff refused to accept payment because it was not in rand. The defendant states that the offered payment in Zimbabwe dollars as an alternative amount had been stipulated in the agreement. He tendered in his plea, payment of the balance owing to the plaintiff against delivery to him of **G** the registration book in respect of the vehicle. He has also filed a counterclaim where he seeks delivery of the registration book to him against payment by him of the outstanding balance payable in local currency.

I will now deal with the evidence which was common cause between the parties. The agreement concluded was for the defendant to purchase the **H** vehicle for the sum of R25 000. The defendant paid an amount of R8 000 on

2008 (2) ZLR p110

Gowora J

the date that the agreement was signed. The defendant was obliged to have **A** paid the balance by 20 January 2007. However, payment was not effected by the stipulated date. The balance was stated as R17 000 on the agreement. The Zimbabwe dollar equivalent was not stated in the agreement.

As to the dispute between them, the plaintiff indicated that the defendant had not tendered payment. During cross-examination it was clear, however, **B** that the defendant had tendered payment of the Zimbabwe dollar component based on official rates of exchange, but the plaintiff had refused to accept any payment in local currency. There is no indication as to how much the defendant had tendered. Although in the summons and declaration the plaintiff had an alternative claim for him to be paid the sum of R17 000, when he gave evidence he indicated that he had abandoned that claim as he said that **C** he had been advised that an individual could not receive any payment in foreign currency and that he understood that the agreement was illegal to that extent. He said it was not capable of execution and said that it was, as a result, null and void.

Initially, it was contended on behalf of the plaintiff that the agreement was **D** *per se* illegal and incapable of enforcement due to the same. It was further submitted on his behalf that not only was the purchase price quoted in foreign currency, but that the equivalent in the local currency was calculated by the use of the parallel market rate of exchange, which in itself is illegal. The plaintiff further contended that the parties were illegally dealing in foreign currency and that the court was, as a result, precluded from giving effect **E** to the agreement.

The defendant, through his counsel, also conceded that the agreement was illegal and that both parties participated in the illegality. Counsel prayed that I find that the *in pari delicto* principle applied and that I should let the loss lie where it falls. Effectively this would mean that the defendant would **F** retain a vehicle for which he contracted to pay ZAR25 000 and for which he only paid ZAR8 000. The defendant would thus be enriched at the expense of the plaintiff.

I was not convinced that both counsel had properly addressed the legal issues before me and I requested that they address me further by way of **G** supplementary submissions. These have now been filed and I am grateful to counsel for acceding to my direction.

The plaintiff now contends that the agreement executed by the parties is legal and valid and that the court can give effect to the same. He relies on the provisions of s 4(1) of the Exchange Control Regulations SI 109 of 1996, which he says, proscribe the buying, selling, borrowing, lending or **H**

2008 (2) ZLR p111

Gowora J

A exchange of any foreign currency without permission from the exchange control authority. It is contended, on his behalf, that although the agreement provided for payment of the purchase price in foreign currency, this was not illegal as it was not an offence to receive foreign currency. The defendant has submitted, contrary to the plaintiff, that the agreement, as it provides for payment of the purchase price in foreign currency, is illegal and that this B court should not give effect to it as that would encourage parties to such agreements to commit illegal acts.

Section 4(1) of the Exchange Control Regulations ("the Regulations") is in the following terms:

"Subject to subsection (3), unless permitted to do so by an exchange control C authority;

(a) no person shall in Zimbabwe

(i) buy any foreign currency from or sell any foreign currency to any person other than an authorized dealer or foreign exchange bureau de change; and

(ii) borrow any foreign currency, lend any foreign currency to or exchange any foreign currency with D any person other than an authorized dealer".

It is not in dispute that when the agreement between the plaintiff and the defendant was concluded, the defendant had paid an amount of ZAR8 000 as deposit on part of the purchase price. In terms of the agreement between the parties, the equivalent of the ZAR8 000 in local currency was \$6 million. The rate of exchange was not given but it is accepted by both parties that the E conversion rate was not the authorized one. The balance outstanding was stated to be ZAR17 000. The equivalent in local currency was not stated.

Mr Kasuso is correct when he says that the law does not proscribe the conclusion by parties of agreements where prices are quoted in foreign currency. A careful scrutiny of S 4(a)(ii) leads me to the conclusion that his F submission is correct. The regulations do not forbid parties from transacting in foreign currency in general terms but they detail specific conduct that involves foreign currency which is then prohibited. What is pertinent is to determine whether the manner in which the parties herein conducted their agreement falls under the species of proscribed conduct within the ambit of the regulations. The only word that would apply to the present case is G "exchange" and what meaning can be ascribed to it.

The Shorter Oxford Dictionary defines "exchange", as a noun, variously as follows:

"the action, or an act, of reciprocal giving and receiving; a mutual grant of equal interest, the one in consideration of the other."

H In respect of the verb, the dictionary ascribes the following meanings to

2008 (2) ZLR p112

Gowora J

"exchange": A

"to change away; to dispose of by exchange; to give or part with (something) for something in return; to give and receive reciprocally; to interchange."

In *Matsika v Jumvea Zimbabwe (Pvt) Ltd & Anor* 2003 (1) ZLR 71 (H), Chinhengo J had to consider whether or not an agreement for the purchase of a motor vehicle within Zimbabwe in currency other than the local currency was legal. It is not B my intention to traverse the path taken by the learned judge in his examination of the matter, for to do so would be repetitive and disrespectful. He concluded that, in accordance with the Decimal Currency Act [Chapter 22:04], the legal tender in this country is the Zimbabwe dollar. He also concluded that, according to the provisions of Reserve Bank Act [Chapter 22:10], a tender of notes and coins issued by the Reserve Bank, which has not been C demonetized, shall be legal tender in Zimbabwe. He also found that the Reserve Bank Act does not prohibit the transaction by Zimbabweans of business in foreign currency. With regard to the application before him, on the facts as presented, the learned judge had no hesitation in finding that when the applicant paid US\$1 700 and US\$ 1730 to the respondent for the D purchase price of a vehicle without first having obtained the permission of an exchange authority, the parties had contravened the regulations.

In the context in which "exchange" is used by the legislature in the regulations, the meaning that can therefore be ascribed to it is "to pay" and "to receive". The defendant paid ZAR8 000 without the permission of an exchange control authority and, in the circumstances, there can be no doubt that this is E prohibited by the regulations. Thus the agreement is tainted with illegality and cannot be enforced. It is trite that there must be no illegality in a contract. An agreement is illegal if the making of the agreement, the performance agreed upon, or the ultimate purpose of both parties in

contracting, is prohibited by common or statute law, that is, if it is contrary to public policy or is *contra bonos mores*. See *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A). A contract ^F will be contrary to public policy if its performance, even though not illegal or immoral, is one which the courts will not enforce because performance would be detrimental to the interests of the community.

From the evidence given by the parties, it emerged that one of the parties, if not both, was aware that their transaction might not have been exactly ^G above board. The defendant gives, as his reason for refusing to pay the balance in rand, the knowledge that the payment in foreign currency was illegal. This, he averred, was the reason why he did not pay, as he was afraid of committing an offence. He does not say when he became aware of the illegality attached to the payment in foreign currency in view of his initial payment of the deposit in foreign currency. ^H

2008 (2) ZLR p113

Gowora J

^A In his declaration, the plaintiff makes the averment that the contract was illegal as it contravened the exchange control regulations and thus was incapable of being enforced. Whilst the agreement itself is not illegal *per se*, it has nevertheless been tainted by illegality in that the parties breached the regulations when they were giving effect to its terms and conditions. Instead of exchanging rand, the parties could have calculated the official rate ^B of the local currency and payment made accordingly and thus there would have been legal performance of the agreement.

Whilst the plaintiff has prayed that the agreement be cancelled and for the return of the motor vehicle, the defendant has counter-claimed for the delivery to him of the registration book of the motor against a tender of payment by ^C the defendant of an amount of \$3 840 000, which he states is the outstanding balance on the purchase price.

The question that now confronts me is whether or not the contract can be cancelled, or whether it is capable of being enforced, thus entitling the defendant to an order in terms of the counterclaim. I would, on this point, ^D respectfully refer to the comments of Gubbay CJ in *Dube v Khumalo* 1986 (2) ZLR 103 (S) at 109D-F, where he stated:

“There are two rules which are of general application. The first is that an illegal agreement which has not yet been performed, either in whole or in part, will never be enforced. This rule is absolute and admits no exception. See *Mathews v Rabinowitz* 1948 (2) SA 876 (W) at 878; *York Estates Ltd v Wareham* 1950 (1) SA 125 (SR) ^E at 128. It is expressed in another maxim *ex turpi causa non oritur actio*. The second is expressed in another maxim *in pari delicto est potior conditio possidentis*, which may be translated as meaning ‘where parties are equally in the wrong, he who is in possession will prevail’. The effect of this rule is that where something has been delivered pursuant to an illegal agreement the loss lies where it falls. The objective of the rule is to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporeal ^F rights, in furtherance of an illegal transaction. But in suitable cases the courts will relax the *par delictum* rule and order restitution to be made. They will do so in order to prevent injustice, on the basis that public policy “should properly take into account the doing of simple justice between man and man”.

The agreement before me has only been partially performed by either of the ^G parties. Whilst the defendant had paid less than half of the purchase price, the plaintiff had not really effected delivery in that the registration book had not been given to the defendant and thus he cannot assume ownership of the vehicle. Although the agreement itself is not illegal, the manner in which the parties performed part of the agreement has rendered it illegal, and any order on my part that would lead to the performance of the remaining part of the ^H same would have the effect of giving sanction to the actions of the parties

2008 (2) ZLR p114

Gowora J

in violating the regulations. As a court, I am precluded from encouraging, ^A through orders of court, the commission of acts that are proscribed by the law or the further perpetuation of such acts in clear violation of statutory provisions. I am therefore of the view that this is not an agreement that can be given effect to and this, in my view, disposes of the counterclaim of the defendant. The question remaining on this issue is whether I should then ^B declare the agreement duly cancelled. When something is illegal, it is in fact null and void. Thus a declaration that it has been duly cancelled would clothe the agreement with legality. The only logical manner to treat the agreement is therefore to declare that it is of no force and effect.

What remains now is what is to be done with the vehicle. The defendant, having acknowledged the unlawful nature of the agreement, has submitted c that the court has several options on how to dispose of the matter. The first is to dismiss the plaintiff's claim in its entirety. The second option, which is strike out the quotation of the price in rand, is not appropriate in view of the illegality of the agreement. The defendant has also suggested that the defendant be made to pay the equivalent of ZAR17 000, calculated in d accordance with the prevailing rates of exchange and that consequentially the plaintiff be ordered to surrender the registration book to the defendant. The last three options suggested by the defendant would result in the court giving effect to an illegal agreement. This would run counter to the two maxims that were pronounced by Gubbay CJ in *Dube v Khumalo supra*. The usual manner of treating illegal agreements, where the parties to the same e are equally to blame, is to let the loss lie where it fell. However, the courts have a discretion in suitable cases to relax the *par delictum* rule in order to do justice between man and man. The rationale for this discretion is to prevent injustice where one party is enriched at the expense of another. In *Jajbhay v Cassim* 1939 AD 537 at 544-545, Stratford CJ stated the following: f

"Courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which underlies and inspired the maxim. And in this last connection I think a court should not disregard the various degrees of turpitude in delictual contracts. And when the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal law provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment g of the one delinquent and lessen it of the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy is not foreseeably affected by a grant or refusal of the relief claimed, that a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment".

It is trite, therefore, that where an agreement is illegal, a court has the h

2008 (2) ZLR p115

Gowora J

A discretion to relax the *par delictum* rule in order to do justice between man and man where the relief granted would be contrary to public policy. I was not addressed by either counsel on the question whether granting the relief sought would be contrary to public policy and as a consequence I find that I am not constrained from relaxing the *par delictum* rule. Considering the circumstances of the case, it is only proper that I do so in order to do justice b between man and man. The plaintiff parted with a valuable item against payment of an amount which was less than half the purchase price. The defendant thereafter did not pay the outstanding amount within the stipulated period. The agreement provided that the full purchase price had to be paid before 20 January 2007. The defendant readily admitted having failed to pay c as stipulated therein. In his evidence he alluded to an agreement between himself and the plaintiff concluded in South Africa, where the plaintiff agreed to extend the period by which payment could be made. The defendant however was unable to state the date by when he was supposed to have made payment under the alleged verbal contract. It is highly improbable, in my view, that the plaintiff, having in the agreement of sale stipulated a time d period for payment of the purchase price, would be so accommodating as to allow the defendant an unlimited extension of time by which to pay the balance. The defendant was already *in mora* and it would only be sensible and reasonable if the plaintiff was to allow more time, to put the defendant on terms about payment. In his evidence ,which was not seriously challenged by the defendant, the plaintiff said he wanted to use the money for a business e venture, hence his stipulation for a time period on when balance was to have been paid in full. The plaintiff denied that he had extended the time to the defendant for payment of the balance or that he had given an impression to that effect. Under cross-examination, the plaintiff had admitted that the defendant had tendered payment of the balance of the purchase price in local f currency at the official rate and, at that stage, the plaintiff had refused to accept the tender. The plaintiff said the offer to pay in local currency came after he had issued summons against the defendant. My assessment of the evidence as a whole leads me to conclude that the plaintiff's version is to be preferred to that of the defendant. Neither he nor his brother impressed me as a witness. I find the plaintiff's version more probable given the prevailing g circumstances. In the premises I find for the plaintiff.

I therefore make an order in the following terms:

1. The plaintiff's claim is granted to the extent that the defendant be and is ordered to restore possession to the plaintiff of a Mitsubishi Chariot motor vehicle registration number AAN 8616 within ten (10) days of the h date of service of this order failing which the Deputy Sheriff is hereby

Gowora J

authorized to seize and recover the same from wherever it is situate and a from whomsoever is in possession of the same.

2. The defendant be and is hereby ordered to pay the costs of suit.

Mantsebo & Co, legal practitioners for the plaintiff

Mapondera & Co, legal practitioners for the defendant b

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Document 16 of 49

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MPOFU v COMMISSIONER OF POLICE & ANOR 2008 (2) ZLR 117 (S)

2008 (2) ZLR p117

Citation	2008 (2) ZLR 117 (S)
Case No	Judgment No. S-15-08
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Sandura JA & Gwaunza JA
Heard	31 October 2006; 31 July 2008
Judgment	2 September 2008
Counsel	<i>T P Kawonde</i> , for the appellant <i>P Ndlovu</i> , for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Police – discipline – dismissal from force – dismissal in terms of s 48(a) of Police Act following conviction – conviction set aside on appeal – dismissal thereby rendered unlawful

Headnote

- The appellant was a police officer. He had in 1999 been convicted of assault and sentenced to a fine, together with a suspended short term of imprisonment. He appealed against conviction and sentence, but before the appeal was heard the first respondent, the Commissioner of Police, acting in terms of s 48(a) of the Police Act [*Chapter 11:10*], summarily ε dismissed him from the police force. In September 2001 the High Court quashed the conviction and set aside the sentence. The appellant applied for reinstatement. The Commissioner rejected his application. An appeal to the Police Service Commission was rejected as being out of time, s 51 of the Act requiring that an appeal be noted within seven days. In October 2003 the appellant launched an

application in the High Court ^F for the rescission of the decision of the Commission. The judge *a quo* dismissed the application on the ground the appeal to the Commission was out of time and prescribed.

Held, that the judge *a quo* was correct in holding that the appeal to the Commission was out of time. However, it is quite clear from s 48 of the Act that a member of the police force has to stand convicted of an ^G offence before he can be dismissed in terms of the section. At the time that the Commissioner of Police discharged the appellant, the appellant stood convicted of assault, but on appeal to the High Court the conviction was quashed and the sentence set aside. The successful appeal had the retrospective effect of obliterating the conviction which was the basis ^H of the appellant's dismissal. To hold that the appellant stood discharged

2008 (2) ZLR p118

Chidyausiku JA

from employment on the basis of a conviction that was quashed would ^A be a travesty of justice and totally irregular. His dismissal in terms of s 48(a) of the Act *in casu* was unlawful because he stood convicted of no offence.

Held, further, that this was a proper case for the court to exercise the review powers conferred by s 25 of the Supreme Court Act [*Chapter 7:13*] to ^B correct a blatant irregularity by an administrative authority in dismissing the appellant. The matter would be remitted to the High Court for the purposes of determining whether following the unlawful dismissal of the appellant he should be reinstated, as he requests, or be paid damages in lieu of reinstatement.

Legislation considered ^C

Police Act [*Chapter 11:10*], s 51

Police (Trials and Boards of Inquiry) Regulations 1965 (RGN 97K of 1965), s 15(1)

Supreme Court Act [*Chapter 7:13*], s 25 ^D

Case information

T P Kawonde, for the appellant

P Ndlovu, for the respondents

Judgment

CHIDYAUUSIKU CJ: The appellant in this case (hereinafter referred to as "Mpofu") was charged with and convicted of assault on 23 July 1999. He ^E was fined \$400 or in default of payment two months' imprisonment with labour. He was further sentenced to imprisonment for one month, all of which was suspended for five years on certain conditions. He successfully appealed against both conviction and sentence.

Following Mpofu's conviction but before the appeal was heard, the first respondent (hereinafter referred to as "the Commissioner of Police") ^F summarily dismissed Mpofu from the Zimbabwe Republic Police with effect from 30 December 1999. The Commissioner of Police dismissed Mpofu in terms of s 48(a) of the Police Act [*Chapter 11:10*] (hereinafter referred to as "the Act"). Section 48(a) of the Act provides as follows:

"48 Procedure upon conviction of member for certain offences ^G

If a member, other than an officer, is convicted of any offence and sentenced therefor to imprisonment without the option of a fine, whether or not the execution of such sentence is suspended, the Commissioner may –

- (a) discharge the member, in which case the discharge may take effect from the date of his conviction; ...".

As I have already stated, Mpofu's appeal against both conviction and sentence ^H

2008 (2) ZLR p119

Chidyausiku JA

^A was successful. In September 2001 the High Court quashed the conviction and set aside the sentence.

Following the quashing of the conviction, Mpofu asked the Commissioner of Police to reinstate him. The request was refused. Mpofu thereafter appealed to the second respondent (hereinafter referred to as "the Commission") ^B against the decision to dismiss him. Some fifteen months elapsed between Mpofu's dismissal and the appeal to the Commission. On 25 August 2003, the Commission dismissed the appeal on the ground that the appeal to it was noted out of time.

Mpofu's appeal to the Commission was in terms of s 51 of the Act, which provides as follows:

c "51 Appeal

A member who is aggrieved by any order made in terms of section *forty-eight* or *fifty* may appeal to the Police Service Commission against the order within the time and in the manner prescribed, and the order shall not be executed until the decision of the Commission has been given."

o The Regulations under the Act provide that an appeal against a decision in terms of s 48 of the Act has to be filed within seven days.

Part V of the Police (Trials and Boards of Inquiry) Regulations 1965 (RGN 97K of 1965), s 15(1) thereof, as amended by s 8 of the Police (Trials and Boards of Inquiry) (Amendment) Regulations 1998 (No. 4) (SI 54 of 1998), ^E provides that:

"A member who wishes to appeal in terms of section 51 of the Act shall –

- (a) within twenty-four hours of being notified of the decision of the Commissioner, give notice to his officer commanding of his intention to appeal;
- (b) within seven days of being notified of the decision of the Commissioner, ^F lodge with his officer commanding a notice of appeal in writing setting out fully the grounds upon which his appeal is based and any argument in support thereof."

It is quite clear that Mpofu's appeal to the Commission against his dismissal by the Commissioner of Police was filed out of time. The probabilities are that this was due to the conviction being quashed well after the time for ^G noting an appeal had prescribed. The Commission, as I have said, dismissed the appeal on the ground that it was filed out of time.

Mpofu was dissatisfied with the decision of the Commission and sought to have it set aside on review by the High Court. On 17 October 2003 Mpofu launched an application in the High Court for the rescission of the decision ^H of the Commission. In the application for review the applicant sought the

2008 (2) ZLR p120

Chidyausiku JA

following relief: ^A

"IT IS ORDERED THAT:

1. The Commission's decision dated 25 August 2003, which turned down the applicant's appeal, is hereby nullified and set aside.
2. In place thereof, the following is submitted (substituted?) as the Commission's decision:
 - '(a) the appeal is upheld; and ^B
 - (b) the Commissioner of Police of the Zimbabwe Republic Police (ZRP) is hereby ordered to reinstate Anatos Mpofu in the ZRP without loss of salary and benefits (including promotions and salary increments)'; and
3. The Commission shall pay the costs of this application."

I pause here to make the following observation. The application for review ^C was really intended to set aside the Commission's refusal to hear Mpofu's appeal. The appropriate relief should have been to ask the High Court to set aside the refusal to hear the appeal and to order the Commission to hear the appeal. The relief sought in the review application was misconceived.

The High Court dismissed the application for review. It is quite clear from the record that the application for review to the High Court was timeous. The ^D Commission dismissed Mpofu's appeal on 25 August 2003. The application for review to the High Court was launched on 17 October 2003. The application for review was therefore made within the eight weeks stipulated by the High Court Rules.

The learned judge in the court *a quo* suggests in his reasons for judgment, ^E in my view erroneously, that the application for review to the High Court was filed out of time. However, a close analysis of the reasons for judgment reveals that this was not the reason for the dismissal of the review

application. He dismissed the application for review on the ground that Mpofu's appeal to the Commission was out of time and prescribed. The Commission, so he reasoned, was correct in dismissing the appeal on the ground that it was noted ^F out of time. The reasoning and conclusion of the court *a quo* in this regard cannot be faulted. Mpofu's appeal to the Commission was noted well out of the time prescribed by the Regulations. There was no application to the Commission for condonation of the late noting of the appeal. Even if there had been an application for condonation, I am doubtful of the Commission's ^G jurisdiction to grant such condonation because the time limits for appeal procedures are statutory.

The learned judge in the court *a quo* was correct in holding that Mpofu's appeal to the Commission against his dismissal was hopelessly out of time.

On this basis the decision of the High Court to dismiss the application for review cannot be flawed. ^H

2008 (2) ZLR p121

Chidyausiku JA

^A However, I do not think that this should be the end of the matter. Section 48(a) of the Act, in terms of which the Commissioner of Police dismissed Mpofu, confers on the Commissioner of Police the discretion to discharge a member of the Police Force, such as Mpofu, upon him being convicted of an offence and sentenced thereafter to imprisonment without the option of a fine. It is quite clear from this provision that a member of the Police Force has to stand ^B convicted of an offence before he can be dismissed in terms of s 48 of the Act.

On the facts of this case, at the time that the Commissioner of Police discharged Mpofu, Mpofu stood convicted of assault, but on appeal to the High Court the conviction was quashed and the sentence set aside. The successful appeal had the retrospective effect of obliterating the conviction which was the basis of ^C Mpofu's dismissal. In this regard, Mr *Kawonde*, for Mpofu, submitted that:

"13. The appellant appealed his conviction. On 27 September 2001 the conviction was quashed and substituted by an acquittal. That acquittal rendered the conviction a nullity. It is trite that nothing arises out of a nullity. To the extent that the (respondents) purported that something could, they erred."

I agree with Mr *Kawonde's* submission. To hold that Mpofu stands discharged ^D from employment on the basis of a conviction that was quashed would be a travesty of justice and totally irregular. The dismissal of Mpofu in terms of s 48(a) of the Act *in casu* is unlawful because he stands convicted of no offence. The Commissioner of Police's discretion to dismiss Mpofu is predicated on the existence of a conviction, which in this case has ceased to exist, although ^E it may have existed at the time of the dismissal. On this basis I am satisfied that Mpofu's dismissal is unlawful and constitutes an irregularity.

Section 25 of the Supreme Court Act [*Chapter 7:13*] provides as follows:

"25 Review powers

(1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the ^F High Court and judges of the High Court, respectively, to review the proceedings and decisions of inferior courts of justice, tribunals and administrative authorities.

(2) The power, jurisdiction and authority conferred by subsection (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such proceedings are, or such ^G decision is, not the subject of an appeal or application to the Supreme Court.

(3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court or a judge of the Supreme Court, and provision may be made in rules of court, and a judge of the Supreme Court may give directions, specifying that any class of review or any particular review shall be instituted before or shall be referred ^H or remitted to the High Court for determination."

2008 (2) ZLR p121

Chidyausiku JA

It would appear to me that this is a proper case for this court to exercise the ^A powers conferred by the above section of the Supreme Court Act to correct a blatant irregularity by an administrative authority in dismissing Mpofu.

It is on this basis that this court hereby sets aside as unlawful the dismissal of Mpofu in the above circumstances.

Having concluded that the dismissal of Mpofu was unlawful, I hold the view ^b that on the facts of this case, in particular the fact that this is essentially a labour dispute and the time that has elapsed since the dismissal of Mpofu, and the nature of the employment involved in this case, the parties should have an opportunity to address the issue of reinstatement or payment of damages in lieu of reinstatement. The issue of whether Mpofu should be reinstated or paid damages in lieu of reinstatement has never been addressed, either ^c in this court or in the court *a quo*. In my view, the parties should be given an opportunity to debate that issue before a determination on it is made. The parties have advised the Court that they would prefer the matter to be remitted to the High Court for the determination of that issue. In my view, the Commission would have been the most appropriate authority to determine ^d that issue in the first instance. However, Mpofu is against a remittal to the Commission because the Commission has been party to these proceedings and has expressed its stance. In the light of this, Mpofu entertains some doubt that he will get a fair hearing from the Commission upon remittal of this matter to it. The respondents are agreeable to the matter being referred to the High Court. In the circumstances, by consent the matter will be remitted ^e to the High Court.

In the result the matter is remitted to the High Court for the purposes of determining whether following the unlawful dismissal of Mpofu he should be reinstated, as he requests, or be paid damages in lieu of reinstatement. Mpofu has been substantially successful and should be awarded his costs. ^f

Accordingly, the matter is hereby remitted to the High Court for the determination of the issue of whether Mpofu should be reinstated or paid compensation in lieu of reinstatement and, if so, the quantum of the damages. Mpofu is hereby awarded costs.

SANDURA JA and GWAUNZA JA concurred ^g

Kawonde & Co, appellant's legal practitioners

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

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Document 17 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/HEM GRANITE INDUSTRIES (PVT) LTD v KEELEY GRANITE (PVT) LTD 2008 (2) ZLR 123 (S)

HEM GRANITE INDUSTRIES (PVT) LTD v KEELEY GRANITE (PVT) LTD 2008 (2) ZLR 123 (S) 2008 (2) ZLR p123

Citation	2008 (2) ZLR 123 (S)
Case No	Judgment No. S-18-08
Court	Supreme Court, Harare
Judge	Malaba DCJ, Ziyambi JA & Garwe JA
Heard	9 September 2008
Judgment	9 September 2008
Counsel	<i>E T Matinenga</i> , for the appellant <i>R M Fitches</i> , for the respondent
Case Type	Civil appeal

Annotations

No case annotations to date

Flynote**Contract** – termination – effect – rights accrued before the date of termination – enforceability of such rights**Mines and minerals** – tribute agreement – effect – minerals extracted in terms of agreement but not removed from site by date of termination of agreement – tributor entitled to remove minerals subject to compliance with terms of agreement relating to payment of royalty**Headnote**

The respondent entered into a tribute agreement with the appellant, which owned a mining location. Whilst the appellant was holder of the title to the minerals within its location it did not have the necessary capital for digging up, extracting, processing and disposing of the actual minerals for its own benefit and account. The agreement gave the respondent the rights, for a period of three years, to mine, extract, process, remove from site granite and dolorite blocks, and dispose of them for its own benefit and account, subject to payment of an amount of a royalty of 10% of the "at quarry" value of the minerals won. The value was defined as being the price set by the Minerals Marketing Corporation. The agreement had a termination clause, in terms of which the respondent had a right to terminate the tribute agreement if it was unable to continue mining operations due to causes beyond its control, subject to it giving the appellant three months' written notice of its intent.

The granite blocks extracted from the mining location were of poor quality and the respondent found it difficult to sell them at the price set for the lowest category of grades of the quality of granite blocks. This resulted in the operations of the respondent becoming increasingly uneconomic, and the respondent gave notice of termination. It duly removed its equipment from the site but left behind 188 granite blocks. Attempts were made to

2008 (2) ZLR p124**Malaba DCJ**

sell the blocks but without success. After some years the prices in the international market had generally improved and the respondent went to remove the blocks from the site. The appellant prevented it from doing so, claiming that the respondent had lost its ownership in them until a new royalty agreement had been concluded. The respondent obtained an order from the High Court, authorising the removal of the blocks, subject to payment of a royalty as provided for in the tribute agreement. The appellant argued that the rights which the respondent had acquired in the granite blocks ought to have been exercised during the period of tribute.

Held, that the general rule of the law of contract is that termination of a contract operates *ex nunc, de futuro* only and does not affect rights which have accrued to the parties. Termination or extinction of the obligation to perform is restricted to the executory portion of the contract, leaving intact rights which were accrued due and enforceable before termination. Up to the date of termination, the rights have come into existence and can be enforced. *In casu* the granite blocks had already been won by the respondent in the exercise of the rights given to it under the tribute agreement. They were in its possession, ready to be removed from the mining location at the time of termination of the contract. They had become the property of the respondent by reason of its having performed its side of the bargain subject, of course, to payment of the amount of royalty which had to be calculated in the manner expressly provided for under the tribute agreement. The right to remove the blocks had accrued to the respondent at the time of termination of the tribute agreement and was enforceable against the appellant in the event of interference with its exercise. The only limitation to the exercise of the right of ownership by the respondent was the obligation to pay the amount of royalty determined in the manner specified in the agreement.

Cases cited

Crest Enterprises (Pty) Ltd v Rycklof Beleggings (Edms) Bpk 1972 (2) SA 863 (A)

Durma (Pvt) Ltd v Siziba 1996 (2) ZLR 636 (S) ^G

Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd 1986 (4) SA 510 (N)

Walker's Fruit Farms Ltd v Sumner 1930 TPD 394

Case information

E T Matinenga, for the appellant

R M Fitches, for the respondent ^H

2008 (2) ZLR p125

Malaba DCJ

Judgment

A MALABA DCJ: At the end of hearing argument for both parties we dismissed the appeal with costs. As the appellant had withdrawn an application it had intended to make for leave to lead further evidence, we ordered it to pay the costs relating to that application. We indicated at the time that reasons for the decision to dismiss the appeal would follow in due course. These are they.

On 4 December 1994, the respondent, which was then known as Boma ^B Granite (Pvt) Ltd, entered into a tribute agreement with the appellant. The appellant owned a mining location registered as No. 22391 BM situated in the district of UMP Zvataida in Mutoko. Whilst the appellant was holder of the title to the minerals within its location it did not have the necessary capital for digging up, extracting, processing and disposing of the actual ^C minerals for its own benefit and account.

The appellant entered into the tribute agreement with the respondent in terms of which it gave to the latter (the tributor) the rights to mine, extract, process, remove from site the minerals and dispose of them for its own benefit and account, subject to payment of an amount of royalty of 10 per cent of the "at quarry" value of the minerals won, for a period of three years commencing ^D 1 March 1995 and terminating on 28 February 1998.

The relevant provisions of the tribute agreement in terms of which the parties defined the rights and obligations of their relationship are these: under clause 2(a), the parties agreed that:

"2(a) The Tributor shall have the right to work the said Mining Location to ^E develop, to extract granite/dolorite blocks and treat the blocks from the same and dispose of the products for own account, but subject to the conditions of this agreement."

One of the conditions of this agreement set out in clause 4 was that:

"4. In consideration of the rights granted by the Grantor to the Tributor under this agreement, the Tributor shall pay to the Grantor a royalty amount of 10 per ^F cent of the 'at quarry' value of the blocks of granite or other valuable products won and removed by the tributor from the said mining location."

In a memorandum of clarification dated February 1995, the parties defined for themselves the meaning of the words "at quarry" value in clause 4 of the tribute agreement. They agreed that it meant "the value free on truck Harare as determined by the Minerals Marketing Corporation Zimbabwe ^G for the said blocks of granite, less the cost of transporting the said blocks of granite from the quarry to Harare".

Under clause 8, the parties agreed that the Tributor had a right to terminate the tribute agreement if it was unable to continue mining operations due to causes beyond its control, subject to it giving the Grantor three months' written ^H notice of its intention to do so. Under clause 10, they provided that on the

2008 (2) ZLR p126

Malaba DCJ

termination of the tribute agreement in terms of clause 8 the Tributor had to ^A remove its machinery or plant from the mining location within three months.

The respondent took occupation of the mining location and exercised the rights given to it under the tribute agreement of mining, extracting and removing the granite blocks for its own account. It also discharged its obligation by paying to the appellant the amounts of royalty of 10 per cent of the "at

quarry" value ^b of the granite blocks removed from the mining location for sale, calculated in terms of clause 4 as read with the memorandum of clarification.

The respondent was obliged to sell the granite blocks at prices prescribed for the industry by the Minerals Marketing Corporation Zimbabwe (MMCZ). The granite blocks extracted from the appellant's mining location were of ^c poor quality. The respondent found it difficult to sell the granite blocks at the price prescribed by MMCZ for the lowest category of grades of the quality of granite blocks. As the MMCZ was unwilling to create another category of poor quality granite blocks the operations of the respondent became increasingly uneconomic.

In October 1997, the respondent gave written notice to the appellant of its ^d intention to terminate the tribute agreement on 28 February 1998, in terms of clause 8 of the agreement. The appellant accepted that the termination was due to causes beyond the respondent's control. Within three months of the termination of the tribute agreement the respondent removed its machinery or plant from the mining location. As of 28 February 1998 the respondent ^e ceased to have the rights to mine, extract and remove minerals from the mining location.

At the time of termination of the tribute agreement the respondent had under its possession and ready to be removed from the mining location 188 granite blocks. These were blocks the respondent had won as a result of the exercise of the rights given to it under the tribute agreement. Its officials regularly ^f visited the mining location to check on the security of the granite blocks. At times, they brought potential buyers as they attempted to sell the blocks on behalf of the respondent. The appellant did not at the time dispute the ownership of the granite blocks by the respondent.

In 2005, MMCZ created a new category in the price structure for granite ^g blocks of the quality similar to those extracted by the respondent from the appellant's mining location. Prices of granite blocks in the international market had generally improved. The respondent's officials went to the mining location in December 2005 with the intention of removing the 188 granite blocks for sale. The appellant's officials prevented the removal of the blocks claiming that they belonged to it. ^h

2008 (2) ZLR p127

Malaba DCJ

^a On 21 March 2006, the respondent made an application to the High Court for an order authorising the removal of the 188 blocks of black granite from the appellant's mining location subject to payment of an amount of royalty of 10 per cent of the "at quarry" value of the blocks within 30 days of their removal. The ground on which the application was made was that at the time of termination of the tribute agreement the 188 granite blocks were owned ^b by the respondent. The contention was that it had the right to remove them from the mining location without hindrance from the appellant.

The application was opposed on three grounds. These were:

- "(a) That ownership of the granite blocks vested in the appellant by virtue of it being the owner of the Mining Location until after payment of royalty. ^c
- (b) That if ownership vested in the respondent by virtue of clause 2(a) of the tribute agreement the respondent had abandoned the granite blocks at the termination of the agreement as being worthless.
- (c) That all the rights of ownership which could have vested in the respondent reverted to the appellant as a result of the termination of the tribute agreement, as a new agreement on the royalty to be paid by the respondent would have had to be entered into by the parties."

^d The court *a quo* in a well reasoned judgment upheld the respondent's contention that it had the ownership of the granite blocks at the time of termination of the tribute agreement and did not lose its right to remove the blocks from the mining location as a result of the termination of a further contractual relationship with the appellant. The defences proffered by the appellant to ^e the claim by the respondent were dismissed and the order appealed against granted.

The argument that the granite blocks were owned by the appellant because it owned the mining location was clearly untenable. Whilst retaining title to the mining location the appellant had in terms of the tribute agreement given ^f some of the rights such as the right to mine, extract, process and remove for own account the granite blocks to the respondent. The granite blocks won by the respondent in the exercise of the rights given to it belonged to the respondent. Ownership of those granite blocks could not vest in two people at the same time. The tribute agreement itself recognised the fact that the granite blocks won in terms of clause 2(a) would be the property of the respondent.

Equally untenable was the argument that the respondent had abandoned the granite blocks when it left them at the mining location upon termination of the agreement. The regular visits to the mining location by the respondent's officials to check on the security of the granite blocks and at times to show them to potential buyers without any objection from the appellant were accepted by the court *a quo* as sufficient evidence of determination on the

2008 (2) ZLR p128

Malaba DCJ

part of the respondent to retain ownership of the granite blocks. A

Mr *Matinenga* argued the appellant's case on one ground. This was that:

"The learned judge erred at law in finding that the termination of the Tribute Agreement between the appellant and the respondent on 28 February 1998 did not in any way change the respondent's rights to blocks of granite mined but left at the appellant's claim. B

He ought to have found that as the contract (Tribute Agreement) between the appellant and the respondent had terminated there had to be a new agreement on royalty before the respondent could remove the blocks of granite from the said claim."

The contention advanced on behalf of the appellant in argument was that the right of ownership which the respondent may have had in the granite blocks C went together with its obligation to pay the amount of royalty of 10 per cent of the "at quarry" value in terms of clause 4 of the Tribute Agreement, extinguished by the termination of the agreement on 28 February 1998. Mr *Matinenga* submitted that the rights which the respondent had acquired in the granite blocks ought to have been exercised *during the period of tribute* (the emphasis is mine). Reliance was placed on the *dictum* in *Durma (Pvt) Ltd D v Siziba* 1996 (2) ZLR 636 (S) at pp 637G-638B, where Ebrahim JA said:

"A tribute agreement is one whereby mineral rights are let by one person (the grantor) to another (the tributor). It is not a lease of land, or even of minerals. It is a concession by the mine owner to the tributor of a portion of his own incorporeal right in respect of the minerals, namely, to win precious metals (or other minerals) if he can find them. A condition is attached that the tributor will E pay a certain proportion of the minerals won to the mine owner: *Spearman & Magden v Snodgrass* 1912 SR 161. It is a contract *sui generis*, being neither a lease nor a sale at common law, though the principles to be applied are not very different: *Naested v Kia Ora Syndicate* 1935 SR 117 at 124, *Graham & Roof Mine Tribute v Rixom NO* 1941 SR 51 at 62. The tributor is given the right to mine the land and to win from it as much of the minerals sought as he can F *during the period of the tribute* and to dispose of the mineral so won for his own profit" (the emphasis is mine).

The contention accepts as its premise that the respondent had at the time of termination of the tribute agreement acquired the rights of ownership in the granite blocks including the right to remove and dispose of them for its own benefit and account subject to payment of the amount of royalty of 10 per G cent of the "at quarry" value of the blocks determined in terms of clause 4 of the agreement. It is important to emphasize the fact that the right to remove the granite blocks lay together with the obligation to pay the royalty. The royalty would be the amount calculated on the value of the granite blocks determined in terms of clause 4 of the tribute agreement. The amount was to be payment for the specific rights given to the respondent and realized H

2008 (2) ZLR p129

Malaba DCJ

A by it in terms of that agreement.

The question then is, did the termination of the tribute agreement have the effect of extinguishing the rights and obligations which had accrued to the respondent as contended by the appellant? The general rule of the law of contract is that termination of a contract operates *ex nunc, de futuro* only and does not affect rights which have accrued to the parties. Termination or B extinction of the obligation to perform is restricted to the executory portion of the contract, leaving intact rights which were accrued due and enforceable before termination. In *Walker's Fruit Farms Ltd v Sumner* 1930 TPD 394, Greenberg J with the concurrence of Solomon J at p 401 spoke about the effect of acceptance of a repudiation of a contract on accrued rights. He said:

C "No doubt it is correct that, where there is repudiation and where the other party elects to treat the contract as at an end, the latter cannot thereafter enforce the contract. But it appears to me that this only applies to the executory portion of the contract; but where a certain right has accrued to the one party before the election, such right is not affected after the election. He treats the contract as at an end as from

the date when he makes his election; up to that date the rights have come into existence and can be enforced."

▯ In *Crest Enterprises (Pvt) Ltd v Rycklof Beleggings (Edms) Bpk* 1972 (2) SA 863 (A) Holmes JA, expounding on the rule at 870B, said:

"when Greenberg J used the word 'accrued' in the foregoing passage, it is clear that he meant 'accrued, due and enforceable'. I say this for three reasons. First, the learned judge contrasted the 'executory portion of the contract' to a right ε which 'has accrued'. Second, a few lines after the above-cited paragraph he used the expression 'accrued due'. Third, on the facts of that case the right in question had not merely vested but had become enforceable prior to the cancellation of the contract ...

Seen in that light, the rule is worth preserving because –

- (a) It has in it elements of fairness and common sense, such as a crisp balancing of contractual performance and prestation when the plaintiff sues. f
- (b) It has been recognized in a number of cases over the past forty years and more, e.g. in *Arnold v Viljoen* 1954 (3) SA 322 (C), even if it was applied somewhat widely in some of them, eg. in *Maw v Grant* 1966 (4) SA 83 (C), the latter being the subject of comment in the 1965 issue of the *Annual Survey of South African Law* at 153-4.
- (c) It accords with English principles which are relevant since the doctrine of g anticipatory repudiation came to us from England. In *Salmond & Williams On Contracts* 2 ed (1945), the learned authors say at 566...

'... every obligation which has accrued due between the parties before the rescission of the contract, and which so creates a then existing cause of action remains unaffected by the rescission and can still be enforced.'

To sum up on this aspect, the rule in the *Walker* case *supra*, is confined to h cases where, prior to the rescission of a contract by one party's acceptance

2008 (2) ZLR p130

Malaba DCJ

of the other's repudiation, there exists a right which is accrued, due and A enforceable as a cause of action independent of any executory part of the contract."

In *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N), Nienaber J stressed the importance of the qualification in the *Crest Enterprises* case *supra* that the rule operates B only to the extent that the accrued rights are independent of the executory portion of the contract. The rule is, furthermore, not restricted to instances of repudiation.

In this case, the granite blocks had already been won by the respondent in the exercise of the rights given to it under clause 2(a) of the tribute agreement. They were in its possession ready to be removed from the mining location c at the time of termination of the contract. The granite blocks had become the property of the respondent by reason of its having performed its side of the bargain, subject, of course, to payment of the amount of royalty which had to be calculated in the manner expressly provided for under clause 4 of the tribute agreement.

The right to remove the granite blocks from the mining location had accrued ▯ to the respondent at the time of termination of the tribute agreement. The right was enforceable against the appellant in the event of interference with its exercise. Mr *Fitches* submitted that the only limitation to the exercise of the right of ownership in the granite blocks by the respondent was the obligation to pay the amount of royalty determined in the manner specified ε in clause 4 of the agreement.

I agree with Mr *Fitches* that the obligation was a subtraction from the respondent's *dominium* in the granite blocks. The amount of royalty determined in the manner specified would be consideration for the particular rights already had by the respondent. The rights accrued to the respondent. So did f the obligation to pay the amount of royalty as agreed. The contention that there had to be a new agreement on the royalty to be paid was based on the illogical proposition that ownership of the granite blocks was somehow lost to the appellant by reason of the termination of the contract. Both the rights and obligation could not be extinguished by the termination of the tribute agreement which affected the executory portion of the contract only. g

The executory portion of the tribute agreement which was terminated was that the respondent no longer had the rights to develop, extract, treat and remove granite blocks from the mining location as from the date of termination. The accrued right to remove the granite blocks already won and the obligation to pay the amount of royalty for them determined in terms of clause 4 of the tribute agreement were not affected. They were enforceable independent of h

Malaba DCJ

A the executory portion of the contract. By preventing the removal of the granite blocks from the mining location, the appellant acted unlawfully, vesting the respondent with a cause of action to enforce its rights.

The appeal was accordingly dismissed with costs.

B ZIYAMBI JA & GARWE JA concurred.

Gutu & Chikowero, appellant's legal practitioners

Costa & Madzonga, respondent's legal practitioners

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Document 18 of 49

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/FANTAISIE FARM (PVT) LTD & ORS v MANYERUKE & ORS 2008 (2) ZLR 132 (S)

FANTAISIE FARM (PVT) LTD & ORS v MANYERUKE & ORS 2008 (2) ZLR 132 (S)

2008 (2) ZLR p132

Citation	2008 (2) ZLR 132 (S)
Case No	Judgment No. S-65-07
Court	Supreme Court, Harare
Judge	Cheda JA, Gwaunza JA & Garwe JA
Heard	25 June 2007
Judgment	11 September 2008
Counsel	<i>A P de Bourbon SC</i> , for the appellants <i>T Mugadza</i> , for the respondents (the settlers) <i>S Moyo</i> , for the additional respondents (the millers)
Case Type	Details not supplied
Annotations	No case annotations to date

Flynote

Property and real rights – *immovable property* – *bona fide possessor* – *entitlement to fruits or produce as long as he remains a bona fide possessor*

Headnote

The appellants were all owners of farms on which they cultivated and produced sugar cane in the Hippo Valley and Triangle areas. The farms D were acquired by the State in terms of s 8(1) of the Land Acquisition Act [*Chapter 20:10*] and allocated to the first group of respondents who settled thereon. The settlers reaped the sugar cane which had been planted there and sold it to sugar

mills in the area. The acquisition orders were subsequently set aside as being invalid. The appellants argued that because the acquisition orders were subsequently set aside, the Minister's actions were invalid right from the beginning and therefore the settlers had no lawful right to the proceeds of the sugar cane that they delivered to the millers during the period of the acquisition.

Held, that there was nothing to suggest that the settlers knew, or were aware, that in settling them on the sugar cane farms the Minister was not acting in accordance with the provisions of the relevant law. It was not for them to question the legality of the Minister's actions. They were therefore *bona fide* occupants of land regarding its fruits or produce. Under the common law, a *bona fide* possessor acquires all the fruits gathered by him before the *litis contestatio* in an action regarding the possession or ownership of the ground, whether they have been consumed or are still in existence; but he is bound to restore to the owner of the property all fruits actually gathered by him after *litis contestatio* because, by *litis contestatio*, a *bona fide* possessor becomes converted into a *mala fide* possessor. A *bona fide* possessor is not answerable to the person actually entitled for acts done by him in accordance with his supposed title, nor for the loss or deterioration of the thing possessed which occurred before

2008 (2) ZLR p133

Cheda JA

he became aware of the other's right.

Held, further, that the fact that the production of sugar cane by the settlers was in contravention of the Sugar Production Control Act [Chapter 18:09] did not mean that they should be deprived of the sugar cane, or that the sugar cane could then become the property of someone who did not produce it.

Cases cited

Bon Espoir (Pvt) Ltd v Chabata & Ors 2003 (2) ZLR 472 (S)

Fletcher Bros v Bulawayo Waterworks Co 1915 AD 636

Getz & Getz v Min of Mines 1916 TPD 66

Odendaal v van Oudtshoorn 1968 (3) SA 433 (T)

Rubin v Botha 1911 AD 568

Wynland Construction (Pty) Ltd v Ashley-Smith en Andere 1985 (3) SA 798 (A)

Legislation considered

Land Acquisition Act [Chapter 20:10], s 8(2)(b)

Sugar Control Production Act [Chapter 18:09], ss 8, 11 & 22(1)

Case information

A P de Bourbon SC, for the appellants

T Mugadza, for the respondents (the settlers)

S Moyo, for the additional respondents (the millers)

Judgment

CHEDA JA: The appellants were the registered owners of farms on which they cultivated and produced sugar cane in the Hippo Valley and Triangle area. Their farms were acquired by the State in terms of s 8(1) of the Land Acquisition Act [Chapter 20:10] and allocated to the first group of respondents who settled thereon (hereinafter referred to as "the settlers"). The additional respondents are sugar cane millers. The settlers produced sugar cane and delivered it to Hippo Valley Estates Limited and Triangle Limited, the additional respondents, for milling. On realizing that they would be facing conflicting claims from the appellants and the settlers for the proceeds of the cane that had been milled, the additional respondents initiated interpleader proceedings at the High Court.

The appellants opposed this action. The High Court resolved the matter by ordering that the settlers be awarded the proceeds of the sugar cane that they produced during the existence of the acquisition orders made by the Minister of Lands, Agriculture and Rural Resettlement (hereinafter referred to as "the Minister"). This is an appeal against that decision.

2008 (2) ZLR p134

Cheda JA

At the beginning of the hearing of this appeal, Mr Moyo indicated that he was not going to argue for the additional respondents but would merely await the decision of the court. In the notice of appeal, the appellants stated as follows:

"The appellants appeal against that part of the judgment in each case in which the High Court of Zimbabwe ordered the payment to the settlers by the additional respondents of the proceeds of sugar cane harvested and delivered to one of the additional respondents during the life span of an order made in terms of s 8 of the Land Acquisition Act [Chapter 20:10] and against that part of the order for costs which directed the appellants to pay one half of the costs of the additional respondents."

The grounds of appeal were stated as follows:

1. The court *a quo* erred in failing to consider the validity of any order made in terms of s 8 of the Land Acquisition Act [Chapter 20:10], especially in the light of orders of the Administrative Court and the High Court, and in light of the decision of this Honourable Court in the matter of *Bon Espoir (Pvt) Ltd v Chabata & Ors*. Judgment 2003 (2) ZLR 472 (S).
2. The court *a quo* erred in failing to consider in each case whether or not the purported acquisition of the farm was lawful and thus whether any occupation thereof, and any farming activities on such farm, by any respondent was lawful.
3. The court *a quo* erred in finding that for the time an order in terms of s 8 of the Land Acquisition Act [Chapter 20:10] was in effect the respondents, as beneficiaries chosen by the acquiring authority to farm the land, were entitled to the proceeds therefrom, especially in that:
 - (a) the orders made in terms of s 8 of the Act were invalid; and
 - (b) the respondents were not registered as cane growers in terms of the law.
4. The court *a quo* erred in finding that it was lawful for the additional respondents to make payments to the respondents, notwithstanding that they were not registered growers of sugar cane in terms of the Sugar Control Production Act [Chapter 18:09], or erred in failing to find that such a payment would be unlawful.
5. The court *a quo* erred in failing to find that any lease of the farms would be unlawful as there was no appointed Agricultural Land Settlement Board in terms of the Agricultural Land Settlement Act [Chapter 20:01]."

The central issue in this appeal is reflected in the appellants' prayer which reads as follows:

"Wherefore each of the appellants pray that their appeal be allowed with costs and that in each case the Order of the High Court be altered to one reading:

1. All the proceeds from the delivery of sugar cane to a miller shall be paid by the miller to the person (company) in whose name the farm from which the sugar cane was registered in respect of the seasons 2002/2003, 2003/2004 and 2004/2005.
2. The second and further respondents will pay the costs of the interpleader."

2008 (2) ZLR p135

Cheda JA

A Section 8 of the Land Acquisition Act provides as follows:

"Immediately after making an order in terms of subsection (1) an acquiring authority may –

- (a) ...
- (b) in relation to any agricultural land acquired for resettlement purposes, exercise any right of ownership, including the right to demarcate, and allocate the land concerned for agricultural purposes, without undue interference to the living quarters of the owner or occupier of that land."

The settlers in this case were allocated the farms by the Minister in terms of that section. This was agricultural land. The settlers carried out agricultural activity on the land. Once acquired, the land fell in the hands of the Minister and he had all the right to allocate it. The appellants argued that, because the acquisition orders were subsequently set aside, the Minister's actions were invalid right

from the beginning and therefore the settlers have no lawful right to the proceeds of the sugar cane that they delivered to the millers during the period of the acquisition.

It is common cause that the acquisition orders were successfully challenged ^d by the appellants and subsequently set aside. What then is the legal position regarding the cane produced during that period? The appellants contend that, if the acquisitions were unlawful, then the settlers should not benefit from the proceeds of the sugar cane. There is nothing in the record to suggest that the settlers knew, or were aware, that in settling them on the sugar cane farms the Minister was not acting in accordance with the provisions of the ^e relevant law. It was not for them to question the legality of the Minister's actions. They were being settled by a Government Minister, unlike where persons invaded and occupied the land on their own. If the Minister was wrong in so settling them, or if he failed to observe or comply with certain provisions of the law, that was a matter for the Minister and not the settlers. ^f Anything wrong in the procedure followed in settling them can only be attributed to the Minister and not to the settlers. They were not aware of anything wrong. They were therefore bona fide occupants of land regarding its fruits or produce.

Maasdorp's Institutes of South Africa Law Vol II The Law of Things 8 ed by C G Hall, states at p 42:

^g "A bona fide possessor acquires all the fruits gathered by him before the *litis contestatio* in an action regarding the possession or ownership of the ground whether they have been consumed or are still in existence; but he is bound to restore to the owner of the property all fruits actually gathered by him after *litis contestatio*, because by *litis contestatio* a bona fide possessor becomes converted into a mala fide possessor. He is even liable for the fruits which he might have ^h gathered after the *litis contestatio* but negligently omitted to gather."

2008 (2) ZLR p136

Cheda JA

At p 43 the writer also states: ^a

"But where a person has built with his own material, or planted his own trees, or sown his own seed, or made other improvements, at his own expense, or by means of his own labour, on the land of another, and the latter claims back his property the former is entitled to claim compensation for all necessary and useful expenses he has incurred."

The following statement also appears on this same page: ^b

"A lessee under a 99 year lease who has bona fide occupied land adjoining that leased to him has, however, been held to be entitled to recover the amount by which the land has been enhanced and has a *jus retentionis*."

In *South African Law of Property, Family Relations and Succession* by R W Lee, we also find the following at p 11: ^c

"Bona fide possessor. A bona fide possessor is not answerable to the person actually entitled for acts done by him in accordance with his supposed title, nor for the loss or deterioration of the thing possessed which occurred before he became aware of the other's right."

In Van Leuwen's Roman Dutch Law, 2 ed vol 1, by Mr Justice Kotzé, at p 183, we find the following by Grotius 11:6 wherein he says: ^d

"By being in possession of property, which we bona fide believe to be our own, we also acquire, *per consequentiam rei*, the dominium of the fruits of such property."

The above authoritative positions were followed in *Fletcher Bros v Bulawayo Waterworks Co* 1915 AD 636, where the owner of a piece of land claimed compensation for water which the respondent had pumped from a well that ^e had been unknowingly sunk, which overlapped into the plaintiff's property, and payment of profits. Hopley J held as follows on p 639 of the judgment:

"I have no difficulty in finding as a fact that defendants were bona fide occupiers or possessors of this piece of ground over which their operations extended and that they thought they were sinking on Slot's ground. I am also of opinion that such of their work as was of a permanent nature was done *pro domino* in the ^f genuine belief that it would be theirs for the term of their lease and would at its expiration, or of its renewals as stipulated, revert to Slot as was agreed upon by the terms of the lease."

He went on to say at p 641:

"As regards the claim for an account, I cannot see on what principle it is made. ^g That water which the defendants won from underground was not the plaintiff's water and the fact that it was got through the misplaced well did not make it theirs. It was something like an animal *ferae naturae* captured or shot by a trespasser which does not by such act become the property of the owner of the land on which it was

captured or killed: or *the water might be likened to fruits won by a bona fide possessor trespassing on another's ground*. The law on that point being that all fruits gathered by a *bona fide* possessor before *litis* ^H

2008 (2) ZLR p137

Cheda JA

^A *contestatio* are acquired by him for himself (my underlining) (see *Maasdorps Institutes*, vol 2, p 52.”

The claim in *Fletcher's* case *supra* failed because after *litis contestatio* took place no more water was taken.

For a further discussion of some of the principles referred to in this matter, ^B see the following cases: *Rubin v Botha* 1911 AD 568; *Getz & Getz v Minister of Mines* 1916 TPD 66; *Wynland Construction (Pty) Ltd v Ashley-Smith en Andere* 1985 (3) SA 798; *Odendaal v van Oudtshorn* 1968 (3) SA 433 (T). See also *South African Law of Property, Family Relation and Succession* by R W Lee, A M Honoré and T W Price.

The judge in the court *a quo* awarded the settlers the proceeds of the sugar ^C cane produced only during the existence of the acquisition orders and not after. The appellants argued that the production of sugar cane by the settlers was in contravention of the Sugar Production Control Act [Chapter 18:09]. I do not see how the sugar cane, if produced in contravention of that Act, becomes the property of the appellants. Section 11 of that Act provides as ^D follows:

“No person shall grow sugar cane for the purpose of delivering it to a factory unless he is licensed as a grower.”

Section 22(1) of that Act provides that:

“Any person who contravenes this Act shall be guilty of an offence and liable – ^E

- (a) in the case of a first conviction, to a fine not exceeding two hundred dollars or to imprisonment for a period not exceeding six months;
- (b) in the case of a second or subsequent conviction, to a fine not exceeding four hundred dollars or to imprisonment for a period not exceeding twelve months or to both such fine and such imprisonment.”

The settlers have not been charged with the offence of producing sugar cane ^F without a licence. Even if they had been charged with such an offence, there is nothing in the Act to suggest that they should be deprived of the sugar cane, or that the sugar cane could then become the property of someone who did not produce it. There is nothing in that Act to suggest that the miller should retain the proceeds for himself or for any person other than the one who delivered it for milling.

^G The appellants also raised issues about the allocation of land without the approval of the Agricultural Land Settlement Board. These are issues which should be raised with the Minister and not the settlers. The appellants also agreed that the judge in the court *a quo* was wrong in having regard to s 8(2)(b) of the Land Acquisition Act in the absence of such a valid order being ^H in force. As has been pointed out, once it was accepted that such orders had

2008 (2) ZLR p138

Cheda JA

been issued, their validity had nothing to do with the ^A settlers but with the Minister, as he was eventually challenged in court and the orders were set aside. The appellants cannot say that such orders were set aside then turn around and deny their existence at the same time.

The appellants referred to s 8 of the Sugar Production Control Act, which provides that: ^B

“No miller shall receive sugar cane grown in Zimbabwe for the manufacture of sugar other than from a grower or his duly authorized servant or agent”,

and that the term –

“grower means a person who grows sugar cane for the purpose of delivering it to a factory and who is licenced in terms of this Act.” ^C

It should be noted that this offence is for the miller, but the miller has not been charged with this offence and it is therefore irrelevant to raise this point against the settlers. The issue of sugar quotas is also the responsibility of the Minister and not the settlers. The Minister settled them and asked them to produce sugar cane. One relevant observation is that since the appellants were not the ones who produced and delivered the sugar cane in question to ^D the millers, they have no basis

for claiming the proceeds either, and it would have been wrong for the millers to give the proceeds of the sugar cane to the appellants who were not the growers of the sugar cane concerned.

It is irrelevant to say that up to the time of *litis contestatio* there had been no lawful acquisition. What is relevant is that, up to the time of *litis contestatio*, the settlers were *bona fide* occupiers of the sugar cane farms.

The additional respondents were correct to institute interpleader proceedings, because it was not for them to determine who was lawfully entitled to the proceeds of the sugar cane once the proceeds were likely to be claimed by different parties. This was a proper case for the interpleader procedure. ^F

It was suggested by the appellants that the association of the settlers had no right to represent them. There is no reason why the settlers cannot be represented by their associations as there is an affidavit showing that the persons listed in it had authorized the association to represent them.

The judge in the court *a quo* was correct in pointing out that some of the issues ^G raised by the appellants were irrelevant, as they concerned the Minister's actions and not those of the settlers. For these reasons I am satisfied that there is no merit in the appeal and it is dismissed with costs.

GWAUNZA JA and GARWE JA concurred.

2008 (2) ZLR p139

Cheda JA

^A *Coghlan, Welsh & Guest*, applicant's legal practitioners

Mutezo & Co, respondent's legal practitioners

Scanlen & Holderness, additional respondent's legal practitioners

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Document 19 of 49

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MAWERE v MINISTER OF JUSTICE 2008 (2) ZLR 140 (S)

2008 (2) ZLR p140

Citation	2008 (2) ZLR 140 (S)
Case No	Judgment No. S-67-07
Court	Supreme Court, Harare
Judge	Cheda JA, Gwaunza JA and Garwe JA
Heard	17 July 2007
Judgment	16 September 2008
Counsel	<i>A P de Bourbon SC</i> , for the appellant <i>E I Manikai</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 18 – right to protection of the law – administrative decisions – constitutional right to challenge such decisions

Criminal procedure – specification in terms of Prevention of Corruption Act ^D [Chapter 9:16] – whether Minister obliged to notify person affected of his intention to declare him to be a specified person – extra-territoriality of specification – whether Minister entitled to declare non-resident of Zimbabwe to be a specified person – such person having assets and controlling companies within Zimbabwe – Minister entitled to declare him to be a specified person ^E

Practice and procedure – parties – locus standi – fugitive from justice – what must be shown for person to be regarded as fugitive from justice

Practice and procedure – parties – locus standi – person specified in terms of Prevention of Corruption Act [Chapter 9:16] – need for investigator's ^F approval to expend assets – whether person may be prevented from challenging correctness of investigator's decision

Statutes – Prevention of Corruption Act [Chapter 9:16] – s 6 – specification in terms of Act – person affected not a citizen of Zimbabwe – citizenship not necessary for specification of a person – powers of Minister to declare person to be a "specified person" – jurisdictional facts which must exist ^G before a person is so declared – natural justice – person directly affected by impending inquiry – fundamental requirements of natural justice in relation to a specified person

Words and phrases – "fugitive from justice" – meaning of ^H

2008 (2) ZLR p141

Cheda JA

Headnote

^A The appellant, a sometime citizen and resident of Zimbabwe, was a businessman residing in South Africa. On 9 July 2004, by notice in the *Government Gazette*, the respondent Minister declared him to be a "specified person" in terms of s 6 of the Prevention of Corruption Act [Chapter 9:16], in order to facilitate an inquiry by an investigator into the appellant's business affairs in Zimbabwe. The Minister had information ^B that a company controlled by the appellant had externalized funds from Zimbabwe and that a South African company, in which he had an interest, had failed to remit to that Zimbabwean company its export proceeds. The appellant complained that he was unaware of any intention to declare him a "specified person", which declaration was impacting adversely ^C on his business activities in South Africa and elsewhere in the world. Unsuccessfully he had sought a review of the respondents declaration before the High Court. On appeal to the Supreme Court, it was argued on his behalf, *inter alia*, that the Act had no application to him as he had ceased to be a Zimbabwean citizen and was no longer resident in the country. It was also argued that he should have been granted the right ^D to be heard before the Minister declared him to be a "specified person" and the Minister had ignored the fundamental requirements of natural justice towards him. He also pressed the point that the jurisdictional facts that had to exist before the Minister could so declare him, did not exist.

Besides opposing the arguments advanced by the appellant, the Minister ^E took two points *in limine*. On his behalf, it was argued that the appellant had no *locus standi* to bring the matter on review as he had no authority from the investigator before engaging in anything which might affect his estate, as required by s 10 of the Act and that, in any event, having fled the country, he was a fugitive from justice.

Held, that the appellant did have *locus standi* to bring that action. It had not ^F been shown that in instituting his action from South Africa, the appellant was expending any of his assets in Zimbabwe. The investigator had no jurisdiction over any of appellant's assets outside the country

Quaere, whether, in any event, the appellant could be deprived of a constitutional right to challenge an administrative decision such as that *in casu*.

^G *Held*, further, that for the court to hold that the appellant was a fugitive from justice, it would have to be shown that he had left Zimbabwe with the intention of fleeing and had deliberately put himself beyond the jurisdiction of the court to avoid any legal action that might be brought against him.

^H *Held*, further, that it was irrelevant whether a person was a resident or a

Cheda JA

citizen of another country as long as that person had done one of the ^a things mentioned in s 6(1) of the Act. The appellant could not avoid being investigated simply because he was not a citizen or a resident of Zimbabwe.

Held, further, that the fundamental requirements of natural justice to which a person directly affected by an impending inquiry are: ^b

- (1) the right to have notice of the charge or complaint; and
- (2) the right to be heard; and
- (3) the right to be given the opportunity to state his case.

Held, further, that the foregoing requirements were met. Due notice of the specification was provided in the *Government Gazette* of the 9 July 2004, and the appellant was to appear in due course before the investigator ^c and would have the opportunity to present his case fully before him.

Held, further, dismissing the appeal, that the jurisdictional facts upon which the Minister had to rely need not be proved or concrete facts. All that was required were facts upon which he could form an opinion. When the investigator considered the matter, in the course of which the appellant could fully present his case, the truth or otherwise of the information ^d laid before the respondent would be determined.

Cases cited

Holland & Ors v Minister of the Public Service, Labour and Social Welfare 1997 (1) ZLR 186 (S)

Min of the Interior v Bechler & Ors 1948 (3) SA 409 (A)

S v Sylow 2002 (2) ZLR 219 (H) ^e

South African Defence & Aid Fund & Anor v Min of Justice 1967 (1) SA 31 (A)

Tefu v Min of Justice & Anor 1953 (2) SA 61 (T)

Legislation considered ^f

Interpretation Act [*Chapter 1:01*], s 3

Prevention of Corruption Act [*Chapter 9:16*], ss 6, 9 and 10

Case information

A P de Bourbon SC, for the appellant

E I Manikai, for the respondent ^g

Judgment

CHEDA JA: The appellant is a businessman currently residing in the Republic of South Africa. The respondent is the Minister of Justice, Legal and Parliamentary Affairs in the Zimbabwean Government and is responsible for the administration of the Prevention of Corruption Act [*Chapter 9:16*] ("the Act"). ^h

Cheda JA

^a On 9 July 2004, the Minister, by notice in the *Zimbabwean Government Gazette Extraordinary*, declared the appellant to be a specified person in terms of s 6 of the Act.

About 17½ weeks after the above notice, the appellant applied to the High Court for condonation for the late filing of the application for review and for ^b the order declaring him to be a specified person to be set aside.

The order that the appellant sought was as follows:

1. Condonation be and is hereby granted for the late filing of the application for judicial review. ^c

2. The decision of the respondent declaring the applicant to be a specified person in terms of s 6 of the Prevention of Corruption Act [*Chapter 9:16*] published in General Notice 345A of 2004 in the *Government Gazette Extraordinary* of 9 July 2004 be reviewed and is hereby set aside.
3. The respondent shall pay the costs of this application.
D ALTERNATIVELY
4. It is declared that the respondent exceeded his powers in terms of s 6 of the Prevention of Corruption Act [*Chapter 9:16*] when he issued a notice published in General Notice 345A of 2004 in the *Government Gazette Extraordinary* of 9 July 2004 declaring the applicant to be a specified E person for purposes of the Prevention of Corruption Act [*Chapter 9:16*].
5. It is declared that the applicant is under no lawful impediment in respect of his property in Zimbabwe.
6. The respondent shall pay costs of the application.

The High Court, in its judgment HC 11951/04 dated 11 May 2005, after careful F consideration of the reasons for the delay in filing the application, granted condonation to the applicant, proceeded to deal with the main application and dismissed it with costs. This appeal is against the High Court's decision dismissing the application for review.

In his heads of argument the respondent raised the points *in limine* that the G appeal should be dismissed on the basis that the appellant has no *locus standi* to appear before this court, more particularly:

- 1.1. The appellant is a specified person and has not obtained the authority of the investigator to launch this appeal; and H
- 1.2. The appellant is a fugitive from justice.

2008 (2) ZLR p144

Cheda JA

Locus Standi A

The appellant launched the application at the High Court in order to challenge the specification by the respondent and has appealed following the High Court's dismissal of the application. In his submission, the specification was wrong and that is why he is challenging it.

It is a legal requirement that a person who is specified should first seek B authority from the investigator before engaging in any transactions that affect his estate.

Section 10 of the Prevention of Corruption Act provides as follows:

"10. Transactions by specified persons

(1) Subject to this section a specified person shall not –

- (a) expend or in any way dispose of any property, or
- (b) enter into any contract for the disposal of any property; or
- (c) operate any account with any bank building society or financial institution;
- (d) increase his indebtedness or adversely affect his estate; or
- (e) D
- (f) perform any act as an agent of a company or partnership that is also a specified person without the approval of the investigator assigned to the specified person or otherwise than in accordance with any condition imposed by the investigator.

without the approval of the investigator assigned to that specified person.

(2) No person shall do anything referred to in subsection(1) for, or on behalf E of a specified person, without the approval of the investigator assigned to that specified person or otherwise than in accordance with any conditions imposed by the investigator

(3) ...

(4) ...

(5) ... F

(6) ...

(7) Any transaction carried out in contravention of subs (1) or (2) shall be void and where any property has been transferred as a result of any such transaction, the investigator may, on behalf of the specified person, recover any such property by proceedings in any court." G

The appellant is a specified person in Zimbabwe, not in the Republic of South Africa. The above restrictions can only apply to his assets in Zimbabwe and not in the Republic of South Africa. It has not been shown that, in instituting this appeal while he is in the Republic of South Africa, he is expending on any of his assets which are in Zimbabwe. Any assets which he may have in South Africa are not affected by the above provision. The investigator ^H

2008 (2) ZLR p145

Cheda JA

^A has no jurisdiction over the applicant's assets which are not in Zimbabwe. Accordingly, this court cannot hold that he has no *locus standi* to launch the appeal in this court in the absence of evidence suggesting that he is expending or disposing of assets in Zimbabwe.

In addition, it is a moot issue whether he can be deprived of his constitutional ^B right to challenge an administrative decision such as the above in a court of law to test its correctness. For example, if such authority was refused by the investigator the appellant would have a right to appeal if it was unreasonably refused.

Fugitive from Justice

^C The other point *in limine* raised by the respondents is that the appellant is a fugitive from justice and should not be allowed to use the justice machinery for his protection.

The Shorter Oxford English Dictionary defines fugitive as "one who flees or tries to escape from danger, apt or tending to flee, given to or in the act of running away".

^D There is evidence to show that the appellant left Zimbabwe some time ago and is now a citizen of the Republic of South Africa. There is no evidence to show that he deliberately put himself beyond the reach of the law. There is no evidence to show that he intended to go into hiding when he left Zimbabwe. It may well be that he was aware of some unlawful acts on his part when he ^E left Zimbabwe, but there is no evidence to link his departure from Zimbabwe with the acts that led to his specification. For this court to hold that he is a fugitive from justice it would have to be shown that he left Zimbabwe with the intention to flee and deliberately put himself beyond the jurisdiction of this court to avoid any legal action that might be brought up against him, or that he is in hiding within the jurisdiction of Zimbabwe. See *s v Sy/low* 2002 (2) ZLR 219 (H) ^F and other cases cited therein. The appellant was specified when he was already a citizen of the Republic of South Africa.

I therefore cannot hold that the appellant falls under the category of a fugitive from justice.

The fact that an attempt was made to arrest and bring him to Zimbabwe and ^G that he is now avoiding coming to Zimbabwe does not make him a fugitive from justice. No person can be compelled to leave his country of residence and citizenship in order to go and subject himself to the jurisdiction of another country to face any legal action in that country.

I therefore come to the conclusion that the appellant cannot be denied a ^H hearing on that basis.

2008 (2) ZLR p146

Cheda JA

WHETHER THE SPECIFICATION SHOULD BE SET ASIDE ^A

Section 6 of the Act reads as follows:

"Power of Minister to Specify Persons

(1) Where the Minister, on reasonable grounds suspects that any person –

- (a) by theft, fraud or other unlawful means has caused the misappropriation ^B or loss of property of the State, a statutory body, a local authority or any other person; or
- (b) has received property from the State, a statutory body, a local authority, or any other person whether directly or indirectly, in contravention of any law, or as a result either direct or indirect of the action of any person who has caused misappropriation or loss such as is referred to in paragraph (a); or ^C
- (c) has accepted or obtained any benefit, advantage or profit corruptly or in circumstances that amount to an offence in terms of this Act, or Chapter IX (Bribery and Corruption of the Criminal Code);
- (d) is associated with or has been party to any transaction whatsoever with any other person who has done anything referred to in paragraph (a), (b) or (c) and as a result of such association or

transaction, may be liable to the State, a statutory body, a local authority or any other person for any claim or proceedings in respect of any property or be liable to have the transaction set aside; and is satisfied that it is in the national interest to do so, he may, by notice in the *Gazette*, declare such person to be a specified person.”

The grounds upon which the application was brought before the High Court were that:

- “(a) The applicant only became aware of the specification in mid-September as he is not normally resident in Zimbabwe and no order was served on him personally;
- (b) The respondent breached the rules of natural justice in failing to afford the applicant a hearing prior to declaring him to be a specified person;
- (c) The respondent had ulterior motives for the declaration;
- (d) The respondent did not have the jurisdictional facts to entitle him to exercise his discretionary power to declare the applicant to be a specified person;
- (e) The Prevention of Corruption Act does not have extra-territorial application, and creates no crime or conduct that has extra-territorial effect.”

The respondent, in his affidavit, denied the allegations made by the appellant.

The appellant was at some time a citizen of, and resident in, Zimbabwe. He has filed papers to support his argument that he is no longer a citizen of Zimbabwe and that the Act does not apply to him. The Act is intended to deal with matters where the Minister has suspicion against any person. “Any person” would include the appellant or any registered company. The

2008 (2) ZLR p147

Cheda JA

A Interpretation Act [Chapter 1:01], s 3 defines a person to include any company incorporated; or any local or other similar authority. It is irrelevant whether a person is a resident or citizen of another country as long as that person has done one of the things mentioned in s 6(1) of the Act. His companies are incorporated according to the laws of Zimbabwe.

If the Minister on reasonable grounds suspects that the appellant has been involved in activities that have resulted in any loss to the State or other persons or institutions in which the State has a direct interest he can specify that person. The appellant cannot avoid being investigated simply because he is not a citizen or resident of Zimbabwe. There is nothing to prohibit investigating the activities of a person simply because he resides outside Zimbabwe. Specification of a person under the Act is simply a declaration. It is neither an arrest nor detention. It is a declaration that is made in order to facilitate an investigation.

The appellant complains that the specification was made without notice to him. The purpose of the specification is to facilitate investigations. It is not a conclusion or declaration that the person has committed any offence or crime. It is only after the investigations that a conclusion can be reached as to whether the person specified has engaged in any unlawful activities that have caused any loss to the State or other persons. Even if it is accepted that the specification of a person may have serious implications, the argument that the appellant should have been notified first is not reasonable in the circumstances. It would defeat the whole purpose of specification if a person were to be informed that it was intended to investigate him as this would give the person an opportunity to take whatever action he could to frustrate the intended investigations.

The person specified is given an opportunity under s 8(c) of the Act to give any explanation on the matters concerned when he is questioned by the investigator.

Section 9 of the Act also gives the specified person the opportunity to present his position on being examined by the investigator. In other words, the person is given the opportunity of a full hearing. Specification is not a final action against the person concerned. In any case the report of the investigation is kept secret and does not prejudice the appellant by any publicity at that stage.

Once the Minister has received the investigator’s report he may either confirm the specification and take any other action that he thinks fit, or cancel the specification. This means also that if the report absolves the specified person of any wrongdoing, the Minister may revoke the specification. The specification is a provisional step taken by the Minister and does not in any

2008 (2) ZLR p148

Cheda JA

way stand as proof that any offence or wrongdoing has been proved against ^a the specified person.

There is no good reason for claiming that a person should first be warned that he will be investigated as this would defeat the whole purpose of investigation. There is no provision in the Act for the Minister to warn or give notice to the person concerned before investigating him. Accordingly, ^b the Minister cannot be ordered to issue such a warning first which is not provided for in the Act. The claim that the specification offends against the rules of natural justice cannot be sustained since if the Minister sees it fit to cancel the specification, he can do so after a report is made to him.

The submission made – that the appellant should have been heard first – is ^c akin to saying that a person reasonably suspected of committing a criminal offence by a police officer should not be arrested unless he is first heard. This would render nugatory the criminal justice process. The same may be said in the instant case.

The manner in which the specification was made was therefore in accordance with the law and cannot be said to be invalid. It was clearly within the ^d Minister's powers.

Holland & Ors v Minister of the Public Service, Labour and Social Welfare 1997 (1) ZLR 186 (S), referred to by the appellant, refers to three fundamental requirements of natural justice to which a person directly affected by an impending inquiry is entitled, that is: ^e

- (a) the right to have notice of the charge or complaint;
- (b) the right to be heard;
- (c) the right to be given the opportunity to adequately state a case in answer to that charge or complaint.

All the above provisions were met in this case, in that the specification was ^f published in the official *Government Gazette* and was intended to facilitate an investigation. The specified person was to appear for a hearing before the investigator at which the appellant could present his case following any issues raised against him or any complaint that would be made. What the appellant suggests is that, even before an investigation was made, ^g he should have been warned of the suspicion and impending investigation. There is no such right in the Act. The specification is not different from any other provisional orders made in our courts where it is feared that investigations may be jeopardised if prior warning is given to the person involved. It is sufficient that the appellant is informed by the notice declaring him as a specified person that investigations are to be carried out against him and that ^h

2008 (2) ZLR p149

Cheda JA

^a he is eventually afforded an opportunity to present his case.

I therefore do not agree that a failure to give appellant a hearing before the specification is a breach of his constitutional right.

The appellant alleged that the respondent acted with an ulterior motive. This is denied by the respondent. The appellant says the respondent acted after ^b attempts to arrest him and extradite him from South Africa had failed. This clearly highlights the fact that there was a suspicion by the Minister against the appellant which necessitated more investigations which could be best dealt with after specification and the appointment of an investigator. The respondent has also been criticized for taking action against the appellant without any jurisdictional facts. However, the respondent's affidavit shows ^c that certain information had been made available to him concerning the activities of the appellant and his companies.

In *South African Defence and Aid Fund & Anor v Minister of Justice* 1967 (1) SA 31, Corbett J (as he then was) held that a jurisdictional fact is a fact the existence of which is contemplated by the legislature as a necessary ^d pre-requisite to the exercise of the statutory power.

At page 35 of the above judgment he went on to say:

"Two points remain to be mentioned. As I have already indicated an exercise of the power granted by s 2 (2) involves two decisions. The first of these consists of the State President being satisfied upon one or more of the matters listed in paras (a) to (e) and constitutes the jurisdictional fact. The second consists of ^e the decision to exercise the power, the jurisdictional fact having been found to exist. Once it is clear that the jurisdictional fact did exist, then it is difficult to see upon what grounds the further decision to exercise the discretionary power to declare the organization unlawful could be challenged in a court of law: but,

inasmuch as plaintiff's case does not touch upon this aspect of the matter, it is unnecessary to pursue this point. The second point arises from the fact that the F power under s 2 (2) is exercised by the issue of a proclamation."

This case also makes the point at p 37 that the right to exercise a discretionary power is made dependent upon the existence of a jurisdictional fact and that jurisdictional fact consists of the repository of the power satisfying himself, subjectively speaking, upon certain matters.

G In this case, the Minister had before him information concerning externalization of foreign currency from Zimbabwe using SMM (Pvt) Ltd, a company that is owned or controlled by the appellant. The minister also had information before him that SAS, the South African company in which the appellant has an interest, had for a long time failed to remit to AA Mines, a division of SMM, its export proceeds, thereby prejudicing the mines of the necessary H working capital and, in addition, failing to meet its obligation.

2008 (2) ZLR p150

Cheda JA

What is expected of the Minister in this situation is not necessarily the A truthfulness of what is alleged. It is sufficient if the Minister, upon whom the power is conferred by the statute, is satisfied after careful consideration of the matter that the jurisdictional facts do exist. The question whether the information is true or not can only be dealt with properly when the matter is investigated and the appellant is afforded an opportunity to be heard. I B do not consider that the jurisdictional facts that the Minister relies on in such a situation need to be concrete or proved facts. All that is required, in my view, is that they be facts on which the Minister can form an opinion. See *Minister of the Interior v Bechler & Ors* 1948 (3) SA 409 (A) at p 442.

In *Tefu v Minister of Justice & Anor* 1958 (2) SA 61 (T) at 67 it was pointed out that what was expected of an officer in making a decision on whether C an organization may be declared unlawful was that he be satisfied of certain conditions, or that he forms an opinion. There is no requirement at this stage for the allegations to be fully proved.

The respondent has listed the following cases in his heads of argument which show that legal process has been instituted against the appellant and his companies. D

1. *Steelmet (Zimbabwe) Pvt Ltd v FSI Trading Proprietary Limited* 2006/27875 South African High Court
2. *SMM (Pvt) Ltd v Southern Asbestos Sales (Proprietary) Ltd*, 2005 JOL 14902(W)
3. *Afaras Mtausi Gwaradzimba* (in his capacity as the Administrator of E *SMM Holdings (Pvt) Ltd & SMM Holdings (Pvt) Ltd v Africa Resources Limited, Mutumwa Dziva Mawere & 2 Ors* 2005HPC 0306 (Zambian High Court)

An attempt had even been made to have the appellant arrested and brought to Zimbabwe. There is, even at this stage, a need to investigate the appellant's F activities for possible prosecution. There is therefore no merit in the submission that the Minister had no jurisdictional facts. There is no requirement for the Minister to state the grounds for specification in the notice or to give the basis of the suspicion. When the appellant is invited for a hearing the grounds of specification are presented in detail and discussed with him. This is a proper opportunity for a fair hearing before the investigator. There is no basis for G complaining that he is not afforded a hearing.

The Act says various transactions referred to in s 6 of the Act are prohibited. These include expending or disposing in any way any property, entering into contracts to dispose of property, operating any account with a bank, increasing any indebtedness which affects his estate and other types of business transactions. Once the Minister had a reasonable suspicion about H

2008 (2) ZLR p151

Cheda JA

A some of the appellant's activities, he was entitled to ensure that the appellant was stopped from engaging in certain activities. The appellant cannot be heard to argue that he should have been warned first then left to engage in such actions freely during the investigations.

The appellant argued that he has a distant relationship with these companies B mentioned in this matter, yet at the same time he complains:

"that the actions of the respondent are having a detrimental effect on me, and that the activities of the respondent and those he has appointed are directly impacting on my business in South Africa and elsewhere in the world."

He could not complain of being under any impediment in respect of his properties in Zimbabwe if the specification did not affect any transactions ^c with these businesses or companies.

No company of his in South Africa or the rest of the world was specified, other than those in Zimbabwe, with which he admits to having a relationship. His submission that he has no assets in Zimbabwe except a house is clearly contradicted by himself in his detailed reference to the share holdings of the companies in Zimbabwe. In fact, through his holding companies, he owns ^d all the companies referred to in Zimbabwe. The fact that those companies are run by boards does not make much difference to their ownership.

The respondent has, in his affidavit, detailed certain matters in which legal processes have been instituted against the appellant in Zambia, South Africa and the United Kingdom. Proof of these matters is irrelevant at this stage. ^e What is important is that the circumstances provided a basis for the Minister to specify the appellant so that investigations can be carried out.

The information given to the Minister that the appellant was also wanted, on charges of externalizing funds and fraud, further strengthens the grounds on which the Minister acted. On the basis of these facts, the argument that ^f the Minister had no jurisdictional facts is devoid of merit; the more so when the appellant himself has disclosed his position regarding all the companies he controls in Zimbabwe through his holding company.

It is significant also to note that the appellant is actually cited by name in one of the cases which is *Atara Mtausi Gwaradzimba* (in his capacity as the Administrator of SMM Holdings (Pvt) Ltd) *and SMM (Pvt) Ltd v African Resources Limited, Mutumwa Dziva Mawere & 2 Ors* 2005 HPC 0306 (Zambian High Court) (my emphasis).

In his replying affidavit, the appellant admits being a director of SMM Holdings. The appellant also admits that he has three bank accounts in Zimbabwe. This contradicts his denial of assets in Zimbabwe.

^h In summary, the following facts are clear from the record:

2008 (2) ZLR p152

Cheda JA

1. The appellant does have assets in Zimbabwe in the form of a house, bank ^a accounts and companies he owns through some holding companies.
2. There are allegations of fraud and externalization of funds.
3. There are pending cases involving several companies owned by him through his holding companies.
4. His relationship with these companies is not denied. ^b
5. He has resisted coming or being brought to Zimbabwe to assist in the investigations of the allegations.
6. There are facts which entitled the Minister to have a suspicion against him for the purpose of specifying him in terms of the Act.

The Act makes the provision for specification, then investigation, and ^c the Minister may simply cancel the specification if he sees fit, after the investigation and hearing.

While the appellant contends that the Act has no extra-territorial effect, the Act simply declares a person as specified. The specification is not an arrest or a matter for a court trial. It only involves naming a person specified and also that investigations be carried out against that person. ^d

There is no basis for alleging ulterior motives when it is clear that some wrongful conduct on the part of the appellant and his companies is alleged. The lifting of the corporate veil was done partly by the appellant himself in his admission of being the sole owner of the holding companies that control the companies in Zimbabwe. The appellant cannot accuse the court *a quo* ^e for doing so.

In specifying a person who is outside the country I do not understand the provisions of the Act to be spreading its jurisdiction outside Zimbabwe, but simply that such specified person, whether in or outside Zimbabwe, is prohibited from engaging in any transactions concerning his affairs or assets

in Zimbabwe. I do not understand the specification to prohibit dealings with F assets that are outside Zimbabwe.

I am therefore unable to find that the Minister exceeded his powers, but find that he acted according to the provisions of the Act.

I therefore come to the conclusion that there is no merit in the appeal and it is dismissed with costs. G

GWAUNZA JA and GARWE JA concurred.

Costa & Madzonga, appellant's legal practitioners

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

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Document 20 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/DOBRACK HOLDINGS (PVT) LTD v TURNER & SONS (PVT) LTD & ANOR 2008 (2) ZLR 153 (S)

DOBRACK HOLDINGS (PVT) LTD v TURNER & SONS (PVT) LTD & ANOR 2008 (2) ZLR 153 (S)

2008 (2) ZLR p153

Citation	2008 (2) ZLR 153 (S)
Case No	Judgment No. S-69-07
Court	Supreme Court, Harare
Judge	Cheda JA, Malaba JA & Gwaunza JA
Heard	1 October 2007
Judgment	11 September 2008
Counsel	<i>A P de Bourbon SC</i> , for the appellant <i>Mrs J B Wood</i> , for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Appeal – interlocutory order – what is – includes provisional order for winding up of company

Company – winding-up – provisional order for winding up of company – D such order interlocutory and not subject to appeal

Headnote

The appellant brought an application in the High Court against the respondents, seeking an order compelling the respondents to transfer to the appellant their shareholding in a third company. The respondents launched a E counter-application for the provisional liquidation of the third

company. The actions were consolidated and culminated in a provisional winding up order being made against the third company. On appeal, the respondents raised *in limine* the point that, the winding up order being provisional only, leave to appeal was required. Leave to appeal not having been acquired, the appeal was not properly before the Supreme Court. The ^F appellant argued that in terms of s 241 of the Companies Act [Chapter 24:03] there was a right of appeal against a provisional liquidation order.

Held, that a provisional order for the winding up of a company is not appealable, as it is an interlocutory order, the correctness of which is still open to be tested on the return date. An appeal court should not make a determination on a matter which could, on the return day, be altered by ^G the court that granted the order. Similarly, the property of a company under provisional liquidation may not be sold before the provisional order is confirmed.

Cases referred to

^H *South Cape Corporation (Pty) Ltd v Engineering Mgmt Svcs (Pty) Ltd* 1977 (3) SA 534 (A)

2008 (2) ZLR p154

Cheda JA

^A *van Leggelo v Transvaal Cellocrete (Pty) Ltd & Anor* 1953 (2) SA 287 (T)

Legislation considered

Companies Act [Chapter 24:03] , s 241

High Court Act [Chapter 7:06], s 43(2)(d) ^B

Case information

A P de Bourbon SC, for the appellant

Mrs *J B Wood*, for the respondents

Judgment

CHEDA JA: The appellant launched a court application at the High Court seeking an order in the following terms – ^C

“IT IS ORDERED:

1. That the respondents jointly as well as severally, the one paying the other to be absolved, shall forthwith undertake all that is necessary and required, including making all payments and completion and signing all documents required, in order to procure transfer without delay by the first respondent to applicant of the first respondent's entire shareholding in Zambezi Paddle ^D Steamer (Pvt) Ltd.
2. That immediately upon registration of the aforesaid transfer in the share register of Zambezi Paddle Steamer (Pvt) Ltd the applicant shall pay the first respondent the balance of the purchase price for the said shares such balance being the sum of \$138 000 000.
3. That the respondents jointly and severally the one paying the other to ^E be absolved shall pay the costs of this application on the scale of legal practitioner's and client scale.”

The application was opposed by the respondents.

The first respondent also launched a counter application seeking an order for the provisional liquidation of the appellant in terms of the Companies ^F Act [Chapter 24:03].

The two applications were eventually consolidated by consent and heard together.

After hearing argument on the two matters the High Court (Kudya J) made the following order: ^G

- “1. The application in case HC 5186/2005 be and is hereby dismissed with costs.
2. In case No. 5264/2005
The first respondent's company Zambezi Paddle Steamers (Pvt) Ltd is provisionally wound up pending the granting of an order in terms of para. 2.3. or the discharge of this order.” ^H

2008 (2) ZLR p155

Cheda JA

A This appeal is against the above judgment and orders of the High Court.¹

At the hearing of the appeal the respondent raised a point *in limine* as follows:

"It is submitted that the appeal in case No. 362/06 is not properly before this Honourable Court as the order granted was interlocutory in that it does not have a final and definitive effect and it may be set aside by the Judge who granted it see *Hunt v Hunt* 2000 (1) ZLR 165 (H); *South Chapter Corporation (Pvt) Ltd v Engineering Management Services (Pvt) Ltd* 1977 (3) SA 534 (A) 549 *et seq.* That being so, leave to appeal was required in terms of s 43 of the High Court Act.

It was not obtained."

A lot of information was placed before the judge in the court *a quo* in the form of documentary exhibits and many issues were raised in that court as well as in the heads of argument on appeal.

However, the main issues for consideration by this court which can resolve or settle the matter are as follows:

- "1. Whether the appeal against the provisional order for liquidation is properly before this court. D
2. Whether the payment arrangements entered into by the parties constituted a legally binding contract which is enforceable through a court of law."

I now proceed to deal with the point *in limine* raised by the respondents.

Section 43 of the High Court Act [*Chapter 7:06*] provides as follows:

"43. Right of appeal from High Court in civil cases

E (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 appellate jurisdiction...

(2) No appeal shall lie –

- (a) ...
- (b) ... F
- (c) ...
- (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 –
 - (i) ...
 - (ii) ..."

G Mr *de Bourbon* submitted that it was wrong to say a provisional liquidation order is not appealable as it was interlocutory. He said s 241 of the Companies Act [*Chapter 24:03*] gives a right of appeal.

2008 (2) ZLR p156

Cheda JA

While he is correct in relation to an order for liquidation proper, I do not A agree that he is correct in relation to an interlocutory order. The order given by the court *a quo* was not a final order for liquidation but a provisional one. Its correctness is still open to be tested on the return date. See *Hunt v Hunt* 2000 (1) ZLR 165 (H).

I also do not consider it correct to say that the property of a company under B provisional liquidation can be sold before the Provisional order is confirmed.

In *van Leggelo v Transvaal Cellocrete (Pty) Ltd & Anor* 1953 (2) SA 287 (T) it was held that an order by a magistrate granting leave to execute pending an appeal was interlocutory and consequently not appealable in terms of s 83 of the Magistrates Court Act 32 of 1944, *in that it did not have the effect of a final judgment* (my emphasis). C

The above decision also received support from Corbett JA (as he then was) in *South Chapter Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A).

I do not believe that any good purpose is achieved by getting this appeal court to make a determination on a matter which can possibly be altered by D the court that granted the order on the return day. The court that makes a Provisional order obviously leaves room for itself to reconsider the merits of the matter on the return day, so it does not appear proper that an appeal court should interfere by pronouncing a final order on such a matter.

I therefore find that the point *in limine* raised by the respondent is well-founded. E

Accordingly, the appeal against the provisional liquidation order should be struck off the roll with costs.

In view of the above finding, I do not intend to deal with the other issues raised concerning this matter because to do so would amount to dealing with the merits of a matter that is not properly before this court. ^F

I now turn to deal with the legality of the agreement of sale.

Once more, the determination of the legality of the agreement entered into by the parties resolves the matter once and for all, without going into the detailed submissions on the merits of the matter.

Both parties agree that the agreement was that payment for the shares would ^G be made to Tony Turner's daughter in the United Kingdom.

Section 11 of the Exchange Control Regulations 1996 (SI 109 of 1996) provides as follows:

"Payments outside Zimbabwe

11(1) Subject to subsection (2), unless otherwise authorized by an exchange control authority, no Zimbabwean resident shall – ^H

2008 (2) ZLR p157

Cheda JA ^A

(a) make any payment outside Zimbabwe; or

(b) incur any obligation to make payment outside Zimbabwe.

(2) Subsection (1) shall not apply to –

(a) any act done by an individual with free funds which were available to him at the time of the act concerned;

or ^B

(b) any lawful transaction with money in a foreign currency account.

(3) Subject to subsection (4), unless authorized by an exchange authority, no foreign resident carrying on any trade, business or other gainful occupation or activity in Zimbabwe shall –

(a) make any payment outside Zimbabwe; or ^C

(b) incur any obligation to make payment outside Zimbabwe;

in respect of that trade, business, occupation or activity.

(4) Subsection (3) shall not apply to any lawful transaction with money in a foreign currency account."

The following paragraph from the appellant's heads of argument gives ^D a very clear background of the position of the parties and the role each played in the sale agreement.

I quote from p 8 para 6 of the heads:

"6. The parties met in Harare in the period between 28 June and 14 July 2004. Representing their respective companies, an agreement was concluded in terms of which Turner and Sons would sell its shareholding in ZPS to ^E Dobrock Holdings for \$250 million.

At a meeting, see para 12, p 38, as read with para 13, p 68, Peter Dobson told Tony Turner that he would procure payment where and whenever Tony Turner wanted. Tony Turner claimed he urgently needed pounds in the United Kingdom, and that payment was to be made to his daughter in that country."

^F In my view, the above shows, firstly that the shares were being purchased by or on behalf of a company, and that Tony Turner was to make the payment again on behalf of the company.

Both companies are based in Zimbabwe but payment was to be made outside Zimbabwe in the United Kingdom.

^G The source of funds was not disclosed and there was no suggestion at all that there were free funds available to pay for the shares.

For that reason, I have no basis to fault the court *a quo*'s finding that the agreement was illegal and is un-enforceable by the court.

Having come to that conclusion, I see no reason to deal with the other issues ^H raised on appeal as they will not change the above conclusion.

2008 (2) ZLR p158

Cheda JA

The appeal cannot succeed. ^A

I therefore make the following order –

1. The appeal in case No. SC 36/06 is dismissed with costs.
2. The point *in limine* in case No. SC 361/06 is upheld and the appeal in that case is struck off the roll with costs. ^B

MALABA JA and GWAUNZA JA concurred.

Atherstone & Cook, appellant's legal practitioners

Byron Venturas, respondents' legal practitioners ^C

¹ The High Court's judgment is reported in *Dobrock Holdings (Pvt) Ltd v Turner & Sons (Pvt) Ltd & Ors* 2006 (2) ZLR 353 (H).

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Document 21 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/S v GAVIYAYA 2008 (2) ZLR 159 (H)

S v GAVIYAYA 2008 (2) ZLR 159 (H)

2008 (2) ZLR p159

Citation	2008 (2) ZLR 159 (H)
Case No	Judgment No. HH- 85-08
Court	High Court, Harare
Judge	Chitakunye J
Heard	11 September 2008
Judgment	11 September 2008
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

^C **Criminal law** – offences under Criminal Law Code – being found in possession of goods in regard to which there is a reasonable suspicion that they were stolen – whether accused person can be convicted on plea alone, without evidence being led

Criminal procedure – admissions – what may be admitted – by accused ^D person – accused may not admit facts which are within the peculiar knowledge of another person

Criminal procedure – plea – guilty – charge of being found in possession of goods in circumstances giving rise to reasonable suspicion that goods are stolen – whether necessary to lead evidence

Headnote

- ¶ The accused pleaded guilty in the magistrates court to a charge of contravening s 125(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], that is, being found in possession of goods in circumstances giving rise to a reasonable suspicion that they were stolen and being unable at any time to give a satisfactory account of his possession. The ¶ magistrate found him guilty on his plea. The facts in the outline of the State case did not contain any explanation of how the accused acquired the goods and the questions posed by the magistrate did not elicit any explanation from the accused as to how he came to possess the goods or even what explanation he gave to the police.
- ¶ *Held*, that it would be absurd to ask an offender in plea proceedings if he admits that there was a reasonable suspicion that the goods found in his possession had been stolen. It is not the accused who suspects himself. The suspicion is formed by a third person, usually a police officer. The circumstances which give rise to the suspicion that the property was stolen must be as perceived by and considered by that police officer. ¶ There must be something that the police officer saw and considered in

2008 (2) ZLR p160

Chitakunye J

the accused's possession or manner of possession for him reasonably ¶ to suspect that the property was stolen. Such a matter is not within the accused's knowledge and so any admission of that element of the offence by the accused would not be of much value. Consequently, where the accused enters a plea of guilty the presiding magistrate should still receive evidence on the circumstances giving rise to a reasonable suspicion that ¶ the goods were stolen. Where no evidence has been given, the court is never in a position to satisfy itself that the explanation is not satisfactory. It is the court that has to be satisfied that the accused has failed to give a satisfactory account of his possession and that the suspicion alleged is therefore reasonable in the circumstances. ¶

Cases cited

S v Chiwondo 1999 (1) ZLR 407 (H)

S v Dube & Anor 1988 (2) ZLR 385 (S)

Legislation considered ¶

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 125

Judgment

CHITAKUNYE J: The accused was charged with the crime of being found in possession of property reasonably suspected to have been stolen as defined by section 125(a) of The Criminal Law (Codification and Reform) ¶ Act [*Chapter 9:23*].

This section is a re-enactment of s 12(2)(b) of the Miscellaneous Offences Act [*Chapter 9:15*].

He was convicted on his own plea of guilty and sentenced to \$10 000, alternatively 2 months' imprisonment and, in addition, to 30 days' ¶ imprisonment, wholly suspended for 5 years on conditions of good behaviour.

My main concern is on the appropriateness of the conviction.

The pertinent part of the state outline reads as follows:

- ¶ "3. On 23 September 2006 and at about 1800 hours, police detectives were at Valley section, Glendale on general patrol with a civilian vehicle when they were approached by the unsuspecting accused person. ¶
4. On approaching the detectives, the accused, who misjudged the police as newly resettled farmers, told the police that he was selling some bearings.
5. So the police were shown five bearings sizes 3 x 30209; 1 x 29029 and 1 x uc205 to which they pretended as though they wanted to buy the bearings and thus told the accused to enter into their

vehicle and hence drove straight to the police station leading to the accused's subsequent arrest. ^h

2008 (2) ZLR p161

Chitakunye J

- A 6. On being interviewed, the accused failed to give a satisfactory account for the bearings thereby giving rise to a reasonable suspicion that the bearings were stolen.
7. The total value of the bearings as per the quotation obtained from Valley Graders, Bindura is \$43 000 Zimbabwean currency and all was recovered."

The essential elements canvassed comprised the following: ^b

- "Q. Do you admit that on 23 September 2006 and at Valley Section you were found in possession of 3 size 30209 1 size 29029 and 1 size uc205 bearings?
- A. Yes
- Q. And that upon being asked to account for the bearings you could not tell where you found the bearings from? ^c
- A. Yes
- Q. Any lawful right to those bearings?
- A. No."

It was upon these facts and his answers to these essential elements that the accused was convicted. As can be noted, the facts did not contain any explanation of how the accused acquired the bearings and the questions ^d posed did not enlist any explanation from the accused as to how he came to possess the bearings or even what explanation he gave to the police. The accused was nevertheless convicted as charged.

It was only in mitigation that the accused said something regarding his possession of the bearings. His explanation was that:

^e "I was given the bearings by a person whom I do not know."

Section 125 of the Criminal Law (Codification and Reform) Act states that:

"If any person –

- (a) is or has been in possession of property capable of being stolen and the circumstances of his or her possession are such as to give rise, either at ^f the time of his or her possession or at any time thereafter, to a reasonable suspicion that when he or she came into possession of the property it was stolen; and
- (b) is unable at any time to give a satisfactory explanation for his or her possession of the property; the person shall be guilty of possessing property reasonably suspected of being ^g stolen ..."

The essential elements of the offence in question may be stated as follows:

1. Possession of property capable of being stolen.
2. Circumstances of his or her possession are such as to give rise either at the time of his or her possession or at any time thereafter to a reasonable ^h suspicion that when he or she came into possession of that property it

2008 (2) ZLR p162

Chitakunye J

was stolen. ^a

3. Unable at any time to give a satisfactory explanation for his or her possession of the property."

The elements of possession and failure to give a satisfactory account (i.e. 1 and 3) are for the accused as these are within the accused's knowledge. He must have been in possession of the property at some time and he must ^b then after being called upon to account for his or her possession fail to give a satisfactory explanation for his or her possession. It is for him to admit possession and to then explain such possession.

However, the elements of the circumstances which give rise to the suspicion that the property was stolen must be as perceived by and considered by the ^c person calling upon him or her to account. Thus, if it is a police officer, there must be something that the police officer saw and considered in the accused's possession or manner of possession for him to suspect that the property was stolen. Such is within that officer's knowledge and the accused cannot answer for him. The officer must

explain how it came about. These are elements that are not within the accused's knowledge and so any admission of these elements by the accused would not be of much value.

Such elements are in the class of elements noted by Dumbutshena CJ in *S v Dube & Anor* 1988 (2) ZLR 385 (S) when he said at 390A that:

"Not every fact should be regarded as proved simply because it is admitted. Thus, an admission of 'being in a prohibited area' should not be blindly accepted. The court should require proof that the area was indeed a prohibited area. See *S v Deka & Anor* S-199-88. The same is true of an admission of 'possession'. The court must be careful to establish what it is that the accused is admitting, because possession is a difficult concept."

In casu, the circumstances giving rise to a suspicion were observed and considered by the police officers and not the accused himself. It was thus imperative for the officer to testify on those circumstances that gave rise in him or her to a suspicion that the bearings were stolen.

In *S v Chiwondo* 1999 (1) ZLR 407 (H) at pp 414-15, Chatikobo J had this to say in such a case:

"it would be absurd to ask an offender in plea proceedings if he admits that there was a reasonable suspicion that the goods found in his possession had been stolen. It is not the accused who suspects himself. The suspicion is formed by a third person, usually a police officer. It is such person who harbours the suspicion. He it is who assesses the circumstances under which he finds the accused in order to determine if the suspicion harboured by him is reasonable."

It is therefore, for this third party or officer to testify on those circumstances, he observed and considered in arriving at a suspicion that the property was

2008 (2) ZLR p163

Chitakunye J

A stolen.

The officer must testify on those circumstances and show that his suspicion was reasonable and not fanciful. If the officer fails to show the circumstances that gave rise to the suspicion, the case fails on that. If, on the other hand, he shows that the suspicion was reasonable the next step is to consider the accused's explanation.

In *S v Chiwondo supra* at p 412, Chinhengo J noted that:

"Even where the accused person enters a plea of guilty the presiding magistrate should still receive evidence on the circumstances giving rise to a reasonable suspicion that the goods were stolen. The result would be that, if the person giving such evidence fails to satisfy the court that the circumstances giving rise to a reasonable suspicion existed, then the State case would have crumbled on the first hurdle. In *Ganyu's case supra*, a caution was given that the provisions of s 12(2), must be applied with exceptional care if the manifest possibility of injustice is to be avoided, (at 106F) and it was appreciated that the accused 'may prejudice himself if he fails to give evidence under oath, more particularly where he has given no account at all, or no acceptable account of his possession prior to trial'."

In any case where no evidence has been given the court is never in a position to satisfy itself that the explanation is not satisfactory. It is the court that has to be satisfied that the accused has failed to give a satisfactory account of his possession and that the suspicion alleged is therefore reasonable in the circumstances.

In casu, it was only in mitigation that the accused said that he was given the bearings by a person whom he did not know. This explanation was given to the court in mitigation and was thus not part of the reasons for convicting. In as far as conviction is concerned, all that the trial magistrate was told was that the accused failed to give a satisfactory account. Such a statement was highly unsatisfactory for the court to have been satisfied that the accused was guilty of the offence as charged. If upon being asked the accused gave an explanation of his possession it was upon the police officer or arresting officer to confirm the explanation given and to then explain why he or she found such an explanation unsatisfactory. The accused himself would in all honesty not know why the police officer deemed his explanation unsatisfactory or why he suspected that the bearings were stolen in the first place. Such knowledge being in the domain of the police officer, it was for that officer to give evidence in that regard. In the absence of such evidence of the circumstances that gave rise to the suspicion, and evidence as to why whatever explanation the accused gave was not satisfactory to the police officer, the conviction cannot stand. As aptly put by Chatikobo J in *S v Chiwondo supra* at p 415C-D:

2008 (2) ZLR p164

Chitakunye J

"No court can convict an accused person under the section purely on the basis A that the accused has not put in issue the question of his guilt. A conviction can properly be based on an admission of facts which are known to the accused. Where facts are not known to the accused evidence must be led to establish them. The fact that the accused may not be in a position to controvert such evidence is not a reason for not putting such evidence before the court."

Further on the judge said that: B

"a court cannot make a finding on the satisfactoriness of an explanation given by the accused in court in the absence of evidence from the person who formed the suspicion. The accused is never in a position to apprise the court on the nature of that suspicion."

In the circumstances of this case, there was absolutely nothing to satisfy court that the accused was guilty of the offence. C

Accordingly, the conviction was not proper and cannot stand. The conviction is hereby quashed and the sentence is set aside.

The matter is referred to the magistrates court for a trial *de novo*.

GUVAVA J concurred. D

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Document 22 of 49

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/TAYLOR v TAYLOR 2008 (2) ZLR 165 (S)

TAYLOR v TAYLOR 2008 (2) ZLR 165 (S)

2008 (2) ZLR p165

Citation	2008 (2) ZLR 165 (S)
Case No	Judgment No. S-70-07
Court	Supreme Court, Harare
Judge	Cheda JA, Ziyambi JA & Garwe JA
Heard	20 November 2007
Judgment	15 September 2008
Counsel	<i>R M Fitches</i> , for the appellant <i>J C Andersen SC</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Contract – donation – *inter vivos* – donation between spouses – may be revoked at any time

Practice and procedure – action – ancillary issue not specifically before court – whether court entitled to deal with such issue *mero motu*

Headnote

▯ The parties met in 1982 and during the same year started co-habiting. They eventually got married the next year. The marriage subsists to this day. After living together for a period of over ten years, the respondent, who was the wife, decided to donate a vacant piece of land to the appellant. ▮ The appellant accepted the donation and the property was formally transferred to him in 1998. After the respondent discovered that the appellant had engaged in an adulterous relationship during the subsistence of the marriage, she brought an action for an order revoking the donation. The High Court granted the order. The appellant appealed, arguing *inter alia* that the court *a quo* erred in ordering a revocation of the donation ▮ without *mero motu* considering the question of compensation for the dwelling built on the land by the appellant. The judgment of the court *a quo* thus, he argued, had the effect of unjustly enriching the respondent.

Held, that in general, a donation *inter vivos*, once made, is irrevocable, except in a few instances, notably ingratitude. In the case of a remuneratory donation, there can be no revocation, even for ingratitude. In the case of ▮ donations between spouses, the common law position was that a donation *inter vivos* between spouses was prohibited, subject to certain exceptions, but that rule no longer applies in this country: see s 11 of the General Law Amendment Act [*Chapter 8:07*]. Consequently, donations between spouses are now permissible, though the common law position remains ▮ that the donor may at any time revoke such a donation. Reciprocal and

2008 (2) ZLR p166

Garwe JA

remuneratory gifts between spouses, however, are not revocable. ▮

Held, further, that unjust enrichment now forms a cause of action in terms of our common law, but the issue of unjust enrichment was not before the court *a quo*, and indeed no submissions in that regard were made by either party. The issue before the court was whether the respondent could revoke the donation and, if so, whether it was necessary to prove ▮ ingratitude on the part of the respondent. The court not having been asked to direct its mind to the question of compensation for improvements effected on the land, there was no basis upon which the court could be said to have misdirected itself in not, *mero motu*, dealing with an issue that was never before it. The appellant was still entitled to take any action he considered appropriate in order to recover any monies he may have ▮ expended in effecting improvements to the donated land.

Cases cited

Akhtar v Min of Public Svc S-173-97

Hay v Hay 1956 R & N 405; 1956 (3) SA 527 (SR)

Industrial Equity Ltd v Walker 1996 (1) ZLR 269 (H) ▯

Phoenix NO v Dyer-Smith NO & Anor 1968 (2) RLR 153 (G); 1968 (3) SA 145 (R)

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

Legislation considered ▮

General Law Amendment Act [*Chapter 8:07*], s 11

Case information

R M Fitches, for the appellant

J C Andersen SC, for the respondent

Judgment

GARWE JA: At the conclusion of the hearing of this matter in the High Court, ▮ an order was granted in favour of the respondent confirming the revocation of a donation consisting of a piece of land known as Lot 2 of Subdivision 1 of Stand 185 of Matsheumhlope Bulawayo. The High Court also ordered that the piece of land be transferred back to the respondent. This appeal is against that judgment. ▮

The facts of this case are to some extent common cause. The parties met in Bulawayo in 1982 and during the same year started co-habiting. They eventually got married in December 1983. The marriage subsists to this day. After living together for a period of over ten years, the respondent decided to donate a vacant piece of land to the appellant. The appellant accepted the donation and the property was formally transferred to him in 1998. ^h

2008 (2) ZLR p167

Garwe JA

^a The court *a quo* made a finding that the appellant had engaged in an adulterous relationship with a lady during the subsistence of the marriage. The court also found that the donation to the appellant had been a simple donation and not a remuneratory one. As a result, the court found in favour of the respondent and made an order revoking the donation. The grounds upon which the appellant has appealed to this court are as follows: ^b

1. The learned judge erred in disposing of the matter on the papers as there were material disputes of facts. The matter should therefore have been referred to trial.
2. The learned judge erred in finding that the donation was a simple donation when in fact it was a remuneratory donation. ^c
3. The learned judge erred in ordering a revocation of the donation without, *mero motu*, considering the question of compensation for the dwelling built by the appellant on the land donated to him.
4. The judgment of the court *a quo* has the effect of unjustly enriching the respondent.

It is clear, from the above grounds of appeal, that there are three issues that ^d require determination. These are, firstly, whether the court *a quo* erred in disposing of the matter on the papers instead of referring the matter to trial; secondly, whether the court *a quo* erred in coming to the conclusion that the donation in this case was a simple donation rather than a remuneratory one; and thirdly, whether the court *a quo* should have, *mero motu*, dealt with the ^e question of unjust enrichment and consequently ordered the respondent to pay compensation for the dwelling constructed on the donated piece of land.

The first and second issues are related and raise one fundamental issue. That issue is whether the court *a quo* should have referred the dispute on whether or not the donation was remuneratory to trial. The position is now well established that not every dispute of fact in motion proceedings has to be sent for trial. ^f The correct approach in this regard was enunciated by this court in *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (S) where Gubbay JA (as he then was) stated at p 339 C-D:

"It is, I think, well established that in motion proceedings a court should endeavour to settle the dispute raised in affidavits without the hearing of evidence. It must ^g take a robust and common sense approach and not an over-fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned ..."

It is common cause that there was a dispute on the papers as to the extent to which the appellant contributed towards the household expenses of the couple, and whether the donation made to him was in exchange for some services ^h that he had rendered to the respondent's late mother. The court *a quo* reached

2008 (2) ZLR p168

Garwe JA

the conclusion that the donation was a simple one. I am not persuaded that ^a the court erred in reaching that conclusion. The court *a quo* accepted that the appellant had been generous with cash gifts for birthdays and anniversaries. The court also concluded that the sum of £10 000 given to the respondent was not a gift at all, as it had subsequently been paid over to the appellant's daughter, who was in need of financial assistance. That was in the year 2002. ^b On the papers, the sum of £10 000 given to the respondent could not have induced the respondent to donate the piece of land to the appellant. In other words, it could not have been a reciprocal donation. I say this because the agreement to transfer the land in question was signed at Bulawayo in 1995. This was long before the appellant gave the respondent the sum of £10 000. In her answering affidavit, the respondent says that the sum was only given to ^c the respondent in the year 2000 but was subsequently taken away in the year 2002. The court *a quo* also dismissed the appellant's claim that the donation had been made because of services he had rendered to the respondent's late mother during the last few

months of her life. That claim is highly improbable and, in my view, the court *a quo* cannot be said to have misdirected itself in rejecting it. The assistance the appellant says he gave was not out of the ordinary. It was the kind of assistance that any son-in-law would have been expected to give to an ailing mother-in-law. In the particular circumstances of this case, it seems improbable that the donation would have been made because of the assistance he gave.

The claim by the appellant that he expended certain sums of money to improve security at the residence of the respondent's mother and in improving a piece of land donated to the respondent's son remained a bald one. The law is clear that bald and unsubstantiated allegations are not sufficient. See *Akhtar v Minister of Public Service* S-173-97. In all probability, the donation was made because at that time the respondent was happy with the appellant and the relationship between the two was a good one. All the facts considered, I am satisfied that the disputes of facts were capable of resolution on the papers and that the court *a quo* did not err, when it came to the conclusion that the circumstances pointed towards a simple, rather than remuneratory, gift.

Both parties have made submissions on whether or not the respondent was entitled to revoke the donation on account of ingratitude, and whether such ingratitude was proved on the papers. For reasons that will follow shortly, there is no requirement in our law that a spouse should prove ingratitude before revoking a donation made during the subsistence of a marriage i.e. *stante matrimonio*. In general, a donation *inter vivos* once made is irrevocable, except in a few instances, notably ingratitude – see Joubert *The Law of South Africa Vol 8* paras 120; 127; Manfred Nathan *Common Law of South Africa*

2008 (2) ZLR p169

Garwe JA

A *Vol II* 2 ed para 1090. In the case of a remuneratory donation, there can be no revocation, even for ingratitude – Nathan *op cit* para 1090.

In the case of donations between spouses, the common law position has been that a donation *inter vivos* between spouses is prohibited subject to certain exceptions – Lee & Honoré *Family, Things and Succession* 2 ed by Erasmus B p 45. That common law rule no longer applies in this country – s 11 of the General Law Amendment Act [Chapter 8:07]. Consequently, donations between spouses are now permissible. The common law position, however, remains that the donor may at any time revoke such a donation – Lee & Honoré *op cit* p 45, para 61. That position has previously been accepted in this country. See for example *Hay v Hay* 1956 R&N 405; 1956 (3) SA 527 (SR); *Phoenix c NO v Dyer-Smith NO & Anor* 1968 (2) RLR 153 (G); 1968 (3) SA 145 (R). Reciprocal and remuneratory gifts between spouses however are not revocable: Joubert *op cit* p 163, para 138; the *Phoenix* case *supra* at 148H.

The issue that now remains to be determined is whether the court *a quo* should have, *mero motu*, raised the question of unjust enrichment and ordered the respondent to pay compensation to the appellant. Unjust enrichment now forms a cause of action in terms of our common law – see *Industrial Equity v Walker* 1996 (1) ZLR 269 (H). The issue of unjust enrichment was not before the court *a quo* and indeed no submissions in that regard were made by either party. The issue before the court was whether the respondent could revoke the donation and, if so, whether it was necessary to prove ingratitude on the part of the respondent. At no stage was the court *a quo* asked to direct its mind to the question of compensation for improvements effected on the land. In those circumstances, I see no basis upon which the court *a quo* can be said to have misdirected itself in not, *mero motu*, dealing with an issue that was never before it. The suggestion that the judgment of the court *a quo* has the effect of unjustly enriching the respondent is not entirely correct, as the issue did not arise at that stage. It is clear that the appellant is entitled to take any action he considers appropriate in order to recover any monies he may have expended in effecting improvements to the donated land.

In the circumstances, therefore, I find that there is no merit in this appeal. The appeal is accordingly dismissed with costs.

CHEDA JA and ZIYAMBI JA concurred.

Ben Baron & Partners, appellant's legal practitioners

Lazarus & Sarif, respondent's legal practitioners

Document 23 of 49**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/KUNG v KUNG 2008 (2) ZLR 170 (S)

KUNG v KUNG 2008 (2) ZLR 170 (S)**2008 (2) ZLR p170**

Citation	2008 (2) ZLR 170 (S)
Case No	Judgment No. S-16-08
Court	Supreme Court, Harare
Judge	Malaba JA, Gwaunza JA and Garwe JA
Heard	5 February 2008
Judgment	16 September 2008
Counsel	<i>A P de Bourbon SC</i> , for the appellant <i>R Y Phillips</i> , for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Family law – husband and wife – divorce – jurisdiction – domicile – domicile of choice of husband – requirements for acquisition of domicile of choice – intention to acquire domicile of choice – no basis for a distinction between a strong and a weak intention – stated desire to retain Zimbabwe as country of domicile – cannot prevail over clear indications to the contrary

Practice and procedure – matrimonial action – divorce – jurisdiction of court to entertain divorce cases – domicile of husband – entitlement of court to consider such domicile *mero motu* E

Headnote

There are three requirements for the acquisition of a domicile of choice. They are:

- (1) the *factum* of residence;
- (2) the *animus manendi*, or intention of remaining permanently; and
- (3) the freedom of volition.

In divorce proceedings before the High Court, the judge *mero motu* considered F the question of the appellant's domicile at the time he commenced divorce proceedings in January 2003. The evidence revealed that the parties had been married in 1999 and had initially lived in Harare. However, in the middle of 2002, the appellant had left Zimbabwe in order to live in South Africa. He had divested himself of all his assets in Zimbabwe, had G bought a house in South Africa and commenced employment there. His evidence was that he was moving "backwards and forwards" between these countries but he was not specific as to how often this was. He also said that he intended to come back to Zimbabwe should the economic situation improve. In the result, the High Court found that the appellant had adopted South Africa as his domicile of choice at the time he had H

Gwaunza JA

^A instituted proceedings. It therefore decided that it had no jurisdiction to entertain the action.

On appeal to the Supreme Court, it was argued on behalf of the appellant that in determining the *animus manendi* for the purpose of ascertaining his domicile of choice, a distinction had to be made between a “weak” ^B intention and a “strong” intention.

Held, that the judge was correct, in the circumstances, in considering *mero motu* the question of the appellant’s domicile.

Held, further, that the acquisition of a domicile of choice is proved on a balance of probabilities. It cannot be qualified on the basis of a “weak” or “strong” intention. To do so would be akin to applying a test higher ^C than a balance of probabilities.

Held, further, that to suggest, as the appellant did, that he intended to return to Zimbabwe, should the economic situation improve, was based on some vague, improbable contingency and did not help his case.

Held, further, dismissing the appeal, that while the appellant stated that he wished to retain Zimbabwe as his country of domicile, this stated ^D intention could not prevail over clear indications to the contrary (*Howard v Howard* 1996 RLR 182 (G) followed).

Cases cited

Boswinkel v Boswinkel 1995 (2) ZLR 58 (H)

^E *Carvalho v Carvalho* 1936 SR 219

Chikwenengere v Chikwenengere 2007 (1) ZLR 196 (S)

de Jager v de Jager 1998 (2) RLR 419 (H)

GRE Insurance Ltd v Chisnall 1982 (1) SA 387 (ZS)

Howard v Howard 1996 RLR 182 (G); 1966 (2) SA 718 (R)

Johnson v Johnson 1931 AD 391

^F *Ley v Ley’s Executor & Ors* 1951 (3) SA 186 (A)

Case information

A P de Bourbon SC, for the appellant

R Y Phillips, for the respondent

Judgment

^G **GWAUNZA JA:** The appellant instituted divorce proceedings against the respondent in the High Court. Having considered the issue of whether or not the plaintiff was domiciled in Zimbabwe and having found that he had adopted South Africa as his domicile of choice at the time the divorce proceedings were instituted, the High Court decided that it had no jurisdiction to entertain the action. The appellant was aggrieved at this decision and has ^H now appealed against it to this court.

Gwaunza JA

It is not in dispute that even though the respondent raised the issue of the ^A appellant’s domicile in her plea, this matter was not considered at the pre-trial conference stage. The learned judge *a quo* was alive to this circumstance and proceeded, *mero motu*, to consider the matter on the evidence led during the trial. The learned judge determined, on the authority of *Boswinkel v Boswinkel* 1995 (2) ZLR 58 (H) at p 60, that the court could, on its own, ^B properly enquire into, and satisfy itself on, the issue of the plaintiff’s domicile. I am satisfied that the court *a quo* was correct in proceeding in that manner.

Evidence on the question of the appellant’s domicile is, for the most part, not in dispute and is aptly summarized in the parties’ heads of argument. The appellant was born and educated in Zimbabwe.

His mother being a citizen of South Africa, the appellant was able to obtain a South African passport and c the right of residence in that country. After their marriage in 1999, the parties initially lived in Harare. They had certain business interests in Zimbabwe. Apart from the parties' concern over the economic situation in Zimbabwe, they also wished to have the respondent's daughter from a previous marriage educated in South Africa. To this end the parties proceeded to purchase a residence in South Africa in 2002, and placed the daughter in a South African school. Before that, the appellant had disposed of all his assets in Zimbabwe and externalised the proceeds. He acquired other assets in South Africa and secured employment in that country. The defendant did not relocate to South Africa. No family of the appellant remained in Zimbabwe and he himself did not maintain his permanent residence status in Zimbabwe. At the time e the divorce proceedings were instituted, the plaintiff was already living in South Africa. It was his evidence that at that time, he was going "backwards and forwards" between Zimbabwe and South Africa.

It is trite in our law that the court's jurisdiction in divorce matters is based upon the domicile of the husband at the time the action is instituted. The f divorce proceedings *in casu* were instituted in January 2003. The disposal of the appellant's assets in Zimbabwe, his relocation to South Africa and his acquisition of South African permanent residence all occurred before this date. It appears undisputed that the only way the appellant remained connected to Zimbabwe was through the few visits to the country as he traveled "backwards and forwards" between Zimbabwe and South Africa.

The learned judge's analysis of the evidence before him, and the conclusions he reached, are contained in the following passage at p 7 of the judgment:

"The issue before the court is whether the plaintiff has abandoned his domicile of origin in favour of a domicile of choice. The evidence led establishes in the view of this court that the plaintiff took a deliberate decision to abandon his domicile of origin in Zimbabwe in favour of a domicile of choice in South Africa. The

2008 (2) ZLR p173

Gwaunza JA

A plaintiff did so with the necessary state of mind or *aminus manendi* as evidenced by his clearly carefully planned disposal of local assets and assuming that he receives the proceeds thereof in foreign currency outside Zimbabwe. He then applied those proceeds together with the funds that he was able to secure to establish a residency outside this country and other assets in South Africa.

It is not in dispute that he secured employment in order understandably to b consolidate his financial well being in South Africa. The visits of the plaintiff, if any, to Zimbabwe do not affect, in the view of this court, the facts of this matter and the inference to be drawn from his settled state of mind."

The learned judge cited authorities to support his findings. He quoted from *Howard v Howard* 1966 RLR 182 (H) at 188, where it is stated that:

"Even if expressions of intention are clear and consistent, they cannot prevail c against a course of conduct inconsistent with them or lending to an opposite inference."

On the basis of this authority, the court *a quo* dismissed the appellant's express denial of having adopted South Africa as a domicile of choice.

The court also relied on the *dictum* in *GRE Insurance Ltd v Chisnall* 1982 (1) SA 387 (ZS) at p 390A to the effect that:

d "An intention to reside in a country for a fixed period of time, or until the happening of some clearly foreseen and reasonably anticipated event, will not be sufficient, but, if the proper conclusion from all the circumstances is that the propositus intends to make his home in a country for an indefinite time, he will acquire a domicile of choice there notwithstanding a continuing emotional attachment to some other country, or an intention to change his residence upon some vague or improbable contingency".

Mr de Bourbon for the appellant challenges the findings of the court *a quo* and argues that the *dictum* cited above in *Chisnall's* case *supra* does not accurately reflect the law of Zimbabwe. He submits that the law was correctly stated by Garwe J (as he then was) in *de Jager v de Jager* 1998 (2) ZLR 419 (H), to the effect that a domicile of choice could only be acquired if there was an f intention of staying in the new home permanently in the sense of a stay of indefinite duration. It is further argued for the appellant that the recent case of *Chikwenengere v Chikwenengere* 2007 (1) ZLR 196 (S) in effect adopted the same approach. *Mr de Bourbon* cites a number of South African and local authorities¹ that he argues suggest that there is a distinction between a "weak" g and "strong" intention, on the part of the *de cujus*, to abandon his previous

domicile and settle permanently in the country of domicile. He argues that in *Chikwenengere's* case, the court applied the test of strong intention even

2008 (2) ZLR p174

Gwaunza JA

though it had used both the words "permanently" and "indefinitely". The ^a latter word, in Mr *de Bourbon's* submission, suggested a "weak" intention. I am not persuaded by these contentions.

It appears to me that the authorities cited have not always deliberately made the distinction between a "weak" and a "strong" intention in determining whether or not the *de cujus* had the requisite *animus manendi* vis-à-vis his ^b domicile of choice. No authority has in fact been cited which specifically qualified the requisite *animus manendi* as either "strong" or "weak". To suggest this qualification, in my view, is akin to requiring the court to apply a test higher than that of "a balance of probabilities" in its determination of the state of mind of the *de cujus*. It is trite that the acquisition of domicile of choice is proved on a balance of probabilities. ^c

I also find, in so far as it is argued that the word "permanent" denotes a strong intention as opposed to the word "indefinitely", that the courts tend to use the words interchangeably. As Mr *de Bourbon* himself pointed out, this trend is observed in *Chikwenengere's* case *supra*. Going by what is stated in the appellant's heads of argument, *de Jager's* case *supra* seems to fall into ^d the same trap. It is argued for the appellant, on the basis of that case, that the correct statement of the law was that a domicile of choice could only be acquired if there was an intention of staying in the new home permanently *in the sense of a stay of indefinite duration* (my emphasis).

In view of the above, I do not find to be persuasive the appellant's submission ^e that there is a radical difference in the approach adopted by the court, for instance, in *GRE Insurance Co Ltd v Chisnall*, on the one hand, and *de Jager* and *Chikwenengere*, on the other.

I find no fault in the learned judge's analysis of the evidence in this case. I am satisfied that the *dictum* that he cited from *Chisnall's* case can appropriately be applied to the circumstances of this case. The appellant, on the evidence ^f before the court, no longer had any business interests in Zimbabwe at the time the proceedings were instituted. He also did not have any family interests left. There is strong evidence therefore that what interest or attachment he did have might have been no more than emotional or sentimental. Viewed against the other factors referred to, I am not persuaded that this interest is ^g sufficient to disprove an intention on his part to make a permanent home in another country. His stated intention to come back to Zimbabwe should the economic situation improve is clearly what is referred to in *Chisnall's* case *supra* as being based on some "vague or improbable contingency". It does not help his case.

The appellant also argues that the court *a quo* failed to critically analyse ^h

2008 (2) ZLR p175

Gwaunza JA

^a the evidence to determine precisely when the appellant and the respondent settled permanently in South Africa. In particular, reference is made to the unchallenged evidence of the appellant that up to and including January 2003 (when the proceedings were instituted) he was moving "backwards and forwards" between South Africa and Zimbabwe. The submission is made that, at that time, he had not settled permanently in South Africa. It was said ^b that at the time of institution of the proceedings the required intention to change domicile was not present.

My reading of the evidence before the court suggests that the parties left Zimbabwe in order to live in South Africa in the middle of 2002. By that time the appellant had divested himself of all assets in Zimbabwe. Late in ^c 2002 he bought a house in South Africa and commenced employment in that country. The learned judge noted that even though the respondent's daughter commenced education in South Africa, the respondent had not managed to relocate to South Africa. At the time the divorce proceedings were instituted in January 2003, the respondent was living in Zimbabwe while the appellant was living in South Africa. His evidence that he was ^d moving "backwards and forwards" between the two countries was not specific as to how often this was. He made it evident that those visits were either for business or family purposes. His family had "moved away". All this, in my view, negates any suggestion that the appellant had not, at the time the proceedings were instituted, settled permanently in South Africa. ^e It in effect points to the contrary.

I have no doubt that the course the appellant's conduct took was inconsistent with his stated intention of wishing to retain Zimbabwe at his country of domicile. On the authority of *Howard's* case *supra* such stated intention cannot prevail over clear indications to the contrary.

In *Chikwenengere's* case *supra*, the court summarized the requirements for the acquisition of a domicile of choice as follows –

- (i) the *factum* of residence;
- (ii) the *animus manendi*, or intention of remaining permanently; and
- (iii) freedom of volition.

The learned judge correctly found that these requirements were fully met *in casu*. That being the case, I find no reason to interfere with the reasoning of the learned judge.

In the result, the appeal has no merit. It is dismissed with costs.

MALABA JA and GARWE JA concurred.

2008 (2) ZLR p176

Gwaunza JA

Gill, Godlonton & Gerrans, appellant's legal practitioners A

Honey & Blanckenberg, respondent's legal practitioners

¹ *Johnson v Johnson* 1931 AD 391; *Ley v Ley's Executor & Ors* 1951 (3) SA 186 (A); *Howard v Howard* 1966 RLR 182 (G); 1966 (2) SA 718 (R); *Carvalho v Carvalho* 1936 SR 219

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Document 24 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/NATIONAL MERCHANT BANK (PVT) LTD v THE COLD CHAIN (PVT) LTD 2008 (2) ZLR 177 (H)

NATIONAL MERCHANT BANK (PVT) LTD v THE COLD CHAIN (PVT) LTD 2008 (2) ZLR 177 (H)

2008 (2) ZLR p177

Citation	2008 (2) ZLR 177 (H)
Case No	Judgment No. HH-96-08
Court	High Court, Harare
Judge	Mtshiya J
Heard	16 September 2008
Judgment	16 September 2008
Counsel	<i>R M Fitches</i> , for the plaintiff <i>E W W Morris</i> , for the defendant
Case Type	Civil action
Annotations	No case annotations to date

Flynote

Exchange control – exchange rate – judgment sounding in foreign currency – when such judgment may be granted – need for loss to have been felt in foreign currency – exchange rate to be used – not competent for court to grant judgment at any rate other than official exchange rate

▫ **Practice and procedure** – judgment – judgment sounding in foreign currency – when may be granted – need for loss to have been felt in foreign currency – exchange rate to be used – not competent for court to grant judgment at any rate other than official exchange rate

Headnote

Ⓔ The plaintiff, an authorised dealer in foreign currency, used to source currency to enable the defendant company to import goods. The defendant had no foreign currency and could only access it through the plaintiff. The practice was that the plaintiff would source foreign currency from the market and credit it to its customers in return for payment in Zimbabwe currency. The defendant paid the plaintiff, in Zimbabwe currency, to Ⓕ source South African currency to pay for a shipment from its supplier in that country. Two months later, the plaintiff, believing that the payment had not gone through, paid the supplier again. The supplier used the duplicated payment to supply another shipment.

The plaintiff initially demanded repayment in Zimbabwe dollars. The Ⓖ defendant tendered payment at the official rate of exchange, which at the time was about a quarter of the “parallel” or market rate that the plaintiff actually had to use to acquire currency. The plaintiff then demanded payment of the South African currency it had sourced, alternatively, payment in Zimbabwe currency at the market rate. The questions that arose for determination were (1) whether or not the defendant was obliged to Ⓗ return the overpayment in rands; and (2) if not, what was the applicable

2008 (2) ZLR p178

Mtshiya J

rate of exchange to determine the Zimbabwe currency equivalent. Ⓐ

Held, that the court has the power to give a judgment sounding in foreign currency. This would normally obtain where there is evidence or agreement that the loss suffered by a plaintiff was indeed felt in foreign exchange. While the options for how to recover a foreign debt must be left to the judgment creditor’s discretion, such options should, however, Ⓑ be spelt out at the time of making the transaction and should be in compliance with foreign exchange regulations. Only then will a court proceed to enforce a claim in the agreed currency. Here, the established dealings between the parties dictated that the plaintiff’s payment should be in local currency. The practice was for the plaintiff to source foreign currency for the defendant from the market and in return the defendant Ⓒ would pay the plaintiff in Zimbabwe currency. That position did not change because of the duplicated amount. The defendant was still expected to meet his obligation in local currency.

Held, further, that while in the current inflationary environment, the use of the parallel market rate made a lot of sense, that route remained illegal Ⓓ and could not be endorsed by the court. The court could only recognize the official exchange rate that was used by the defendant.

Cases referred to

AMI Zimbabwe (Pvt) Ltd v Casalee Hldgs (Successors) (Pvt) Ltd 1997 (2) ZLR 77 (S) Ⓔ

Avacalos v Riley 2007 (2) ZLR 274 (H)

CBZ v Watergate (Pvt) Ltd HH-166-04

Echodelta Ltd v Kerr & Downey Safaris (Pvt) Ltd 2002 (1) ZLR 632 (H)

Lowveld Leather Products (Pvt) Ltd v IFC Ltd 2003 (1) ZLR 78 (S)

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

Owners, MV Eleftherotria v Owners, MV Despina R (The "Despina R") [1979] 1 All ER 421 (HL)

PTC v Zhong 1999 (1) ZLR 525 (H)

Zimbabwe Development Bank v Zambezi Safari Lodges (Pvt) Ltd 2006 (2) ZLR 118 (H) ^g

Case information

R M Fitches, for the plaintiff

E W W Morris, for the defendant

Judgment

MTSHIYA J: The cause of action *in casu* is one of unjust enrichment and arises from the following facts: ^h

2008 (2) ZLR p179

Mtshiya J

^a The defendant, who is an importer of goods for sale in Zimbabwe, depends on authorised dealers for the requisite foreign currency in his business. On 21 March 2001 the defendant instructed the plaintiff, an authorised dealer, to effect payment of ZAR372 062.80 to its supplier, namely, Kimberley Clark of South Africa (Pty) Ltd (Kimberley). The plaintiff, through a telegraphic transfer, effected the payment on 4 April 2001.

^b On 11 May 2001, believing that the telegraphic transfer had not gone through, the plaintiff, on the advice of the defendant, paid Kimberley yet another sum of ZAR372 062.80 through a bank draft thus duplicating payment. The defendant's supplier, who was credited with the duplicated payment, supplied further goods to the defendant utilizing the duplicated funds. Upon ^c becoming aware of the duplicated payment, the defendant offered to pay back in Zimbabwe currency. The defendant would make payment using the official exchange rate for the rand. Having so accepted liability for the duplicated payment, on 6 August 2001 the defendant tendered to the plaintiff a cheque in the sum of Z\$2 664 341.71. That amount represented the sum of ZAR 372 062.80 converted to Zimbabwe dollars at the official exchange ^d rate, inclusive of interest thereon to the date of tender. The plaintiff rejected the payment tendered and returned the cheque to the defendant.

Prior to the tender of payment the parties had exchanged the following important correspondence, which correspondence serves to confirm the above factual background to the case before me.

^e (a) *9 July 2001- Facsimile transmission from plaintiff to defendant*

"As telephonically advised, there was a duplication of payment to your named supplier. Our correspondent bank debited our account with ZAR372 062.50 on 4 June 2001 and 10 April 2001. On 19 April 2001, one of the debit entries was reversed crediting our account as returned funds. Upon informing you of ^f the returned funds you confirmed your supplier's banking details that we had applied as correct. However, you then asked for a different mode of payment in which case we issued a draft which has since been paid. Please assist us to recover the funds as soon as possible. May you urgently advise your actions as we would want to know what course of action to take".

^g (b) *11 July 2001 – Facsimile transmission from defendant to plaintiff*

"Having received your fax and confirming with my supplier that indeed 2 credits for the same value, R372 067.80 were received in their account. We acknowledge the fact that we owe you the Zimbabwe dollar equivalent for the second transaction paid by draft.

^h We propose to settle the outstanding amount by means of a Zimbabwe

2008 (2) ZLR p180

Mtshiya J

dollar cheque for the rand equivalent at the selling rate ruling at the time ^a the transaction was effected by yourselves on our behalf.

Please confirm this rate to enable us to effect the payment swiftly to resolve this issue".

(c) *July 2001 – Facsimile transmission from plaintiff to defendant* ^b

"DUPLICATION OF ZAR372 062.80 IN FAVOUR OF KIMBERLY CLARK OF SOUTH AFRICA

We acknowledge receipt of your facsimile transmission of even date in which you propose to settle the outstanding amount in Zimbabwe dollars calculated at the ruling rate at the time the duplication occurred.

^c

Please note that we need to source forex from the market at ruling market rates to cover our account. This implies that the Zimbabwe dollar equivalent should be calculated at current market rates.

If the issue cannot be resolved by way of a Zimbabwe dollar at current market rates, then we will have to ask for the return of funds from your supplier. D

Your urgent response will be greatly appreciated".

(d) *12 July 2001 – Facsimile transmission from plaintiff to defendant*

"DUPLICATION OF PAYMENT IN FAVOUR OF KIMBERLY CLARK OF SA (PTY) LTD

Kindly forward a cheque for ZWD8 185 381.60 being the local currency E equivalent of the outstanding amount.

Your urgent response to this matter is greatly appreciated".

(e) *20 July 2001 – Facsimile transmission from defendant to plaintiff*

"As you were informed in my previous fax we are only prepared to forward F a cheque to you for the exchange rate ruling at the time the transaction was effected.

The draft was issued on 11 May 2001 for the value of ZAR372 062.80. I would appreciate you check with your dealing room and confirm the rate applicable for transactions on that date. The first payment you effected on G 4 April at a rate of ZWD8 0558:ZAR1.

Please advise soonest".

(f) *6 August 2001 Facsimile from defendant to plaintiff*

"Further to your fax to us of 9 July 2001 signed by Ms V Mujuru, we now enclose our cheque in your favour made up as follows:- H

2008 (2) ZLR p181

Mtshiya J

A Amount of payment To Kimberly Clark	ZAR	372 062.80
NMB Selling Rate for ZAR on 11/5/01		7.1610
Therefore amount in Z\$		266 4341.71
Interest thereon for 88 days at 16.5%		
Being cost of money to Cold Chain in May 2001		<u>105 989.70</u>
TOTAL	Z\$	<u>2770331-41</u>

B In our view this satisfies in full all our indebtedness to you in respect of this payment".

In rejecting the above payment, on 11 September 2001 the plaintiff wrote to the defendant in the following terms:

C "DUPLICATED PAYMENT OF ZAR372 062.87

We make reference to the various discussions we have had regarding the above reference matter. We also acknowledge receipt and thank you for your cheque in the sum of ZW\$2 770 331.41 as the refund on the duplicated payment.

As previously indicated we fully acknowledge the error in duplicating D payment to Kimberly Clark of South Africa (Pty) Ltd. The duplicated payment was in the sum of ZAR372 062.87, which amount was sourced by our Treasury department in the market at different rates. Consequently our Treasury department quoted for you a break-even rate of ZW\$22 to ZAR1 to enable us to recover our position. Your cheque indicates that you have calculated the Zimbabwe dollar equivalent of the duplicated payment at E the official rate. The bank will incur a significant loss in the event that the conversions are done at the official rate. In the absence of a compromise on the applicable rate, we retain a clear legal right to seek a refund of the money in the currency in which it was paid, being

the full extent to which you have been unjustly enriched. We are aware that you have committed the duplicated payment for the settlement of your own obligations.

We therefore advise that we are unfortunately unable to accept your cheque and return it to you together with this letter. We must now insist that in the absence of an agreement on an acceptable rate, we receive a refund payment from you in the sum of ZAR372 076.87 being the extent of our exposure.

Should you need to discuss this matter any further please do not hesitate to contact the undersigned.

Yours faithfully

Alisto A. Mawuta

Senior Manager International Banking

For NMB Bank Limited"

2008 (2) ZLR p182

Mtshiya J

As a result of the defendant's refusal to accept the plaintiff's proposal, on 3 July 2002 the plaintiff issued summons against the defendant for:

- "(a) Payment in the sum of \$8 185 383.00 being a refund due in respect of the amount of which defendant has unjustly been enriched at plaintiff's expense which defendant has unjustly been enriched at plaintiff's expense which amount, despite demand, defendants have failed and/or neglected to pay; b
- (b) Interest thereon at the prescribed rate with effect from 11 May 2001 to date of payment in full, and
- (c) Costs of suit".

On 9 September 2003 the plaintiff filed a notice to amend its declaration and prayer. Correspondence in exhibit 1, produced by the plaintiff, indicates that amendments were effected by consent. c

I shall therefore assume that the joint pre-trial conference minute filed on 20 June 2006 was based on the amended prayer as agreed at the pre-trial conference held on 13 June 2006. The amended prayer reads as follows:

- (a) Payment in the sum of R372 062.80 together with interest thereon at the rate of 15.5 per cent per annum with effect from the date of summons d to date of payment in full; or
- (b) Alternatively, payment in the sum of \$8 185 383.00 together with interest thereon at the prescribed rate with effect from 11 May 2001 to date of payment in full; and
- (d) Costs of suit". e

It is important to note that at the point of issuing the summons the plaintiff did

not "seek a refund of the money in currency in which it was paid" as it had threatened to do in its letter of 11 September 2007.

The joint pre-trial conference minute identifies the following as issues for determination/trial: f

- "1. Whether or not the defendant is obliged to return the overpayment in rands
- 2. If not, what is the applicable rate of exchange to determine the Zimbabwe dollar equivalent."

Having gone through the pleadings, I formed the impression that the facts of the case were common cause and hence the formulation of the above issues g of law at the pre-trial conference.

At the commencement of the hearing of this matter I indicated to both parties that I did not see the desirability of leading evidence since the issues that remained to be determined were clearly matters of law. However, Mr Morris for the defendant insisted on the need for evidence to be led. I then allowed the parties to lead evidence. h

2008 (2) ZLR p183

Mtshiya J

A The plaintiff led evidence from Mr Matthew Hore, who is its current assistant manager, Corporate Banking. Mr Hore told the court that he was, at the material time, the foreign payments clerk in

International Banking and was therefore responsible for the execution of foreign payments on behalf of the plaintiff's clients, including the defendant. Apart from giving details of the transactions and admitting that it was illegal to use the parallel market exchange rate, Mr Hore confirmed what had been admitted at the pre-trial conference.

The defendant led evidence from Mr John Stewart Matthew Gardiner who is its managing director. Like the plaintiff's witness, he too confirmed what had been admitted at the pre-trial conference. He agreed that the defendant's supplier, Kimberley, had been paid twice and that the defendant had utilised the second payment for further imports. The defendant had, however, accepted its indebtedness to the plaintiff and had tendered payment in Zimbabwe dollars at the official exchange rate. He said the plaintiff had advised the defendant to pay in Zimbabwe dollars but had rejected payment because it wanted payment to be based on the parallel market exchange rate. It was his evidence that the defendant had always paid the plaintiff in Zimbabwe dollars. The defendant had no foreign currency account. The plaintiff had only demanded payment in foreign currency upon defendant's refusal to pay it using the parallel market rate, he testified.

As I have already indicated above, the evidence of both witnesses merely served to confirm what was common cause. Accordingly, apart from what I have already narrated, I see no value in detailing that evidence herein.

At the close of the hearing I asked counsel for both parties to submit written submissions. These were duly filed as requested, with Mr *Fitches* also taking the opportunity to file a reply to the defendant's submissions. I must say the submissions from both counsel were very helpful in the determination of this matter. I am grateful to both.

The fact that the defendant was unjustly enriched is not in dispute. However, having accepted liability, the defendant duly "tendered payment by sending a cheque in the amount of the Zimbabwe dollar equivalent calculated at the official foreign exchange rate" at that time. That tender was rejected by the plaintiff only because it was not based on the parallel market rate. With the defendant having refused to use the parallel market rate, the plaintiff then decided that it should be paid in foreign currency (rand) as per its threat in its letter of 11 September 2001. That development explains the two issues for determination/trial as agreed at the pre-trial conference.

Submissions from both parties recognise the power of this court to grant

2008 (2) ZLR p184

Mtshiya J

a judgment sounding in foreign currency as determined in *Makwindi Oil A Procurement (Pvt) Ltd v National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC) at 495, where in disallowing the plaintiff's claim for damages in foreign currency, Gubbay CJ had this to say:

"In order to meet its contractual obligations in respect of payment, the plaintiff, a Zimbabwean company which conducts its business in the country, was compelled to obtain the permission of the Reserve Bank of Zimbabwe to purchase with local currency the requisite amount of United States dollars. It is not alleged that the plaintiff's normal currency of use is United States dollars, nor that it owns any foreign currency at all. Notwithstanding, therefore, that the currency in which the loss was immediately sustained was in United States dollars (the expenditure currency), the currency in which the loss was effectively felt or borne has the closest, if not the only, connection, thus the loss of foreign currency was effectively felt or borne, not by the plaintiff, but by the national foreign currency reserve".

The learned Chief Justice said the above upon having quoted the following paragraphs from *Despina R* [1979] 1 All ER 421 by Lords Wilberforce and Russell at pp 427 and 434 respectively:

"It appears to me that the plaintiff, who normally conducts his business through a particular currency, and who, when other currencies are immediately involved, uses his own currency to obtain those currencies, can reasonably say that the loss he sustains is to be measured not by the immediate currencies in which the loss first emerges but by the amount of his own currency, which in the normal course of operation, he uses to obtain those currencies. This is the currency in which his loss is felt, and is the currency which it is reasonably foreseeable he will have to spend".

"In this case the plaintiffs' business was conducted in US dollars, it being managed in New York, The other foreign currency was necessarily acquired in exchange for US dollars. The true loss of the plaintiffs was a loss of US dollars, and in pursuit of the remedy of *restitutio in integrum*, or full and proper compensation, I conclude that the claim and judgment should be for the US dollars lost"

Clearly what emerges from the above quotes is that the currency in which the loss is felt is of paramount importance in determining a claim such as this one.

Mr *Fitches* for the plaintiff submitted, correctly in my view, that *Makwindi* established that “if one’s loss is felt in a foreign currency, then judgment may be entered in that currency”. *Makwindi* provides for that. ^g

On the issue of the official exchange rate, he referred me to *Echodelta Ltd v Kert & Downey Safaris (Pvt) Ltd* 2002 (1) ZLR 632 (H) and submitted that the import of that case is that the conversion referred to in *Makwindi* at the date of enforcement should be at the official rate.

Relying on *Commercial Bank of Zimbabwe v Watergate (Pvt) Ltd* HH-166-04, *Lowveld Leather Products Pvt Ltd v IFC Ltd* 2003 (1) ZLR 78 (S) ^h

2008 (2) ZLR p185

Mtshiya J

^A (*Commercial Bank*) and *Zimbabwe Development Bank v Zambezi Safari Lodges (Pvt) Ltd* 2006 (2) ZLR 118 (H), Mr *Fitches* submitted that he tender in Zimbabwe dollars could only be allowed “if repayment in local currency is agreed by contract or otherwise accepted by the creditor”. He said *in casu* the plaintiff was neither accepting or acquiescing to the tender and therefore, that being the case, “the tender in local currency did not constitute sufficient ^B discharge of an obligation sounding in foreign currency”. He went further to submit that “the options for recovering a foreign currency debt must be left to the judgment creditor’s discretion”.

On the question of the rate of interest, Mr *Fitches* stated that case authorities indicated that *in casu* the rate of interest should be that prevailing in the superior ^C courts of South Africa as at 11 May 2001 to the date of payment. The rate of interest, he submitted, should be that appropriate to the foreign currency in question. See *AMI Zimbabwe (Pvt) Ltd v Casalee Holdings (Successors) (Pvt) Ltd* 1997 (2) ZLR 77 (S) and *PTC v Zhong* 1999 (1) ZLR 525 (H).

Mr *Morris*, for the defendant, submitted that, in a period of continuous ^D dealings between the parties, it was common cause that the defendant had no foreign currency and could only access some through the plaintiff who is an authorised dealer in foreign currency. The practice was that the plaintiff would source foreign currency from the market and credit it to a customer in return for payment in Zimbabwe currency. This is what had happened *in casu* and the duplicated payment was to be corrected by way of tendering ^E Zimbabwe currency using the official exchange rate. That is what the defendant had done but the plaintiff had rejected the tender demanding that the equivalent local currency payable should be calculated on the basis of the parallel market rate. Upon refusal by the defendant to use the parallel market rate the plaintiff had departed from the earlier mode of dealing and demanded to be paid in foreign currency (i.e. in rand) or the equivalent in ^F local currency calculated at the official exchange rate at the date of payment.

It was Mr *Morris*’ view that, as in *Makwindi*, the plaintiff’s loss *in casu* was felt, not in foreign currency, but in local currency. That being the case, the defendant’s obligation was to be met in local currency. He went further to submit that, given the facts of this case, the plaintiff’s right to any payment ^G is restricted to the amount of the tender which it rejected. I agree.

As I have already acknowledged, the written submissions were helpful and clearly gave an overview of the law governing the issues identified at the pre-trial conference, which issues are spelt out above in this judgment.

There is no dispute that following *Makwindi*, this court has power to give a ^H judgment sounding in foreign currency. This, in my view, would normally

2008 (2) ZLR p186

Mtshiya J

obtain where there is evidence or agreement that the loss suffered by a plaintiff ^A was indeed felt in foreign exchange. *In casu*, it is clear to me that, through established conduct in their dealings, the parties were throughout mindful of the fact that the duplicated amount was to be repaid in local currency. That is the currency that the plaintiff would use in its dealings with the defendant who purchased foreign currency through it or the currency that the defendant ^B would normally use to purchase foreign currency through the plaintiff.

Following the duplicated payment, the plaintiff naturally proceeded to recover the funds. As reflected in correspondence quoted herein, the defendant, who did not hesitate to admit liability, advised the plaintiff that it would refund it by way of a Zimbabwe dollar cheque for the rand

equivalent at the selling rate ruling at the time the transaction was effected. The plaintiff responded ^c to that proposal by pointing out that the Zimbabwe dollar equivalent should be calculated at the current market rates, failing which the plaintiff would demand the return of funds (foreign currency) from the defendant's supplier, namely, Kimberley.

Apart from "instructing" the defendant to violate foreign exchange rules ^d by resorting to the illegal parallel market, the plaintiff did not suggest any change in the original mode of operation (i.e. the plaintiff sourcing forex from the market and being paid for same in Zimbabwe dollars by the defendant). Such a unilateral change would all the same be improper. As confirmation of the currency in which the refund was to be made, on 12 July 2001 the plaintiff actually asked defendant to pay ZWD 8 185 381.60, being the local ^e currency equivalent of the duplicated amount. Unfortunately that amount was calculated on the basis of an illegal exchange rate, a fact that was admitted by the plaintiff through its witness in court. The defendant correctly refused to follow the illegal route.

On 6 August 2001, the defendant, using the official rate of exchange, forwarded ^f to the plaintiff a cheque for \$2 770 331.41 being the local currency equivalent of the amount of ZAR372 062.80 that had been duplicated. There is no suggestion that the defendant's calculation was wrong. All the plaintiff wanted was the use of the illegal parallel market rate. The plaintiff's loss had been felt in Zimbabwe currency and hence the calculation in Zimbabwe dollars. ^g

My view is that the sudden change in demanding the return of funds (in foreign currency) by defendant's supplier was simply a ploy to force the defendant to agree to the use of an illegal exchange rate. The reason was not because the plaintiff had felt its loss in foreign currency. As established in their usual conduct of business, the plaintiff correctly expected repayment in local currency – the usual currency of their dealings and the currency in ^h

2008 (2) ZLR p187

Mtshiya J

^a which the loss was felt. The plaintiff knew that the defendant had no foreign currency account. That is why it threatened that it would seek a refund from the defendant's supplier, Kimberley.

While I accept that it might be true that options for recovering a foreign debt must be left to the judgment creditor's discretion, such options should, ^b however, be spelt out at the time of making the transaction and should be in compliance with foreign exchange regulations. To that end I would observe that whereas in *Zimbabwe Development Bank and Commercial Bank (supra)* the parties proceeded on the basis of promise and contract respectively, which contract and promise the court went on to enforce, the situation *in casu* is different. Accordingly, where there is a promise or contract, it must ^c be clear from inception that the parties have "promised" or "contracted" to pay each other in a particular currency. It is only then that a court will proceed to enforce a claim in the agreed currency.

The established dealings between the parties dictated that the plaintiff's payment should be in local currency. The operative practice was for the plaintiff to source foreign currency for the defendant from the market and in return ^d the defendant would pay the plaintiff in Zimbabwe currency. That position did not change because of the duplicated amount. The defendant was still expected to meet his obligation in local currency. Correspondence between the parties, reproduced earlier in this judgment, is testimony to that fact.

The foregoing clearly suggests that, while it is competent for me to grant ^e judgment in foreign currency, I am, *in casu*, disabled from doing so. The plaintiff's rejection of a tender that was sufficient and lawfully made was based on its wish to induce the defendant to commit an offence (i.e. by using the illegal parallel market rate for conversion purposes). That is not acceptable.

It is not arguable that in the current inflationary environment use of the ^f parallel market rate makes a lot of sense. However, that route remains illegal and cannot be endorsed by this court. This court can only recognize the official exchange rate that was used by the defendant (See *Avacalos v Riley* 2007 (2) ZLR 274 (H) and *Echodelta Ltd v Kerr & Downey Safaris (Pvt) Ltd* 2002 (1) ZLR 632 (H)).

With respect to the date of conversion, I associate myself with the finding of ^g Makarau JP in *Avacalos supra* at 278F-279B when she reasoned as follows:

"Finally, Mrs Wood argued that if I were to uphold the submissions by Mr Fitches that the only rate applicable to convert the amount due to the plaintiff is the official rate, then I must order that the rate

applicable be the current official rate and not the rate that obtained at the time the defendant consented to judgment and attempted to pay off the debt.

It appears to me that Mrs Wood is seeking reliance from the *dicta* in *Makwindi*

2008 (2) ZLR p188

Mtshiya J

Procurement (Pvt) Ltd (supra) where it was laid down that the amount of foreign A currency in a judgment is to be converted into local currency at the date when leave is given to enforce the judgment. This is the established position but in my view it only applies where the judgment is expressed in foreign currency. Where the judgment is to be expressed in local currency, then the amount of the judgment is set and determined on the date that the consent to judgment is filed. It cannot be re-converted on the date that judgment is finally given as B to do so will, in my view, be highly prejudicial to the defendant who would have unequivocally elected to have a judgment entered against him in a certain specified amount.

I admit though that *in casu* there was never any formal consent to judgment. However, the defendant's action on 6 August 2001 can, in my view, be regarded as consent to judgment. It is clear to me that, if on 6 August 2001 C the defendant had tendered ZWD8 185 381.60 instead of ZWD2 770 331.41, it would not have been necessary for me to write this judgment. The plaintiff was prepared to accept the tender as long as it was based on the illegal rate. The Zimbabwe dollar amount demanded by the plaintiff was therefore tainted with illegality and the defendant correctly proceeded to tender an amount that was based on the official exchange rate. Its calculations, based on the D official rate, were not questioned. Accordingly the amount the defendant tendered was correct and included the requisite interest. That, in my view, was full settlement.

It is true that due to inflation the amount that was tendered has been rendered *de minimis*. However, that situation would have been avoided if the plaintiff E had accepted the tender that was properly and lawfully made on 6 August 2001. The plaintiff is to blame for the loss it has suffered as a result of inflation.

Accordingly I make the following order:

1. Judgment be and is hereby entered for the plaintiff in the sum of \$2 770 331.41 F
2. The defendant shall pay the plaintiff's costs up to 6 August 2001.

Costa & Madzonga, plaintiff's legal practitioners

Atherstone & Cook, defendant's legal practitioners

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Document 25 of 49

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MUDIMA v COMMISSIONER GENERAL, ZIMBABWE REVENUE AUTHORITY 2008 (2) ZLR 189 (H)

2008 (2) ZLR p189

Citation	2008 (2) ZLR 189 (H)
Case No	Judgment No. HH-83-08
Court	High Court, Harare
Judge	Makarau JP
Heard	5 September 2008; 9 September 2008
Judgment	24 September 2008

Counsel	<i>R M Fitches</i> , for the plaintiff <i>M Sinyoro</i> , for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Customs and excise – seizure of goods – goods in possession of traveller leaving the country – traveller not asked to declare goods – not a violation of Customs and Excise Act and goods not liable to seizure

Headnote

- ▯ In terms of s 55(2)(b) of the Customs and Excise Act [*Chapter 23:02*], any person leaving Zimbabwe shall, whether or not he has goods in his possession, report to an officer, in the case of a person leaving by aircraft, at the customs post or to an officer at the aerodrome of departure and ^ε shall, *if called upon to do so*, unreservedly declare all the goods in his possession which he proposes to take with him beyond the borders of Zimbabwe in such manner as the officer may require, and shall fully and truthfully answer any questions put to him by the officer and, if so required, produce such goods for inspection by an officer. Goods found that have not been declared are subject to seizure in terms of s 193 of the Act. The discovery of goods in possession of a traveller which he has not been asked to declare is not a violation of ^ϕ the Act and thus there would be no basis upon which the seizure of the money could be lawfully made. The law does not oblige every traveller to *mero motu* declare the goods on his person. A traveller is only obliged to disclose and disclose fully and truthfully the goods in his possession if called ^ϑ upon to do so by a customs officer.

Legislation considered

Customs and Excise Act [*Chapter 23:03*], ss 27, 55(2)(b) & 193

Exchange Control Regulations, 1996 (SI 109 of 1996), s 20(2)(c)

2008 (2) ZLR p190

Makarau JP

Case information

R M Fitches, for the plaintiff ^α

M Sinyoro, for the defendant

Judgment

MAKARAU JP: The revenue authority still has to find ways to endear itself to the public. Throughout time, the tax collector has been called many unsavoury names. In the trial before me, the defendant was called a day light robber. ^β

The plaintiff is a Zambian national. He is a businessman and he often visits Zimbabwe to make purchases of wares and grocery items for resale in Zambia. On 16 July 2007, he entered Zimbabwe through the Chirundu Border Post. He was using the road. Whilst in Zimbabwe, he made certain purchases. Four days later, he left Zimbabwe. This time, he used the Harare International Airport. At the airport, the security scanners detected that he ^γ had some money on him. It was US\$70 000. The money was then seized on the basis that he had failed to declare it to a customs official. Aggrieved by what he termed the daylight robbery, the plaintiff approached this court for an order compelling the defendant to refund the seized amount.

At the trial of the matter, the plaintiff gave evidence. His testimony was to ^δ the following effect: when he arrived at the Chirundu Border Post, he had US\$101 600 on him. He had purchased this

money from a bureau de change in Zambia over a short period prior to his trip to Harare. He adduced into evidence a bundle of receipts proving the various purchases. At the border post, he declared the currency to an immigration officer. He then approached the customs officer who waved him on indicating that he was free to go as ^ε the officer was busy with other travellers.

Whilst in the country he made a few purchases. He remained with US\$70 000. On his way back to Zambia, he presented himself to a customs officer who asked him if he had any Zimbabwean currency. He responded in the negative. The customs officer did not ask him if he had any foreign currency on him. ^ϕ He then proceeded to the scanning machine where the money was detected. The money was then seized.

The witness gave his evidence emotionally and understandably so. The facts of the matter are largely common cause and his evidence was a repetition of this common cause evidence. Under cross examination, it however emerged ^ϑ that he had tried to prove that he had declared the money upon entry into the country by producing old declaration forms that had no bearing to this importation. He had not testified to this effect in his evidence-in-chief.

I was not impressed by the witness's failure in this regard. He did not take me into his utmost confidence.

The defendant relied on the evidence of one Douglas Zinyemba. He is the ^η

2008 (2) ZLR p191

Makarau JP

A customs official who was on duty at the Harare International Airport when the plaintiff presented himself for pre-departure formalities. He recalls that he greeted the plaintiff when he presented himself and asked him if he had any currency on him, both local and foreign. The plaintiff responded that he had local currency and a few Zambian kwacha. The plaintiff also mentioned that he was a regular traveller and is aware of the legal restrictions regarding ^β currency movement into and out of the country. He then wished the plaintiff a pleasant flight. The plaintiff went to the Civil Aviation scanner where the money was detected. He was referred back to the customs official. After the plaintiff had failed to prove that he declared the money upon entry into the country, he then seized the money. The plaintiff produced old forms on ^ϐ which he had declared past importations of foreign currency.

The witness did not impress in the witness stand. He was not direct in his responses to questions put to him even under direct examination. On the critical question of whether or not he had asked the plaintiff to declare the foreign currency that he had on him, his response was woolly and did not shed any light on whether he did or did not ask the plaintiff to declare the ^δ foreign currency in his possession. The witness was in my view unnecessarily argumentative. For instance, he argued and incorrectly so in my view, that by failing to make a declaration even when not asked to do so, the plaintiff is at law taken to have declared that he had nothing to declare. In my view, this further clouds his evidence as to whether or not he asked the plaintiff ^ε to declare the foreign currency he was carrying.

In its plea, the defendant denies that the seizure of the plaintiff's money was unlawful. It proceeds to plead that the plaintiff failed to declare the money upon exiting Zimbabwe in violation of s 55(2) (b) and 193 of the Customs and Excise Act [*Chapter 23:03*] ("the Act"). In particular, it pleads that the plaintiff lied that he did not have any foreign currency on his person when ^ϕ asked by a customs officer to make the requisite declaration.

Section 55(2)(b) of the Act provides:

- "Any person leaving Zimbabwe shall, whether or not he has goods in his possession, report to an officer –
- (b) in the case of a person leaving by aircraft, at the customs post or to an officer ^ϑ at the aerodrome of departure or such other aerodrome as the Commissioner may direct;
 - (c) ...;
 - (d) ...;
- and shall, if called upon to do so, unreservedly declare all the goods in his possession which he proposes to take with him beyond the borders of Zimbabwe ^η in such manner as the officer may require, and shall fully and truthfully answer*

2008 (2) ZLR p192

Makarau JP

any questions put to him by the officer and, if so required, produce such goods ^A for inspection by an officer" (my own emphasis).

Section 193 of the Act that the defendant referred to in its plea provides for the seizure of goods, including local and foreign currency, where an officer has reasonable grounds for believing that such goods are liable to seizure.

In essence, it was the defendant's plea that the foreign currency was seized ^B because the plaintiff failed to declare it upon exit from Zimbabwe.

The plaintiff attacked the seizure of his funds on two grounds. Firstly, he argued that he was authorized to take the money out of Zimbabwe as he had imported it into the country four days earlier when he entered the country through Chirundu Border Post. Secondly, he denied that he was ever called ^C upon to declare the money when he exited the country and thus did not violate s 55(2) (b) of the Act.

I will deal with the first leg of attack.

The plaintiff argued that since he had imported the money into the country four days earlier, he fell squarely within the provisions of s 20(2)(c) of the Foreign Exchange Control Regulations SI 109 of 1996 ("the Regulations"), ^D which exempts a foreign resident from seeking exchange control authority to export money that he imports into the country.

I cannot fault this conclusion at law as the law clearly provides so.

To his credit, I did not hear Mr Sinyoro for the defendant challenging the legal conclusion reached by the plaintiff above. Instead, I heard Mr *Sinyoro* ^E argue that the plaintiff failed to declare the money upon exit when he was called upon to do so by Zinyemba, the customs officer. He thus urged me to dispose of the matter on the factual basis of whether or not Zinyemba called upon the plaintiff to declare the foreign currency in his possession and the plaintiff failed to do so. ^F

I am in agreement with Mr *Sinyoro* that this matter turns on whether or not the plaintiff failed to declare the foreign currency in his possession after being called upon to do so by the customs officer at the point of exit. In my view, if this is proved, then, the money was liable to seizure even if the plaintiff had imported the money into the country four days earlier.

It is my further view that there has been a curious mixing of the legal ^G provisions applicable in this matter.

The balance of the plaintiff's case was to prove that he had imported the money into the country and was therefore allowed to take it out without the need to procure a permit. Thus he was at pains to show that he had purchased the money in Zambia and had declared it to an immigration ^H

2008 (2) ZLR p193

Makarau JP

^A officer at Chirundu Border Post. It is not in dispute that the plaintiff, as a foreign resident, was permitted by law to export the foreign currency. In my view, s 20 of the Regulations simply permits a foreign resident to take out foreign currency from the country without a permit if he can show that he imported the money into the country. It does not prescribe the customs clearance procedures by which such foreign currency may be exported. More ^B importantly, the provisions of s 20 do not exempt the foreign resident from declaring the money in his possession if called upon to do so by a customs officer in terms of s 55 of the Act. The issue facing the plaintiff in this matter is not that he attempted to export foreign currency without a permit in terms of the regulations. Were it so, issues of his foreign residency and the fact ^C that he had imported the money into the country would then have been key and material in resolving the dispute. Instead, the plaintiff had his money seized on the allegation that he failed to declare it upon exiting Zimbabwe. Having allegedly violated s 55 of the Act, the consequences spelt out in s 93 of the Act were enforced. This is why I am in agreement with Mr *Sinyoro* that the centrepiece of this dispute is whether or not the plaintiff violated ^D s 27 of the Customs and Excise Act and thereby rendered his money liable to seizure. The dispute before me is factual.

As indicated above, the two persons who are central to the dispute gave evidence. These were the plaintiff and Zinyemba the customs officer. I have already made my findings above as to the credibility of each. On balance, I ^E was impressed more by the plaintiff and less by Zinyemba. While

the plaintiff did not take me into his utmost confidence, I believed him when he said that he was not asked to declare the foreign currency in his possession. Had he been asked, he most probably would have declared the money as he had done when he entered the country. I do not believe the testimony by Zinyemba that he asked the plaintiff to make the declaration and the plaintiff lied to him ^F that he had no foreign currency to declare save for some Zambian kwacha.

In my view, the discovery of the money in the possession of the plaintiff where the plaintiff had not been asked to declare it is not a violation of s 27 of the Act. There was thus no violation of the law and consequently, no basis upon which the seizure of the money could be lawfully made. The law does ^G not oblige every traveller to *mero motu* declare the goods on his person. A traveler is only obliged to disclose and disclose fully and truthfully the goods in his possession if called upon to do so by a customs officer.

In the result, I make the following order:

1. The defendant is hereby ordered to return the sum of US\$70 000 to the ^H plaintiff together with interest thereon at the prescribed rate of interest

2008 (2) ZLR p194

Makarau JP

for foreign currency accounts. ^A

2. The defendant shall pay the plaintiff's costs of suit.

Atherstone & Cook, plaintiff's legal practitioners

Sinyoro & Partners, defendant's legal practitioners ^B

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Document 26 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/MEGA PAK ZIMBABWE (PVT) LTD v GLOBAL TECHNOLOGIES CENTRAL AFRICA (PVT) LTD 2008 (2) ZLR 195 (H)

MEGA PAK ZIMBABWE (PVT) LTD v GLOBAL TECHNOLOGIES CENTRAL AFRICA (PVT) LTD 2008 (2) ZLR 195 (H)

2008 (2) ZLR p195

Citation	2008 (2) ZLR 195 (H)
Case No	Judgment No. HH-84-08
Court	High Court, Harare
Judge	Makarau JP
Heard	10 September 2008; 16 September 2008
Judgment	24 September 2008
Counsel	<i>R Y Phillips</i> , for the plaintiff <i>T Mawere</i> , for the defendant
Case Type	Civil trial
Annotations	Link to case annotations

Flynote

Contract – enforceability – illegal contract – *maxim ex turpi causa non oritur actio* – inflexibility of *maxim* – no exceptions will be entertained by the courts

Headnote

- The plaintiff, which wanted to purchase two luxury cars from outside the country, entered into an arrangement with the defendant in terms of which the plaintiff would pay the defendant local currency (plus a commission) and the defendant would source funds from another party. ▫ The third party did not transmit all the funds expected and payment for one of the cars was not made. The plaintiff sought specific performance of the contract, and the delivery from the defendant of the car that was not paid for. Alternatively, it sought damages to place it in a position where it could procure a similar vehicle to the one the defendant allegedly failed to deliver.
- *Held*, that the plaintiff could not succeed: the *maxim ex turpi causa non oritur actio* applied. An illegal agreement which has not yet been performed, either in whole or in part, will never be enforced. This rule is absolute, admitting of no exceptions. Were the plaintiff simply seeking to extricate itself from the contract by seeking a refund of the local currency payment it made in respect of the motor vehicle yet to be delivered, there may ▫ have existed scope for the court to apply the *in pari delicto* rule and attempt to do justice between the parties. Here, however, the court *a quo* was dealing with the attempted enforcement of a contract which arose *ex turpi causa* and not an attempt to undo performance pursuant to an illegal contract. It followed that the plaintiff must be entirely non-suited.

2008 (2) ZLR p196

Makarau JP

Cases cited

DPP, Cape of Good Hope v Bathgate 2000 (2) SA 535 (C)

Dube v Khumalo 1986 (2) ZLR 103 (S)

Mathews v Rabinowitz 1948 (2) SA 876 (W)

Myburgh v Neethling 1948 (2) SA 515 (C) ▫

Case information

R Y Phillips, for the plaintiff

T Mawere, for the defendant

Judgment

MAKARAU JP: I am quite taken by the notion that justice is dispensed from “halls of justice”. I further like the idea that these halls are sparkling clean, hence no litigant with grubby hands is allowed in. The conception ▫ of a clean hall of justice, in my view, finds further expression in the rule expressed in the *maxim ex turpi causa non oritur actio*, which operates against any attempt to enforce an unlawful agreement, which rule I find to be of application in this matter. It is my view that the conduct of the parties before me, and the transaction they entered into, is to all intents and purposes illegal, as it violates the Exchange Control Regulations. The approach to this ▫ court by the plaintiff seeking an order compelling the defendant to deliver to it a new Mercedes Benz ML 280 CDI or, alternatively, payment of the sum of 64 994 euros, being the reasonable cost of procuring such a motor vehicle, is in my view an attempt to enforce an illegal contract and must fail.

The material facts giving rise to this claim are largely common cause or ▫ are not seriously challenged. They are as follows: The plaintiff, a company carrying on business in Harare, was desirous of procuring two luxury vehicles. It sourced these vehicles from a supplier in London, England, going by the trade name of Stenham Global Services Ltd. It obtained *pro forma* invoices for the two purchases. On the invoices, the buyer was indicated as Zimoco Ltd and the plaintiff as the consignee. It is common cause that, armed with ▫ the invoices, the plaintiff approached the defendant with a request that it arrange for the payment due in terms of each invoice.

The defendant is a company whose core business is information technology. It deals in banking software. The astute may already start to wonder why the plaintiff was approaching such a company to pay for its vehicles, which it ^G had lawfully sourced from a company in London through a reputable dealer in Harare. This is where the illegality of the transaction between the parties emerges. The defendant had acquired a name for being able to arrange for the payment of invoices to foreign suppliers. It had done so successfully for four years, for an international corporation based in Harare which, presumably impressed by the ability of the defendant to source for foreign currency, ^H

2008 (2) ZLR p197

Makarau JP

^A referred the plaintiff to it. It had its own sources of foreign currency and, had the source come through again this time, this suit would not have been filed.

The defendant did not have any offshore account. It did not hold any free funds anywhere. It would source its foreign currency from a third party within Zimbabwe who allegedly had these free funds. This was known to the plaintiff ^B at the time of the transaction, or ought to have been reasonably known to the plaintiff at the time. Payment of local currency, agreed to between the parties as being sufficient to purchase the foreign currency illegally, together with an agreed mark up for the defendant, was deposited into the account of the defendant. The funds were transmitted to the third party who, had all gone well, was supposed to wire the sum of 64 994 euros into the account ^C of Stenham Global Services Ltd, the supplier of the vehicles. Payment on the first invoice was made. Payment on the second invoice, involving the Mercedes Benz, was not. A report was made to the police who declined to be involved, on the grounds that what the parties were engaged in was an illegal transaction.

^D As part of disguising the illegal transaction into something that the board of directors of the plaintiff would approve, the defendant wrote to the plaintiff, intentionally lying that it would use free funds to meet the value of the invoice and that the defendant would make the requisite payment to the seller of the vehicles. On the basis of this falsehood, the request was made that the plaintiff pays the local currency equivalent, at an illegal rate ^E of exchange, to the defendant in advance and before the defendant wired the foreign currency payment to the supplier. After the third party had failed to come through with the foreign currency payment, the defendant used its own funds and paid to the supplier the sum of US\$6 000. In addition, a sum of Z\$15 trillion was transferred into the account of the plaintiff by the third ^F party and at the instance of the defendant. It was alleged that these payments were in full and final settlement of the plaintiff's claim.

In its declaration, the plaintiff prayed for specific performance of the contract. It sought the delivery, from the defendant, of the Mercedes Benz. In the alternative, it sought damages to place it in the position where it could procure a vehicle similar to the one the defendant allegedly failed to deliver. ^G In essence, the plaintiff is seeking to enforce the contract between the parties. This it cannot do. *Ex turpi causa non oritur actio*.

In my view, the general principle expressed in the maxim does not permit litigants to bring their "dirty" transactions into the clean halls of justice. Justice will not soil its hands by touching such transactions. "Dirty", in this regard, ^H not only refers to immoral transactions, contracts specifically prohibited by

2008 (2) ZLR p198

Makarau JP

law, but also includes transactions that seek to defeat the law. See *Myburgh A v Neethling* 1948 (2) SA 515 (C) at 521 and *Mathews v Rabinowitz* 1948 (2) SA 876 (W) at 878. This principle finds expression in the maxim whose literal translation is "no action arises from an immoral cause". The principle is meant to discourage illegality and to advance public policy. Van Zyl J in *DPP, Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) at 561 D goes ^B further, to opine that the maxim bears some resemblance to the Biblical concept of "filthy lucre" found in 1 Timothy Chapter 3 verse 3. He holds that filthy lucre is anathema to the values of human dignity, equality and freedom pertaining in an open and democratic society. Whether the maxim is founded on principles of natural justice or the Bible, it is the settled position in our law that the maxim is part of our law. It is also absolute, admitting ^C of no exceptions. In considering whether a claim for relief

, based on an agreement to defraud a local authority could be entertained by the court, Gubbay JA (as he then was), had this to say in *Dube v Khumalo* 1986 (2) ZLR 103 (S) at 109D-F:

"There are two rules which are of general application: the first is that an illegal ^D agreement which has not yet been performed, either in whole or in part, will never be enforced. This rule is absolute and admits no exceptions. See *Mathews v Rabinowitz* 1948 (2) SA 876 (W) at 878; *York Estates Ltd v Wareham* 1950 (1) SA 125 (SR) at 128. It is expressed in the maxim *ex turpi causa non oritur actio*. The second is expressed in another maxim *in pari delicto potior est conditio possidentis*, which may be translated as meaning 'where the parties are equally in the wrong, he who is in possession will prevail.' The effect of this rule is that ^E where something has been delivered pursuant to an illegal agreement the loss lies where it falls. The objective of the rule is to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporeal rights, in furtherance of an illegal transaction."

In argument, Mr *Phillips* has found little to say on the illegality of the contract. He submitted that I did not have any evidence before me on which to make ^F a finding on the matter. With this submission I am unable to agree. The facts of this matter are largely common cause and clearly reveal the illegality. There was no agreement of sale between the parties relating to the motor vehicles. The defendant is not in the business of supplying vehicles. The payment of the local currency to the defendant was not in pursuance of an ^G agreement of sale. It was for the defendant to source foreign currency for the plaintiff from sources other than the lawful sources, and at rates other than the legally approved rates. It was clearly an illegal transaction. Further, Mr *Phillips* suggested that I apply the *in pari delicto* rule and order restitution in favour of the plaintiff. In this respect, he urged me to order restitution, not of the local currency that the plaintiff paid over to the defendant, but ^H

2008 (2) ZLR p199

Makarau JP

^A of the foreign currency equivalent it would have purchased on the black market. I am confident that this submission was made with Mr *Phillips*' tongue firmly in his cheek.

I have already made a finding that the plaintiff is seeking to enforce the contract between the parties. It is seeking to enforce a contract that was ^B partially performed. It would like delivery of the vehicle or enough money, in foreign currency, that will enable it to purchase a similar vehicle. Were it simply seeking to extricate itself from the contract by seeking a refund of the local currency payment it made in respect of the motor vehicle yet to be delivered, there may have existed scope for me to apply the *in pari delicto* rule and attempt to do justice between the parties. This is not so and cannot ^C be so, in the light of the undisputed evidence that the plaintiff has to date received some money from the defendant which, in local currency, exceeds that which it paid over. I am here dealing with the attempted enforcement of a contract which arises *ex turpi causa* and not an attempt to undo performance pursuant to an illegal contract. It follows that the plaintiff must be entirely non-suited.

^D Finally I must deal with the issue whether the plaintiff's claim was compromised by the payments made to the plaintiff after the deal to source foreign currency from a third party had soured. In my view, the defence that the claim has been compromised falls on the same sword that killed the plaintiff's claim. If the court cannot probe the merits of an illegal agreement ^E by operation of the maxim *ex turpi causa*, I see no basis upon which it can determine whether the tainted agreement has been discharged by way of a compromise. In my view, once a court makes a finding that the maxim applies against the enforcement of the contract, the parties may not enter the halls of justice with their soiled agreement for the purpose of determining whether such a contract has been discharged anywhere.

^F In the result I make the following order:

1. The plaintiff's claim is dismissed.
2. Each party shall bear its own costs.

Gill Godlonton & Gerrans, plaintiff's legal practitioners.

^G *Mawere & Sibanda*, defendant's legal practitioners.

Document 27 of 49**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/ZIMNAT LIFE ASSURANCE LTD v DIKUNYE 2008 (2) ZLR 200 (S)

ZIMNAT LIFE ASSURANCE LTD v DIKUNYE 2008 (2) ZLR 200 (S)**2008 (2) ZLR p200**

Citation	2008 (2) ZLR 200 (S)
Case No	Judgment No. S-21-08
Court	Supreme Court, Harare
Judge	Cheda JA
Heard	11 June 2008
Judgment	30 September 2008
Counsel	<i>H Zhou</i> , for the applicant <i>L Uriri</i> , for the respondent
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Appeal – *leave to appeal* – application for leave to appeal to the Supreme Court – discretion of Supreme Court where application is out of time – important point of law involved – Supreme Court will entertain the appeal

Employment – *appeal* – under Labour Act – appeal from Labour Court – leave to appeal refused by Labour Court – application for leave to appeal to the Supreme Court – time within such application should be made

Headnote

The appellant had applied to the President of the Labour Court for leave to appeal against a ruling of that court. Leave was refused and application was made to a judge of the Supreme Court in terms of s 92F(3) of the Labour Act [Chapter 28:01]. The respondent contended that the application was out of time, but the applicant argued that it was made within the 30 day period allowed by r 36 the Labour Court Rules 2006 (SI 59 of 2006).

Held, that the period of 30 days is for an application to the President of the Labour Court. For an application to a judge of the Supreme Court, the applicable rule is r 30(c) of the Supreme Court Rules 1964 (RGN 380 of 1964), which provides that if leave to appeal is necessary and has been refused by the High Court, by making application for leave to appeal within ten days of the refusal of leave to appeal. The application was therefore out of time. Notwithstanding that an application is out of time, the Supreme Court has a discretion to hear the appeal in appropriate cases, such as where an important point of law is involved, and leave to appeal would nonetheless be granted.

Legislation considered

Labour Act [Chapter 28:01], s 92F(1), (2) and (3) ^H

2008 (2) ZLR p201

Cheda JA

A Labour Court Rules 2006 (SI 59 of 2006), r 36

Supreme Court Rules 1964 (RGN 380 of 1964), r 30(e)

Case information

H Zhou, for the applicant

L Uriri, for the respondent

Judgment

Before **CHEDA JA**: In Chambers in terms of r 30(c) as read with s 92F(3) of the Labour Act [Chapter 28:01] ("the Act").

The applicant applied to the President of the Labour Court for leave to appeal its decision on a point of law. Leave was refused. The applicant has now applied for such leave to a judge of this court in Chambers as provided for c by s 92F(3) of the Act.

The application is opposed by the respondent, who contends that the application is out of time and should not be granted. The applicant argued that it was within the time permitted by the Labour Court Rules in SI 59 of 2006, which allows a period of 30 days.

o I invited the parties to file heads of argument on this point. I have since considered their submissions and established that s 92F(2) provides for a party who is refused leave to appeal by the Labour Court to apply to a judge of the Supreme Court.

Section 92F(2) provides as follows:

"92F Appeals against decision of Labour Court

e (1) An appeal on a question of law only shall lie to the Supreme Court from any decision of the Labour Court.

(2) Any party wishing to appeal from any decision of the Labour Court on a question of law in terms of subsection (1) shall seek from the President who made the decision leave to appeal that decision.

f (3) If the President refuses leave to appeal in terms of subsection (2), the party may seek leave from a judge of the Supreme Court to appeal."

Section 36 of the Labour Court Rules in SI 59 of 2006 provides as follows:

"Leave to appeal against decision of Court

An application in terms of section 92F (2) of the Act seeking leave to appeal from any decision of the Court shall be made *to the President of the Court who g made the decision* within 30 days from the date of that decision" (my emphasis).

This shows clearly that the period of 30 days is for an application to the Labour Court President and not to the judge of the Supreme Court.

Rule 30(c) of the Supreme Court Rules provides as follows:

"An appellant shall institute an appeal within the following terms: h

(a) ...

2008 (2) ZLR p202

Cheda JA

(b) ... A

(c) If leave to appeal is necessary and has been refused by the High Court, by making application for leave to appeal within *ten days* of the refusal of leave to appeal" (my emphasis).

Rules 4 to 6 of the Supreme Court (Miscellaneous Appeals and References) Rules refer to appeals, but not to applications to a judge of the Supreme Court b where leave has been refused by a lower court. For that reason I consider that the provisions of r 30(c) of the Supreme Court Rules are the appropriate rules in the circumstances.

In this case, leave to appeal was refused by the President of the Labour Court. It follows that an application should have been made to the judge of the Supreme Court within 10 days of such refusal. Leave was refused by c the Labour Court on a date which is not clearly ascertained.

The application was heard on 25 January 2008. There are two dates stamped on it, that is, 25 April 2008 and another unclear date stamped on it, which looks like 11 April 2008.

None of these days is within the 10 days period. However, the point raised by D the applicant in its ground of appeal on the point of law is of such importance that I am persuaded that an opportunity should be allowed for it to be argued on appeal. It is for that reason that I have decided to exercise my discretion, condone the delay and allow the application.

In view of the positions taken by both parties, I do not consider it appropriate to award costs to either party. There will be no order as to costs. E

I therefore order as follows –

- “1. The application for leave to appeal to the Supreme Court is granted.
2. There will be no order as to costs.” F

Gill, Godlonton & Gerrans, applicant’s legal practitioners

Kantor & Immerman, respondent’s legal practitioners

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Document 28 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/KHUMALO v MANDEYA & ANOR 2008 (2) ZLR 203 (S)

KHUMALO v MANDEYA & ANOR 2008 (2) ZLR 203 (S)

2008 (2) ZLR p203

Citation	2008 (2) ZLR 203 (S)
Case No	Judgment No. S-23-08
Court	Supreme Court, Harare
Judge	Malaba JA (in chambers)
Heard	16 January 2008
Judgment	30 September 2008
Counsel	<i>N G Maphosa</i> , for the applicant <i>H Zhou</i> , for the first respondent No appearance for the second respondent
Case Type	Application for condonation
Annotations	No case annotations to date

Flynote

Contract – *Contractual Penalties Act [Chapter 8:04] – applicability – instalment sale – of land – when such sale exists – agreement under which lessee to buy sells rights in property to another – not a sale of land – contract one of cession of rights and interests in land – contract D not governed by s 8 of Act*

Contract – *sale – instalment sale – of land – when such sale exists – agreement under which lessee to buy sells rights in property to another – not a sale of land – contract one of cession of rights and interests in land – contract not governed by s 8 of Contractual Penalties Act [Chapter 8:04]*

Headnote

¶ The applicant entered into a lease-to-buy agreement with the Bulawayo City Council in respect of a stand in a high-density suburb. The agreement included a clause in terms of which the applicant was prohibited, prior to transfer of the property to himself, from ceding or assigning the agreement or any rights acquired by him thereunder, or parting with the possession of the property or any part thereof or alienating, donating or otherwise disposing of the same without the prior consent in writing of the Council. The applicant subsequently entered into a written agreement with the first respondent in respect of the property before transfer of ownership of the property to him by the Council. The transaction was described by the parties as an "agreement of sale", the subject matter of which was referred to as "a piece of land". The agreement provided for payment by means of a deposit, followed by two instalments (which were not equal amounts). The applicant had sought and obtained the written consent of the Council. With that consent the applicant ceded all his rights and interests in the property under the lease-to-buy to the first respondent.

2008 (2) ZLR p204

Malaba JA

The first respondent did not pay the deposit in full, nor did she pay the instalments either timeously or in full. The applicant, acting in terms of the agreement, gave the first respondent, who admittedly was in breach of the contract, 14 days' notice to remedy her breach. When she failed to do so within the time limit prescribed in the notice, he cancelled the agreement.

The first respondent applied to the High Court for an order declaring the cancellation of the agreement of "sale" by the applicant null and void on the ground that the written notice fell foul of s 8(2)(c)(i) of the Contractual Penalties Act [Chapter 8:04]. Section 8(1) of the Act prohibits a seller under an instalment sale of land from terminating the contract on account of any breach of by the purchaser unless he has given notice in terms of subs (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued. The period given to the first respondent within which she was called upon to remedy the breach was less than the thirty days specified in s 8(2)(c) in respect of an "instalment sale of land". An "instalment sale of land" is defined in s 2 of the Act as a contract for the sale of land whereby payment is required to be made by way of a deposit and two or more instalments; and ownership of the land is not transferred until payment is completed. The court *a quo* held that the agreement was an "instalment sale of land" as the subject matter of the sale was "land", the purchase price for which was payable by way of a deposit and two or more instalments. The judge declared the cancellation of the agreement by the applicant null and void *ab initio*.

The applicant noted an appeal, but out of time. About a week later, an application for condonation was made. The reasons given for not noting the appeal in time were unconvincing. However, allowing the application:

Held, that whilst the concept used by the parties to describe the *merx* was an important factor to consider in the determination of the question whether the subject-matter of the agreement of sale was "land", it was not an overriding one. At the time the parties entered into the agreement, the applicant was not the owner of the land and improvements thereon. He could not pass title to the land to the first respondent at the payment of the purchase price in terms of the agreement. At the time the parties entered into the agreement, the applicant held rights and interests in the land and improvements thereon under the lease-to-buy. With the written consent of the Council he ceded those rights and interests to the first respondent, who stepped into his shoes as the cessionary and acquired them under the lease-to-buy. In spite of the language used by the parties in the agreement, what was in effect sold and purchased were rights

2008 (2) ZLR p205

Malaba JA

and interests in the land, not the *dominium* in the land. The Contractual Penalties Act accordingly was inapplicable to the transaction.

Cases referred to

Frye's (Pty) Ltd v Ries 1957 (3) SA 575 (A)

Maheya v Independent African Church 2007 (2) ZLR 319 (S)

Legislation considered

Contractual Penalties Act [*Chapter 8:04*], s 8

Case information

N G Maphosa, for the applicant

c H Zhou, for the first respondent

No appearance for the second respondent

Judgment

MALABA JA: This is an application for condonation of non-compliance with r 30(1) of the Supreme Court Rules 1964 and extension of time within which to note an appeal. Rule 30(1) provides that a party wishing to appeal ^o against a judgment of the High Court must institute the appeal within fifteen days of the date of the judgment appealed against. The judgment against which the appeal was noted out of time was delivered on 13 September 2007.

The facts to be considered in the determination of the application are these. The applicant entered into a lease-to-buy agreement with Bulawayo City Council ^e ("the City Council") in respect of Stand No. 71072 Lobengula West. I shall hereinafter refer to the agreement as "the lease-to-buy". The written lease-to-buy contains the usual terms and conditions found in similar agreements involving high-density residential premises owned by municipalities. It contained a clause in terms of which the applicant was prohibited, prior to ^f transfer of the property to himself, from ceding or assigning the agreement or any rights acquired by him thereunder, or parting with the possession of the property or any part thereof or alienating, donating or otherwise disposing of the same without the prior consent in writing of the City Council (the *pactum non cedendo*).

The applicant subsequently entered into a written agreement with the first ^g respondent in respect of the property prior to transfer of ownership of the property to him by the City Council. The transaction entered into was described by the parties as an "agreement of sale". The subject matter of the sale was referred to as "a piece of land, situate in the District of Bulawayo being 71072 Lobengula West comprising 4 bedrooms ...".

^h The property was "sold" for \$75 million payable as follows:

2008 (2) ZLR p206

Malaba JA

- (a) a deposit of \$10 million upon signing of the agreement; ^a
- (b) \$40 million on or before 3 May 2004; and
- (c) the balance of \$25 million within a period of six months from the date of signing the agreement.

The applicant had sought and obtained the written consent of the City Council. With the written consent of the City Council, the applicant ceded all his rights ^b and interests in the property under the lease-to-buy to the first respondent. It appears from the judgment of the court *a quo* that the first respondent failed to pay the whole amount of \$10 million required as a deposit upon signing the agreement. She also failed to pay the whole amount of \$40 million on or before 3 May 2004, nor did she pay the purchase price in full within the ^c period of six months from the date of signature to the agreement. Whilst it was accepted that she paid some money towards the purchase price, we are not told how much she paid and when.

Under clause 10.1 of the agreement of "sale" the parties provided that should the purchase commit any breach of the contract, the seller had to give her written notice advising of the breach and calling upon her to remedy or ^d rectify such breach within a period of 14 days from the date of receipt of the notice and that, should she fail to remedy the breach, the seller had the right to cancel the agreement. It is common cause that the applicant gave the first respondent, who admittedly was in breach of the contract, the requisite notice. When she failed to remedy the breach within the time limit prescribed ^e in the notice, he cancelled the agreement.

The first respondent made an application to the High Court in case HC 664/05 seeking an order declaring the cancellation of the agreement of "sale" by the applicant null and void on the ground that the written notice given to her and calling upon her to remedy the breach fell foul of the

mandatory provisions of s 8(2)(c)(i) of the Contractual Penalties Act [*Chapter 8:04*] ("the Act").^f Section 8(1) of the Act prohibits a seller under an instalment sale of land from terminating the contract on account of any breach of by the purchaser unless he has given notice in terms of subs (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued.

Section 8(2) provides:

- "(2) Notice for the purposes of subsection (1) shall – g
- (a) be given in writing to the purchaser, and
 - (b) advise the purchaser of the breach concerned; and
 - (c) call upon the purchaser to remedy, rectify or desist from continuing as the case may be, the breach concerned within a reasonable period specified in the notice, which period shall not be less than – h

2008 (2) ZLR p207

Malaba JA^a

- (i) the period fixed for the purpose in the instalment sale of the land concerned; or
 - (ii) thirty days;
- whichever is the longer period."

An "instalment sale of land" is defined in s 2 of the Act as:

- b "... a contract for the sale of land whereby payment is required to be made –
- (a) in three or more instalments; or
 - (b) by way of a deposit and two or more instalments; and ownership of the land is not transferred until payment is completed."

It is common cause that the period given to the first respondent within which she was called upon to remedy the breach was less than thirty days. The c question for determination by the court *a quo* was whether the applicant was bound to give the first respondent a period of thirty days within which to remedy the breach of the contract. He would be bound by the provisions of s 8(2)(c)(ii) of the Act if the agreement between the parties was an "instalment sale of land" as defined under s 2 of the Act. The learned judge held that the agreement was an "instalment sale of land" as the subject matter of the sale d was "land", the purchase price for which was payable by way of a deposit and two or more instalments. He declared the cancellation of the agreement by the applicant null and void *ab initio*.

The appeal against the judgment was not noted until 16 October 2007. The notice of appeal was filed eight days out of time. The explanation given for e failure to comply with r 30(1) was that the applicant's legal practitioner was waiting for a copy of the written judgment to be released by the Registrar. The explanation is unacceptable because the applicant's legal practitioner was in court to note the reasons for judgment on the day it was delivered. The judgment was in fact in writing although it contained some corrections f in longhand.

The applicant did not make the application for condonation of non-compliance with r 30(1) until 25 October 2007. The explanation for the failure to make the application on 16 October was that the legal practitioner laboured under a misapprehension that the *dies induciae* for instituting an appeal against a judgment of the High Court was 21 days from the date of the judgment g appealed against. Not only does the explanation show that the legal practitioner did not bother to read the relevant rule by which the applicant was bound to act in seeking relief from the court, it also confirms the irrelevance of the explanation given by the same legal practitioner for purporting to file a notice of appeal on 16 October.

h In *Maheya v Independent African Church* 2007 (2) ZLR 319 (S) at 323B-C

2008 (2) ZLR p208

Malaba JA

it is stated that: a

"In considering applications for condonation of non-compliance with its rules, the court has a discretion which it has to exercise judicially in the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance; the explanation therefor; the prospects of success on appeal; the importance of the b case; the respondent's interests in the finality of

the judgment; the convenience to the court and avoidance of unnecessary delays in the administration of justice: *Bishi v Secretary for Education* 1989 (2) ZLR 240 (H) at 242D-243C.”

Had it not been for the fact that I consider the prospects of success on appeal to be good I would have dismissed the application. It is clear that the learned judge came to the conclusion that the contract between the parties was an “instalment sale of land” on the basis that in para 1 of the agreement the parties described the subject-matter of the “sale” as the “piece of land” being Stand 71072 Lobengula West including the improvements thereon. The question whether the subject-matter of the agreement of sale was “land” was, in my view, a question of fact, the determination of which required the court *a quo* to consider all the circumstances of the case. Whilst the concept used by the parties to describe the *merx* was an important factor to consider in the determination of the question it was not an overriding one.

At the time the parties entered into the agreement, the applicant was not the owner of the land and improvements thereon. He could not pass title to the land to the first respondent at the payment of the purchase price in terms of the agreement of sale. Mr *Zhou* argued that under our law a person can sell property which he does not own as long as the property exists and he realizes that he may face an action for damages if he is unable to give good title to the purchaser when the time comes to hand over vacant possession and in the case of immovable property give transfer: *Frye’s (Pty) Ltd v Ries* F 1957 (3) SA 575 (A) at p 582A.

It appears to me that the principle of law on which Mr *Zhou* relied to support the contention that what was sold by the applicant to the first respondent was “land” is not applicable to the facts of the case. It is common cause that, at the time the parties entered into the agreement of sale, the applicant held rights and interests in the land and improvements thereon under the lease-to-buy. It is also common cause that, with the written consent of the City Council, he ceded those rights and interests to the first respondent, who stepped into his shoes as the cessionary and acquired them under the lease-to-buy.

A cession is an act of transfer of personal rights and interests from the cedent to the cessionary. It appears to me that the applicant ceded to the first

2008 (2) ZLR p209

Malaba JA

a respondent what he sold under the agreement of sale. In the circumstances, the argument by Miss *Maphosa* that, notwithstanding the language used by the parties in para 1 of the agreement of sale, what was in effect sold and purchased were rights and interests in the land recognizes the legal significance of the cession effected in the interests of the parties with the written consent of the City Council. To uphold the decision of the court *a quo* that the real rights in the land and improvements thereon in the sense of *dominium* was sold and purchased under the agreement of sale would accord no legal effect at all to the cession and the limited rights it transferred from the applicant to the first respondent.

The application for condonation of non-compliance with r 30(1) of the Rules and an extension of the time within which to note the appeal is granted. The appeal shall be deemed to have been instituted in accordance with the notice of appeal filed in the application on the date of this order. The first respondent is to pay the costs of the application.

Calderwood, Bryce Hendrie & Partners, applicant’s legal practitioners

Marondedze, Mukuku, Ndove & Partners, first respondent’s legal practitioners

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Document 29 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/RIX UPHOLSTERY (PVT) LTD v BIDDULPHS (PVT) LTD 2008 (2) ZLR 210 (H)

RIX UPHOLSTERY (PVT) LTD v BIDDULPHS (PVT) LTD 2008 (2) ZLR 210 (H)

Citation	2008 (2) ZLR 210 (H)
Case No	Judgment No. HH-91-08
Court	High Court, Harare
Judge	Makarau JP
Heard	4 September 2008; 11 September 2008
Judgment	15 October 2008
Counsel	<i>C Tafireyi</i> , for the plaintiff <i>Mrs J B Wood</i> , for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Contract – *depositum* – applicability thereto of Praetorian edict relating to liability of sailors, innkeepers and stable-keepers – loss of goods deposited due to theft by employee of bailee – where onus of proving damage lies – “owner’s risk” clause in contract – effect of – need for D plaintiff to allege and prove gross negligence

Headnote

The plaintiff left certain of his goods in storage at the defendant’s premises. He signed, but did not read, a document which stated that the defendant “shall not be responsible for any loss or damage of any nature whatsoever sustained or suffered by the customer and however and from whatever E cause arising even if the customer (*sic*) and/or their servants and/or agents are negligent, the basis of this quotation being that work and storage will be effected entirely and solely at the customer’s risk.” An employee of the defendant broke into the warehouse where the plaintiff’s goods were stored and stole some of the plaintiff’s goods. The plaintiff issued F summons against the defendant, claiming a sum representing the value of the stolen goods. The claim was based on breach of contract, on the basis that the defendant failed to return to the plaintiff certain items that had been left with it for storage. No fault was pleaded in the papers and no cause of action of which fault is an element was raised.

Held, that a plaintiff who has suffered loss as a result of the alleged negligent G performance of a contract by the defendant has the option to embed his claim in either delict or in contract. The legal principles applied in establishing liability under each cause of action are different, and necessary averments to sustain each cause of action have to be made and supporting evidence adduced.

Held, further, that this was a *depositum* contract, a specific form of contract H

Makarau JP

A whose terms are implied by law. An essential element of the contract is the fact of the delivery of the item to the bailee and its return to the owner upon demand. Were the contract for storage only, the plaintiff would have been merely shown a designated place on the defendant’s premises where he could place his goods and from which he could retrieve them when he chose. Under a contract of *depositum*, the bailee B has the obligation, imposed by law, to return the goods to the owner upon demand. The liability of the bailee under the *depositum* contract is similar to the obligations imposed on sailors, innkeepers and stable keepers by the Praetor’s Edict *de nautis, cauponibus et stabulariis*, which is a part of our law. The parties to a *depositum* contract can

agree to exempt one ^c of the parties from liability for breach of the contract that ordinarily would have attracted liability, just as carriers by land invariably insert clauses in their contracts limiting their liability to instances of gross negligence only. Although the "owner's risk" clause expressly referred to negligence, it would not exempt the defendant from liability arising from gross negligence. *In casu*, there was no averment, evidence or ^d argument that the defendant or its servants were negligent in any way, let alone grossly negligent. Employing a dishonest employee on its own is not *per se* proof of negligence. Consequently, the claim must fail.

Cases cited

Cotton Marketing Board of Zimbabwe v NRZ 1988 (1) ZLR 304 (S)

^e *Electra Rubber (Pvt) Ltd v Socrat Products (Pvt) Ltd* 1981 ZLR 356 (A)

Smith v Min of Lands 1979 RLR 421 (G)

Zeeta Manufacturers (Pvt) Ltd v Zimbabwe United Freight Co Ltd 1990 (1) ZLR 337 (H)

Case information

^f *C Tafireyi*, for the plaintiff

Mrs *J B Wood*, for the defendant

Judgment

MAKARAU JP: On 20 December 2007, the plaintiff issued summons against the defendant claiming the sum of \$87 501 810.94, being the value of certain goods that were stolen after the plaintiff had placed them in storage with the ^g defendant. The claim was resisted primarily on the basis that the defendant was not negligent in any respect leading to the loss of the goods. In particular, it was the defendant's case that the parties had specifically agreed that the defendant would not be liable for any loss or damage suffered by the plaintiff howsoever and from, whatever cause arising, even if the defendant and its ^h agents were negligent.

2008 (2) ZLR p212

Makarau JP

The facts giving rise to this claim are largely common cause. I summarize ^a them as follows.

The plaintiff, as its name implies, is in the business of upholstery. It is managed by one Alwyn Richard Pahla in whose name the initial process was sued. By consent, the plaintiff was changed from Alwyn Richard Pahla to Rix Upholstery (Pvt) Ltd. ^b

Sometime in 2007, Pahla was proceeding on holiday. He took his personal goods and goods belonging to the plaintiff and placed them in storage with the defendant. He had used the defendant for this purpose before. When he placed the goods in storage, he was not shown a quotation from the defendant where the terms and conditions were endorsed. He however, signed the ^c contract indicating that he accepted the terms and conditions of carriage endorsed on the back of the defendant's quotation. Clause 7 of the terms and conditions of service reads:

"The Contractors shall not be responsible for any loss or damage of any nature whatsoever sustained or suffered by the customer and however and from whatever cause arising even if the customer (*sic*) and/or their servants and/or agents are ^d negligent, the basis of this quotation being that work and storage will be effected entirely and solely at the customer's risk."

Pahla further indicated on the contract form that the plaintiff would take out insurance for the goods but because he was in a rush, he never got round to taking out the insurance.

Sometime in October 2007, the defendant called Pahla and advised him that ^e some of his goods had been stolen. He inspected the goods and established that some of the leather belonging to the plaintiff was missing. Specifically, these were 31 parcels of leather, each 45 square metres in size.

A report of the theft was made to the police. Subsequent investigations revealed that the leather was stolen by persons who included one of the defendant's ^f employees by the name Alexio Chinzara. Armed with this information, the plaintiff filed this claim which was resisted on the basis that I have detailed in the opening paragraph of this judgment.

At the trial of the matter, Pahla gave evidence for the plaintiff. His testimony was a repetition of the facts that are largely common cause in this trial. He ^G gave his evidence well. He was not shaken under cross examination. I find no fault with his testimony.

It may be pertinent, however, for me to note at this stage that while the witness testified that he was not shown the quotation on which the terms and conditions of storage were endorsed, he nevertheless signed the contract, specifically accepting the importation of those terms and conditions into the ^H

2008 (2) ZLR p213

Makarau JP

A contract he signed. That he accepted the terms and conditions blindly does not, in my view, make the terms and conditions invalid and inapplicable. *Caveat subscriptor*.

On the basis of the foregoing, it is therefore, my finding that the terms and conditions as endorsed on the reverse side of the defendant's quotation are ^B binding on the parties.

The plaintiff also called one Brighton Ruzvidzo as a witness. He is a member of the Zimbabwe Republic Police based at Southerton Police Station. He received a report of a theft that had occurred at the defendant's premises. Prior to receiving the report of the theft of the plaintiff's goods, he had received other reports of thefts from the defendant. In the first reported cases, an ^C employee of the defendant's known as Alexio Chinzara was implicated and accused of the offences. Later on during the course of his investigations, he discovered that Alexio Chinzara was involved in the theft of the plaintiff's leather.

He attended the scene of the offence. From his observations, there was no ^D physical break in and he concluded that the theft had been effected through the doors. In the previous cases, Alexio Chinzara had confessed and had told the police that he used duplicate keys to gain access into the warehouses where he stole from. In the view of the witness, the gap that had been created in the defendant's outer security wall was too small to be used for the removal ^E of the goods from the premises.

He arrested the person to whom the leather had been sold. By then, Alexio Chinzara, who had been granted bail in the previous matters, was on the run.

In my view, the testimony of this witness does not take the plaintiff's case much further. The loss of the plaintiff's goods to theft is common cause.

^F I found the testimony of this witness somewhat hazy on details and to some extent, based on conjecture. In his view, since Alexio Chinzara had confessed to the earlier thefts where he had used duplicate keys to gain access into the warehouses, duplicate keys were also used to gain access into the warehouse where the plaintiff's goods were stored. He holds this view despite the evidence of the plaintiff and of the defendant's second witness that there ^G was a forcing of the bars of the steel gate to the warehouse. In view of this unsatisfactory feature of his evidence, where there is evidence to the contrary, I shall not rely on the testimony of this witness.

The third witness to testify on behalf of the plaintiff was one Rodrick Madzima. He is the leather dealer to whom the stolen leather was sold. He bought the ^H leather from three young men. Alexio Chinzara was one of the three.

2008 (2) ZLR p214

Makarau JP

The witness gave his evidence well. He was however understandably a bit ^A vague on the dates when the leather was sold to him.

The defendant called Amerigo Alvera as its first witness. He is Furniture Manager at the defendant's business. He did not deal directly with the plaintiff.

He testified that the defendant has a standard quotation that has its terms and conditions on the reverse side. The document was duly adduced into evidence. ^B

The witness also testified on the various security measures that it has in place at the warehouses before narrating how the theft of the plaintiff's goods was reported to him.

In my view, the witness gave his evidence well. I have no reason to doubt his testimony. ^C

Last to give evidence in this trial was Ben Mutambu Nyamhunga. He is employed by the defendant as a storesman. He is in charge of warehouse number 1 where the plaintiff's goods were stored.

He recalls how he discovered the theft of the plaintiff's goods in October 2007. He noticed that the sliding door was off its rails and was askew. It had been removed from its hinges and was not in its normal position. Access had been gained into the warehouse through the door that had been tampered with. Apart from the theft of the plaintiff's goods, there had been no other thefts from the warehouse under his charge.

The witness is of the old school. He has been employed by the defendant for the past 48 years. He clearly impresses as being honest and truthful. I will rely on his evidence.

On the basis of the above evidence, I now have to ascertain whether the defendant is liable to the plaintiff as claimed.

In its declaration, the plaintiff alleged that the defendant was in breach of the contract obtaining between the parties, as it failed to return to the plaintiff certain items that had been left with it for storage. The cause of action pleaded is thus embedded in contract and does not arise *ex delicto*. I make this point at this stage as in argument, Mr *Tafireyi* for the plaintiff sought to argue that the defendant was vicariously liable to the plaintiff as the missing items were stolen by the employees of the defendant. While the tenor of the evidence led and the suggestions put to the defendant's witnesses during cross-examination suggested that the plaintiff believed the defendant was at fault, no fault was pleaded in the papers and no cause of action of which fault is an element was raised. The pleadings raise a simple allegation of breach of contract.

It is also pertinent in my view to stress at this stage that a plaintiff who has

2008 (2) ZLR p215

Makarau JP

A suffered loss as a result of the alleged negligent performance of a contract by the defendant has the option to embed his claim in either delict or in contract. He cannot plead both save in the alternative as damages for breach will seek to place him in the position he would have been had the contract been performed. In other words, contractual damages simply convert the plaintiff's bargain into monetary terms. Damages for delictual loss on the other hand seek to replace the diminution to the plaintiff's estate caused by the delict. The loss is fixed as on the date of the delict. Occasionally, the amount of damages claimable under each cause of action coincides but not always. The amount of damages claimable in this matter is the market value of the lost leather and this may have caused Mr *Tafireyi* to think he can argue in delict for a claim that is founded *ex contractu*, for the same amount would have been claimable had the cause of action been founded in delict, a case of the end justifying the means, perhaps. The legal principles applied in establishing liability under each cause of action are different and necessary averments to sustain each cause of action have to be made and supporting evidence adduced.

As indicated above, the plaintiff chose to plead breach of contract. By so doing he nailed his colours to the mast and must succeed or else he will fail on the cause of action that he chose to plead.

To determine the dispute before me, it appears to me that I must be clear as to the nature of the contract that the parties entered into, the obligations that the defendant assumed under the contract and whether or not he breached such obligations as pleaded.

Regarding the nature of the contract that the parties concluded, I am clear that this was a *depositum* contract. This is a specific contract whose terms are implied by law. See *Electra Rubber (Pvt) Ltd v Socrat Products (Pvt) Ltd* 1981 ZLR 356 (A) at 359D-E. It is defined as a contract whereby one person delivers to another a thing to be kept by him gratuitously or for reward and returned on demand. An essential element of the contract is the fact of the delivery of the item to the bailee and its return to the owner upon demand. These are the key essentials that distinguish the contract from other agreements. The point was in my view succinctly put by Waddington J in *Smith v Minister of Lands and Natural Resources* 1979 RLR 421 (G) at 428E-G in the following words:

"Bearing in mind that the contract of *depositum* involves the delivery of a thing 'to be kept', I do not think that it can be said that the circumstances in which the plaintiff's boat was left at the dam constituted a delivery to the defendant for the purposes of being kept. At the most, on the evidence led, what happened was that the third mooring bay was simply pointed out by an official at the Park as being

Makarau JP

a place where the plaintiff could moor his vessel. No evidence was led and it ^A cannot, in my view, be inferred from any of the surrounding circumstances that it was the intention of any official at the Park, acting on behalf of the defendant to keep the vessel for the plaintiff. The circumstances are akin to the kind of case where a member of the public is allowed to come on to ground owned by a person who runs the business of a car park and to leave his motor vehicle there for stipulated periods in return for a small fee.” ^B

From the example given by Waddington J above, one immediately thinks of a parking slot allowed by the city authorities along streets for the convenience of motorists. When one parks ones vehicle in such a slot, one has not delivered the vehicle to the city authorities and need not demand it back from them when one wishes to drive away. ^C

In casu, however, the goods were not only left with the defendant. They were delivered to the defendant who took them into its custody. The defendant then stored the goods in warehouses which were under its control. It kept the goods under lock and key. To retrieve the goods, the plaintiff could not simply approach the warehouse and remove his goods therefrom as a driver would remove his vehicle from a parking slot. He had to demand them from ^D the defendant. The keys to the warehouse where the goods were kept were not accessible to him but were kept by the defendant’s employees.

It is on the basis of the above, that I am satisfied that the parties concluded a contract of deposit and the averment by the defendant that the contract was for storage only and not for safekeeping becomes unmeritorious in the ^E circumstances. Was the contract for storage only, the plaintiff would have been merely shown a designated place on the defendant’s premises where he could place his goods. The defendant’s employee would not have taken into their custody the goods and keep them under lock and key.

Under a contract of *depositum*, the bailee has the obligation, imposed by law, to return the goods to the owner upon demand. The liability of the ^F bailee under the *depositum* contract is in my view, similar to the obligations imposed on sailors, innkeepers and stable keepers by the Praetor’s Edict which is a part of our law. (See *Cotton Marketing Board of Zimbabwe v NRZ* 1988 (1) ZLR 304 (S).) It is now the settled position in this jurisdiction that the Edict applies to carriers by land, a trade that the defendant plies in ^G but is not relevant for the purposes of this trial. The quotation upon which the defendant’s terms and conditions are endorsed clearly indicate that the defendant is not a public carrier and does not assume the obligations and liabilities of a public carrier. In my view, it matters not whether the defendant describes itself as a public carrier as its obligations and liabilities as a bailee under the deposit contract are implied by law. In my view, the strict liability ^H

Makarau JP

^A that is imposed on public carriers by the Edict *de nautis, cauponibus et stabulariis* is similar to the strict liability that the common law imposes on a bailee under a *depositum* contract.

As for carriers by land, our law recognizes that the parties to a *depositum* contract can agree to exempt one of the parties from liability for breach of ^B the contract that ordinarily would have attracted liability. In this regard, carriers by land have invariably inserted clauses in their contract limiting their liabilities to instances of gross negligence only. A number of such clauses appearing in contract of carriage mainly have come before the courts for interpretation and application.

In *Cotton Marketing Board of Zimbabwe v NRZ supra*, the court had to deal ^C with the case of ninety-five bales of cotton that were destroyed whilst being transported by the defendant under a contract of carriage under which the goods were being carried at the “sole risk” of the consignor.

It was argued for the consignor in that matter that the Praetor’s Edict *de nautis, cauponibus et stabulariis*, dealing with the liability of sailors, innkeepers ^D and stable keepers applied, and that the “owners risk” clause in the contract did not exempt the carrier from liability for negligence but would exempt the carrier from the absolute liability of the common law.

Dealing with the issue of the “owners’ risk” clause in the contract of carriage between the parties, Dumbutshena CJ) had this to say at 315H:

“Generally, carriers by land may contract themselves out of strict liability imposed by the common law or limit their liability. The issue here is whether in spite of the strict liability imposed by common law, the respondent is exempted from liability for damage occasioned by its servants’ negligence.”

After setting out in detail the submissions made by both counsel in respect of this issue, the learned Chief Justice continued at 317F to put it as a trite position at law that the question of exclusion of liability by a carrier is one of fact or interpretation, to be decided in light of all the relevant circumstances. I presume that the learned Chief Justice in this regard was essentially observing that each case depends on its facts.

In conclusion, the learned Chief Justice held that the clause in the matter before him did not expressly refer to negligence and therefore was not wide enough to exempt the respondent from liability arising from negligence.

In *Zeeta Manufactures (Pvt) Ltd v Zimbabwe United Freight Co Ltd* 1990 (1) ZLR 337 (H), Chidyausiku J (as he then was), had to deal with the case of a consignment of jewellery in a small parcel that was stolen together with the tricycle belonging to an employee of the defendant as he was making deliveries. The consignment was in a padlocked cargo bin but the tricycle

2008 (2) ZLR p218

Makarau JP

itself was left unattended and unlocked. In absolving the defendant from liability, the learned judge, who was dealing with an exemption clause that specifically referred to negligence had this to say at 340A:

“I am satisfied that for the plaintiff to succeed he has to establish that the conduct of the defendant’s employees constitute gross negligence. It will not be sufficient for him to establish ordinary negligence.”

The court went on to find that the plaintiff had failed to prove gross negligence on the part of the defendant’s employees and accordingly dismissed the plaintiff’s claim with costs.

In casu, no averment was made in the declaration that the defendant or its servants were negligent in any way. No argument was advanced that the defendant was negligent. It is common cause that the goods were stolen from a secured warehouse by forcing apart the steel doors to the warehouse. The plaintiff was however at pains to show that the goods were stolen by an employee of the defendant’s. In my view, employing a dishonest employee on its own is not *per se* proof of negligence.

I am not satisfied that the plaintiff has led any evidence before me that tends to show that the defendant was negligent at all in the matter, let alone being grossly negligent in the loss of the plaintiff’s leather.

On the basis of the foregoing, I would dismiss the plaintiff’s claim with costs.

Muzondo & Chinhema, plaintiff’s legal practitioners

Byron Venturas & Partners, defendant’s legal practitioners

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Document 30 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/NYANDORO & ANOR v NYANDORO & ORS 2008 (2) ZLR 219 (H)

NYANDORO & ANOR v NYANDORO & ORS 2008 (2) ZLR 219 (H)

2008 (2) ZLR p219

Citation 2008 (2) ZLR 219 (H)

Case No Judgment No. HH-89-08

Court	High Court, Harare
Judge	Kudya J
Heard	21 July 2008; 22 July 2008; 23 July 2008; 24 July 2008
Judgment	16 October 2008
Counsel	<i>S Mugadza</i> , for the plaintiffs <i>S Gahadzikwa</i> , for the first and second defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Administration of estates – *deceased estate – litigation – must be represented by executor*

Practice and procedure – *parties – deceased estate – must be represented by executor – citation of – must be cited in name of executor*

▯ **Prescription – pleading** – *how should be pleaded – not necessary to raise matter in special plea*

Headnote

The first plaintiff, a widow, sought the transfer of a property to her. The property was registered in the name of her late husband's brother, who ^ε was also deceased. The plaintiff's brother in law had never lived in the house, but her husband had. The action was also brought in the name of the estate of the first plaintiff's husband. The first defendant was the son of the first plaintiff's late brother in law.

Apart from disputing the claim on the facts, the defendants argued (1) that the second plaintiff was not properly before the court, no executor ^ϕ having been appointed for the estate; (2) that the first plaintiff in any event had no *locus standi*; and (3) that the claim had prescribed. The plaintiff conceded the first point, but argued that the plaintiff had *locus standi*; that a plea of prescription must be pleaded; that it should be raised by way of a special plea and, lastly, that the first plaintiff's claim ^Ϸ was not a debt but a claim for land for which prescription runs for 30 years. The defendants initially counter-claimed for eviction and rentals but abandoned this claim during the trial. The defendants had raised the matter of prescription in their plea, but did not raise a special plea.

Held, that the plaintiff's concession was correct. A deceased estate must be represented by an executor or executrix duly appointed and issued ^η with letters of administration by the Master. The executor occupies the

2008 (2) ZLR p220

Kudya J

position of legal representative of the deceased with all the rights and ^α obligations attaching to that position. Because a deceased's estate is vested in the executor, he is the only person who has *locus standi* to bring a vindictory action relative to property alleged to form part of the estate. Arising from the nature of a deceased estate, the citation of a deceased estate as a party to litigation is wrong. The correct party to ^β cite is the executor, by name. The citation of the second plaintiff and second defendant *in casu* was therefore improper and incurable and their presence was a nullity.

Held, further, that on the issue of whether the plaintiff, as the widow, had the legal interest to sue for the immovable property in question on the basis that she was a part owner of the property, property that is registered ^Ϸ solely in the husband's name belongs only to him. This case dealt with estate property, not the distribution of matrimonial property arising from divorce, which

would be governed by s 7 of the Matrimonial Causes Act [*Chapter 5:13*]. The plaintiff would not have had *locus standi* to sue for such property in her own right.

Held, further, that the failure to raise a special plea does not debar a litigant ^D who has pleaded prescription from having its case resolved. Having pleaded it *in casu*, the defendant was within his rights to seek to curtail the trial on the basis of prescription.

Held, further, that the plaintiff's claim fell within the definition of "debt" in the Prescription Act [*Chapter 8:11*]. Her claim for transfer of the ^E immovable property, whether based on a purported trust for her children or on her contributions, began to run, at the latest, when the distribution plan of Nelson's estate was approved by the Master.

Cases referred to

Angelique Entprs (Pvt) Ltd v Albco (Pvt) Ltd 1990 (1) ZLR 6 (H) ^F

Cattle Breeders Farm (Pvt) Ltd v Feldman (2) 1973 (2) RLR 261 (A)

Clarke v Barnacle NO & Ors 1958 R & N 358 (SR)

Dube v Khumalo 1986 (2) ZLR 103 (S)

Hodgson v Granger & Anor 1991 (2) ZLR 10 (H)

Hwaire v Mbare Development (Pvt) Ltd & Ors HH-105-05 ^G

Mhlanga v Ndlovu HB-54-04

Muganga v Sapukwanyanya 1996 (1) ZLR 217 (S)

Muswere v Makanza 2004 (2) ZLR 262 (H)

Muzanenhemo & Anor v Katanga 1991 (1) ZLR 182 (S)

Takafuma v Takafuma 1994 (2) ZLR 103 (S)

Young v van Rensburg 1991 (2) ZLR 149 (S) ^H

2008 (2) ZLR p221

Kudya J

Legislation considered ^A

Prescription Act [*Chapter 8:11*], ss 2, 14 & 20

Case information

S Mugadza, for the plaintiffs

S Gahadzikwa, for the first and second defendants

Judgment

^B **KUDYA J:** The first plaintiff is the widow of the late Bernard Nyandoro, while the first defendant is the son of the late Nelson Nyandoro. Bernard was the elder brother of Nelson. The tussle in the present matter is between the first plaintiff and her nephew, the first defendant, over the ownership of Stand Number 748 – 3rd Street Hatcliffe (748) in Harare. This immovable property ^C was purportedly acquired and developed by Bernard, but was registered in the name of Nelson. Nelson never resided at this property. He lived with his wife and children at another house in Hatcliffe that was registered in Bernard's name. On completion of the immovable property, Bernard lived at this house with his family and after his death his wives and their children continued to and still reside on this property.

^D The first plaintiff claims that it was her husband's property, while the first defendant maintains that it was his father's property.

In a bid to prove her claim, the first plaintiff gave evidence and in addition called the evidence of four witnesses. She produced five documentary exhibits. The first defendant also testified and called the evidence of one ^E other witness and produced three documentary exhibits.

The first and second defendants raised two preliminary issues on the first day of hearing. These were filed on Friday 18 July 2008 and were only received by the plaintiffs' counsel on the day of hearing. In view of the late notification and in a bid to avoid a postponement, I directed that the preliminary issues ^F be argued at the conclusion of the trial together with oral submissions. The preliminary issues were on the plaintiffs' *locus standi* and prescription. In this judgment I will deal with the evidence first and then proceed to consider the preliminary issues.

[*The learned judge analysed the evidence in detail and continued:*]

^G In my view, the evidence led by both parties demonstrated that the house belonged to Nelson. The actions of Bernard after the death of Nelson confirmed this fact. Bernard was instrumental in having the house registered in Nelson's estate. He took no measures to have it transferred to him. At the time the estate was registered, he could have been appointed an heir and transferred the property to himself. He dealt with legal practitioners ^H who could have advised him to this effect. The fact that he was content to

2008 (2) ZLR p222

Kudya J

be appointed guardian only demonstrated that he was not a greedy man. I ^A found myself convinced that John told the truth, unlike the witnesses called by the first plaintiff, who, for reasons of friendship, gilded the lily in a bid to appease her.

On the evidence led, I find that first plaintiff has not demonstrated that the property belonged to Bernard. Rather, the evidence shows that it belonged to ^B Nelson. Registration of title is not a mere formality but confers real rights to the holder. See *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) at 105H-106A.

Mr *Gahadzikwa*, for the first and second defendants, raised two preliminary issues at the commencement of the trial. He submitted that the second plaintiff was improperly before the court and that, in the absence of letters ^C of administration, could not be represented by the first plaintiff. The second issue was that even if one or both had *locus standi*, the claims for transfer were prescribed.

Mr *Mugadza*, for the plaintiffs, conceded that the second plaintiff was not before the court, as no executor had been appointed for the estate of the late Bernard Nyandoro. He however contended that the first plaintiff had *locus* ^D *standi* to represent her interests in the matter. On prescription, he submitted that, as the issue concerned the transfer of land and not a debt, it could not be prescribed in the time frame contended by the first and second defendants.

I agree with both counsel that the second plaintiff is not before this court. In our law, in terms of s 25 of the Administration of Estates Act [*Chapter 6:01*], ^E a deceased estate is represented by an executor or executrix duly appointed and issued with letters of administration by the Master. In *Mhlanga v Ndlovu* HB-54-2004, Ndou J stated as follows:

"The executor of an estate has certain rights and powers in connection with the liquidation and administration of the estate and also certain duties to perform. What they consist of is to be found both in common law and the Administration ^F of Estates Act *supra* – and *The Law and Practice of Administration of Estates* 5 ed by D Meyerowitz at p 107 and *Fischer v Liquidators of Union Bank* (1891) 8 SC 46. What must be noted is that the applicant, as executor, is legally vested with the administration of the estate. He is not a mere procurator or agent for the heirs. In *The Law and Practice of Administration of Estates supra* the learned author correctly observed on p 123: 'A deceased estate is an aggregate of assets and liabilities and the totality of the rights, obligations and powers of dealing ^G therewith, vests in the executor, so that he alone can deal with them. He has no principal and represents neither the heirs nor the creditors of the estate ...' – *Malcomess NO v Kuhn* 1915 CPD, In re *Brown* (1890) 7 SC 237; *CIR v Emory NO* 1961 (2) SA 621 (A) and *Goosen v Bosch and The Master* 1917 CPD 189."

In *Clarke v Barnacle NO & Ors* 1958 R&N 358 (SR) at 349B-350A Morton J stated the legal position that still obtains to this day in Zimbabwe. It is ^H

2008 (2) ZLR p223

Kudya J

^A that "whether testate or intestate, an executor, either testamentary or dative, must be appointed....so that the executor and he alone is looked upon as the person to represent the estate of the deceased person." He left no doubt that towards the rest of the world the executor occupies

the position of legal representative of the deceased with all the rights and obligations attaching to that position and that because a deceased's estate is vested in the executor, he ^b is the only person who has *locus standi* to bring a vindicatory action relative to property alleged to form part of the estate.

Arising from the nature of a deceased estate as described in *Clarke v Barnacle, supra*, and *Mhlanga v Ndlovu, supra*, it must follow that the citation of a deceased estate as a party to litigation is wrong. The correct party to cite ^c in lieu of the deceased estate is the executor, by name. The citation of the second plaintiff and second defendant *in casu* was therefore improper and incurable. It makes their presence before me a nullity.

In the absence of letters of administration, the first plaintiff could not represent her husband's estate as she purported to do in the present matter. I am satisfied that the second plaintiff is not part of these proceedings.

^d The next issue that presents itself is whether she, as the widow, has the legal interest to sue for the immovable property in question on the basis that she was a part owner of the property. She stated in her pleadings and her evidence that, had the house been registered in her late husband's name, she would have been a part owner by virtue of her contributions to its acquisition and ^e construction. In her testimony, she averred that she did not directly contribute to either the purchase or development of the house but only made indirect contributions.

The position in our law is that property that is registered solely in the husband's name belongs only to him. See *Muswere v Makanza* 2004 (2) ZLR 262 (H), ^f *Cattle Breeders Farm (Pvt) Ltd v Veldman* (2) 1973 (2) RLR 261 (A), *Muzanenhemo & Anor v Katanga* 1991 (1) ZLR 182 (S) and *Muganga v Sakupwanyanya* 1996 (1) ZLR 217 (S). We are here dealing with estate property and not the distribution of matrimonial property arising from divorce, which would be governed by s 7 of the Matrimonial Causes Act [Chapter 5:13]. It must follow that she would not have had *locus standi* to ^g sue for such property in her own right.

The above findings would make it unnecessary for me to deal with the other issues that were raised. I however deal with these other issues on the basis that I might be wrong in the findings I have come to above.

The second preliminary point raised by Mr *Gahadzikwa* was that, even if the ^h wife had *locus standi*, her action was prescribed. He contended that the date

2008 (2) ZLR p224

Kudya J

of prescription ran, at the earliest, from the date of death of Nelson in 1995 ^a and at the latest in March 1996 when the Master approved the distribution account for the transfer of the property to the first defendant. Her claims against Nelson's estate and the first defendant expired three years later, respectively. Mr *Mugadza's* response was threefold. Firstly, he contended that a plea of prescription must be pleaded; secondly, that it should be raised ^b by way of a special plea; and, lastly, that the first plaintiff's claim was not a debt but a claim for land for which prescription runs for 30 years.

Section 20 of the Prescription Act [Chapter 8:11] states the manner in which prescription may be raised in legal proceedings. It reads:

"20 Prescription to be raised in pleadings

(1) No court shall of its own motion take notice of prescription. ^c

(2) A party to litigation who invokes prescription shall do so in the relevant documents filed of record in the proceedings:

Provided that a court may allow prescription to be raised at any stage of the proceedings."

In para 6 of their plea, the defendants pleaded prescription. The first objection ^d raised by Mr *Mugadza* falls away. The second objection was that it had to be raised by way of a special plea. He relied on *Angelique Enterprises (Pvt) Ltd v Albco (Pvt) Ltd* 1990 (1) ZLR 6 (H) at 9G where Smith J quoted Baker J in *Cordier v Cordier* 1984 (4) SA 524 (C) that

"on the other hand it has been held that the issue of prescription should be raised ^e by special plea and not by way of an objection to an amendment, as Mr *Louw* has done here ... Section 17(2) provides that a party to litigation who invokes prescription shall do so in the relevant document filed of record in the proceedings. What is 'the relevant document filed of record in the proceedings?' The 1943 Act provided that a party who

raised prescription had to do so in the pleadings (s 14 of Act 18 of 1943) and this has always been taken to mean in a special plea". F

At page 11B Smith J agreed with these views.

Mr *Gahadzikwa* on the other hand relied on *Hwaire v Mbare Development (Pvt) Ltd & Others* HH-105-05 at p 4 wherein Makarau J, as she then was, held that the right to claim for transfer in terms of the agreement of sale is a debt in terms of s 14 of the Prescription Act [Chapter 8:11] and that the right G prescribes three years after the cause of action arose. She relied on *Hodgson v Granger and Anor* 1991 (2) ZLR 10 (H) where Greenland J reviewed the jurisdictional philosophy behind statutes of limitations, represented herein by the Prescription Act, to come to the conclusion that prescription starts to run from that date when the creditor becomes aware of all the facts necessary to create the need to approach a court for relief. Hwaire issued H

2008 (2) ZLR p225

Kudya J

A summons in July 2004 although she became aware that her claim to transfer was under threat in June 2001. The second purchasers in that case pleaded prescription. The matter proceeded to trial and the issue was argued at the closure of trial. It did not proceed by way of special plea.

It does not appear to me that the failure to raise a special plea debars a litigant who has pleaded prescription from having its case resolved. Having pleaded B it *in casu*, it seems to me that the defendant was within his rights to seek to curtail the trial on the basis of prescription.

The last point revolves on whether the plaintiff's claim is a debt as defined in s 14 of the Prescription Act. Section 2 of the Prescription Act defines debt in these terms:

C "'debt', without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise."

Her claim for transfer of the immovable property, whether based on a purported trust for her children or her contributions, began to run at the latest D when the distribution plan of Nelson's estate was approved by the Master.

I accept Mr *Gahadzikwa's* submission that her claim was prescribed.

I proceed to deal with the merits for completeness' sake since I allowed the adduction of evidence at the trial.

The onus lay on the first plaintiff to show that she acquired Stand 748. In E her testimony, which was supported by four witnesses, she testified that it was her late husband who purchased the stand. While she said she made no direct contributions to the purchase and development, Agnes Price stated that she used monies eked from her informal trade activities to help her husband in developing the property. It was clear that she did not contribute to the purchase and development of the stand in issue. Her allegations that F it was registered, to her knowledge at the time, in Nelson's name to evade the municipal policy undermines her case, as it runs foul of the clean hands policy raised *mero motu* by the court in *Chikadaya v Chikadaya* 2000 (1) ZLR 343 (H). The principle is ingrained in our law that a court will not assist a litigant who has demonstrated a lack of probity or honesty in his or her dealings.

G Mr *Mugadza*, however, contended that this was a proper case for the application of the *in pari delicto* rule. He relied on the case of *Dube v Khumalo* 1986 (2) ZLR 103 (S). Gubbay JA, as he then was, stated at 109D as follows:

"There are two rules which are of general application: The first is that an illegal agreement which has not yet been performed, either in whole or in part, will never H be enforced. This rule is absolute and admits of no exception. See *Mathews v*

2008 (2) ZLR p226

Kudya J

Rabinowitz 1948 (2) SA 876 (W) at 878; *York Estates Ltd v Wareham* 1949 SR A 197; 1950 (1) SA 125 (SR) at 128. It is expressed in the maxim *ex turpi causa non oritur actio*. The second is expressed in another maxim *in pari delicto potior est conditio possidentis*, which may be translated as meaning 'where parties are equally in the wrong, he who has possession will prevail'. The effect of this rule is that that, where something has been delivered pursuant to an illegal agreement, the loss lies where it falls. The objective of the rule is to discourage B illegality by

denying judicial assistance to persons who part with money, goods or incorporeal rights, in furtherance of an illegal transaction. But in suitable cases the courts will relax the *par delictum* rule and order restitution be made. They will do so to prevent injustice, on the basis that public policy 'should take into account the doing of simple justice between man and man'."

Gubbay JA relaxed the *par delictum* rule at p 110D on the basis that the c plaintiff was not seeking to enforce an illegal agreement that had been performed, with the result that the municipality had been defrauded, as the defendant girlfriend had acquired rights in the stand without giving value for it, while the man continued to pay for it. He agreed that the girlfriend acted as a nominee of the man, with the result that he could recover his rights from her, otherwise, refusing him relief would result in her unjust enrichment at d his expense. He entered judgment for him.

The first plaintiff does not appear to have been privy to her husband's partnership agreement with Nelson. Her assumption that there existed an agreement to defraud the municipality was based on her belief that Stand 748 was acquired, developed and occupied by her husband and the fact that e Nelson never resided nor laid claim to it during his lifetime. The onus lay on her to show on a balance of probabilities that Nelson was a nominee.

I am not satisfied that she has discharged that onus in the face of the primary role made by her husband in registering the house in the estate of Nelson and passing it on to Nelson's heir. The actions of her husband and his failure to claim the property as his own demonstrated that the property did not belong f to him. His actions rather confirm the version of his elder brother that the transport business was a partnership of the three brothers, that is, Robert, Bernard and Nelson, which they used to purchase and develop properties for their respective benefit. She has, therefore, failed to demonstrate that her husband acted to defeat a municipal policy or that even, if he did so; he g acted in connivance with Nelson. The case of *Young v van Rensburg* 1991 (2) ZLR 149 (S), which Mr *Mugadza* relied on, is distinguishable from the present matter. Firstly, while Young was found to have been a nominee of van Rensburg, it was not proved that Nelson was a nominee of Bernard. Secondly, while Young did not pay value for the farm, Nelson purchased the property and developed it from his share of the proceeds generated by h

2008 (2) ZLR p227

Kudya J

A the transport partnership. The first plaintiff has not shown that Nelson was unjustly enriched at the expense of Bernard in the light of the existence of the partnership. The question of damages against Nelson's estate does not arise for determination, but even if it did these were neither quantified nor proved.

Clearly, the plaintiff's claim would also fail on the merits.

B In his evidence, the first defendant abandoned his claim for eviction and rentals and thus his counterclaim in its entirety. There does not appear to be any legal impediment in his quest to have the property in issue transferred to him from his father's estate. He would have to put that process in motion. I will dismiss his counterclaim on the basis that he abandoned it in his evidence.

The first defendant has won. Costs must follow the cause.

C Accordingly, it is ordered that:

1. The first plaintiff's claim be and is hereby dismissed
2. The first defendant's counterclaim be and is hereby dismissed.
3. The first plaintiff shall bear the first defendant's costs for both the claim d in convention and the counterclaim.

Madanhi, Mugadza & Co Attorneys, plaintiff's legal practitioners

Gahadzikwa & Mupunga, first and second defendants' legal practitioners.

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Document 31 of 49**Source:**

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SAMUDZIMU v NGWENYA 2008 (2) ZLR 228 (H)**2008 (2) ZLR p228**

Citation	2008 (2) ZLR 228 (H)
Case No	Judgment No. HH-92-08
Court	High Court, Harare
Judge	Kudya J
Heard	112 September 2008
Judgment	16 October 2008
Counsel	Mrs B Mtetwa for the applicant O Mutero for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Family law – child – custody – rights of custodian parent – access rights of non-custodian parent – must follow child at his own expense – custodian parent not permitted to impede access rights of non-custodian parent – onus of proof in this regard – custodian parent relocating with children to another country – rights of non-custodian parent – must show that such relocation is not in the best interests of the children – need for possible variation of custody order in the future

Practice and procedure – parties – locus standi – “clean hands” – need for litigants to come to court with clean hands – not allowed to seek assistance of court if guilty of lack of probity or honesty

Headnote

People are not allowed to come to court seeking the court’s assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court. It is called, in time-honoured legal parlance, the need to have clean hands. It is a basic principle that litigants should come to court without dirty hands. If a litigant with unclean hands is allowed to seek a court’s assistance, then the court risks compromising its integrity and becoming a party to underhand transactions (*dicta per* Bartlett J in *Deputy Sheriff Harare v Mahleza & Anor*, 1997 (2) ZLR 425 (H) at p 426 followed).

A parent who is entitled to access must follow his children at his own expense. A custodian parent is, however, not permitted to place impediments in the way of the non-custodian parent’s access rights. But the *onus* is on the latter to show that the former has deliberately acted to frustrate his or her access rights.

The applicant sought an order granting him the custody of his two very young children. Custody had been granted to their mother, the respondent, when

2008 (2) ZLR p229

Kudya J

^A she and the applicant were divorced, with provision for access. The custody order also provided that if the respondent wanted to remove the children from Zimbabwe, she should seek the consent of the applicant, "which consent shall not be unreasonably withheld". The respondent proposed to relocate to South Africa, and sought the applicant's consent. His response was to initiate the present action. He averred that the ^B relocation was not in his best interests. The respondent counterclaimed for the removal of the children to South Africa.

Held, that the respondent, as the custodian parent, was in absolute charge of the day-to-day needs of the children. She did not exercise these powers in consultation with anyone and as long as they were in the best interests ^C of the children, they could not be impugned.

Held, further, dismissing the application, that although the applicant had averred that the relocation to South Africa was not in his best interests, he had failed to show how that relocation was not in the best interests of the children. It was not enough to aver that she had relocated to another country or that the non-custodian parent was economically better able ^D to support the children and offer them the creature comforts of life. *In casu*, he could not use the fact of her employment in South Africa as a changed circumstance which necessitated the variation of custody. The children were still very young and their mother was best suited to look after them. The view that that the maternal link, which is necessary ^E for the psychological well being of children, is formed earlier than the paternal link, was still true.

Held, further, with regard to the counterclaim, that it should be granted. As the custodian parent she had the power to decide where she and the children should live. In terms of the existing custody order, all she had to do was to seek the applicant's consent. She had done so and was not ^F obliged to obtain his approval. His consent was required for the purpose of ensuring that the parties come to some reasonable accommodation on the applicant's access rights. If he was able to exercise them in South Africa, then well and good; if not, then the custody order would need to be varied so as to allow him to have them in Zimbabwe at his cost on agreed terms. If both parties, as the parents, truly had the interests of ^G their children at heart, then they should come to a workable compromise.

Cases cited

ANZ v Minister of State for Information & Ors S-20-03

Barclay Bank (DCO) v Volkskas Bpk 1951 (2) SA 296 (T)

^H *Deputy Sheriff, Harare v Mahleza & Anor* 1997 (2) ZLR 425 (H)

2008 (2) ZLR p230

Kudya J

Dunsterville v Dunsterville 1946 NPD 594 ^A

Hackim v Hackim 1988 (2) ZLR 61 (S)

Makuni v Makuni 2001 (1) ZLR 189 (H)

Mutetwa v Mutetwa 1993 (1) ZLR 176 (H)

Ex p Rhoprops Ltd 1975 (1) RLR 302 (G); 1975 (3) SA 630 (R)

Underhay v Underhay 1977 (4) SA 23 (W) ^B

Zvorwadza v Zvorwadza 1996 (1) ZLR 404 (S)

Case information

Mrs *B Mtetwa* for the applicant

O Mutero for the respondent

Judgment

KUDYA J: The applicant seeks interim custody of the two minor children ^C on the basis that the respondent, who was by consent awarded custody on 16 June 2005, has denied him access to the children. In addition, he averred that the respondent has relocated to South Africa and has left the children in the care of her mother in Bulawayo. The respondent did not only oppose the application

but filed a counter application seeking authority to remove ^d the children from the jurisdiction of this court. The applicant also opposed her counter application.

In my view, both applications are premised upon the order of 16 June 2005. It reads as follows:

"IT IS ORDERED BY CONSENT THAT:

1. The applicant restore to the respondent custody of the minor children in issue ^e namely:-
 - i. David Michael Nathan Samudzimu (born 5 March 2004) and
 - ii. Danielle Alaina Janet Samudzimu (born 5 March 2004).
2. The said minor children shall be given to the respondent no later than sunset on this 16th day of June 2005.
3. The applicant shall be entitled to reasonable access to the said minor children, ^f once a week on Saturdays between the hours of 10:00 hours and 17:00 hours.
4. The respondent shall be at liberty to remove herself and the said minor children to any place within Zimbabwe as long as this is done in a manner that does not impede on the applicant's rights of access to the said minor children.
5. The respondent shall seek the consent of the applicant before she removes the children from Zimbabwe, which consent shall not be unreasonably withheld. ^g
6. The applicant shall bear the costs of this application."

The preliminary issue

The applicant sought to *prevent* the respondent from appearing before me to argue her opposition and prosecute her counterclaim on the basis that she has dirty hands. The respondent disputed that contention. ^h

2008 (2) ZLR p231

Kudya J

^a Mrs *Mtetwa*, for the applicant, contended that the respondent breached clause 3 of the order of 16 June 2005 in that she removed the children to Bulawayo with intent to, and did, impede the applicant's access rights granted in clause 3. The respondent achieved this by relocating the children to Bulawayo without notifying the applicant and when he found out their whereabouts, he was denied access to the children. She accordingly submitted that the respondent's ^b conduct stained the clean halls of justice to the extent that she should be denied audience. She relied on the sentiments of Davidson J in *Underhay v Underhay* 1977 (4) SA 23 (W) at 24E where the learned judge stated:

"It is fundamental to Court procedures in this country and in all civilized countries that standards of truthfulness and honesty be observed by parties who seek relief."

^c She also referred to the case of *Barclays Bank (Dominion, Colonial & Overseas) v Volkskas Bpk* 1951 (2) SA 296 (T) at 307C where Dowling J used the term "dirty hands" to describe the "type of misconduct which the Court penalizes by withholding its protection ... as conduct involving moral obliquity such as fraud or other form of dishonesty."

^d The principle that a litigant who has dirty hands should be denied audience in the halls of justice was also expressed by Bartlett J in *Deputy Sheriff, Harare v Mahleza & Anor* 1997 (2) ZLR 425 (H). At 426A-C he stated thus:

"People are not allowed to come to court seeking the Court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which ^e cause them to seek relief from the Court. It is called, in time-honoured legal parlance, the need to have clean hands. It is a basic principle that litigants should come to court without dirty hands. If a litigant with unclean hands is allowed to seek a court's assistance, then the court risks compromising its integrity and becoming a party to underhand transactions."

See also *Ex parte Rhoprops Ltd* 1975 (1) RLR 302 at 305A and *Mutetwa v f Mutetwa* 1993 (1) ZLR 176 at 177.

The same concept was extended by Chidyausiku CJ in *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity in the President's Office & Ors* S-20-03 to include not only moral obliquity, such as fraud or other forms of dishonesty, but the defiance of a court order. At p 11 of the cyclostyled judgment the learned Chief Justice ^g stated that:

"The court will not grant relief to a litigant with dirty hands in the absence of good cause shown or until such defiance or contempt has been purged."

Mr *Mutero*, for the respondent, contended that the respondent had not defied the order of court and submitted that the dirty hands policy had no application ^H in the present matter. He contended that the respondent operated within the

2008 (2) ZLR p232

Kudya J

confines of clause 4 of the order of 16 June 2005. She removed the children ^A to Bulawayo and notified the applicant of their whereabouts.

Clearly, there is a dispute of fact on what actually transpired between the parties as regards the removal of the children. Clause 4 was drawn by the parties. It did not spell out the minute details concerning the delivery and collection of the minor children. The applicant did not state how he used to ^B exercise his access rights before the children were taken to Bulawayo. He, however, averred that he last had access in May 2007. He also stated that he was advised at Avondale police station in May 2007 that the children were in Bulawayo. He only sought to exercise his rights on 13 October 2007 when he went to Bulawayo. He did not say what he did between the time he learnt of their relocation in May and the receipt of the letter of 16 July ^C 2007 from the respondent's legal practitioners. Neither did he state what he did to enforce his rights between May and October 2007. All we have on record are the respondent's averments of her attempts to bring the children to his house before she removed them to Bulawayo and his absence each time she did so. He appeared to have been disinterested in exercising his ^D access rights when she was in Harare. Gowora J quoted, with approval, the sentiments in *Spiro Parent and Child* 4 ed p 300 in *Makuni v Makuni* 2001 (1) ZLR 189 (H) at 193B-C that the parent who is entitled to access must follow them at his own expense. The custodian parent is, however, not permitted to place impediments in the way of the non-custodian parent's access rights. The respondent, in my view, did what was expected of her in ^E advising him of the relocation. It was incumbent on him not only to exercise but also to enforce his rights.

It does not appear to me that the respondent deliberately set out to frustrate the applicant's access rights. The previous conduct of the parties, which resulted in the order by consent, created suspicion and mistrust between the parties ^F to such an extent that they failed to communicate other than through their legal practitioners. They both failed to realize that the consent order could not supplant common sense, which required them to make personal contact in order to implement the agreement. Common courtesy required that the applicant ~~to~~ make prior arrangements on how and where he would collect the children. It was disrespectful of him to simply bulldoze his way into the ^G residence of the respondent with an entourage of police officers in tow. One would expect that the children would be advised by the custodian parent that their father was coming to collect them, for them to make the necessary emotional preparations and adjustments. The custodian parent would need to make the necessary preparations and assist the children prepare for the collection. The absence of common sense in implementing the agreement ^H

2008 (2) ZLR p233

Kudya J

^A resulted in the unfortunate innuendoes that each party levelled against the other in the pleadings. The parties must truly seek to work together for the emotional and physical well-being of their children, rather than seek to use them as missiles in an unfinished war between them.

The onus is on the applicant to show that the respondent has deliberately acted to frustrate his access rights. He has failed to show that she has denied him ^B access to his children. She notified him of their whereabouts, according to him, in May 2007 at Avondale police station and neither party thereafter made any attempt to streamline the implementation of the consensual agreement in a humane and practical manner.

I would, accordingly, dismiss the preliminary issue raised by the applicant.

^C The application in convention

The applicant seeks interim custody. The first basis is that he has been denied his access rights since 3 May 2007. He averred that the respondent "contemptuously violated and breached" his access rights and though "mindful of the fact that the respondent is in deliberate contempt of this Honourable ^D Court's order" was not asking for an order of contempt. The respondent denied that she ever violated his access rights and averred that she advised him of her move to Bulawayo.

It seems to me that the applicant implicitly contends that any movement from Harare necessarily violated clause 3 of the consent order. That contention ^E is not borne out by clause 4 of the same order, which allows her to take the children to any place in Zimbabwe. The only rider against doing so being that this should not impede the applicant's reasonable rights of access, once a week on Saturdays between 10.00 hours and 17.00 hours. Obviously, once she moved from Harare, a variation of the applicant's access rights became inevitable unless the applicant was able to visit Bulawayo every ^F Saturday. If he did so, he would only have been able to exercise his access rights in Bulawayo. The choice, as I see it, lay with him to seek a variation of his access rights. The duty was on him to exercise his access rights. The relocation, in my view, would not amount to a violation of his access rights.

His first ground for seeking variation fails.

^G The second is that she has relocated to South Africa and, in the process, left the children in Bulawayo with her mother. Clause 5 of the consent order contemplated the removal of the children from Zimbabwe. It seems to me that all that the respondent needed to do was to seek the applicant's consent. She sought that consent on 16 July 2007. The applicant declined to give his consent. He came to this court on 23 October with the present application; ^H in itself a demonstration of denial of such consent.

2008 (2) ZLR p234

Kudya J

It seems to me that the applicant does not appreciate the legal powers that ^A are vested in a custodian parent. She is in absolute charge of the day to day needs of the children. She determines where they go to school; which church they go to; which houses they visit; which friends they play with. She does not exercise these powers in consultation with anyone. As long as these are in the best interests of the children; they cannot be impugned. The extent ^B of the legal powers of the custodian parent was dealt with in *Makuni's case, supra*, at 191B-D. He or she is vested with the power of nurturing, shaping and bringing up the minor children.

Her opposing papers demonstrate that she found a better paying job in South Africa. Her prospects are brighter in South Africa than in Zimbabwe. The improvement of her fortunes directly benefits the children and, in my view, ^C is in their best interest.

The onus is on the applicant to show, on a balance of probabilities, that her relocation is not in the best interests of the children. The case of *Hackim v Hackim* 1988 (2) ZLR 61 (S) sets out what the non-custodian parent needs to prove in order to wrest custody from the custodian parent. It is not adequate ^D to aver that she has relocated to another country or that the non-custodian parent is economically better able to support the children and offer them the creature comforts of life. See *Zvorwadza v Zvorwadza* 1996 (1) ZLR 404 (S) at 409F. *In casu*, he cannot use the fact of her employment in South Africa as a changed circumstance which necessitates the variation of custody. She ^E wrote to him on 16 July 2007 seeking his consent to remove the children to South Africa. He does not appear to have concerned himself with the need to renegotiate his access rights. He decided to wrest custody from her and thus squandered an opportunity to negotiate new terms of access. His attitude meant that she could not take the children with her without a court order.

He has averred that the relocation is not in his best interests. He has failed ^F to demonstrate how the relocation is not in the best interests of the children. The children are still very young and their mother is best suited to look after them. The views of Broome J in *Dunsterville v Dunsterville* 1946 NPD 594 at 597 that the maternal link, which is necessary for the psychological well being of children is formed earlier than the paternal link, is still true ^G today. These views are similar to those expressed by Adam J in *Mutetwa's case supra*, at 180D. In the present matter, the applicant entered into the consensual agreement in appreciation of the respondent's better qualities as a mother. That agreement allows her to take the children out of the country. He has not shown why her relocation should result in her loss of custody.

It is for these reasons that I would dismiss his application for interim custody. ^H

2008 (2) ZLR p235

Kudya J

^A The counterclaim

The respondent in the main matter counterclaimed for the removal of the children and consequential relief to facilitate the removal. The basis of her application is grounded in the consent order which contemplated the removal of the children. It also required her to seek his consent. He was required not ^b to withhold such consent without just cause. She seeks removal because she has found employment in South Africa for herself. She attached proof of her employment. She stated where she would reside and her future plans about the accommodation and education of the children. As the custodian parent, she has the power to make these decisions. She is not required to seek the applicant's approval on these decisions. All she has to do is to seek his ^c consent. That consent is sought, in my view, for the purpose of ensuring that they come to some reasonable accommodation on his access rights. If he is able to exercise them in South Africa, then well and good. If he is not able to do so, then the order would need to be varied to allow him to have them in Zimbabwe, at his cost, on agreed terms. If both parties, as the parents, truly have the interests of the children at heart, then they should come to a ^d workable compromise.

The access rights that the applicant has are comparable to those that Mr Hackim had in *Hackim's* case, *supra*. The Supreme Court in that case left those access rights intact notwithstanding that Mrs Hackim was permitted to permanently remove the child to the United States of America. One of the ^e bases of the decision was that Mr Hackim was a man of means who was able to implement his access rights. I have read both the applicant's answering affidavit to the main claim and opposing affidavit to the counterclaim, to assess his response to his ability to exercise his access rights in South Africa. He has not disputed that he traverses the world on business and that he has ^f the means to visit the children in South Africa. He has dwelt on possible administrative difficulties that he will have in obtaining a visa to South Africa and expressed his scepticism on his ability to enforce his rights in South Africa. These are speculative fears which would not warrant denying the custodian parent the right to remove the children to South Africa. If the access rights prove to be onerous to him, then it is up to him to consider ^g what action to take to make them more bearable.

The parties must realize that the court cannot cover every foreseeable eventuality in its order. It expects the parties to be mature and reasonable in their approach. They should act in good faith and not in bad faith. They should respect the other parent's rights for bonding with the children.

^h The consent order was made by the parties. It may not work now that the

2008 (2) ZLR p236

Kudya J

two parents will be residing in two different countries. It is up to them to ^a agree on the best way to make it work, bearing in mind that the children are still of a tender age. As they grow older and start primary school, the parties may arrange visitation rights that suit the age of the children.

In the premises, the counter application succeeds.

It is ordered that: ^b

1. Justin Taonehama Samudzimu's application be, and is hereby, dismissed.
2. Sithandiwe Miranda Ngwenya be, and is hereby, authorised to remove the minor children David Michael Nathan Samudzimu born 5 March 2004 and Danielle Alaina Janet Samudzimu born 5 March 2004 from Zimbabwe to South Africa and stay with them in South Africa. ^c
3. Justin Taonehama Samudzimu shall surrender the birth certificates and traveling documents of the minor children to Sithandiwe Miranda Ngwenya's legal practitioners within 24 hours of service of this order upon him.
4. Justin Taonehama Samudzimu shall pay Sithandiwe Miranda Ngwenya's ^d costs of suit for both the main and counter application.

Mtetwa & Nyambirai, applicant's legal practitioners

Sawyer & Mkushi, respondent's legal practitioners

Document 32 of 49**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/AFRICA
FIRST RENAISSANCE CORPORATION LTD v ACM INVESTMENTS (PVT) LTD & ORS 2008 (2) ZLR 237 (H)

**AFRICA FIRST RENAISSANCE CORPORATION LTD v ACM INVESTMENTS (PVT) LTD & ORS
2008 (2) ZLR 237 (H)**

2008 (2) ZLR p237

Citation	2008 (2) ZLR 237 (H)
Case No	Judgment No. HH-95-08
Court	High Court, Harare
Judge	Uchena J
Heard	9 October 2008; 14 October 2008
Judgment	16 October 2008
Counsel	<i>A B Chinake</i> , for the applicant <i>J C Andersen SC</i> , with him <i>E T Matinenga</i> , for the first to fifth respondents <i>P C Lloyd</i> , for the sixth respondent
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Company – general meeting – when can be called by shareholders – articles of association – provisions dealing with calling of meetings – such provisions override general provisions of s 128(1)(b) of Companies Act 0 [Chapter 24:03] – shareholders must require directors to call meeting – shareholders only entitled to call meeting if directors fail to comply with requisition

Headnote

The first five respondent companies, all shareholders in the sixth respondent, ^ε gave public notice convening an extraordinary meeting of the sixth respondent. The object of the meeting was to remove and replace certain of the directors of the sixth respondent. The applicant, also a shareholder, contended that the convening of the meeting was a nullity. It was argued on behalf of the first five respondents that they were entitled to call a meeting in terms of s 128(1)(b) of the Companies Act [Chapter 24:03]. ^ϕ This section provides that, in so far as the articles of a company do not make other provision in that behalf, two or more members, holding not less than one tenth of the issued share capital of a company, may call a meeting. On the other hand, the articles of association of the sixth respondent provided that meetings had to be called by the directors, whether on their own initiative or when requisitioned by shareholders ^ϑ “in accordance with the statutes”. “The statutes” was defined as meaning the Companies Act.

Held, that the provisions of s 128(1)(b) of the Act only have effect if the company’s articles of association do not provide otherwise. In this case, the provisions of the articles were different from the provisions ^η of s 128(1)(b). They therefore provided otherwise, and should in terms

2008 (2) ZLR p238

Uchena J

of s 128(1) have been followed. ^α

Held, further, that since the requisitioning of a general meeting had to be in accordance with the Act, it was necessary to look into the Act for provisions on how shareholders can call for an extraordinary meeting or any meeting other than in the manner prescribed in s 128(1)(b), which defers to the provisions of the articles of association. Section 126 ^Б provided the procedure whereby shareholders could requisition a meeting and for the circumstances where they could convene a meeting if the directors failed to call a meeting when required. The first five respondents therefore used the wrong procedure. While they had a right to initiate an extraordinary meeting by requisitioning the directors, they had no right to convene the meeting themselves. They could only have convened the ^С meeting themselves if, after they had requisitioned the directors in terms of s 126(1), the directors had failed to comply with their requisition. It is not lawful for shareholders to convene an extraordinary meeting before requisitioning the directors to do so, and then they may only do so if the directors have failed to comply. The notice was therefore null and void. ^Д

Legislation considered

Companies Act [*Chapter 24:03*], ss 126 & 128(1)(b)

Case information

A B Chinake, for the applicant

J C Andersen SC, with him *E T Matinenga*, for the first to fifth respondents ^Е

P C Lloyd, for the sixth respondent

Judgment

UCHENA J: The applicant is a public company incorporated in terms of the company laws of Zimbabwe and is listed on the Zimbabwe Stock Exchange. It has shares in the sixth respondent. It filed an urgent chamber application to this court, seeking orders to regulate the holding of an extraordinary general ^Ф meeting of the sixth respondent's shareholders convened by the first to the fifth respondents. At the hearing of the application, it applied to amend its draft order by seeking a declaration that the convening of the extraordinary general meeting by the first to the fifth respondents is in terms of ss 126 and 128 of the Companies Act [*Chapter 24:03*], as read with article 63 of the ^Г sixth respondent's articles of association was null and void.

The first to the fifth respondents are sister companies controlled by the Meikles family. They are all shareholders of the sixth respondent. They, in their capacity as shareholders, issued a notice convening the meeting scheduled for 23 October 2008. The notice, Annexure B, to the respondent's opposing papers was signed by Mr John Moxon on their behalf. They each ^Н

2008 (2) ZLR p239

Uchena J

^А indicated in Annexure B their shareholding in the sixth respondent. The notice was therefore not issued by the directors of the sixth respondent. They seek resolutions on the removal of three directors from the sixth respondent's board of directors, and the appointment of five new directors whose details are given in the notice.

^Б The sixth respondent is a company registered in terms of the laws of Zimbabwe. It is the company over which the applicant and the first to fifth respondents are in contention. The meeting convened by the first to the fifth respondents is intended to discuss and resolve issues on the removal of some of its directors and the appointment of new directors. It filed opposing papers in which it indicated an intention to abide by the decision of the court, and ^С set the record straight in respect of what it has done following the notice convening the meeting, and what happened at its directors' meeting of 23 September 2008.

Points in limine

At the hearing on 9 October 2008 the first to the fifth respondents raised two ^Д points *in limine*. Mr *Andersen* submitted on behalf of the first to the fifth respondents that the applicant's application was not urgent. This point *in limine* was premised on the applicant not having taken action between 23 September 2008, when the boardroom disputes in sixth respondent arose, and 3 October 2008,

when this application was filed. He argued that the delay was an indication that the urgency was self inflicted. He submitted ^ε that the applicant had other remedies through which it could protect itself, before the meeting and at the meeting; therefore the case did not deserve to be heard on an urgent basis. Mr *Matinenga*, also for the first to fifth respondents, submitted that the applicant did not have *locus standi* as it was not a shareholder in the sixth respondent.

¶ Mr *Chinake* for the applicant, in response to Mr *Andersen's* submissions, explained that the applicant is not a board member of the sixth respondent and was therefore not aware of what happened on 23 September 2008. He submitted that the applicant, being the sixth respondent's ordinary shareholder, only got to hear of the boardroom disputes and the proposed extraordinary ^g general meeting through the press on 28 September 2008. He submitted that 28 September was a Sunday, so the applicant started working on the application by instructing its legal practitioners on Monday the 29 September 2008 and filed this application on 3 October 2008. I am satisfied that the applicant has given a reasonable explanation for the delay. It does not therefore destroy the urgency of this application. In response to Mr *Andersen's* submission ^h that the applicant could take corrective action before the meeting or raise

2008 (2) ZLR p240

Uchena J

issues at the meeting as provided by the law to avoid any prejudice it may ^a suffer, he submitted that the applicant's main concern was many shareholders would not receive the notices which were send by post and would not attend personally or by proxy. This is, in my view, a valid argument, as the failure by many shareholders to attend may give the first to fifth respondents an unfair advantage to push through their agenda unopposed. He also submitted that ^b the meeting was not convened in terms of the law. It should therefore not be allowed to take place. If it does, an illegal meeting would then decide on the affairs of the sixth respondent. This is a valid argument. The legality of the meeting must be determined before it takes place. The application must therefore be heard on an urgent basis.

In response to Mr *Matinenga's* submission that the applicant had no *locus c standi*, Mr *Chinake* submitted that the applicant was a shareholder in the sixth respondent and therefore had *locus standi*. He produced two share certificates to prove that it was a shareholder. Mr *Matinenga* then conceded that applicant has *locus standi*.

The first to the fifth respondent's points *in limine* are therefore dismissed ^d with costs.

Joinder and Postponement

After hearing the parties on the preliminary issues, I postponed this case to 14 October 2008. After announcing my decision on the preliminary issue, on 14 October 2008, I was requested by Mr Tawanda Nyambirai to hear an ^e oral application for the joinder of Messrs Nigel Chanakira, Rugare Chidembo and Calisto Jokonya and Econet Wireless Holdings (Pvt) Ltd into these proceedings. He submitted that he had already prepared affidavits which he could file by 1.00 pm if his application for joinder succeeds. He indicated that the parties who intended to be joined were seeking a slightly different relief from the applicant's, though the facts relied on were the same. The ^f application was strongly opposed by the first to the fifth respondents and the applicant. Mr *Chinake* for the applicant submitted that Messrs Chanakira, Chidembo and Jokonya were present at the board meeting of 23 September 2008, which triggered the applicant's application, yet they did not take action but now want to benefit from the applicant's application. He submitted that ^g the joinder would unnecessarily delay the applicant's urgent application and increase costs on the applicant's part. He further submitted that the parties seeking joinder can make their own separate application as the relief they are seeking is different from that being sought by the applicant. Mr *Andersen* also opposed the application for joinder for the same reasons.

In reply Mr Nyambirai conceded that the applicants for joinder could make ^h

2008 (2) ZLR p241

Uchena J

^a their own application but was worried that, that may result in different decisions being arrived at if different courts hear the cases. That, in my view, is not a valid reason for joinder. The joinder, if granted, will obviously delay this urgent application and will cause inconvenience to the applicant and the respondents who have opposed the joinder.

Mr Lloyd for the sixth respondent did not oppose the application as he wanted a postponement to enable the sixth respondent to engage the services of an advocate. The postponement was opposed, as the sixth respondent had indicated in its opposing papers that it would abide by the decision of the court. I am satisfied that the sixth respondent will suffer no prejudice if the postponement is not granted as it is already represented by an experienced lawyer who will, in my view, have no difficulty in following proceedings and making submissions where necessary as it intends to abide by the court's decision.

In the result, the application for joinder is dismissed, and the applicants for joinder shall jointly and severally pay to the applicant and the first to the fifth respondents, the costs they incurred in respect of the application for joinder, the one paying the others to be absolved.

The issues

The issues in this case are:

1. Whether the notice issued by the first to the fifth is a valid notice in terms of the Companies Act; and
2. Whether or not the court can grant the regulatory orders sought by the applicant, to regulate the meeting scheduled for 23 October 2008.

The second issue is relevant in the event of a finding that the notice issued by the first to the fifth respondents is a valid notice. If the court finds that the notice is not valid and declares it to be null and void, there will be no need to make a determination on it.

Validity of the notice

It is common cause that the notice convening the meeting scheduled for 23 October 2008 was issued by the first to the fifth respondents in their capacity as the sixth respondent's shareholders.

The validity of the notice depends on the provisions of the Companies Act which provides for the convening of extraordinary general meetings.

The law

Mr Chinake, for the applicant, submitted that ss 126 and 128(1)(b) of the Companies Act, as read with article 63 of the sixth respondent's articles of

2008 (2) ZLR p242

Uchena J

association, provides for the convening of an extraordinary general meeting by the directors of the company. He further submitted that the first to the fifth respondents should have requisitioned the sixth respondent's directors to convene the meeting. He therefore concluded that the meeting convened by the first to the fifth respondents is a nullity and should be declared to be of no force or effect.

Mr Matinenga, who argued this point for the first to the fifth respondents, submitted that article 63 of the sixth respondent's articles of association is a re-incarnation of s 126, and should not be read as taking away the first to the fifth respondents' right to convene the meeting in terms of s 128(1)(b) of the Companies Act. He therefore argued that the notice calling for an extraordinary general meeting of 23 October 2008 is valid, and the meeting should be allowed to take place.

Section 128 (1) of the Companies Act provides as follows:

"The following provisions shall have effect in so far as the articles of a company do not make other provision in that behalf:

- a. Notice of the meeting of a company shall be served on every member of a company in the manner in which notices are required to be served by Table A.
- b. Two or more members holding not less than one-tenth of the issued share capital may call a meeting."

The provisions of s 128(1)(b) of the Companies Act are clear. They entitle two or more shareholders, who hold one-tenth or more of the company's issued share capital, to call a meeting. That is, however, subject to whether or not that company's articles of association provides otherwise. If the company's articles provide otherwise, then the shareholders referred to in subs (1)(b), cannot call a meeting as provided in s 128(1)(b), but as provided in the articles of the company's association. The provisions of s 128(1)(b) can only have effect if the company's articles

of association do not provide ^F otherwise, in respect of the provision of the section in issue. Section 128(1) gives a company an option as to whether or not it intends to be bound by its provisions. If a company does not want to be bound, it simply makes provisions in its articles of association providing for the convening of meetings in a manner other than the manner provided in s 128(1)(b). If it makes such ^G provisions, then its meetings shall be held in the manner provided in its articles of association.

In the case before the court, article 63 of the sixth respondent provides as follows:

"The directors may whenever they think fit, convene an Extraordinary Meeting, and the directors shall forthwith proceed to convene an Extraordinary Meeting ^H

2008 (2) ZLR p243

Uchena J

^A if and when required so to do in accordance with the provisions of the Statutes. Extraordinary Meetings of the Company shall be held at such places and at such times as the directors may from time to time determine."

Article 63 provides for a procedure to be followed by shareholders who desire to call for an extraordinary meeting. They must requisition for it through the company's directors, who shall forthwith call for the meeting, but use ^B their discretion as to the place and time where the meeting shall be held. The provisions of article 63 are different from the provisions of s 128(1)(b) of the Companies Act. They therefore provide otherwise, and should in terms of s 128(1) be followed. A reading of s 128(1)(b) of the Act and article 63 of the sixth respondent's articles of association therefore indicates that any calling of an extraordinary meeting must be by directors, either at their ^C own instance or on requisition by members of the company in terms of the statutes. The reference to "in terms of the statutes" is significant. It means the requisitioning shareholders must do so in terms of the statutes, and must enforce their requisition in terms of the statutes. If they have to act personally they should do so in terms of the statutes.

^D The word "statutes" is defined in the sixth respondent's articles' definition section. It means the "Companies Act" or "any other law for the time being in force concerning companies and necessarily affecting the company". The court must therefore look into the Companies Act for provisions on how shareholders can call for an extraordinary meeting or any meeting other than in the manner prescribed in s 128(1)(b), which defers to the provisions of the ^E company's articles of association. Mr *Chinake* for the applicant submitted that s 126 provides the procedure to be followed. It provides as follows:

"(1) On the requisition of members of a company holding at the date of the deposit of the requisition not less than one-twentieth of such of the paid-up capital of the company as at the date of the deposit carries the right of voting at general meetings of the company the directors of the company, notwithstanding anything ^F in its articles, shall, within twenty-one days of the deposit of the requisition, issue a notice to members convening an extraordinary general meeting of the company for a date not less than fourteen nor more than twenty-eight days from the date of the notice:

Provided that if a special resolution is to be submitted the period of the notice shall not be less than twenty one days.

^G (2) The requisition shall state the objects of the meeting and shall be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.

(3) If the directors do not within twenty-one days from the date of the deposit of the requisition issue a notice as required by subsection (1) the requisitionists, ^H or any of them numbering more than fifty or representing more than one-half of

2008 (2) ZLR p244

Uchena J

the total voting rights of all of them, may themselves convene a meeting, stating ^A the objects thereof, on twenty-one days' notice, but no meeting so convened shall be held after the expiration of three months from the said date.

(4) Any meeting convened under this section by the requisitionists shall be convened in the same manner, as nearly as possible, as that in which meetings are to be convened by directors. ^B

(5) Any reasonable expense incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting shall be repaid to the requisitionists by the company, and any sum so repaid shall be

retained by the company out of any sums due or to become due from the company by way of fees or other remuneration in respect of their services to such of the directors as were knowingly party to the default. c

(6) Any officer of the company who is knowingly a party to a default in convening a meeting as required by subsection (1) shall be guilty of an offence and liable to a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment."

Subsection (1) provides as to which members can requisition the directors for an extraordinary meeting, and what the directors are required to do ^D on receiving the requisition. The first to the fifth respondents should have requisitioned the directors of the sixth respondent for a meeting instead of convening it themselves.

Subsection (2) provides for what should be stated in the requisition, its signing, where it should be deposited, what documents may accompany it and the ^E signing of the accompanying documents. That is the procedure the first to the fifth respondents should have followed. They should have requisitioned the sixth respondent's directors for an extraordinary meeting, by depositing the requisition at the company's registered offices.

Subsection (3) provides for what requisitionists who qualify in terms of that subsection can do if the directors of the company do not act in terms of ^F subsection (1). They can themselves convene the meeting if they number more than fifty, or represent more than half of the total voting rights of all of them. They should state the objects of the meeting and must give twenty-one days' notice of such meeting. The first to the fifth respondents should therefore have requisitioned for a meeting in terms of subs (1), and if the ^G directors had failed to act in terms of subs (1) they themselves could, if they qualified, have acted in terms of subs (3).

Article 63 as read with s 126 of the Companies Act therefore lays down the procedure to be followed by a shareholder of the sixth respondent who wishes to call for an extraordinary general meeting. Section 128(1)(b), which the first to the fifth respondents relied on, defers to article 63. They therefore ^H

2008 (2) ZLR p245

Uchena J

^A used a wrong procedure. While they have a right to initiate an extraordinary meeting by requisitioning the directors, they had no right to convene the meeting themselves. They could only have convened the meeting themselves if, after complying with s 126(1), the directors had failed to comply with their requisition. It is not lawful for shareholders to convene an extraordinary meeting before requisitioning the directors to do so, and the directors have ^B failed to comply. The notice is therefore null and void and of no legal effect.

In the result the notice issued by the first to the fifth respondents convening an extraordinary general meeting on 23 October 2008 is declared null and void and of no legal effect.

The first to the fifth respondents shall bear the applicant's and the sixth ^C respondent's costs.

Kantor & Immerman, applicant's legal practitioners

Scanlen & Holderness, first to fifth respondent's legal practitioners.

Gill, Godlonton & Gerrans, sixth respondent's legal practitioners.

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Document 33 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/ANCHOR RANCHING (PVT) LTD v BENEFICIAL ENTERPRISES (PVT) LTD & ANOR 2008 (2) ZLR 246 (H)

ANCHOR RANCHING (PVT) LTD v BENEFICIAL ENTERPRISES (PVT) LTD & ANOR 2008 (2) ZLR 246 (H)

2008 (2) ZLR p246

Citation	2008 (2) ZLR 246 (H)
Case No	Judgment No. HB-103-08
Court	High Court, Bulawayo
Judge	Bere J
Heard	4 February 2008; 14 February 2008
Judgment	16 October 2008
Counsel	<i>P Ncube</i> , for the applicant
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Practice and procedure – *action – dismissal of for want of prosecution – application for dismissal – notification of application to other party necessary – whether application must be served on other party – D procedure under r 236(3) of High Court Rules not appropriate – only applicable to actions commenced by way of civil application, not to actions commenced by way of summons*

Headnote

Where reliance is sought on r 236(3) of the High Court Rules for the dismissal ^E of an application for want of prosecution, it is not competent to place the matter before a judge before notifying the other party to the application.

Quare, however, whether such notice entails service of the application or whether written notice of such application will suffice.

Rule 236(3) only applies to actions commenced by civil application. It does not apply to actions commenced by way of summons. In such actions, ^F where pleadings are closed and the plaintiff does not prosecute his claim, the defendant has numerous courses open, under Orders 16, 23, 24 or 26.

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 236(3)(b) ^G

Case information

P Ncube, for the applicant

Judgment

BERE J: In this case there is need to set out the background of this case in greater detail in order to fully appreciate the issues involved.

The applicant is Anchor Ranching (Pvt) Ltd, a duly registered company ^H

2008 (2) ZLR p247

Bere J

^A carrying on business from Anchor Yeast Farm, Bristol Road, Gweru. The applicant is the defendant in the main action which has led to the instant interlocutory application.

The first respondent is the plaintiff in the main action referred to above and is equally a duly registered company operating under the name Beneficial ^B Enterprises (Pvt) Ltd, t/a Kika Transport.

The second respondent, who is the second defendant in the main action, is an employee and driver of the applicant.

The third respondent, who is the third defendant in the main action, is a company duly incorporated in accordance with the laws of Zimbabwe, engaged in the business of providing insurance cover.

c In the main action, on 6 October 2004, the first respondent issued summons against the applicant, claiming certain sums of money from the applicant in respect of damages for loss suffered by the first respondent due to the damage of its 30-seater vehicle, and loss of business as a result of the alleged negligence by the second respondent in his driving conduct. The summons d and declaration were served on the applicant on 14 October 2004.

On 21 October 2004, the applicant entered appearance to defend and followed it up by filing and serving a request for further particulars on 28 October 2004.

On 21 December 2005, the first respondent filed and served its further particulars, prompting the applicant to file its plea on 20 January 2005, e which plea was served on the first respondent on 23 January 2006. On 24 January 2006, the first respondent filed a joinder of issues and served the same on the other parties.

From 24 January 2006 up until 2 November 2007, when the instant chamber application was filed, there was virtually nothing done on the matter. The f applicant stated that about twenty months lapsed without the first respondent doing anything to try and expedite the finalisation of the matter. There is no doubt there was an inordinate delay in trying to bring the litigation to finality.

The instant application

The applicant's reaction was to file the instant application seeking the g following order:

"It is ordered that

1. The first respondent's action in case number HC 3560/04 be and is hereby dismissed.
2. The first respondent be and is ordered to pay costs on an attorney/client scale, both for this matter and case number HC 3560/04."

h In essence, this is an application for dismissal of the plaintiff's case in the

2008 (2) ZLR p248

Bere J

main action for want of prosecution. a

In lodging this application, the applicant sought to rely on Order 32 r 236(3)(b) of the High Court Rules 1971.

When the application was placed before me as a chamber application, I directed that the application be made on "notice" to the other parties involved, which direction was subsequently complied with. b

For quite some time this court has had to deal with similar applications brought under the same provisions of the High Court Rules. For clarity's sake the relevant order, that is, Order 32 r 236(3) (b), as amended, reads as follows:

"236 Set down of application

- (3) Where the respondent has filed a notice of opposition and an opposing c affidavit and, within one month thereafter, the applicant has neither filed an answering affidavit nor set the matter down for hearing, the respondent, *on notice to the applicant*, may either –
 - (a) ...
 - (b) make a chamber application to dismiss the matter for want of prosecution, and the judge may order the matter to be dismissed with costs or make such other order on such terms as he thinks fit." (Emphasis added.) d

It is crystal clear from the wording of r 236(3) that where reliance is placed on this rule, it is not competent for an application to be placed before a judge before the other party is notified of such an application. There seem to be conflicting views as to whether the notice referred to in this rule entails "service" of the application or merely writing to the other party to notify him e of the application. Without endeavouring to make a proper determination on the matter (which process would require guided submissions), I am more inclined to hold the view that what was intended was service of the application itself on the other party

In invoking the above-mentioned order, the applicant's counsel, whilst ^f appreciating that the order applies to court applications, was of the view that the rule "must *mutatis mutandis* apply to actions commenced by way of summons."

This brings me to the main issue that I am being called upon to determine.

Does r 236(3)(b) apply to actions commenced by way of summons? ^g

It will be noted that Order 32 is headed "Application Procedure". A simple reading of the whole of that order shows, in very clear terms, that it is exclusively devoted to the manner and form which applications must take. Order 236(3) deals specifically with the aspects of filing of a notice of opposition, opposing affidavit, and an answering affidavit. There is no reference to the filing of pleadings in this rule. ^h

2008 (2) ZLR p249

Bere J

^a In my view, the legislature was clear in what was intended and it would be stretching it too far to argue that the same provisions should cover pleadings. The legislature would have been clear if it so desired. The words used are clear and they require no further stretched interpretation.

I am fortified in my interpretation of the rule in question in that the situation in which the applicant finds itself was envisaged by our rules and there are ^b numerous solutions provided which are at the disposal of a litigant when pleadings are closed.

The whole of Order 16 of the same rules deals specifically with the close of pleadings. When pleadings are closed a litigant has so many options which he can utilize. He has the option to apply for directions in terms of ^c Order 23. He also has the option to apply for discovery in terms of Order 24 of the same rules, as a prelude to holding a pre-trial conference in terms of Order 26 of the same rules.

These are the procedures which can be initiated by either party to the proceedings and these are specifically meant to enable a concerned party to ^d bring finality to litigation where the action has been commenced by summons.

For the above reasons, I am satisfied that it was not competent for the applicant to bring the chamber application in the manner it has.

The application is dismissed with no order as to costs.

^e *Coghlan & Welsh*, applicant's legal practitioners

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Document 34 of 49

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/TIMBE v REGISTRAR-GENERAL 2008 (2) ZLR 250 (S)

TIMBE v REGISTRAR-GENERAL 2008 (2) ZLR 250 (S)

2008 (2) ZLR p250

Citation	2008 (2) ZLR 250 (S)
Case No	Judgment No. S-25-08
Court	Supreme Court, Harare
Judge	Malaba JA, Ziyambi JA & Garwe JA
Heard	14 January 2008

Judgment	21 October 2008
Counsel	Mrs <i>N P Munangati</i> , for the appellant <i>M Chimombe</i> , for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Family law – *child – birth – registration of – correction of “error” in register – meaning of “error” – when Registrar may correct entry – courses open to Registrar when entry based on false information – not open to Registrar to cancel entry without court order* D 0020

Headnote

The appellant was the mother of two children. Before their birth she had married a man under customary law, unaware that he had been previously married under the civil law some 20 years earlier. After the birth of each child, the appellant and the man gave notice of the birth and its particulars to the Registrar for purposes of registration. As a result of the ^ε information they supplied, the man’s name was entered in the register as the father of each child. He loved and cared for the children as their father. It subsequently emerged that he could not, due to physical deformities, have been the father of the children, although he always acknowledged them as his. He was later killed in a car accident, and in a bid to prevent ^ϕ the children from sharing in the inheritance of his estate, the deceased’s relatives approached the respondent and asked him to direct that the birth certificates of the two children be cancelled. Purporting to act in terms of s 8(1) of the Births and Deaths Registration Act [*Chapter 5:02*], he cancelled the registration of the children’s births, on the ground that false information had been given that the deceased was their father. The ^ϑ appellant unsuccessfully sought an order in the High Court setting aside the respondent’s purported cancellation of the births.

Held, that the Registrar has the power under s 8(1) of the Act to direct the correction of any error in any register, whether it is a clerical error or an error of fact or substance, if he discovers the error himself or upon an application by any person. Under s 8(3), corrections shall be made ^η

2008 (2) ZLR p251

Malaba JA

^α without erasing the original entry. “Entry”, in relation to any register kept in terms of the Act, is defined in s 2(1) as including any information contained in a birth certificate which forms part of that register. Section 8(1) is the only section which gives the Registrar the power to correct an entry in a register without erasing the whole entry altogether. The subsection vests him with a discretionary power, exercisable only when ^β he has satisfied himself that what he is being called upon to correct is an error in the register. An error of fact or substance implies the existence of a state of mind in regard to the fact or state of facts but one which does not accord with the facts or state of facts in question. For purposes of exercising the powers of correction under s 8(1) of the Act, it would have had to be shown that the man had genuinely believed that he was ^γ the father of the children and had caused that belief to be entered in the register when in fact another man was the father of the children. That would have been an error of fact found to have been entered in the register. It would not have been enough for the respondent to find that the man was not the father of the children without relating that fact to ^δ his state of mind for the existence of an error of fact to be established.

Held, further, that cancellation of a birth certificate, on the other hand, has the effect of erasing the entry in the register. There is no section in the Act which gives the respondent power to cancel an entry in a register without an order of a court. The respondent did not find that there was an error of fact in the register relating to the entry of the name of the ^ε man as the father of the two

children; he found that there was a false entry in the register relating to the paternity of the children. If there was a false entry, it could be cancelled but only on the order of a court.

Legislation considered

Births and Deaths Registration Act [Chapter 5:02], ss 2(1), 8(1) and (3), 27(2)(a) and (4)(b)

Case information

Mrs *N P Munangati*, for the appellant

M Chimombe, for the respondent

Judgment

MALABA JA: This is an appeal against the judgment of the High Court given on 30 July 2007 dismissing with costs an application by the appellant for an order declaring that the decision by the respondent to cancel registrations of the births of two children of the appellant was void.

The facts of the case are these. The appellant is the mother of two children, *Kudzai Louisa Timbe* born on 6 June 1995 and *Kudakwashe Lisa Timbe*

2008 (2) ZLR p252

Malaba JA

born on 5 August 1997. The respondent is the officer-in-charge of the Central ^A Registering Office for all notices of births. He has the power, under s 8(1) of the Births and Deaths Registration Act [Chapter 5:02] ("the Act"), to direct the correction of any error in any register, whether it is a clerical error or an error of fact or substance, if he discovers the error himself, or upon an application by any person. ^B

In 1985, the appellant solemnized a customary marriage with one *Stanlake Gahadzikwa Timbe* in terms of the Customary Law Marriages Act [Chapter 5:07]. She did not know at the time that Mr Timbe had on 21 January 1963 solemnized a civil marriage with one *Grace Marara* in terms of the Marriages Act [Chapter 5:11]. The appellant *bona fide* believed that Mr Timbe was a bachelor. It was not suggested that she had knowledge of the existence of ^C the other marriage during the time she lived with Mr Timbe as husband and wife. Theirs was, therefore, a putative marriage.

After the birth of each child, the appellant and Mr Timbe gave notice of the birth and its particulars to the Registrar for purposes of registration. As a result of the information they supplied, the name of Mr Timbe was entered ^D in the register as the father of each child. He loved and cared for the children as their father.

In 2001, Mr Timbe had an altercation with the appellant's sister which resulted in him shooting her dead. At the trial, on a charge of murder, he raised the defence of provocation, the substance of which was that the dead woman ^E had humiliated him by mocking him in front of the children as being barren. On 30 October 2002, the court ordered that he be examined by a doctor to ascertain the truthfulness of the allegation that he had no sexual organs. The examination, which was conducted on 9 January 2003, revealed scars below both nipples suggesting that breasts had been removed. It also revealed that he had a small penis which was 4 cm long. Testicles were absent from both ^F scrotal sacs. The doctor did not express an opinion as to whether or not Mr Timbe was capable of having intercourse and bearing children. On the basis of the results of the medical examination, Mr Timbe was found guilty of culpable homicide.

Mr Timbe died in a car accident on 18 February 2004 on his way home from ^G collecting one of the children from school. Up to the time of his death, Mr Timbe had acknowledged himself as being the father of the two children.

After the death of the deceased, and in a bid to prevent the children from sharing in the inheritance of his estate, the deceased's relatives approached the respondent and asked him to direct that the birth certificates of the two children be cancelled. They alleged that the deceased could not father children ^H

2008 (2) ZLR p253

Malaba JA

A and produced a copy of the medical report on the examination conducted on the deceased by the doctor on 9 January 2003. They had also obtained an opinion on 1 March 2005 from a doctor who, after studying the contents of the medical report, said that it was not possible that the deceased could have been capable of fathering children. At a meeting of relatives of the deceased called by the respondent on 9 March 2005, the appellant denied B the allegations that the deceased was not capable of fathering children. She pleaded with the respondent not to cancel the registrations of the children's births without having first obtained an order from a court.

On 17 March 2005, the respondent had the registration of the births of the children cancelled on the ground that false information had been given that C the deceased was their father.

In the application before the High Court for a declaratory order, the respondent defended the decision to cancel the children's birth certificates on the ground that he was authorized to do so under s 8 of the Act. The section provides as follows:

D "8 Correction of error in register

(1) The Registrar-General may, subject to any regulations made in terms of section *twenty-six*, direct the correction of any error in any register, whether it is a clerical error or an error of fact or substance.

(2) Any person may, upon payment of the prescribed fee, apply to the Registrar-General for a correction to be made under subsection (1).

E (3) Corrections shall be made without erasing the original entry, and shall be authenticated by the signature of the Registrar-General or a registrar.

(4) The fee payable in terms of subsection (2) shall not be refunded unless the application is made in regard to an error which was made by the Registrar-General, a registrar or a member of their staff."

F Although Mrs *Munangati* argued strongly that the power given to the Registrar-General under s 8(1) of the Act did not cover a situation where the action taken would lead to a change of the status of the person whose birth was registered, the learned judge held that the cancellation of the registrations of the children's births by the respondent was *intra vires* s 8(1) of the Act.

The learned judge said:

G "Considering the facts before me, it is my view that the Registrar-General could act as he did in terms of s 8(1) of the Births and Deaths Registration Act [*Chapter 5:02*]. It allows the Registrar to correct any errors be they clerical or errors of fact or of substance in his registers. The Registrar-General after examining the medical reports presented to him and carrying out an enquiry as is confirmed by his papers, determined that the late Stanlake Timbe could not have fathered H the two minor children and proceeded to cancel the birth certificates.

2008 (2) ZLR p254

Malaba JA

In other words, he made a declaration that those two minor children could A not have been the late Stanlake Timbe's children and he was saying there was therefore an error of fact and substance in his register as the late Stanlake Timbe was indicated as the father of those children. In doing so, the Registrar-General was making an administrative decision in the exercise of his administrative functions as provided for in s 8(1)."

Regrettably, I am unable to agree with the learned judge in holding that B the respondent was exercising the powers vested in him under s 8(1) of the Act when he cancelled the children's birth certificates. "Entry", in relation to any register kept in terms of the Act, is defined in s 2(1) to include any information contained in a birth certificate which forms part of that register. Section 8(1) only gives the respondent the power to correct an entry in a C register, without erasing the whole entry altogether. Cancellation of a birth certificate has the effect of erasing the entry in the register. There is no section in the Act which gives the respondent power to cancel an entry in a register without an order of a court.

Section 8(1) vests the respondent with a discretionary power exercisable only when he has satisfied himself that what he is being called upon to correct is D an error in the register. An error of fact or substance implies the existence of a state of mind in regard to the fact or state of facts but one which does not accord with the facts or state of facts in question. For purposes of exercising the powers of correction under s 8(1) of the Act, it would have had to be shown that Mr Timbe had genuinely believed that he was the father of the children E and had caused that belief to be entered in the register when in fact another man was the father of the children. That would have been an error of fact found to have been entered in the register. It would not have been enough, as the learned judge thought, for the respondent to find that Mr Timbe was not the father of the children

without relating that fact to his state of mind, for the existence of an error of fact to be established.
F

As a result of a failure to comprehend the essence of an error of fact, the learned judge did not appreciate the fact that the respondent did not find that there was an error of fact in the register relating to the entry of the name of Mr Timbe as the father of the two children. The respondent found that there was a false entry in the register of the fact that Mr Timbe was the G father of the children. He said that the entry in the register was as a result of Mr Timbe, with the consent of the appellant, having given the Registrar false information on the fact of paternity of the children. It was for that reason that the respondent said he cancelled the children's birth certificates. The letter of cancellation dated 17 March 2005 clearly states that the birth certificates were cancelled "as false information was given at the time of H

2008 (2) ZLR p255

Malaba JA

a registration". In para 14 of the opposing affidavit, the respondent reveals that the decision to cancel was arrived at on the basis of information received after the registration of the births of the children. He said:

"Ad Paragraph 16

14.1 Evidence from experts in the medical field and affidavits from the deceased relatives confirming that the late Mr Timbe could not have children resulted B in the cancellation of the birth registration."

So the ground on which the birth certificates were cancelled was that when he had full knowledge of the fact that he was infertile or impotent and could not have intercourse and father children, Mr Timbe, with the consent of the appellant, fraudulently misrepresented to the Registrar through notices of C births of the children that he was the father and got his name entered in the register as the father of the children for the purpose of obtaining the registrations of births of the children. There could not be an error of fact if Mr Timbe and the appellant were found to have acted in concert and deliberately gave false information on the fact of the paternity of the children to the Registrar.

It is also important to note that a finding of the existence of an error in a D register attracts correction of the error whilst a finding that false information was given to a Registrar for the purposes of obtaining registration of a birth leads to the cancellation of the entry itself. Section 8(3) of the Act specifically prohibits the erasure of the original entry by the respondent in the exercise of his powers under s 8(1). A careful examination of the various provisions E of the Act shows that the power to order cancellation of an entry in a register vests in a court. The respondent can only cancel an entry in the Register upon an order of a court. Section 27(2)(a) of the Act makes it an offence to wilfully give any false information for the purposes of the registration of a birth of a child. Section 27(4)(b) provides that without derogation from its powers in any civil proceedings, a court may, at the conclusion of any F criminal proceedings, order the Registrar to delete or remove any false information or entry in the register. It was for a court to make a finding that the entry made in the register to the effect that Mr Timbe was the father of the children was false. As the respondent purported to cancel the birth certificates of the children without having been ordered by a court to do so his action was unlawful.

G The appeal succeeds with costs. The order of the court *a quo* is set aside and substituted with the following -

- "(1) The decision of the respondent to cancel the birth certificates of the minor children Kudzai Louisa Timbe (born 6 June 1995) and Kudakwashe Lisa Timbe (born 5 August 1997) is null and void. H
- (2) The respondent shall within seven days of this order cause to be issued to

2008 (2) ZLR p256

Malaba JA

the children, birth certificates containing the same particulars as were in A the register at the time the cancellation was effected.

- (3) The respondent is to pay the costs of the application."

ZIYAMBI JA & GARWE JA concurred.

Munangati & Associates, appellant's legal practitioners B

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

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Document 35 of 49

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/METRO INTERNATIONAL (PVT) LTD v OLD MUTUAL PROPERTY INVESTMENT CORP (PVT) LTD 2008 (2) ZLR 257 (S)

METRO INTERNATIONAL (PVT) LTD v OLD MUTUAL PROPERTY INVESTMENT CORP (PVT) LTD 2008 (2) ZLR 257 (S)

2008 (2) ZLR p257

Citation	2008 (2) ZLR 257 (S)
Case No	Judgment No. S-31-08
Court	Supreme Court, Harare
Judge	Malaba DCJ (in chambers)
Heard	29 October 2008
Judgment	29 October 2008
Counsel	<i>I A Kurawley</i> , for the applicant <i>R M Fitches</i> , for the respondent
Case Type	Application for extension of time
Annotations	Link to case annotations

Flynote

Appeal – extension of time within which to note appeal – application – delay due to legal practitioner not making enquiries about when pending judgment was to be handed down – not an acceptable explanation for non-compliance with rules

▫ **Legal practitioner** – conduct and ethics – duties – duty to ascertain whether pending judgment has been handed down or when it is to be handed down

Headnote

On 18 June 2008 an order for the ejectment of the applicant from the premises it occupied was made by the High Court. Judgment in the matter had been ^εreserved on 31 January. The applicant claimed that it had no knowledge that judgment had been given on 18 June 2008 until the Deputy Sheriff served a copy of it at its head office on 4 ^φOctober 2008 in execution of the writ of ejectment. On 7 October it applied for extension of time within which to note an appeal. The applicant's legal practitioner admitted that he did not at any time during the period between 31 January 2008 and 4 October 2008 contact the judge's clerk or the Registrar's office to inquire as to when judgment would be handed down. The only inquiry made was by a legal assistant on 26 August 2008 when she asked the judge's clerk whether the judgment was still pending. She said she was told that the judgment had not yet been given. It was her view that she did not find it necessary to confirm the inquiries by a letter because the status *quo* ^g*ante* was in favour of the applicant. As events turned out the statement that judgment had not yet been given was not true and the belief that the status *quo* *ante* continued to favour the applicant was misplaced.

Held, that in considering an application for condonation of non-compliance with its Rules or for an extension of time within which to note an appeal, ^h the court has a discretion, which it has to exercise judicially in the sense

2008 (2) ZLR p258

Malaba DCJ

that it has to consider all the facts and apply established principles ^a bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance; the explanation therefore; the prospects of success on appeal; the importance of the case; the respondent's interests in the finality of the judgment; the convenience to the court and the avoidance ^b of unnecessary delays in the administration of justice.

Held, further, that the applicant's legal practitioners were under a duty, having taken instructions to represent it in the application at the High Court, to make regular inquiries at the Registry, confirmed by letters, as to whether the judgment had been given and, if not when, it was to be handed down. A vigilant litigant interested in the speedy outcome of the application ^c would have satisfied himself that the legal practitioners made regular inquiries for the judgment. Lack of knowledge of a judgment due to failure to make necessary inquiries in circumstances where one is under a duty to do so cannot be an acceptable explanation for non-compliance with Rules of the court. The applicant could not remain inactive until notification of the judgment was given by the Registrar. ^d

Held, further, that in any event, there were no prospects of success on appeal: *inter alia*, the applicant was not entitled to the protection of a statutory tenant as it had not complied with the terms of the lease.

Cases referred to

Capital Alliance (Pvt) Ltd & Ors v Kafesu & Anor S-3-08 ^e

Maheya v Independent African Church 2007 (2) ZLR 319 (S)

Moffat Outfitters (Pvt) Ltd v Hoosein & Ors 1986 (2) ZLR 148 (S)

Case information

I A Kurawley, for the applicant

R M Fitches, for the respondent ^f

Judgment

MALABA DCJ (in chambers, in terms of r 31 of the Supreme Court Rules ("the Rules")).

This is an application for an extension of time within which to note an appeal against the judgment of the High Court given on 18 June 2008 granting to ^g the respondent an order of ejectment of the applicant from the commercial premises it is occupying at the Westgate Shopping Centre.

The respondent is the owner of the premises it had leased to the applicant for a period of 10 years with effect from 1 April 1997 to 31 March 2007 under an agreement of lease. Under clause 32.3 of the lease the parties agreed that the tenant would not without having first obtained prior written consent of ^h

2008 (2) ZLR p259

Malaba DCJ

^a the landlord transfer shares from any of its shareholders to a third party. The terms in which the obligation was undertaken by the applicant are worth re-stating. They were that:

"If the tenant is a company whose shares are not listed on a recognized stock exchange, no shares therein shall be transferred from its shareholders nor may any shares be allocated to any person other than such shareholders without the ^b landlord's prior written consent, which in the case of an allotment or transfer of shares which will still leave control of the tenant with the present shareholders, or of a transfer of shares to a deceased shareholder's heirs shall not be unreasonably withheld."

It is common cause that in breach of clause 32.3 of the agreement of lease 90 per cent of the shares held by the majority shareholder were transferred c to Alphaviv (Pvt) Ltd.

On 3 July 2007 a letter was written on behalf of the respondent by the chief property manager drawing the attention of the applicant to the breach of clause 32.3. The applicant was advised by the respondent's chief property manager as follows:

▷ "In light of the breach and developments at hand, and whilst we reserve our rights in terms of clause 31 of the lease agreement with respect to breach, we wish to advise that we will not be in a position to extend the Metro lease beyond the extension given up to 30 September 2007. Therefore take this as notice to vacate our premises on or before 30 September 2007."

Whilst the lease had been due to expire on 31 March 2007, the parties e agreed to extend the period of expiry to 30 September 2007 whilst awaiting a judgment of the Supreme Court in case No SC 83/06 which would have affected the contractual relationship between the parties. The Supreme Court judgment was handed down on 26 June 2007¹.

The applicant refused to vacate the premises after the expiry of the agreement of f lease. The respondent made an application to the High Court for an order of ejectment. At the end of hearing argument in the application the learned judge reserved judgment. The judgment was given on 18 June 2008.

There was no indication that the applicant intended to appeal against the judgment until it made an application for an extension of time within which g to note an appeal on 7 October 2008. The period of non-compliance with r 30(a) of the Rules requiring an appellant to institute an appeal within fifteen days of the date of the judgment appealed against is two months.

The explanation given in the founding affidavit deposed on behalf of the

2008 (2) ZLR p260

Malaba DCJ

applicant was that it had no knowledge that judgment had been given on a 18 June 2008 until the Deputy Sheriff served a copy of it at its head office on 4 October 2008 in execution of the writ of ejectment. The averment was that the applicant and its legal practitioners did not receive notification from the Registrar to the effect that judgment had been given on 18 June 2008.

The applicant's legal practitioner confirmed in the supporting affidavit that b he did not at any time during the period between 31 January 2008, when judgment was reserved, and 4 October 2008 contact the judge's clerk or the Registrar's office to inquire as to when judgment would be handed down. The only inquiry made was by a legal assistant on 26 August 2008 when she asked the judge's clerk whether the judgment was still pending handing c down. She said she was told that the judgment had not yet been given. It was her view that she did not find it necessary to confirm the inquiries by a letter because the status *quo ante* was in favour of the applicant. As events turned out, the statement that judgment had not yet been given was not true and the belief that the status *quo ante* continued to favour the applicant was misplaced. ▷

In *Maheya v Independent African Church* 2007 (2) ZLR 319 (S) at 323B-C it is stated that:

"In considering an application for condonation of non-compliance with its Rules, the court has a discretion which it has to exercise judicially in the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and e weighed one against the other are: the degree of non-compliance; the explanation therefore; the prospects of success on appeal; the importance of the case; the respondent's interests in the finality of the judgment; the convenience to the court and the avoidance of unnecessary delays in the administration of justice: *Bishi v Secretary for Education* 1989 (2) ZLR 240 (H) at 242D-243C."

The same principles are applicable to an application for an extension of time f within which to note an appeal: *Capital Alliance (Pvt) Ltd & Ors v Kafesu & Anor* S-3-08 at p 3.

It is clear that the applicant's legal practitioners were under a duty, having taken instructions to represent it in the application at the High Court, to make regular inquiries at the Registry, confirmed by letters, as to whether g the judgment had been given and, if not, when it was to be handed down. A vigilant litigant interested in the speedy outcome of the application would have satisfied himself that the legal practitioners made regular inquiries for the judgment. Lack of knowledge of a judgment due to failure to make necessary inquiries in circumstances where one is under a duty to do so cannot be an acceptable explanation for non-compliance with the Rules of h

Malaba DCJ

At the court. The applicant could not remain inactive until notification of the judgment was given by the Registrar.

In addition to the unacceptable explanation of the failure to note the appeal timeously, there are no good prospects of the appeal succeeding. The applicant admitted breach of clause 32.3 of the agreement of lease. It pleaded three ^B defences against the consequences of the breach being brought to bear upon it.

The first defence was that the respondent was estopped from denying knowledge of the change in the shareholding structure of the applicant because it dealt with the new shareholder for two years prior to raising the issue of shareholding in the applicant in the letter of 3 July 2007.

The defence of estoppel failed in the court *a quo* and there are no prospects ^C of it succeeding on appeal because the parties agreed under clause 37 of the agreement of lease that no representation, express or implied, which did not form part of the terms of the agreement would be binding on any of them. Any suggested authorization of the change in the shareholding structure of the applicant by the respondent which was not in the form of a written consent given prior to the change in the shareholding structure being ^D effected would be of no legal effect. It would not be what the parties agreed upon. The alleged representation the respondent is alleged to have made to the effect that it approved of the change in the shareholding structure of the applicant was not part of the terms of the contract of lease. In any case, the respondent denied that it knew that the third party had acquired the majority ^E shares in the applicant when it dealt with it. It averred that it got to know about the third party when the applicant asked for authority to sub-let the premises to it. There was nothing to suggest that the intended sub-lessee was in fact a majority shareholder in the applicant. The facts show that when the respondent had knowledge of the fact that there had been a change of shareholding in the applicant it wrote the letter of 3 July. The first paragraph ^F of the letter reads:

"We note with concern that there has been a transfer of shareholding in Metro International (Private) Limited without our consent. This is in breach of clause 32.3 of the existing lease agreement."

The knowledge of the change in the shareholding structure in the applicant ^G imputed to the respondent as the basis of the defence of estoppel was not borne out by the facts. What is clear from the papers is that, when the respondent got to know that there had been a change in the shareholding structure of the applicant without its written consent having been obtained, it got so concerned that it confronted the applicant with the information and accused it of breach of contract in the letter of 3 July. It is highly unlikely ^H that the respondent would conduct itself in that manner if it had previously

2008 (2) ZLR p262

Malaba DCJ

dealt with the third party with full knowledge that it was now the majority ^A shareholder in the applicant.

The second defence was that the respondent could not rely on the breach of contract by the applicant before giving it written notice to remedy the breach within 10 days of receipt of the notice as required under clause 31 of the agreement of lease. Clause 31 provides that: ^B

"If the tenant fails to pay any rent on due date or it commits any other breach of the lease and fails to pay such rent or remedy such other breach within 10 days after the receipt of written notice requiring it to do so ... the landlord shall have the right but shall not be obliged ... forthwith to cancel the lease and to resume possession of the premises"

Although the defence was raised by the applicant there are no prospects of ^C it succeeding on appeal. The reason is that the respondent did not seek to rely on the breach in the application for the order of ejectment against the applicant. The respondent relied on the expiry of the lease by the effluxion of time. That is why, in response, the applicant claimed that it had become a statutory tenant entitled to the protection from eviction under s 22(2) of ^D the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983) ("the Regulations").

That brings me to the third defence to the application. Accepting that the lease had expired on 30 September 2007, the applicant averred that it could not be evicted from the premises because as a

statutory tenant it enjoyed the protection under s 22(2) of the regulations. Section 22(2) provides that: ^E

"No order for the recovery of possession of commercial premises for the ejectment of a lessee therefrom which is based on the fact of the lease having expired, either by the effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee ...

(a) continues to pay the rent due, within seven days of due date and;

(b) performs the other conditions of the lease." ^F

At the time of expiry of the lease by effluxion of time, the applicant was still in breach of clause 32:3 of the lease. The breach meant that the applicant was in fact not performing the other conditions of the lease, even if it was paying rent. It did not become a statutory tenant to enjoy the protection under s 22(2) of the Regulations. In *Moffat Outfitters (Pvt) Ltd v Hoosein* ^G & Ors 1986 (2) ZLR 148 (S) Gubbay JA (as he then was) referred to the circumstances which a court must take into account in deciding whether the protection was available to a party claiming it. He said at p 152D-E:

"It is apparent that as a preliminary to its decision as to whether a statutory lessee is to be given the protection afforded by this provision the court must be satisfied not only that the rent is being paid within seven days of the due date but that ^H

2008 (2) ZLR p263

Malaba DCJ

^A the other conditions of lease as it was at the date of its expiration are being performed. A statutory lessee therefore who fails to perform any conditions of a lease will forfeit the protection to which he may otherwise have been entitled. See for example *Elher (Pty) Ltd v Silver* 1945 WLD 271; *Marshall v Ivory* 1951 SR 76; 1951 (2) SA 555 (SR) at 560 *in fine*–561A."

Mr *Kurawley* argued that under s 23 of the Regulations the applicant was ^B entitled to the benefit of all the terms and conditions of the original contract of lease. The contention was that the applicant was entitled to be given the written notice to remedy the breach within 10 days of receipt of the notice as required under clause 31 before it could be said to have forfeited the protection under s 22(2) of the Regulations.

Section 23 of the Regulations provides that:

^C "A lessee who by virtue of section 22, retains possession of any commercial premises shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of lease, so far as the same are consistent with the provisions of these regulations ...".

It is clear that the condition precedent to the entitlement to the benefits of ^D all the terms and conditions of the original contract of lease is that the party should be a statutory tenant retaining possession of the premises because he continues to pay the rent due within seven days of due date and performs the other conditions of the lease. He must be shown to be enjoying the protection from ejectment under s 22(2) of the Regulations for s 23 to apply.

In this case the applicant did not become a statutory tenant because it was ^E not performing the other conditions of the contract of lease at the time of its expiry by reason of breach of clause 32.3. Section 23 of the Regulations was not applicable to the applicant. There are no prospects of the third defence succeeding on appeal.

The application is accordingly dismissed with costs.

^F *Gollop & Blank*, applicant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

¹ See *Metro Intl (Pvt) Ltd v Old Mutual Property Invstm Corp (Pvt) Ltd & Anor* 2007 (1) ZLR 408 (S) — Editor.

Document 36 of 49**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/MUFUNDISI v RUSERE 2008 (2) ZLR 264 (H)

MUFUNDISI v RUSERE 2008 (2) ZLR 264 (H)**2008 (2) ZLR p264**

Citation	2008 (2) ZLR 264 (H)
Case No	Judgment No. HH-22-09
Court	High Court, Harare
Judge	Bere J
Heard	6 November 2008
Judgment	6 November 2008
Counsel	No appearance for the applicant <i>C Chipere</i> , for the respondent
Case Type	Urgent chamber application
Annotations	Link to case annotations

Flynote

Legal practitioner – *conduct and ethics* – refusal to accept court process – practitioner having obtained order in *ex parte* application – order granted erroneously – practitioner refusing to accept notice of set-down for fresh hearing – such conduct unethical and unacceptable

Practice and procedure – application – *ex parte* application – court's discretion to allow affected party to be heard – High Court Rules 1971 – r 244 D – proviso to – r 246(1) – purpose of these provisions – protection for litigants in *ex parte* applications

Practice and procedure – judgment – correction of – judgment or order erroneously granted in absence of party affected thereby – judge *mero motu* invoking provisions of r 449 of High Court Rules 1971 E

Headnote

The applicant sought and obtained an *ex parte* order which restrained the respondent from disposing of a certain motor vehicle. Upon having had his attention drawn to the respondent's notice of opposition to the applicant's application, the judge considered that the order should not F have been granted before affording the respondent an opportunity to be heard. Accordingly, he *mero moto* invoked the provisions of r 449 of the High Court Rules 1971, which allows a court to correct, rescind or vary any judgment or order erroneously granted in the absence of any party affected thereby. He arranged for the matter to be set down for further hearing, intending to advise the parties that he proposed to have the order granted *ex parte* rescinded and to hear both parties afresh and on equal footing before making a determination. The applicant's legal practitioner did not appear at the hearing; the evidence was that his firm had refused to accept service of the notice of hearing, and that the applicant's counsel, who happened to be at the court on the date of set-down, indicated that he would not attend. G

2008 (2) ZLR p265

Bere J

A *Held*, that judges are not endowed with the gift of infallibility and r 449 can, in certain circumstances, be invoked by the judge to rectify his error. Thus, the rule may be used where a

provisional order is erroneously granted in the absence of the respondent.

Held, further, that the purpose of the proviso to r 244 of the High Court Rules, 1971, and of r 246(1)(b) of the Rules, is to provide sufficient ^B safeguards for litigants who might otherwise be adversely affected by *ex parte* applications granted in terms of r 246(2).

Held, further, that it is both unethical and unprofessional for a legal practitioner to attempt to frustrate court process by refusing to accept service of a notice of set down in an attempt to cling to a provisional order granted ^C erroneously in the absence of the respondent. For a legal practitioner to advise his law firm to refuse to accept court process for whatever reason would represent an act of brutality to the rules of professional ethics. Such an act is clearly calculated to subvert court process and is unacceptable. It is unforgivable for a legal practitioner to conspire to defeat court process by arrogantly instructing his law firm to refuse to ^D accept court process in the misplaced hope that his client can hold onto a court order obtained *ex parte*.

Case cited

Zimbank v Masendeke 1995 (2) ZLR 400 (S)

Legislation considered ^E

High Court Rules 1971 (RGN 1047 of 1971), rr 244, 246 and 449

Case information

No appearance for the applicant

C Chipere, for the respondent

Judgment

^F **BERE J:** After perusing the papers filed of record and hearing the respondent's counsel on 6 November 2008, I granted the following order:

"IT IS ORDERED

1. That in terms of Order 49 r 499(1)(a) as read with Order 1 r 4C(a) of the High Court Rules, 1971, the provisional order granted *ex parte* by this court ^G on 27 October 2008 be and is hereby rescinded.
2. That the applicant be and is hereby given leave to set the matter afresh should he so desire.
3. That there be no order as to costs".

I did indicate at the time of granting this order that my reasons would follow. ^H Here they are:

2008 (2) ZLR p266

Bere J

The background ^A

In order to fully understand the issues in this case it is imperative that the background of this case be clearly laid down. This background can be summarised as follows:

On 27 October 2008, the applicant filed an urgent chamber application wherein he sought and was granted by me interim relief couched in the ^B following terms:

"Interim Relief Granted

Pending finalization of this matter, the applicant is granted the following order:

- (a) The respondent be and is hereby ordered not to dispose of or give possession of the Ford Bantam motor vehicle belonging to the applicant to a third party. ^C
- (b) The respondent be and is hereby ordered to furnish the applicant with an evaluation report prepared by a neutral valuer within forty eight hours thereof."

Service of Provisional Order

Service of this application or order shall be effected by the applicant's legal practitioners".

The provisional order in question was granted *ex parte*.

Subsequently, and upon my attention having been brought to the respondent's notice of opposition to the applicant's application, it dawned on me that the order that I had granted ought not to have

been granted before affording the other party an opportunity to be heard. ^Ε

Having carefully considered the options available, including allowing the provisional order granted to stand until such time as either the respondent had sought to have it discharged, or the applicant had taken the formal initiative to have the same order confirmed, I reasoned that, given the injustice my order had created against the other party (who had not been heard before the ^Ε order was granted), I should correct the situation *mero moto* by invoking the provisions of Order 49 r 449(1) (a) and (2) of the High Court Rules, 1971.

The rule in question is crafted as follows:

“(1) The court or a judge may in addition to any other power it or he may have, *mero moto* or upon application of any party affected, correct or rescind, or vary any judgment or order – ^Γ

(a) that was erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) ...

(c) ...

(2) The court or judge *shall not make any order* correcting or rescinding or varying a judgment or order unless satisfied that all parties whose interests may ^Η

2008 (2) ZLR p267

Bere J

^Α be affected have had notice of the order proposed” (my emphasis).

It was in the spirit of endeavouring to fully comply with the above-cited rule that I directed my clerk to set down the matter for hearing on 6 November 2008. It was on that date that I wished to advise both litigants that I intended to have the order granted *ex parte* rescinded and hear both parties afresh and ^Β on equal footing before making a determination.

On 6 November 2008 the applicant and his counsel did not arrive for the hearing. Only the respondent’s counsel and his client were present. I enquired from the respondent’s counsel if he had taken steps to notify his learned colleague of the hearing date and his response was in the affirmative.

He produced before me a certificate of service confirming that, indeed, the ^Γ applicant’s law firm had been served and was aware of the hearing date. I wish to specifically refer to that certificate of service. Part of that document read as follows:

“I, the undersigned REASON NDIWENI, a clerk in the employ of Messrs Mtombeni, Mukwasha, Muzawazi and Associates legal practitioners of record for the respondent in the above matter, do hereby certify that a true copy of ^Δ the NOTICE OF SET DOWN, was attempted to be served by handing a copy thereof to a receptionist within the employ of Messrs Madzivanzira and Partners, applicant’s legal practitioners, *who refused service on behalf of the applicant* on 6 November 2008 at 11.10 a.m. and explained the urgencies [*sic*] thereof ...” (my emphasis).

To further confirm that the applicant, through his counsel, was determined ^Ε to avoid the hearing of 6 November 2008, submissions were made to the effect that on the morning of the hearing date a Mr Gama, who was supposed to represent the applicant, had been seen here at the High Court attending to another matter and was specifically advised the instant case had been set down for hearing. Mr Gama was reported to have indicated in clear terms ^Ε that he would not attend “such a hearing”.

It is most unusual that a legal practitioner would advise his law firm to refuse to accept court process for whatever reason. I think such an attitude represents a brutal act against the rules of professional ethics as I perceive them. It is an act which is clearly calculated to subvert court process and such conduct is certainly unacceptable.

^Γ It is clear that the applicant, through his counsel, was determined to hold on to the provisional order, which he knew the other party would probably have succeeded in defending if she had been given an opportunity to be heard before that provisional order was granted. If I read the conduct of the applicant’s counsel correctly (which I am certain I did) such conduct is ^Η deplorable.

2008 (2) ZLR p268

Bere J

I am fully aware of the provisions of Order 32 r 246(2) of the Rules which ^Α allows an urgent chamber application to be determined on the papers without inviting either of the litigants for a

hearing. That rule must be understood by all and sundry to clearly violate the rules of natural justice, which require a party to be heard first before any order is made against him or her, and because of that, resort to this rule must be made sparingly. ^B

It is precisely because of this that r 244 of the Rules, which is relevant to r 246, has a proviso to the effect that;

“... before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations, in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent”. ^C

Of equally relevant significance is r 246(1)(b), which gives the court further discretion to “require either party’s legal practitioner to appear before him to present such further argument as the judge may require”.

In my view, all these provisions were inserted to provide sufficient safeguards against litigants who might be affected by *ex parte* applications, as in the instant case. ^D

It must be accepted that judges are not endowed with the gift of infallibility. They often make mistakes and, once such mistakes are noted, they must be addressed at the earliest possible opportunity to avoid perpetuating a miscarriage of justice. Rule 449 *supra* is one such rule which a judge can invoke in order to do justice between litigants. ^E

It is unforgivable for a legal practitioner to conspire to defeat court process by arrogantly instructing his law firm to refuse to accept court process in the misplaced hope that his client can hold onto a court order obtained *ex parte*.

I think legal practitioners who behave in such a manner are as bad as those who snatch judgments and notoriously cling on to them. It is both unethical ^F and unprofessional. McNally JA commented on such conduct in the case of *Zimbabwe Banking Corporation Ltd v Masendeke* 1995 (2) ZLR 400 (S) at 403. I associate myself completely with his remarks.

It was for these reasons that I made the order of 6 November 2008.

Mutombeni, Mukwasha, Muzawazi & Associates, respondent’s legal ^G practitioners

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Document 37 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/CHIRAMBA v MINISTER HOME AFFAIRS & ORS 2008 (2) ZLR 269 (H)

CHIRAMBA v MINISTER HOME AFFAIRS & ORS 2008 (2) ZLR 269 (H)

2008 (2) ZLR p269

Citation	2008 (2) ZLR 269 (H)
Case No	Judgment No. HH-29-09
Court	High Court, Harare
Judge	Hungwe J
Heard	11 November 2008
Judgment	11 November 2008
Counsel	<i>C Kwaramba</i> , for the applicants <i>P Ndlovu</i> , for the respondents
Case Type	Urgent chamber application

Annotations

Link to case annotations

Flynote**Criminal procedure** – arrest – child of arrested person – police having no right to detain child along with parent**Criminal procedure** – arrest – time for which an arrested person may be detained by police**Family law** – child – arrest – parent of child arrested by police – police having no right to detain child along with parent**International law** – treaties – human rights treaty – obligations of state parties – duty of state parties to refrain from acts which violate treaty and to guarantee enjoyment of rights contained in treaty**Headnote**

^eThe applicants, all activists in the main opposition party, were detained by the police. One of the applicants had a two year old child and the child was also taken away with its mother. For some two weeks the applicants were kept incommunicado. They had no access to their lawyers for ^fnearly two weeks. They were not informed of the reason for their arrest, and enquiries by their lawyers were met with denials that the applicants were in police custody at all. The applicants sought orders (a) declaring their arrest and continued detention unlawful; (b) requiring the respondents and all those acting through them or on their behalf to ^gpermit the applicants access to medical treatment at medical centres of their choices; and (c) directing the respondents produce the applicants before a High Court judge in chambers within two hours of the order being made or, alternatively, to take the applicants for a remand hearing at the magistrates court by a stated time, failing which the respondents should forthwith release all the applicants from custody.

^h*Held*, that Zimbabwe is a signatory to the International Covenant on Civil

2008 (2) ZLR p270

Hungwe J

and Political Rights. As a state party to this treaty, Zimbabwe is bound ^aby the obligations flowing from the treaty, which deals, *inter alia*, with the rights of persons who have been arrested and detained on criminal charges. The treaty places two types of obligations on states: firstly, the duty to respect and ensure human rights and, secondly, the duty to guarantee that those same rights are respected. The first set of obligations ^bis both positive and negative in nature; on the one hand the state must refrain (whether by act or omission) from violating human rights; and on the other the state must ensure that, through the adoption of whatever means necessary, such rights can be actively enjoyed. Section 13(3) of the Constitution guarantees the rights of persons who have been detained, and s 32(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ^crequires that a person who has been arrested must be brought before a judge or magistrate within 48 hours. The respondents had denied the applicants the protection of the law. Their conduct in doing so should be deprecated.

Held, further, that Zimbabwe was also a signatory to the Convention on ^dthe Rights of the Child and accordingly it must be seen, through the acts of its public officials, to be protective of the rights of the child. Article 16 of the Convention provided that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. Neither the Criminal Procedure and Evidence Act nor the ^eChildren's Act [*Chapter 5:06*] provided for a child in a situation like this; they dealt with young persons suspected of having committed criminal offences. The Prisons Act [*Chapter 7:11*] made provision in s 58 for dealing the unweaned child of a female prisoner. Section 84(1) of the Children's Act did not expressly address the plight of a baby taken by police who have arrested its mother but the prohibition against detention ^fof minors is implied in this section. The conduct of the respondents in this case did not in any way uphold this international obligation to protect and promote the rights of the child. To subject a two year old to the rigours of detention simply on the grounds that its mother may have committed some criminal offence is totally unconscionable and immoral, ^gmade worse by the denial of basic rights to the mother.

Held, accordingly, that the orders sought should be granted.

Case referred to

S v Makwakwa 1997 (2) ZLR 298 (H) ^H

2008 (2) ZLR p271

Hungwe J

Legislation considered ^A

Children's Act [*Chapter 5:06*], s 84(1)

Constitution of Zimbabwe 1980, s 13(4)

Criminal Procedure & Evidence Act [*Chapter 9:07*], ss 32(2) & 135(1)

Prisons Act [*Chapter 7:11*], s 58

International covenants and treaties considered ^B

Convention on the Rights of the Child, art 16

International Covenant on Civil and Political Rights 1966, art 9

Case information

C Kwaramba, for the applicants

c P Ndlovu, for the respondents

Judgment

HUNGWE J: In this application the applicants seek an order (a) declaring their arrest and continued detention unlawful; (b) requiring the respondents and all those calling through them or acting on their behalf to permit the ^D applicants access to medical treatment at medical centres of their choice; (c) directing the respondents or anyone calling through them or acting on their behalf to produce the applicants before a High Court judge in chambers within two hours of the order being made or, alternatively, take the applicants for a remand hearing at the magistrates court at or before 12.00 on 11 November 2008, failing which the respondents and all those calling through them or ^E on their behalf shall forthwith release all the applicants from custody and that thereafter no magistrates court should entertain the matter for remand purposes save for trial purposes, applicants having been duly summoned.

They also seek an order for costs on a higher scale.

The application was placed before me through the chamber book as an urgent ^F application on 6 November 2008. After perusing the papers I directed that the applicant serves the application on the respondents as well as on the office of the Attorney-General. I considered that the matter merited speedy consideration and that the rules of court relating to notice be dispensed with, in the interests of the rights of the applicants. The matter was to be set down for hearing the next day at 10.00.

^G The application is premised on an affidavit deposed to by applicants' counsel Mr Andrew Mukoni. He makes the following averments. The applicants are Fidelis Chiramba, Pieta Kaseke, Terry Musona, Fanuel Tembo, Mrs Mutemagau, Mr Manyemwe, Lloyd Tarumbwa and others. The third and fourth respondents are police officers responsible for the arrest and detention ^H of the applicants. The police officers operate under the direction and control

2008 (2) ZLR p272

Hungwe J

of the first and second respondents. ^A

On 3 November 2008 Mr Makoni was instructed to represent all the applicants. From the information he gathered the applicants were being dealt with by either CID Homicide Section or CID Law and Order Section at Harare Central Police Station, although they had been arrested in places around Banket and Chinhoyi. ^B

Upon visiting CID Law and Order section, the officer-in-charge of that section professed ignorance of the matter. When he then visited homicide section, he learnt that the third respondent was handling the matter. Upon requesting audience with him, the latter was said to be too busy to see the applicants' counsel. He also gathered information concerning the detention of the applicants at various police stations around Harare. ^c

A visit to these stations, however, indicated that the applicants had been released into the custody of the fourth respondent.

He concluded that the police were detaining the applicants illegally for the reason that the 48-hour period permitted at law had long expired. He also believed that the police were holding the applicants incommunicado. He ^d feared that the applicants were being subjected to torture, ill-treatment or other inhuman and degrading treatment, as access to legal practitioners was being denied. He believed that police had no legal basis for detaining the applicants, hence they had failed to take the applicants to court within 48 hours as required of them by law. He believed that the applicants were being ^e subjected to such ill-treatment for the purposes of unlawfully extracting from them confessions without legal representation. He therefore prayed that the applicants be produced at court or be released.

At the hearing Mr *Ndlovu*, for the respondents, indicated that the police did not have the applicants in their custody and therefore were unable to release the applicants. He pointed out that the police deny arresting the applicants ^f as no evidence of such an arrest had been produced by the applicants.

In view of the attitude of the respondents, the matter was postponed to 11 November 2008 to allow the applicants to file further affidavits to address the following questions:

- (a) where are the applicants detained? ^g
- (b) what are their detention book numbers, if any?
- (c) under what circumstances were they detained?
- (d) on whose authority are they detained?
- (e) what are the applicants full and further particulars?
- (f) what other persons were arrested and detained under similarly ^h

2008 (2) ZLR p273

Hungwe J

^a circumstances as the present applicants?

- (g) what is the registration number or numbers of the vehicles which conveyed the applicants if any? and
- (h) whether any criminal charges were preferred against any of the detainees.

The respondents, particularly the third and fourth respondents, for their ^b part were directed to file affidavits answering the allegations raised in the founding as well as the supplementary affidavit.

On 10 November 2008 Mr Makoni filed his supplementary affidavit as directed by the court. The respondents did not file any affidavit, despite being directed to do so by the court.

^cIn his supplementary affidavit he makes the following averments at paras 5 and 6:

- "5. After the postponement of the matter, I drove to Mabelreign police station in the company of the defence team comprising of myself, Alec Muchadehama and Charles Kwaramba. We gathered the following facts. Pieta Kaseke, the seventh applicant, was detained at the police station under Detention ^d Book Number I55/OS 2 November 2008. She was booked in by Detective Assistant Inspector Chibaya for Chief Superintendent Makedenge of CID Homicide. She resides at 167 Munashe Street, Kuwadzana Township, Banket. She was released by Detective Sergeant Muuya of CID Homicide on behalf of Chief Superintendent Makedenge. We then visited Avondale police station and discovered that Pieta Kaseke had been detained at ^e the station prior to her detention at Mabelreign police station, She was detained under DB 1122/08. She was detained by Detective Assistant Inspector Phiri for Makedenge on 1 November 2008 and booked out on 2 November 2008. Her whereabouts are still unknown. We believe she is still in the hands of the police with her minor child,
6. At Avondale police Station we also gathered that the first applicant was also ^f at some stage detained there, He was detained at the station on 3 November 2008 under detention number DB 1126/08 and released by Detective Chief Inspector Paradza and Detective Inspector Chibata for C/S

Makedenge on 4 November 2008. His whereabouts are still unknown. We have reason to believe he is still in police custody. Prior to this detention he was detained at Rhodesville police station. His detention number at Rhodesville was DB 1886/08. He was in these cells on 31 October 2008 from 09h00 to 15h00 ^g when he was booked out by D/C Muuya of CID Homicide allegedly for CID Law and Order. The first applicant was again detained at Highlands police station and Borrowdale police station before he was taken to Avondale police station. We failed to get the detention numbers at these two police stations as the police were less co-operative. The first applicant resides at number 825 Kuwadzana Township, Banket. His ID number is [number ^h supplied].”

2008 (2) ZLR p274

Hungwe J

He recites that he ascertained that the third applicant was once detained at ^a Rhodesville and gives his particulars. The third applicant was detained under DB 1892/08 at Rhodesville and released by Detective Sergeant Mavunga of CID Homicide on 4 November 2008.

In respect of the rest of the applicants, Mr Makoni says he was unable to obtain any information regarding where they were detained after they were ^b arrested or where they currently were detained. This was in spite of his visiting various police stations around the city like Avondale, Borrowdale, Braeside, Highlands, Mabelreign, Matapi, Mbàrà, Marlborough and Rhodesville. Despite diligent inquiry, he was unable to ascertain full particulars of certain of the detainees e.g. the fifth applicant. He was however able to confirm that the applicants were being accused of contravening ^s 24 of the Criminal ^c Law (Codification and Reform) Act [*Chapter 9:23*] i.e. training insurgents, bandits, saboteurs and terrorists. He averred that after his discussion on 4 November 2008 with Detective Chief Inspector Paradza, he was under no illusion that all the detainees were held by the police and that Chief Superintendent Makedenge was handling the case. Paradza referred all ^d questions to Makedenge who refused to entertain counsel.

A further supplementary affidavit was obtained from the first applicant's son, one Ponsiano Chiramba. According to him, police came into their neighbourhood on 30 October 2008 and arrested Larry Gaka, the eighth applicant. No-one had the presence of mind to record the police vehicle registration number. This occurred at night. The following day, 31 October ^e 2008 around 03.00, police struck again and arrested his father together with the second and third applicants. His father is the losing senatorial candidate for Zvimba in the March 2008 harmonised elections. He believes the arrests were politically motivated as all those arrested are MDC activists. The police took away his father's fully licensed .303 rifle. His father, the first applicant, ^f is a 71-year-old retired police officer.

Ponsiano brought food for his father at Rhodesville and later Highlands police stations, but when he attempted to do the same at Borrowdale he was met with resistance. Police refused to disclose his father's whereabouts, saying only that they were under instructions not to divulge such information, ^g

The ninth, tenth and eleventh applicants were arrested whilst driving from MDC Headquarters in Harare. They are resident in Banket, Their motor vehicle and themselves have not been seen since their arrest, Ponsiano was surprised to hear that the police deny any knowledge of the whereabouts of the applicants.

Faced with this evidence, Mr *Ndlovu*, for the respondents, reconsidered his ^h

2008 (2) ZLR p275

Hungwe J

^a position and advised the court at the resumed hearing on 11 November 2000 that he was no longer opposed to the granting of the final order sought by the applicants were seeking. The change in his altitude is not only legally correct but commendable. I say this for the following reasons.

The Republic of Zimbabwe is a signatory to the International Covenant on ^b Civil and Political Rights, 1966 (ICCPR). It acceded to this international treaty. As a state party to this international human rights treaty, the Republic of Zimbabwe is bound by the international treaty obligations flowing from the treaty. It may well be necessary to recite the relevant provisions of the ICCPR here.

Article 9 of the International Covenant on Civil and Political Rights, 1966, ^c provides thus:

- “1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with

- such procedure as are established by law,
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons ^d for his arrest and shall be promptly informed of any charges against him.
 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial ^e proceedings, and, should occasion arise, for execution of the judgement.
 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if his detention is not lawful."

^f Generally speaking, the treaty places two types of obligations on States: firstly, the duty to respect and ensure human rights and, secondly, the duty to guarantee that those same rights are respected. The first set of obligations is both positive and negative in nature: on the one hand, the State must refrain (whether by act or omission) from violating human rights; and on the other hand the State must ensure that, through the adoption of whatever means ^g necessary, such rights can be actively enjoyed.

In fulfilment of the positive duty to ensure the protection, enjoyment and promotion of the rights set out in the ICCPR, the Republic of Zimbabwe has given prominence to these rights by devoting an important part of its Constitution to these rights (Chapter III The Declaration of Rights ss 11 to 26),

^h Section 13 of the Constitution of the Republic of Zimbabwe guarantees the

2008 (2) ZLR p276

Hungwe J

protection of the right to personal liberty. Section 13(3) thereof provides ^a that any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language which he understands, of the reasons of his arrest or detention and shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and hold communication with him. Subsection (4) further provides that any person who ^b is arrested or detained upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not tried within a reasonable time, then, without any prejudice to any further proceedings that may be brought ^c against him, shall be released either unconditionally or upon reasonable conditions necessary to ensure that he appears at a later date for trial or proceedings preliminary to trial

The meaning of the right, contained in s 13(4) of the Constitution, was considered by this court in *Ss v Makwaka* 1997 (2) ZLR 298 (H). The court ^d noted that s 32(2) of the Criminal Procedure and Evidence Act [Chapter 9:07] says:

"... a person arrested without warrant shall as soon as possible be brought to a police station or charge office and, if not released by reason that no charge is to be brought against him, may be detained for a period not exceeding forty-eight hours, unless he is brought before a judge or a magistrate, or a warrant for his ^e further detention is obtained in terms of section thirty-three."

The enactment of this provision further demonstrates the State party's commitment to the upholding and promotion of the above rights. The judicial interpretation rendered to it is consistent with the spirit of that treaty.

From the above, it is clear that the police on or about 30 October 2008 took ^f all the applicants into their custody. They were required by law to advise the applicants of the reasons for their arrest. The police did not do so almost 14 days after they effected an arrest! They were legally obliged to afford the detained persons access to legal counsel as soon as possible. The police did not do so 14 days after arresting the applicants. In terms of the Constitution of Zimbabwe, the police were obliged to release the applicants if they failed ^g to charge them with a criminal offence or bring them before a court of law within 48 hours of their arrest. Again, the police did not do such a basic thing. When they were sued, the police denied any knowledge of the applicants when clearly they knew or ought to have blown that the applicants were being held in their custody. When I asked Mr *Ndlovu* at the hearing why his clients had not indicated some willingness to act according to the law in view of his ^h

Hungwe J

A advice to them, his response was that both third and fourth respondents had taken leave of absence from their duties. No-one was prepared to deal with the matter. Such conduct by the police ought to be deprecated. Being officers of this court, the respondents ought to have known better than to deny such a notorious fact as the detention of the applicants. This denial has placed their counsel in a position where he can hardly oppose the order sought. B The respondents have denied the applicants the protection of the law. The respondents have permitted the applicants to be detained *incommunicado*. People are at risk of torture or other forms of ill-treatment if they are detained *incommunicado*. The risk increases the longer they are held, as this allows for a longer period for injuries to be inflicted and visible marks of these injuries C to fade. Further, detainees have a right of access to legal advice without delay. They should be able to consult with a lawyer in private while in custody, to have a lawyer present during interrogations and to representing them when they appear in court. Lawyers should be able to advise and represent their clients in accordance with professional standards free from intimidation, hindrance, harassment and without improper interference from any quarter. D This is trite. No authority is required for stating the obvious.

There is one more disturbing feature in this saga. The respondents have not denied it either orally through Mr *Ndlovu* or by their action. It is the detention of a two-year-old alongside its mother. It hardly needs me to point out that, being a signatory to the Convention on the Rights of the Child, the E Republic of Zimbabwe must be seen, through the acts of its public officials, to be protective of the rights of the child. One of the applicants was arrested and taken away together with her two year old baby. There is no suggestion that the baby was suspected of having committed, or being about to commit a criminal offence at the time. There appears to be no provision in our law as it currently stands as to how the police should deal with, such a situation,

F Section 135(1) of the Criminal Procedure and Evidence Act [Chapter 9:07] says that when a person under the age of eighteen years of age is accused of any offence other than treason, murder or rape, any judge, magistrate or police officer who has power under that part to admit the said person too bail may, instead of detaining him, (a) release him without bail and warn G him to appear before a court H or magistrate at a time and on a date fixed by such a person; or (b) release him without bail to the care of the person in whose custody he is and warn that person to bring him or cause him to appear before a court or magistrate at a time and on a day then fixed; or (c) place him in a place of safety as defined in s 2 of the Children's Act [Chapter 5:06] pending his appearance before a court or magistrate or until he is dealt H with according to law.

Hungwe J

Section 58 of the Prisons Act [Chapter 7:11] provides that, subject to such A conditions as may be specified by the Commissioner, any unweaned infant child of a female prisoner may be received into prison together with its mother and may be supplied with clothing and necessities at the public expense, provided that, when such child has been weaned, the officer in charge, on being satisfied that there are relatives or friends of the child able and willing B to support it, shall cause such child to be handed over to such relatives or friends. If he is not so satisfied, shall hand over such child to the care of such welfare authority as may be approved by the Commissioner for the purpose.

Section 84(1) of the Children's Act [Chapter 5:06] provides that a child or young person who is charged with an offence shall not before conviction be detained in a prison or police cell or lock-up unless his detention is necessary C and no suitable remand home is conveniently available for his detention.

It is clear that all three statutes address the position of a child suspected of having committed a criminal offence. The Children's Act does not expressly address the plight of a baby taken by police who have arrested its mother but, in my view, the prohibition against detention of minors is implied in this D section. Article 16 of the Convention on the Rights of the Child provides thus:

"Article 16 — protection and privacy

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference E or attacks."

In any event, I hold that the protection afforded to children is over and above that set out in the Constitution and other statutes. There is need, however, for the appropriate Act to expressly state this prohibition in clearer terms, as it appears a lacuna exists in our law as presently constituted. ^F

The conduct of the respondents in this case does not in any way uphold this international obligation to protect and promote the said rights.

It is not sufficient to pass legislation which recognizes the protective rights set out under international covenants and the Constitution as well as other domestic laws when in practice the public face of the State acts in flagrant ^G breach of such protection afforded by the law. There must be adequate recourse in cases of breaches being proved before the courts.

To subject a two-year-old to the rigours of detention simply on the grounds that its mother may have committed some criminal offence is totally unconscionable and immoral, This is made worse by the denial of basic rights to the mother in the present case. It cannot be over-emphasised that the ^H

2008 (2) ZLR p279

Hungwe J

A police can only act within the law. No-one is above the law or below it. In the present case, the third and fourth respondents have callously demonstrated the affinity to act as if they were above the law.

Despite the fact that I directed that they file affidavits in answer to the allegations personally against them none were forthcoming. I assume they ^B have nothing to say for themselves in view of their blatant breach of the clear provisions of the law. I will therefore make findings without having their side of the story since they have declined the opportunity to respond.

The applicants seek an order declaring their arrest and continued detention unlawful. They also seek an order requiring the respondents and all those acting through them or on their behalf to permit applicants access to medical ^C treatment at medical centres of their choices. Further, the applicants seek an order directing the respondent or anyone calling through them or on their behalf to produce applicants before a High Court judge in chambers within two hours of the order being made or, alternatively, take the applicants for a remand hearing at the magistrates court at or before 12.00 on 11 November 2008, failing which the respondents and all those calling through them or ^D acting on their behalf shall forthwith release all applicants from custody and that thereafter no magistrates court should entertain the matter for remand purposes save for trial purposes, applicants having been duly summoned.

Because at the end of the hearing there was no opposition to the order sought, I am of the view that costs on a higher scale should be reserved for ^E those cases where there is malicious opposition. Had the applicants sought an order for costs personally against the third and fourth respondents, I may have favourably considered granting it in view of the attitude displayed by the two to the present the proceedings. In the event I will grant the following final order: ^F

1. The treatment and continued detention of the applicants beyond the statutory 96 hour period be and is hereby declared unlawful.
2. That the respondents and all those calling through them or acting on their behalf be and are hereby ordered to take applicants for a remand hearing at the nearest magistrates court at or before 16h00 on 11 November 2008, failing which the applicants are entitled to their immediate release. ^G
3. In the event of the State deciding to charge the applicants for any offence arising from the allegations presently under investigating, then the police may proceed by way of summons.
4. The respondents and all those calling through them or acting on their behalf shall forthwith allow the applicants access to their legal practitioners, ^H relatives and to medical treatment at medical facilities of their choice.

2008 (2) ZLR p280

Hungwe J

5. This order shall stand notwithstanding the noting of any appeal. ^A

6. This order shall be served by the applicants' legal practitioners or the Deputy Sheriff.

Mbidzo, Muchadehama & Makoni, applicant's legal practitioners

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Document 38 of 49**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/S v GWANDE & ANOR 2008 (2) ZLR 281 (H)

S v GWANDE & ANOR 2008 (2) ZLR 281 (H)**2008 (2) ZLR p281**

Citation	2008 (2) ZLR 281 (H)
Case No	Judgment No. HH-101-08
Court	High Court, Harare
Judge	Omerjee J
Heard	15 November 2008
Judgment	15 November 2008
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure – plea – guilty plea – questioning of accused by magistrate – need to phrase questions carefully to ensure accused understands what he is pleading guilty to – disclosure of facts by prosecutor – need for court to ensure that prosecution discloses sufficient facts – use of State's outline of facts – need to ensure that accused has actually agreed ^D with such outline

Criminal procedure – trial – conduct of – duties of magistrate – magistrate's duties towards accused persons

Headnote

Magistrates owe enormous duties toward unrepresented accused persons. ^E The magistrate is the primary bulwark defending the ignorant or impoverished against the potential injustices wrought through an excess of zeal, pressure of work, administrative inefficiency or plain ineptitude in the investigation and prosecution of offences.

Where the accused person pleads guilty, and the court proceeds in terms of s 271(2)(b)(i) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], ^F the magistrate is duty bound to ensure that the prosecutor has disclosed sufficient and adequate facts, which are capable of informing, not only the court, but also the accused, precisely what the allegations against him are. Where the prosecution fails to provide or disclose adequate facts in support of the charge, it must be directed to do so: the magistrate ^G must *mero motu* invoke the provisions of s 177(1) of the Act and direct the prosecution to provide further particulars. Failure by the magistrate to ensure prior disclosure of adequate and sufficient facts amounts to a misdirection and offends against the accused person's constitutional right to be afforded a fair trial, in particular, the right to be

informed, in detail, of the nature of the offence charged as guaranteed by s 18(3) ^h (b) of the Constitution.

2008 (2) ZLR p282

Omerjee J

The purpose of the enquiry in terms of s 271(2)(b)(i) of the Act is to ensure ^a that the accused's plea of guilty is an unqualified or unequivocal and genuine plea. The magistrate can only satisfy himself of this if he asks questions which are carefully formulated by marrying the charge, the essential elements and the particular facts of the case. Merely paraphrasing the definition of an offence will not assist the accused to understand the ^b import of the elements, more so if they are of a technical legal nature.

Magistrates and prosecutors should desist from the practice, which appears to be common, of simply using the State's outline of its case when the accused tenders a guilty plea. The State outline is not based on facts which the accused has given prior agreement to. The use of the State outline exposes the accused to the danger of being convicted on facts that he ^c has not been given an opportunity to carefully reflect on and has the real potential of the accused being severely prejudiced, in the sense that he may be convicted on the basis of facts which he may not agree with but which facts aggravate the offence and lead to a more severe punishment than warranted. The correct procedure should be that if, in a contested trial, the accused pleads guilty to the charge, the magistrate should take ^d a short recess to allow the prosecutor to interview the accused and draw up a statement of agreed facts based on the information gathered.

Cases cited

S v Machokoto 1996 (2) ZLR 190 (H) ^e
S v Matimbe & Ors 1984 (1) ZLR 283 (H)
S v Matimbe HH-215-03
S v Tau 1997 (1) ZLR 93 (H)

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 177, 271(2) ^f (b)(i) and (ii)

Judgment

OMERJEE J: The accused person, Norman Gwande, was jointly charged with one Tafaana Dangarembizi on a charge of stock theft as defined by s 114 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ^g ("Criminal Code").

On the date of arraignment, his co-accused pleaded not guilty whereas he tendered a guilty plea, necessitating a separation of trials.

The trial court proceeded to carry out what it purported to be an enquiry in terms of s 271(2)(b) of the Criminal Procedure and Evidence Act ("the Act") and convicted the accused on his own plea of guilty. He was sentenced to ^h

2008 (2) ZLR p283

Omerjee J

^a 10 years' imprisonment of which 12 months were suspended on the usual conditions.

The record has come before me by way of automatic review.

The state outline captures the facts, which brought rise to the charges against the accused in the following terms: ^b

01. The complainant in this case is Cyprian Tsuro a male adult who resides at Plot 4 Cotter farm, Marondera and is the plot holder.
02. The accused persons in this case are Norman Gwande, a male adult who resides at Bemba farm, Marondera and Tafaana Dangarembizi, a male adult who resides at Rapid farm, Marondera and is employed. ^c

03. On the date to the prosecutor unknown but in the month of May 2008 the two accused persons proceeded to the complainant's cattle pen and stole one black ox. The accused persons slaughtered the beast near the bush and sold the meat to some locals.
04. On 12 June 2008, the accused person was spotted with [sic] members of the neighbourhood watch committee within the scene looking for ^o transport to Marondera. The accused person was arrested which led to the arrest of the other accused person was at the residence in Rapid Farm, Marondera.
05. The hide of the stolen ox was recovered at the scene and can also be produced in court as an exhibit. ^e
06. The value of the stolen ox is \$600 billion and nothing was recovered.
07. The State would submit that the accused persons had no right to act in the manner they did.

Based on these inelegantly drafted, scanty and meaningless facts the magistrate proceeded, with indecent haste, to conduct what he purported to ^f be the enquiry envisaged by s 271(2)(b) of the Act.

Before I deal with the magistrate's enquiry, I think it is important to once again remind magistrates that they owe enormous duties toward unrepresented accused persons. As stated in s v *Tau* 1997 (1) ZLR 93 (H) at 99:

"The vast majority of criminal prosecutions are against unrepresented persons. ^g The magistrate is the primary bulwark defending the ignorant or impoverished against the potential injustices wrought through an excess of zeal; pressure of work; administrative inefficiency or plain ineptitude in the investigation and prosecution of offences."

One such duty of a magistrate directly emanates from the requirements of s 271(2)(b)(i) of the Act i.e. that a magistrate has a duty to "explain the ^h charge and the essential elements of the offence to the accused *and to that*

2008 (2) ZLR p284

Omerjee J

end require the prosecution to state, in so far as the acts or omissions on ^a which the charge is based are not apparent from the charge, on what acts or omissions the charge is based" (my emphasis).

A magistrate is, therefore, duty bound to ensure that the prosecutor has disclosed sufficient and adequate facts, which are capable of informing not only the court but also the accused, precisely what the allegations against ^b him are. The accused has the right to be fully appraised of the facts relied upon by the prosecution, to enable him to make an informed decision as to what plea to tender in answer to the charge. Similarly, the magistrate needs to know the full facts because it is from these that he will formulate meaningful questions when canvassing the essential elements of the charge in fulfilment of the requirements of s 271(2)(b). ^c

In circumstances where the prosecution fails to provide or disclose adequate facts in support of the charge, they must be directed to do so, that is to say, a magistrate must *mero motu* invoke the provisions of s 177(1) of the Act and direct the prosecution to provide further particulars. This sections reads:

"The court may either before or at the trial, in any case if it thinks fit, direct that ^d particulars be delivered to the accused of any matter alleged in the indictment, summons or charge, and may, if necessary, adjourn the trial for the purpose of the delivery of such particulars."

Failure on the part of a magistrate to ensure prior disclosure of adequate and sufficient facts amounts to a misdirection and offends against the accused person's constitutional right to be afforded a fair trial, in particular the right ^e to be informed, in detail, of the nature of the offence charged as guaranteed by s 18(3)(b) of the Constitution.

Turning to the present case, I have already quoted *verbatim* the state outline produced by the prosecution in support of the charge against the accused. It is obvious from its brevity that it failed to adequately inform the accused ^f and for that matter the magistrate of the acts or omissions on which the prosecution were basing the charge. The outline as can be seen raised more questions than answers. Questions such as –

1. Did the complainant identify the recovered hide as that belonging to his stolen ox?
2. Was it the accused who, through indications, led to the recovery of the ^g hide?

3. Were any of the buyers identified and questioned?
4. Was the accused identified by any of the alleged buyers as the person who sold them the meat from the stolen ox?
5. In short, how was the accused linked to the theft? ^h

2008 (2) ZLR p285

Omerjee J

^A The scanty information contained in the state outline fails to answer a single one of these pertinent questions resulting in the magistrate's purported canvassing of essential elements to be similarly scanty, as a consequence of which there was a complete failure to achieve the object of the enquiry envisaged by s 271(2)(b) of the Act.

^B In this regard, the purported enquiry conducted by the magistrate comprised six short questions prompting an equal number of monosyllabic responses from the accused. The sufficiency of the responses could not inspire any confidence that the accused "understood the charge and the essential elements of the offence and that his plea of guilty was an admission of the elements of the offence and of the acts or omissions stated in the charge or by the ^Cprosecutor" (see s 271(2)(b) (ii)).

To demonstrate the magistrate's failure, I will recite the full enquiry as appears on record. It went like this:

Q. Are the facts true and correct?

A. Yes ^D

Q. Any variations?

A. No

Q. Do you admit that on a date unknown to the prosecutor but in the month of May 2008 and at Plot 4 Cotter farm, Marondera you took one ox belonging to Cyprian Tsuro? ^E

A. Yes

Q. Intending to deprive complainant permanently of his property?

A. Yes

Q. Any lawful right? ^F

A. No

Q. Any defence to offer?

A. No.

I consider that these questions failed to explain to the accused the essential elements of the particular charge he was facing. The enquiry, it must be ^Gremembered, is the mechanism used to ensure that "prior to conviction the magistrate satisfies himself, beyond doubt, that the accused's plea of guilty or admission to the charge is an unqualified or unequivocal and genuine plea". See *s v Matimbe & Ors* 1984 (1) ZLR 283 (H). The magistrate can only satisfy himself if he asks questions which are carefully formulated by marrying the charge, essential elements and the particular facts of the case. ^H As stated by Gillespie J in *s v Machokoto* 1996 (2) ZLR 190 (H) at 200G:

2008 (2) ZLR p286

Omerjee J

"Where it is necessary to invoke this provision, then the essential elements of the ^A offence must be explained in such a way as is calculated to inform the accused, if unrepresented, of the nature of the charge in sufficient clarity and detail as will suggest to him, in his knowledge of the matter, whether he has a defence to offer. Obviously, I do not intend to imply that the magistrate should be suggesting defences to the accused. On the other hand, it must not be overlooked that where a person on trial has not had the benefit of legal advice, the only possible ^B source of independent assistance towards an understanding of the nature of his predicament will be the bench. The mere fact that the person wishes to plead guilty is no reason to be cursory in the explanation of essential elements. On the contrary, it is precisely because an admission of guilt is tendered that it is necessary to ensure that the accused has applied his mind to the true import of the charge and is properly aware that anything he may wish to say in his behalf could not constitute a defence." ^C

The accused was facing a charge of theft. An essential element of theft is the unlawful *contrectatio* of property capable of being stolen. *In casu*, it will be seen that the third asked question fell far

short of explaining to the accused that the taking must be unlawful. It is thus, difficult to be satisfied that the terse response "Yes" that it elicited was an admission to an unlawful taking. ^D One would have expected the magistrate to follow up on this question but surprisingly he simply proceeded to regurgitate, without attempting to simplify, another element of theft in his next question. Magistrates are implored to always remember that the questioning of an accused is a mechanism that is used to reveal exactly what it is the accused is admitting to and demonstrate that he is understandingly admitting the elements of the offence. Thus ^E merely paraphrasing the definition of an offence will not assist an accused to understand the import of the elements, more so if they are of a technical legal nature such as "intent to deprive the owner permanently". As was stated in *s v Matimbe* HH-215-03:

"What is important when canvassing essential elements is not the slavish regurgitation of the words 'intention to deprive the owner permanently' but to ^F establish that intention by suitable questions and answers."

The long and short of it is that *in casu* the magistrate dismally failed to satisfy the requirements of s 271(2)(b) thus rendering the conviction unsafe. On this basis alone, the conviction cannot be confirmed and must be set aside.

In addition to the above, there is another glaring irregularity evident on the ^G record. The magistrate, without conducting any enquiry into the existence or otherwise of special circumstances, proceeded to sentence the accused to the mandatory minimum sentence provided by s 114(2)(e) of the Criminal code. That it is a requirement to make an enquiry into special circumstances is made clear by the provisions of subs (3) of s 114. It reads:

"If a person convicted of stock theft involving any bovine or equine animal ^H

2008 (2) ZLR p287

Omerjee J

A stolen in the circumstances described in paragraph (a) or (b) of subsection (2) satisfies the court that there are special circumstances peculiar to the case, which circumstances shall be recorded by the court, why the penalty provided under paragraph (e) of subsection (2) should not be imposed, the convicted person shall be liable to the penalty provided under paragraph (f) of subsection (2)."

In his reasons for sentence, the magistrate made a passing statement that he ^B found no special circumstances, but what is conspicuous is the absence of any evidence that he carried out an investigation on the question. It would appear that this magistrate is either unaware of the need to conduct an enquiry or was just derelict in his duty.

On this basis also, even if the conviction had been sound the sentence imposed ^C could not be confirmed.

In the result, I have no choice but to set aside both the conviction and sentence imposed and order that the matter be remitted back to the magistrates court for a new trial, on a plea of not guilty, should the prosecution wish to pursue it. In addition, it is ordered that the accused should be released from prison forthwith. I have accordingly issued a warrant for his liberation.

^D Before ending this judgment, I wish to make one other observation. Magistrates and prosecutors should desist from the practice, which appears to be common, of simply using the state outline when an accused tenders a guilty plea after having been arraigned for a contested trial. It must be remembered that a state outline is not based on facts which the accused has given prior agreement to. The use of a state outline exposes an accused ^E to the dangers of being convicted on facts that he has not been given an opportunity to carefully reflect on. This has the real potential of an accused being severely prejudiced in the sense that he may be convicted on some facts which he may not agree with, and which aggravate the offence and lead to a more severe punishment than warranted.

^F The correct procedure should be that if in a contested trial an accused tenders a guilty plea in answer to the charge, a magistrate should take a short recess to allow the prosecutor to interview the accused and draw up a statement of agreed facts based on the information gathered.

^G HUNGWE J concurred.

Document 39 of 49**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/COMMUNICATION & ALLIED INDUSTRIES PENSIONERS' ASSOCIATION v COMMUNICATION & ALLIED INDUSTRIES PENSION FUND 2008 (2) ZLR 288 (S)

COMMUNICATION & ALLIED INDUSTRIES PENSIONERS' ASSOCIATION v COMMUNICATION & ALLIED INDUSTRIES PENSION FUND 2008 (2) ZLR 288 (S)

2008 (2) ZLR p288

Citation	2008 (2) ZLR 288 (S)
Case No	Judgment No. S-29-08
Court	Supreme Court, Harare
Judge	Malaba JA, Gwaunza JA & Garwe JA
Heard	4 February 2008
Judgment	17 November 2008
Counsel	<i>L T Biti</i> , for the appellant <i>W Ncube</i> , for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Arbitration – arbitration clause – clause in rules of pension fund – construction of clause – clause providing that dispute under rules may be referred to D arbitration – proper construction of rules showing that dispute was not about matter arising out of rules – matter not a dispute falling within terms of arbitration clause

Headnote

The respondent was a self-administered fund governed by a set of rules. The E affairs of the fund were administered and controlled by nine trustees. The object of the fund was to provide benefits for officers and employees and former officers and employees of the PTC and its successor companies on their retirement through age, ill-health or other reasons specified under the rules.

One of the categories of beneficiaries under the fund was that of employees who F were discharged owing to the abolition of office or to any retrenchment. They were entitled to benefits calculated in accordance with a formula which took into account the accumulated contributions made by the member every year from the fifth year of service, together with an additional benefit equal to a prescribed percentage of his accumulated G contributions, excluding any voluntary contributions paid. The rules gave the trustees the discretionary power to make additions to the benefits payable to the member as they saw fit. The additions referred to could be made to a benefit payable to a member of any category of pensioners. Where the benefit was to be paid to a pensioner who received an additional pension from another source, the exercise of the power H

2008 (2) ZLR p289

Malaba JA

A must take into account amounts of increases made to those pensions.

The appellant, as an association of pensioners, claimed on behalf of retrenched pensioners that such pensioners were entitled to additions to benefits calculated in accordance with a formula which

took into account the amounts of increases made to salaries of employees in the services of ^b the successor companies. The trustees denied that the rules imposed any obligation on them to do this. The appellant asked that the matter be referred to arbitration in terms of r 7 of the rules, which allowed a dispute about a claim from a member about any matter under the rules to be referred to arbitration. In the High Court, the judge held that the claim did not arise from the rules but rather sought an amendment of the rules.

^c The appellants were demanding, as a matter of law, that the trustees had to act in the manner suggested, whilst the trustees argued that the decision as to what factors were to be taken into account in calculating additions to benefits payable to pensioners or beneficiaries was a matter of discretion. The appellant conceded that the rules did not impose an obligation on ^d the trustees but argued that the court could nonetheless proceed on the basis that the trustees were under the obligation.

Held, that the matter about which the dispute which the parties must refer to arbitration, should the other party in the dispute be dissatisfied with the decision of trustees, should not be a matter outside the rules; it must be a matter for which provision is made *under* the rules. The first thing to ^e be ascertained was the precise nature of the dispute which had arisen. The dispute in this case was about the existence, or otherwise, as a matter of law under the rules, of an obligation on the trustees to take into account amounts of increases made to salaries of serving employees by the successor companies when calculating additions to benefits payable ^f to retrenched pensioners.

Held, further, that the next question was whether the dispute was one which fell within the terms of the arbitration clause, that is, whether the matter about which the dispute arose was a matter under the rules. To hold the court should proceed on the basis that the trustees were under the obligation referred to would impose on the trustees a burden they did ^g not undertake under the rules. The principle of impartiality, which the trustees had to observe in dealing with beneficiaries under the rules, required that the court should intervene in matters of administration of the fund for purposes of enforcing the rules. The matter sought to be imposed on the trustees was one outside the rules. Accordingly, the ^h dispute did not fall within the terms of the arbitration clause.

2008 (2) ZLR p290

Malaba JA

Cases cited ^a

Finlayson v Standard Chartered Pension Fund 1995 (1) ZLR 302 (H)

Heyman v Darwins Ltd [1942] 1 All ER 337 (HL)

Case information

L T Biti, for the appellant

W Ncube, for the respondent ^b

Judgment

MALABA JA: This is an appeal from a judgment given by the High Court on 24 January 2007 dismissing, with costs, an application for an order the terms of which were that:

“(1) Within seven days of the delivery of this Order on the same, the Commercial ^c Arbitration Centre in Harare shall appoint an Arbitrator in this dispute which Arbitrator shall proceed to arbitrate on the dispute in terms of the Arbitration Act No. 6 of 1996 as read together with UNCITRAL Model Law.”

The cause of action was the refusal by the Trustees of the respondent to have the dispute between the parties referred to arbitration, on the ground that it is ^d not the kind of dispute the parties agreed, under r 7 of the Rules governing the administration of the affairs of the respondent, to refer to arbitration. In dismissing the application, the court *a quo* in effect accepted the contention by the respondent’s trustees that the dispute fell outside the ambit of r 7. The question for determination in the appeal is whether the decision of the court *a quo* is wrong. To be considered in that connection are the grounds ^e of appeal which are that:

“1. The court *a quo* erred in holding that there was no dispute existing between the parties that warranted the matter to be referred to arbitration.

- 1.2. More importantly, even if the court *a quo* was correct in holding that the dispute between the parties was an amendment of the Rules rather than their enforcement, surely that is a matter that had to be referred ^F to the Arbitrator and not for the court to decide on the merits."

The facts on which the decision of the court *a quo* was made are these. The respondent is a self-administered fund established with effect from 1 July 1970 and governed by the Communication and Allied Industries Pension Fund Rules (hereinafter referred to as "the Rules"). I shall from now on refer ^G to the respondent as "the Fund". The affairs of the Fund are administered and controlled by nine trustees. In addition to the powers given them over matters under specific provisions in the Rules, the trustees are given, under r 6, an absolute discretion to do anything not inconsistent with the provisions of the Rules, as amended from time to time, that, in their opinion, is for the benefit and protection of members and beneficiaries of the Fund. ^H

2008 (2) ZLR p291

Malaba JA

A The object of the Fund is to provide benefits for officers and employees and former officers and employees of the Posts and Telecommunications Corporation which was dissolved, and what are divisions incorporated as successor companies, namely Tel-One (Pvt) Ltd, Net-One (Pvt) Ltd, Zimpost (Pvt) Ltd and People's Own Savings Bank Limited, on their retirement through age, ill-health or other reasons specified under the Rules. I shall refer to the ^B successor companies as "the employer organizations".

One of the categories of beneficiaries under the Fund is that of employees who have been discharged from employment for the reasons specified in r 46. These are employees who were discharged owing to abolition of office or to any retrenchment. I shall refer to them as "Rule 46 Pensioners". They ^C are entitled to benefits calculated in accordance with the formula prescribed under r 54(6), which takes into account the accumulated contributions made by the member every year from the fifth year of service together with an additional benefit equal to a prescribed percentage of his or her accumulated contributions, excluding any voluntary contributions paid in terms of r 36. Rule 39 gives the trustees the discretionary power to make additions to the ^D benefits payable to the member in terms of r 54(b) as they see fit. It provides as follows –

"Addition to pension

39. The Trustees shall have power to make such additions to pensions as they decide provided that: ^E

- (a) any such addition may be reduced, suspended or increased at any time as the Trustees decide;
- (b) any such addition or variation of such addition shall take into account the amount of every increase referred to in the proviso to r 38; and
- (c) any decision in terms of this rule shall be made after consultation with the actuary; and ^F
- (d) any such addition shall be approved by the Registrar."

The additions referred to in r 39 may be made to a benefit payable to a member of any category of pensioners. Where the benefit is being paid to a pensioner who receives an additional pension from the Consolidated Revenue Fund because he used to work for the Government of Zimbabwe and/or the Central African Pension Fund because he used to work for the Federation of ^G Rhodesia and Nyasaland, the exercise of the power must take into account amounts of increases made to those pensions.

Rule 38 provides as follows:

"Net payment of benefits

The amount of each payment of benefit made from the Fund shall be the amount ^H laid down in these Rules less the amounts paid from the Consolidated Revenue

2008 (2) ZLR p292

Malaba JA

Fund and the Central African Pension Fund direct to the member or ^A beneficiary or estate; provided that if the amounts that are paid from the Consolidated Revenue Fund and/or the Central African Pension Fund are increased, the net pension payable from the Fund, including any additions granted in terms of r 39, shall not be less than it would have been if such increase had not been made."

Rule 47 makes it clear that every pension payable to a Rule 46 Pensioner shall be charged on, and paid out, of the general revenues and assets of the employer ^B organization. It is highly unlikely that r 38 would have any application to benefits and additions payable to Rule 46 Pensioners. The

appellant, as an association of pensioners, made a claim on behalf of Rule 46 Pensioners to the trustees. The claim was to the effect that Rule 46 Pensioners were entitled to additions to benefits calculated in accordance with a formula which took c into account the amounts of increases made to salaries of employees in the services of the employer organizations. The basis of the claim was the allegation that the trustees were bound by the provisions of r 39(b) to take into account the increases made to the salaries of serving employees by the employer organizations when calculating the additions to benefits payable to Rule 46 Pensioners only. d

The trustees denied that any rule, let alone r 39(6), imposed upon them any obligation to calculate the additions to benefits payable to Rule 46 Pensioners in accordance with the formula suggested by the appellant. They pointed out that r 39(b) referred to amounts of increases to pensions paid directly to a member or beneficiary from the Consolidated Revenue Fund and/or e the Central African Revenue Fund. They said r 39(b) does not make any reference to amounts of increases to salaries of serving employees of the employer organizations.

When it became clear to the appellant that r 38 was inapplicable to benefits and additions payable to Rule 46 Pensioners as they were paid by the employer organizations and not the Fund, a concession was made to the effect that, f on the face of it, the language of r 39 confers on the trustees the discretion to make the decision as to what factors to take into account in calculating the additions they would have decided to make to the benefits payable to any pensioners, including Rule 46 Pensioners. A startling proposition was nonetheless made on behalf of the appellant. It was that, notwithstanding the g discretionary power given to the trustees under r 39, the court could impose upon them an obligation to take into account the amounts of increases made to salaries of serving employees by the employer organizations when they calculated the additions to the benefits payable to Rule 46 Pensioners only.

The trustees still disagreed with the appellant on the allegation that r 39 could be construed so as to imply existence of the obligation on them. Seeing that h

2008 (2) ZLR p293

Malaba JA

A a dispute had arisen between the parties about the matter of the existence or otherwise under the Rules of the obligation on the trustees to calculate the additions made to benefits payable to Rule 46 Pensioners only, by taking into account the amounts of increases made to salaries of serving employees by employer organizations, the appellant requested that the matter be referred to arbitration in terms of r 7. The trustees refused to act in terms of the request, b on the ground that the dispute was not the kind which fell within the ambit of r 7. The terms in which the Trustees and members agreed to submit disputes between them to arbitration were that:

"Any dispute that may arise between the Fund and a member or former member or any person deriving a claim from a member about any matter under these Rules shall be decided by the Trustees, provided that if any party to the dispute c is dissatisfied with the decision the Trustees, that party shall refer the dispute to arbitration in accordance with the arbitration laws in force in Zimbabwe or to a court of law."

The application was made to the court a quo for an order, the terms of which anticipated a finding that the dispute was referable to arbitration in terms of d r 7. The learned judge held that the matter about which the dispute between the parties had arisen was not a matter under the Rules.

Consequently she dismissed the application. She said:

"Rule 54(b) provides a formula which is applied in calculating the pension benefit which is premised on the pensioner's period of service and their own contribution to the Fund. The mode of calculating benefits which is suggested by the applicant is not laid out in the Fund Rules. In my view, the suggestion e by the applicant would amount to amending the Rules as the Rules specify in very clear terms the formula to be applied when awarding pensions to this particular category of employee. Rule 39, upon which the applicant also seeks to rely, gives the Trustees the power to make any additions to pensions as they deem fit. These additions are however discretionary, and may be removed at any time. On a careful reading of the founding affidavit these are not the type f of increases being sought by the applicant. They have sought a more structured increase which takes place every time the other employees receive a salary increment. In paragraph 6 of the founding affidavit the applicant makes the following concession:

'I appreciate that in terms of clause 39 of the Rules, on the face of it, there is nothing to compel the Trustees of the respondent to make such increases.'

g This was in my view an acceptance that this provision did not give the applicant the power to compel the Trustees to make the payments sought in terms of this Rule ... The dispute between the parties in my view seems to be dealing with an amendment of the Rules rather than their enforcement."

Rule 7 provides for a written submission to arbitration, agreed upon by the parties to the Fund. It must be construed according to its language. The ^H submission to arbitration is, in my view, not very wide. It covers any dispute

2008 (2) ZLR p294

Malaba JA

arising between the parties about any matter under the Rules. The matter ^A about which the dispute which the parties must refer to arbitration should the other party in the dispute be dissatisfied with the decision of the trustees on it, should not be a matter outside the Rules. It must be a matter for which provision is made under the Rules. The first question to ask and answer is: what is the dispute about? The second is: does the dispute fall within the ^B ambit of the written submission to arbitration agreed upon by the parties? In *Heyman v Darwins Ltd* [1942] 1 All ER 337 Lord MacMillan said at 345D:

“Where proceedings at law are instituted by one of the parties to a contract containing an arbitration clause and the other party founding on the clause applies for a stay, the first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which ^C falls within the terms of the arbitration clause”.

The dispute in this case is about the existence or otherwise, as a matter of law, under the Rules of an obligation on the trustees to take into account amounts of increases made to salaries of serving employees by employer organizations when calculating additions to benefits payable to Rule 46 Pensioners. The papers show that the appellants are demanding, as a matter ^D of law, that the trustees must act in the manner suggested, whilst the trustees argue that the decision as to what factors are to be taken into account in calculating additions to benefits payable to pensioners or beneficiaries is a matter of discretion provided for under ^r 39. The next question is whether the matter about which the dispute arose is a matter *under* the Rules. It is ^E common cause that there is no rule which, in express terms, imposes on the trustees the obligation to take into account amounts of increases made to salaries of serving employees by employer organizations when calculating additions to benefits payable to Rule 46 Pensioners. Whilst conceding the fact that ^r 39 does not impose on the trustees such an obligation, the appellant made the startling proposition that the court could nonetheless proceed on ^F the basis that the trustees were under the obligation. What is provided for under ^r 39 is clearly a matter of discretion. The court cannot make rules for the parties.

In *Finlayson v Standard Chartered Pension Fund* 1995 (1) ZLR 302 (H), it is stated at 317B-C that:

“Trustees must act with impartiality and endeavour to avoid decisions that have ^G the direct effect of conferring upon some of the beneficiaries more benefits than are received by others on the same level of entitlement, unless the disparity is sanctioned by the trust instrument. This principle of common law is succinctly summarized in para 827 of *Halsbury’s Laws of England* vol 48 in these terms.

‘Except where the instrument creating the trust expressly gives him a discretion as to adopting a course which will benefit one beneficiary at ^H

2008 (2) ZLR p295

Malaba JA

^A at the expense of the others, it is the duty of a trustee to hold an even hand between the parties interested under the trust and to look at the interests of all and not to those of any particular beneficiary or class of beneficiaries. He must not be a partisan of one of several beneficiaries’.”

The claim by the appellant would have the court impose on the trustees a burden they did not undertake under the Rules. The principle of impartiality, ^B which trustees must observe in dealing with beneficiaries under the Rules, requires that the court should intervene in matters of administration of the Fund for purposes of enforcing the Rules. In my view, it could not, by any stretch of the imagination, be said that the matter sought to be imposed on the trustees is a matter under the Rules. It is a matter outside the Rules. The court *a quo* was correct in holding that the dispute was about a matter not ^C under the Rules. As such the dispute did not fall within the terms of ^r 7.

The appeal is accordingly dismissed with costs.

GWAUNZA JA and GARWE JA concurred.

^D *Honey & Blanckenberg*, appellant’s legal practitioners

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Document 40 of 49**Source:**

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/HILTUNEN v HILTUNEN 2008 (2) ZLR 296 (H)

HILTUNEN v HILTUNEN 2008 (2) ZLR 296 (H)**2008 (2) ZLR p296**

Citation	2008 (2) ZLR 296 (H)
Case No	Judgment No. HH-99-08
Court	High Court, Harare
Judge	Makarau JP
Heard	25 September 2008
Judgment	19 November 2008
Counsel	<i>K Gama</i> , for the application <i>F Zuva</i> , for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote**Appeal** – *lapsing of – question of fact to be determined by clerk of the court***Evidence** – *hearsay – civil case – affidavit containing hearsay evidence – Civil Evidence Act [Chapter 8:01] – s 27(1) – effect of – first hand evidence may be admissible in certain circumstances* D**Evidence** – *hearsay – civil case – urgent and interlocutory applications – when hearsay evidence is admissible***Practice and procedure** – *affidavit – founding affidavit – urgent and interlocutory applications – hearsay evidence in founding affidavit – when such evidence may be admissible* E**Headnote**

The applicant's founding affidavit was deposed to, not by the applicant herself, but by a person to whom a general power of attorney had been granted by the applicant. There were no facts in the affidavit that the deponent, as a general agent of the applicant, would have personal ^F knowledge of. The entire founding affidavit was hearsay and was an affidavit of belief and information. The deponent either believed that what she was saying was correct or had been informed and believed the information to be correct.

Held, that in application proceedings, it is to the founding affidavit that the court will look to for the cause of action being alleged by the applicant ^G and the evidence that the applicant has to sustain such a cause of action. Hence an applicant must stand or fall by his founding affidavit and the facts alleged therein, because those are the facts which the respondent is called upon either to affirm or deny. Generally speaking, affidavits must be confined to such facts as the witness is able of his own knowledge to prove, except in interlocutory motions, in which statements as to ^H

Makarau JP

A belief, with the grounds thereof, may be admitted. It is also a long-standing practice in urgent applications to receive hearsay evidence if an acceptable explanation is given why direct evidence is not available and the source of the information and the grounds for the belief in the truth of the statement are disclosed.

Held, further, that the practice of the court has to some extent been amended ^B by the relaxation to the rule against hearsay evidence provided in s 27 of the Civil Evidence Act [*Chapter 8:01*], making first-hand hearsay evidence admissible on conditions. For first-hand hearsay to be admissible under the Act, the evidence must be about a statement made orally or in writing by another person. The person who made the statement must ^C be identified and it must appear from the nature of the evidence that the contents of the statement would have been admissible from the mouth of that person were he present and testifying. Thus, if the statement were, for instance, on an opinion held by that other person, then the evidence would be inadmissible because opinion evidence is inadmissible from the mouth of any witness other than expert witnesses. Similarly, second- ^D and third-hand hearsay remains inadmissible as the amendment to the law only provides for first-hand hearsay.

Held, further, that in having recourse to the provisions of s 27(1) of the Civil Evidence Act in order to determine whether the contents of the affidavit could be admitted, the source of the information and the basis of belief ^E by the deponent were not given, so it was not possible to determine whether, if the source of the information were present and testifying, such information as was supplied to the deponent would have been admissible.

Held, further, that the lapsing of an appeal is a fact that is declared by the clerk of the court who is the custodian of the record of appeal. Delays caused by the processing of appeal records in these days of economic ^F challenges are not evidence of failure to prosecute an appeal.

Held, accordingly, that the affidavit before the court was inadmissible

Cases cited

Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd & Anor 1984 (4) SA 149 (T)

^G *Grant-Dalton v Win & Ors* 1923 WLD 180

Johnstone v Wildlife Utilization Svcs (Pvt) Ltd 1966 RLR 596 (G)

Levin v Saidman 1930 WLD 256

Mangwiza v Ziumbe NO & Anor 2000 (2) ZLR 489 (S)

Pountas' Trustee v Lahamas 1924 WLD 67

^H *Standard Bank of SA Ltd v Sewpersadh & Anor* 2005 (4) SA 148 (C)

Makarau JP

Legislation considered ^A

Civil Evidence Act [*Chapter 8:01*], s 27(1)

Case information

K Gama, for the application

F Zuva, for the respondent

Judgment

MAKARAU JP: This is an application to declare null and void an appeal ^B noted to this court by the respondent under Civ App 89/07. In the alternative, the appellant seeks an order that the appeal be declared to have lapsed.

The parties in this application are husband and wife. They are embroiled in a divorce that has spawned a number of cases in interlocutory litigation, this application included. ^c

It would appear from the affidavit filed on behalf of the applicant, an issue that I shall revert to in detail shortly, that the applicant purchased certain immovable property in 2002, a year before she married the respondent. The parties agreed that the house be registered in their joint names. The applicant alleges that she donated one half share in the property to the respondent on ^d the understanding that he would, in turn, make over to her a half share in his dental practice in Switzerland. He appears not to share that understanding, for at one stage he requested her to sign an agreement declaring him the sole owner of the dental practice in Switzerland and one half share owner of the immovable property in Zimbabwe. She declined to accede to his demands. ^e

In April 2006, the applicant obtained a default judgment against the respondent in which revocation of her donation of one half share in the immovable property was "allowed" by the magistrates court. He attempted to have the decision set aside in an application for rescission of judgment. The application was not successful as it was ruled to be out of time. He again approached the court for condonation for the late filing of the application for rescission. ^f Again, luck eluded him, prompting him to note an appeal to this court on 7 March 2007. It is this appeal that the applicant before me wishes to have declared null and void or duly lapsed.

In her application, the applicant made two points. She argues that a year after the appeal was noted, the clerk of the lower court had not prepared the ^g record of appeal and the respondent had not furnished the clerk with a written undertaking to pay the costs of preparing the record. On the basis of these two grounds, the applicant argued that the appeal is null and void or, at least, has lapsed as a year has gone by without the appeal having been prosecuted.

Before I deal with the substance of the arguments submitted by the applicant in this matter, there is an issue that has exercised my mind. It is the manner ^h

2008 (2) ZLR p299

Makarau JP

^a in which the founding affidavit has been deposed to. My dilemma is that both counsel in the matter did not see anything wrong with the manner in which the affidavit was deposed to and so I did not have any meaningful debate on the issue. The issues I raise herein are from my own research.

The applicant's founding affidavit was deposed to by one Evelyn Gondo under a general power of attorney, granted to her by the applicant on 21 ^b March 2007. The power of attorney constitutes the deponent the applicant's general attorney and agency for managing all her affairs. It then grants her specific powers that are described fully in the body of the instrument. The issue that arises is whether this general power of attorney can authorize the agent to depose to a founding affidavit on behalf of her principal in this ^c matter, testifying as to the facts that she does.

In answer to my query as to why the founding affidavit was deposed to by the general agent, Mr *Gama* for the applicant answered that the deponent had satisfied herself as to all the facts that she deposed to. In other words, she visited the clerk of the magistrates court and satisfied herself that the record of the matter was not yet ready and that the respondent had not furnished the ^d clerk with the requisite security for the costs of the preparation of the record.

I am unable to agree that the facts deposed to by the applicant's agent are within her personal knowledge. It is all hearsay evidence in my view.

For instance, in para 3 of the founding affidavit, she deposes that the respondent purported to note an appeal in the matter on 7 March 2007. She does not ^e aver that she was present when the appeal was noted for her to have direct evidence of the noting of the appeal. The notice of appeal was not served upon her person or at her place of abode. It was served on the applicant's legal practitioners. She could only have had knowledge of it through information from the applicant's legal practitioners.

^f Further, the deponent testifies as to the purchase of the immovable property in dispute by the applicant in 2002. She was not a witness to the agreement of sale. She does not indicate in the affidavit her source of information. She merely attaches the document to her affidavit, a feat that could have been accomplished by anyone to whom the story was told by the applicant. Again in my view, that is hearsay.

g The deponent testifies as to the inability of the clerk of the lower court to prepare the record of proceedings. She does not indicate in her affidavit that she has personally attended upon the clerk of court and has established that the record is not ready and will not be prepared for want of security for the costs of such preparation.

h All in all, I have not been able to isolate any facts that the deponent, as a

2008 (2) ZLR p300

Makarau JP

general agent of the applicant, would have personal knowledge of. I therefore a find that the entire founding affidavit is hearsay and is an affidavit of belief and information. She either believes what she is saying to be correct or she has been informed and verily believes it to be correct.

Like Krause J in *Pountas' Trustee v Lahanas* 1924 WLD 67, I find that the manner in which the evidence of the applicant has been placed before b the court is eminently irregular and that the evidence is thus rendered inadmissible. In deciding the matter that was before him, the learned judge relied on the earlier decision of the same division in *Grant-Dalton v Win & Ors* 1923 WLD 180 in which it had been held, following the English law practice on the admissibility of statements of belief and information, that generally speaking affidavits must be confined to such facts as the witness c is able of his own knowledge to prove, except in interlocutory motions, in which statements as to belief, with the grounds thereof, may be admitted.

Six years later, in *Levin v Saidman* 1930 WLD 256, the same position was upheld as it was held that hearsay evidence in an affidavit is inadmissible in the absence of an explanation as to why direct evidence is unavailable. d

The earlier decisions of the Witwatersrand Local Division cited above were applied with approval in *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd And Anor* 1984 (4) SA 149 (T) where at p 157E-H, van Dijkhorst J had the following to say:

"It has been a long-standing practice of this court in urgent applications to receive hearsay evidence if an acceptable explanation is given why direct evidence is e not available and the source of the information and the grounds for the belief in the truth of the statement are disclosed. *Levin v Saidman* 1930 WLD 256; *Pountas' Trustee v Lahanas* 1924 WLD 67; *Mia's Trustee v Mia* 1944 WLD 102 at 104; *Mears v African Platinum Mines Ltd and Others (1)* 1922 WLD 48 at 55; *Grant-Dalton v Win and Others* 1923 WLD 180 at 186; *The Master v Slomowitz* 1961 (1) SA 669 (T) at 673F-G; *Gemeenskapsontwikkelingsraad v F Williams and Others (1)* 1977 (2) SA 692 (W) at 696. This is also the practice in the other Divisions. *Galp v Tansley NO and Another* 1966 (4) SA 555 (C); *Brighton Furnishers v Viljoen* 1947 (1) SA 39 (GW); *Southern Pride Foods (Pty) Ltd v Mohidien* 1982 (3) SA 1068 (C); *Geanotes v Geanotes* 1947 (2) SA 512 (C). An affidavit of information and belief is required to show that the applicant has some reasonable and proper cause for making the statement and has not sworn merely to raise an issue." g

As is clear from the authorities cited by the learned judge, the practice has been widely accepted in other divisions of the High Court of South Africa.

More recently, the Cape Provincial Division in *Standard Bank of SA Ltd v Sewpersadh & Anor* 2005 (4) SA 148 (C) had this to say on the same practice:

"The 'evidence' contained in annexure BLB.6 is, in any event, of a hearsay nature. h

2008 (2) ZLR p301

Makarau JP

a It is not ordinarily admissible. It must be borne in mind that hearsay evidence is not permitted in affidavits (except in urgent interlocutory matters). There are no special circumstances justifying the inclusion of hearsay testimony in the instant matter. (See *Pountas' Trustee v Lahanas* 1924 WLD 67; *Cash Wholesalers Ltd v Cashmead Wholesalers* 1933 (1) PH A24 (D).)"

It is trite that in application proceedings, it is to the founding affidavit that b the court will look to for the cause of action being alleged by the applicant and the evidence that the applicant has to sustain such a cause of action. Hence, as has been said in numerous cases before, an applicant must stand or fall by his founding affidavit and the facts alleged therein because those are the facts which the respondent is called upon either to affirm or deny. See *Mangwiza v Ziumbe NO & Anor* 2000 (2) ZLR 489 (S) at 492D-F.

c In casu, the founding affidavit was deposed to by a general agent who did not give an explanation as to why the applicant herself could not depose to the affidavit. The agent deposed to facts that

were not within her personal knowledge, could not have been within her personal knowledge, and did not explain the basis of her belief or the source of her information, save for ^D her statements on the alleged non-compliance with the provisions of the Supreme Court Rules, where she informs that she was so informed by the applicant's legal practitioners.

The authorities in South African law are quite clear that unless it is in urgent interlocutory applications, hearsay evidence remains inadmissible in ^E affidavits. While I have not been able to find any local cases where *Pountas'* and *Levins's* cases have been cited and directly applied in Zimbabwe, it seems to me that the two decisions correctly state the practice of this court, albeit one that has to some extent been amended by the relaxation to the rule against hearsay evidence provided for in s 27 of the Civil Evidence Act [*Chapter 8.01*], ("the Act"), making first hand hearsay evidence admissible ^F on conditions. Section 27(1) of the Civil Evidence Act provides:

"Subject to this section evidence of a statement made by any person, whether orally or in writing or otherwise, shall be admissible in civil proceedings as evidence of any fact mentioned or disclosed in the statements, if direct oral evidence by that person of that fact would be admissible in those proceedings."

The practice of this court, developed over the years, has been almost overrun ^G by the overwhelming number of affidavits filed under general power of attorney by absentee litigants deposing to matters that are not within their personal knowledge and, in my view, without in any manner attempting to satisfy the conditions for admissibility of first hand hearsay evidence laid down in the Act. For first hand hearsay to be admissible under the Act, the evidence ^H must be about a statement made orally or in writing by another person. The

2008 (2) ZLR p302

Makarau JP

person who made the statement must, in my view, be identified and it must ^A appear from the nature of the evidence that the contents of the statement would have been admissible from the mouth of that person were he or she present and testifying. Thus, if the statement was, for instance, on an opinion held by that other person, because opinion evidence is inadmissible from the mouth of any witness other than expert witnesses, the evidence would ^B remain inadmissible notwithstanding the amendment to the law. Similarly, second and third hand hearsay remains inadmissible as the amendment to the law only provides for first hand hearsay.

In my view, the legal position remains clear: that hearsay evidence is inadmissible in affidavits filed with court applications unless it is evidence of a statement made by a person, where such a statement would have been ^C admissible had it been adduced as direct evidence by the maker of the statement. Hearsay evidence may be admissible, as per the practice of this court, in urgent and interlocutory applications where an explanation as to why direct evidence cannot be led is tendered and the basis of belief and information by the deponent is fully given in the affidavit. I am fortified in my view by the remarks of Beadle CJ in *Johnstone v Wildlife Utilization ^D Services (Pvt) Ltd* 1966 RLR 596 (G) at 597I-598A where he dealt with the admissibility of hearsay evidence in motion proceedings in the following terms:

"It is accepted, in our practice, that the rules of admissibility of hearsay evidence applicable to interlocutory proceedings are not the same as those that apply to trial actions. Such evidence, given in affidavit form in such applications, is not ^E necessarily excluded because it is hearsay, provided the source of the information is disclosed. As I understand our practice, it is this: first, the court must examine the evidence given in this form and ascertain the prejudice which might result to the opposite party, if the evidence is later shown to be incorrect, would be irremediable; second, the court must examine the passages to see whether there is some justification, such as urgency, for the evidence being placed before it in hearsay, and not in direct form." ^F

I accept that the above remarks were made prior to the amendment of the Act referred to above but, in my view the practice of this court remains to a large extent unchanged. The provisions of s 27(1) of the Act merely provide for the admissibility of statements made by other persons where such statements would have been admissible had they been adduced as direct evidence by ^G the makers of the statements as detailed above. It does not provide for the wholesale admissibility of hearsay evidence.

The application before me is neither urgent nor interlocutory. Thus, hearsay evidence is inadmissible.

I have had recourse to the provisions of s 27(1) of the Act to determine whether the contents of the affidavit can be admitted thereunder. I am ^H

Makarau JP

A unable to find in favour of the deponent in this regard in that the source of information and basis of belief by the deponent is not given. I am therefore unable to determine whether if the source of the information were present and testifying, such information as was supplied to the deponent would have been admissible from the mouth of the source.

B On the basis of the foregoing, I come to the conclusion that the founding affidavit before me is inadmissible and, thus, there is no application for me to consider.

I have indicated above that I have come to this conclusion without the aid of argument from counsel. Assuming that I have erred in holding that the founding affidavit before me is inadmissible as being hearsay evidence, I C still would have dismissed the application on another basis.

The applicant alleges that the respondent did not secure the costs for the preparation of the record of appeal in violation of the rules of the Supreme Court. The respondent denies that he has failed in this regard. He argues that by 8 March 2007 he had tendered security for such costs and has adduced D into evidence a letter that was dispatched to the clerk of court tendering the security. The letter was copied to and received by the applicant's legal practitioners. In response to the proof that is afforded by this letter, Mr *Gama* sought to argue that because the letter was written later than the date on which the appeal was filed, it does not save the validity of the appeal. In my view, the argument lacks merit. There is nothing in the wording of the E rules that suggest that failure to secure costs on the same date that the appeal is noted renders the noted appeal null and void. I would have dismissed the application on this basis, were such an application properly before the court.

Finally, Mr *Gama* argues that the appeal has lapsed due to non-prosecution. Again, with respect, I see no merit in this argument. The lapsing of an F appeal is a fact that is declared by the clerk of the court who is custodian of the record of appeal. *In casu*, there is no indication on record that the clerk of the magistrate's court deemed the appeal to have lapsed for any reason provided for in the law. It did not lapse for want of prosecution at common law for the systemic delays in the processing of appeal records in these days G of economic challenges facing the justice delivery system are notorious.

In the result, I make the following order:

The application is dismissed with costs.

Madzivanzira, Gama & Associates, applicant's legal practitioners.

H *Muzondo & Chinhema*, respondent's legal practitioners.

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Document 41 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/P ROSATI & SONS (PVT) LTD v P & C PANEL BEATERS & SPRAY PAINTERS (PVT) LTD 2008 (2) ZLR 304 (H)

P ROSATI & SONS (PVT) LTD v P & C PANEL BEATERS & SPRAY PAINTERS (PVT) LTD 2008 (2) ZLR 304 (H)

2008 (2) ZLR p304

Citation	2008 (2) ZLR 304 (H)
Case No	Judgment No. HH-102-08
Court	High Court, Harare
Judge	Uchena J

Heard	22 July 2008; 23 July 2008; 25 July 2008
Judgment	19 November 2008
Counsel	<i>D Halimani</i> , for the plaintiff <i>A A Debwe</i> , for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Landlord and tenant – lease – termination – fixed term lease – grounds on which landlord may seek eviction of tenant

Landlord and tenant – statutory tenant – when statutory tenancy created – D referral of issue of quantum of rental to rent board – determination of rental by board – tenant not thereby made a statutory tenant

Headnote

The plaintiff leased commercial premises to the defendant in terms of a ten-year lease. The lease provided that the rentals were to be reviewed from time to time. In pursuance of such a review, when the parties could not agree on a rental, the plaintiff referred the matter to the rent board, which set a rental figure. The plaintiff was dissatisfied with the figure set and sought the eviction of the defendant, claiming that the defendant had, because of the referral to the Rent Board, become a statutory tenant, and that as the plaintiff wanted the premises for its own use, it was entitled to have the defendant evicted.

Held, that in terms of s 10(2) of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), the rent board may, in fixing a fair rent for the premises, specify different rents for different periods during the currency of the lease concerned. The wording of s 10(2) clearly indicated that the intention of the legislature in providing for the determination of a fair rental by a rent board was not to terminate the lease agreement, but to determine fair rentals to be paid during the currency of the lease agreement. It was clear from the wording of the lease agreement that the intention of the parties was to review the rentals while the lease remained in existence for the stated period. The defendant was not, therefore, a statutory tenant. H

2008 (2) ZLR p305

Uchena J

A *Held*, further, that a landlord and his tenant are bound by the terms of their contract. If a fixed period is agreed, earlier termination is not possible unless there has been a breach by the tenant. Notice to quit cannot be given before the expiry of the lease, save where the premises have become dangerous or urgently in need of repair and vacation becomes necessary for that purpose. Even in that situation, the lessee would ordinarily be B permitted to resume occupation upon completion of repairs. There being no breach alleged, the defendant was entitled to lease the premises until the period agreed to in the lease had lapsed.

Case referred to

C *Mungadze v Murambiwa* 1997 (2) ZLR 44 (S)

Legislation considered

Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), s 10(2)

Case information

D Halimani, for the plaintiff

▷ *A A Debwe*, for the defendant

Judgment

UCHENA J: The plaintiff owns premises which are being rented by the defendant. The plaintiff is a company duly incorporated in terms of the laws of Zimbabwe. Its shareholding has changed by virtue of its majority ¶ shareholders selling their shares to Regimos Paints the current majority shareholder.

¶ The defendant is a company duly incorporated in terms of the laws of Zimbabwe. It is renting the premises in dispute, together with two other tenants who are not part of this litigation. It entered into a lease agreement with the plaintiff, for a ten year period ending on 30 January 2015.

The rentals were to be reviewed from time to time. In October 2006 they had a dispute over the rentals to be paid by the defendant. The plaintiff referred the dispute to the commercial premises rent board, which determined rentals to be paid by the defendant. The plaintiff's major shareholders at that time were not happy with the rentals set by the rent board. They decided to sell ¶ their shares as they were not getting a satisfactory return from their investment in the plaintiff. The plaintiff's identity has therefore not changed, as a company's identity is not affected by the sale of its shares from an existing shareholder to a new shareholder.

The issues between the parties are: ¶

1. Whether or not the lease agreement signed between the parties is still

2008 (2) ZLR p306

Uchena J

valid or lapsed on or after the 1 October 2006. ¶

2. Whether or not the defendant' became a statutory tenant after the referral of the rent dispute to the rent board on 1 October 2006.
3. Whether or not the plaintiff has good and sufficient grounds to seek the defendant's eviction from the premises.

The evidence in this case is mostly common cause. The parties agree that ¶ they entered into a ten-year lease agreement. They also agree that rentals were to be reviewed from time to time. They agree that in October 2006 they could not agree on the new rentals to be paid by the defendant. That issue was referred to the rent board by the plaintiff. The rent board set the rentals to be paid. The major shareholders then sold their shares, to Regimos ¶ Paints, the new major shareholder. The plaintiff's identity was not affected.

Effect of the determination by the rent board of fair rent

Mr *Halimani*, for the plaintiff, submitted that the determination of fair rent by the rent board signifies the termination of the lease and its substitution by the defendant's statutory tenancy. Mr *Debwe*, for the defendant, argued ▷ that the referral of the rent issue to the Rent Board does not terminate the lease but merely facilitates the determination of fair rental.

Section 10(2) of the Commercial Premises (Rent) Regulations clarifies the issue. It provides as follows:

"(2) In fixing a fair rent for commercial premises, a board may specify different rents for different periods during the currency of the lease concerned" (my ¶ emphasis).

The wording of s 10(2) clearly indicates that the intention of the legislature, in providing for the determination of fair rental, was not to terminate the lease agreement, but to determine fair rentals to be paid during the currency of the lease agreement. I would therefore not agree with the plaintiff's counsel's ¶ submission that the defendant became a statutory tenant, when the rent board determined fair rentals for the premises.

The lease agreement refers to review of rentals. The intention of the parties was to review the rentals while the lease remained in existence for the stated period.

In his application for the determination of fair rentals, the plaintiff on p 2 ¶ of exhibit 3 said:

"The respondent (*sic*) have a contract of lease which commenced on 1 January 2005 and shall terminate on (*sic*) January 2015."

The plaintiff was, therefore, aware of the continuance of the lease and even stated when it was to terminate. It therefore merely wanted the rent board ^H

2008 (2) ZLR p307

Uchena J

A to determine for them fair rental for the premises the defendant was renting from it.

In the result, I find that the relationship between the plaintiff and the defendant continues to be governed by the lease agreement. The defendant is therefore not a statutory tenant.

B Notice to vacate

A finding that the lease between the parties is still valid brings into question the validity of the plaintiff's notice to the defendant to vacate the premises. In *Mungadze v Murambiwa* 1997 (2) ZLR 44 (S) at 46DE Gubbay CJ said:

"Insofar as the law of this country is concerned, I conceive of no basis upon which to hold that the rule — even assuming it was received as a legal principle ^C in Holland — is applicable today. The position is simply that a landlord and his tenant are bound by the terms of their contract. If a fixed period is agreed, earlier termination will not be possible unless there has been a breach by the tenant. Notice to quit cannot be given before the expiry of the lease, save where the premises have become dangerous or urgently in need of repair and vacation becomes necessary for that purpose. Even in that situation, the lessee would ^D ordinarily be permitted to resume occupation upon completion of repairs. See *Moffat Outfitters (Pvt) Ltd v Hoosein & Ors* 1986 (2) ZLR 148 (S) at 153A-F."

It is, therefore, not possible for the lessor to give notice of the termination of a lease agreement other than for breach of the lease agreement. In this case, the plaintiff gave the defendant notice to vacate because the plaintiff wanted to use the premises for its own operations. The notice does not, therefore, ^E refer to any breach which would justify termination. It is an invalid notice as it was given during the currency of the lease, and for a reason other than breach of the lease agreement by the defendant.

In the result, the lease agreement was not interrupted by the notice. The defendant is, in the absence of any breach for which he can be given notice ^F to vacate, entitled to lease the premises until the period agreed to in the lease has lapsed. The issue of whether or not the plaintiff needs the premises for its own use does not arise.

The plaintiff's claim is, therefore, dismissed with costs.

G *Wintertons*, plaintiff's legal practitioners

Debwe and Partners, defendant's legal practitioners

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Document 42 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/MUJURU NO & ORS v THE MASTER & ANOR 2008 (2) ZLR 308 (H)

MUJURU NO & ORS v THE MASTER & ANOR 2008 (2) ZLR 308 (H)

2008 (2) ZLR p308

Citation	2008 (2) ZLR 308 (H)
Case No	Judgment No. HH-112-08
Court	High Court, Harare
Judge	Guvava J

Heard	18 May 2008
Judgment	20 November 2008
Counsel	<i>R M Fitches</i> , for the applicants <i>Mrs B Mtetwa</i> , for the second respondent
Case Type	Application for review
Annotations	No case annotations to date

Flynote

Administration of estates – Master of the High Court – acceptance of will by – Master’s discretion – process that should be followed in deciding whether or not to accept will

Succession – will – validity – will not complying with formalities set out in D Wills Act [Chapter 6:06] – Master’s discretion as to whether or not to accept will in spite of such lack of compliance – process to be followed

Headnote

The Master of the High Court rejected the will of the deceased on the grounds that it did not comply with the formalities prescribed in s 8(1) of the Wills Act [Chapter 6:06]. The will had been signed by the deceased and E the two witnesses on the last page only, the other pages being unsigned. The executor nominated in the will brought the Master’s decision on review, seeking an order, *inter alia*, to have the will accepted. Section 8(5) of the Act allows the Master, if he is satisfied that the document was intended to be the will of the deceased, to accept it for the purpose F of administering the estate. It was argued that the failure by the Master to apply this provision when arriving at a decision was grossly irregular.

Held, that a proper application of the section would require the Master to adopt a two stage approach in coming to a decision. Firstly, he must satisfy himself that the document before him does not comply with the formalities in the Act. Secondly, he must satisfy himself that the document G was indeed intended to be the last will and testament of the testator. If he is so satisfied, then he has a discretion whether or not to accept it for the purpose of administering the estate. His failure to take the second step in the enquiry was a gross irregularity which would warrant the setting aside of his decision.

Held, further, that it would not be correct for the court to make the decision H

2008 (2) ZLR p309

Guvava J

A whether or not to accept the will. The provision envisaged the exercise of this discretion by the Master, with the court determining the matter on appeal in the event that one of the parties is dissatisfied with his decision.

Cases cited

Janda v Janda 1995 (1) ZLR 375 (S)

B *Mashakada v The Master & Anor* 2001 (2) ZLR 311 (H)

Legislation considered

Wills Act [Chapter 6:06], s 8(1) and (5)

Case information

C *R M Fitches*, for the applicants

Mrs B Mtetwa, for the second respondent

Judgment

GUVAVA J: This is an application for review of the Master of the High Court's decision which was made on 12 October 2005. The applicants cited ^b two grounds for review. Firstly, they submitted that the decision was grossly irregular in that it failed to recognize and uphold the clear intention of the deceased from the document purported to be his will. Secondly, the applicant submitted that the decision rejecting the will was grossly unreasonable. The applicants thus seek an order in the following terms: ^e

1. The decision by the first respondent rejecting the will executed by the late Josiah Tungamirai on 10 September 1988 is hereby set aside.
2. The document executed by the deceased, Josiah Tungamirai, on 10 September 1988 shall be deemed as his will for purposes of winding up his estate in terms of the Administration of Estates Act [*Chapter 6:01*]. ^f
3. The first respondent shall appoint the first applicant as the sole executor of the late Josiah Tungamirai's estate and shall revoke the appointment of second respondent as joint executor of the said estate.
4. In the event of this application being opposed, the second respondent shall pay the costs of suit.

^g Following the application for review, the applicant had also filed an application for condonation of the late noting of an appeal and an appeal in relation to this same matter. At the commencement of the proceedings however, Mr *Fitches*, for the applicant, withdrew the appeal and the matter proceeded as a review. In my view, this was the correct procedure to adopt as the applicant was seeking to set aside the Master's decision on the basis ^h of a procedural irregularity.

2008 (2) ZLR p310

Guvava J

The facts which have given rise to this matter may be summarized as follows. ^a Josiah Tungamirai (the deceased) passed away on 25 August 2005. He was survived by his wife, Pamela Christine Tungamirai (Pamela), who is the second respondent in this matter. The second and third applicants are the children of the deceased from another union but it is common cause that Pamela raised both children as her own. It is also common cause that Pamela ^b did not have any children with the deceased. The first applicant was appointed as executor of the deceased's estate through a will executed by the deceased. At an edict meeting convened by the first respondent, the first applicant was appointed joint executor with the second respondent.

The will which was made by the deceased bequeathed the bulk of his estate ^c to his two sons who are the second and third applicants in this matter. The estate comprised of the matrimonial home and its contents together with a farm and all its equipment and shares in various companies. To Pamela the deceased makes a bequest of her personal car, bedroom suite, kitchen household (I assume utensils) and one television set. When the will was submitted to the Master in accordance with the Wills Act [*Chapter 6:06*] ^d (the Act) the Master declined to accept the will.

The first respondent, in a letter dated 12 October 2005, stated the reasons for refusing to accept the deceased's will as follows:

"I acknowledge receipt of your letter dated 3 October 2005 whose contents have been noted. The will dated 10 September 1988 has been rejected by the Master for want of compliance with the provisions of the Wills Act [*Chapter 6:06*] ^e s 8(b) and (d). Even if the Master was to exercise his discretion in terms of the Act, such discretion would violate the rights of the surviving spouse at law.

We will now proceed intestate and the edict meeting to choose an executor will be held before me tomorrow (12 October 2005 at 11a.m.). Anyone who is aggrieved by this my decision should take me on review within 21 days of this letter." ^f

It was pursuant to this letter that the applicants then launched this application.

The application was opposed by the second respondent on the basis that the will does not comply with the Wills Act and that it excludes six other children of the deceased. The first respondent filed a report as required by ^r 248 of the High Court Rules as amended in which he reiterated and expanded the ^g issues set out in his letter rejecting the will.

The issues before me are therefore as follows:

1. whether the first respondent's decision in rejecting the will was unreasonable; and

2. whether the first respondent's decision in rejecting the will was grossly ^h

2008 (2) ZLR p311

Guvava J

^a irregular.

In order to determine these issues, it is necessary to examine the provisions of the Act. Section 8 of the Act has provision for the formalities that must be complied with by a testator in making a will. The relevant provision of the Act provides as follows: ^b

"8 Formalities for making wills, other than soldiers wills, wills made during epidemics and oral wills

- (1) Subject to subsections (3) and (5), a will shall not be valid unless–
- (a) it is in writing; and
 - (b) the testator, or some other person in his presence and at his direction, signs each page of the will as closely as may be to the end of the writing ^c on the page concerned; and
 - (c) each signature referred to in paragraph (b) is made or acknowledged by the testator in the presence of two or more competent witnesses present at the same time; and
 - (d) each competent witness either –
 - (i) signs each page of the will; or ^d
 - (ii) acknowledges his signature on each page of the will;
 in the presence of the testator and of the other witness."

Subsection as amended by s 3 of Act 21 of 1998.

It is clear from an examination of the will (which original document I caused to be brought before me from the Master's File) that it does not comply with ^e s 8(1)(b) and (d) of the Act. The will was drafted on three A4 size pages. The will is partly type-written and the other part is handwritten in the testator's own hand. The pages are not signed on each page by either the testator or the witnesses. The testator signed the will on the last page in the presence of the two subscribing witnesses. The Masters decision to reject the will on this basis therefore, cannot be faulted as it did not subscribe to the formalities ^f set out in the Act. See *Janda v Janda* 1995 (1) ZLR 375 (S).

The second issue, in my view, warrants some consideration. It was submitted by the applicants that the first respondent should have used the provisions of s 8(5) of the Act to accept the will for the purpose of administering the estate. It was argued on their behalf that the failure by the first respondent ^g to apply this provision when arriving at a decision was grossly irregular. Section 8(5) of the Act allows the Master, if he is satisfied that the document was intended to be the will of the deceased, to accept it for the purpose of administering the estate. The provision provides as follows:

"Where the master is satisfied that a document or an amendment of a document which was drafted or executed by a person who has since died was intended to ^h be his will or an amendment of his will, the Master may accept that as a will

2008 (2) ZLR p312

Guvava J

for the purposes of Administration of Estates Act [*Chapter 6:01*] even though ^a it does not comply with all the formalities for the execution of wills referred to in subsection (1) or (2) or (b) to amendments ..."

It seems to me from an examination of the case authorities that this provision was enacted in order to remedy the mischief which had presented itself in a number of cases. The sentiments expressed by Gubbay CJ in the *Janda* case ^b *supra* did not fall on deaf ears as a real injustice appeared to be taking place because certain formalities had not been complied with. The amendment to the Act was introduced in 1998 to give the Master a discretion where formalities in a will have not been complied with. It seems to me that a proper application of this provision would require the Master to adopt a two-stage approach in coming to a decision. Firstly, he must satisfy himself that ^c the document before him does not comply with the formalities in the Act. The second stage of the inquiry is to satisfy himself that the document was indeed intended to be the last will and testament of the testator. If the first respondent is so satisfied, then he has a discretion whether or not to accept it for the purpose of administering the estate. ^d

In this case, the first respondent successfully completed the first stage of the inquiry and found that the will did not comply with the formalities in the Act. He however, did not proceed to consider whether the document before him was a true document, which is devoid of fraud, or whether or not he should accept it for the purpose of administering the estate. The first respondent made his decision without any reference to s 8(5) of the Act at all, when the *express* wording of the section enjoins him to apply the section in making a decision. It seems to me that the failure by the first respondent to apply the second stage of the inquiry was a gross irregularity which would warrant the setting aside of his decision.

The applicant has asked this court to step into the shoes of the Master and *find* determine whether or not the will should be accepted for the purpose of administering the estate. In seeking this relief they have relied on the case of *Mashakada v The Master of the High Court & Anor* 2001 (2) ZLR 311 (H). It seems to me from the facts of this particular case that this would not be the correct approach to adopt. The facts in the *Mashakada* case *supra* show that the court was constrained to act in the manner it did as it was dealing with a *new* provision which had come into operation after the Master had already made his decision. The provision, in my view, envisages the exercise of this discretion by the Master, with this court determining the matter on appeal in the event that one of the parties is dissatisfied with his decision. I have also considered that the matter came before me on review and the appropriate relief would be to remit the case to the first respondent for him to reconsider. *h*

2008 (2) ZLR p313

Guvava J

a The second respondent also proceeded to find that the will was invalid on the basis that it is contrary to the provisions of s 5(3)(a) and (b) of the Act. In my view, having set aside the decision of the first respondent on the grounds of irregularity, it is not necessary for me to determine this point.

The applicant sought costs against the second respondent. In my view, as the *review* was warranted by the irregularity occasioned by the first respondent, the second respondent was entitled to oppose the application as the relief sought affected her rights as co-executor of the estate. This is an estate matter and, in my view, it is only appropriate that costs are borne by the estate.

Accordingly, I make the following order:

1. The decision by the first respondent rejecting the will by the late Josiah *c* Tungamirai on 10 September 1988 is hereby set aside.
2. The first respondent is ordered to consider the matter *de novo* and take into account s 8(5) of the Wills Act [*Chapter 6:06*].
3. The costs of this application shall be borne by the estate of the late Josiah Tungamirai.

b *Scanlen & Holderness*, applicants' legal practitioners

Mteywa & Nyambirai, second respondent's legal practitioners

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Document 43 of 49

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/MALOYA v NYAMUPFUKUDZA NO & ANOR 2008 (2) ZLR 314 (H)

MALOYA v NYAMUPFUKUDZA NO & ANOR 2008 (2) ZLR 314 (H)

2008 (2) ZLR p314

Citation 2008 (2) ZLR 314 (H)

Case No Judgment No. HH-115-08

Court	High Court, Harare
Judge	Makoni J
Heard	7 March 2007
Judgment	26 November 2008
Counsel	<i>F M Katsande</i> , for the applicant <i>Mr Mukonoweshuro</i> , for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Administration of estates – maintenance – dependant – who is – person unrelated to deceased who received support during lifetime of deceased – not entitled to maintenance

Headnote

The applicant was employed by the late M (hereinafter referred to as “the deceased”). The applicant had a minor child, who stayed with him after he divorced the child’s mother. From the time of the divorce until his death, the deceased provided the child with the basic necessities of life. The deceased, in his will, left his entire estate to his sister. The will was accepted by the Master of the High Court as the deceased’s final ^εtestamentary disposition. The applicant sought, in terms of s 3, as read with s 8(2)(d), of the Deceased Persons Family Maintenance Act [*Chapter 6:03*], an order that a specified immovable property be transferred to the child. It was argued that the child was a “dependant” of the deceased in terms of para (f) of the definition of “dependant”. This classifies as a ^εdependant any person who (i) was being maintained by the deceased at the time of his death or (ii) was entitled to the payment of maintenance by the deceased at the time of his death.

Held, that a “dependant”, in the context of the Act, must be someone whom the deceased had a legal duty to maintain. The word “maintain”, in the context of the Act, connotes a legal duty on the part of the deceased to ^gmaintain the claimant. *In casu*, the deceased had no legal obligation to maintain the minor child. It was an act of benevolence on the part of the deceased, constituting gratuitous support. He was assisting the child’s father, who had a legal obligation to maintain the child. Adopting the approach suggested by the applicant would lead to an absurdity, more particularly in the context of the African extended family. If the deceased, ^h

2008 (2) ZLR p315

Makoni J

^A during his lifetime, had ceased to assist the minor child, the applicant could not have successfully sued the deceased for maintenance.

Cases cited

van Rensburg NO v Board of Trustees of the Mining Industry Pension Fund 1979 RLR 131 (G)

Legislation considered ^B

Deceased Persons Family Maintenance Act [*Chapter 6:03*], s 2(1)(f)

Case information

F M Katsande, for the applicant

^c *Mr Mukonoweshuro*, for the respondent

Judgment

MAKONI J: The applicant seeks an order, in terms of s 3 of the Deceased Persons Family Maintenance Act [Chapter 6:03] ("the Act") that Stand 140 Upper East Road be awarded to the minor child Beatrice Maloya ("Beatrice"). The background to the matter is that the applicant was employed by the late ^D Christopher McNamara, during his lifetime. He divorced his wife when Beatrice was still a baby. From that time, the late McNamara provided the child with the basic necessities of life until the time he met his death. McNamara executed a will, whereby he bequeathed his entire estate to his sister. The will was accepted by the Master of the High Court as the deceased's final ^E testamentary disposition

The issue for determination, as agreed by both parties, is whether Beatrice qualifies as a dependant of the deceased and whether she is entitled to an award out of the net estate in terms of the Act. It was submitted on behalf of the applicant that the meaning of "dependant" should be given a broad purposive approach, as opposed to a narrow restrictive one. It was further ^F submitted that "dependant" should not be confined to a person who is legally entitled to support. The word, it was argued, should include persons who received support and the necessities of life from a deceased. I was referred to *van Rensburg NO v Board of Trustees of the Mining Industry Pension Fund* 1979 RLR 131 (G). In that case, the court found that a wife who was ^G in a bigamous situation was a dependant. It was dealing with the definition of "dependant" in the context of the Mining Industry (Pension Rules). The said rules did not define the word "dependant". *In casu*, the word "dependant" is defined. In any event, the case is distinguishable from the present matter in that in that case the dependency of the applicant was a direct result and creation of the deceased's action. He had contracted a bigamous marriage ^H and the "spouse" only became aware of that position after his death.

2008 (2) ZLR p316

Makoni J

It was further submitted that it is competent for the court to award the ^A immovable property to the applicant. This is provided for in s 8(2)(d) of the Act. The child is in need of maintenance as all her material needs were provided for by the deceased.

The first respondent contends that Beatrice is not a dependant as is defined in s 2(1) of the Act. The Act was designed for the provision of maintenance ^B for certain members of the deceased's family. Beatrice is not family to the deceased. It was further contended that, if the court were to find that the minor is a dependant, the deceased's estate should only pay maintenance up to the time when the minor becomes a major. The age of the minor child was not given. At the time the application was filed in 2006, the minor child was doing form three. In making the award of maintenance, the court should ^C take into account the factors listed in s 7 of the Act.

Section 2(1) of the Act defines dependant, in relation to a deceased, as:

- (a) a surviving spouse;
- (b) a divorced spouse who at the time of the deceased's death was entitled to the payment of maintenance by the deceased in terms of an order of ^D court;
- (c) a minor child;
- (d) a major child who is, by reason of some mental or physical disability, incapable of maintaining himself and who was being maintained by the deceased at the time of his death; ^E
- (e) a parent who was being maintained by the deceased at the time of his death;
- (f) any other person who –
 - (i) was being maintained by the deceased at the time of his death; or
 - (ii) was entitled to the payment of maintenance by the deceased at the ^F time of his death.

The minor child, Beatrice, does not fall under the category of minor "child", as child is defined to include an adopted and an illegitimate child of the deceased. She is neither of the above. The applicant contends that she falls under the category of persons defined in s 2(f). Section 2(f) was inserted ^G by the Administration of Estates Amendment Act, 1997 (No. 6 of 1997). It widened the parameters of persons who can claim maintenance under the Act. Before the insertion of the amendment, the category of persons who could file maintenance claims in terms of the Act was restricted to family whom the deceased had a legal obligation to maintain. Is s 2(f) expanding this category or is it opening up the claims to persons outside of the family ^H

Makoni J

A who are able to establish that they were being maintained by the deceased? See s 2(f)(i).

Section 2(f)(ii) is clear and unambiguous. The person must have had an entitlement to payment of maintenance, which entitlement he did not exercise by obtaining a court order during the lifetime of the deceased. Section 2(f) B (i) is not so clear. It could mean any person who received support and the necessities of life from the deceased, as suggested by the applicant, or any person being maintained in terms of a court order. Once there is ambiguity in the meaning of a provision in a statute, the court should resort to the tools of construction.

In my view, there is need to read the Act as a whole and the interpretation C made of all the parts together. The meaning of the statute and the intention of the legislature in enacting it can only properly be derived from a consideration of the whole enactment and every part of it, in order to arrive, if possible, at a consistent plan. The statute should be construed in a manner to carry out the intention of the legislature. This can be discerned from the policy of the D legislation and the scope and object of the statute. See *The Construction of Deeds & Statutes* by Sir Charles E Odgers 2 ed.

The Act is titled "Deceased Persons Family Maintenance Act". The purpose of the Act, according to the long title, is to make provisions for maintenance out of the estate of a deceased person for certain members of his family. The long title was not amended when s 2(f) was inserted. Section 2, before the E insertion of para 2(f), defines the dependants who can file claims against an estate. These include a surviving spouse, a divorced spouse, a minor child, a major child and parents who were being maintained by the deceased. They all fall under the umbrella of family. From the short title, the long title and the definition of dependant, there is the thread of family running through. F It must, therefore, have been the intention of the legislature that the Act applies to family members. *In casu* Beatrice is not a member of family of the deceased. If it was the intention of the legislature that any person, regardless of not being family to the deceased, would be a dependant, if he was supported by the deceased at the time of his death, then paras (a) to (e) of s 2 would have been repealed and replaced by the substitution of para 2(f). G Section 2(f) would have covered all situations.

I was unable to locate any write up explaining the rationale for the insertion of s 2(f). The Administration of Estates Amendment Bill 1997 did not contain any provision amending the Act. It was only during the second recording of the Bill that the amendment to the Act of the definition of "dependant" was H introduced and was adopted without debate

2008 (2) ZLR p318

Makoni J

It might be significant to note that the amendment to the Act by the A Administration of Estates Amendment Act 1997 was meant to cater primarily for certain situations created either by bigamous relationships or by marriages contracted in accordance with custom and not solemnized. Such persons would not be surviving spouses in terms of the Act as defined in s 2. Since the insertion of para 2(f) was passed in this Bill, one can safely assume that B "any other person" contemplated in para 2(f) is someone in the category of persons in bigamous relationships and in unregistered customary law unions. This new category would still fit under family.

It is my view that, in the circumstances, as discussed above, a dependant in the context of the Act must be someone to whom the deceased had a legal duty to maintain. The word maintain, in the context of the Act, connotes a C legal duty on the part of the deceased to maintain the claimant. *In casu*, the deceased had no legal obligation to maintain the minor child. It was an act of benevolence on the part of the deceased. It can also be termed "gratuitous support". He was assisting Beatrice's father who had a legal obligation to maintain the child. Adopting the approach suggested by the applicant would lead to an absurdity, more particularly in the context of the African extended D family. Estates would be flooded with claims from persons, who at one point would have been assisted by a deceased during his lifetime. Put in another way, if the deceased, during his lifetime, would have ceased to assist the minor child, could the applicant have successfully sued the deceased for maintenance? The answer is in the negative. There would be no legal basis E for such a claim.

In any event, if the deceased had wanted the assistance to continue beyond his life, he would have made provision for that in his will. Instead he bequeathed his entire estate to his sister. I was unable to find case law dealing with the interpretation of s 2(1)(f) in our jurisdiction. In the result, the application cannot succeed. ^f

I accordingly make the following order:

The application is dismissed.

F M Katsande & Partners, applicant's legal practitioners ^g

Mukonoweshure & Partners, first respondent's legal practitioners

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Document 44 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/MAKAMURE v DEVEN ENGINEERING (PVT) LTD 2008 (2) ZLR 319 (H)

MAKAMURE v DEVEN ENGINEERING (PVT) LTD 2008 (2) ZLR 319 (H)

2008 (2) ZLR p319

Citation	2008 (2) ZLR 319 (H)
Case No	Judgment No. HH-106-08
Court	High Court, Harare
Judge	Gowora J
Heard	14 March 2008
Judgment	26 November 2008
Counsel	Mrs <i>J B Wood</i> , for the applicant <i>H Zhou</i> , for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Contract – option – *right of first refusal (pre-emption) – meaning – what rights are given to grantee – when right exercisable – third party must make offer for the property – duty of grantor before accepting such offer – right cannot be exercised in the absence of an offer by a third party – D grantor of right not compelled to offer property for sale to a third party*

Practice and procedure – *application – urgent – urgent applications should not be brought where relief is dependent on the conclusion of an action launched or to be launched*

Headnote

^e Litigants must refrain from seeking relief in an urgent manner where such relief is dependant on the conclusion of an action launched.

The applicant was employed by the respondent company. When he left its service, having worked there for nearly four years, he retained the car that had been allocated to him. He sought an order compelling the respondent to sell the car to him at the current market value. The relevant clause in the contract of employment provided that assigned vehicles shall be disposed of after three years of continuous use by the employee concerned and, where applicable, subject to the lease hire company's laid down conditions. The user would be given a right of first refusal to purchase the vehicle at a price to be determined by reference to the lease hire company's laid down value or any other value as determined by the executive directors.

Held, that there was an agreement offering the applicant a right of pre-emption or first refusal, which entitles the holder to the first opportunity of buying if the seller decides to sell. For the right to be exercisable there must be an offer made for the property by a third party for the property which

2008 (2) ZLR p320

Gowora J

is subject to the right. At that stage the obligation of the grantor, before accepting the offer of the third party made with a specific price, is to offer the property for sale to the grantee to purchase the property at the price being offered by the third party. The grantee is then at liberty to accept or refuse the offer made to him. Thus are the conditions of first refusal satisfied. *B*

Held, further, that where there is no offer on the table for the grantor to accept, there can be no right of first refusal for the grantee to exercise. The right cannot be exercised in a vacuum. Nor can the grantor be compelled to offer the property for sale so that the grantee may then exercise his right of first refusal. *In casu* there was no offer on the table, nor was there a third party vying to purchase the car from the respondent. There was no price specified on the vehicle. The applicant could thus not exercise a right of pre-emption.

Cases cited

Cohen v Behr 1946 CPD 942

Hirschowitz v Moolman & Ors 1983 (4) SA 1 (T) *D*

Manchester Ship Canal Co v Manchester Race Course Co [1901] 2 Ch 37; (1901) 84 LTR 436

Owsianick v African Consolidated Theatres (Pty) Ltd 1967 (3) SA 310 (A)

Sawyer v Chioza 1999 (1) ZLR 203 (H) *E*

Case information

Mrs J B Wood, for the applicant

H Zhou, for the respondent

Judgment

GOWORA J: On 8 October 2007, this court granted the applicant a provisional order in terms whereof the applicant was granted the right to retain possession of a Mazda B1800 registration AAG 9397. Part of the order gave the applicant the obligation to retain the vehicle in a safe place and ensure that it was not damaged or destroyed. The applicant has now sought an order in the final terms of the provisional order as follows:

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

1. That pending the determination of the matter in Case No. HC 5252/07 wherein the applicant is applying for an order for specific performance compelling the respondent to comply with the employment contract and policy on motor vehicle usage and offer the applicant the Mazda B1800 to purchase at the current market value of that vehicle, the applicant shall retain possession of Mazda B1800 Reg. No. AAG 9397
2. Pending the determination of the matter in Case No. HC 5252/07 the

2008 (2) ZLR p321

Gowora J

A applicant shall keep the Mazda B 1800 Reg. No. AAG 9397 in a secure place and is hereby interdicted from lending the vehicle to any third party and shall undertake to ensure that the vehicle is not damaged or destroyed

3. That pending the determination of the matter in Case No. HC 5252/07 the applicant shall not sell or in any manner dispose of the Mazda Reg. No. B 1800 Reg. No. AAG 9397."

B The facts surrounding the dispute are these. The applicant was employed by the respondent as a projects engineer with effect from 25 August 2003. As part of his employment package, he was entitled to the use of a company vehicle allocated to his exclusive use for both business and personal use. He resigned from his employment with the respondent on 9 July 2007 and, C at the request of the respondent, he left employment on 1 August without serving his notice period. The applicant had been allocated a Mazda B1800 Reg. No. AAG 9397 at the time that he assumed his employment. When he left employment he took the vehicle with him and the respondent demanded its return. A perusal of HC 5252/07 shows that the plaintiff issued summons on 25 September 2007 and, apart from the demand for further particulars D by the defendant and the furnishing of the same by the plaintiff, no real progress has been made in having the claim prosecuted. The respondent has not filed a plea. The defendant has not been put on terms by the plaintiff and it appears that neither party is in any hurry for the matter to be concluded. Litigants must refrain from seeking relief in an urgent manner where such relief is dependant on the conclusion of an action launched or to be launched. E When one considers that a court sets aside its normal business to deal with the urgent application, only for the litigants therein to then take their time in having the dispute concluded, it becomes obvious that the urgent application system is being abused. Were the provisional order subject to a return date the parties would, in my view, make haste to have their dispute concluded F prior to the expiry of the return date.

In the summons the applicant is seeking, amongst other relief, an order compelling the respondent to sell the vehicle to him in accordance with the company vehicle policy. In order to avoid making factual findings that would compromise the court hearing the main action between the parties, I have considered whether I can determine this matter without an attempt at G interpreting the vehicle policy document, but it seems that I cannot avoid doing so. The applicant has made the contents of the document the basis for his entitlement to hold on to the vehicle, pending the conclusion of the claim for specific performance. My comments arise from the following statement in the founding affidavit:

H "9. I advised the respondent that I wanted to exercise the option to purchase the

2008 (2) ZLR p322

Gowora J

vehicle, Mazda B 1800 Registration No. AAG 9397 in terms of clause 23 of A the motor vehicle policy Annexure 'B' because I had use of that vehicle for a period in excess of three years and in terms of the policy the respondent had to dispose of the vehicle and give me the first option to purchase the vehicle."

The respondent in turn denies that the applicant has an option to purchase but has, instead, a right of first refusal, and that the two concepts are very B distinct. An examination of the clause is therefore unavoidable.

The clause in the policy is worded as follows:

"Vehicles shall be disposed of:-

- 22.1 In the case of assigned vehicles, after three years of continuous use by the concerned employee and where applicable subject to the Lease Hire C Company's laid down conditions. The user will be given right of first refusal to purchase the assigned vehicle at a price to be determined by reference to the Lease Hire Company's laid down value or any other value as determined by the Executive Directors."

The first issue for determination is the exact right that the applicant was given in the clause contained in the vehicle policy as it relates to his contract of D employment. According to the respondent the applicant was given a right of first refusal. The applicant, in the founding affidavit, referred to the right as an option to purchase. It is in the replying affidavit that the applicant admits that what he was given was a right of first refusal. In the heads of argument, however, it seems that the applicant still contends that he had the right to purchase the vehicle. It is clear, therefore, that the two parties to the dispute E each put a different construction on the right given to the applicant in terms of the vehicle policy of the respondent. The difference between an option to purchase and a right of first refusal was discussed at length in *Cohen v Behr* 1946 CPD 942, which is a judgment by de Villiers J (as he then was). At p 947 the learned judge quoted the following

passage from the judgment of F Williams LJ from *Manchester Ship Canal Co v Manchester Race Course Co* (1901) 84 LT 436:

"There appear to be two possible meanings of the words 'first refusal'; one is that they mean the opportunity of refusing a 'fair and reasonable' offer by the Race Course Company to sell the land *en bloc* to the Canal Company; the other is that they mean the opportunity of refusing the land at a price acceptable to the G Race Course Company offered by some person other than the Canal Company, which is what I understand by the term 'right of pre-emption'... The agreement does not provide that the first refusal shall be given at any particular price or on any particular terms; nor that the price and other terms shall be ascertained by arbitration or in any other way. Looking at these circumstances, I think there is at least fair ground for the contention that the clause only imports that the Race Course Company shall, in either of the prescribed events, make a H

2008 (2) ZLR p323

Gowora J

A fair and reasonable offer to sell the land to the Canal Company, and I wish to consider the case from this point of view, which is the view most favourable to the defendants ... I think that the very words 'first refusal' in clause 3 import that the price at which the Race Course Company give the Canal Company the 'first refusal' is a price at which the Canal Company will offer the land to other would be buyers in the event of the refusal of the Canal Company to but at that price ... The contract here to give Canal Company the 'first refusal' involves B a negative contract not to part with the land to any other company or person without giving that first refusal".

A more concise description of the term was given by Gwaunza J (as she then was) in *Sawyer v Chioza* 1999 (1) ZLR 203 (H) at 207, where she said the following:

c "Cooper *Landlord and Tenant* at p 143 aptly summaries the grantor's obligations in relation to the exercise by the grantee of his right of pre-emption:

'An agreement of pre-emption contains both a negative and a positive element. The negative element is that the grantor is restrained from selling to a third party, the positive element is once he is prepared to sell he is under obligation to sell to the grantee'.

d In my view, the above captions describe the essential elements of the right of pre-emption (or first refusal) in terms that are both clear and unambiguous. My reading of these requirements is that the following steps must, in that sequence, be followed in the exercise of the right of pre-emption:

- (a) a specific third party offers to buy the property at a given price;
- (b) the grantor is prepared to sell at that price; but E
- (c) before accepting the buyer's offer, the grantor reverts to the right of pre-emption, informs him of his decision to sell at the price offered by the particular buyer and asks him (grantee) to exercise his right of first refusal.

Thereafter, the outcome, in terms of who ends up buying the property, depends on the grantee's decision on whether to exercise his right ..."

I can put it no better than has been said in the two judgments I have quoted F above. What emerges, therefore, is that for a right of first refusal to be exercisable, there must be an offer made for the property which is subject to the right. At that stage the obligation of the grantor, before accepting the offer made with a specific price, is to offer the property for sale to the grantee to purchase at the price being offered by the third party. The grantee is then at liberty to accept or refuse the offer made to him. Thus are the conditions G of first refusal satisfied.

In casu, the applicant wishes the court to recognize a right of first refusal. There is indeed an agreement offering him a right of pre-emption. There is, however, no offer on the table for the respondent to accept. There is no third party vying to purchase the same item from the respondent. There is no price H specified on the vehicle, and it seems to me that the applicant cannot exercise

2008 (2) ZLR p324

Gowora J

a right of pre-emption in a vacuum. A right of pre-emption of first refusal A entitles the holder to the first opportunity of buying, if the seller decides to sell. It is a right that is exercised upon the fulfillment of a condition and, in this case, no circumstances have occurred that would result in there being such a condition coming into fruition.

This conclusion leads to me consider the next issue for determination, that B is, whether or not the respondent can be compelled to offer its vehicle for sale in order that the applicant may then

exercise a right of pre-emption. The grantor of a right of pre-emption cannot be compelled to sell the subject of the right. Should he, however, decide to do so, he is obliged, before executing his decision to sell, to offer the property to the grantee of the right of pre-emption upon the terms reflected in the contract creating that right. See *c Owsianick v African Consolidated Theatres (Pty) Ltd* (3) SA 310 (A) at 316. In *Hirschowitz v Moolman & Ors* 1983 (4) SA 1 at 6D-F, Coetzee J stated:

"There seems to be no doubt that *Sher's* case reflects our common law on this point. The pre-emptive right *in casu* is substantially identical with that considered in *Sher's* case. I agree therefore with appellant's counsel that it is one in which there is no 'option' price nor any express reference to the price which a stranger D might offer but it is nonetheless to be regarded in its effect as an enforceable undertaking to offer the subject matter thereof first to the appellant at the same price as the owner is prepared to accept from a third party. That undertaking is not a sale nor yet an offer to sell-it only compels the grantor to give the grantee the preference in case he sells at all (*van Pletsen v Henning* 1913 AD 82 at 95)".

In his replying affidavit, the applicant seems to suggest that what he wishes E is for the respondent to be compelled to offer the vehicle to him for sale. Based on the common law principle on the right of pre-emption, the applicant does not have the right to demand that the vehicle be sold to him. The clause "shall dispose of" in the policy document seems to compel the respondent to dispose of a vehicle after the expiration of a certain period of use. I do not believe that the clause should be read as imposing an obligation upon the F respondent to do so, nor do I accept the contention that the respondent is, in that clause, compelled to offer the vehicle for sale to the user. I am inclined to believe that the intention in the document was to set a period by which a vehicle could be disposed of. It cannot have been meant as imposing an obligation to the respondent to dispose of the vehicle once such a period had G lapsed. Nor did the applicant thereby acquire a right to purchase the vehicle upon the expiration of the period in question. As a consequence, his retention of the vehicle is without proper or legal foundation.

I turn now to the issue of the interdict. An examination of the provisional order reveals that the interdict was against the applicant and was meant to operate during the period of his retention of the vehicle. In view of my finding H

2008 (2) ZLR p325

Gowora J

A that he has no legal entitlement to retention of the vehicle, the interdict falls away upon his return of the vehicle to the respondent. In the premises, the provisional order must be discharged. I therefore make an order as follows:

The application be and is hereby dismissed with costs.

B *Byron Venturas & Partners*, applicant's legal practitioners

S *Takundwa & Co*, respondent's legal practitioners

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Document 45 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/MURADA v MURADA 2008 (2) ZLR 326 (H)

MURADA v MURADA 2008 (2) ZLR 326 (H)

2008 (2) ZLR p326

Citation	2008 (2) ZLR 326 (H)
Case No	Judgment No. HB-119-08
Court	High Court, Bulawayo
Judge	Ndou J

Heard	10 September 2008
Judgment	27 November 2008
Counsel	<i>M Makonese</i> , for the plaintiff Defendant in person
Case Type	Divorce action
Annotations	No case annotations to date

Flynote

Family law – husband and wife – divorce – grounds – grounds for divorce objectively proved – court obliged to grant a divorce in such case – irretrievable breakdown of marriage – two characteristics thereof – plaintiff no longer desiring to maintain the marriage relationship – in D itself an indication of the breakdown of the marriage – thereafter the court required to determine objectively the irretrievability of the breakdown

Headnote

If a ground of divorce has been objectively proved, a court has no choice but to grant the divorce. As far as the irretrievable breakdown of marriage is concerned, there are two characteristics thereof. Firstly, the marriage E relationship is no longer normal and, secondly, that there is no reasonable prospect of the restoration of the normal marriage relationship.

Where a plaintiff has made a subjective decision that he or she no longer desires to maintain the marriage relationship, this, in itself, is an indication of the breakdown of the marriage, but not necessary of an F irretrievable breakdown. The enquiry is then to examine the reasons advanced by the plaintiff objectively and to determine the irretrievability of the breakdown. Where it is the party's stated desire to terminate the marriage, it is in reality hardly possible for a court to find that there is a reasonable prospect of reconciliation between the parties. A further factor could be that the parties have separated: this would evince a G serious violation of *consortium* i.e., *inter alia*, loyalty, love, affection, comfort, mutual services and sexual relations which characterise a normal marriage relationship.

Cases cited

Coetzee v Coetzee 1991 (4) SA 702 (C) H

2008 (2) ZLR p327

Ndou J

A *Levy v Levy* 1991 (3) SA 614 (A)

Msimanga v Msimanga HB-7-07

Schwartz v Schwartz 1984 (4) SA 467 (A)

Singh v Singh 1983 (1) SA 781 (C)

Smit v Smit 1982 (4) SA 34 (O)

Swart v Swart 1980 (4) SA 364 (O)

Legislation considered B

Matrimonial Causes Act [*Chapter 5:13*], ss 5(2) and 7

Case information

M Makonese, for the plaintiff

c Defendant in person

Judgment

NDOU J: The parties are husband and wife respectively. They were married at Bulawayo magistrates' court on 13 January 1995. Their marriage is blessed with three minor children, namely Maylean, Joylean and Shylean. The plaintiff has sued for divorce with ancillary relief. On the question of the divorce, the ^d defendant's position is that the marriage has not irretrievably broken down and she contends that there are bright prospects of its successful restoration. On the question of the distribution of the immovable assets. the plaintiff claims stand number 10633 Mkoba 20, Gweru (with 5-roomed house thereon) and offers the defendant stand number 751/3 Mbizo, Kwekwe (with a 5-roomed house thereon) plus an undeveloped stand number 15223/15 Mbizo, Kwekwe ^e (also known as stand number 223/15 Mbizo, Kwekwe).

In her plea, the defendant claimed stand number 751/3 Mbizo, Kwekwe (i.e. the property offered to her by the plaintiff) and half share of the undeveloped stand number 15223/15 Mbizo, Kwekwe (the plaintiff had offered her the entire property). She offered the plaintiff the other half of the same property ^f plus stand number 10633 Mkoba 20, Gweru. This plea remained unamended. However, during her testimony, she claimed for herself stand number 10633 Mkoba 20, Gweru as well. She further introduced another stand number 575/4 Mbizo Kwekwe, which she offered to the plaintiff. She also offered a rural home to the plaintiff. Later, she also offered undeveloped stand number ^g 15223/15 to the plaintiff. Admittedly the defendant is a self actor, but if she desired to amend her plea she should have done so procedurally. She cannot alter the distribution of the property willy-nilly during the course of the trial. Be that as it may, I will consider whether there is justification for her newly suggested distribution without dwelling much on the procedural flaws, as there seems to be no prejudice that will be occasioned to the plaintiff since ^h his legal practitioner cross-examined the defendant extensively on these

2008 (2) ZLR p328

Ndou J

fresh claims. On the movable assets there was agreement on the distribution ^a of most of them. I will now deal with the issues in turn.

Has the marriage irretrievably broken down?

It is common cause that at the time of the issuance of the summons in September 2005 the parties had been separated for a period of around a year. At the time of the commencement of the trial, they had been separated for ^b a period of about four to five years. The parties have hardly communicated during this period, save for a few telephone calls occasioned by the needs of their children or something to do with the assets. They have not shared conjugal rights during this period. In his testimony the plaintiff has expressly stated that he no longer loves the defendant and that there is no longer any ^c hope for a change of heart . He said the marriage's demise started in 2002 when his ailing sister came to stay with them. The defendant refused to live with his ailing sister on account of her (the sister) suffering from AIDS. He tried to reason with her, but in vain. She started locking toilets in order to deny him and his sister access. He eventually moved his sister from their home to Gweru. ^d

Even after his sister's departure, the defendant no longer accepted him as part of the family. She no longer prepared food for him and denied him his conjugal rights. She locked him out of the house most of the time. She went on to sue him for maintenance in the magistrate's court even though he was providing for his family. He tried to involve their relatives in a reconciliation ^e but she was not interested. She tried to prevent their minor children from accessing him. He said they had not had any sexual relations since 2002 to the date of his testimony in September 2008. As a result of this issue, the relationship has soured even more to the extent that they do not talk to each other; in fact, they do not even greet each other. Whenever he phones her to discuss issues involving their children she puts the phone down. He stated ^f that he does not love the defendant anymore and he believes she does not love him, irrespective of what she is telling the court.

On her part, the defendant concedes that their separation is not consistent with a marriage but is confident that the plaintiff will reconcile with her as soon as he has "finished enjoying himself" and has run out of his US dollars. ^g She said she is prepared to wait for him to become reconciled with her, even if it involves health risks and takes years for him to do so. She said four years of separation is not out of this world, compared to migrant workers or men who desert their wives

while in South Africa only to reconcile after several years e.g. ten to twenty years. I think the distinction is that *in casu* there is no distance between husband and wife. She and the defendant are

2008 (2) ZLR p329

Ndou J

A not in a long distance relationship, as in the example she is giving. It is clear in this case that the plaintiff no longer loves her and unfortunately the court cannot come to her assistance in this regard. No matter how sympathetic the court may be, it is not within its competence to make her husband love her. It is trite law that a court has no choice: if the presence of a ground for divorce has been objectively proved, it has to grant the divorce – *Schwartz v Schwartz* 1984 (4) SA 467 (A) at 473; *Levy v Levy* 1991 (3) SA 614 (A) and *Msimanga v Msimanga* HB-7-07. There are two characteristics of irretrievable breakdown of marriage:

- (a) the marriage relationship is not normal anymore; and
- (b) there is no reasonable prospect of the restoration of a normal marriage c relationship.

In this case, the marriage relationship is not normal any more, as shown above. The plaintiff has made a subjective decision that he no longer desires to maintain a marriage relationship with the defendant. He has evinced this decision by word of mouth and by conduct, as outlined above. This is an d indication of the breakdown of the parties' marriage, but not necessarily of an irretrievable breakdown – *Swart v Swart* 1980 (4) SA 364 (O) at 368 and *Coetzee v Coetzee* 1991 (4) SA 702 (C).

The next enquiry is the examination of the reasons advanced by the plaintiff in an objective manner and a determination on the irretrievability of the e breakdown. It is the plaintiff's stated desire to terminate the marriage. In reality, it is hardly possible for a court to find that there is a reasonable prospect of reconciliation between the parties when one of them is determined to bring the marriage to an end – *Swart v Swart supra*; *Levy v Levy supra*; *Msimanga v Msimanga supra*; *Smit v Smit* 1982 (4) SA 34 (O) and *Singh v Singh* 1983 (1) SA 781 (C). *In casu*, in addition to the expressed firm desire f to terminate the marriage relationship, the plaintiff has moved out of the matrimonial home and has remained absent for a period in excess of three years. This is a relevant factor in terms of s 5(2)(a) of the Matrimonial Causes Act [Chapter 5:13]. During this period of separation the parties no longer have a sexual relationship. The facts of this case evince a serious violation of g consortium i.e. *inter alia*, loyalty, love, affection, comfort, mutual services and sexual relations which characterise a normal marriage relationship. There is no prospect of the restoration of a normal marriage relationship. The defendant has no option but to accept this unfortunate termination of her marriage relationship and move on with her life: it is time for a clean break. Accordingly, I find that the marriage relationship between the parties h has irretrievably broken down to such an extent that there is no reasonable

2008 (2) ZLR p330

Ndou J

prospect of the restoration of a normal marriage relationship. A

Distribution of the immovable assets

I have a discretion conferred on me by s 7 of the Matrimonial Causes Act. This issue was mainly common cause between the parties, as alluded to above. The defendant only changed her position during the course of her testimony. In my view, the original distribution of the immovable assets was equitable b and fair. In terms of that agreed distribution, each party would end up with a 5-roomed residential property in the high density suburbs. In addition, out of the plaintiff's generosity, the defendant would end up with an additional undeveloped residential stand. On a preponderance of equities, the original distribution from the plaintiff's particulars of claim and defendant's plea is c fair. The issue of the rural homestead that the defendant raised for the first time in her testimony would not alter that fair distribution, bearing in mind that the defendant was awarded an extra undeveloped residential stand. Another reason why the defendant is changing her position is because she suspects (although she has not produced any proof) that because the plaintiff frequents stand number 575/4 Mbizo, Kwekwe, it must be his property. The d plaintiff has testified that the said property does not belong to him; he only goes there to visit his sister, who is merely a tenant in the house. I have no reason to doubt the testimony of the plaintiff in this regard. Even if the property was bought by the plaintiff, the defendant still has to establish that it was bought before the separation and what her contribution was, in order e to establish the percentage thereof that she

alleges accrued to her. Even with regard to the two stands i.e. number 10633 Mkoba 20, Gweru and 751/3 Mbizo, Kwekwe, she would have been required to prove her entitlement had it not been for the generous attitude of the plaintiff. This is so because both are registered in the names of the plaintiff alone. The defendant has failed to establish any of the fresh allegations that she introduced in her testimony ^F about the rural home and ownership of stand 575/4 Mbizo, Kwekwe. It is trite that he or she who alleges must prove. She has failed to do so. I will revert to the original position which is common cause from the plaintiff's particulars of claim and the defendant's plea. The balance of equities favour such a distribution.

Distribution of movable assets ^G

Once again, the defendant lays claim to a truck which she saw the plaintiff using. This is a fresh claim. The plaintiff says that the truck has not yet been acquired. He and some relatives are in the process of acquiring it as an association. It is common cause that this truck only featured after the parties were separated. Once more, the defendant has just made a bold allegation that ^H

2008 (2) ZLR p331

Ndou J

^A the truck belongs to the plaintiff without providing any proof. As far as the video camera is concerned, the plaintiff stated that it was sold and the proceeds thereof were employed in the construction of one of their properties and that the defendant is fully aware of this. As far as the shovels are concerned, the plaintiff testified that these belong to the government and were available to him as he is employed by the government, however, ownership is retained by ^B government. The plaintiff said he was claiming only the motor vehicle Mazda 323 registration number 669-988X, a Philips radio, lounge suite, four stools, a fridge (1-door upright), two-door wardrobe, carpet, one pair of bedsheets and five blankets. He offered the defendant a Philips colour television set (24 inch) together with a VCR, room divider, a Panasonic radio, a bedroom ^C suite, 4-plate electric stove and all the kitchen utensils. This appears to be an equitable distribution of the matrimonial assets.

Accordingly, it is hereby ordered as follows:

1. A decree of divorce be granted.
2. The custody of the three minor children namely, Maylean Murada, a girl, ^D born on 21 October 1994, Joylean Murada, a girl born on 16 December 2000 and Shylean Murada, a girl born on 30 October 2002, is granted to the defendant, with the plaintiff enjoying reasonable access to these minors.
3. 3.1 It is ordered that the plaintiff be awarded the following assets as his ^E sole and exclusive property:
 - (a) stand number 10633 Mkoba 20, Gweru
 - (b) Mazda 323 motor vehicle registration number 669-988X (non-runner)
 - (c) 1 Philips radio
 - (d) Lounge suite ^F
 - (e) 4 stools
 - (f) 1 door upright refrigerator
 - (g) 1 carpet in the rural home
 - (h) 1 pair bedsheets
 - (i) 5 blankets ^G
 - (j) 2-door wardrobe
- 3.2 It is ordered that the defendant be awarded the following assets as her sole and exclusive property:
 - (a) stand number 751/3 Mbizo, Kwekwe ^H
 - (b) Stand number 223/15 Mbizo, Kwekwe (undeveloped)

2008 (2) ZLR p332

Ndou J

- (c) 1 Philips 24 inch colour television set with VCR ^A
- (d) 1 room divider

- (e) 1 Panasonic radio
- (f) 1 bedroom suite
- (g) 4-plate electric stove
- (h) All the kitchen utensils ^b

4. Each party to pay its own costs.

Makonese & Partners, plaintiff's legal practitioners ^c

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Document 46 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/MOYO v NCUBE & ORS 2008 (2) ZLR 333 (H)

MOYO v NCUBE & ORS 2008 (2) ZLR 333 (H)

2008 (2) ZLR p333

Citation	2008 (2) ZLR 333 (H)
Case No	Judgment No. HB-122-08
Court	High Court, Bulawayo
Judge	Kamocha J
Heard	5 November 2008
Judgment	27 November 2008
Counsel	<i>N Mazibuko</i> , for the plaintiff <i>J Sibanda</i> , for the second defendant No appearance for the first, third and fourth defendants
Case Type	Civil action
Annotations	No case annotations to date

Flynote

Enrichment – will – wrong person paid in error under will and enriched thereby – right of true heir to recover his inheritance – extent of his recovery in terms of the *condictio*

▫ **Practice and procedure** – parties – joinder – non-joinder of a party – not a basis for defeating the cause of action

Practice and procedure – parties – locus standi – beneficiary under a will – locus standi to claim recovery of inheritance wrongly given to another

Succession – will – beneficiary – locus standi to bring action to recover inheritance wrongly given to another – extent of recovery permissible

Headnote

Where the wrong person has been paid out as an heir, the true heir can recover the inheritance with a *condictio* from the wrong heir. Where the wrong heir acted in good faith, recovery will be limited to his enrichment as at the time of the action. Where he acted in bad faith, he will be accountable ^f for all he has received, with interest.

The late NM had died, leaving a will in which he had bequeathed his house to his son, the plaintiff, and his moveables to his wife. In error, however, it was believed by all that he had died intestate and, in the result, his widow had inherited the house in terms of s 3 of the Deceased Estates Succession Act [Chapter 6:02]. Thereafter, his widow died intestate and the first defendant, as the executor, obtained the permission of the Assistant Master, the fourth defendant, to sell the house by private treaty. The house was bought by the second defendant. Only thereafter was it discovered that NM had left a will. The plaintiff thereupon sought to assert his rights in terms of the will. While accepting that NM had indeed left a will, the second defendant entered appearance to defend

2008 (2) ZLR p334

Kamocha J

the action. In filing an exception thereto, he argued that the plaintiff's A failure to join the executor, or putative executor, to the estate of NM was fatal irregularity to the plaintiff's claim and that, in any event, as a mere beneficiary, and not the executor of his father's estate, the plaintiff lacked *locus standi* to bring the action.

Held, that there was no irregularity in failing to join the executor, or putative B executor, of NM's estate, as there was no executor thereto. The deceased's estate had been finalized long before it was discovered that he had made a will. In any event, in terms of r 87(1) of the High Court Rules, non-joinder of a party will not defeat a cause of action.

Held, further, dismissing the exception with costs, that he plaintiff did have *locus standi* to bring the action, notwithstanding that he was only a C beneficiary under the will and not the executor. At common law, he had a right, in terms of a *condictio*, to recover his inheritance from the second defendant.

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 87(1) D

Case information

N Mazibuko, for the plaintiff

J Sibanda, for the second defendant

No appearance for the first, third and fourth defendants

Judgment

KAMOCHA J: The second defendant excepted to the plaintiff's claim as E being incurably bad at law, on two grounds.

Firstly, he alleged that the plaintiff had no *locus standi* to institute the proceedings as he was not the executor of the estate of the late Njabulo Moyo, who was his father. It was contended that only an executor of an estate could make claims on behalf of a deceased estate and not a beneficiary under a F will. A beneficiary under a will had no capacity to sue third parties to comply with the terms of a will, to which such third parties have no connection, so the argument went.

Secondly, it was asserted that since the executor or putative executor of the estate had not been joined to these proceedings, the omission was a fatal G irregularity in the plaintiff's papers.

In brief, the background to this matter is this. One Njabulo Moyo was the owner of house number 4407, Nketa 7 Bulawayo. He was married to Knowledge Moyo. He had a son known as Mandla Moyo – the plaintiff in this matter. During his lifetime he executed a will wherein he bequeathed the said house to his son, the plaintiff, while the movable property (namely H

2008 (2) ZLR p335

Kamocha J

A sofas, refrigerator, a 3-plate stove, bed and wardrobe) were bequeathed to his wife Knowledge Moyo.

The validity of Njabulo Moyo's last will and testament was not put in issue, although after his death his estate was dealt with as an intestate. This was due to a common error by all concerned that

Njabulo Moyo died intestate. ^Б In the result, house No. 4407, Nketa 7 was inherited by his wife Knowledge Moyo in terms of the provisions of s 3 of the Deceased Estates Succession Act [*Chapter 6:02*].

Knowledge Moyo died intestate. Sazini Bigboy Ncube was appointed executor of her estate. The Assistant Master of this court authorised Sazini Bigboy Ncube, in terms of s 120 of the Administration of Estates Act [*Chapter 6:01*] to sell the said house by private treaty. The property was bought by Sibonisiwe Ndlovu, the second defendant.

It was only then that it was discovered that Njabulo Moyo had, in fact, left a valid will and that was common cause. The plaintiff then sought to assert his rights and issued summons out of this court in an endeavour to rectify ^Д the situation.

The second defendant, who was the buyer of the house, entered appearance to defend the matter and so did the executor of the estate of the late Knowledge Moyo. Thereafter, the second defendant then filed this two-pronged exception.

I shall deal with the grounds of exception in reverse order – starting with ^Е the second ground. The second defendant claimed that since the executor or putative executor of the estate had not been joined to these proceedings the omission was a fatal irregularity in the plaintiff's papers. This assertion tends to ignore the fact that the estate of the late Njabulo Moyo had been finalised. That is why the late Knowledge Moyo acquired transfer of the property from the estate of her late husband and, further, that was how the same property ^Ф was subsequently transferred from her own estate to the second defendant. There was therefore no executor in an estate which had been long finalised.

In any event, nonjoinder or misjoinder will not defeat a cause of action. Order 13 r 87(1) of the Rules of this court provides that:

"No cause or matter shall be defeated by reason of the misjoinder or nonjoinder ^Г of any party and the court may in any cause or matter determine the issues of questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

The court can determine the rights and interests of the plaintiff in the matter despite the nonjoinder of the executor. It is therefore not correct to suggest that nonjoinder of the executor was a fatal irregularity to the plaintiff's ^Н papers. I would, in the result, conclude that the court is entitled to determine

2008 (2) ZLR p336

Kamocha J

the rights and interests of the plaintiff, irrespective of whether or not the ^А executor is joined to the proceedings in the main action.

The first ground for the exception was that the plaintiff lacked *locus standi* to institute the proceedings in the main action, since he was not the executor of his father's estate but was a mere beneficiary. It was argued that a beneficiary under a will had no capacity to sue third parties to comply with the terms of ^Б a will to which such third parties had no connection. It was the duty of an executor to sue any third party on behalf of the beneficiaries.

A further assertion was that the complexion of the case would have been different had the second defendant inherited the property. But that was not the case. The second defendant bought the property. She was in possession of it ^С by virtue of having purchased it and was, therefore, different from someone who gets possession of a property through inheritance, so the argument went.

What admits of no doubt is the fact that the plaintiff in this case is not trying to claim on behalf of other beneficiaries. He is only seeking to assert his own rights to recover an inheritance. This, in my view, is supported by common law. For instance Johannes Voet *Commentary upon the Pandects* (J C Juta ^Д and Co 1891), translated by Victor Sampson, at p 214 states thus:

"The action to recover an inheritance is primarily a civil action *in rem*; yet mixed as well, because of the personal obligations enforced by it; and belonging to the *bona fide* class; *by which a person contends that an inheritance belongs to him and that it should be restored to him by the person who is in possession of it as heir or as a mere possessor*" (emphasis added). ^Е

The learned jurist continued at p 216 that:

"The action is available to the true heir and ... whether he has adiated under will or is an heir *ab intestato*."

This position of the law on this point is simplified and made clear in *The Law of Succession in South Africa* by Corbett, Hahlo, Hofmeyer and Kahn F (1980), where the learned authors state at p 10:

“Where the wrong person has been paid out as heir (e.g. no will having been found, A has been paid the inheritance as heir *ab intestato*; later, a will appointing B as deceased’s sole heir is discovered) the true heir can recover the inheritance with a *condictio* from the wrong one. Where the wrong heir had acted in good faith, recovery will be limited to his enrichment as at the time of action. Where G he had acted in bad faith, he will be accountable for all he has received, with interest.”

These authorities illustrate the point that, although the plaintiff was a mere beneficiary to his late father’s estate, he was entitled in his own right to institute proceedings to recover an inheritance which he believes had been wrongly given to Knowledge Moyo. In his view, she was not entitled at law H

2008 (2) ZLR p337

Kamocha J

A to have inherited the property *ab intestato* where there was a valid will. She therefore could not acquire any rights in the property. In conclusion, it was his contention that the second respondent could not derive any rights from something which was wrong. I am inclined to agree that, this being his attitude, he must assert his rights in a court of law. He has the *locus standi* to do that.

B In the light of the above findings, I would dismiss the exception with costs.

Calderwood, Bryce Hendrie & Partners, plaintiff’s legal practitioners

Job Sibanda & Associates, second defendant’s legal practitioners

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Document 47 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/S v MOYO & ORS 2008 (2) ZLR 338 (H)

S v MOYO & ORS 2008 (2) ZLR 338 (H)

2008 (2) ZLR p338

Citation	2008 (2) ZLR 338 (H)
Case No	Judgment No. HB-124-08
Court	High Court, Bulawayo
Judge	Ndou J
Heard	27 November 2008
Judgment	27 November 2008
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – offences under Criminal Code – stock theft – penalties applicable – theft of equine animal – whether includes theft of a donkey

International law – international instruments – use of to resolve ambiguity in domestic legislation and to ensure equal treatment ^D

Interpretation of statutes – meaning of words – ambiguity – ambiguity in criminal statute resulting in unequal treatment of persons being sentenced – use of international instruments to ensure equality of treatment

Interpretation of statutes – meaning of words – international instruments – may be used to resolve ambiguity and ensure equal treatment ^E

Headnote

The three accused were convicted before different magistrates of the theft of donkeys. In terms of s 114(2)(e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], where stock theft involves any bovine or equine animal, a mandatory minimum sentence is applicable. The magistrates all took the view that a donkey is an “equine animal” and ^F imposed the mandatory minimum sentence. The cases went to the High Court on automatic review.

Held, that there are conflicting rulings of the High Court as to whether a donkey is or is not an “equine animal”. This has resulted in widely different sentences for the crime, depending on which line the magistrate or judge follows. This is not justice. The accused should benefit from this ^G uncertainty and not be disadvantaged. Irrespective of what interpretation is followed, the lesser of the punishments should be visited upon the donkey thieves. The imposition of the minimum mandatory sentence on the accused person in the present cases is discriminatory and unfair when other thieves of donkeys do not attract such mandatory punishment. There is a need, *in casu*, to use international law for the purpose of removing ^H

2008 (2) ZLR p339

Ndou J

^A this uncertainty or ambiguity. It is within the proper nature of judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law. Article 7 of the Universal Declaration of ^B Human Rights states that all are equal before the law and are entitled without any discrimination to equal protection of the law. To remove that discrimination, the mandatory minimum sentence should not be applied.

Cases referred to

^C *Attorney-General v Dow* 1992 BLR 119 (CA)

Min for Immigration & Ethnic Affairs v Teoh (1994) 128 ALR 353 (HC)

S v Chigovera HH-84-05

S v Gibson & Ors HB-74-07

S v Ndlovu & Anor 2006 (2) ZLR 32 (H)

S v Ndlovu & Ors HB-117-07

Legislation considered ^D

Criminal Law (Codification & Reform) Act [*Chapter 9:23*], s 114(2)(e)

International instruments

^E Universal Declaration of Human Rights, arts 7 & 10

Judgment

NDOU J: The accused persons were convicted by magistrates sitting at Plumtree, Mberengwa and Beitbridge magistrates’ court, respectively. Each stole a donkey, i.e. committed stock theft as defined in s 114(2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Nothing turns on the ^F convictions. Each magistrate held the view that mandatory minimum sentence of nine years is applicable. In each case the question of special circumstances was considered and such were

found not to exist. Consequently each accused was sentenced to the mandatory minimum sentence of nine years. This is on account of the provisions of s 114(2)(e) which state that any person who ^g steals stock shall be guilty of stock theft and liable –

“if the stock theft involved any bovine or *equine* animal stolen in the circumstances described in paragraph (a) and (b), and there are no special circumstances in that particular case as provided in subsection (3) to imprisonment for a period of not less than nine years or more than twenty-five years ...” (emphasis added)

This provision restates s 12 of the previous Stock Theft Act [*Chapter 9:18*].

^h The problem that has arisen, which, in my humble view, requires urgent

2008 (2) ZLR p340

Ndou J

legislative intervention is whether a donkey is an equine animal. This court, ^a in its judgments, has given conflicting interpretation of “equine”. On the one hand, there is an interpretation which opines that a donkey is not an equine animal: *s v Ndlovu* 2006 (2) ZLR 32 (H); *s v Gibson & Ors* HB-74-07 and *s v Ndlovu & Ors* HB-117-07. On the other hand, there is a school of thought that construes a donkey as an equine animal: *s v Chigovera* HH-84-05. ^b

Both interpretations are based on dictionary definitions of equine. Both definitions appear very convincing. At this stage I do not wish to take sides. I am deeply concerned by the effect of these conflicting judgments on the lower court and the resultant injustice caused on the accused persons. Some magistrates have followed the judgments that view a donkey as an equine animal. The unfortunate consequence of this interpretation as evinced in ^c these three matters, is the imposition of the minimum mandatory term of nine years. Other magistrates have followed the judgments that do not view a donkey as an equine animal resulting in short term of imprisonment in the region of nine to 24 months. In terms of the *stare decisis* both sets of magistrates are correct. But is this justice? In my humble view it is not. The ^d legislature had an opportunity to deal with this anomaly when it enacted Criminal Law (Codification and Reform) Act *supra*. Sadly it did not, and some donkey thieves continue receiving mandatory sentences of nine years whilst others enjoy the benefit of a couple of months. This all depends on which magistrate they appear before.

I am aware that some of my brother and sister judges confirm on review the ^e mandatory sentences of nine years, while others reduce the sentences to a few months’ imprisonment.

In my humble view, the accused should benefit from this uncertainty and not be disadvantaged. After all, we always say the accused should be given the benefit of doubt as far as the conviction is concerned. But should this ^f principle be extended to deal with the situation that has arisen as a result of the interpretation of equine? I believe it should and there is a legal basis for saying so. In other words, irrespective of whatever interpretation is followed, the lesser of the punishments should be visited upon the donkey thieves. If there is any doubt on the interpretation, the doubt must be resolved in ^g favour of the accused: *Criminal Procedure in Zimbabwe* – by John Reid Rowland at 25-46.

This is, however, a merely temporary measure, pending legislative intervention on whether a donkey is an equine animal. It is trite that the legislature plays an important role in the origin of criminal provisions, of criminals and of criminal punishment. The legislature should realise what the purpose of ^h

2008 (2) ZLR p341

Ndou J

^a criminal law is and the nature of criminal sanction. I would highlight that before the discretion of the sentencing court is taken away or limited, as is the case here, the legislature should seek clarity on these crucial issues, because if clarity is not sought or if no thought is given to these issues, a legislature would resemble a blind person wielding an axe, and being unaware of the nature of that instrument: *Punishment: An Introduction to Principles* 3 ed ^b by M A Rabie and ^s A Strauss at p 21.

From the above facts, it is clear that the imposition of the minimum mandatory sentence of nine years on the accused person in the present cases is discriminatory and unfair when other thieves of donkeys do not attract such mandatory punishment. The domestic courts have been unable to resolve ^c this conflict, with serious consequences for some of the accused persons convicted of theft of donkeys. There is a need, *in casu*, to use international law for the purpose of removing this

uncertainty or ambiguity in s 114(2) of the Criminal Law (Codification and Reform) Act. The Universal Declaration on Human Rights provides the solution:

Article 7:

D "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

Article 10:

E "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights, obligations and of any criminal charge against him."

It is within the proper nature of judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into F domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law: *The Bangalore Principles of 1988* and the Botswana case of the *Attorney-General v Dow* 1992 BLR 119 (CA). There is a need in such cases of uncertainty or ambiguity to use international law norms and principles in informing domestic decisions: see G also the Australian case of *Minister for Immigration and Ethnic Affairs v Teoh* (1994) 128 ALR 353 (High Court). To remove the discrimination against the donkey thieves who appear before the courts that interpret a donkey as an equine animal, I would set aside the minimum mandatory sentences of nine years imposed in each of the above cases and substitute the following:

"Each accused is sentenced to 3 years' imprisonment of which 1½ years is H suspended for 4 years on condition that the accused in that period does not

2008 (2) ZLR p342

Ndou J

commit an offence involving theft of stock and for which he is convicted and A sentenced to imprisonment without the option of a fine."

The sentence that each accused has already served will be taken into account.

KAMOCHA J agreed B

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Document 48 of 49

Source:

Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2008/Volume 2/MIKE CAMPBELL (PVT) LTD & ORS v REPUBLIC OF ZIMBABWE 2008 (2) ZLR 343 (SADC T)

MIKE CAMPBELL (PVT) LTD & ORS v REPUBLIC OF ZIMBABWE 2008 (2) ZLR 343 (SADC T)

2008 (2) ZLR p343

Citation	2008 (2) ZLR 343 (SADC T)
Case No	Judgment No. SADC(T)-2-07
Court	SADC Tribunal, Windhoek
Judge	Pillay P, Mtambo J, Mondlane J, Kambovo J & Tshosa J
Heard	28 November 2008
Judgment	28 November 2008
Counsel	<i>J J Gauntlett SC</i> , with him <i>A P de Bourbon SC</i> , <i>J L Jowell QC</i> & <i>Mrs E N Angula</i> , for the applicants <i>P Machaya</i> , with him <i>Mrs N Mutsonziwa</i> , for the respondent

Case Type	Civil application
Annotations	Link to case annotations

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – Declaration of Rights – s 18(1) & (9) – right to protection of the law – right specifically ousted in relation to land acquired under s 16B*

D International law – *international tribunals – access to – requirement that domestic remedies must have been exhausted – applicants entitled to approach such tribunals where domestic remedies are denied or are ineffective*

International law – *treaties – binding nature of – effect of domestic legislation – party to treaty may not invoke domestic law to evade treaty obligations*

E International law – *treaties – SADC Treaty – art 4(1) – interpretation – principles – requirement to act in accordance with human rights, democracy and the rule of law – art 21(b) – Tribunal required to develop its own jurisprudence, having regard to applicable treaties, general principles and rules of public international law*

F Jurisprudence – *rule of law – meaning of – essential rights embodied in rule of law – right of access to courts and right to fair hearing*

Headnote

The applicants brought an application before the SADC Tribunal in Windhoek, ^G arguing that the respondent (the Government of Zimbabwe) had acted in breach of its obligations under the SADC Treaty by enacting and implementing Amendment No 17 to the Zimbabwean Constitution. They argued that all the lands belonging to them which had been compulsory acquired by the respondent under that Amendment were unlawfully acquired, since the Minister responsible had failed to establish that he ^H applied reasonable and objective criteria in order to satisfy himself that

2008 (2) ZLR p344

Mondlane J

the lands to be acquired were reasonably necessary for resettlement ^A purposes in conformity with the land reform programme. They claimed that they had been denied access to the courts to challenge the legality of the compulsory acquisition of their lands, that the respondent was in breach of art 6(2) of the Treaty, which prohibits discrimination, by enacting and implementing Amendment No 17 to the Constitution, and ^B that they had been denied compensation (on the subject of compensation, s 16B(2)(b) of the Constitution, as amended, provides that compensation shall be paid for improvements only). Apart from arguing to the contrary, the respondent argued that the Tribunal had no jurisdiction to entertain the application, on the grounds that the applicants had not shown that they had exhausted all available remedies or were unable to proceed ^C under the domestic jurisdiction.

Held, that individuals are required to exhaust local remedies in the municipal law of the state before they can bring a case to the Tribunal. This means that individuals should go through the courts system, starting with the court of first instance to the highest court of appeal to get a remedy. The ^D rationale for exhaustion of local remedies is to enable local courts to first deal with the matter because they are well placed to deal with the legal issues involving national law before them. It also ensures that the tribunal does not deal with cases which could easily have been disposed of by national courts. However, where the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is ^E not required to exhaust the local remedies. Amendment No 17 ousted the jurisdiction of the courts of law in Zimbabwe from any case related to acquisition of agricultural land and therefore the applicants were unable to institute proceedings under the domestic jurisdiction.

Held, further, that member states cannot rely on their national law to avoid their legal obligations under the Treaty. To allow this would permit ^F international law to be evaded by the simple method of domestic legislation. The Vienna Convention on the Law of Treaties provides in art 27 that a party to a treaty may not invoke provisions of its own internal law as justification for failure to carry out an international agreement.

Held, further, the concept of the rule of law embraces at least two fundamental rights, namely, the right of access to the courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation. In terms of arts 4(c) and 6(1) of the SADC Treaty, member states are obliged to respect principles of "human rights, democracy and the rule of law" and "to refrain from taking any measure likely to jeopardize the sustenance of its principles, the achievement of its

2008 (2) ZLR p345

Mondlane J

A objectives and the implementation of the provisions of the Treaty". Legislation which deprives the courts of the powers to determine the lawfulness of the acts and decisions and orders of public authorities exercising public functions, and to afford protection to the rights of the citizen, is inimical to the principle of the rule of law, which requires citizens to have access to justice. Indeed, one can scarcely conceive of the rule of law without there being a possibility of having access to the courts. The right of access to the courts is not only set out in court decisions, but also enshrined in international human rights treaties, such as the African Charter on Human and Peoples' Rights. In a constitutional democracy founded on the rule of law, disputes between the state and its subjects, and amongst its subjects themselves, should be adjudicated upon in accordance with law. The more potentially divisive the conflict is, the more important that it be adjudicated upon in court. That is why a constitutional democracy assigns the resolution of disputes to a court or, where appropriate, another independent and impartial tribunal or forum. It is quite clear that the provisions of s 18(1) and (9) of the Constitution of Zimbabwe, dealing with the right to the protection of law and to a fair hearing, have been taken away in relation to land acquired under s 16B(2)(a). There is not even the remedy of judicial review in respect of land acquired under s 16B(2)(a)(i) and (ii). The applicants had thus been expressly denied the opportunity of going to court and seeking redress for the deprivation of their property, giving their version of events and making representations. The applicants had established that they had been deprived of their agricultural lands without having had the right of access to the courts and the right to a fair hearing, which are essential elements of the rule of law, and consequently the respondent has acted in breach of art 4(c) of the Treaty.

Held, further (Tshosa J dissenting), that discrimination of whatever nature is outlawed or prohibited in international law. There are several international instruments and treaties which prohibit discrimination based on race, the most important one being the United Nations Charter, as well as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and Peoples' Rights and the Convention On the Elimination of All Forms of Racial Discrimination, all of which prohibit racial discrimination. The respondent acceded to both Covenants, the African Charter and the Convention and, by doing so, was under an obligation to respect, protect and promote the principle of non-discrimination and must, therefore, prohibit and

2008 (2) ZLR p346

Mondlane J

outlaw any discrimination based on the ground of race in its laws, policies and practices. In addition to those international agreements, the SADC Treaty itself, in art 6(2) prohibits discrimination. Although the Treaty does not define racial discrimination or offer any guidelines to that effect, the Convention On the Elimination of All Forms of Racial Discrimination, for example, prohibits any distinction, exclusion, restriction or preference based on race, colour, descent, or natural or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. The 17th Amendment affected all agricultural lands or farms occupied and owned by the applicants and all the applicants were white farmers. While there was no explicit mention of race, ethnicity or people of a particular origin in the Amendment as to make it racially discriminatory, its implementation affected white farmers only and consequently constituted indirect discrimination or *de facto* or substantive inequality. The differentiation of treatment meted out to the applicants also constituted discrimination, as the criteria for such differentiation were not reasonable and objective but arbitrary and based primarily on considerations of race. The aim of the respondent in adopting and implementing a land reform programme might have been legitimate if and when all lands

under the programme were indeed distributed to poor, landless and other disadvantaged and marginalized ^ε individuals or groups.

Held, further, that ordinarily in international law it is the expropriating state that should pay compensation. This would mean that *in casu* the respondent should shoulder the responsibility of paying compensation to the applicants for their expropriated lands. It is the right of the applicants under international law to be paid, and the correlative duty ^ϕ of the respondent to pay, fair compensation. The respondent cannot rely on its domestic legislation to avoid payment of compensation to the applicants for their expropriated farms, regardless of how the farms were acquired in the first place, provided that the applicants had a clear legal title to them.

Held, further (Pillay P dissenting), that no order of costs would be made. ^ς

Cases referred to

Advisory Opinion OC-9/87 (Inter-American Court of Human Rights)

Attorney-General, Bahamas v Ryan [1980] AC 718

CFU v Min of Lands 2001 (2) SA 925 (ZS) ^η

2008 (2) ZLR p347

Mondlane J

^α *Constitutional Rights Project, Civil Liberties Organization & Media Rights Agenda v Nigeria* 140/94 (1999)

Golder v UK (1975) 1 EHRR 524

Jackson v Attorney-General [2006] 1 AC 262 (HL)

Mike Campbell (Pvt) Ltd & Anor v Minister of National Security Responsible for Land, Land Reform & Resettlement & Anor 2008 (1) ZLR 17 (S)

Philis v Greece (1991) 13 EHRR 741

^β *Zimbabwe Human Rights NGO Forum v Zimbabwe* Comm. No. 245 (2002) (African Commission on Human & People's Rights)

Zondi v MEC for Traditional & Local Govt Affairs & Ors 2005 (3) SA 589 (CC)

Legislation considered ^ς

Constitution of Zimbabwe 1980, ss 16B, 18(1) & 18(9)

International instruments

African Charter on Human & People's Rights, arts 2, 7(1)(a), 50

American Convention on Human Rights, arts 25, 27

^δ Convention on the Elimination of all Forms of Racial Discrimination, art 1

European Convention on Human Rights, arts 14, 26

International Covenant on Civil & Political Rights, art 2(1)

International Covenant on Economic, Social & Cultural Rights, art 2(2)

SADC Treaty, arts 6, 9, 16, 21

^ε SADC Protocol, art 14(a), 15

Universal Declaration of Human Rights, art 2

Vienna Convention on the Law of Treaties, art 27

Case information

J J Gauntlett SC, with him *A P de Bourbon SC*, *J L Jowell QC* & *Mrs E N Angula*, for the applicants

^ϕ *P Machaya*, with him *Mrs N Mutsonziwa*, for the respondent

Judgment

MONDLANE J:

I Factual background

On 11 October 2007, Mike Campbell (Pvt) Ltd and William Michael Campbell ^g filed an application with the Southern African Development Community Tribunal (the Tribunal), challenging the acquisition by the respondent of agricultural land known as Mount Carmell in the District of Chegutu in the Republic of Zimbabwe. Simultaneously, they filed an application in terms of art 28 of the Protocol on Tribunal (the Protocol), as read with r 61(2)–(5) ^h of the Rules of Procedure of the SADC Tribunal (the Rules), for an interim

2008 (2) ZLR p348

Mondlane J

measure restraining the respondent from removing or allowing the removal ^a of the applicants from their land, pending the determination of the matter.

On 13 December, 2007, the Tribunal granted the interim measure through its ruling which in the relevant part stated as follows:

“[T]he Tribunal grants the application pending the determination of the main case and orders that the Republic of Zimbabwe shall take no steps, or permit ^b no steps to be taken, directly or indirectly, whether by its agents or by orders, to evict from or interfere with the peaceful residence on, and beneficial use of, the farm known as *Mount Carmel of Railway 19, measuring 1200.6484 hectares held under Deed of Transfer No. 10301/99, in the District of Chegutu in the Republic of Zimbabwe, by Mike Campbell (Pvt) Ltd and William Michael Campbell, their employees and the families of such employees and of William Michael Campbell.*” ^c

Subsequently, 77 other persons applied to intervene in the proceedings, pursuant to art 30 of the Protocol, as read with r 70 of the Rules.

Additionally, the interveners applied, as a matter of urgency, for an interim measure restraining the respondent from removing them from their agricultural lands, pending the determination of the matter. ^d

On 28 March 2008, the Tribunal granted the application to intervene in the proceedings and, just like in the Mike Campbell (Pvt) Ltd and William Michael Campbell case, granted the interim measure sought.

Mike Campbell (Pvt) Ltd and William Michael Campbell’s case, as well as the cases of the 77 other applicants, were thus consolidated into one case, ^e hereinafter referred to as the *Campbell* case – *vide* Case SADC (T) No. 02/2008.

On the same day, another application to intervene was filed by Albert Fungai Mutize and others (Case SADC (T) No. 08/2008). The Tribunal dismissed this application on the basis that it had no jurisdiction to entertain the matter ^f since the alleged dispute in the application was between persons, namely, the applicants in that case and those in the *Campbell* case and not between persons and a State, as required under Article 15 (1) of the Protocol.

On 17 June 2008, yet another application to intervene in the proceedings was filed. This was by Nixon Chirinda and others – Case SADC (T) No. ^g 09/2008. The application was dismissed on the same ground as in Case SADC (T) No. 08/2008.

On 20 June 2008, the applicants referred to the Tribunal the failure on the part of the respondent to comply with the Tribunal’s decision regarding the interim reliefs granted. The Tribunal, having established the failure, reported its finding to the Summit, pursuant to art 32 (5) of the Protocol. ^h

2008 (2) ZLR p349

Mondlane J

^a In the present case, the applicants are, in essence, challenging the compulsory acquisition of their agricultural lands by the respondent. The acquisitions were carried out under the land reform programme undertaken by the respondent.

We note that the acquisition of land in Zimbabwe has had a long history. However, for the purposes of the present case, we need to confine ourselves ^b only to acquisitions carried out under s 16B of

the Constitution of Zimbabwe (Amendment No. 17, effected by Act 5 of 2005), hereinafter referred to as Amendment 17.

Section 16B, inserted by Amendment 17, provides as follows:

"16B Agricultural land acquired for resettlement and other purposes

(1) In this section –

c "acquiring authority" means the Minister responsible for lands or any other Minister whom the President may appoint as an acquiring authority for the purposes of this section;

"appointed day" means the date of commencement of the Constitution of Zimbabwe Amendment (No. 17) Act, 2004 (i.e. 16 September, 2005)

(2) Notwithstanding anything contained in this Chapter–

(a) all agricultural land –

- (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 itemized in Schedule 7, being agricultural land required for resettlement purposes; or
- (ii) that is identified after the 8th July, 2005, but before the appointed day ^e [i.e. 16th September, 2005], 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 purposes, including, but not limited to– ^f
 - A. settlement for agricultural or other purposes; or
 - B. the purposes of land reorganization, forestry, environmental conservation or the utilization of wild life or other natural resources; or
 - C. the relocation of persons dispossessed in consequence of the utilization of land for a purpose referred to in subparagraph A or B;

^g 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 ^h acquired.

2008 (2) ZLR p350

Mondlane J

(3) The provisions of any law referred to in section 16(1) regulating the ^a 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 ^b 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."

Amendment 17 effectively vests the ownership of agricultural lands ^c compulsorily acquired under s 16B(2)(a)(i) and (ii) of the Constitution in the respondent and ousts the jurisdiction of the courts to entertain any challenge concerning such acquisitions. It is on the basis of these facts that the present matter is before the Tribunal.

II Submissions of the parties ^d

It was submitted, in substance, on behalf of the applicants that:

- (a) the respondent acted in breach of its obligations under the Treaty by enacting and implementing Amendment 17;
- (b) all the lands belonging to the applicants which have been compulsory acquired by the respondent under Amendment 17 were unlawfully ^e acquired since the Minister who carried out the compulsory acquisition failed to establish that he applied reasonable and objective criteria in order to satisfy himself that the lands to be acquired were reasonably necessary for resettlement purposes in conformity with the land reform programme; ^f

- (c) the applicants were denied access to the courts to challenge the legality of the compulsory acquisition of their lands;
- (d) the applicants had suffered racial discrimination since they were the only ones whose lands have been compulsory acquired under Amendment 17, and ^g
- (e) the applicants were denied compensation in respect of the lands compulsorily acquired from them.

Counsel for the applicants submitted, in conclusion, that the applicants, therefore, seek a declaration that the respondent is in breach of its obligations under the Treaty by implementing Amendment 17 and that the compulsory acquisition of the lands belonging to the applicants by the respondent was illegal. ^h

2008 (2) ZLR p351

Mondlane J

^A The agent for the respondent, for his part, made submissions to the following effect:

1. the Tribunal has no jurisdiction to entertain the application under the Treaty;
2. the premises upon which acquisition of lands was started was on a willing ^b buyer, willing seller basis and that the land was to be purchased from white farmers who, by virtue of colonial history, were in possession of most of the land suitable for agricultural purposes;
3. the respondent continues to acquire land from mainly whites who own large tracts of land suitable for agricultural resettlement and this policy ^c cannot be attributed to racism but to circumstances brought about by colonial history;
4. the respondent had also acquired land from some of the few black Zimbabweans who possessed large tracts of land;
5. the figures for land required for resettlement were revised from 6 to 11 ^d million hectares. The applicants' farms were considered for allocation after they had been acquired as part of the land needed for resettlement;
6. the increase in the demand for land resulted in the portions left with the applicants being needed for resettlement;
7. the applicants will receive compensation under Amendment 17; ^e
8. the compulsory acquisition of lands belonging to applicants by the respondent in the context must be seen as a means of correcting colonially inherited land ownership inequities, and
9. the applicants have not been denied access to the courts. On the contrary, the applicants could, if they wish to, seek judicial review. ^f

III Issues for determination

After due consideration of the facts of the case, in the light of the submissions of the parties, the Tribunal settles the matter for determination as follows:

- (a) whether or not the Tribunal has jurisdiction to entertain the application; ^g
- (b) whether or not the applicants have been denied access to the courts in Zimbabwe;
- (c) whether or not the applicants have been discriminated against on the basis of race; and
- (d) whether or not compensation is payable for the lands compulsorily ^h acquired from the applicants by the respondent.

2008 (2) ZLR p352

Mondlane J

IV Jurisdiction ^a

Before considering the question of jurisdiction, we note first that the Southern African Development Community is an international organization established under the Treaty of the Southern African Development Community, hereinafter referred to as "the Treaty". The Tribunal is one of the institutions of the organization which are established under art 9 of the Treaty. The functions ^b of the Tribunal are stated in art 16. They are to ensure adherence to, and the proper interpretation of, the provisions of the Treaty and the subsidiary instruments made thereunder, and to adjudicate upon such disputes as may be referred to it.

The bases of jurisdiction are, among others, all disputes and applications referred to the Tribunal, in accordance with the Treaty and the Protocol, c which relate to the interpretation and application of the Treaty – *vide* art 14(a) of the Protocol. The scope of the jurisdiction, as stated in art 15(1) of the Protocol, is to adjudicate upon “disputes between States, and between natural and legal persons and States”. In terms of art 15(2), no person may bring an action against a State before, or without first, exhausting all available d remedies or unless is unable to proceed under the domestic jurisdiction of such State. For the present case such are, indeed, the bases and scope of the jurisdiction of the Tribunal.

The first and the second applicants first commenced proceedings in the Supreme Court of Zimbabwe, the final court in that country, challenging the acquisition of their agricultural lands by the respondent. e

The claim in that court, among other things, was that Amendment 17 obliterated their right to equal treatment before the law, to a fair hearing before an independent and impartial court of law or tribunal, and their right not to be discriminated against on the basis of race or place of origin, regarding ownership of land. f

On 11 October 2007, before the Supreme Court of Zimbabwe had delivered its judgment, the first and second applicants filed an application for an interim relief, as mentioned earlier in this judgement.

At the hearing of the application, the respondent raised the issue as to whether the Tribunal has jurisdiction to hear the matter considering that the Supreme g Court of Zimbabwe had not yet delivered the judgement and, therefore, that the applicants had not “exhausted all available remedies or were unable to proceed under the domestic jurisdiction”, in terms of art 15(2) of the Protocol.

The concept of exhaustion of local remedies is not unique to the Protocol. It is also found in other regional international conventions. The European Convention on Human Rights provides in art 26 as follows: h

2008 (2) ZLR p353

Mondlane J:

a “The Commission (of Human Rights) may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law...”

Similarly, the African Charter on Human and Peoples’ Rights states in art 50 as follows:

“The Commission can only deal with a matter submitted to it after making sure b that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving the remedies would have been unduly prolonged”.

Thus, individuals are required to exhaust local remedies in the municipal law of the state before they can bring a case to the Commissions. This means that individuals should go through the courts system, starting with the court c of first instance to the highest court of appeal to get a remedy. The rationale for exhaustion of local remedies is to enable local courts to first deal with the matter because they are well placed to deal with the legal issues involving national law before them. It also ensures that the international tribunal does not deal with cases which could easily have been disposed of by national courts.

d However, where the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is not required to exhaust the local remedies. Further, where, as the African Charter on Human and Peoples’ Rights states, “... it is obvious ... that the procedure of achieving the remedies would have been unduly prolonged”, the individual is not expected to exhaust local remedies. These are circumstances that make the e requirement of exhaustion of local remedies meaningless, in which case the individual can lodge a case with the international tribunal.

In deciding this issue, the Tribunal stressed the fact that Amendment 17 has ousted the jurisdiction of the courts of law in Zimbabwe from any case related to acquisition of agricultural land and that, therefore, the first and f second Applicants were unable to institute proceedings under the domestic jurisdiction. This position was subsequently confirmed by the decision of the Supreme Court given on February 22, 2008 in *Mike Campbell (Pvt) Ltd & Anor v Minister of National Security Responsible for Land, Land Reform & Resettlement & Anor* 2008 (1) ZLR 17 (S)

The Tribunal also referred to art 14(a) of the Protocol, and observed that ^g Amendment 17 had indeed ousted the jurisdiction of the courts of law in that country in respect of the issues that were raised before us, and decided that the matter was properly laid before the Tribunal and, therefore, that the Tribunal had jurisdiction to consider the application for the interim relief.

It will be recalled that the Supreme Court of Zimbabwe delivered its judgment ^h dismissing the applicants' claims in their entirety, saying, among other things,

2008 (2) ZLR p354

Mondlane J:

that the question of what protection an individual should be afforded in the ^a Constitution in the use and enjoyment of private property, is a question of a political and legislative character, and that as to what property should be acquired and in what manner is not a judicial question. The Supreme Court went further and said that, by the clear and unambiguous language of the Constitution, the legislature, in the proper exercise of its powers, had lawfully ^b ousted the jurisdiction of the courts of law from any of the cases in which a challenge to the acquisition of agricultural land may be sought. The court further stated that the legislature had unquestionably enacted that such an acquisition shall not be challenged in any court of law. The Supreme Court, therefore, concluded that there cannot be any clearer language by which the jurisdiction of the courts has been ousted. ^c

Such are the circumstances in which we are to consider the question of jurisdiction. The respondent first submitted that the Treaty only sets out the principles and objectives of SADC. It does not set out the standards against which actions of member states can be assessed. The respondent also contended that the Tribunal cannot borrow these standards from other Treaties ^d as this would amount to legislating on behalf of SADC member states. The respondent went on to argue that there are numerous protocols under the Treaty but none of them is on human rights or agrarian reform, pointing out that there should first be a protocol on human rights and agrarian reform in order to give effect to the principles set out in the Treaty. The respondent further submitted that the Tribunal is required to interpret what has already ^e been set out by the member states and that, therefore, in the absence of such standards, against which actions of member states can be measured, in the words of its agent, "the Tribunal appears to have no jurisdiction to rule on the validity or otherwise of the land reform programme carried out in Zimbabwe."

In deciding this issue, the Tribunal first referred to art 21(b) which, in addition ^f to enjoining the Tribunal to develop its own jurisprudence, also instructs the Tribunal to do so "having regard to applicable treaties, general principles and rules of public international law" which are sources of law for the Tribunal. That settles the question whether the Tribunal can look elsewhere to find answers where it appears that the Treaty is silent. In any event, we do not consider that there should first be a protocol on human rights in order to ^g give effect to the principles set out in the Treaty, in the light of the express provision of art 4(c) of the Treaty which states as follows:

"SADC and member states are required to act in accordance with the following principles –

- (a) ...
- (b) ... ^h

2008 (2) ZLR p355

Mondlane J: ^a

- (c) human rights, democracy and the rule of law."

It is clear to us that the Tribunal has jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law, which are the very issues raised in the present application. Moreover, the respondent cannot rely on its national law, namely, Amendment 17 to avoid its legal obligations ^b under the Treaty. As Professor Shaw Malcolm *International Law* at pp 104-105 aptly observed:

"It is no defence to a breach of an international obligation to argue that the state acted in such a manner because it was following the dictates of its own municipal laws. The reason for this inability to put forward internal rules as an excuse to evade international obligation are obvious. Any other situation would permit international law to be evaded by the simple method of domestic legislation."

^c This principle is also contained in the Vienna Convention on the Law of Treaties, in which it is provided in art 27 as follows:

"A party may not invoke provisions of its own internal law as justification for failure to carry out an international agreement."

▷ V Access to justice

The next issue to be decided is whether or not the applicants have been denied access to the courts and whether they have been deprived of a fair hearing by Amendment 17.

It is settled law that the concept of the rule of law embraces at least two fundamental rights, namely, the right of access to the courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation. As indicated already, art 4(c) of the Treaty obliges member states of SADC to respect principles of "human rights, democracy and the rule of law" and to undertake under art 6(1) of the Treaty "to refrain from taking any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty". Consequently, member states of SADC, including the respondent, are under a legal obligation to respect, protect and promote those twin fundamental rights.

As stated in s A De Smith's *Judicial Review* (6 ed, 2007) at para 4-015:

g "The role of the courts is of high constitutional importance. It is a function of the judiciary to determine the lawfulness of the acts and decisions and orders of public authorities exercising public functions, and to afford protection to the rights of the citizen. Legislation which deprives them of these powers is inimical to the principle of the rule of law, which requires citizens to have access to justice."

Moreover, the European Court of Human Rights, in *Golder v UK* (1975) 1 EHRR 524, at para 34 of its judgment stated as follows:

2008 (2) ZLR p356

Mondlane J:

"And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts."

The same Court held, in *Philis v Greece* (1991) 13 EHRR 741 at 765, at para 59 of its judgment that:

"Article 6, paragraph 1 (art. 6-1) secured to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way the art embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. This right of access, however, is not absolute but may be subject to limitations since the right by its very nature calls for regulation by the State. Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired." c

The Inter-American Court of Human Rights, in its *Advisory Opinion OC-9/87* of 6 October, 1987, *Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8 of the American Convention on Human Rights)*, construed art 27(2) of the Convention as requiring member states to respect essential judicial guarantees, such as *habeas corpus* or any other effective remedy before judges or competent tribunals – vide para 41. The Court also considered that member states were under a duty to provide effective judicial remedies to those alleging human rights violations under art 25 of the Convention. The Court stated at para 24:

"According to this principle, the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective."

The Court also, at para 35 of its judgment, pointed out that the rule of law, representative democracy and personal liberty are essential for the protection of human rights and that "in a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning."

The right of access to the courts is also enshrined in international human rights treaties. For instance, the African Charter on Human and Peoples' Rights provides in art 7(1)(a) as follows:

"Every individual shall have the right to have his cause heard. This comprises: h

Mondlane J: A

(a) The right to an appeal to competent national organs against acts violating his fundamental rights..."

The African Commission on Human and Peoples' Rights, in its decision in *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, Comm. No. 140/94, 141/94 145/95 (1999), held at para 29 of its judgment that the ouster clauses introduced by the Nigerian military government which prevented Nigerian courts from hearing cases initiated by publishers against the search of their premises and the suppression of their newspapers "render local remedies non-existent, ineffective or illegal. They create a legal situation in which the judiciary can provide no check on the executive branch of the government."

c The African Commission on Human and Peoples' Right also in its decision in *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Comm. No. 245 (2002), found that the complainant had been denied access to judicial remedies since the clemency order introduced to pardon "every person liable for any politically motivated crime" had prevented in effect the complainant from bringing criminal action against the perpetrators of such crimes. The Commission began by stating at para 171 of its decision:

"The general obligation is on States Parties to the different human rights treaties to ensure through relevant means that persons under their jurisdiction are not discriminated on any of the grounds in the relevant treaty. Obligations under international human rights law are generally addressed in the first instance to States. Their obligations are at least threefold: to respect, to ensure and to fulfil the rights under international human rights treaties. A State complies with the obligation to respect the recognized rights by not violating them. To ensure is to take the requisite steps, in accordance with its constitutional process and the provisions of relevant treaty (in this case the African Charter), to adopt such legislative or other measures which are necessary to give effect to these rights. To fulfill the rights means that any person whose rights are violated would have an effective remedy as rights without remedies have little value. Article 1 of the African Charter requires States to ensure that effective and enforceable remedies are available to individuals in case of discrimination..."

The Commission went on to point out at para 174:

"For there to be equal protection of the law, the law must not only be fairly applied but must be seen to be fairly applied. Paragraph 9(3)(a) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms provides that everyone must be given the right to complain about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms, by petition or other appropriate means, to competent domestic judicial, administrative or legislative authorities or any other competent authority provided for by the legal system of the State, which should render their decision on the complaint without undue delay."

Mondlane J:

It is useful, finally, to refer to the decision of the Constitutional Court of South Africa in *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC). The Court found that certain provisions of the Pound Ordinance of 1947 of KwaZulu-Natal, which allowed landowners to bypass the courts and recover damages against the owners of trespassing animals, were inconsistent with s 34 of the Constitution which guarantees the right of access to courts. At para 82 of the judgment, Ngcobo J made the following pertinent observations:

"The right of access to courts is an aspect of the rule of law. And the rule of law is one of the foundational values on which our constitutional democracy has been established. In a constitutional democracy founded on the rule of law, disputes between the state and its subjects, and amongst its subjects themselves, should be adjudicated upon in accordance with law. The more potentially divisive the conflict is, the more important that it be adjudicated upon in court. That is why a constitutional democracy assigns the resolution of disputes to 'a court or, where appropriate, another independent and impartial tribunal or forum'. It is in this context that the right of access to courts guaranteed by s 34 of the Constitution must be understood." b

The right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation is another principle well recognized and entrenched in law.

Any existing ouster clause in terms such as "the decision of the Minister shall not be subject to appeal or review in any court" prohibits the court from re-examining the decision of the Minister if the decision reached by him was one which he had jurisdiction to make. Any decision affecting the

legal rights of individuals arrived at by a procedure which offended against natural justice was outside the jurisdiction of the decision-making authority so that, if the Minister did not comply with the rules of natural justice, his decision was *ultra vires* or without jurisdiction and the ouster clause did not prevent the court from enquiring whether his decision was valid or not – *vide Attorney-General of the Commonwealth of the Bahamas v Ryan* [1980] AC 718.

Lord Diplock for the Board of the Judicial Committee of the Privy Council stated in that case as follows:

“It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority. As Lord Selborne said as long ago as 1885 in *Spackman v Plumstead District Board of Works* (1885) 10 App Cas 229 at 240: ‘There would be no decision within the meaning of the statute if there were anything ... done contrary to the essence of justice’. See also *Ridge v Baldwin* [1964] AC 40.”

2008 (2) ZLR p359

Mondlane J:

Moreover, in *Jackson v Attorney-General* [2006] 1 AC 262, Baroness Hale made the following observations at para 159:

“The courts, will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear. The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny.”

We turn now to consider the relevant provisions of Amendment 17. It is quite clear that the provisions of s 18(1) and (9) dealing with the constitutional right to the protection of law and to a fair hearing have been taken away in relation to land acquired under s 16B(2)(a). Indeed, the Supreme Court of Zimbabwe explicitly acknowledges this in its judgement, cited above, when it stated:

“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 *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 agent for the respondent seized upon the following statement of the Supreme Court at p 38 of its judgment to argue that an individual whose property has been acquired can proceed by judicial review:

“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.”

2008 (2) ZLR p360

Mondlane J:

No doubt there is a remedy but only in respect of the payment of compensation under s 16B(2)(b) but judicial review does *not* lie at all in respect of land acquired under s 16B(2)(a)(i) and (ii), as correctly submitted by learned counsel for the applicants. Indeed, the applicants' land had been acquired under s 16B(2)(a)(i) and (ii). It is significant that, whereas under s 16B(2)(a)(iii), mention

is made of the acquiring authority i.e. a Minister whose decision can ^B admittedly be subject to judicial review, no such mention is made in respect of s 16B(2)(a)(i) and (ii), so that in effect the applicants cannot proceed by judicial review or otherwise. This is why specific reference is made to the fact that the provisions of s 18(1) and (9) do not apply in relation to land acquired under s 16B(2)(a). The applicants have been expressly denied the opportunity of going to court and seeking redress for the deprivation of their ^C property, giving their version of events and making representations.

We are, therefore, satisfied that the applicants have established that they have been deprived of their agricultural lands without having had the right of access to the courts and the right to a fair hearing, which are essential elements of the rule of law, and we consequently hold that the respondent has acted in breach of art 4 (c) of the Treaty. ^D

VI Racial discrimination

The other issue raised by the applicants is that of racial discrimination. They contended that the land reform programme is based on racial discrimination, in that it targets white Zimbabwean farmers only. The applicants further argue that Amendment 17 was intended to facilitate or implement the land reform ^E policy of the Government of Zimbabwe based on racial discrimination. This issue is captured in the applicants' heads of arguments, para 175, in the following terms:

"That the actions of the Government of Zimbabwe in expropriating land for resettlement purposes has been based solely or primarily on consideration of ^F race and ethnic origin ... It is being directed at white farmers ... In reality it was aimed at persons who owned land because they were white. It mattered not whether they acquired the land during the colonial period or after independence".

The applicants further argued at para 128 of the heads of argument that:

"The evidence presented to this Tribunal shows as a fact that the decision as to whether or not agricultural raw land in Zimbabwe is to be expropriated is ^G determined by the race or country of origin of the registered owner. In terms of a policy designed to redress the ownership of land created during the colonial period, the GoZ has determined that no person of white colour or European origin was to retain ownership of a farm, and all such farms were to be expropriated. The fact that this could not be done through the normal procedures between 2000 and 2005 led to the enactment of Amendment 17, which was the ultimate legislative tool used by the GoZ to seize all the white owned farms". ^H

2008 (2) ZLR p361

Mondlane J:

^A The applicants went on to argue that, even if Amendment 17 made no reference to the race and colour of the owners of the land acquired, that does not mean that the legislative aim is not based on considerations of race or colour, since only white owned farms were targeted by the Amendment. There is a clear legislative intent directed only at white farmers. According to the applicants, the Amendment strikes at white farmers only and no other rational ^B categorization is apparent therein. The applicants further contended that the targeted farms were expropriated and given to certain beneficiaries whom they referred to as "chefs" or a class of politically connected beneficiaries. These were, in the words of the applicants, "senior political or judicial, or senior members of the armed services."

^C It is on the basis of those arguments that the applicants, therefore, submitted in conclusion that the respondent is in breach of art 6(2) of the Treaty, prohibiting discrimination, by enacting and implementing Amendment 17.

The respondent, for its part, refuted the allegations by the applicants that the land reform programme is targeted at white farmers only. It argued instead ^D that the programme is for the benefit of people who were disadvantaged under colonialism and it is within this context that the applicants' farms were identified for acquisition by the respondent. The farms acquired are suitable for agricultural purposes and happen to be largely owned by the white Zimbabweans. In implementing the land reform programme, therefore, it was inevitable that the people who were likely to be affected would be ^E white farmers. Such expropriation of land under the Programme cannot be attributed to racism but circumstances brought about by colonial history. In any case, according to the respondent, not only lands belonging to white Zimbabweans have been targeted for expropriation but also those of the few black Zimbabweans who possessed large tracts of land. Moreover, some white farmers have been issued with offer letters and 99-year leases in respect of ^F agricultural lands. The respondent has, therefore, not discriminated against white Zimbabwean farmers and has not acted in breach of art 6 (2) of the Treaty.

The Tribunal has to determine whether or not Amendment 17 discriminates against the applicants and as such violates the obligation that the respondent ^g has undertaken under the Treaty to prohibit discrimination.

It should first be noted that discrimination of whatever nature is outlawed or prohibited in international law. There are several international instruments and treaties which prohibit discrimination based on race, the most important one being the United Nations Charter, which provides in art 1 (3) that one ^h of its purposes is:

2008 (2) ZLR p362

Mondlane J:

"To achieve international corporation in solving international problems of an ^a economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to *race*, sex, language or religion" (emphasis supplied).

There is also the Universal Declaration of Human Rights which provides in art 2 as follows:

"Everyone is entitled to all the rights and freedoms set forth in this Declaration ^b without distinction of any kind, such as *race*, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (emphasis supplied).

Moreover, art 2(1) of the International Covenant on Civil and Political Rights and art 2(2) of the International Covenant on Economic, Social and Cultural ^c Rights prohibit racial discrimination, respectively, as follows:

"Each State party to the present Covenant undertakes to respect and ensure to all individuals within its territory without distinction of any kind such as *race*, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

"The States parties to the present Covenant undertake to guarantee that the rights ^d enunciated in the present Covenant will be exercised without discrimination of any kind as to *race*, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status" (emphasis supplied).

The above provisions are similar to art 2 of the African Charter on Human and Peoples' Rights (African Charter) and art 14 of the European Convention on Human Rights. ^e

Discrimination on the basis of race is also outlawed by the Convention On the Elimination of All Forms of Racial Discrimination (the Convention). It is worth noting that the respondent has acceded to both Covenants, the African Charter and the Convention and, by doing so, is under an obligation to respect, protect and promote the principle of non-discrimination and must, ^f therefore, prohibit and outlaw any discrimination based on the ground of race in its laws, policies and practices.

Apart from all the international human rights instruments and treaties, the Treaty also prohibits discrimination. Article 6(2) states as follows:

"SADC and member states shall not discriminate against any person on grounds of ^g gender, religion, political views, *race*, ethnic origin, culture, ill health, disability or such other ground as may be determined by the Summit" (emphasis supplied).

This article, therefore, enjoins SADC and member states, including the respondent, not to discriminate against any person on the stated grounds, one of which is race.

The question then is, what is racial discrimination? It is to be noted that the ^h

2008 (2) ZLR p363

Mondlane J:

^a Treaty does not define racial discrimination or offer any guidelines to that effect. Article 1 of the Convention is as follows:

"Any distinction, exclusion, restriction or preference based on race, colour, descent, or natural or ethnic origin which *has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights* and fundamental freedoms in the political, economic, social, cultural or ^b any other field of public life" (the emphasis is supplied).

Moreover, the Human Rights Committee in its General Comment No. 18 on non-discrimination has, in para 7, defined discrimination as used in the Covenant on Civil and Political Rights as implying

"any *distinction, exclusion, restriction or preference which is based on any ground such as race*, colour, sex, language, religion, political or other opinion, national ^c or social origin, property, birth or other status,

and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms” (emphasis supplied).

The Committee on Economic, Social and Cultural Rights, for its part, in its General Comment No. 16 on the equal right of men and women to the ^D equality of all economic, social and cultural rights underlined at para 13 that “guarantees of non-discrimination and equality in international human rights treaties mandate both *de facto* and *de jure* equality. *De jure* (or formal) equality and *de facto* (or substantive) equality are different but interconnected concepts”.

The Committee further pointed out that formal equality assumes that equality ^E is achieved if a law or policy treats everyone equal in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices in order to ensure that they do not discriminate against any individual or group of individuals.

The Committee went on to state at paras 12 and 13 respectively that:

^F “Direct discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or women, which cannot be justified objectively”.

“Indirect discrimination occurs when a law, policy or programme *does not appear to be discriminatory but has a discriminatory effect when implemented*” (emphasis supplied).

^G It is to be noted that what the Committee is stating about direct and indirect discrimination in the context of sex applies equally in the case of any other prohibited ground under the Covenant such as race.

The question that arises is whether Amendment 17 subjects the applicants to any racial discrimination, as defined above. It is clear that the Amendment ^H affected all agricultural lands or farms occupied and owned by the applicants

2008 (2) ZLR p364

Mondlane J:

and all the applicants are white farmers. Can it then be said that, because all ^A the farms affected by the Amendment belong to white farmers, the Amendment and the land reform programme are racially discriminatory?

We note here that there is no explicit mention of race, ethnicity or people of a particular origin in Amendment 17 as to make it racially discriminatory. If any such reference were made, that would make the provision expressly ^B discriminatory against a particular race or ethnic group. The effect of such reference would be that the respondent would be in breach of its obligations under the art 6 (2) of the Treaty.

The question is whether, in the absence of the explicit mention of the word “race” in Amendment 17, that would be the end of the matter. It should be ^C recalled that the applicants argued that, even if the Amendment could be held not to be racially discriminatory in itself, its effects make it discriminatory because the targeted agricultural lands are all owned by white farmers and that the purpose of Amendment 17 was to make it apply to white farmers only, regardless of any other factors such as the proper use of their lands, their citizenship, their length of residence in Zimbabwe or any other factor ^D other than the colour of their skin.

Since the effects of the implementation of Amendment 17 will be felt by the Zimbabwean white farmers only, we consider it, although Amendment 17 does not explicitly refer to white farmers, as we have indicated above, its implementation affects white farmers only and consequently constitutes indirect discrimination or *de facto* or substantive inequality. ^E

In examining the effects of Amendment 17 on the applicants, it is clear to us that those effects have had an unjustifiable and disproportionate impact upon a group of individuals distinguished by race such as the applicants. We consider that the differentiation of treatment meted out to the applicants also constitutes discrimination as the criteria for such differentiation are not reasonable and ^F objective but arbitrary and are based primarily on considerations of race. The aim of the respondent in adopting and implementing a land reform programme might be legitimate if and when all lands under the programme were indeed distributed to poor, landless and other disadvantaged and marginalized individuals or groups. ^G

We, therefore, hold that, implementing Amendment 17, the respondent has discriminated against the applicants on the basis of race and thereby violated its obligation under art 6(2) of the Treaty.

We wish to observe here that if: (a) the criteria adopted by the respondent in relation to the land reform programme had not been arbitrary but reasonable and objective; (b) fair compensation was paid in respect of the expropriated ^h

2008 (2) ZLR p365

Mondlane J:

A lands, and (c) the lands expropriated were indeed distributed to poor, landless and other disadvantaged and marginalized individuals or groups, rendering the purpose of the programme legitimate, the differential treatment afforded to the applicants would not constitute racial discrimination.

We can do no better than quote in this regard what the Supreme Court of ^b Zimbabwe stated in *Commercial Farmers Union v Minister of Lands* 2000 (2) ZLR 469 (S) at 480; 2001 (2) SA 925 (ZS), where it dealt with the history of land injustice in Zimbabwe and the need for a land reform programme under the rule of law:

“We are not entirely convinced that the expropriation of white farmers, if it is done lawfully and fair compensation is paid, can be said to be discriminatory. ^c But there can be no doubt that it is unfair discrimination ... to award the spoils of expropriation primarily to ruling party adherents”.

VII Compensation

The applicants have also raised the issue of compensation. Counsel for the applicants contended that expropriation of their lands by the respondent was not accompanied by compensation and that failure to do so is a breach of ^d the respondent’s obligations under international law and the Treaty. We note that the respondent does not dispute the fact that the applicants are entitled to compensation. It, however, argued that the independence agreement reached in 1978 in London provided that payment of compensation for expropriated land for resettlement purposes would be paid by the former ^e colonial power, Britain.

As regards the question of who should pay compensation, ordinarily in international law it is the expropriating state that should pay compensation. This would mean that, respecting the matter at hand, the respondent should shoulder the responsibility of paying compensation to the applicants for their expropriated lands. We note, however, that ^s 16B(2)(b) of the Constitution ^f provides as follows:

“No compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it is acquired”.

This provision excludes payment of compensation for land referred to in paragraph (a)(i) and (ii) which is agricultural land that has been acquired ^g for resettlement purposes. It is difficult for us to understand the rationale behind excluding compensation for such land, given the clear legal position in international law. It is the right of the applicants under international law to be paid, and the correlative duty of the respondent to pay, fair compensation. Moreover, the respondent cannot rely on its national law, its Constitution, to avoid an international law obligation to pay compensation as we have already ^h indicated above.

2008 (2) ZLR p366

Mondlane J:

Similarly, in the present case, the respondent cannot rely on Amendment 17 ^a to avoid payment of compensation to the applicants for their expropriated farms. This is regardless of how the farms were acquired in the first place, provided that the applicants have a clear legal title to them.

We hold, therefore, that fair compensation is due and payable to the applicants by the respondent in respect of their expropriated lands. ^b

VIII Conclusions

For the reasons given, the Tribunal holds and declares that:

- (a) by unanimity, the Tribunal has jurisdiction to entertain the application;
- (b) by unanimity, the applicants have been denied access to the courts in Zimbabwe; ^c
- (c) by a majority of four to one, the applicants have been discriminated against on the ground of race, and
- (d) by unanimity, fair compensation is payable to the applicants for their lands compulsorily acquired by the respondent.

The Tribunal further holds and declares that: ^D

- (1) by unanimity, the respondent is in breach of its obligations under art 4(c) and, by a majority of four to one, the respondent is in breach of its obligations under art 6(2) of the Treaty;
- (2) by unanimity, Amendment 17 is in breach of art 4(c) and, by a majority of four to one, Amendment 17 is in breach of art 6(2) of the Treaty; ^E
- (3) by unanimity, the respondent is directed to take all necessary measures, through its agents, to protect the possession, occupation and ownership of the lands of the applicants, except for Christopher Mellish Jarret, Tengwe Estates (Pvt) Ltd and France Farm (Pvt) Ltd that have already been evicted from their lands, and to take all appropriate measures to ^Fensure that no action is taken, pursuant to Amendment 17, directly or indirectly, whether by its agents or by others, to evict from, or interfere with, the peaceful residence on, and of those farms by, the applicants, and
- (4) by unanimity, the respondent is directed to pay fair compensation, on or before 30 June 2009, to the three applicants, namely, Christopher ^GMellish Jarret, Tengwe Estates (Pvt) Ltd and France Farm (Pvt) Ltd.

By a majority of four to one, the Tribunal makes no order as to costs in the circumstances.

MTAMBO J and KAMBOVO J concurred. ^H

2008 (2) ZLR p367

Pillay P; Tshosa J

A PILLAY P:

With regard to the issue of costs, I shall first refer to r 78 of the Rules.

Rule 78 provides as follows:

- "1. Each party to the proceedings shall pay its own legal costs.
2. The Tribunal may, in exceptional circumstances, order a party to the ^B proceedings to pay costs incurred by the other party."

The general rule is that each party bears its own costs except where there are exceptional circumstances warranting the grant of costs in the interests of justice against a party.

The Tribunal has already construed r 78 in a broad and purposive manner ^C in the case of *Chirinda and Others* Case SADC (T) No. 09/2008 and held that there were exceptional circumstances justifying the grant of costs in the interests of justice against a party that brought before the Tribunal a patently frivolous and vexatious application.

I cannot do otherwise but consider that there are indeed also exceptional circumstances, on the particular facts of the present case, justifying the award ^D of costs to the applicants in the interests of justice, especially given that the applicants have suffered for a long time human rights abuses for remaining on their lands, three of them having been forcibly evicted from their lands without any compensation, and that the respondent has up to now failed to comply with the interim orders of the Tribunal directing the respondent to ^E prevent its agents and others from interfering with the enjoyment of the lands occupied by those applicants who are still in occupation thereof.

Consequently, I made an order as to costs against the respondent under r 78(2). The costs are to be determined by the Registrar if the parties are not agreed.

F TSHOSA J:

During the deliberations I agreed with my colleagues on the main conclusions reached on this case. I agreed because it was very clear to me that Amendment 17 denied the applicants a remedy under the national law of Zimbabwe, that they have been denied access to the courts by the ouster clause in the ^G Amendment concerning compulsory acquisition of the agricultural lands and that the said Amendment excludes compensation for the compulsory acquisition of agricultural land. However, I did not agree with the conclusion reached on the issue of racial discrimination, which is to the effect that although Amendment 17 was not explicitly discriminatory, it is indirectly discriminatory against the applicants on the basis of race. The main basis ^H of the majority view on this issue is that because the implementation of

2008 (2) ZLR p368

Tshosa J

Amendment 17 affects the applicants and who own agricultural lands that ^A are being acquired by the respondent for resettlement purposes that makes the Amendment racially discriminatory. This is the conclusion that makes me break ranks with my brethren.

I should observe that during the deliberations on the case, it was not entirely clear to us how the issue of racial discrimination would be resolved. It was ^B only towards the end of the deliberations, that is, a day before the judgment was to be delivered, that the majority were inclined to hold that Amendment 17 indirectly discriminated against the applicants. This should also explain why my view is so brief.

It is not in dispute that the agricultural lands that were compulsorily acquired ^C by the respondent, and are the subject of these proceedings belong to, or are owned by, the applicants. This means that the implementation of 17 Amendment applies mainly to agricultural lands owned by the applicants or, rather, the effects of the implementation of the Amendment will be felt mainly by the applicants. Thus, on the face of it, one is inclined to conclude that although Amendment 17 does not explicitly relate to white farmers, ^D its implementation only affects the applicants and is therefore indirectly discriminatory on the basis of race, and thereby in violation of the respondent's legal obligation under s 6(2) of the SADC Treaty outlawing discrimination, *inter alia*, on the basis of race.

In my view, there is no basis for this conclusion and these are my reasons. ^E Firstly, the fact that the agricultural lands of the applicants have been, and being affected, by the implementation by Amendment 17 is not because they are of white origin. The Amendment 17 affects their land because the agricultural land that is required for resettlement purposes, and which is the subject of the Amendment is in their hands. In other words, Amendment 17 targets agricultural land and they are affected, not because they are of ^F white origin, but because they are the ones who own the land in question. Thus, the target of Amendment 17 is agricultural land and not people of a particular racial group. This means that in implementing the Amendment it was always going to affect those in possession of the land, be they of white, black or other racial background. In my view, this does not amount to racial ^G discrimination, whether directly or indirectly.

There is also the second reason for holding the view that the implementation of Amendment 17 is not indirectly discriminatory against the applicants. In oral arguments, and this is on record, the respondents were specifically asked by the Tribunal whether there were other people apart from the applicants whose agricultural land was compulsorily acquired on the basis ^H

2008 (2) ZLR p369

Tshosa J

^A of Amendment 17. The answer was in the affirmative and this was not challenged by the applicants. In my view, this means that the applicants or, rather white Zimbabwean farmers, were not the only ones who were affected by the Amendment as to make it racially discriminated even indirectly. The Amendment is of a general application. It applies to all Zimbabweans who are in occupation of the land that is required for resettlement purposes, ^B irrespective of their racial origins.

Admittedly, non-white Zimbabweans in possession of agricultural land in question and who are affected by the Amendment are few in number as compared to white Zimbabwean farmers. But even if, numerically, this other group of Zimbabweans is less compared to the white Zimbabwean farmers, ^C the fact of the matter is that there are other Zimbabweans, who are not white, whose lands are affected by the Amendment. The land of these farmers may not have been expropriated yet, but is not immune from expropriation, at least, on the basis of the Amendment. It is on these grounds that I am of the view that Amendment 17 does not discriminate against the applicants on the basis of race and therefore does not violate the respondent obligation ^D under art 6(2) of the Treaty.

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SHUMBA v CHAIRMAN, ZIMBABWE ELECTORAL COMMISSION & ANOR 2008 (2) ZLR 370 (H)
2008 (2) ZLR p370

Citation	2008 (2) ZLR 370 (H)
Case No	Judgment No. HH-116-08
Court	High Court, Harare
Judge	Makoni J
Heard	27 November 2008
Judgment	10 December 2008
Counsel	<i>K van Huyssteen</i> , for the applicant <i>G C Chikumbirike</i> , for the first respondent <i>A M Gijima</i> , for the second respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Costs– *legal practitioner and client scale – abuse of process – persistence in argument on which a ruling has already been delivered*

Elections– *election petition – time limits – failure to comply with – High Court has no power to condone such failure*

Practice and procedure– *condonation – application for – failure to adhere to time limits – act to be condoned must be provided for in Rules – not applicable to situations outside High Court Rules* E

Headnote

Where the applicant persisted with an argument on which the court, in an earlier case, had already made a pronouncement against him, it amounted to an abuse of process which led to the respondents being unnecessarily brought to court. In the circumstances the court was justified in awarding costs in favour of the respondents and against the applicant on the higher scale. F

The applicant had wanted to contest the presidential election in March 2008. His nomination papers were rejected. He made an urgent application to the High Court, which was rejected on the grounds of lack of jurisdiction. The Electoral Court, to which the applicant then turned, declined to hear the case on the grounds that the time for presenting a petition G had expired. The applicant appealed to the Supreme Court, sitting as a constitutional court. After the run-off election in June 2008, the Supreme Court handed down its decision (see *Shumba & Anor v ZEC & Anor* 2008 (2) ZLR 65 (S), above, in this volume). The applicant then presented an election petition to the Electoral Court and simultaneously applied to the High Court for condonation of the late presentation of the petition. H

2008 (2) ZLR p371

Makoni J

A The respondents opposed the application, arguing that the High Court had no jurisdiction to grant condonation. The Electoral Court could only hear election petitions and other matters in terms of the Electoral Act [Chapter 2:13] and the Act did not provide for condonation. The applicant also argued that in terms of s 165(4) of the Act that if no rules in terms thereof are

made, the High Court Rules 1971 (RGN 1047 of 1971) shall apply. Rule 4C thereof gives a judge the power "... to condone a departure ..." from the High Court Rules "... including an extension of any period specified therein ..." where in the interest of justice a departure is so required.

Held, that the Electoral Court can only hear election petitions and other matters in terms of the Electoral Act [Chapter 2:13]. The Electoral Court is a creature of statute whose powers and functions are to be found in the statute. It has no inherent powers such as are possessed by the High Court and can therefore not claim authority to do which cannot be found within the four corners of the Electoral Act. No provision is made in that Act for condonation, so the High Court cannot grant condonation. To ask the court to condone a departure from a period provided for in an enactment, as urged by the applicant, would be to usurp the functions of the legislature. With regard to r 4C of the High Court Rules 1971, the act to be condoned must be provided for in the Rules themselves and not in any situations which are outside the provisions thereof. The court had no power to condone an act provided for in an Act of Parliament.

Cases cited ^Ε

Chitungo v Munyoro & Anor 1990 ZLR (1) 52 (H)

Nair v Teik [1967] 3 All ER 34 (PC)

Pio v Smith 1986 (3) SA 145 (ZH)

Registrar-General of Elections v Combined Harare Residents Assn & Anor (3) 2002 (1) ZLR 83 (S)

Techniquip (Pvt) Ltd v Allan Cameron Eng (Pvt) Ltd 1994 (1) ZLR 246 (S)

Legislation considered

^Γ Electoral Act [Chapter 2:13], ss 4, 46(19)(c), 111(1), 161(1), 165(4), 168, 169, 172 and 182

High Court Rules 1971 (RGN 1047 of 1971), r4C

Case information

K van Huyssteen, for the applicant

G C Chikumbirike, for the first respondent

^Η *A M Gijima*, for the second respondent

2008 (2) ZLR p372

Makoni J

Judgment

MAKONI J: On 25 August 2008, the applicant presented to the Registrar of ^Α this court an election petition to set aside the presidential election and the subsequent presidential run-off whose results were announced on 29 June 2008. He simultaneously filed the present application seeking condonation for the late presentation of the election petition. The basis for the application is found in para 23 of the applicant's founding affidavit. It reads as follows: ^Β

"I could not have brought my application within the 30 day period stipulated in s 111(1) of the Electoral Act [Chapter 2:13] because I was disabled to do so, owing to the fact that the Supreme Court, sitting as a Constitutional Court, reserved judgment. The judgment was only made known to me on 1 August 2008. It is from this judgment that I draw my authority to bring about the main application seeking for nullification or invalidation of the Presidential Elections ..." ^Γ

The brief background to the matter is as follows:

The applicant was an aspirant for the Presidential candidacy. On 15 February 2008, he arrived at the nomination court sitting at Harare, before the nomination court had closed, to present his papers. The papers were rejected on the basis that they were late. He challenged the rejection of his papers in an urgent ^Δ chamber application filed in the High Court of Zimbabwe. The application was dismissed on the basis that the court lacked jurisdiction, sitting as a High Court, to entertain an urgent chamber application which had anything to do with the Electoral Act [Chapter 2:13] ("the Act").

Dissatisfied with the above ruling the applicant noted an appeal to the Supreme Court in case No. SC 42/08. The applicant also noted an appeal, to a judge in chambers in terms of s 46(19)(b) of the Act, against the decision of the Constituency Elections Officer. The matter was heard by Uchena J sitting as a judge of the Electoral Court. The appeal was dismissed on the basis that it had prescribed. Dissatisfied with the dismissal, the applicant noted an appeal to the Supreme Court. F

The applicant then proceeded to file another urgent chamber application in the High Court of Zimbabwe. The matter was dismissed, without hearing, on the basis that the matter was not urgent. He again noted an appeal to the Supreme Court against that decision.

Against this background, the applicant finally approached the Supreme Court under case No. SC 11/08 and Constitutional Application No. 77/08. He alleged that his right to freedom of association, granted by ss 21(1) and 21(2) of the Constitution of Zimbabwe and his right to protection of the law, guaranteed by s 18(1) of the Constitution were violated by the Constituency Elections Officer.

The application was heard by the Constitutional Court on 22 May 2008 and H

2008 (2) ZLR p373

Makoni J

A judgment was reserved. Judgment was delivered on 1 August 2008. This was some sixty days after the Presidential run-off, whose results were announced on 29 June 2008. The applicant then presented the election petition and the present application.

The application is contested by both respondents. They filed notices of B opposition in which they both raise the point *in limine* whether this court has jurisdiction to entertain an application to condone non-compliance with the provisions of the Act. The second respondent also raised the issue of whether there was a petition before the court in view of the fact that the petition was not served in terms of the Act.

I might as well, at this stage, comment about the second respondent's second C point *in limine*. In my view, this issue, in these proceedings, is misplaced. It should be raised in the court which will deal with the election petition.

Mr *Chikumbirike* submitted that the Electoral Court is a creature of statute and that its powers and functions should be found in the four corners of the statute. There is no provision in the Act for parties to make an application D such as the one before the court. The court cannot therefore, entertain an application for condonation.

He agreed that the High Court Rules apply in this court as there were no rules for this court. He however submitted that the rule referred to by the applicant does not apply as it condones a departure from any provisions of the Rules. E The 30-day period in issue is not provided for in the Rules but in the Act.

He further submitted that in the relevant provisions, s 111(1) of the Act, no provision is made for extension of time. All that the section provides is that a petition "may be presented to the Electoral Court within thirty days". The thirty day period is peremptory. The use of the word "may" before the words "be presented" gives discretion to the losing candidate to challenge F the petition or not. After he decides to challenge, he must present the petition within thirty days.

Mr *Gijima* submitted the same argument that this court has no power to condone non-compliance with the provisions of the Act. He cited the case of *Chitungo v Munyoro & Anor* 1990 ZLR (1) 52 (H).

G In his heads of argument, the applicant submitted that from the wording of s 111(1) of the Act, the court is at large on whether or not to condone non-compliance. The provision makes use of the term "may" as opposed to the repealed Electoral Act No. 14 of 1979 which uses the term "shall" in s 140(2). The section is not peremptory. This distinction separates the present case H from that of *Chitungo supra*.

2008 (2) ZLR p374

Makoni J

It was further argued that the applicant was temporarily handicapped within A the thirty day period from bringing about the petition, and there is indeed a relationship between the Supreme Court case No. SC 11/08 and the petition, in that the Supreme Court application gave birth to the applicant's rights which he now enforces in the present application.

In a surprise turn of events, Mr *van Huyssteen* in his oral submissions, ^B submitted that the fact of filing the application for condonation is not a concession that the petition was presented out of time. The application was filed out of an abundance of caution as an extra pre-cautionary measure. The judgment of the Supreme Court was handed down on 1 August 2008. That is when the applicant reached the position where he could say he had a right in terms of s 111(1)(a). He presented his petition on 25 August 2008 ^C which is within thirty days of 1 August. The declaration of the result on 29 June 2008 must be read together with any judicial pronouncements. He concluded by saying that condonation was not necessary.

He suggested that the application should be postponed until the petition is heard and then the court should determine whether the application for ^D condonation was necessary. He said the matters should have been set down at the same time.

The submissions by Mr *van Huyssteen* are at a tangent with the applicant's papers. If his oral submissions were correct, the proper procedure would have been to withdraw the application. There is no provision in law to file ^E an application out of an abundance of caution. It is trite that an application is based on true and correct facts and not on assumptions. If the applicant's oral submissions are correct, that the application was filed on time, there would be no basis for filing the present application.

The application for condonation was not withdrawn by the applicant despite the submissions by Mr *van Huyssteen*. I will therefore proceed to determine ^F the matter.

The Electoral Court is a special court set up in terms of s 79 of the Constitution of Zimbabwe. It is constituted in terms of s 161 of the Act. Section 161(1) provides as follows:

"(1) There is hereby established a court, to be known as the Electoral Court, for ^G the purpose of hearing and determining election petitions and other matters in terms of this Act" (my own emphasis).

The words I emphasized above outline the powers and functions of the Electoral Court. It can only hear election petitions and other matters in terms of this Act. The Electoral Court is, therefore, a creature of statute whose powers and functions are to be found in the four corners of the statute. It has no inherent ^H

2008 (2) ZLR p375

Makoni J

A powers such as is possessed by the High Court and can therefore not claim authority which cannot be found within the four corners of its constituent Act, which is the Electoral Act.

This court can therefore not entertain an application for condonation as no provision is made for such an application in the Act. All that s 111 of the Act ^B provides is that a petition "may be presented to the Electoral Court within thirty days" and it ends there. See *Chitungo supra* at p 57. The provision is not qualified with clauses such as "or within such period as the court may deem reasonable". That would have given the court powers to consider an application to extend the time.

The applicant sought to argue that the current Act uses the term "may" unlike ^C the repealed Act 14 of 1979 which used the term "shall". It was submitted that this distinction distinguishes the present case from that of *Chitungo supra*. In *Chitungo supra*, the court was interpreting s 140 of the old Act which is identical to s 111 except for the use of the word "shall" which is peremptory.

I agree with Mr *Chikumbirike's* submissions that the use of the word "may" ^D in s 111 gives an option to losing candidates whether to file a petition or not. Once the losing candidate decides to present a petition then it must be presented within thirty days. The thirty day period is peremptory because of the use of the word "within" before the stipulated period. In *Black's Law Dictionary* 5 ed the word "within". when used relative to time, has been defined, variously, as meaning "time before, at or before, at the end of, not ^E later than". It is clear from the above definitions that the period of thirty days cannot be exceeded.

The applicant also seeks to rely on the provisions of the High Court of Zimbabwe Court Rules 1971 on condonation, by virtue of s 165(4) of the Act which provides that if no rules of the Electoral Act are made in terms ^F of that Act, the Rules of the High Court shall apply.

Order 1 r 4C deals with the issue of condonation. It provides:

"The court or a judge may, in relation to any particular case before it or him, as the case may be –

(a) direct, authorise or condone a departure *from any provisions of these rules including an extension of any period specified* therein, where it or ^a he, as the case may be, is satisfied that the departure is required in the interests of justice" (my own emphasis).

The key words in r 4C are those emphasized above. The act to be condoned must be provided for in the Rules and not in any situations outside the provisions of the Rules. The applicant is asking me to condone an act ^b provided for in an Act of Parliament. I have no such powers. It is trite that

2008 (2) ZLR p376

Makoni J

Rules of this court cannot interfere or derogate from a specific provision of ^a the Act. Rules are subordinate to an enactment. To ask the court to condone a period provided for in an enactment, as urged by the applicant, would be to usurp the functions of the legislature, by purporting to amend a specific provision, which this or any other court cannot do. See *Registrar-General of Elections v Combined Harare Residents Association & Anor* (3) 2002 (1) ZLR 83 (S) at p 105G-106D. ^b

The mandatory nature of the time limits within which process must be presented or completed runs through the Act. Section 46(19)(c) provides for a mandatory period within which an appeal must be noted. Section 172 provides for a mandatory period of six months within which an appeal must be determined. Sections 168 and 169 relate to mandatory periods within ^c which a petition must be presented and served on the respondent. There is also ^s 182 which provides:

"Every election petition shall be determined within six months from the date of its presentation."

This provision did not exist in the old Act. It is a recent amendment of the ^d Act by the Electoral Amendment Act No. 17 of 2007. The amendment was in line with decided cases which stressed the point that it is in the public interest that election petitions be speedily resolved. See *Pio v Smith* 1986 (3) SA 145 (ZH) and *Nair v Teik* [1967] 3 All ER 34 (PC). It also proves beyond a shadow of doubt that there cannot be room for an extension of the ^e prescribed periods for if there was room for such, the peremptory periods, such as the six months, would not be achievable. From the above analysis, it is clear that the court has no jurisdiction to entertain an application for condonation.

The applicant in his affidavit raises two points *in limine*. These are that the ^f first respondent filed its notice of opposition outside time and that the affidavit of Emmerson Mnangagwa is not properly before the court as he was not authorised by the second respondent to depose to such affidavit. These issues relate to the application for condonation. Since I have made a finding that this court has no jurisdiction to entertain the application, it will not be necessary to determine the points raised. ^g

Both counsel for the respondents asked for costs *de bonis propriis* in their submissions. The basis for such an application was that Mr *Chinyama* appeared for the applicant in case number EP 12/08. The same point whether ^r 4, in that case ^r 4A, extends to the time limits prescribed in an Act of Parliament, was in issue. In that case, Mr *Chinyama* conceded that his argument was untenable. He then proceeded to file the present application using the same ^h

2008 (2) ZLR p377

Makoni J

^a argument. He is persisting with the untenable argument.

The above facts were known to the respondents when they filed their notices of opposition. They did not pray for costs *de bonis propriis* but for costs on a higher scale. If they had prayed for costs *de bonis propriis*, Mr *Chinyama* would have had notice of their prayer and would have responded appropriately. Granting such costs in the circumstances would be a clear breach of the ^b *audi alteram partem* rule, an elementary rule based on natural justice and fairness. See *Techniquip (Pvt) Ltd v Allan Cameron Eng (Pvt) Ltd* 1994 (1) ZLR 246 (S) at 252H.

No serious argument was advanced for costs *de bonis propriis* against Mr *van Huyssteen*. Therefore the court will not grant the prayer.

^c However, the court will grant costs in favour of the respondents on a higher scale. In my view, the applicant's conduct is an abuse of court process and the respondents were unnecessarily brought before the court. The applicant persists with an argument on which this court has already made a pronouncement against him.

▯ In the result, I will make the following order:

(1) The application is dismissed.

(2) The applicant is to pay the respondent's costs on a legal practitioner client scale.

▮ *Chinyama & Partners*, applicant's legal practitioners

Chikumbirike & Associates, first respondent's legal practitioners

F G Gijima & Associates, second respondent legal practitioners

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